



GAHC010122712014

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/714/2014

1. Jatinga Tea Ltd., A Company incorporated under the Companies Act, 1956 and having its registered Office at Kishore Bhawan, 17, R.N. Mukherjee Road, Kolkata- 700001, West Bengal and is being Rep. By its duly authorized attorney holder, Sri Sachindra Narayan Suman, Son of Shri Upendra Narayan Yadav, R/O Jatinga Valley Tea Estate, P.O. Damcherra, Dist. Cachar, Silchar, Assam.
2. Jatinga Valley Tea Estate, P.O. Damcherra in the District of Cachar, Silchar, Assam is being Rep. by its duly authorized attorney holder Sri Sachindra Narayan Suman, Son of Shri Upendra Narayan Yadav, R/O Jatinga Valley Tea Estate, P.O. Kamcherra, Dist. Cachar, Silchar, Assam.

.....Petitioner

-Versus-

1. The State of Assam, Rep. by its Secretary, Ministry of Labour and Employment, Department Govt. of Assam, D-Block, 3rd Floor, Assam Sachivalaya, Dispur, Guwahati- 781005, Assam.
2. The Chief Labour Commissioner, Rajgarh Road, Chanmari, Guwahati- 781003, Assam.
3. The Assistant Labour Commissioner cum Authority under the



Payment of Wages, Cachar, Silchar, Assam.

4. Sri Bhanu Goala, S/O Lt. Guru Dayal Goala, R/O Vill-
Urrunabond Tea Estate, P.O. and P.S. Udharbond in the Dist.
of Cachar, Assam.
5. Barak Valley Cha Karmachari Sangh, Cachar, Silchar, Assam,
Rep. by its Vice President, Sri Dhiresh Chandra Das.

.....Respondents

Advocates :

Petitioner : Mr. G.N. Sahewalla, Senior Advocate
Mr. H.K. Sarma, Advocate

Respondent nos. 1 - 3 : Mr. M. Chetia, Jr. Government Advocate, Assam

Date of Hearing, Judgment & Order : 03.10.2023 & 05.10.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

The present writ petition under Article 226 of the Constitution of India is preferred assailing an Order dated 16.12.2013 passed by the Assistant Labour Commissioner, Cachar, Silchar [the respondent no. 3] as an Authority under the Payment of Wages Act, 1936 in Case no. PW.06/2011. By the Order dated 16.12.2013, the respondent no. 3, that is, the Authority under the Payment of Wages Act, 1936 rejected a petition filed by the petitioner under Order IX Rule 13 r/w Section 151 of the Code of Civil Procedure [CPC], 1908, as amended, seeking setting aside of an Order dated 02.05.2013 passed *ex-parte* against the

petitioner by the said Authority in Case no. PW.06/2011.

2. A brief narration of the background events leading to the passing of the Order dated 16.12.2013 appears necessary at the inception.

2.1. The petitioner no. 1 is a company incorporated under the Companies Act, 1956 and the petitioner no. 2 is a unit of the petitioner no. 1 company. The petitioner no. 2, M/s Jatinga Valley Tea Estate runs a tea estate by the same name and style, located at Damcherra in the district of Cachar, Assam.

2.2. The respondent no. 4 claiming to be a former workman-employee in M/s Jatinga Valley Tea Estate, filed an application before the respondent no. 3, who is an Authority under Section 15 of the Payment of Wages Act, 1936 *inter alia* to decide a claim regarding non-payment of wages or delayed payment of wages, claiming that the employer, M/s Jatinga Valley Tea Estate did not make payment of the salary and other benefits to him like Variable Dearness Allowance [VDA], Travelling Allowance [TA], fuel charges, medical benefits, etc. for the periods indicated therein. The respondent no. 4 had thereby, claimed that the total amount payable towards delayed/non-payment of wages and other benefits was Rs. 40,520/-. On receipt of the said application from the respondent no. 4, the respondent no. 3 registered the application as Case no. PW.06/2011.

