

ORDER SHEET
IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

C.P. No.S-738 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection
2. For orders on MA 10349/2014
3. For katcha peshi.

20.02.2018

Mr. Muhammad Asif Arain, advocate for petitioner.
Mr. Ali Ahmed Soomro, advocate for respondent No.3& 4.

ORDER

AGHA FAISAL, J: The present petition has been instituted against the order of Court of the learned Commissioner Workmen's Compensation and Authority under the Payment of Wages Act Hyderabad (hereinafter referred to as the "Trial Court"), dated 13.05.2014 (hereinafter referred to as the "Impugned Order"), content whereof is reproduced herein below:

"I have gone through the application for recalling and the objection thereof. Before going into the facts of this recalling application my attention has been invited by Ld. representative of applicant to earlier history of the case and attitude of the respondent. Their side was already closed in 2013 and later on opened giving them fair chance of defence but I am surprised that the case has been filed long ago in 2011 and the respondent has failed to submit reply as yet. This leads me to conclude that the respondent is merely using delaying tactics as he was strictly directed on 10.03.2014 to submit reply on 25.03.2014 but he failed and hence declared exparte. The applicant submitted affidavit-in-exparte proof and all of burden the respondent came with this recalling application. To me it appears that if the

respondent is given more time it will be quite unjust with the applicant who is awaiting for justice since 2011. Therefore the recalling application is dismissed.

Admitting the facts and contention of the applicant supported exparte proof affidavit, claim of applicant is allowed. Same order in case No.24/2011, 18/2013 and 19/2013. The respondent is directed to deposit the decretal amount in this Court within 30 days for onward payment.”

2. At the outset, the attention of the learned counsel for petitioner was drawn towards the office objections, wherein it was queried as to how the subject petition was maintainable in the presence of an adequate legal remedy available before the learned Tribunal (as defined in the Act).

3. In view of the office objection with regard to maintainability both learned counsel were requested to address the said issue prior to proceeding any further in the matter.

4. The learned counsel for petitioner stated that Impugned Order was passed pursuant to the authority conferred by section 3 of the Workmen Compensation Act, 1923 (hereinafter referred to as the “Act”), which is reproduced herein below:

“3. Employer’s liability for compensation.---(1) If personal inquiry is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this chapter:

Provided that the employer shall not be so liable-

- (a) *in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding four days;*
- (b) *in respect of any injury , not resulting in death, caused by an accident which is directly attributable to--*

- (i) *the workman having been at the time thereof under the influence of drink or drugs , or*
 - (ii) *the willful disobedience of the workman to an order expressly framed, for the purpose of securing the safety of workman, or*
 - (iii) *the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen.*
- (c) *omitted by the Workmen's Compensation (Amdt.) Act, V of 1929.*

(2) *if a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman, whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months in any employment specified in Part B of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the employer proves the contrary, the accident shall be deemed to have arise out of and in the course of the employment.*

Explanation---For the purpose of this sub-section a period of service shall be deemed to be continuous which has not included a period of service under any other employer in the same kind of employment.

(3) *The Provincial Government, after giving, by notification in the official Gazette, not less than three months' notice of its intention so to do, may, by a like notification, add any description of employer to the employments specified in Schedule III, and shall specify in the case of the employments so added the diseases which within the Province shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and the provisions of sub-section (2) shall thereupon apply within the province as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.*

(4) *Save as provided by sub-sections (2) and (3), no compensation shall be payable to a workman in respect of any disease unless the disease is directly attributable to a specified injury by accident arising out of and in the course of his employment.*

(5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person, and no suit for damages shall be maintained by a workman in any Court of Law in respect of any injury--

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act."

5. The attention of the Court was also drawn to section 8 (1) of the Act, which is reproduced herein below:

"No payment of compensation in respect of workman whose injury has resulted in death, and no payment of lump-sum as compensation to a workman or a person under legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation.

Provided that in case of a deceased workman, an employer any make to any dependent advances on account of compensation not exceeding an aggregate of one hundred rupees, and so much of such aggregate as does not exceed the compensation payable to that dependent shall be deducted by the Commissioner from such compensation and repaid to the employer."

6. The learned counsel for the petitioner stated that the petitioner was aggrieved by the Impugned Order and yet the present petition was instituted, in place of an appeal, for the following reasons:

"(i) The managing director of the petitioner was out of the country and so there was no guidance with regard to the proper forum.

(ii) The Impugned Order was passed without jurisdiction.

(iii) The petitioner is a private limited company, as opposed to an individual, and hence was unaware of the correct legal avenue to pursue."

