

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

WRIT PETITION NO.974 OF 2018

Kalyan Dombivli Mahangar
Parivahan Seva
Ganesh Ghat,
Kalyan Dist. Thane .. Petitioner

Vs.

Anil Shankar Dhanke
R/o. S.Padmakar Tange Chawl,
Shivaji Nagar, Baitulkar Pada,
Kalyan (W), Dist.Thane .. Respondent

Mr.A.S. Rao for the petitioner.
Mr.Ashok B. Tajane for the respondent.

CORAM : A.K. MENON, J

**RESERVED ON : 25TH APRIL, 2018
PRONOUNCED ON : 17TH JULY, 2018**

JUDGMENT :

1. The petitioner challenges an order dated 29th December, 2017 passed by the Labour Court, Thane in Miscellaneous Application (IDA) No.5 of 2011 in Reference (IDA) No.552 of 2002 by which the Labour Court

dismissed an application filed on behalf of the petitioner seeking condonation of delay in filing an application for restoring a Reference under Rule 26(2) of the Industrial Disputes (Bombay Rules) 1967 for setting aside an exparte award dated 28th October, 2005.

2. The facts in brief are that the respondent was employed with the petitioner since 12th September, 1999 as a Badli worker in the category of "Conductor". His last drawn salary was about Rs.3,500/-. His services were terminated with effect from 17th May, 2002. According to the respondent, the said termination was illegal and improper. He was reportedly registered with the Employment Exchange and on 12th June, 1998 he made an application to the petitioner. The respondent was called for a written test vide letter dated 3rd December, 1998 in which he qualified and thereafter he was called for interview. Out of 333 candidates who appeared for a written test, the respondent was initially at Serial No.85 and thereafter at Serial No.76.

3. On 12th May, 1999 the respondent received a communication that he was selected for the post of Conductor and was called upon to attend medical examination which he did. He was sent for training between 18th May, 1999 to 23rd May, 1999 and vide communication dated 11th July, 1999 he was appointed as a Badli Conductor. He was asked to deposit a sum of Rs.1,500/- and called to report for duty on 12th September, 1999. The respondent thereafter was given breaks in employment, periodically. Sometimes he worked for all days in some months and sometime for 20 days.

He was then informed that his services were terminated on or about 25th July, 2001 along with 13 other conductors. The basis of termination was allegations that they had remained absent. Thereafter the respondent and other 13 persons were taken back in employment for a period of three months and thereafter further continued from January to March 2002. No order of appointment was given and ultimately vide letter dated 16th May, 2002 the respondent was informed that his services were terminated from 17th May, 2002. It is stated that eight of the workmen who were re-appointed along with the respondent were continued in their services and their services were not terminated. A dispute was raised before the Labour Commissioner where the respondent sought reinstatement in service with full back wages. The Conciliation Officer attempted to resolve the dispute but upon failure thereof the State Government referred the matter to the Labour Court and that is how the Reference came to be filed.

4. It is the petitioner's contention that it was never served with any notice and that the petitioner was surprised to receive a copy of the award dated 28th October, 2005 passed by the Labour Court. The judgment recorded that the petitioner had appeared in the case but it failed to file a written statement and on 12th August, 2005 the Reference was ordered to proceed exparte.

5. The Labour Court passed the order of reinstatement of the respondent with full back wages and continued the respondent's services with

effect from 17th May, 2002. The petitioner then filed Miscellaneous Application No.46 of 2004 on 28th June, 2006 contending that the petitioner never received any notice and was unaware of the proceedings.

6. The respondent filed its reply contending that there was delay in filing the application. It was further urged on behalf of the respondent that the Advocate for the petitioner had appeared in the Reference and therefore it was not correct to say that the petitioner was not aware of the pending Reference.