2.3. In the proceedings before the Authority under the Payment of Wages Act, 1936 [the respondent no. 3], the respondent no. 4-workman [ex] was represented by M/s Barak Valley Cha Karmachari Sangh, Silchar through its Vice-President on being duly authorized by the respondent no. 4-workman [ex], on 11.12.2011. The Authority under the Payment of Wages Act, 1936 [the respondent no. 3] decided to proceed with the said claim application and the claim application was finally decided by passing an Order dated 02.05.2013 wherein it was observed that the claim filed by the respondent no. 4-workman [ex] under the provisions of the Payment of Wages Act, 1936 was to be treated as true and genuine and as such, the respondent no. 4-workman [ex] as the claimant, would be entitled to get all his entitlements and due benefits. By holding so, the Authority under the Payment of Wages

Act, 1936 directed the Manager, M/s Jatinga Valley Tea Estate to pay a sum of Rs. 1,21,560/- including the cost of the proceedings within a period of 45 days from the date of issuance of the said Order. The sum of Rs. 1,21,560/- comprised of two parts, *firstly*, a sum of Rs. 40,520/- towards non-payment/delayed payment of wages and other benefits to the respondent no. 4-workman [ex] and, *secondly*, a sum of Rs. 81,040/- [= Rs. 40,520/- x 2], which was two times the sum awarded as non-payment/delayed payment of wages and other benefits as compensation. The Order dated 02.05.2013 was passed *ex-parte* by the Authority under the Payment of Wages Act, 1936 in view of absence of the employer of the respondent no. 4-workman [ex], that is, M/s Jatinga Valley Tea Estate.

2.4. From the contents of the Order dated 02.05.2013, which is annexed as Annexure-IV to this writ petition, it can be noticed that the Authority under the Payment of Wages Act, 1936 had observed that after registration of the claim application, notice was served upon the employer, M/s Jatinga Valley Tea Estate for filing of written statement or objection, if any, and a date was fixed for appearance and/or filing of written statement/objection on 02.04.2012. As no response was received from the employer pursuant to the said notice, the Authority fixed the next date on 04.05.2012. The Authority had observed that on 04.05.2012 also, appearance was not made on behalf of the employer, M/s Jatinga Valley Tea Estate. The Authority had further observed that a number of dates were fixed thereafter, for appearance of the employer, but the employer was found unrepresented on those occasions also. The respondent no. 4-workman [ex] as the claimant had, in the meantime, filed his affidavit on 23.11.2012 in support of his claim. The Authority had observed that the last opportunity was given to the employer for its representation by fixing a date on 06.10.2012. But on that occasion also, the employer was found unrepresented. The Authority had thereafter, posted the case on 29.04.2013 as the final date for appearance of the employer. When on 29.04.2013 also the employer was found absent without any information, the Authority had thereafter, taken the decision to proceed *ex-parte* against the employer of the respondent no. 4-workman [ex]. After deciding to proceed *ex-parte* against the employer, M/s Jatinga Valley Tea Estate, the Authority had recorded a finding that the amount claimed by the respondent no. 4-workman [ex] under the provisions of the Payment of Wages Act, 1936 was found to be just. With such finding, the



Order dated 02.05.2013 came to be passed by the Authority with the direction to the employer, M/s Jatinga Valley Tea Estate to make payment of the sum of Rs. 1,21,560/-, calculated in the afore-stated manner, within the period of 45 days therefrom.

