



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.09.2019

CORAM:

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THE HONOURABLE MR.JUSTICE S.S. SUNDAR

W.P.(MD).No.9549 of 2010
and M.P.(MD).No.1 of 2010

The Management
Tamilnadu Mercantile Bank,
Tuticorin,
Rep. by its General Manager

.. Petitioner

Vs.

1.The Deputy Commissioner of Labour
(Appellate Authority under Tamilnadu
Shops and Establishment Act, 1947)
Tirunelveli.

2.B.Charles Solomon

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, calling for the records relating to the impugned order dated 31.12.2009 by the first respondent and received by the petitioner on 29.06.2010 passed in TNSC(IA)No.3/2008 in TNSE 12/2000 and quash the same as illegal.

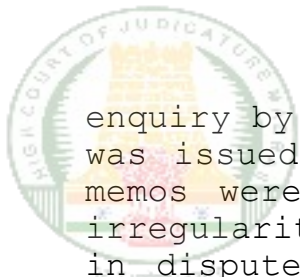
For Petitioner : Mr.M.E.Ilango
For Respondents : Mr.S.Muthukumar

ORDER

This writ petition is filed by the Management of Tamilnadu Mercantile Bank, as against the order, dated 29.06.2010, passed by the Appellate Authority under the Tamilnadu Shops and Establishments Act, 1947 (herein after referred as 'The Act'), in TNSC(IA) No.3/2008 in TNSE 12/2000.

2.The brief facts that are necessary for the disposal of this writ petition are as follows:

The writ petitioner is a scheduled Bank in the private sector, having its branches throughout the country. The petitioner opened a branch at Culcutta during January 1981. The second respondent was posted as the Manager in the branch newly established in Culcutta. It is stated that the second respondent indulged in various acts of misappropriation and irregularities. As a result, the second respondent was placed under suspension pending



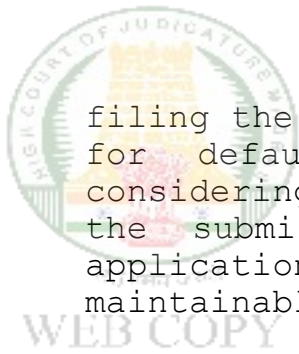
enquiry by order, dated 26.10.1985. A charge memo, dated 13.05.1986 was issued on the second respondent. Subsequently, several charge memos were issued to the petitioner with reference to some other irregularities after the issuance of first charge memo. It is not in dispute that domestic enquiry was conducted and a second show cause notice was issued by the petitioner to the second respondent. Ultimately, the second respondent was terminated from service by an order, dated 03.02.1999.

3.Challenging the order of termination from service, the second respondent filed an appeal before the first respondent under Section 41 of the Act in TNSE.12/2000. Though the appeal was filed in the year 2000 itself, it appears that the matter was adjourned from time to time for recording evidence on the side of second respondent. It is seen that even after lapse of five years, the second respondent had not laid evidence on his side and not appeared for enquiry even on a single occasion. Therefore the first respondent namely, the Appellate Authority dismissed the appeal for default on 11.10.2004.

4.Thereafter, the second respondent filed an interlocutory application in I.A.No.11 of 2004 to restore the appeal. The above petition to restore the appeal was allowed on condition that the first respondent should appear on 19.03.2005 without fail. Though the physical presence of the second respondent was required in compliance with the order passed in I.A.No.11 of 2004 for the restoration of the appeal, the second respondent did not appear on 19.03.2005. Hence, the second respondent was imposed cost of Rs.500/- and the matter was adjourned to 16.05.2005 at the request of counsel for the second respondent. Even on 16.05.2005, the second respondent did not appear. Again, when the matter was adjourned to 24.05.2005, the respondent was not present. Thereafter, the main appeal itself was again dismissed for default.

