

SUPREME COURT OF INDIA

Mahabir Prosad Choudhary

Vs.

Octavius Tea and Industries Ltd.

C.A.No.8320 of 2011

(Asok Bhushan and Indu Malhotra,JJ.,)

04.12.2018

JUDGMENT

Ashok Bhushan,J.,

1. This appeal has been filed against the Division Bench judgment dated 23.12.2009 of Calcutta High Court in F.M.A. No. 1187 of 2009 by which the appeal filed by appellant has been dismissed.

2. The issue involved in this appeal lies in a very narrow compass. The necessary facts of the case to be noticed for deciding the issue are:-

2.1 The appellant was working as Accountant in the respondent company since 1986. There had been change of management in the year 2004 in the company. The appellant was not allowed to work w.e.f. 02.05.2005. The State of West Bengal referred the industrial dispute between the company and the appellant to the Fifth Industrial Tribunal. The Tribunal framed the issue as to whether refusal of employment to Shri Mahabir Prosad Choudhary by the management w.e.f. 02.05.2005 is justified?

2.2 After receiving the reference, the Industrial Tribunal on 27.08.2007 issued summons upon the parties concerned directing them to appear on 19.09.2007. The workman appeared on 19.09.2007 but no one appeared from the company, since the summons were received back with the remarks "left". 11.10.2007 was again fixed by the Tribunal. On 11.10.2007, Tribunal noted that summons sent through Process Server has been served upon the company. The advocate for the workman appeared and filed W/S. The W/S was filed without serving the copy of W/S to the company. On 05. 11 . 2007, none of the parties had appeared and 27. 11 . 2007 was fixed for W/S by the company. On 29.11.2007, no one appeared on behalf of the company, the Tribunal fixed for ex-parte hearing. 26.12.2007 was fixed for documents of the workman. On 26.12.2007, documents were filed, which were kept on record and 29.01.2008 was fixed for ex-parte hearing. The Tribunal again on the request of the

workman deferred the case, which was fixed for ex-parte hearing for 26.02.2008. On 26.02.2008, none appeared for the company, workman was heard and the award was pronounced. The Hon'ble Tribunal disposed of the award ex-parte by allowing the claim of reinstatement with full back wages. The award was also published on 27.03.2008.

2.3 The company filed an application on 02.05.2008 to recall the ex-parte award. The company stated in its application that as per the agreement dated 10.06.2004 with its erstwhile management, the new management has no responsibility in respect of senior executives and managerial staff of the old management including the appellant. The company states that ex-parte award was received on 22.04.2008 and thereafter an application has been filed for recall of the ex-parte award dated 26.02.2008. The Tribunal heard the parties on the application filed by the company. The tribunal although return the finding that the award was passed in violation of principles of natural justice and no notice under Rule 20B(5) and Rule 21 of the West Bengal Industrial Disputes Rules, 1958 (hereinafter referred to as "1958 Rules") were served on the company. The Tribunal, however, took the view that application being filed by the company after 30 days of publication of the award, the Tribunal has become functus officio, hence the application is rejected.

2.4 After rejection of application, the company filed a writ petition in the Calcutta High Court. Learned Single Judge vide its judgment and order dated 11.02.2009 allowed the writ petition setting aside the award and the order dated 30.09.2008 of the Industrial Tribunal and the Tribunal was directed to reconsider the issue between the parties as expeditiously as possible in accordance with law upon affording them opportunity of being heard. Against the judgment of learned Single Judge, the appellant filed an appeal before the Division Bench, which has been dismissed by the impugned judgment of the Calcutta High Court.

