

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 6931 OF 2010**

M/s. Classic Wordrob

.... Petitioner

Vs.

Shri Raju Dhondu Jadhav

.... Respondent

Mr Shailesh S Pathak, for the Petitioner.

Mr Ashok D Shetty, for the Respondent.

CORAM : K.K. TATED, J.**DATE : APRIL 11, 2017****P.C.**

1. Heard learned counsel for parties.
2. By consent of both the parties the matter is taken on board for final disposal at the stage of admission itself.
3. Liberty is granted to the Petitioner to carry out amendments in prayer clause (a). Amendments to be carried out during the course of day.

4. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner challenges the judgment dated 21st June 2010 passed by the 7th Labour Court at Mumbai in Miscellaneous Restoration Application (IDA) No. 2 of 2008 dismissing the Petitioner's application for setting aside the exparte award dated 14th May 2005 in Reference (IDA) No. 645 of 2000.

5. The learned counsel Mr Pathak appearing on behalf of the Petitioner submits that the Labour Court erred in coming to the conclusion that the Petitioner failed to show sufficient cause for condonation of delay in filing the application for setting aside the exparte award dated 14th May 2005. He further submits that the learned Court erred in come to the conclusion that as per the provisions of Rule 26 of the Industrial Disputes (Maharashtra) Rule 1957, the Labour Court have no power to pass any order of setting aside the exparte award, if the application made after 30 days.

6. The learned counsel appearing on behalf of the Petitioner submits that in the present proceeding the Deputy Commissioner for Labour, District Mumbai had forwarded the reference under Section

10(1), 12(5), 2A and 39 of the Industrial Disputes Act, 1947 between the Petitioner and Respondent in respect the demand of second party of reinstatement, continuity of service with back wages with effect from 23rd May 2001. He submits that the Respondent's services were terminated by the Petitioner with effect from 23rd May 2001.

7. The learned counsel for the Petitioner submits that the Labour Court without making proper service on the Petitioner in reference, passed exparte award on 14th May 2005 directing the Petitioner to reinstate the Respondent with full back wages and continuity of service with effect from 23rd May 2001.

8. The learned counsel appearing for the Petitioner submits that they learnt about the exparte award passed by the Labour Court in the month of October 2007. He submits that Petitioners were out of India from July 2007 to October 2007. He submits that Petitioner received notice in another related case i.e. Application (IDA) No. 138 of 2007 from 1st Labour Court, Mumbai, from that case Petitioner learnt about the present case. They immediately applied for certified copies of the award. He submits that they received a certified copy of

an award on 14th December 2007. Thereafter they preferred immediately the Miscellaneous Restoration Application (IDA) No. 2 of 2008, for setting aside an ex parte award on 7th January 2008, with following prayers:

“a) That the Hon'ble Court be pleased to call the record and proceeding of Reference (IDA) No. 645 of 2000.

b) That the Hon'ble Court be pleased to set aside the ex parte award dated 14th May 2005 passed in Reference (IDA) No. 645 of 2000.

c) That the Hon'ble Court be pleased to restore the original Reference (IDA) No. 645 of 2000 for fresh adjudication upon merit giving the Applicant an opportunity to defence therein.

d) That pending hearing and final disposal of main application the Hon'ble Court be pleased to stay the ex parte award dated 14th May 2005 passed in Reference (IDA) No. 645 of 2000.

e) Any interim or ad-interim relief in terms of prayer clause (b), (c) and (d).

f) Any other relief just and proper in the nature and circumstances of case.”

9. The learned counsel for the Petitioner in respect of this contention, relied on paragraphs Nos. 9, 10, 11, 12 & 13 of his application which read thus:-

“9. The Applicant states that no notice of present reference was served upon the Applicant. The Applicant states that the copy of said impugned award is also not served upon Applicant. The Applicant's family member received notice in another related case i.e. Application (IDA) No. 138 of 2007 from 1st Labour Court, Mumbai in July 2007. However, the Applicant was abroad at Africa since July to October 2007 thereby he could know the contents of copy of Application (IDA) No. 138 of 2007. When he reached India in October 2007, the Applicant came to know that an Ex-Parte Award dated 14th May 2005 is passed in Reference proceeding against Applicant being Reference (IDA) No.645 of 2000 by VIII

Labour Court, Mumbai. Hereinafter annexed and marked as Exhibit "A" is the award certified Original Copy of the said impugned Ex-Parte Award. The Applicant immediately appointed an Advocate to enquire about the matter and to initiate the legal proceeding. Going through the award dated 14th May 2005 and papers of proceeding, it was found that the bailiff met Mr SN Sharma, who told that the employer is out of Company; hence no one can take notice. First of all Mr SN Sharma was not any employee of the Company, secondly said statement of Mr SN Sharma not mount to refusal. It is also made clear that Mr SN Sharma was representative appointed by the Applicant exclusively for Conciliation proceeding. He was having no right to refuse or receive the notice of Hon'ble Court. Without prejudice to above, the statement of Mr Sharma that employer is out of company hence no one can take notice is not refusal, not to speak refusal by any employee of the Applicant Company. The Applicant states that in the said circumstances as upon said report of bailiff, another

notice ought to have been sent to serve upon the Applicant.