5.Thereafter, the second respondent filed another interlocutory application in I.A.No.5 of 2005 under Rule 9 (A) of the Tamilnadu Shops and Establishments Rules, 1948 (herein after referred as 'The Rules') for restoration of the appeal once again. It is specifically stated that when I.A.No.5 of 2005 was listed for the appearance of second respondent on several occasion, the second respondent did not present before the Appellate Authority. Thereafter, the matter was listed for hearing on 20.07.2005, 09.08.2005, 23.08.2005, 13.09.2005, 20.09.2005, 18.10.2005 and 11.11.2005. However, it is admitted that on all the above dates, the second respondent was not present. Therefore, I.A.No.5 of 2005 was dismissed for default.

6.The second respondent thereafter filed one more interlocutory application in I.A.No.3 of 2008 to restore I.A.No.5 of 2005. The respondent has done the delay of 2 years 8 months and 9 days in



filing the petition to restore I.A.No.5 of 2005 which was dismissed for default on 11.11.2005. The first respondent, without considering the merits, allowed the application, by rejecting one of the submission of the petitioner herein that the successive application in I.A.No.3 of 2008 in I.A.No.5 of 2005 is not maintainable and barred by Res-judicata.

7.Challenging the order passed by the Appellate Authority the above writ petition came to be filed by the petitioner Management.

8.Learned counsel appearing for the petitioner submitted that the unexplained delay was not at all considered by the Appellate Authority. Learned counsel after referring to the affidavit filed by the petitioner in support of his petition, submitted that the only explanation offered by the petitioner was that he was ill as he was facing so many litigations. His non appearance on 24.05.2005 was stated to be on account of warrant issued against him. It is further stated that the second respondent though prayed for condonation of delay in the petition for restoration, he has not filed an independent application to condone the delay. The interlocutory application is only to condone the delay. But the authority has allowed the petition and restored the petition filed for restoration of appeal.

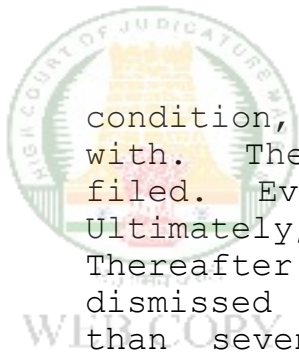
9.Learned counsel for the petitioner further submitted that the petition to restore the application with the delay of more than 2 years is not maintainable and the petition cannot be presented beyond 30 days. Learned counsel, referring to the conduct of the second respondent, submitted that no indulgence can be shown to a person like the second respondent who had swindled huge money due to the Bank, taking advantage of the situation, that the branch of the petitioner's Bank was established in a faraway place in Culcutta.

10.Learned counsel appearing for the second respondent would contend that no limitation is prescribed under the Act to file an application to rehear the appeal which was dismissed for default.

Learned counsel for the second respondent would also submit that by virtue of Section 29 (2) and Section 5 of the Limitation Act, the provisions of Limitation Act will be applicable.

11.This court considered the submissions of counsels on either side.

12.It is to be pointed out that the contention of the second respondent even it is well to be accepted, Section 5 of Limitation Act has to be applied. In such circumstances, the second respondent has filed an application to condone the delay while seeking to set aside the order dismissing the petition in I.A.No.5 of 2005 for default. It is to be noted that the appeal is pending for a long



condition, it was restored. Even, the condition was not complied with. Thereafter, a second application to restore the appeal was filed. Even, the second application was not prosecuted diligently. Ultimately, the appeal came to be dismissed for default once again. Thereafter a restoration application was filed and the same was dismissed for default. From the facts, it is made clear that more than seven occasions the matter was adjourned and thereafter I.A.No.5 of 2005 was dismissed. With a delay of 2 years 8 months and 9 days I.A.No.3 of 2008 is filed.

13.The contention of the counsel appearing for the petitioner is that the second respondent never appeared before the Appellate Authority for enquiry for more than five years. It is in the said circumstances, it has to be seen whether the inordinate delay of 2 years 8 months and 9 days (about 981 days) can be condoned.

