

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**WP (C) No. 1066/2020
CM Nos. 2523/2020**

Reserved On: 7th of December, 2023
Pronounced On: 29th of December, 2023.

Sahil Gupta S/O Late Col. R. R. Gupta
R/O 34 Sector-A, Extension, Sainik Colony, Jammu,
Proprietor M/S B. D. Security Pvt. Ltd.,
3rd Building Greater Kailash, Jammu/
Aziz Complex 1st Floor, Nayak Bagh,
Nowgam, Srinagar.

... Petitioner

Through: -
Mr Farhat Zia, Advocate.

V/S

- 1. Union Territory of J&K through**
Commissioner/ Secretary, Labour & Employment Department,
Civil Secretariat, Jammu/ Srinagar.
- Commissioner under Employees Compensation Act, 1923,
District Srinagar (Assistant Labour Commissioner), Srinagar.
- Masooda W/O Late Ghulam Ali Lala
R/O Kawdara, Srinagar,
At present Shalimar Colony, Lane No.3,
Dr Ali Jan Road, Eidgah, Srinagar,
- Chairman, Jammu & Kashmir Bank,
Corporate Office, TRC, Srinagar,
- Branch Head, Jammu & Kashmir Bank,
Hawal, Srinagar.

... Respondents

Through: -
None for R-1 & 2;
Ms Rasheeda Shaheen, Advocate for R-3; and
Mr A. Hanan, Advocate for R-4 & 5.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE

(JUDGMENT)

01. Through the medium of this Writ Petition filed under Article 226 of the Constitution of India, the Petitioner-Sahil Gupta seeks issuance

of appropriate Writ, Order or direction, including a 'Writ of Certiorari', thereby quashing the *ex-parte* Award dated 11th of July, 2018 (for short 'the impugned Award') passed in a claim Petition titled '**Masooda v. Sahil Gupta & Ors.**' by the Respondent No.2-Assistant Labour Commissioner, as Commissioner under the Workmen's Compensation Act, 1923 (for short 'the Commissioner'), together with Order dated 12th of February, 2022 passed by him, rejecting the application filed by the Petitioner seeking setting aside of the *ex-parte* Award dated 11th of July, 2018 and with a further 'Writ of Prohibition' directing not to act upon the recovery notice No. WC/Sgr/2020/88 dated 22nd of June, 2020 issued by the Respondent No.2 initiated against the Petitioner, for recovery of awarded compensation in the amount of Rs.8,42,594/-.

02. The factual matrix of the case is that the Respondent No.3 herein, namely, Masooda, filed an application for assessment of compensation, its recovery and payment, asserting therein that her son Mohammad Altaf Lala was an employee with the Respondent-Sahil Gupta, proprietor M/S B. D. Security Pvt. Ltd./ Petitioner herein; that the said son of the Respondent No.3 herein was engaged as a Security Guard by the Petitioner herein and deployed with the Respondent No.2-Jammu & Kashmir Bank at Srinagar for security purposes; that, on 7th of March, 2016, during and in the course of his employment with the Respondents, the said Mohammad Altaf Lala (hereinafter referred to as 'the deceased') received a bullet shot from a weapon (Gun) of the fellow Guard, which pierced into his chest, who was immediately shifted to SKIMS, Soura, by the Bank staff, but unfortunately, the doctors declared him brought dead; that, in this connection, an FIR was got registered at Police Station, Nigeen, Srinagar; that the age of the deceased, at the time of his death, was stated to be 38 years with monthly wages of Rs.7,000.

03. The mother of the deceased-Mohammad Altaf Lala, who is Respondent No.3 in this Petition, filed a case claiming compensation for the death of her son during the employment of Respondent No.1 as a Security Guard before the Commissioner under Workmen's Compensation, Act

1923 (Assistant Labour Commissioner), Srinagar, who, vide impugned Award dated 11th of July, 2018, granted a compensation to the tune of Rs.6,63,460/-, together with interest @ 12 percent per annum w.e.f. 17th of April, 2016 till 30th of June, 2018 of Rs.1,79,134/-, totaling to Rs.8,32,594/- in favour of the legal dependents of the deceased Mohammad Altaf Lala and, through the award, the direction was issued to the Respondent-Sahil Gupta/ Petitioner herein to deposit the aforesaid awarded amount within 30 days from the date of receipt of deposit notice, failing which penalty shall be invoked. The compensation was assessed in terms of Section 4(A) read with Schedule IV of the Workmen's Compensation Act, 1923.

