



2024:DHC:2156



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of order : 5th March, 2024**

+ **W.P.(C) 10012/2018**

ZEBRONICS INDIA PVT LTD Petitioner

Through: Mr.____, Advocate (Appearance not given)

versus

PUSHPENDER KUMAR SHARMA Respondent

Through: Mr. Neeraj Kanwar, Advocate
(Through VC)

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant writ petition under Article 226 of the Constitution of India has been filed on behalf of petitioner seeking the following reliefs:-

"(i) issue a Writ in the nature of mandamus and or any other appropriate order or direction of like nature directing to quash the impugned order dated 26.05.2018 in PWA no 78 of 2017 and order dated 26.07.2018 in Application under Order IX Rule 13 of the Code of Civil Procedure, 1908 passed by the Court of Sh. Vinay Singhal, Ld. PO, Labour Court-V, Dwarka, New Delhi; and

(ii) Any other order which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case may also be passed in favour of the petitioner and against the respondents."



2. The relevant facts necessary for the adjudication of the instant petition are reproduced herein below:

- a) The respondent (“respondent workman” hereinafter) was employed at the post of ‘service engineer’ in Zebrionics India Pvt. Ltd. (“petitioner entity” hereinafter).
- b) It has been stated by the petitioner entity that the respondent workman tendered his resignation on 12th July, 2016. Thereafter, the New Delhi office of the petitioner entity was intimated by the Chennai office to accept the resignation of the respondent workman and that his notice period will conclude on 11th August, 2016. The respondent workman then sent another email dated 9th August, 2016, requesting the petitioner entity to cancel the resignation tendered by him earlier. Subsequently, the respondent workman, on 21st September, 2016, again tendered his resignation, thereby, seeking to be released on an immediate basis. Thereafter, on the request made by the respondent workman, the petitioner entity extended the respondent workman’s notice period on several occasions and finally it was settled that his last working day would be 29th October, 2016.
- c) Pursuant to the above, the respondent workman filed a petition before the learned Presiding Officer, Labour Court-V Dwarka Courts, New Delhi, bearing no. PWA no.78/2017, under Section 15(2) of the Payment of Wages Act, 1936,



("the Act" hereinafter) seeking payment of wages for the month of September and October.

- d) In the above said petition, despite being served with summons dated 6th September, 2017, the petitioner entity failed to appear and accordingly, the learned Court proceeded *ex parte vide* order dated 18th January, 2018.
- e) The learned Labour Court in PWA no.78/2017, *vide* judgment/order dated 26th May, 2018, passed an *ex parte* order in favour of the respondent workman, thereby, holding that the respondent workman is entitled to Rs.27,036/- towards earnest wages, Rs.40,554/- towards bonus, Rs.4,050/- towards conveyance allowance totalling to Rs.71,640/- along with the compensation amounting to Rs.3,000/-, in accordance with the provisions of Section 15 (3) of the Act.
- f) Aggrieved by the aforementioned judgment/order, the petitioner entity preferred an application bearing no. M. No. 94-18 under Order IX Rule 13 of the Code of Civil Procedure, 1908 ("CPC" hereinafter), thereby, challenging the *ex parte* order on the ground that it did not have any knowledge of the proceedings in PWA no.78/2017.
- g) The learned Labour Court in M. No. 94-18 *vide* order dated 26th July, 2018, dismissed the aforesaid application on merits, and held that upon perusal of the judicial records it



transpires that the petitioner entity was duly served with the summons on 6th September, 2017.

h) Therefore, aggrieved by the abovesaid, the petitioner entity has preferred the instant writ petition under Article 226 of the Constitution seeking to set aside the impugned judgment/order dated 26th May, 2018, and order dated 26th July, 2018 (“impugned orders” hereinafter).

3. Learned counsel appearing on behalf of the petitioner entity submitted that the learned Labour Court erred in passing the impugned orders as the same have been passed without taking into consideration the entire facts and circumstances of the case.