10. It is also pertinent to note that the Hon'ble Court has nowhere passed any order that abovesaid statement of Mr SN Sharma amounts to refusal of notice by the Applicant Company, hence the said refusal amounts to service of notice upon the Applicant.

11. The Applicant states that thus the Hon'ble Court has proceeded without holding that the proper notice is served upon the Applicant Company. Furthermore, the impugned award states that the Hon'ble Court passed order upon 29th April 2004 to proceed ex parte whereas it is found that there is no date in the Roznama as of 29th April 2004 and no such order in the words "to proceed ex-parte" is passed.

12. Without prejudice to above the Applicant states, that there is no proper service of notice as per requirements of Rule 20 of the Industrial Disputes (Bombay) Rule, 1957 which envisage that in case of refusal of notice, the notice be sent once again by UPC

which is not send in this matter.

13. The Applicant further states that the impugned award gives direction to the Applicant to reinstate the Opposite Party w.e.f. 23rd May 2001 and hold the termination of service of Opposite Party illegal w.e.f. 23rd May 2001. Whereas the reference no of the case is Reference (IDA) No. 645 of 2000 and the Opposite Party also stated in his demand and other papers that his services was terminated w.e.f. 28th December 1999.

10. The learned Counsel for the Petitioner submits that the impugned award states the Labour Court passed order on 29th April 2004 to proceed exparte, whereas it is found that there is no date in Labour Court's Roznama as of 29th April 2004 and no such order in the words “to proceed exparte is passed”.

11. The learned counsel for the Petitioner submits that these facts were not considered by the Labour Court at the time of deciding their application for setting aside the exparte award and condonation of delay. He submits that the Trial Court mainly dismissed their

application only on the ground that as per the Rule 26 of the said Rules, the Labour Court have no jurisdiction to pass any order if application is made after 30 days from the date of award. Rule 26 of the Industrial Disputes (Bombay) Rule 1957, which reads thus:-

“26. Board, Court, Labour Court, Tribunal or Arbitrator may be proceed ex-parte.-(1) If without sufficient cause being shown, any party to a proceeding before a Board, Court, Labour Court, Tribunal or an Arbitrator fails to attend or be represented, the Board, Court, Labour Court, Tribunal or an Arbitrator may proceed ex-parte.

(2) Where any award, order or decision is made ex-part under sub-rule(1), the aggrieved party, may, within thirty days of the receipt of a copy thereof, make an application to the Board, Court, Labour Court, Tribunal or an Arbitrator, as the case may be, to set aside such award, order or decision. If the Board, Labour Court, Tribunal or Arbitrator is satisfied, that there was sufficient cause for non-appearance of the aggrieved party, it or he may set aside the award, order or decision so made and shall appoint a

date for proceeding with the matter.

Provided that, no award, order or decision shall be set aside on any application as aforesaid unless notice thereof has been served on the opposite party.”

12. The learned counsel for the Petitioner submits that in the present proceeding, the Advocate on behalf of the Respondent relied on Judgment of this Court in the matter of ***Shri Radhakrishna Mani Tripathi, Mumbai Vs. LH Patel & Anr, 2006 I CLR 743***. He submits that in that authority, the Trial Court allowed the Application filed by the Company for setting aside the exparte award qua challenged by the other side in this Court. This Court dismissed the Writ Petition. Paragraph 49 of this Judgment reads thus:-

“49. In the above view of the matter, the view taken in the impugned order is a reasonable and possible view. Even otherwise, in exercise of Writ jurisdiction under Article 227, it is not possible for this Court to take contrary view to dislodge the well considered judgment of the Court below based on findings of fact. The impugned order, in effect,

provides opportunity of hearing to the affected party keeping in view the principles of natural justice. Let there be an award on merits with full contest rather than by way of default. The Petition is, thus, liable to be dismissed.”

13. The learned Counsel for the Petitioner submits that the matter of ***Shri Radhakrishna Mani Tripathi (Supra)*** went to the Apex Court. He submits that the Apex Court dismissed the SLP. He submits that the Apex Court upheld the judgment passed by the High Court. Paragraph 19 of the said judgment reads thus:-

“19. In the light of the decision in Anil Sood we find no substance in the appellant's submission based on Section 17-A of the Act. There being no substance in the first limb of the submission there is no question of any conflict between Rule 26(2) of the Maharashtra Rules and Section 17-A of the Act.”