7. On behalf of the petitioner Mr. Rao, learned Advocate submitted that the petitioner was unaware of pendency of the Reference. According to Mr. Rao, the Advocate who appeared on behalf of the petitioner was not instructed to appear in the matter but he was already present in the Court. Since he was on the panel of the petitioner – corporation, had appeared only intending to convey to the Corporation that such reference was pending but he had no authority to appear in the matter. He further submitted that the Advocate concerned had deposed before the Labour Court to the effect that even though he appear on behalf of the corporation on that day but he had lost sight of the matter and did mention that he had not informed the Corporation of the matter on that date. According to Mr. Rao the notice of reference was not served at all and the Labour Court had proceeded to pass the exparte order based on the erroneous impression that the petitioner had appeared in the Court and yet not filed the written statement.

8. Mr. Rao submitted that the impugned order which declined to entertain the application for restoration had proceeded on an erroneous basis. He submitted that delay ought to have been condoned and the matter should have been restored. It transpires that the petitioner had filed Miscellaneous Application (IDA) No.46 of 2006 in Reference (IDA) No.46 of 2006 seeking condonation of delay and that was allowed by an order of the Labour Court dated 8th March, 2011 subject to payment of costs of Rs.300/-. Thereafter Mr. Rao placed reliance upon the order dated 29th November, 2017 whereby this Court passed the consent order setting aside the order dated 14th March, 2016 passed by the Presiding Officer, Second Labour Court and remanded the matter and directed the Presiding Officer to hear Miscellaneous Application No.5 of 2011 in Reference (IDA) No.552 of 2002 afresh and decide the same within four weeks from the date of order. All contentions relating to the delay were kept open. It is on this basis that the Miscellaneous Application came to be heard afresh.

9. Mr. Rao further submitted that the impugned order fails to consider the fact that notice was not served upon the respondent. He relied upon the following judgments :

(i) Grindlays Bank Ltd. Vs. Central Government, Industrial Tribunal and Others 1980 (Supp) SCC 420;

(ii) Satnam Verma Vs. Union of India 1984 (Supp) SCC 712;

(iii) Anil Sood Vs. Presiding Officer, IInd Labour Court (2001) 10 SCC 534;

- (iv) Radhakrishna Manoj Tripathi Vs. L.H. Patel (2009) 2 SCC 81;*
- (v) Ram Shiroman Mishra Vs. Vishwanath Pandey (2012) 8 SCC 575;*
- (vi) M/s.Harrai Dessai & Sons Stores Vs. 2000 (3) Mh.L.J. 540;*
- (vii) M/s.Chabada Petro Pump Vs. Shaikh Hasan 2007 (5) ALL MR 573;*
- (viii) Kewalchand Mimani (D) Vs. S.K. Sen & Others (2001) 6 SCC 512;*
- (ix) New India Structural & Cane Works Vs. Abdul 1998 (1) Bom.C.R. 320.*

10. On behalf of the respondents, Mr. Tajane, learned counsel submitted that there was no substance in the challenge. He submitted that the only challenge is to the order dismissing the application for restoration. He submitted that the judgment and award dated 28th October, 2005 stands and that there is no challenge to the said order. Mr. Tajane submitted that the impugned order was passed after considering all the documents and submissions and it did not suffer from any illegality. The petitioner corporation was fully aware of the fact that the reference was pending and yet failed to contest the same. He submitted that the respondent had been targeted. That although he was appointed as a Badli Conductor in 1999 and was his services were terminated from 25th July, 2001, seven others who were also the Badli Conductors and whose services were terminated, were taken back in services. The respondent was shown absent for 27 days and once again his services were terminated on 17th May, 2002. He submitted

that the Advocate's notice in the matter was duly served and the Advocate also represented the Corporation on 29th August, 2004. According to Mr. Tajane the case of the petitioner that it has not been served with notice is incorrect. He therefore supported the impugned order and submitted that the challenge had no merit. He invited my attention to the fact that even Advocate who appeared for the corporation had deposed before the Labour Court but the Labour Court had not accepted that evidence. Mr. Tajane, learned counsel for the respondent relied upon the following judgments :

