

(2000) 04 BOM CK 0048

In the Bombay High Court

Case No : Writ Petition No. 4537 of 1994

M/s. Harrai Desai and Sons Stores

APPELLANT

Vs

Smt. Leelavati S. Vaza

RESPONDENT

Date of Decision : 06-04-2000

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes (Bombay) Rules, 1957 — Rule 26(2)
Industrial Disputes Act, 1947 — Section 10(1), 12(5), 17

Citation : (2000) 4 BomCR 66 : (2000) 85 FLR 783 : (2000) 2 LLJ 835 : (2000) 3 MhLj 540

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Ms. C. Salgaonkar Radia, for Vineet B. Naik, for the Appellant; Miss Anita Borkar, for P.G. Lad, for the Respondent

Judgement

R.J. Kochar, J.—By an Order of Reference dated 11-9-1986 the Deputy Commissioner of Labour (Conc.) Bombay District, Bombay, in exercise of his powers conferred on him u/s 10(1)(c) read with section 12(5) of the Industrial Disputes Act, 1947 referred an industrial dispute between the petitioner-employer and the respondent for reinstatement with full back wages and continuity of service with effect from 24-1-1986 to the Labour Court. Pursuant to the said order the parties appeared before the Labour Court. The receipt of notice from the Labour Court is not denied by the petitioner-employer, however, he failed to file written statement in reply to the statement of claims filed by the respondent, and therefore, the Labour Court passed an ex-parte award on 5-5-1988 of reinstatement with full back wages and continuity of service against the petitioner-employer and in favour of the respondent.

2. It is the case of the petitioner-employer that he came to know about the passing of the impugned ex-parte award only after a letter was received from the Union on 12-12-1988 and that he had not received any award dated 5-5-1988 earlier than the said letter. It is the case of the petitioner-employer that soon

after the receipt of a copy of the said ex-parte award along with the union's letter dated 12-12-1988, the petitioner-employer filed an application before the Labour Court on 29-12-1988 for setting aside the ex-parte award and for restoration of the reference to the file for fresh hearing. The respondent opposed the said application on two grounds (1) The Labour Court had become functus officio after the award dated 5-5-1988 was published on 4-8-1988 and therefore the Labour Court had no jurisdiction to entertain such an application after expiry of 30 days from 4-8-1988, (2) To be precise the Labour Court had no jurisdiction to entertain and try the application after 3-9-1988. The Labour Court has accepted the said position purported to be under the law and dismissed the application filed by the petitioner-employer. Being aggrieved by the said order the petitioner has filed the present writ petition under Article 227 of the Constitution of India.

3. Ms. Salgaonkar-Radia, the learned Counsel for the petitioner has submitted that the application for setting aside the ex-parte award dated 5-5-1988 was filed on 29-12-1988 soon after the receipt of the letter from the union on 12-12-1988 and therefore, the application was well within limit prescribed under the Rule 26(2) of the Industrial Disputes (Bombay) Rules, 1957. It is also submitted that earlier than that the petitioner had not received any copy of the award or any such intimation, and therefore, he had no knowledge about the existence of the said ex-parte award. It is therefore submitted that the application was well within 30 days period prescribed under Rule 26(2) and that the Court had powers to entertain and try the said application. On the contrary it was submitted on behalf of the respondent that the Labour Court had become functus officio after expiry of 30 days from the date of publication of award u/s 17-A of the Industrial Disputes Act, 1947 on 4-8-1988. It was further pointed out that from the date of publication 30 days had expired on 3-9-1988 and therefore after 3-9-1988 the Court had become functus officio and it could not entertain the application for setting aside the award. In support of her case the learned Advocate for the respondent has cited a judgment in the case of Anil Sood & others v. S.K. Samaria & others, reported in 1977(2) C.L.R. 119. The ratio of this judgment clearly supports the respondent's case that an application for setting aside the ex-parte award of the Labour Court made after the expiry of 30 days from the date of its publication cannot be entertained. The Division Bench of the Delhi High Court has further observed that on the expiry of 30 days from the date of the publication of the award, it becomes final and enforceable and the proceedings before the Labour Court are deemed to be concluded, and that the Labour Court becomes functus officio and has no jurisdiction to deal with the application.

