

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Criminal Petition No.2393 of 2015

ORDER:

In this petition filed under Section 482 Cr.P.C., the petitioner challenges the order dated 04.03.2015 in M.P.No.6424 of 2011 of II Additional Chief Metropolitan Magistrate, Visakhapatnam whereunder the learned Magistrate in execution of the order in APSE No.3 of 2010 of the Assistant Commissioner of Labour, Circle II, Visakhapatnam directed the present petitioner—Company to deposit Rs.6,75,230/- within 10 days from the date of his order towards payment of back wages of third respondent/employee.

2) The factual matrix of the case briefly is thus:

a) The services of third respondent/employee as Net Work Administrator in Petitioner's Company were terminated by an order dated 05.08.2010 and consequently he filed a case APSE 3 of 2010 under Section 47 of Andhra Pradesh Shops and Establishments Act, 1988 (for short "APSE Act") before the Assistant Commissioner of Labour, Circle II, Visakhapatnam who directed the petitioner—Company to reinstate the third respondent/employee with all backwages and with continuity of service within 15 days from the date of receipt of the order. Aggrieved, the petitioner—Company filed appeal in APSE MP SA 1 of 2012 before the Deputy Commissioner of Labour, Visakhapatnam with a delay of 97 days. The third respondent/employee contested the matter. It appears, without first deciding the delay condoning petition, the appellate authority decided the main appeal and allowed the appeal in his order dated 21.03.2012 and set aside the order APSE 3 of 2010. Hence, the third respondent/employee filed W.P.No.8432 of 2012 before the High Court. A learned single Judge of this High Court allowed the writ petition and remitted the matter to the second appellate authority for consideration of delay condone application. As against the said order, the petitioner—Company filed W.A.No.1452 of 2012. A Division Bench of this High Court dismissed the Writ Appeal by confirming the

order in writ petition.

b) Meanwhile, the Assistant Commissioner of Labour, Circle II, Visakhapatnam filed a petition under Section 48 of the Act before the II Additional Chief Metropolitan Magistrate, Visakhapatnam with a prayer to recover the amount of Rs.6,75,230/- from the petitioner—Company towards payment of backwages and remit to the said authority. The petitioner—Company contested the matter before the II Additional Chief Metropolitan Magistrate, Visakhapatnam mainly on two grounds; firstly that their concern is excluded from the operation of certain provisions of the APSE Act in view of G.O.Ms.No.53 Labour, Employment, Training and Factories (Lab.II) Department dated 20.06.2007 and hence the order in APSE 3 of 2010 passed by the Assistant Commissioner of Labour, Circle II, Visakhapatnam was without jurisdiction and the said order cannot be executed by the learned Magistrate and secondly, on the ground that the appeal filed by the petitioner—Company is pending before the Deputy Commissioner of Labour, Visakhapatnam. The learned Magistrate turned down the objections with the observation that pendency of appeal with a delay condoning petition, without any stay order cannot stop him from executing the order and so far as validity of the order passed by the Assistant Commissioner of Labour is concerned, the executing Court cannot go beyond the scope of decree. He thus directed the petitioner—Company to deposit a sum of Rs.6,75,230/- within 10 days from the date of his order.

Hence the instant petition.

3 a) The main contention of learned counsel for petitioner—Company is that by virtue of G.O.Ms.No.53 dated 20.06.2007 the IT Enabled Services and Information Technology Establishments were exempted from certain provisions of the APSE Act and since the petitioner—Company is a IT Related Establishment, the Assistant Commissioner of Labour had no jurisdiction to entertain the application of third respondent/employee and pass an order under Section 47 of the Act and thereby his order is vitiated by illegality and

consequently the Magistrate had no jurisdiction to execute the said illegal order and in spite of bringing the said fact to the notice of learned Magistrate, he passed the impugned order in gross violation of law.

b) Learned counsel secondly contended that appeal filed by the petitioner—Company is pending before the Deputy Commissioner of Labour for consideration and in view of the same also Magistrate ought not to have passed impugned order in executing the order passed by Assistant Commissioner of Labour. Since the impugned order of the Magistrate is a sheer abuse of process of law, the same can be quashed under the inherent jurisdiction of the High Court. He relied upon several decisions relating to inherent powers of the High Court under Section 482 Cr.P.C.

4 a) In oppugnation, learned counsel for third respondent/employee argued that Magistrate being an executing court cannot go beyond the order passed by the Assistant Commissioner of Labour to test its validity and so, learned Magistrate rightly rejected the plea of the petitioner—Company.

b) Regarding the pendency of appeal with the Deputy Commissioner of Labour, he submitted that the said appeal was in the stage of considering the delay condoning petition as per the orders of High Court in W.P.No.8423 of 2012 and the regular appeal was not even numbered and further no stay of operation of the order of Assistant Commissioner of Labour was granted in the said appeal and thereby learned Magistrate rightly rejected the said contention also.

c) Learned counsel further argued that even if the delay is condoned, still the petitioner—Company cannot proceed with appeal without depositing the arrears of backwages which is a condition precedent for proceeding the appeal as per Section 48(3) of the APSE Act and so far the petitioner—Company has not deposited the said amount. Learned counsel relied upon the following decision of this High Court upholding the Constitutional validity of Section 48(3) of the Act.