04. The Petitioner-Sahil Gupta, having been aggrieved of the aforesaid impugned Award, has challenged the same through the medium of this Writ Petition, *inter alia*, on the following grounds:

“A. That the impugned order dated 11-07-2018 (Annexure I-A) passed by Respondent No.2 ALC Srinagar in case titled Masooda v/s Sahil Gupta & Ors together with impugned order dated 12-2-2020 (Annexure I-B) passed by ALC Srinagar rejecting the application filed by the petitioner seeking setting aside of the *exparte* judgment dated 11-07-2018 and impugned Recovery notice bearing No. WC/Sgr/2020/88 dated 22-06-2020 (Annexure I-C) issued by Respondent No.2 Asstt. Labour Commissioner Srinagar and further proceedings initiated by the respondent No.2 against the petitioner on the premise of orders impugned and impugned recovery notice being illegal and bad in law and being an outcome of colorable exercise of jurisdiction which is otherwise not vested with the said authority. The case in hand has not been heard on merits from the way go and in the facts and circumstances of the case the Respondent No.2 on being approached by the petitioner ought to have set aside the *exparte* award dated 11-7-2018 and allowed the petitioner to defend the case, file the reply and decide the matter on its merits, however, the same was not done and principles of natural justice have been thrown to wind;

B. That the impugned *exparte* order dated 11-7-2018 (Annexure I-A) was passed by the respondent No.2 ALC Srinagar without following the process of law and summons for appearance were issued on an incorrect address and also the company M/S B. D. Security was not even arrayed as party respondent in case titled ‘Masooda V/S Sahil Gupta & Ors.’ and instead the petitioner Sahil Gupta was arrayed as respondent in the claim petition. No justification for proceeding *exparte* was cited in the said order. Moreover, the respondent No.3 failed to array ESIC as a party respondent in the claims application which covered the case of the deceased and the liability to compensate the loss was that of the ESIC and not the petitioner who was unnecessarily arrayed as a respondent and found liable to pay the compensation when fact of the matter was that the petitioner at his end had taken all the steps to process the case of the deceased for payment through ESIC. Moreover, it is humbly submitted

that a cursory look at the impugned award dated 11-07-2018 would show that the Respondent No.2 has not even discussed the gist of evidence adduced before the said Court in support of the claims petition and passed the order against the petitioner;

C. That the impugned order dated 12-2-2020 (Annexure I-B) has been passed by ALC Srinagar rejecting the application filed by the petitioner seeking setting aside of the exparte judgment dated 11-07-2018 by one stroke of pen and without affording any opportunity of being heard to the counsel of the petitioner and in his absence and the order dated 12-2-2020 is a non-speaking one. The Respondent No.2 has held that there is no provision in the Workmen's Compensation Act for reviewing the final order being oblivious of the Rules framed under the Workmen's Compensation Act wherein Rule 41 in clear, unambiguous and unequivocal terms makes certain provisions of Civil Procedure Code applicable including an application for setting aside exparte award under Order 9 Rule 13 CPC. Therefore, the impugned order passed by the Respondent No.2 besides being a non-speaking one and passed on a wrong legal premise cannot sustain in the eyes of law and liable to be quashed;

D. That a cursory look at the impugned order dated 12-2-2020 (Annexure I-B) would show the non-application of mind by the Respondent No.2 as he has decided and dismissed the application under order 9 Rule 13 CPC filed by petitioner for setting aside exparte award when as a matter of act the said application was yet to be considered since the application for condonation of delay was to be considered in the first instance and that the respondent No.3 Mst. Masooda had also filed her objections to the application for condonation of delay. On this count alone, the impugned order dated 12-2-2020 and the resultant impugned recovery notice bearing No. WC/Sgr/2020/88 dated 22-06-2020 (Annexure I-C) cannot sustain in the eyes of law and the impugned order dated 12-02-2020 along with impugned recovery notice bearing No. WC/Sgr/2020/88 dated 22-06-2020 are liable to be set aside/ quashed by orders of this Hon'ble Court;

E. That the impugned recovery notice bearing No. WC/Sgr/2020/88 dated 22-06-2020 (Annexure I-C) issued by Respondent No.2 Asstt. Labour Commissioner, Srinagar is again bad in law as the petitioner has been saddled with the liability of an amount of Rs.8,42,594/- when fact of the matter is that the case of the deceased employee/ son of the respondent no.3 was covered by the ESIC and the case of the deceased was also processed by the petitioner and she is receiving pension which fact has been concealed through and through by her before the court below;

F. That the reply submitted by the petitioner dated 25-7-2018 to the demand notice dated 17-7-2018 was also not considered by the respondent No.2 and proceeded in the matter in hot haste thereby infringing and violating the just fundamental rights of the petitioner guaranteed by the Constitution of India; and

G. That the respondent No.3 concealed very important and material facts from the court of ALC Srinagar/ Respondent No.2 about receiving two cheques bearing No. 684561 for an amount of Rs.6000/- dated 29-03-2016 on account of wages for the month of February, 2016 and cheque No. 695151 for Rs.5,000/- dated 30-03-2016 on account of interim relief both drawn on J&K Bank Branch Natipora, Srinagar much before the filing of claims petition."