(i) South Seas Distilleries and Breweries Pvt. Ltd. Vs. Deepak R. Patne and Anr. 2002 (Supp.2) Bom.C.R.657;

(ii) Anand Shivram Samant Vs. Kansal Nerolac Paints Ltd. & Ors. 2016 I CLR 88;

(iii) Sunil Kumar Sambhudayal Gupta & Ors. Vs. State of Maharashtra (2010) 13 SCC 657;

(iv) Vasant Govind Shirsekar vs. Mhatre Pen & Plastics Pvt. Ltd. & Ors. 2005(3) Mh.L.J. 272;

Mr. Tajane also relied upon the deposition of the Advocate Mr.Patwardhan who had appeared before the Labour Court and was later cross examined by the Advocate for the petitioner corporation to buttress his argument that no case has been made out for interference.

11. Having heard learned counsel for the parties and having perused the impugned judgment with the aid of the learned counsel, I find no reason to interfere with the impugned order. The judgment records the background of the case leading to the High Court remanding the matter and keeping open the issue pertaining to delay. The impugned order records that the applicant (petitioner) had contended that the summons had not been received by the petitioner and therefore no reply was filed and as a result the exparte order came to be passed. The Court found that the roznama of the original proceedings showed appearance of Mr.Patwardhan but he had not filed his Vakalatnama. It was contended before the Labour Court that the statement of claim was not served upon the petitioner and that acknowledgment on the notice relied upon by the respondent bears the postal stamp of Kalyan Delivery Centre but name of the petitioner was not mentioned and there were two dates on the receipt, thereby raising certain doubts as to its delivery. The Labour Court has since heard the matter afresh and has dismissed the application as not maintainable.

12. The Labour Court has considered the aspect delay and it has found that the delay is beyond limits and as prescribed by law in doing so the Labour Court has made reference to the decision of this Court in South Seas Distilleries and Breweries Pvt. Ltd. (supra) and a decision in Gujrat Electricity Board & Anr. Vs. Atmaram Sungomal Poshani (1989) 2 SCC 602, wherein it was observed that mere denial was not sufficient to rebut the presumption

relating to service of registered cover. Apart from denying the postal endorsement the party was expected to place material evidence before the Court in support of the pleadings. There is presumption of service having been properly effected if the cover is returned back with the postal endorsement that addressee has refused the same. In the present case it is not even case of the petitioner that the registered envelope has been sent back. On the other hand nothing has been shown to disbelieve version of the respondent. In the course of considering the petitioner's case, I had also occasion to peruse Miscellaneous Application made by the petitioner in which it is stated that the applicant received a copy of the impugned order on 28th October, 2005. It is further stated that the applicant had not received notice from the Court and was not aware of the proceedings. This aspect of the matter has not been established to the satisfaction of the Labour Court which relied upon the facts that the notice had been served in accordance with its record. The Labour Court was thus entitled to proceed on the basis of its own record unless the petitioner was in a position to cast some doubt on the evidence of service. The Advocate for the Corporation who had appeared before the Labour Court had deposed that he was on the panel of Advocates of the petitioner and could appear only when the Corporation would authorized him. He deposed that he was present in the Court on 18th January, 2005 but he was not authorized by the Corporation but happened to see that Reference (IDA) No.552 of 2002 on board. He admits that he

appeared on 18th January, 2005 but he did not receive Vakalatnama in the matter. He further deposed that he forgot to write to the Corporation about the matter being on board. Even assuming in favour of the petitioner and accepting the evidence of learned Advocate as correct there is nothing shown to me and indeed to the Labour Court that endorsement on the notice evidencing service of notice was wrong.