4. I am however afraid that the said judgment does not help the respondent as in that case there was no rule equal to Rule 26(2), which is introduced in the State Act. This rule i.e. 26(2) was introduced by way of an amendment enabling the aggrieved party to apply for setting aside an ex-parte award, order or decision. The present matter therefore will have to be decided in the light and

context of the present rule, which is reproduced below:

26. Board, Court, Labour Court, Tribunal or Arbitrator may 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 Arbitrator may proceed ex-parte.

(2) Where any award, order or decision is made ex-parte 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.

The Labour Court has committed a clear error of law in dismissing the application for setting aside the ex-parte award wholly on the ground that the application could not be entertained after 30 days from the date of publication of the ex-parte award. It appears that the Labour Court had not applied its mind to Rule 26(2) (supra). So long as an application u/s 26(2) is not decided the Labour Court does not become functus officio. The party aggrieved has a right under this rule to file an application within 30 days from the receipt of a copy of an ex-parte award. On receipt of such application, the Labour Court has to satisfy itself about sufficiency of cause for non appearance of the aggrieved party and has power to set aside such an ex-parte award, order or decision and appoint a date for proceeding with the matter after hearing opposite party. This Rule 26(2) has made all the differences between the present case and the case before the Delhi High Court. From the facts in our case it is clear that the ex-parte award dated 5-5-1988 was published on 4-8-1988 and the petitioner came to know about the same on 12-12-1988 pursuant to the union's letter to enforce the said award. The present application for setting aside the ex-parte award was filed well within 30 days i.e on 29-12-1988. Since the rule specifically talks about the receipt of a copy of an ex-parte award we have to give a liberal interpretation to the said language. The legislature knew the provision regarding publication of award u/s 17-A of the Act but the word "publication" is avoided in the Rule and it is only receipt of a copy of the award is specifically mentioned. In view of the clear language of the said rule it is not possible for me to read the word "publication" of the award in the said Rule when the word "receipt" is specifically mentioned. According to me, therefore, the limitation prescribed under this Rule would commence from the date of the receipt of a copy of the ex-parte award and not from the date of the publication of such an ex-parte award. In the present case the petitioner had received a copy of the ex-parte award along with a letter from the union and the application for setting aside the ex-parte award filed on

29-12-1988, within 30 days limitation. In view of the special Rule 26(2) introduced in the Bombay Rules, the Labour Court, Tribunal/Arbitrator does not become functus officio till such an application is decided on the merits.

5. Unfortunately, the Labour Court has not applied its mind to the law and the facts correctly. It has also not decided whether the petitioner had sufficient cause for remaining absent. Since the reference pertains to 1986 I have myself gone through the application for setting aside the award and the reasons took put forward by the petitioner. The petitioner appears to be a small businessman carrying on business of selling Bhelpuri, Shevpuri and other items of Farsan. It is his case that the proprietor was out of India from 1983 and therefore in his absence his wife was carrying on this business. In these circumstances she could not attend the matter. According to me, in the given circumstances it would be in the interest of justice to set aside the ex-parte award. I am satisfied that the petitioner had sufficient cause for her absence in the Court in the absence of her husband Proprietor. The main grievance of the petitioner appears to be that the respondent was never employed by the petitioner and that there was no relationship of employer and employee between them. It is the specific case of the petitioner that the respondent was merely a supplier of Shevpuri etc. She was preparing these items at her home and she was bringing the same and the petitioner was purchasing them as readymade items on payments as per agreed rates. In view of this real dispute between them in respect of the relationship of employer and employee I deem it proper that the Labour Court decides all the questions on merits of the case. According to me, the petitioner employer should be afforded an opportunity of putting and proving its case on merits instead of the employer employee relationship and also the case of termination put up by the respondent. If the petitioner succeeds in proving that the respondent was only a supplier of material for preparation of Panipuri and Shevpuri etc. the respondent's claim of wrongful termination would not survive and on the contrary if the respondent succeeds to prove her employment with the petitioner then the Labour Court would also decide the question of legality and propriety of the order of termination and relief, if any.

6. In the aforesaid circumstances I quash and set aside the order dated 15-2-1994 passed by the Labour Court. I also quash and set aside the ex-parte award dated 5-5-1988. I direct the Labour Court to restore the reference to its file for further hearing in accordance with law. Since this is a very old matter the Labour Court would decide the same as expeditiously as possible. The petitioner shall file his written statement and all other documents within four weeks from the receipt of notice from the Labour Court. The petitioner shall pay a sum of Rs. 10,000/- by way of costs to the respondent No. 1 through her Advocate. The writ petition is disposed of accordingly.

7. Certified copy of this order is expedited.

8. Order accordingly.