14. On the basis of these submissions and the authorities of the Apex Court, the learned counsel appearing on behalf of the

Petitioner submits that, the Labour Court erred in coming to the conclusion that they have no power to pass any order to set aside *exparte* award, if the application made beyond 30 days in view of Rule 26 of the said Rules. Hence in the interest of justice this Hon'ble Court may please to set aside the judgment dated 21st June 2010 passed by the Labour Court dismissing their application for setting aside *exparte* award and allow their application to set aside *exparte* award dated 14th May 2005. He further submits that the Labour Court may be directed to hear the Reference on its own merits after giving liberty to both the sides to file their pleading and to argue the matter on its own merits. He further submits that if the Petition is not allowed irreparable loss and injury will cause to the Petitioner.

15. On the other hand, the learned Counsel Mr Shetty appearing on behalf of the Respondent vehemently opposed the present Writ Petition. He submits that in view of Rule 26 of the said Rules, the Labour Court rightly held that Petitioners application for setting aside *exparte* award by condonation of delay was not maintainable. As the same was filed beyond 30 days. He further submits that in the present proceedings, the Petitioner in their

application for setting aside an *ex parte* award in paragraph 9 given incorrect particulars. He submits that bear reading of paragraph 9 itself shows that the Petitioner had knowledge about the *ex parte* award passed by the Labour Court in the month of October 2007 itself. In spite of that the Petitioner filed Miscellaneous Restoration Application for setting aside the *ex parte* award on 7th January 2008. He further submits that there is no explanation in the Petitioner's application for delay from October 2007 till the filing of application in January 2008. He also submits that our High Court in the matter of *M/s. South Seas Distilleries and Breweries Pvt Ltd., Thane V. Deepak R Patne & Anr, 2003 LAB IC 262*, held that if the application for setting aside *ex parte* award filed beyond 30 days, then the Court has no jurisdiction to entertain the same. The learned Counsel for the Respondent further submits that in view of the judgment of our High Court in the matter of *M/s. South Seas Distilleries (Supra)*, and reasons given that the Labour Court in impugned judgment dated 21st June 2010, there is no substance in the present Writ Petition and same is required to be dismissed with costs.

16. I heard both sides at length. It is to be noted that in the

present proceeding the Petitioner specifically made averment in his application for setting aside award that the notice of Reference was not served on him by the office of Labour Court, Mumbai. Those facts were stated by the Petitioner in paragraph 9 of application for setting exparte award. Though the present Petition is pending since 2010, there is no reply filed by the Respondent denying these facts.

17. In the present proceedings as soon as the Petitioner learnt about the exparte award passed by the Labour Court, he immediately made an application for certified copies. The certified copies made available to him on 14th December 2007. Thereafter the Petitioner filed the application for setting aside an exparte award on 7th January 2008 that is within 30 days from the receipt of certified copies. Our High Court in the matter of *Shri Radhakrishna Mani Tripathi (Supra)*, held that if a sufficient cause is shown, Court can condone the delay for setting aside the exparte award under Rule 26 of the said Rules and same is upheld by the Apex Court in the matter of *Shri Radhakrishna Mani Tripathi, Mumbai Vs. LH Patel & Anr, 2008 III CLR 1043*.

18. Considering these two authorities and the reason given by the Labour Court at the time of dismissing the Petitioner's application for setting aside the exparte award, it is not correct to say that application filed by Petitioner was not maintainable in law. Same is required to be set aside. At the same time the Petitioner to pay the cost of Rs.7,500/- to the Respondent.

19. Hence the following order:-

- a. The impugned judgment dated 21st June 2010 passed by the 7th Labour Court at Mumbai in Miscellaneous Restoration Application (IDA) No. 2 of 2008 is set aside.
- b. The application filed by the Petitioner being Miscellaneous Restoration Application (IDA) No. 2 of 2008 is allowed.
- c. The exparte award dated 14th May 2005 passed by the 7th Labour Court, Mumbai under Reference (IDA) No. 645 of 2000 is set aside.
- d. Reference (IDA) No. 645 of 2000 is restored to file of Labour Court, Mumbai for hearing on its own merits.
- f. Liberty granted to the Petitioner to file their Written Statement on or before 3rd June 2017 with copy to the other side.

- g. The Labour Court to decide the Reference (IDA) No. 645 of 2000 on its own merits as early as possible but in any case on or before 30th November 2017 by giving opportunity to both the parties to complete pleadings.
- h. The Petitioner to pay cost of Rs.7,500/- to the Respondent and / or deposit in the Labour Court within four weeks from today failing which Writ Petition shall stand dismissed without reference to the Court.
- i. If cost is deposited in the Labour Court as stated above, the Respondent worker is entitled to withdraw the same without furnishing any security.

(K.K. TATED, J.)