3. Shri Manoj Swarup, learned counsel for the appellant in support of the appeal contends that notice issued by the Industrial Tribunal in Form D2 was served on the company, which has also been recorded by the Industrial Tribunal, there was no cause for non-appearance of the company before the Tribunal. The Tribunal rightly proceeded ex-parte due to non-appearance of the company. He submits that the application for recall of the ex-parte award was filed after 30 days from publication of award, the Tribunal having become functus officio, The Tribunal has rightly taken the view that application for recall cannot be entertained. He further submits that the view of the High Court that there was violation of Rule 20B(5) and Rule 21 of 1958 Rules is erroneous. He submits that Rule 20B(5) contemplates that Tribunal, in event, if the W/S had been filed, the same shall be made available to the party concerned or its authorised representative in the office of Industrial Tribunal/Labour Court. He submits that Rule 20B(5) does not contemplate that any notice has to be issued to the other party for receiving the W/S. He submits that there is no non-compliance of Rule 20B(5). He submits that High Court committed error in taking the view that notice was required to be served under Rule 21 to the company before hearing the case ex-parte. No one has appeared on behalf of the respondent.

4. We have considered the submissions of the learned counsel for the appellant and have perused the records.

5. Before the Division Bench of the Calcutta High Court, main submission, which was pressed by the appellant was that application filed by the company for recall of the ex-parte order was after 30 days of publication, hence, could not have been entertained. The Division Bench of the High court has elaborately dealt with the said issue and repelled the contention. There is no dispute regarding dates and events, which took place in the present case. The date of ex-parte award is 26.02.2008, the publication of the award was made on 27.03.2008 and the case of the company was that it came to know about the award on 22.04.2008. The date of filing of application for recall of ex-parte award is 02.05.2008, the application was clearly beyond 30 days from publication of the award.

6. Before we proceed to consider the submissions raised by learned counsel for the appellant, it is relevant to notice certain Rules of 1958 Rules. Rule 20B deals with Statement of case or written statement. Rule 20B is as follows:-

20B. Statement of case or written statement. - (1) The Industrial Tribunal/Labour Court shall, on the date fixed in the summons for the appearance of the parties direct the party which appears to the Tribunal/Labour Court to be the party at whose instance the reference has been initiated or where no such party can be ascertained, the party, which, in the opinion of the Industrial Tribunal/Labour Court, ought to be required to state its case first (hereinafter referred to as the first party) to state its case, together with the grounds upon which the claim for relief is founded, and a list of relevant documents which are in their possession and upon which they want to rely, in writing on a date fixed by the Industrial Tribunal/Labour Court which shall ordinarily be within two weeks from the date of the order.

(2) After the first party has complied with the order passed under sub rule (1), the other party (hereinafter referred to as the second party) shall be asked to file its written statement and a list of relevant documents which are in their possession and upon which they want to rely on a date fixed by the Industrial Tribunal/Labour Court, which shall ordinarily be within two weeks from the date of the order.

(3) Every statement of case and every written statement shall be signed and verified in the manner prescribed by rule 69 or rule 70, as the case may be.

(4) Each party shall file along with its statement of case or the written statement, as the case may be, as many copies thereof as may be directed by the Industrial Tribunal /Labour Court.

(5) A copy of the statement of case or the written statement shall be served on the first party or the second party, as the case may be, by the Industrial Tribunal/Labour Court within seven days from the date on which copies of the statement of case or the written statement, as the case may be, are filed by making it over to the party

concerned or to its authorised representative in the Office of the Industrial Tribunal /Labour Court on a date and time fixed for the purpose and intimated to the party concerned by the Industrial Tribunal/Labour Court.

7. Rule 21, which empowers the Tribunal to proceed ex-parte is as follows:-

"21. Board, Court, Labour Court, Tribunal, or Arbitrator may proceed ex-parte. - If without sufficient cause being shown, any party to a proceeding before a Board, Court, Labour Court, Tribunal or Arbitrator fails to attend or to be represented, the Board, Court, Labour Court, Tribunal or Arbitrator may proceed as if such party had duly attended or had been represented.

