

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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CWP-10151-2019 (O&M)

Date of Decision : 30.11.2023

M/s A.V. Spinning Mill, Sanoli Road, Jalalpur, Panipat and others

... Petitioners

Versus

Presiding Officer, Employees Compensation Act, Circle-1, Panipat and others

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present: Mr. Divyam Singh, Advocate, for
Mr. Vikram Singh, Advocate
for the petitioners.

Mr. Rahul Jaswal, Advocate
for respondents No. 2 to 6.

VINOD S. BHARDWAJ J. (ORAL)

1. In compliance to the order dated 22.10.2019, a demand draft bearing No. 468627 dated 27.10.2023 for a sum of Rs. 25,000/- has been brought in Court today. The same has been handed over to the counsel for respondents No. 2 to 6 in original.

2. Prayer in the present petition is for setting aside the impugned order dated 10.04.2017 (Annexure P-1) passed by respondent No.1 vide which the petitioners were proceeded against ex parte in the proceedings initiated by respondents No. 2 to 6 before the Commissioner under Employee's Compensation Act, Circle-1, Panipat, and further for setting aside the ex parte award dated 10.07.2017 (Annexure P-2). A further challenge is made to the order dated 17.01.2018 (Annexure P-5) vide which

the application of the petitioners under Order 9 Rule 13 of CPC has been dismissed.

3. Learned counsel for the petitioners has argued that the contesting respondents No. 2 to 6 had preferred an application before the Commissioner, Employee's Compensation Act, Circle-1, Panipat alleging that deceased Tirloki (husband of respondent No.2 and father of respondents No. 3 to 6) was an employee of the petitioners and had died in an accident that took place of work and during course of his employment on 25.11.2016. It was alleged that the deceased Tirloki was working as a labourer with the petitioners from the last 15 days and was a regular employee of the petitioner under the supervision of Ajay Gupta, Proprietor and Vijay Gupta. On 25.11.2016, when the employees were working on their duty, fire spread out in the factory at around 4:00 P.M. and Tirloki, the husband of the respondent-claimant as well as other co-employees could not find any escape from the same. Resultantly they were burnt to death. An FIR No. 69 dated 25.11.2016, was also registered under Sections 304/337/ 34 of IPC, 1860 at Police Station Sanoli qua the incident.

4. A claim was filed by the respondents No. 2 to 6 before the Commissioner, where order dated 10.04.2017 was passed to proceed ex-parte against the petitioners. The petitioners were proceeded against ex-parte and a final award was passed on 10.07.2017. The petitioner herein moved an application dated 24.11.2017 (Annexure P-3) for setting aside the ex-parte order and consequential ex-parte final award dated 10.07.2017, however, the abovesaid application was also dismissed by the Commissioner, Employee's Compensation, Circle-1, Panipat vide order dated 17.01.2018. All the aforesaid three orders are under challenge by the

petitioners in the present writ petition.

5. Counsel for the petitioner has referred to the order dated 17.01.2018, passed on the application submitted by the petitioners under Order 9 Rule 13 CPC for setting aside the ex parte order as well as the ex parte award. The relevant extract reads thus :

“The brief facts giving rise to this order are that applicants have filed a claim case against the respondents for compensation amount of death of Tirloki who died on 25/11/2016 due to suffocation as fire arose out in the factory and during course of employment of respondents. The respondents have not come forward despite service of notices and they refused to take notice and were proceeded ex-parte on 16/05/2017. Thereafter, final order was passed vide order dated 10/07/2017. Notices were sent to respondents for depositing compensation amount and now the respondents have come forward and moved the present application.

I have heard both the parties and perused the record.

From the scrutiny of the file it is evident that the registered notice sent to respondents received back un-served with the postal report that receiver is not found. Further by hand notice was sent which the respondents have refused to take and the respondents were proceeded ex-parte. Thus, it is proved that proceedings of the case were well in the knowledge of respondents. The respondents could not rebut the fact that duly summons were sent to them but they have not received the summons on their own and refused to take the summons knowingly.

The respondents have the knowledge of the case from its beginning and there is no substance in the contents of application moved by the respondents now. The respondents have failed to move the application within 30 days from the day of ex-parte order dated 16/05/2017 and they also failed to

move the application within 30 days from the day of final order dated 10/07/2017. Thus, the present application moved by the respondents is time barred and the same is not sustainable in the eyes of law, hence dismissed. However, there is no order as to costs. Parties be intimated accordingly.”

6. Referring to the above, counsel for the petitioners contends that the registered notices sent to the petitioners had been received back unserved with a report that the “receiver was not found”, whereas notice sent via *dasti* is stated to have been “refused”.

7. He further submits that as per the provision contained under Order 5 Rule 17 CPC, in the event of a refusal to accept service, the authority concerned was required to issue a fresh service by affixation of copy of the summons on the outer door of the premises or the place of residence of the petitioner. The order proceeding ex parte could have been passed only thereafter. The relevant clause is extracted as under :

“Rule 17. Procedure when defendant refuses to accept service, or cannot be found. - *Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other persons on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a*

report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

8. It is, thus, submitted by him that even if the report as is accepted, the same merely establishes that there was a refusal to accept service and that in such eventuality, the procedure stipulated under Order 5 Rule 17 C.P.C. ought to have been followed. The needful having not been done, order proceeding ex parte and the consequential award were liable to be set aside as no opportunity of hearing had been extended to the petitioners to defend the claim against them, especially when the specific case of the petitioners herein is that the deceased- Tirloki was not an employee of the petitioner-Spinning Mills.