2.5. It was after passing of the Order dated 02.05.2013 *ex-parte* against the employer, M/s Jatinga Valley Tea Estate, a petition purportedly under Order IX Rule 13 r/w Section 151, CPC came to be preferred on 22.05.2013 before the Authority seeking setting aside of the Order dated 02.05.2013 passed *ex-parte* against the petitioner-employer by the Authority under the Payment of Wages Act, 1936. In the said petition filed on 22.05.2013, the petitioners' side i.e. the employer had averred that it did not receive any notice prior to the Order dated 02.05.2013 passed *ex-parte* against it in Case no. PW.06/2011. It was contended that it received a notice only on 06.05.2013 along with a copy of the Order dated 02.05.2013. It was pleaded that the petitioner-employer had no knowledge of the date of hearing fixed on 29.04.2013 and it came to know about the proceedings before the Authority only on 06.05.2013 when the notice was delivered to it. It was mentioned by the petitioner-employer therein to the effect that had it been notified earlier prior to 29.04.2013, it could have contested the case and cross-examined the witnesses from the claimant's side. But, since it received the information about the proceedings of Case no. PW.06/2011 pending before the Authority only on 06.05.2013, it was prevented by sufficient cause from appearing before the Authority on 29.04.2013. With such projections, the petitioner-employer had sought the Authority to exercise its power under Order IX Rule 13, CPC to set aside the Order dated 02.05.2013 passed *ex-parte* against it.

3. On receipt of the said application under Order IX Rule 13 of r/w Section 151, CPC, the Authority under the Payment of Wages Act, 1936 after hearing the petitioners' side, had rejected the same by the impugned Order dated 16.12.2013 on the ground that there was no provision under the Payment of Wages Act, 1936 to consider the application under the provisions of Order IX Rule 13 r/w Section 151, CPC for re-opening the case after passing the Final Order. The Authority had further made a direction that the Order dated 02.05.2013 would continue to stand.

4. Heard Mr. G.N. Sahewalla, learned Senior Counsel assisted by Mr. H.K. Sarma, learned counsel for the petitioner; and Mr. M. Chetia, learned Junior Government Advocate, Assam for the respondent nos. 1, 2 & 3. Notices were duly served upon the respondent nos. 4 & 5. The respondent nos. 4 & 5 have also jointly filled an affidavit-in-opposition on 27.02.2020. The respondent nos. 4 & 5 had also entered appearance through their engaged counsel, whose names are reflected in the cause-list. When the writ petition was listed earlier on 28.09.2023, the learned engaged counsel for the respondent nos. 4 & 5 were found absent. They were also found absent when the writ petition was listed for hearing on 03.10.2023. In view of such repeated absence on the part of the learned engaged counsel for the respondent nos. 4 & 5, this Court has to proceed with for adjudication of the writ petition in their absence.

5. From a bare perusal of the impugned Order dated 16.12.2013, it is discernible that the Authority under the Payment of Wages Act, 1936 had considered the matter on the premise that there was no provision under the Payment of Wages Act, 1936 to consider a petition filed under Order IX Rule 13 r/w 151, CPC for re-opening a case after passing an order on the matter of non-payment/delayed payment of wages and other benefits under the Payment of Wages Act, 1936.

6. It is apt to observe herein that the Order dated 02.05.2013 was passed by the Authority in exercise of the powers conferred on it under the provisions of Section 15 of the Payment of Wages Act, 1936. The earlier Order dated 29.04.2013 passed by the Authority, thereby, deciding to proceed *ex-parte* against the employer was also passed by the Authority in exercise of such power. The provisions of Section 15 of the Payment of Wages Act, 1936 has provided for claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims. For ready reference, Section 15 is quoted hereinbelow :

Section 15 : Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims.