8. Rule 27 deals with the correction of errors and review of an award, which is to the following effect:-

"27. Correction of errors and review of an award. -
The Labour Court, Industrial Tribunal or Arbitrator may -

(i) correct any clerical or arithmetical mistake arising from an accidental slip or omission in any award made by it or him, and

(ii) review an award on the ground of some mistake or error apparent on the face of the record, either of its/his own motion or on the application of any of the parties ;

(iii) for sufficient cause set aside after notice to the opposite party or parties as the case may be, the ex-parte award or an award on the footing that the industrial dispute under reference is no longer in existence either of its/his own motion or on the application of any of the parties :

Provided that no correction shall be made without previous notices to the parties or opposite party, as the case may be. Provided further that no application for review under clause (iii) shall be entertained on the expiry of the 15th day from the date of the award."

9. This Court in *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*¹, had occasion to consider Rule 22 of Industrial Disputes (Central) Rules, 1957 as well as Industrial Disputes (Bombay) Rules, 1957. Rule 22 of Industrial Disputes (Bombay) Rules, are parimateria with Rule 21 of the West Bengal Industrial Disputes Rules, 1958. This Court in the case of *Grindlays Bank Ltd. (supra)* has held that Rule 22 and Rule 24B were sufficiently the source of power for the Industrial Courts to recall the ex-parte award. Following was laid down in Paragraph 11:-

"11. The language of Rule 22 unequivocally makes the jurisdiction of the Tribunal to render an ex parte award conditional upon the fulfilment of its requirements. If there is no sufficient cause for the absence of a party, the Tribunal undoubtedly has

jurisdiction to proceed ex parte. But if there was sufficient cause shown which prevented a party from appearing, then under the terms of Rule 22, the Tribunal will have had no jurisdiction to proceed and consequently, it must necessarily have power to set aside the ex parte award. In other words, there is power to proceed ex parte, but such power is subject to the fulfilment of the condition laid down in Rule 22. The power to proceed ex parte under Rule 22 carries with it the power to enquire whether or not there was sufficient cause for the absence of a party at the hearing."

10. The submission which was pressed before the High Court in the present case that application having been filed to recall after expiry of 30 days from publication of the award as per the judgment of this Court in *Grindlays Bank Ltd.* (supra), the Tribunal has become functus officio and could not have been entertained the application. This Court had occasion to consider this very aspect in *Radhakrishna Mani Tripathi Vs. L.H. Patel and Another*².. This Court noticed the observation made by this Court in the case of *Grindlays Bank Ltd.* (supra) in Paragraph No.14 as well as judgment of this Court in *Anil Sood Vs. Presiding Officer, Labour CourtII*³, in Paragraph Nos. 16, 17 and 18, this Court laid down following:-

"14. In *Grindlays Bank* this Court held that Rules 22 and 24(b) were sufficiently the source of power for the Industrial Courts to recall an ex parte award. It was pointed out that in terms of Rule 22 the Industrial Courts could proceed ex parte in the matter only in case a party to the proceeding failed to attend or be represented without showing sufficient cause. The Court held that power to proceed ex parte under Rule 22 carried with it the power to inquire whether or not there was sufficient cause for the absence of the party at the hearing and in case the party was able to show sufficient cause for its non-appearance on the date the court had proceeded ex parte against it, to recall the award.

(Vide para 11 of the decision.)

16. Coming now to the submission based on Section 17-A of the Act the Court in para 14 of the decision held and observed as follows: (*Grindlays Bank case*, SCC pp. 425-26)

"14. The contention that the Tribunal had become functus officio and, therefore, had no jurisdiction to set aside the ex parte award and that the Central Government alone could set it aside, does not commend to us. Sub-section (3) of Section 20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under Section 17-A. Under Section 17-A of the Act, an award becomes enforceable on the expiry of 30 days from the date of its publication under Section 17. The proceedings with regard to a reference under Section 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the dispute referred to it for adjudication and up to that date it has the power to entertain an application in connection with such dispute. That stage is not

reached till the award becomes enforceable under Section 17-A. In the instant case, the Tribunal made the ex parte award on 9-12-1976. That award was published by the Central Government in the Gazette of India dated 25-12-1976. The application for setting aside the ex parte award was filed by Respondent 3, acting on behalf of Respondents 5 to 17 on 19-1-1977 i.e. before the expiry of 30 days of its publication and was, therefore, rightly entertained by the Tribunal. It had jurisdiction to entertain it and decide it on merits."

