

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

WP(C).No. 5170 of 2010 (U)

PETITIONER:

**J. KRISHNAMOORTHY,
S/O. P. JAGADEESWARAN PILLAI,
KIZHAKKE PUTHEN VEEDU, CHOONDIKAL,
PLANKALA, VELLARADA.P.O., THIRUVANANTHAPURAM.**

**BY ADVS.SRI.K.T.SHYAMKUMAR
SRI.HARISH R. MENON
SMT.M.S.KIRAN**

RESPONDENTS:

- 1. THE COMMISSIONER FOR WORKMEN'S COMPENSATION,
THIRUVANANTHAPURAM.**
- 2. SAROJAM,
MALANCHUTTU MELATHATTU PUTHEN VEEDU,
PARASUVKKAL.P.O., PARASSALA, THIRUVANANTHAPURAM.**
- 3. SAJU.S.,
MALANCHUTTU MELATHATTU PUTHEN VEEDU,
PARASUVAKKAL.P.O., PARASSALA, THIRUVANANTHAPURAM.**
- 4. SJIN.S.,
MALANCHUTTU MELATHATTU PUTHEN VEEDU,
PARASUVAKKAL.P.O., PARASSALA, THIRUVANANTHAPURAM.**
- 5. CHANDRAN,
PLANKALA VEEDU, MANATHOTTAM,
VELLARADA.P.O., THIRUVANANTHAPURAM.**

**R2 & 3 BY ADVS. SRI.GOPAKUMAR R.THALIYAL
SRI.N.P.PRAJEESH
R1 BY GOVERNMENT PLEADER SRI. SOJAN JAMES**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03-03-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

APPENDIX

PETITIONER'S EXHIBITS

- EXT- P1- TRUE COPY OF THE WCC No.76/2006 FILED BY THE
RESPONDENTS 2 TO 4.
- EXT- P2- TRUE COPY OF THE NOTICE ISSUED BY THE 1ST RESPONDENT.
- EXT- P3- TRUE COPY OF THE ORDER DATED 29-06-2009 ISSUED BY THE
1ST RESPONDENT.
- EXT- P4- TRUE COPY OF THE PETITION TO SET ASIDE EXPARTE ORDER
FILED BY THE PETITIONER ON 07-10-2009 BEFORE THE
1ST RESPONDENT.

RESPONDENTS' EXHIBITS

NIL

True copy

P.A. To Judge

AMG

C.K.ABDUL REHIM,J.

WP(C).NO. 5170 of 2010

Dated this the 3rd day of March, 2015

JUDGMENT

Grievance of the petitioner is that, the 1st respondent is not considering Ext.P4 application submitted by him seeking to set aside an ex-parte order passed by the 1st respondent, the gist of which was communicated to him as per Ext.P3. Respondents 2 to 4 herein had approached the 1st respondent in a workmen's compensation claim on the premise that they are the legal heirs of one Sri.Y.Sundaran, who had suffered personal injury on 12.6.2006 in an accident which occurred at the work place of the petitioner, and which had resulted in his death on the same day. The petitioner received notice in the claim petition from the 1st respondent, intimating about posting of the case on 1.1.2007. According to the petitioner, the said day was declared as a holiday and there was no sitting of the 1st respondent. It is stated that the petitioner went to the office of the 1st respondent on the next day and he was informed that fresh notice intimating the next posting date will be issued to him. But, according to the

petitioner, no further notice was received and he had received Ext.P3 gist of the order wherein it was revealed that the claim petition was allowed awarding the compensation, which was directed to be paid by the petitioner and the 5th respondent jointly. It is stated that, being aggrieved by Ext.P3 order the petitioner submitted Ext.P4 application seeking to set aside the ex-parte order passed by the 1st respondent. From Ext.P4 it is evident that the said application was filed supported by an affidavit for setting aside the ex-parte order issued on 29.6.2009. It is averred in the writ petition that the 1st respondent had refused to entertain Ext.P4 application stating that there is no provision for setting aside an ex-parte order and that the said application is not maintainable.