[1] The appropriate Government may, by notification in the Official Gazette, appoint

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- [a] any Commissioner for Workmen's Compensation; or
- [b] any officer of the Central Government exercising functions as, -
 - [i] Regional Labour Commissioner; or
 - [ii] Assistant Labour Commissioner with at least two years' experience; or
- [c] any officer of the State Government not below the rank of Assistant Labour Commissioner with at least two years' experience; or
- [d] a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947 [14 of 1947] or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State; or
- [e] any other officer with experience as a Judge of a Civil Court or a Judicial Magistrate,

as the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims :

Provided that where the appropriate Government considers it necessary so to do, it may appoint more than one authority for any specified area and may, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

[2] Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-section [1], may apply to such authority for a direction under sub-section [3] :

Provided that every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be :

Provided further that any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

[3] When any application under sub-section [2] is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of

wages under Section 3, or give them an opportunity of being heard, and, after such further enquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding three thousand rupees but not less than one thousand five hundred rupees in the latter, and even if the amount deducted or delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the authority may think fit, not exceeding two thousand rupees :

Provided that a claim under this Act shall be disposed of as far as practicable within a period of three months from the date of registration of the claim by the authority:

Provided further that the period of three months may be extended if both parties to the dispute agree for any bona fide reason to be recorded by the authority that the said period of three months may be extended to such period as may be necessary to dispose of the application in a just manner:

Provided also that no direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to -

[a] a bona fide error or bona fide dispute as to the amount payable to the employed person; or

[b] the occurrence of an emergency, or the existence of exceptional circumstances, the person responsible for the payment of the wages was unable, in spite of exercising reasonable diligence; or

[c] the failure of the employed person to apply for or accept payment.

[4] If the authority hearing an application under this section is satisfied -

[a] that the application was either malicious or vexatious, the authority may direct that a penalty not exceeding three hundred seventy-five rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application; or

[b] that in any case in which compensation is directed to be paid under sub-section [3], the applicant ought not to have been compelled to seek redress under this section, the authority may direct that a penalty not exceeding three hundred seventy-five rupees be paid to appropriate Government by the employer or other person

responsible for the payment of wages.

[4A] Where there is any dispute as to the person or persons being the legal representative or representatives of the employer or of the employed person, the decision of the authority on such dispute shall be final.

[4B] Any inquiry under this section shall be deemed to be a judicial proceeding within the meaning of Sections 193, 219 and 228 of the Indian Penal Code [45 of 1860].

[5] Any amount directed to be paid under this section may be recovered –

[a] if the authority is a Magistrate, by the authority as if it were a fine imposed by him as Magistrate, and

[b] if the authority is not a Magistrate, by the Magistrate to whom the authority makes application in this behalf, as if it were a fine imposed by such Magistrate.

7. In view of Clause [c] of sub-section [1] of Section 15 of the Payment of Wages Act, 1936 an Assistant Labour Commissioner with atleast two years' of experience, can be appointed as an Authority to hear and decide for any specified area all claims arising out of deduction from wages, or delay in payment or non-payment of wages, of persons employed or paid in that area including all matters incidental to such claims. As per the provisions of sub-section [2], where contrary to the provisions of the Payment of Wages Act, 1936 any deduction has been made from the wages of an employee, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector under the Act, or any other person acting with the permission of the Authority appointed under sub-section [1], may apply to such Authority for a direction under sub-section [3]. As per sub-section [3] of Section 15, when any application under sub-section [2] is entertained, the Authority shall hear the applicant and the employer or other person responsible for the payment of wages under Section 3, or give them an opportunity of being heard, and, after such further enquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under the Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the Authority may think fit, not exceeding ten times the

amount deducted in the former case and not exceeding ₹ 3,000/- but not less than ₹ 1,500/- in the latter, and even if the amount deducted or delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the Authority may think fit, not exceeding ₹ 2,000/-.

8. As per Section 3 of the Payment of Wages Act, 1936, every employer is responsible and obligated for the payment of wages required to be paid under the Payment of Wages Act, 1936 to persons employed by it.