1) ***District Coop. Central Bank Ltd., Eluru v. State of A.P.***

He thus prayed to dismiss the petition.

5) In the light of above rival arguments, the point for determination in this petition is:

“Whether there are merits in this petition to allow?”

6) **POINT**: Admittedly, the third respondent/employee filed W.P.No.8432 of 2012 aggrieved by the order of Deputy Commissioner of Labour in APSE MP SA 1 of 2012. The said writ petition was allowed with certain observations and W.A.No.1452 of 2012 filed by the petitioner—Company was dismissed by the Division Bench confirming the order in writ petition. Therefore, it is pertinent to extract here the observations and order passed in W.P.No.8432 of 2012.

“It is however not in dispute that by the said order, the second appellate authority set aside the order under appeal and therefore exercised jurisdiction as a second appellate authority. When the statute provides in no uncertain terms that the second appeal itself cannot be ‘entertained’ unless the deposit is made as required under the proviso to Section 48(3) of the Act of 1988, the second appellate authority could not have exercised its jurisdiction as such. The order dated 21.03.2012 passed by the second appellate authority is therefore in violation of the statute and is consequently unsustainable. The order is accordingly set aside and the matter is remitted to the second appellate authority for independent consideration of the condone delay application.

Needless to state, unless the delay is condoned, the second appeal would not be taken on file. Unless the appeal is taken on file, it cannot be said to have been entertained. Therefore, the fifth respondent would be required to make the deposit in terms of the proviso to Section 48(3) of the Act only upon the condonation of the delay. The second appellate authority shall, in the first instance, consider the condone delay application filed by the fifth respondent on its own merits after giving due opportunity of hearing to both sides and pass appropriate orders thereon in accordance with law.

The Writ Petition is accordingly allowed and the matter is remitted to the second appellate authority for consideration of the condone delay application. Interim order dated 27.03.2012 passed in WPMPNo.10659 of 2012 shall stand vacated. WPMPNos.10659, 24624 and 24813 of 2012 and WVMPNo.2185 of 2012 do not survive for consideration in the light of this final order. No order as to costs.”

a) The above order reads that the High Court found fault with the appellate authority i.e. Deputy Commissioner of Labour deciding the main appeal itself without at first deciding delay condoning petition on merits. Thereby, the above order was passed and the matter was remitted to second appellate authority for consideration of delay condoning petition. By virtue of the aforesaid order, now, the appeal is pending before the Deputy Commissioner of Labour for considering the merits of the delay condonation petition.

b) Be that it may, impugned order passed by the learned Magistrate is concerned, on a careful scrutiny, the said order cannot be found fault with because as rightly observed by him, none of the grounds raised by the petitioner—Company are formidable to stop from executing the order passed by learned Assistant Commissioner of Labour, Visakhapatnam. The applicability of G.O.Ms.No.53 to the petitioner's Company has to be decided in the second appeal pending on the file of Deputy Commissioner of Labour, Visakhapatnam but not by the Magistrate. Further, since no order was passed in the second appeal staying the execution of the order of Assistant Commissioner of Labour, learned Magistrate was right in rejecting the objection of the petitioner—Company. To that extent, the Magistrate is right. However, it must not be forgotten that by virtue of order in W.P.No.8432 of 2012 the matter is remitted back to Deputy Commissioner of Labour for considering the delay condonation petition and the same is pending with him. Hence, interest of justice requires that till the order is passed on merits in delay condoning petition, the order of the learned Magistrate needs to be kept in abeyance.

Hence, the following order is passed.

- a. The Deputy Commissioner of Labour, Visakhapatnam is directed to dispose of delay condoning petition—APSE MP SA 1 of 2012 on merits within two months from the date of receipt of a copy of this order.
- b. The operation of order dated 04.03.2015 in MP No.6424 of 2011 of II Additional Chief Metropolitan Magistrate, Visakhapatnam is stayed till the order in delay condoning petition is passed by Deputy Commissioner of Labour, Visakhapatnam as directed supra.
- c. Depending upon the out come of the order in delay condoning petition passed by Deputy Commissioner of Labour, Visakhapatnam, the further proceedings in the second appeal shall follow as per Section 48 of APSE Act.

8) Accordingly, this Criminal petition is disposed of.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 06.04.2015

Note: L.R. copy to be marked Yes / No

Murthy