9. Controverting the said submissions, counsel for the respondents has placed reliance on the order of ***Priyanka Kumari Vs. Shailendra Kumar***, passed by the Hon'ble Supreme Court in Transfer Petition (Civil) No. 2090 of 2019 dated 13.10.2023. Relevant extract of the said order reads, thus :

“It has been observed that Registry mentions in the office report that where the notice is returned as 'refusal', is complete /proper service, whereas when it is returned as 'unclaimed', is not proper service/ incomplete service.

In the opinion of this Court, it is not proper and correct. The word 'refusal' can be interpreted in synonymous to the word “unclaimed”. As held by the Hon'ble Supreme Court in the above decisions, when a notice is served to the proper address of the addressee, it shall be deemed to be served unless contrary is proved. Thus, when the notice is returned as

unclaimed, it shall be deemed to be served and it is proper service. Therefore, service of notice to the sole respondent which has returned as unclaimed is considered as deemed to be served but none has entered appearance.”

10. Referring to the above, it is submitted that when a notice is returned with a report of 'refusal' it should be deemed as service, unless contrary is proved.

11. He further contends that since FIR No. 69 dated 25.11.2016, under Sections 304/337/ 34 of IPC 1860 had already been registered at Police Station Sanoli against him, hence, he was deemed to be aware that he is likely to be prosecuted.

12. Rebutting the abovesaid argument, learned counsel for the petitioners contends that the aforesaid judgment would not be applicable to the facts of the present case since the report shows that registered notice had been received back 'unserved' while the *dasti* process is stated to be refused. The report does not reflect as to who refused the same. Order 5 Rule 17 CPC specifically contemplate the remedial, and consequential measures for such an eventuality and mandates affixation, before an order proceeding ex parte is passed. He further submits that in the aforesaid order dated 13.10.2023, the Hon'ble Supreme Court has not examined the statutory provision contained in Order 5 Rule 17 CPC and as such, the said order cannot be construed or be applied as an interpretation of Order 5 Rule 17 CPC. He further submits that insofar as the submission of the petitioner about pendency of a criminal case is concerned, the same can only be constructed as an awareness of the criminal proceedings and a possibility of the claim petitions being filed. There can be no presumption on the part of

the petitioners to be aware of any proceedings instituted before the Commissioner Employee's Compensation, Circle-1, Panipat till such time that summons are served upon him. He further contends that a technicality in law should not lay the foundation for incarceration of the petitioners and that the equities can be duly balanced.

13. I have heard learned counsel for the parties.

14. At the stage of issuing notice of motion, an amount of Rs. 25,000/- was ordered to be paid to the respondents-claimants and that a demand draft in this regard has been handed over today in Court. On being confronted with the fact that despite the order having been passed in October, 2019, the draft has been submitted after a delay of more than four years, he submits that he is ready and willing to compensate the respondents-claimants adequately and appropriately as may be so directed by this Court so that the equities can be balanced.

15. Without going any further into the controversy and commenting as to whether CPC is strictly applicable in proceeding under the Employee's Compensation Act and noticing that the claim of the respondents is that Tirloki was employed only 15 days prior to the incident while petitioner claims that he was not employed at all, it is felt that a technicality should not defeat right of any party to prove its defence. It is a settled position in law that procedural laws are hand maiden of justice. If the equities can be balanced, the substantive right of a person to establish its case/ defence should be extended.

16. Taking into consideration the submissions advanced by the parties and noticing that the order dated 13.10.2023 passed by the Hon'ble

Supreme Court, does not interpret the scope of Order 5 Rule 17 CPC for

effecting service and the procedure to be followed in the event of a refusal, and also the defence claimed by the petitioners that deceased Tirloki was not an employee of the petitioner's company and that he being incarcerated and being called upon to pay the award merely on account of a lapse and without being afforded any opportunity to establish its defence, the petitioners should not be made liable to pay any compensation, I deem it appropriate to allow the instant petition after balancing the equities.

17. The petitioners shall disburse an additional amount of Rs. 25,000/- to the respondent Sabo, widow of Tirloki, within a period of two weeks from the date of receipt of certified copy of this order. The impugned award dated 10.07.2017 as well as the order proceeding ex parte dated 10.04.2017 and the order dismissing the application under Order 9 Rule 13 CPC dated 17.01.2018 are accordingly set aside. The parties are directed to appear before the Commissioner, Employee's Compensation Act of 1923 on 19.12.2023 for adjudicating the claim.

18. The amount of Rs. 50,000/- paid (Rs. 25,000/- +Rs. 25,000/-) is, however, to be adjusted towards the cost and not towards the compensation. The said amount shall not be liable to be adjusted towards the claim finally awarded, if any.

19. In the event of petitioners furnishing the proof of having disbursed the amount as ordered today in favour of the respondents-claimants, the Commissioner Employee's Compensation Act shall adjudicate upon the case on merits, after granting an opportunity of hearing to respective parties. Considering that the matter in question is old, it is desired that the Commissioner Employee's Compensation, Circle-1, Panipat may

pass the final award expeditiously and preferably within a period of four

months from the date of receipt of certified copy of this Court.

20. It is made clear that in the event, the amount as ordered today is not paid to the respondents-claimants, the present order shall not be given effect to and the respondents No. 2 to 6 would be at liberty to seek execution and enforcement of the award already passed.

21. Allowed in above terms.

22. Miscellaneous application(s), if any, also stands disposed of.

30.11.2023

Satyawan

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned : Yes

Whether reportable : No