
(2011) 03 MP CK 0051

In the Madhya Pradesh High Court

Case No : Writ Petition No. 5149 of 1999

Sagar Auto Sales Pvt. Ltd.

APPELLANT

Vs

Appellate Authority, M.P. Shops and Establishments Act and
Another

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Constitution of India, 1950 — Article 226, 227

Madhya Pradesh Shops and Establishments Act, 1958 — Section 58(2), 58(3), 59, 59(2)

Madhya Pradesh Shops and Establishments Rules, 1959 — Rule 14A, 14A(2), 14A(3), 14A(4), 14A(5)

Citation : (2011) 2 MPJR 339 : (2011) 2 MPLJ 638

Hon'ble Judges : A.K.Shrivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

By this petition under Article 226/227 of the Constitution of India the Petitioner is challenging the validity of the impugned order dated 30-3-1998 (Annexure-P/4) passed by the Respondent No. 1 and the order dated 30-9-1999 (Annexure-P/11) dismissing the application of the Petitioner to set aside the ex parte order, being not maintainable.

In brief the case of the Respondent No. 2 (hereinafter referred to as "employee" is that he was serving on the post of Supervisor under the establishment of the Petitioner/employer who is carrying on the business in the name and style Sagar Auto Sales Pvt. Ltd. The employer is having dealership of Bajaj two-wheelers and its establishment is selling the vehicles of Bajaj and its spare parts as well as engaged for extending free service and disposal of warranty claim of a product sold by it to the customers.

The employee submitted an appeal u/s 58(2) of the M.P. Shops and Establishments Act, 1958 (in short Act of 1958) on the averments that he was appointed on the post of Supervisor in the establishment of Petitioner/employer on 19-11-1999 where he continued in service. Although his service record was satisfactory but without any reason vide order dated 30-8-1997 his services were terminated. According to employee, the option of the Petitioner terminating his service is illegal and. contrary to law and thus he is entitled to be reinstated.

The prescribed authority registered the appeal and issued notice to the Petitioner by fixing the date of hearing 23-12-1997. On bare perusal of the order of the appellate authority under the Act of 1948 dated 30-3-1998 (Annexure-P/4) it is gathered that despite the notice was served upon the employer/Petitioner, none appeared on its behalf and hence the matter was proceeded in ex parte against the Petitioner. In the ex parte proceedings, the employee examined himself. The appellate authority thereafter passed an order dated 30-3-1998 (Annexure-P/4) directing to reinstate the employee.

The aforesaid ex parte order passed against Petitioner to reinstate the employee was assailed by Petitioner by filing application under Order IX, Rule 13 CPC on 20-5-1996 (Annexure-P/6) along with affidavit assigning the reasons of non-appearance on the date of hearing. The employee was noticed and he submitted reply of the application (Annexure-P/9). Learned Appellate Court under the Act dismissed the application as not maintainable since there is no provision under the Act of 1958 to set aside the ex parte order dated 30-9-1999 (Annexure-P/11).

In this manner this writ petition has been filed by the Petitioner under Article 226 of the Constitution of India.

The notices were issued to the Respondent No. 2/employee but despite having served, he is not appearing in this petition.

Shri Puneet Shroti, learned Panel Lawyer has appeared for appellate authority under the Act of 1958.

The contention of learned Counsel for Petitioner is that although there is no specific provision under the Act of 1958 or under the Rules of 1959 to file an application for setting aside the ex parte order but since the appellate authority is exercising judicial power, the power to set aside the ex parte order is inherent in the said authority though specifically not provided either under the Act of 1958 or under the Rules of 1959.

Learned Counsel has placed reliance on two decisions of Supreme Court *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, and *P. Sarathy Vs. State Bank of India*, Learned Counsel has also placed reliance on another decision of Supreme Court *Rabindra Singh Vs. Financial Commissioner, Cooperation, Punjab and Others*,

On the other hand Shri Puneet Shroti, learned Panel Lawyer argued in support of

the impugned orders.

Having heard learned Counsel for the Petitioner and learned Panel Lawyer, I am of the view that this petition deserves to be allowed.

On bare perusal of Section 58(2)(a) of Act of 1958 this Court finds that employee who has been discharged, dismissed or retrenched may file appeal to said authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been held guilty by the employer or on the ground that such punishment of discharge or dismissal was severe. Clause (b) of Section 58(2) empowers the appellate authority to give notice in the prescribed manner to the employer and employee and may dismiss the appeal or direct the reinstatement of the employee with or without wages for the period during which he was kept out of employment or direct payment of compensation without reinstatement or grant such other reliefs as it deems fit in the circumstances of the case. According to Sub-section (3) of Section 58(2) the decision of appellate authority shall be final and binding on both the parties and be given effect to within such time as may be specified in the order of the appellate authority.

Under Section 59 of the said Act the power to frame Rules has been conferred to the Government to carry out the purposes of the Act. In this regard Section 59 may be seen. Accordingly, the rules namely the M.P. Shops and Establishments Rules, 1959 (in short Rules) are framed. Clause (i) of Section 59(2) which has been substituted by Amendment Act No. 10 of 1982 the legislature has given power to government to appoint appellate authority. Under Rule 14-A of the Rules which has been amended by notification 2167-728-84-XVI-A dated 11-4-1984, the Divisional Assistant Commissioner of Labour has been appointed as appellate authority for the purpose of Sub-section (2) of Section 58. Rule 14-A of Rules of 1959 speaks about establishment of appellate authority and limitation of appeal. This Rule further prescribes the procedure of hearing the appeal and to pass the order.

Under Rule 14-A(2) the employee who has been discharged, dismissed or retrenched may prefer an appeal within one year from the date of communication of order of discharge, dismissal or retrenchment as the case may be. There is proviso also to this rule that appeal may be entertained even after expiry of 1 year if the employee satisfies that he has sufficient reason that he could not prefer appeal within such period.

Sub-rules (3), (4) and (5) prescribe the procedure to hear the appeal. According to Sub-rule (3) on receiving the appeal, the appellate authority shall give a notice in format K-1 to non-Appellant (employer) and in the form of K-2 to Appellant (employee) and would send the notice by registered AD post. Under Sub-rule (4) after perusing the record and after giving opportunity to the parties of being heard, the appellate authority shall decide the appeal, by assigning reasons in brief. After passing of the decision, under Sub-rule (5) the appellate

authority is obliged to supply copy of order passed by it in the appeal to the non-Appellant (employer) as well as Appellant (employee) concerned free of cost.

Although in the format K-1 and K-2 prescribed under the Rules of 1959 it is mentioned that in case Appellant (employee) and non-Appellant (employer) fails to appear on the prescribed date the case will be decided in ex parte but there is no express provision under the Rules to hear the appeal in ex parte and the Rule 14-A is totally silent in this regard. No other procedure has been prescribed either under Rule 14-A or Rules of 1959 or under the Act to hear the appeal in ex parte. Similarly there is no provision under the Act or Rules to dismiss the appeal in default in case employee does not appear. There is no express provisions to hear the appeal in ex parte either in the Act or in the Rules although in the format K-1 and K-2 it is mentioned that in case a party fails to appear, the appeal would be heard in ex parte and therefore according to me, since there is no express provision to hear the appeal in ex parte therefore if the appeal is heard in the absence of employer in ex parte, certainly the inherent jurisdiction vest in the appellate authority to entertain an application to set aside an ex parte order. Although under the Act of 1958 and Rules of 1959 there is no express provision of exercising inherent power in the appellate authority, but, according to me, in every Tribunal, quasi-judicial authority these inherent powers vest impliedly.

The Supreme Court in *P. Sarathy (supra)* has categorically held that if revenue Court has passed an ex parte order and an application in terms of Order IX, Rule 13 read with Section 151 CPC was filed for setting aside the ex parte order and the Revenue Court dismissed the said application after holding that same was not maintainable being no express provision to set aside ex parte order, the Supreme Court held that all the Courts have incidental power to set aside an ex parte order on the ground of violation of principle of natural justice. The Supreme Court held that even in absence of any express provision having regard to principles of natural justice in such a proceeding, the Courts will have ample jurisdiction to set aside the ex parte order.

A similar situation also arose in the Supreme Court in the case of *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, wherein, an application to set aside the ex parte award passed under the Industrial Dispute Act was submitted and the same was rejected on the ground that there was no express provision. Deciding the point the Supreme Court held that although there is no express provision in the Industrial Dispute Act or the Rules framed there under giving jurisdiction to the Tribunal to do so but, it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. The Supreme Court categorically held that to setting aside the award would not amount to review.

Thus, on the basis of aforesaid decisions of Supreme Court, I am of the view that the power to set aside ex parte order is inherent in the appellate authority under

the Act of 1958 and Rules of 1959. Apart from this a party cannot be left remedy less and by judging the provision of the Act of 1958 and Rules of 1959 from this angle also I have no hesitation to say that a person cannot be left remedyless if any order has been passed against him.

Apart from this while exercising power under Article 226 of the Constitution of India, this Court can pass suitable order apart from the prerogative writs. The scope of Article 226 is wide enough. This Court while exercising power of judicial review can set aside the illegality, irrationality and procedural impropriety of an order passed by the State or Statutory authority. This Court is further empowered to exercise its extraordinary jurisdiction to meet un-precedent extraordinary situation having no parallel. The words "for any other purpose" is having wider connotation and confers jurisdiction to this Court to issue writs in more extensive manner and these powers can be exercised to enforce fundamental rights as well as for other purpose. According to me "other purpose" would mean any purpose other than enforcement of fundamental right i.e. enforcement of some legal right or performance of some legal duty.

Under Article 227 of the Constitution the power of superintendence in this Court is not confined to administrative superintendence only, but includes power of judicial revision also and therefore this Court by exercising power under Articles 226 and 227 of the Constitution of India can judicially, review the impugned order Annexure-P/11 dated 30-9-1999 of appellate authority prescribed under the Act of 1958 and the Rules of 1959.

The application to set aside the ex parte order submitted by the Petitioner has been dismissed as not maintainable by the appellate authority vide order dated 30-9-1999 (Annexure-P/11). For the reasons stated hereinabove I am of the view that application to set aside the ex parte order is maintainable before the appellate authority under the Act of 1958 and Rules of 1959. Since the application has been dismissed only on the ground of maintainability and not on merits, the impugned order dated 30-3-1998 (Annexure-P/4) and 30-9-1999 (Annexure-P/11) is hereby set aside and the case is remanded back to learned Appellate Authority to decide the application to set aside the ex parte order in accordance with law.

This petition is allowed to the extent indicated hereinabove with no order as to costs.