14.Learned counsel for the second respondent relied upon the judgment of the Honourable Supreme Court in **Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker** reported in **(1995) 5 Supreme Court Cases 5**. It was a case where the provisions under the Kerala Rent Control Act and the applicability of Limitation Act was considered by the Honourable Supreme Court. Since the Kerala Rent Control Act does not expressly exclude the application of Section 5 of the Limitation Act, the Honourable Supreme Court held that the Section 5 of the Limitation Act is applicable. The same view has been taken with reference to the provisions of the Tamilnadu Lease and Rent Control Act by this Court following the Judgment of the Honourable Supreme Court. The judgment cited by the second respondent would only enable him to argue that a petition can be filed under Section 5 of the Limitation Act to condone the delay in filing the application, even though a specific provision is not available under the Tamilnadu Shops and Establishments Act to accept the petition for delay beyond the period of 30 days.

15.Rule 9(A) of the Rules reads as follows:

"9-A. Re-hearing of appeals.-- (1) In any appeal preferred under the Act, if the employer or his representative fails to appear on the specified date, the appellate authority may proceed to hear and determine the appeal ex-parte.

(2) In any appeal preferred under the Act, if the appellant fails to appear on the specified date, the appellate authority may dismiss the appeal.

(3) Notwithstanding anything contained in sub-rules (1) and (2), an order passed under either of those sub-rules may be set aside and the appeal reheard on good cause being shown within one month of the date of the said order, notice being served on the opposite party of the date fixed for such rehearing."



16.From the reading of Rule 9 (A) it is true that a petition to restore the application in appeal and for rehearing can be filed within a period of one month from the date of the order dismissing or allowing the appeal. There is no provision excluding the applicability of Section 5 of the Limitation Act under any of the provisions of the Tamilnadu Shops and Establishments Act, 1947. This would only suggests that a petition to condone the delay under Section 5 of the Limitation Act is maintainable and that a petition for restoration of appeal or an application can be filed even after 30 days along with a petition to condone the delay.

17.In this case, it is stated that no independent application was filed under section 5 of the Limitation Act. In the typed set there is a petition with a prayer to condone the delay of 2 years 8 months and 9 days. Even assuming that the said application has to be considered on merits, this Court is not in a position to appreciate the contention of the second respondent on merits. Despite giving several opportunities to the second respondent, the second respondent was wilfully absent and allowed the dismissal of the appeal on two occasions earlier. When it is not in dispute that the second respondent had never appeared even once before the Appellate Authority, when the matter was posted for hearing, the conduct of the second respondent would give the first impression that he is making all attempts to drag on the proceedings for extraneous reasons. In the affidavit filed in support of the petition, the second respondent/petitioner has not given any explanation for the delay. The Honourable Supreme Court has repeatedly held that the Court need not show any indulgence to a person who does not have any explanation for the delay. When the delay is not explained by sufficient cause, the Court is not expected to exercise its discretion in favour of such person. In this case the conduct of second respondent cannot be ignored. Learned counsel for the second respondent, submitted that there is no delay in this case as Article 137 of Limitation Act has to be applied. The contention is abscond in view of Rule 9 A which provides limitation for filing a petition.

18.This is a case where the second respondent has not only failed to appear before the Appellate Authority for 8 years, no explanation is offered at any time earlier and even during this time to condone the delay. In such circumstances, this Court has no hesitation to hold that the order of Appellate Authority is erroneous while allowing I.A.No.3 of 2008 in TNSE.12/2000. Having regard to the serious allegations against the second respondent, the Appellate Authority ought to have considered the petition with due care and caution as the petitioner in this case is likely to suffer on account of the long delay in the proceedings.

19.As a result, this writ petition is allowed and the ~~interim order~~ dated 31.12.2009 passed by the first respondent in



TNSC(IA)No.3/2008 in TNSE 12/2000 is set aside. No costs.
Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar

Sub Assistant Registrar(CS)

TM

To

The Deputy Commissioner of Labour
(Appellate Authority under Tamilnadu
Shops and Establishment Act, 1947)
Tirunelveli.

+1 CC to M/s.M.E.ILANGO, Advocate (SR-87129[F] dated 17/09/2019)

+1 CC to M/s.S.MUTHUKUMAR, Advocate (SR-87104[F] dated 17/09/2019)

W.P. (MD) .No.9549 of 2010
16.09.2019

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