

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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WP(C) No.5350/2004

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Date of decision: 12th April, 2010

SHRI JAI NARAIN

..... Petitioner

Through: Mr. H.K. Chaturvedi & Ms. Anjali
Chaturvedi, Advocates.

Versus

**THE MANAGEMENT OF M/S SAWHNEY RUBBER
INDUSTRIES**

..... Respondents

Through: Ms. Raavi Birbal, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | NO |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported
in the Digest? | NO |

RAJIV SAHAI ENDLAW, J.

1. The petitioner workman by way of this writ petition impugns the award dated 8th August, 2002 of the Industrial Tribunal answering the reference in the industrial dispute raised by the petitioner workman against the petitioner workman for the reason of the petitioner workman having failed to lead any evidence. The petitioner workman also impugns/challenges the order dated 31st January, 2003 of the Tribunal on the application moved by the petitioner workman for setting aside of the said award.

2. The respondent employer transferred the petitioner workman from Delhi to Gwalior. On dispute being raised by the petitioner workman, the following reference was made to the Tribunal:-

“Whether the transfer of Shri Jai Narain from Delhi to Gwalior is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?”

It was the case of the petitioner that he was residing at Delhi with his parents who were dependent upon him; that his father was ill for the last four years and as such he was unable to shift from Delhi to Gwalior; that though he was working as a Fitter yet he was shown as an unskilled workman. Transfer was also challenged on the ground that at the time of the appointment there was no office of the employer at Gwalior and that in the transfer order the nature of work to be undertaken by the petitioner workman was not mentioned; that the transfer order had been made by the employer to avoid six years' wages in case of closure of factory.

3. The respondent employer contested before the Tribunal by pleading that it was competent to transfer the petitioner anywhere throughout India if in the exigency of its business; that the transfer being an incident of service could not be challenged; that the petitioner workman having not joined at the place of transfer, was not entitled to any relief.

4. Though the petitioner workman examined himself and another witness but neither of them turned up for cross examination inspite of repeated opportunities and as such the evidence of the petitioner workman was closed; accordingly their examination in chief was also not read in evidence. The Tribunal held that the petitioner workman having failed to lead evidence showing that the transfer order was *mala fide*, the petitioner was not entitled to any relief. On application for setting aside of the said award being filed by the petitioner workman treating the

said award to be “ex parte” the Tribunal vide order dated 31st January, 2003 (supra) also recorded that on 7th August, 2008 the authorized representative of the petitioner workman had made a statement that the petitioner was not contacting him; that the case had been filed not by the petitioner workman himself but by the Union and the Union representative having stated that the petitioner was not contacting him, the award could not be said to be an *ex parte* award and thus the application for setting aside the same was not maintainable.

5. The petitioner in this petition has pleaded that his father had suffered a paralytic attack due to brain stroke and the petitioner workman had to go to his village and could not inform his representative with regard to the said happenings; that upon his return he learnt of the award and immediately filed the application which had been dismissed.

6. The counsel for the petitioner has before this Court also urged that the Tribunal has shown undue haste in deciding the reference. It is argued that under Schedule 5 of the Industrial Dispute Act, *mala fide* transfer under the guise of following management policy is an unfair labour practice. It is further contended that the petitioner being an unskilled workman, transfer could not be an incidence of service. Attention is also invited to Section 9A of the ID Act where notice of change in conditions of service is required to be given. It is stated that the order of transfer was a change in conditions of service applicable to the petitioner and could not be affected without compliance of Section 9A of the Act.

7. Per contra, the counsel for the respondent employer has contended that the petitioner workman did not appear before the Tribunal for four months inspite of

sufficient opportunity and the Tribunal had no option but to decide the reference against the petitioner. It is further contended that neither before the Tribunal nor before this Court any document has been filed to show that the father of the petitioner was unwell. Attention is also invited to ***Sangham Tape Company Vs. Hans Raj*** (2005) 9 SCC 331 to the effect that the Tribunal is *functus officio* after thirty days of the publication of the award. It is also argued that the reason given for the petitioner not appearing before the Tribunal is apparently false. It is pointed out that the petitioner had challenged the order of transfer on the ground that he was residing at Delhi along with his parents and that his father had been ill for four years; a contradictory stand is taken now that the father was residing in the village and was unwell and the petitioner had to go to visit him. The counsel for the respondent employer has also handed over in the court a letter dated 31st December, 1992 of appointment of the petitioner and as per Clause 10 thereof the services of the petitioner were transferable and non-reporting at transferred destination is to be treated as resignation. Reference is also made to ***Union of India Vs. Muralidhara Menon*** (2009) 9 SCC 304 holding that transfer is an incident of service and an employee has no right to be posted at a particular place and an employee cannot exercise his option to be posted in his home State unless there exists any statute or statutory rule governing the field. It is also contended that even the present petition was filed after more than one year of the order dated 31st January, 2003 (*supra*) of the Tribunal. It is contended that the representative of the Union was the authorized representative of the petitioner and the award was made in his presence and could not be said to be an *ex parte* award. Attention is also invited to the fact that the petitioner in spite of opportunity did not appear

before the Mediation Cell of this Court and it is urged that the present is a speculative litigation.

8. I may notice that the stand of the petitioner is found to be inconsistent in another respect also. While challenging the order of transfer it was the stand of the petitioner that he was a Fitter i.e. a skilled worker and was being wrongly shown by the respondent employer as a unskilled worker; before this Court it is urged that the petitioner being a unskilled worker could not be transferred.

9. In my opinion the matter ought to be rested on the appointment letter itself which provides for transfer. The Supreme Court in *Pearlite Liners Pvt. Ltd. v. Manorama Sirsi* AIR 2004 SC 1373, a case of private employment, held that such employment would be governed by the terms of the contract between the parties. In that case there was no written contract. The Supreme Court held that in the absence of a pleading that the transfer was in violation of any term of employment and in the absence of a term prohibiting transfer of the employee, *prima facie* the transfer order cannot be called in question. Reference in this regard may also be made to *Shyam Sunder Aggarwal vs. Globe Detective Agency (P) Ltd.* MANU/DE/7973/2007 & *Anand Swarup Mittal Vs. Managing Committee of Ramjas Sr. Secondary School No. 4* MANU/DE/9134/2006. It was further held that unless there is a term to the contrary in the contract of service, a transfer is a normal incidence of service.

10. Thus even without considering the appointment letter handed over by the respondent in the court, in the absence of any pleading of the petitioner that there was any term in his contract of employment prohibiting transfer, the challenge by

the petitioner workman to the transfer was misconceived. I am thus satisfied that no interference on the merits of the award is called for.

11. As far as the power of the Industrial Tribunal/Labour Court to set aside the *ex parte* is concerned, I may notice that there are conflicting decisions in this regard. In

- i. ***Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal*** AIR 1981 SC 606 it was observed that the Labour Court has power to set aside *ex parte* award at any time when sufficient cause for absence is shown;
- ii. ***Satnam Verma Vs. Union of India*** AIR 1985 SC 294 also the power of the Labour Court to set aside the *ex parte* award was upheld;
- iii. ***Anil Sood Vs. S.K. Saruaria*** (1997) 1 SCT 652 Division Bench of this Court held that the application for setting aside *ex parte* award is entertainable by the Labour Court within 30 days of publication only;
- iv. ***Anil Sood Vs. Presiding Officer*** (2001) 10 SCC 534 the Supreme Court reversed the judgment aforesaid of the Division Bench and set aside the *ex parte* award on an application even after 30 days of publication of the award;
- v. ***Sangham Tape Company*** (supra) it was held that the Labour Court has no power to set aside the *ex parte* award after 30 days of publication;
- vi. ***Radhakrishna Mani Tripathi Vs. L.H. Patel*** (2009) 2 SCC 81 the Supreme Court without reference to ***Sangham Tape Company*** held

on the basis of the earlier judgments (*supra*) that the Labour Court is competent to entertain an application for setting aside of the *ex parte* award even after 30 days of publication.

12. However in the facts of the present case, it is not necessary to enter the said controversy. The Tribunal is found to have correctly held the award to be not an *ex parte* award and in not granting another opportunity to the petitioner. The reasons given by the petitioner for his absence are found to be inconsistent and are not believable. The delay in preferring this petition also comes in the way of the petitioner.

There is no merit in the petition; the same is dismissed. However no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

12th April, 2010
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