9. The issue raised in the present writ petition is with regard to the rejection of the petitioner's application preferred under Order IX Rule 13 r/w Section 151, CPC. Rule 13 of Order IX, CPC has provided for setting aside of a decree passed *ex-parte* against defendant[s]. It has been laid down that in any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. The first proviso to Rule 13, Order IX, CPC has provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also. In the second proviso, it is mentioned that no Court shall set aside a decree passed *ex-parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. The provisions contained in Order IX Rule 13, CPC has, in essence, provided for an opportunity to a party to approach the Court which has passed an order *ex-parte* against it, with the prayer to set aside the *ex-parte* order. Such *ex-parte* order can be set aside by the Court provided the party approaching it is able to show that the notice calling for its appearance was not duly served on it or that it was prevented by any other sufficient cause from appearing before the Court on the date fixed for hearing.

10. To find out the legality and validity of the impugned Order dated 16.12.2013 in the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India, it is required to find out as to whether the Authority under the Payment of Wages Act, 1936 has the authority and jurisdiction to set aside an order passed by it *ex-parte* against a party in an application preferred under Section 15 of the Payment of Wages Act, 1936.

11. Under Section 26 of the Payment of Wages Act, 1936, the Appropriate Government has been empowered to make rules. As per sub-section [1] of Section 26, the Appropriate Government may make rules to regulate the procedure to be followed by the Authorities and Courts referred to in Section 15 and Section 17. In exercise of the powers conferred under sub-section [1] of Section 26 of the Payment of Wages Act, 1936, the Central Government has framed a set of rules, 'the Payment of Wages [Procedure] Rules, 1937'. Similarly, the State Government in exercise of powers conferred by Section 26 of the Payment of Wages Act, 1936, has framed a set of rules, 'the Assam Payment of Wages [Procedure] Rules, 1981'.

11.1. Rule 8 of the Payment of Wages [Procedure] Rules, 1937 read as under :-

8. Appearance of parties.—

[1] If the application is entertained, the Authority shall call upon the employer by a notice in Form E to appear before him on a specified date together with all relevant documents and witnesses, if any, and shall inform the applicant of the date so specified.

[2] If the employer or his representative fails to appear on the specified date, the Authority may proceed to hear and determine the application ex-parte.

[3] If the applicant fails to appear on the specified date, the Authority may dismiss the application :

Provided that an order passed under sub-rule [2] or sub-rule [3] may be set aside and the application re-heard on good cause being shown within one month of the date of the said order, notice being served on opposite party of the date fixed for

rehearing.

11.2. In the similar manner, Rule 9 of the Assam Payment of Wages [Procedure] Rules, 1981 has provided as under :-

9. Appearance of parties.—

[1] If the application is entertained, the authority shall call upon the employer by a notice in Form E to appear before him on a specified date at the place of fixed for the purpose together with all relevant documents and witnesses, if any, shall inform the applicant of the date and place so specified :

Provided that if necessary or thought to be expedient the notice shall be served on the employer through a messenger.

[2] If the employer or his representative fails to appear on the specified date the authority may proceed to hear and determine the application ex-parte.

[3] If the applicant fails to appear on the specified date, the authority may dismiss the application :

Provided that an order passed under sub-rule [2] or sub-rule [3] may be set aside and the application re-heard on good cause being shown within one month of the date of the said order, notice being served on opposite party of the date fixed for re-hearing.

12. From a conjoint reading as well as a disjoint reading of the provisions contained in Rule 8 of the Payment of Wages [Procedure] Rules, 1937 and Rule 9 of the Assam Payment of Wages [Procedure] Rules, 1981, it is evidently clear that after an application under sub-section [2] of Section 15 of the Payment of Wages Act is entertained by the Authority, the Authority is required to call upon the employer by a notice in prescribed Form-E to appear before him on a specified date together with all relevant documents and witnesses, if any, and the applicant is also to be informed about the specified date. If the employer or its representative fails to appear on the specified date, the Authority may proceed to hear and determine the application *ex-parte*. On the other hand, if the applicant fails to appear on the specified date, the Authority may dismiss the application. The proviso thereof has laid down that an order determining an application *ex-parte* due to non-appearance of the