(emphasis added)

From the above quotation it would appear that in Grindlays Bank the recall application was filed within thirty days from the date of publication of the award and hence, the objection raised on the basis of Section 17-A did not arise in this case. In Grindlays Bank this Court did not say that the Industrial Courts would have no jurisdiction to entertain an application for setting aside an award made after thirty days of its publication. Nevertheless, on the basis of the passage marked in italics in the above quotation Ms Issar strongly contended that that is the true import of the judgment.

17. We are unable to accept. The position is made clear in the later decision in Anil Sood v. Labour Court. In Anil Sood interestingly the Labour Court had rejected the recall application on the very same ground that after making the award it became functus officio in the matter. The order of the Labour Court was challenged before the High Court but the High Court also took the same view. In appeal this Court noted that the award was made on 11-9-1995 and the application for its recall was filed on 6-11-1995. The Court referred to the earlier decision in Grindlays Bank and the provisions of sub-sections (1) and (3) of Section 11 of the Act and in paras 6, 7 and 8 of the decision observed and held as follows: (Anil Sood case, SCC p. 536)

"6. The aspect that the party against whom award is to be made due opportunity to defend has to be given is a matter of procedure and not that of power in the sense in which the language is adopted in Section 11. When matters are referred to the tribunal or court they have to be decided objectively and the tribunals/courts have to exercise their discretion in a judicial manner without arbitrariness by following the general principles of law and rules of natural justice.

7. The power to proceed ex parte is available under Rule 22 of the Central Rules which also includes the power to inquire whether or not there was sufficient cause for the absence of a party at the hearing, and if there is sufficient cause shown which prevented a party from appearing, then if the party is visited with an award without a notice which is a nullity and therefore the Tribunal will have no jurisdiction to proceed and consequently, it must necessarily have power to set aside the ex parte award.

8. If this be the position in law, both the High Court and the Tribunal (sic Labour Court) fell into an error in stating that the Labour Court had become functus officio

after making the award though ex parte. We set aside the order made and the award passed by the Labour Court and affirmed by the High Court in this regard, in view of the fact that the learned counsel for the respondent conceded that application filed by the appellant be allowed, set aside the ex parte award and restore the reference."

18. In light of the decision in Anil Sood we find no substance in the appellant's submission based on Section 17-A of the Act. There being no substance in the first limb of the submission there is no question of any conflict between Rule 26(2) of the Bombay Rules and Section 17-A of the Act."

11. This Court in Radhakrishna Mani Tripathi's case (supra) has clearly held that the case of Grindlays Bank Ltd. (supra) did not say that the Industrial Courts would have no jurisdiction to entertain an application for setting aside an award made after thirty days of its publication. This Court's judgment in Radhakrishna Mani Tripathi (supra) is clearly applicable in the present case. Furthermore, in the present case, the Tribunal, which rejected the application of the company to recall the ex-parte award had itself returned the finding that there was violation of principles of natural justice since a copy of W/S was not sent to the company. The High Court after considering the submission of the parties had made following observations:-

"On a perusal of the order dated 30. 09. 2008 it is difficult for this Court to accept the contention raised on behalf of the workman. It appears from the said order that the Tribunal had accepted the position that notice under Rule 21 of the said Rules had not been served upon the company before placing the case for ex-parte hearing. It has also accepted that Written Statement filed the workman had not been served upon them in accordance with provisions contained in Rules 20B(5) of the said Rules. On the face of such finding recorded by the Tribunal, it is absolutely clear that proceedings were conducted before it, leading to the impugned award, in clear violation of principles of natural as well as mandatory provisions of law. The award passed on 26.2.2008 is liable to be set aside only on this ground."