4. It is submitted that the learned Labour Court has erred in law by not granting to the petitioner entity a fair opportunity to present its case and hence, it violated the principles of natural justice, thereby, causing irreparable harm to the petitioner entity.

5. It is submitted that the learned Labour Court failed to consider that the respondent workman does not fall within the ambit of the Act, therefore, the decree obtained by him under Section 15(2) of the Act, is *void* and based on a frivolous claim.

6. It is submitted that the learned Labour Court in impugned order dated 26th May, 2018, erred by not acknowledging the fact that the respondent workman had been drawing a salary of Rs.13,580/- whereas the Act only applies to employees drawing a salary amounting to Rs.6,500/- or below.

7. It is submitted that the learned Labour Court impugned in order dated



26th May, 2018, erred in law by concluding that the respondent workman is entitled to bonus amounting to Rs.40,554/- and conveyance amounting to Rs.4050/-, whereas the Act does not prescribe for any provisions relating to the grant of bonus to employees.

8. It is submitted that the learned Labour Court while hearing the petitioner's application filed under Order IX Rule 13 of CPC, ought to have considered the fact that the petitioner entity was unaware of the ongoing proceedings as well as the receipt of summons regarding the same.

9. It is submitted that the learned Labour Court failed to consider the fact that the respondent workman himself tendered his resignation and did not serve his notice period adequately.

10. Therefore, in light of the foregoing submissions, the learned counsel appearing on behalf of the petitioner workman seeks that the instant petition may be allowed, and the reliefs be granted, as prayed.

11. *Per Contra*, learned counsel appearing on behalf of respondent workman vehemently opposed the instant petition submitting to the effect that the impugned judgment/order dated 26th May, 2018, has been passed in conformity of the mandate under the Payment of Wages Act, 1936, therefore, the instant petition is misconceived, and the same, being devoid of any merit, is liable to be dismissed.

12. It is submitted that the impugned orders have been passed by the learned Labour Court after duly considering the entire facts and circumstances available on record, and there is no illegality or infirmity thereto. It is also submitted that the learned Labour Court has applied its



judicial mind and as per the law settled with regard to the present matter, the impugned orders cannot be challenged under the garb of a writ petition.

13. It is submitted that the petitioner entity failed to appear before the learned Labour Court despite issuance of summons and thus, the *ex parte* order dated 26th May, 2018, cannot be challenged on the ground of being violative of principles of natural justice.

14. It is submitted that the instant petition is misconceived as the learned Labour Court *vide* order dated 26th July, 2018, had dismissed the application filed by the petitioner entity under Order IX Rule 13 of the CPC, thereby, rejecting the plea of non-receipt of summons by the petitioner entity and observed that it was duly served with the summons on 6th September, 2017.

15. It is submitted that it has been wrongfully submitted by the petitioner entity that the respondent workman is not covered under the Act as the notification dated 11th September, 2012, bearing no. S.O.2260 (E) published in the official Gazette of India, clearly states that the ceiling of wages has been enhanced to Rs.18,000/-.

16. Therefore, in light of the foregoing submissions, the learned counsel appearing on behalf of the respondent prayed that the present petition, being devoid of any merit, may be dismissed.

17. Heard learned counsel appearing on behalf of the parties and perused the record.

18. At the outset, this Court deems it imperative to test the present matter on its maintainability before delving into the merits of the same.

19. The petitioner has approached this Court seeking setting aside of the



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impugned judgment/orders dated 26th May, 2018, passed in PWA no.78/2017 and dated 26th July, 2018, passed in the application filed under Order IX Rule 13 of the CPC.

20. In regard to the facts of the instant petition, this Court has observed that the learned Labour Court, *vide* order dated 18th January, 2018, decided to proceed *ex-parte* in PWA No. 78/2017 since the petitioner entity had failed to appear before it despite issuance of summons. Thereafter, the learned Court passed an *ex-parte* judgment/order dated 26th May, 2018, whereby, it decided the claim in favour of the respondent workman. The said judgment/order is under challenge before this Court in the captioned petition.