employer or its authorized representative or dismissing an application due to non-appearance of the applicant on the specified date, can be set aside and the application can be re-heard provided good cause is shown within 1 [one] month from the date of passing of such order, with the notice being served on the opposite party of the date fixed for re-hearing. Thus, the provisions contained in the proviso to Rule 8 of the Payment of Wages [Procedure] Rules, 1937 and proviso to Rule 9 of the Assam Payment of Wages [Procedure] Rules, 1981, in essence, are akin to the provisions contained in Order IX Rule 13 of the Code of Civil Procedure, 1901 [CPC] in that it has provided for setting aside of an order passed *ex-parte* against a party and for re-hearing of the application, provided such party is able to show cause reason about its failure to appear on the specified date. The requirements of the proviso to Rule 8 of the Payment of Wages [Procedure] Rules, 1937 and Rule 9 of the Assam Payment of Wages [Procedure] Rules, 1981 are that, *firstly*, the applicant must be able to show good cause; and *secondly*, the application has to be made within a period of one month from the date of the passing of the order whereby the Authority has decided to proceed *ex-parte*.

13. In **Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others**, reported in 1980 Supp SCC 420, relied upon and referred to by the learned Senior Counsel appearing for the petitioner, the Hon'ble Supreme Court of India has considered the question whether the Industrial Tribunal constituted under Industrial Disputes Act, 1947 after passing an *ex-parte* order, had become *functus officio* and therefore, had no jurisdiction to set aside the *ex-parte* award. It was observed in that context that a tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its function effectively for the purpose of doing justice between the parties. It has been held therein to the effect that although there is no express provision in the Industrial Disputes Act or the rules framed thereunder giving the tribunal jurisdiction to set aside its *ex-parte* award, the Tribunal should be considered as invested with such incidental or ancillary powers unless there is indication in the statute to the contrary. Be that as it may, such is not the case here. As has already been observed above, the proviso to Rule 8 of the Payment of Wages [Procedure] Rules, 1937 and proviso to Rule 9 of the Assam Payment of Wages [Procedure] Rules, 1981 has provided the power to the Authority to set aside an order

passed by it *ex-parte* earlier which power is akin to the power laid down in Order IX Rule 13 of the CPC. At the cost of repetition, it may be stated that the conditions required to be considered by the Authority while dealing with an application seeking setting aside of an *ex-parte* order are, *firstly*, whether the application seeking setting aside of the *ex-parte* order is filed within 1 [one] month from the date of the *ex-parte* order; *secondly*, whether notice is served on the opposite party as regards the date fixed for re-hearing; and **thirdly**, whether the applicant has been able to show good cause.

14. The respondent no. 1, the respondent no. 3 and the respondent nos. 4 & 5 in their respective counter affidavits have contended that the petitioners' side had defaulted from appearing before the Authority in response to a number of earlier notices sent from the end of the Authority and the Authority was, thus, justified in rejecting the application of the petitioner preferred for setting aside of the *ex-parte* Order dated 29.04.2013 in view of such repeated failures to appear before the Authority earlier.

14.1. It has been observed by the Hon'ble Supreme Court of India while interpreting the provisions of Order IX Rule 13, CPC in **G.P. Srivastava vs. R.K. Raizada**, [2000] 3 SCC 54, as under :-

7. Under Order 9 Rule 13 CPC an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex-parte decree. The words 'was prevented by any sufficient cause from appearing' must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient

cause' for non-appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex-parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.

14.2. The aforesaid view expressed in **G.P. Srivastava** [supra] has been reiterated by the Hon'ble Supreme Court of India in **A. Murugesan vs. Jamuna Rani**, reported in [2019] 20 SCC 803.