2. According to the petitioner, as per Rule 41 of the Workmen's Compensation Rules 1924, provisions of Order IX of the Code of Civil Procedure is made applicable to the proceedings before the Commissioner. Therefore an application under Order IX Rule 13 is maintainable before the 1st respondent Commissioner. Under such circumstances the petitioner seeks relief to the extent of quashing Ext.P3 order and inter alia seeks declaration that Ext.P4 application is maintainable before the 1st

respondent.

3. In the counter affidavit filed on behalf of respondents 2 to 4 it is contended that the Workmen's Compensation Commissioner had posted the case to 12.2.2007, since the initial posting date was declared as a holiday. It is contended that the practice followed is that, if a day of posting is declared as a holiday, the next posting date will be published in the Notice Board on the next day itself. Since there is no system of sending communication to the parties intimating each posting date, there is no merit in the contention raised by the petitioner, is the contention. It is specifically contended that Ext.P3 order was passed after considering merits of the contentions raised and the said order was passed after various postings granted by the 1st respondent. It is further contended that Ext.P4 application is not filed under Order IX Rule 13 of CPC and that the same was not filed within 30 days from the date of the order. The respondents have denied the averments even with respect to filing of such an application before the 1st respondent.

4. Heard; counsel appearing for the petitioner and learned counsel appearing for respondents 2 to 4. Counsel for respondents 2 to 4 contended that the 1st respondent will become

functus officio on passing the order and he cannot set aside the order in view of Rule 32(2) of the Workmen's Compensation Rules 1924. The said Rule provides that the Commissioner, at the time of signing and dating his judgment shall pronounce, his decision and thereafter no addition or alteration to be made to the judgment other than the correction of a clerical or arithmetical mistake arising from any accidental slip or omission. It is true that the said provision prevents the 1st respondent from revising or reviewing his order in any manner or from making any addition or alteration except from any correction of arithmetical or clerical mistake.

5. Question mooted for consideration is as to whether the 1st respondent has got power to set aside an exparte order passed by him. Learned counsel for the petitioner points out that Rule 41 provides that certain provisions contained in the 1st schedule of the CPC shall apply to the proceedings before the Commissioner, in so far as they may be applicable to such proceedings. The provisions of CPC mentioned in Rule 41 includes the provisions contained under order IX. Rule XXIII of Order IX CPC provides procedure for setting aside the decree exparte passed against the defendant in a case. There is no

dispute that the petitioner herein had not appeared or contested the claim before the 1st respondent. Hence it could not be denied that the 1st respondent had awarded the claim on an ex parte basis. Going by provisions contained in Rule 41 by which order IX of CPC was made applicable, it cannot be said that the 1st respondent is lacking powers to entertain an application to set aside the decree/order. Therefore this court is of the considered opinion that Ext.P4 application is maintainable before the 1st respondent.

6. Learned counsel for respondents 2 to 4 contended that there is no evidence to the effect that the petitioner had filed Ext.P4 application before the 1st respondent. Specific averments contained in the writ petition is to the effect that the 1st respondent had refused to entertain Ext.P4 application stating that the same is not maintainable. Under such circumstance, this court is of the opinion that the 1st respondent can be directed to entertain Ext.P4 application and to dispose of the same on merits in view of the findings arrived as above. It is pointed out that, pursuant to amendment of the Act in question the authority now conferred with jurisdiction, is the Industrial Tribunal. Therefore this court is of the opinion that the petitioner

can be permitted to move before the said authority.

7. Hence this writ petition is hereby disposed of by granting liberty to the petitioner to approach the Industrial Tribunal having jurisdiction in the matter, with appropriate petition seeking to set aside the exparte order, gist of which is intimated as per Ext.P3. If any such application is filed before the Tribunal concerned, along with a certified copy of this judgment, within 2 weeks from the date of receipt of a certified copy of this judgment, the said Tribunal shall consider such application and shall dispose of the same on merits, after affording opportunity to both sides. A decision on the said application shall be taken after affording an opportunity of personal hearing to the petitioner and others, at the earliest possible, at any rate within a period of three months from the date of receipt of such application.

C.K.ABDUL REHIM, JUDGE

Pmn/