21. Subsequently, the petitioner entity filed an application bearing no. M. No. 94-18 under Order IX Rule 13 of CPC, challenging the *ex-parte* judgment/order dated 26th May, 2018, on the ground that it did not have any knowledge of the proceedings in PWA no.78/2017.

22. The learned Court below dismissed the above said application noting that upon perusal of the judicial records it is transpired that the petitioner entity was duly served with the summons on 6th September, 2017 and despite the same, the petitioner entity chose not to appear in the proceedings before it and hence, the said application does not hold any merit. The petitioner entity has also assailed the said order *vide* which its application was dismissed.

23. Upon giving due consideration to both the impugned orders, this Court is of the view that since the grievance of the petitioner is primarily



with regard to the fact that the *ex-parte* proceedings against it is bad in law and the same is liable to be set aside, this Court does not find it appropriate to go into the merits of the impugned judgment/order dated 26th May, 2018.

24. Furthermore, since the order dated 26th July, 2018, emanates from the impugned judgment/order dated 26th May, 2018, it would be appropriate, in the interest of justice, to only decide upon the maintainability of the challenge against the order dated 26th July, 2018, passed in the application filed under Order IX Rule 13 of the CPC which was filed by the petitioner entity before the learned Court below to set aside the *ex-parte* judgment/order dated 26th May, 2018.

25. In regard to the above, this Court deems it necessary to ascertain as to under which provision and before which forum does an appeal against Order IX Rule 13 of the CPC lies.

26. Order XLIII Rule 1 (d) of the CPC, provides provisions for appeals against an order passed in an application under Order IX Rule 13 of the CPC seeking to set aside an *ex parte* order. The relevant provisions of the same are reproduced herein below:

“...ORDER XLIII: Appeals from orders

Rule1. Appeal from orders.

An appeal shall lie from the following orders under the provisions of section 104, namely: ---

*(a)****

*(c)****

(d) An order under Rule 13 of Order IX rejecting an application



(in a case open to appeal) for an order to set aside a decree passed ex parte;....”

27. In this backdrop, the Hon’ble Supreme Court in one of its recent judgment in ***Koushik Mutually Aided Coop. Housing Society v. Ameena Begum***, 2023 SCC OnLine SC 1662, observed the following:

“13. As against the ex-parte decree, a defendant has three remedies available to him. First, is by way of filing an application under Order IX Rule 13 CPC seeking for setting aside ex-parte decree; the second, is by way of filing an appeal against the ex-parte decree under Section 96(2) of the CPC and the third, is by way of review before the same court against the ex-parte decree.

14. The filing of an application under Order IX Rule 13 CPC as well as the filing of appeal under Section 96(2) of the CPC against the ex-parte decree are concurrent remedies available to a defendant. However, once the appeal preferred by the defendant against the ex-parte decree is dismissed, except when it is withdrawn, the remedy under Order IX Rule 13 CPC cannot be pursued. Conversely, if an application filed under Order IX Rule 13 CPC is rejected, an appeal as against the ex-parte decree can be preferred and continued under Section 96(2) of the CPC. Thus, an appeal against an ex-parte decree even after the dismissal of an application under Order IX Rule 13 CPC is maintainable.

15. In Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787 : AIR 2005 SC 626, speaking through Sinha, J. observed in paragraph 26 as under:

“When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order IX Rule 13 of the Code. He can take recourse to both the



proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order IX Rule 13 of the Code a petition under Order IX Rule 13 would not be maintainable. However, the Explanation I appended to the said provision does not suggest that the converse is also true.”