13. Adverting to the numerous decisions cited by Mr. Rao of the Supreme Court, they are no assistance to the petitioner in the present case. In *Grindlays Bank (supra)* the issue was whether one *exparte* award made and published in the gazette, the Tribunal has jurisdiction to entertain and set aside the *exparte* award. The Court held that the Tribunal had power to pass an order setting aside the award by observing that the Tribunal had power to proceed *exparte* under Rule 22, it would be considered to have ancillary power as well for doing justice between the parties. In the present case, the order under challenge is one of rejection of application for restoration. This decision is also referred in case of *Satnam Verma (supra)*. The same issue was canvassed.

14. In *R.K. Tripathi (supra)* the Labour Court recorded that an *exparte* award on a petition for recall was filed within two days of the receipt of a copy of the award but in that case the applicant was able to fully satisfy the Labour Court that there was sufficient cause for his non-appearance. In the present case, the facts are quite different. The application proceeded on the basis that

the application has not been served. The record indicated that it had been so served. The facts in R.K. Tripathi (supra) being different the said decision is of no assistance to Mr. Rao. In the case of Ram Shiromani Mishra (supra) the Supreme Court was considering whether the Industrial Tribunal becomes functus officio after 30 days of publication of the award and loses all powers to recall an exparte award on an application made by the aggrieved party beyond that period. The execution of the award was stayed, since a similar issue was already pending before a larger bench. In Sangham Tape Company, (2005) 9 SCC 331 a two Judge bench of the Supreme Court held that an application for recall of an exparte award may be entertained by the Tribunal only in case it is filed before expiry of 30 days from the date of publication of award. Although in that case and in R.K. Tripathi (supra) the Court had referred to and relied upon Grindlays Bank (supra) and Anil Sood (supra) the interpretation placed on that case is completely different. Mr. Rao sought to rely upon different interpretation placed on this aspect and submitted that the petitioner was entitled to benefit of doubt as in South Seas Distilleries and Breweries Pvt. Ltd. (supra), Mr. Rao relied upon the fact that this Court has left open the issue whether an application for condonation of delay can be decided or not.

15. In case of Harrai Desai & Sons Stores (supra) the Mr. Rao submitted that the Court had set aside the exparte order by observing that the Labour Court had committed an error of law in dismissing the application on the

ground that the same could not be entertained after 30 days of publication of the award and so long an application under section 26(2) has not been decided, the Labour Court does not become functus officio and in that case the application was filed within a period of 30 days.

16. These judgments are of no assistance to Mr. Rao. In the present case, the delay was of one month and 8 days which was condoned by the order dated 8th March, 2011. In *Vasant Govind Shirsekar* (supra) this Court held that upon expiry of 30 days from the date of publication of the award in gazette the award becomes enforceable and the Labour Court has no jurisdiction to entertain application for condonation of delay thereafter. Proceedings before the Tribunal would be without jurisdiction for setting aside exparte award on the date on which it was presented. This judgment is of no assistance to Mr. Rao.

17. Even in other cases cited by Mr. Rao, namely, *M/s.Chabada Petrol Pump* (supra) the Aurangabad Bench of this Court held that the period of limitation under Rule 26(2) starts from receipt of copy of the award by the aggrieved party. On facts, this judgment is again of no assistance to the petitioner since admittedly the application in the present case was delayed by one month and 8 days. It is not case of Mr. Rao that the period of delay was required to be excluded as a result of non receipt of copy of the award.

18. Thus, none of the judgments cited by Mr. Rao come to his assistance. In the facts of the present case the Labour Court has proceeded on

the basis that the record indicated that the notice has been duly served on the corporation. The fundamental premise on which the application was made was also not established and in the circumstances there is nothing that has been shown to me to be perverse and which requires interference of this Court. In the circumstances the petition fails and I pass the following order;

- (i) Writ Petition is dismissed.
- (ii) No order as to costs.

At this stage Mr.Rao seeks continuance of the ad-interim order. The request is declined.

(A.K. MENON,J.)

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