7. The learned counsel for the petitioner cited case of *TOWN COMMITTEE, GAKHAR MANDI V. AUTHORITY UNDER THE PAYMENT OF WAGES ACT GUJRANWALA* and 57 others, reported as *P L D 2002 SUPREME COURT 452*, and drew the Court's attention on the following passage:

"It is true that as a general rule a person would not be permitted to invoke the extraordinary constitutional jurisdiction of a High Court under Article 199 of the Constitution if an adequate remedy was available to him to seek redress of his grievance. But then this is also equally true that such was not an inflexible rule of law not subject to any exception. This Court has held, more than once, that a writ of certiorari for instance, could be granted, despite availability of an alternate remedy, where, for example, the Impugned Order was ex facie without lawful authority or where it was a case of lack or absence of or even excess of jurisdiction, reference may be made to the cases of S.A. Haroon v. The Collector of Customs PLD 1959 SC (Pak.) 177; Pakistan v. Zia-ud-Din PLD 1960 SC 440; Lt-Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty and others PLD 1961 SC 119; Nagina Silk Mills v. The Income-tax Officer and others PLD 1963 SC 322; Premier Cloth Mills Ltd. v. The Sales Tax Officer 1972 SCMR 257 and Murree Brewery Co. Ltd. v. Pakistan PLD 1972 SC 279. As has been held above, the case in hand was a case of absence of jurisdiction on the part of the respondent-Authority and the High Court was, therefore, not right in rejecting the petition under Article 199 of the Constitution only because a remedy by way of appeal was available to the petitioner before it. The order dated 24-4-1996 of the High Court passed in Writ Petition No.13342 of 1994 could, therefore, not be said to be an order justifiable in law."

8. The learned counsel for the petitioner then cited the case of *FARZAND RAZA NAQVI AND 5 OTHERS V. MUHAMMAD DIN THROUGH LEGAL HEIRS AND OTHERS*, reported as 2004 SCMR 400, and drew the Court's attention on the following passage.

"The explanation offered by the respondents of non-representation of Din Muhammad was that he due to the physical disability could not pursue the case and file the appeal, would be a valid ground to condone the

delay. The respondents in proof of the ailment of Din Muhammad placed on record, the Medical Certificate of the doctors, who have been providing him treatment and the High Court having found the same sufficient evidence instead of dismissing the writ petition on the ground of laches, decided it on merits. We, while taking into consideration the nature of ailment of Din Muhammad, predecessor-in-interest of respondents and the dispute between the parties, are of the view that despite of non-presentation of defendants in the suit, the trial Court was under legal obligation to attend the important question relating to the maintainability of the suit and the genuineness of the claim of plaintiff arising out of the pleadings of the parties, and decide the suit on merits to avoid any injustice to any party in his absence. The interest of administration of justice always demands that one should not be allowed to get any benefit in absence of his opponent to which he is not entitled in law.”

9. In view of the arguments, it was contended by the learned counsel for the petitioner that this Court may be pleased to declare the present petition as maintainable and proceed to exercise its discretionary jurisdiction and adjudicate upon the merits of the case.

10. It was pointed out to the learned counsel for the petitioner that even though the Impugned Order was dated 13.5.2014 but present petition was presented on 27.9.2014, which is after passage of four months. On the question regarding the justification for the delay, the learned counsel for the petitioner stated that the delay was occasioned as the *partners* of the petitioner were outside the country.

11. In response it was contended by learned counsel for respondent Nos.3 and 4 that present petition is prima facie not maintainable in view of the statutory provision of appeal provided under section 30 of the Act, content whereof is reproduced herein below:

30. Appeals.---(1) *An appeal shall lie to the [Tribunal] for the following orders of a Commissioner, namely:*

- “(a) an order awarding a compensation a lump-sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump-sum;*
- (b) an order refusing to allow redemption of a half-monthly payment;*
- (c) an order providing for the distribution of compensation among the dependents of a deceased workman, or disallowing any claim of a person alleging himself to be such dependent;*
- (d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of Section 12; or*
- (e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions.*

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided further, that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties.

Provided further, that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appeared against.

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provision of section 5 of the Limitation Act, 1908 (IX of 1908), shall be applicable to appeals under this section.

[(4) All appeals under this section, and all questions under section 27, pending before any High Court immediately before the commencement of the Labour Laws (Amendment) Act, 1975, shall, on such

commencement, stand transferred to and be disposed of by the Tribunal within whose jurisdiction, the cause of action to which the appeal relates or as to case may be the question arose.]”