12. Shri Manoj Swarup, learned counsel for the appellant has strenuously contended that present is not a case of any breach of Rule 20B(5) as held by the High Court. The relevant order of the Industrial Tribunal has been brought on the record by the appellant, i.e., of 11.10.2007, where workman had appeared and filed Written Statement. It has been noted in the order that copy of the W/S cannot be served upon the another party as none appeared on behalf of the company. Sub-rule (5) of Rule 20B, which is relevant for present case is reproduced for ready reference:-

20B. Statement of case or written statement. —

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(5) A copy of the statement of case or the written statement shall be served on the first party or the second party, as the case may be, by the Industrial Tribunal/Labour Court within seven days from the date on which copies of the statement of case or the written statement, as the case may be, are filed by making it over to the party

concerned or to its authorised representative in the Office of the Industrial Tribunal/Labour Court on a date and time fixed for the purpose and intimated to the party concerned by the Industrial Tribunal/Labour Court.

13. A perusal of sub-rule(5) of Rule 20B indicates that the copy of the statement of the case or the W/S is to be served on the first party or the second party, as the case may be, by the Industrial Tribunal/Labour Court within seven days from the date on which copies of the statement of case or the written statement, as the case may be, are filed, by making it over to the party concerned or to its authorised representative in the Office of the Industrial Tribunal/Labour Court on a date and time fixed for the purpose and intimated to the party concerned by the Industrial Tribunal/Labour Court. The duty, thus, has been cast on the Tribunal to serve a copy of W/S or statement of case on either side. The use of word "shall be served" in sub-clause (5) of Rule 20B has to be given some meaning and purpose. The provision obviously cast a duty on Industrial Tribunal and the Court to ensure that service should be completed within seven days. Another aspect, which is decipherable from the Rule is that Tribunal has to ensure that statement of case of W/S has to be served by making it available to the party concerned or its authorized representative in the office of the Industrial Tribunal/Labour Court on a date and time fixed for the purpose. The last line of the sub-rule (5) used the expression "on a date and time fixed for the purpose and intimated to the party concerned by the Industrial Tribunal/Labour Court". The above expression contains two requirements, firstly, the Industrial Tribunal/Labour Court has to fix a date for service of statement of case of W/S within 7 days, specially, fixed date for the purpose and secondly date and time fixed for purpose has to be intimated to the party concerned. Although sub-rule(5) does not contemplate issuing any second notice after receipt of the statement of a case or a W/S, i.e. date and time is required to be fixed for the purpose of statement of case and a date and time, which is also required to be intimated to the party concerned for the purpose. In the facts of present case, it has to be held that the Tribunal was required to intimate date and time for receiving of the written statement by the company. Neither the order sheet of Tribunal indicate that any date was fixed for such service of W/S nor any intimation was sent to the company. Thus, there was a clear breach of sub-rule(5) of Rule 2 0B, no error has been committed by High Court in taking the view that Rule 20B(5) has been violated, resulting in violation of principles of natural justice.

14. Now coming to Rule 21, which empowers the Tribunal to proceed when any party to a proceeding fails to attend. Learned counsel for the appellant is right in his submission that the plain language of Rule 21 does not indicate that it is necessary for Tribunal to issue any notice to a party before proceeding ex-parte. However, the expression used in Rule 21 is "may proceed". Thus, on non-appearance on one day does not oblige the Tribunal to proceed ex-parte. The Tribunal or arbitrator can exercise his discretion and may decide to send a notice before proceeding ex-parte in facts of each case, which may be required in facts of a particular case. But even otherwise accepting, the submission of the learned counsel for the appellant that no mandatory notice under Rule 21 was required to be issued by the Tribunal to the company, there being violation of Rule 20B(5), the High Court committed no error in setting aside the order of the Tribunal's ex-parte award by directing the Tribunal to proceed afresh.

15. Learned counsel for the appellant submitted that appellant has already attained the age of superannuation in July, 2018.

16. In view of the foregoing discussions, we do not find any error in the judgment of the High Court. The appeal being devoid of any merit is dismissed. Parties shall bear their own costs.

Judgment Referred.

¹(1980) Supp. SCC 0420

²(2009) 2 SCC 0081

³(2001) 10 SCC 0534