16. *Against the order passed under Order IX Rule 13 CPC rejecting an application for seeking setting aside the decree passed ex parte, an appeal is provided. When an application is filed seeking condonation of delay for seeking setting aside an ex-parte decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable. Thus, an appeal only against the refusal to set aside the ex-parte decree is maintainable whereas if an order allowing such an application is passed, the same is not appealable.*

17. *Thus, when an application or petition filed under Order IX Rule 13 CPC is dismissed, the defendant can avail a remedy by preferring an appeal in terms of Order XLIII Rule 1 CPC. Thus, Civil Revision Petition under Section 115 of the CPC would not arise when an application/petition under Order IX Rule 13 CPC is dismissed. Thus, when an alternative and effective appellate remedy is available to a defendant, against an ex-parte decree, it would not be appropriate for the defendant to resort to filing of revision under Section 115 of the CPC challenging the order refusing to set aside the order of setting the defendant ex-parte. In view of the appellate remedy under Order XLIII Rule 1(d) CPC being available, revision under Section 115 of the CPC filed in the instant case was not maintainable.*

18. *When there is an express provision available under the CPC or any statute under which an appeal is maintainable, by-passing the same, a Revision Petition cannot be filed. It is*



needless to observe that in the absence of an appellate remedy, a revision may be maintainable.”

28. The Full Bench of Assam High Court in ***Madanlall Agarwalla v. Tripura Modern Bank Ltd., 1953 SCC OnLine Gau 55***, observed the following:

“54. The consensus of the judicial opinion, therefore, is to my mind that no matter whether an application under R. 13, O. 9, is dismissed for default or on the merits, an appeal will be competent under O. 43, R. 1(d) of the CPC. As to whether an application under Section 151 of the CPC would lie should be left to the circumstances of the case. We need not set any limit to or set out the conditions under which a party might claim relief under inherent powers of the Court. In the above view, as a matter of fact, there is no conflict between the two decisions of the Assam High Court reported in — ‘AIR 1952 Assam 93 (Z2)’ and : ‘AIR 1952 Assam 75 (M)’. Mr. Lahiri raised a preliminary objection that no revision is competent against an order passed under Section 151 of the CPC but it will be enough to say that there are ample authorities to hold that in a suitable case, the High Court can exercise its power of revision even against an order passed under Section 151 of the CPC.”

29. Upon perusal of the aforementioned judgments, it can be summarily stated that the CPC expressly provides that the remedy of challenging an order passed in an application filed under Order IX Rule 13 CPC can be availed by preferring an appeal in terms of Order XLIII Rule 1 (d) of the CPC. It was further observed that when the Code specifically provides for an alternative and effective appellate remedy against an *ex-parte* order/decreed under Order XLIII Rule 1 (d) of the CPC to the defendant, it would be



inappropriate for the defendant to resort to any other recourse in law.

30. In this regard, this Court is of the view that the remedy for challenging the order dated 26th July, 2018, passed in the application filed under Order IX Rule 13 of the CPC, falls under Order XLIII Rule 1 (d) of the CPC since, the Code expressly provides for an efficacious remedy in such regard and this Court cannot deviate from the explicit statutory provisions.

31. In order to adjudicate upon the same, this Court is of the view that a challenge against an order passed under Order IX Rule 13 of the CPC, the appropriate remedy does not lie under the extraordinary writ jurisdiction of this Court.

32. Therefore, the petitioner entity has wrongfully preferred the present petition seeking a writ of mandamus against the impugned order dated 26th July, 2018, which is impermissible as per the procedure established by law and entertaining the same would amount to judicial overreach. Accordingly, this Court is of the considered view that the same is not maintainable under the writ jurisdiction since an appropriate remedy is available to the petitioner entity.

33. At this juncture, it is pertinent to state here that this Court has not gone into the merits of the impugned judgment/order dated 26th May, 2018, passed in PWA no.78/2017 by the learned Presiding Officer, Labour Court-V Dwarka Courts, New Delhi as going into the merits of the same would defeat the purpose of the present writ petition since the petitioner entity also assails the order dated 26th July, 2018, and deciding the merits would make the recourse stated above i.e., challenge under Order XLIII Rule 1 (d) of the



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CPC infructuous and would not be in the interest of justice.

34. Hence, it is held that the instant petition is not maintainable in view of the aforementioned discussions and accordingly the petitioner entity is at liberty to approach the appropriate forum in accordance with law.

35. Based on the aforesaid terms, this writ petition stands disposed of along with the pending applications, if any.

36. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 5, 2024

dy/da/ryp

Click here to check corrigendum, if any