

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1343 OF 2016

Shri. Rajan Mallaya Dharmaji

..Petitioner

Versus

Tata Memorial Hospital and others

..Respondents

Mrs. Vidula S. Patil for the Petitioner

**Mr. Agnel Carneiro & Mr. Vaishnav Shah i/by Mulla & Mulla & CB & C
for the Respondent No.1.**

CORAM : R. M. SAVANT, J.

DATE : 30th AUGUST, 2016

PC.

1 The writ jurisdiction of this Court is invoked against the order dated 30.07.2013 passed by the I/c Member of the Industrial Court, Mumbai, by which order, the Complaint filed by the Petitioner being Complaint ULP No.350 of 2011 came to be dismissed for default.

2 The impugned order discloses that on the said day i.e. on 30.07.2013 the complainant and his Learned Advocate Mrs. Vidula Patil were absent when the Complaint was called out. The order further records the issues were framed in the month of September 2012 and in spite of opportunity given there was no attempt on the part of the complainant to give evidence in support of his claim. The said recording

made in the impugned order dated 30.07.2013 is sought to be controverted by the Learned Counsel for the Petitioner by referring to the Roznama of the said date which records that complainant and his advocate were present and that the order dismissing the Complaint for default has been passed. Normally this Court would have shown indulgence to the Petitioner/original complainant having regard to the fact that the Complaint has been dismissed for non-prosecution. However the facts in the instant case are such which dissuades this Court from adopting the said course of action. It is required to be noted that though reliance is sought to be placed on the Roznama dated 30.07.2013 to contend that in fact the complainant and his advocate were present. The said stand taken by the Learned Counsel for the Petitioner is directly contrary to the averment made in the application for restoration by the complainant which was filed in the Industrial Court on 15.11.2013. It is averred in paragraph 2 of the said application to the following effect :-

“I say that I was not present in the court when the matter was called out as the date for filing evidence was 03.09.2013 as per my record therefore I could not remain present in Hon'ble Court on the date fixed i.e. 30.07.2013.”

3 Thereafter another version appears in the main application for restoration being Restoration ULP No.1 of 2013, wherein it is stated that the advocate for the complainant was under an impression that the

Complaint is adjourned to 03.09.2013. It is further mentioned in paragraph 5 of the said application that the recording made in the order dated 30.07.2013 that the advocate for the complainant was not present is not correct as the advocate for the complainant was very much present on 30.07.2013. Thereafter another version appears in paragraph 6 of the instant Writ Petition, wherein it is averred that the advocate appearing for the complainant was ready to proceed to examine the complainant and the Learned Member of the Industrial Court had therefore kept back the matter. It is further averred that despite the advocate urging the Court that she wants to proceed with examination in chief of the complainant, the Learned Member of the Industrial Court relying on the statement of the advocate appearing for the Respondent held that the Complaint has become infructuous. Thereafter another version appears in paragraph 8(f) of the above Petition, wherein it is stated that both the complainant and his advocate were present in the Court and in fact the Court adjourned the hearing to 03.09.2013. Hence, the Petitioner i.e. the original complainant has come with different versions in the context of the recording made in the order dated 30.07.2013 in a matter like this, the least that is expected is a certain amount candor on the part of the Applicant which is unfortunately lacking in the instant case. The facts as pleaded by the Petitioner/original complainant, which involves different

versions as indicated above, do not make out a case for exercise of discretion in his favour.

4 It is also required to be noted that the impugned order has been passed on 30.07.2013 whereas the instant Petition has been filed on 06.11.2015 hence a good two years and four months after the passing of the order. The said delay is sought to be explained by the averments made in paragraph 11 of the above Writ Petition by stating that the delay in approaching this Court has occurred in view of the fact that the order passed by the Learned Member of the Industrial Court came to be known to the Petitioner i.e. the complainant only after search was taken by the advocate for the complainant after the adjourned date it was found that the Complaint was dismissed. It is further stated that the application for certified copy was made on 16.09.2013 and the certified copy was made available on 23.09.2013. There is absolutely no explanation for the delay between 16.09.2013 till the filing of the above Petition on 06.11.2015. The Petition therefore suffers from delay and laches.

5 In passing, a reference would have to be made to the subject matter of the Complaint. It appears that the Petitioner i.e. the original complainant had applied for correction of his date of birth on 02.12.2006 when he was to superannuate on 31.12.2006. In terms of the law laid

down by the Apex Court, a employee has to apply for correction of the date of birth well in advance of the date of his retirement and cannot apply for correction of his date of birth at the last minute. Hence, the merits of the Complaint are prima-facie questionable. It is also required to be noted that the complainant seems to have collected all his retiral dues payable to him as per his date of retirement i.e. on 31.12.2006. The Complaint is question can therefore be said to be only speculative in nature. Having regard to all the aforesaid facts, in my view, the Petitioner is not entitled to exercise of any discretion in the matter of restoration of the Complaint. No case for exercise of the writ jurisdiction of this Court is therefore made out. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]