12. The learned counsel for respondents No.3 & 4 placed reliance upon the case of *SYED MATCH COMPANY LIMITED THROUGH MANAGING DIRECTOR V. AUTHORITY UNDER PAYMENT OF WAGES ACT AND OTHERS*, reported as 2003 PLD 395, and drew the attention of the Court to the following passage:

“8. These are not the cases of lack of complete jurisdiction nor could be termed as mala fide. First appeal is a continuation of suit/application and factual controversy can only be resolved after sifting the evidence brought on record. It is not the discretion of a party to ignore the provisions of appeal and file Constitutional petition instead. Even, if it is assumed for the sake of arguments that the claim of the respondents was on higher side, yet, for this reason alone it could not be asserted that the respondent No.1 had no jurisdiction in the matter. In various cases, this Court has discouraged the tendency to bypass the remedy provided under the relevant statute and to press into service Constitutional jurisdiction of High Court. It is, however, true that in certain cases resort to Constitutional jurisdiction of High Court instead of availing remedy provided under the statute, may be just, but no such material is available on record for ignoring the remedy provided under section 17 of the Act.

10. We are of the view that in order to nullify the effect of section 17(1) (a) of the Act, the jurisdiction of High Court was invoked and it was mala fide. The amount, determined by the respondent No.1 as wages, was never deposited by the petitioners. Accordingly, we set aside the above quoted observations of High Court and leave it to the appropriate forum/Appellate Authority to decide the issue of limitation on merits having taken into consideration all the circumstances of these case. In fact, High Court had no justification to pre-empt the decision of the First Appellate Court on the point of limitation.”

13. In order to adjudicate upon this matter guidance is sought from the decisions of superior judiciary and in addition to the authorities cited by learned counsel for the respondents No.3 & 4,

the ratio of the judgment of the Divisional Bench of this Court in the case of *NAWAB AHMED KHANZADA V/S. AUTHORITY UNDER PAYMENT OF WAGES ACT, 1936 AND COMMISSIONER WORKMEN'S COMPENSATION FOR HYDERABAD & 02 OTHERS*, reported as *2013 PLC 402*, is also pertinent to consider. The relevant portion is reproduced as follows:

“10. Keeping in view hereinabove facts and circumstances of the instant case, we are of the opinion that instant petition, besides being devoid of any merits, has been filed with mala fide intention to circumvent the legal requirement of deposit of the amount in terms of Proviso to clause (a) subsection (1) of section 17 of the Payment of Wages Act, 1936, and to bypass and abandon the forum as provided under the statute. A party cannot be allowed to bypass or abandon the forum provided for the purposes of redressal of grievance under a statute without any lawful and reasonable excuse....”

14. In view of the foregoing, this Court shall endeavor to address the grounds taken by the counsel for the petitioner in seriatim:

- (i). The presence of the managing director of the petitioner in the country or otherwise cannot be deemed a cogent ground for bypassing of the statutory provision of appeal. The petitioner has represented itself to be a juridical legal identity, which by definition is a legal entity distinct from any person who may hold a certain office therein. Therefore, this ground was not found to be sustainable.
- (ii) The objection stipulating that the Impugned Order was passed without jurisdiction could in fact be agitated before the relevant appellate forum and it would fall upon the appellate forum to adjudicate the same in accordance with law. Simply by terming an order to be void cannot be made a

ground to compel this Court to assume the jurisdiction, which otherwise vests in a statutory appellate authority.

- (iii) The argument of learned counsel that the petitioner was unaware of the law cannot be sustained, as ignorance of the law is no defense.

15. The reservation of this Court regarding the delay in presentation of the present petition has also not met with satisfactory reply. Once again it is stated that the petitioner being a juridical legal identity cannot be absolved of its legal obligation simply because certain persons, who may hold offices therein, may be outside the country.

16. It was observed that the Act provided a period of sixty days, from the date of an order, to prefer an appeal there against. Not only did the petitioner never institute an appeal as per the requirements of the law but even the present petition was preferred after four months of the Impugned Order having been passed.

17. It was also observed that the provision of appeal under the Act also contains a provision for the condoning of any delay in filing of the appeal. Therefore, it follows that the appellate Court in terms of the Act had / has ample authority to condone any delay in filing of an appeal if it is satisfied that cogent grounds exist for the grant of such relief.

18. In view of the foregoing it is the finding of this Court that the statutory provision of an appeal may not be bypassed by filing of a constitution petition.

19. The ratio of superior Court judgments, as stated supra, is very clear in this regard and the same could not be distinguished by the learned Counsel of the petitioner herein.

20. Even the condoning of delay in filing of an appeal before an appellate forum, by the High Court, was deprecated in the case of *SYED MATCH COMPANY LIMITED THROUGH MANAGING DIRECTOR V. AUTHORITY UNDER PAYMENT OF WAGES ACT AND OTHERS*, reported as 2003 PLD 395.

21. It is therefore the considered view of this Court that the present petition is not maintainable and hence dismissed alongwith all listed applications.

Announced in open court.

JUDGE

Shahid