14.3. Having regard to the principles outlined in the afore-mentioned two decisions, this Court is of the considered view that the same principles are applicable when an application is preferred before the Authority under the Payment of Wages Act, 1936 seeking setting aside of an order passed by the Authority deciding to proceed *ex-parte* against a party. It was on 29.04.2013 the Authority decided to proceed *ex-parte* against the employer on the premise that the employer side failed to appear on that day despite sending of notice. For the purpose of examining the application seeking set aside the Order dated 29.04.2013, the Authority is not required to take into consideration the non-appearance on the other previous dates as it did not decide to proceed *ex-parte* on those dates.

15. In a writ petition under Article 226 of the Constitution of India, the Court does not act as a court of appeal. A writ of certiorari is to be exercised in cases where any judicial or quasi-judicial or subordinate tribunal or a body or an officer has acted wholly without jurisdiction, or in excess of jurisdiction, or in violation of the principles of natural justice, or has refused or has failed to exercise a jurisdiction vested in them or there is an apparent error on the face of the record and such act, omission or error or failure has resulted in

manifest injustice. It is well settled that if an Authority has the power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power exists and can be traced to a source available in law [Ref : **N. Mani vs. Sangeetha Theatre**; [2004] 12 SCC 278]. In the same analogy, mention of a wrong provision of law in an application does not take away the power and jurisdiction of an authority to set aside an order passed by it, thereby, deciding to proceed *ex-parte* against a party if the source of power is available to it under the law and mere mention of a wrong provision of law cannot stand in the way for an authority to exercise such power and jurisdiction. Thus, mere mention of the provision of Order IX Rule 13, CPC by the applicant-employer in the application seeking setting aside of the Order dated 29.04.2013 could not have dissuaded the Authority under the Payment of Wages Act, 1936 from considering the application and from exercising the power and jurisdiction which such Authority has been vested with under the rules framed under Section 26 of the Payment of Wages Act, 1936.

16. Reverting back to the facts of the case, it is found that the observations made by the Authority under the Payment of Wages Act, 1936 in its Order dated 16.12.2013 that there is no provision under the Payment of Wages Act, 1936 to reopen the case after passing any order/award of *ex-parte* is clearly an error wherein the Authority despite having the power and jurisdiction provided by the Rules framed under Section 26 of the Payment of Wages Act, 1936 to set aside an order passed by it *ex-parte* earlier, has failed to exercise such power and jurisdiction. In such view of the matter, the impugned Order dated 16.12.2013 passed by the Authority under the Payment of Wages Act, 1936 in Case no. PW.06/2011 is found to have suffered from failure on the part of the Authority to exercise a jurisdiction vested in it under the law and consequently, the impugned order is liable to be interfered with. It is accordingly set aside and quashed. However extensive the jurisdiction may be, this Court should not convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made. With the setting aside of the Order dated 16.12.2013, the matter stands remanded to the Authority under the Payment of Wages Act, 1936, that is, the Assistant Labour Commissioner, Cachar, Silchar to proceed with the matter from the stage of



consideration of the application submitted by the applicant-petitioner seeking setting aside of the Order dated 29.04.2013 passed in Case no. PW.06/2011, thereby, deciding to proceed *ex-parte*, afresh. While considering the application afresh, the Authority shall take into consideration the conditions mentioned in the extant rule providing the Authority with the power and jurisdiction to set aside an Order deciding to proceed *ex-parte* against a party to the proceedings.

17. It is observed, for the purpose of facilitating an expeditious consideration of the Order, that the petitioner side shall appear before the Authority on 06.11.2023 by presenting a certified copy of this Order. The learned Senior Counsel appearing for the petitioner has fairly submitted that for the purpose of appearance on 06.11.2023, the petitioner would not insist for issuance of any notice by the Authority. It is expected that on such appearance of the petitioner before it on 06.11.2023, the Authority would proceed to decide the application in an expeditious manner, preferably within a period of 3 [three] months after ensuing proper service of notice upon the applicant in Case no. PW.06/2011.

18. With the observations made and the direction given above, the writ petition is allowed to the extent indicated. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant