
(2016) 06 KL CK 0065
In the High Court Of Kerala
Case No : OP. (LC) . No. 34 of 2015 (O)

Sri. R. Nagarajan

APPELLANT

Vs

Sri. P. Karthikeyan Nair

RESPONDENT

Date of Decision : 17-06-2016

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2016) 4 KerLJ 9 : (2016) 4 KLT 35 : (2016) LIC 4082 : (2016) 3 LLN 401

Hon'ble Judges : Mr. K. Vinod Chandran, J.

Bench : Single Bench

Advocate : J.R. Prem Navaz and P.T. Sheejish, Advocates, for the Appellant; J. Harikumar, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

K. Vinod Chandran, J.—The challenge in the above original petition is levelled against Ext.P5 order of the Industrial Tribunal, in applications filed for setting aside an ex-parte award and condonation of delay. Placing reliance on the decision in Sangham Tape Company v. Hans Raj (2005 (9) SCC 331) the Labour Court found that it is functus officio after 30 days of publication of the award and rejected the application.

2. The learned counsel for the respondent workman places before me a decision of a learned Single Judge of this Court in Mother Superior v. State of Kerala (2003 (2) KLT 417) to further urge that the order of the Labour Court be sustained and the writ petition dismissed. Therein the management challenged an ex-parte award after 30 days of publication of the award. The learned Single Judge relying on Grindlays Bank v. Central Industrial Tribunal (1980 Supp SCC 420) held that the original petition could not be entertained since this Court was exercising jurisdiction; the Labour Court was exercising.

3. The Hon'ble Supreme Court in Grindlays Bank was concerned with the

application filed by the management before the Industrial Tribunal to set aside an ex-parte award. The questions raised for adjudication, by the Hon"ble Supreme Court, were (i) whether the Tribunal had jurisdiction to set aside the ex-parte award particularly when it was posted for evidence and (ii) whether the Tribunal becomes functus officio on the expiry of 30 days from the date of publication of the ex-parte award, by virtue of Sections 17 & 17A of the Industrial Disputes Act, 1947. The specific contention raised by the workman in the said case was that neither the Act nor the rules framed thereunder, conferred the power on the Tribunal to set aside the ex-parte award. Though there was no express provision in the Act and Rules, it was found that the Tribunal had inherent power to consider, setting aside of an ex-parte award, in the interest of justice, since the procedural rules granted it power, to proceed ex-parte; in the context of absence of a party to the dispute. The Tribunal was found to have been invested with such incidental and ancillary powers especially since there was nothing in the statute indicating the contrary. The Hon"ble Supreme Court noticed sub-section (3) of Section 20 of the ID Act, which provides for the continuance of proceedings before the Tribunal till the date on which the award become enforceable under Section 17A; which is on the expiry of 30 days from the date of publication of the award under Section 17. Till then, the proceedings before the Industrial Tribunal is deemed to be continuing and the Tribunal, thus retaining jurisdiction over the dispute, would be entitled to entertain any application in connection with the dispute, was the finding. Till that stage is reached; ie: till 30 days from the publication of the award; the Tribunal does not become functus officio.

4. Anil Sood v. Presiding Officer (2001 (10) SCC 534) was a case in which a party to the dispute approached the Labour Court after 30 days from the ex-parte award, to set it aside, on ground of the notice having not been duly served. Relying on Grindlays Bank it was held that Rule 22 of the Central Rules (under the I.D.Act) conferred power on the Labour Court to proceed ex-parte, in the event of absence of a party and that included the power to look at whether the absence was for sufficient cause. Sangham Tape Company distinguished Anil Sood, on facts, and found that Grindlays Bank clearly held that after 30 days of publication of award under Section 17 the Labour Court becomes functus officio. It was specifically noticed that in Anil Sood the date of publication of award was not at all adverted to. Sangham Tape Co. was a case in which the workman challenged the Labour Courts action in setting aside an ex-parte order after the expiry of 30 days from its publication.

5. The issue again came up before the Hon"ble Supreme Court in Radhakrishna Mani Tripathi v. L.H Patel (2009 (2) SCC 81). There the rules framed by the State of Maharashtra under the I.D Act, 1947 specifically provided for an application for setting aside the ex-parte award within 30 days from the date of receipt of the notice of the award. It was held by the Hon"ble Supreme Court that: "in Grindlays Bank this Court did not say that the Industrial Courts would have no jurisdiction to entertain an application for setting aside of an award made after 30 days of publication"(sic). Anil Sood was also relied on to arrive at such a

finding. In *Haryana Suraj Malting Ltd. v. Phul Chand* (2012 (8) SCC 579); the conflicting decisions in *Sangham Tape Co. and Radhakrishna Mani Tripathi*; by two benches of coordinate strength, was noticed and the matter was referred to a larger bench.

6. A reading of the decisions later to *Grindlays Bank* would indicate that they were all proceedings from orders of the Labour Court, allowing application to set aside ex-parte award, after 30 days from its publication. The decisions would also indicate a conflict as to whether the Labour Court had the jurisdiction to set aside an ex parte award after 30 days from its publication under Section 17 of the I.D. Act. The question whether, under Article 226; the rejection of an application to set aside an ex-parte award by the Labour Court, for reason of it being functus officio after the expiry of 30 days from the publication of the award, could be interfered with was not at all considered. Assuming that the Labour Court or the Industrial Tribunal would be functus officio after 30 days of the publication of the award; that alone cannot be a reason to curtail the High Court's power under Article 226 of the Constitution of India.

7. This is where *Mother Superior*, a decision rendered by a learned Single Judge of this Court, is placed, to deter this Court from, in anyway, interfering with the impugned order, which rejected the application for setting aside ex-parte award for reason of it being beyond the 30 days of publication of the award. Specific reliance is placed on the declaration of this Court that: "This Court at the most would be entitled to grant the reliefs which the Labour Court itself could have granted" (sic). With all the respect at my command, I am unable to agree with the said proposition, which would curtail the jurisdiction of this Court conferred under Article 226 of the Constitution of India. I would have been compelled to refer the issue for consideration by a Division Bench but for the following authoritative pronouncements of the Hon"ble Supreme Court.

8. In *Kapra Mazdoor Ekta Union v. Birla Cotton Spng. & Wvng. Mills Ltd.* 2005 (13) SCC 777, a three Judge bench of the Hon"ble Supreme Court considered the issue of whether an award passed, could be recalled for fresh consideration on merits, if the application was filed within 30 days of the publication of award. Since the application was filed within the 30 day period, following *Grindlays Bank*, it was held that the Tribunal cannot be said to be functus officio. The Management relied on *Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya* 1987 (4) SCC 525 and *Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji* 1971 (3) SCC 844 to contend that no review was permissible unless there is a specific conferment of such power under the statute. *Grindlays Bank* was relied on by the Union to urge review on the ground that an application filed within the 30 day period, is at a time when the Labour Court is seized of the dispute and has not become functus officio. It was urged that the review would be permissible since there was obvious illegality in the Tribunal having not considered certain issues on merits. The prayer before the Tribunal was also to frame an additional issue which was not considered earlier by the Tribunal in its ex-parte award.

9. The Hon''ble Supreme Court drew a subtle distinction insofar as procedural reviews and review on merits. A review on merits was held to be impermissible unless there is a specific power conferred under the statute while procedural review was inherent and could be exercised on being shown the illegality in the procedure followed; without any error being shown on the face of the record, which was held to be necessary in exercise of a review on merits. The Hon''ble Supreme Court held so in paragraph 19:

"19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch as the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal* it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again.

10. In *Rabindra Singh v. Financial Commissioner* (2008) 7 SCC 663 the Hon''ble Supreme Court was concerned with an ex parte order passed in an action for partition initiated under the Punjab Land Revenue Act. The parties were brothers and the defendant/brother was residing outside the country, which was also in the knowledge of the plaintiff. The lower authorities under the Act found that the provisions of the Code of Civil Procedure was not applicable and only a review

would be maintainable under the Act. The said proposition found favour up to the High Court. The Apex Court held so in paragraph 21:

"What matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law. Even in the absence of any express provision having regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an ex parte decree, subject of course to the statutory interdict.

11. Apposite also would be reference to *Sujitendra Nath Singh Roy v. State of West Bengal* (2015) 12 SCC 514, which considered the question as to whether a writ application would be maintainable against the order of the Tribunal, refusing to initiate contempt proceedings when there is a specific conferment of power so to do. Therein the West Bengal Land Reforms and Tenancy Tribunal refused to initiate contempt proceedings against an authority, which decision was refused to be interfered with by the High Court on the premise that there is no right of appeal against a refusal to initiate contempt proceeding. The contention of the appellant before the Hon"ble Supreme Court was noticed in the following manner:

"The learned counsel for the appellant has placed before us the Division Bench judgment of the Calcutta High Court in *Manju Banerjee v. Debabrata Pal* [2005 SCC Online Cal 538: (2006) 3 CHN 249 : (2006) 1 WBLR 147] and has submitted that the view taken therein that there is no right of appeal against dismissal of contempt proceeding, is correct and requires no discussion but the further view that even in gross cases of palpable contempt the informant concerned aggrieved by the refusal to initiate contempt proceeding can move only the Supreme Court under Article 136 of the Constitution of India, has been assailed on the ground that such observation in the judgment is on account of non-appreciation of the relevant facts in the judgment of the Constitution Bench of the Supreme Court in *L. Chandrakumar v. Union of India* (1997) 3 SCC 261.

12. The Division Bench of the Calcutta High Court, in the decision referred, obviously relied on the proposition that no appeal would lie against an order of the High Court refusing to initiate contempt proceedings; and even in cases of palpable contempt, the party would have to move the Supreme Court under Article 136. While holding that the said proposition is indisputable in view of Section 19 of the Contempt of Courts Act, 1971; it was held to be applicable only to the refusal to exercise such power, by the High Courts and not by the Tribunals. The argument of the State was that since the power to initiate contempt has been conferred on the Tribunal, in exercise of such power the Tribunal is not inferior to the High Court. It was held so in paragraph 8 and 9:

"On a careful consideration of the judgment of the Division Bench in *Manju Banerjee* which has been followed in the impugned order, we are unable to agree with the view that the writ petition under Articles 226/227 of the Constitution is not maintainable when the Tribunal refuses to initiate a contempt proceeding. Such inference has been drawn by the Division Bench on the basis of some

judgments of this Court such as in *D.N. Taneja v. Bhajan Lal* [(1988) 3 SCC 26] In those cases the order refusing to initiate proceeding had been passed by the High Court and not by a tribunal and, therefore, this Court observed that in a fit and proper case the aggrieved person who informed the court of the alleged act of contempt can approach the Supreme Court under Article 136 of the Constitution of India. Obviously in those cases there could be no occasion to observe that the aggrieved person can also approach the High Court under Articles 226/227. The submission that because of similar powers of contempt vested in the Tribunal under Section 15 of the 1997 Act, the Tribunal ceases to be inferior to the High Court for exercise of writ jurisdiction, is devoid of any substance because it ignores that the High Courts have constitutional status and are vested with extraordinary writ jurisdiction whereas the Tribunal is only a creature of statute. Hence, in our considered view, in *Manju Banerjee* the Division Bench of the Calcutta High Court does not lay down the law correctly that when the tribunal refuses to initiate contempt proceeding, the aggrieved person has remedy only under Article 136 and not under Articles 226/227 of the Constitution.

9. As held by the Constitution Bench in *L. Chandrakumar v. Union of India* (1997) 3 SCC 261 the power of judicial review of the High Court under Articles 226/227 of the Constitution cannot be taken away by a law or even by a constitutional amendment. Hence, it will be indeed a rare case where the High Court can hold that a writ petition against any order of the inferior court or the Tribunal is not maintainable. However, we hasten to add that it is always open for the High Court, in appropriate cases, to hold that a writ petition is not entertain able on account of propriety, the constitutional scheme, some settled rules of self-restraint or its peculiar facts.

13. The Constitution bench in *L. Chandrakumar v. Union of India* (1997) 3 SCC 261 interalia held so in paragraph 79:

"We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided."

14. Going by the above authoritative pronouncements of the Hon"ble Supreme Court this Court does not feel compelled to follow *Mother Superior*, nor refer the issue for consideration before a Division Bench. The finding that this Court would be exercising a jurisdiction which the Tribunal, a creature of statute, is exercising, cannot be countenanced especially when the jurisdiction exercised is under Article 226. This court would not venture to look into the confines of the jurisdiction exercised in appeal or even the limitation in invoking the supervisory jurisdiction under Article 227, as held by the Hon"ble Supreme Court in 2002 (8) SCC 400 (*Essen Deinki v. Rajiv Kumar*). The jurisdiction under Article 226

definitely cannot be fettered by a statute since the power is sourced from the Constitution. Though the present petition is one filed under Article 227; this Court could at any time invoke the jurisdiction under Article 226; to set right an apparent injustice.

15. In that view of the matter what is to be looked at is the sufficiency of the reasons for non-appearance of the petitioner herein, which led to the ex parte order being passed by the Labour Court. The petitioner has pleaded before the Labour Court, as also in the present writ petition that it was an omission committed by the lawyer which led to its non-appearance. Though on mere attribution of such defect on the lawyer, the non-appearance cannot be condoned, this Court in exercise of its extraordinary jurisdiction could always advance the cause of justice by compensating the opposite party, so as to ensure a fair adjudication of the dispute referred to the Labour Court. On the above reasoning it is directed that on payment of Rs. 10,000/- as cost to the Workman or deposit before the Tribunal, the ex parte order shall be set aside. The Workman and the management shall appear before the Labour Court on 01.08.2016. The Labour Court shall positively complete the adjudication within a period of 4 months from the date of appearance, giving an opportunity to the management to produce documents as also file objections in the matter.

16. The Original Petition is disposed of. No costs.