05. Pursuant to notice having been issued, the Respondent/ Claimant-Masooda filed her Reply to the Petition, asserting therein that the deceased employee, namely, Late Mohammad Altaf Lala, during and in the course of employment, received a bullet shot from the weapon of a fellow Guard into his chest, resulting into his death, for which, accordingly, FIR was lodged in Police Station, Nowhatta, Srinagar; that the deceased, at the time of his death, was aged about 38 years and his monthly wages were Rs.7,000/-; that a case was filed before the Respondent No.2- Commissioner, for assessment and recovery of compensation as per law, as the Petitioner company failed to pay any compensation on account of the death of the son of the Respondent/Claimant, as such, she filed a compensation claim before the Commissioner in terms of the Employees Compensation Act, 1923, stating therein that an amount of Rs.6,000/- was paid to the Respondent No.3 on account of unpaid wages of the deceased employee, along with an amount of Rs.5,000/- as interim relief and nothing else by way of compensation; that the Petitioner was served summons by the Commissioner on his residential address as well official address, however, the Petitioner did not choose to attend and pursue the case and the matter was finally decided in *ex-parte* against him by following the due process of law by the Commissioner and an award of Rs.8,42,596/-, including interest, was passed in favour of the Respondent/ Claimant on 11th of July, 2018.

06. It was alleged that after a gap of about 7 months, an application for setting aside the impugned *ex-parte* Award dated 11th of July, 2018 was filed by the Petitioner before the Commissioner, that was disposed of on 12th of February, 2020. Subsequently, final recovery notice dated 22nd of June, 2020 was issued by the Respondent No.2 against the Petitioner for deposit of the awarded amount; that before the final deposit notice, a series of notices, including dated 17th of July, 2018 and 1st of November, 2018 were issued to the Petitioner with direction to deposit the decreed amount, but with no compliance from the Petitioner company.

07. Heard learned Counsel for the parties, perused the record and considered the matter.

08. Under the Employees Compensation Act, 1923, the Order passed by the Commissioner, under the Act, is appealable before the High Court within a period of 60 days on a substantial question of law, after obtaining a certificate from the Commissioner to the effect that the Appellant has deposited the amount payable under the order appealable against. It appears that the Appellant, in order to circumvent the provision of deposit of the award impugned with the Commissioner, has, instead of filing the appeal, invoked the Writ jurisdiction of this Court by filing the instant Writ Petition. The Writ jurisdiction is in the nature of discretion and cannot be a substitute for a statutory provision of appeal. When an alternate efficacious remedy is available through the statutory Appeal, the High Court normally does not invoke the writ jurisdiction to decide the matter, which can be decided in appeal.

09. A Co-Ordinate Bench of this Court, while placing reliance on the law laid down by the Hon'ble Apex Court in cases titled '**M. G. Abrol v. Shanti Lal & Company, AIR 1996 SC 197**' and '**Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya Sitapur (UP) and Ors., AIR 1987 2186**', and in a Writ Petition bearing OWP No. 498/2014 titled '**Director, Rural Development & Ors. v. Assistant Commissioner & Ors.**, decided on 23rd of April, 2021, which has been referred to and relied upon by the learned Counsel for the Petitioner, has held that it is well settled that where the Order of the Authority is patently without jurisdiction, the availability or exhausting of alternate remedy is no bar to invoke the extraordinary Writ jurisdiction of the High Court by the aggrieved party and that the High Court should not refuse to exercise its Writ jurisdiction, on the ground of existence of an alternate remedy in such cases.

10. Applying the afore-stated principles laid down by the Hon'ble Apex Court and this Court to the facts and circumstances of the present case, when the Commissioner has decided the claim of the

Respondent/Claimant in *ex-parte* as the Petitioner against whom the claim had been lodged in terms of Workmen's Compensation Act, 1923, the Petitioner has failed to show as to how the impugned Award can be bracketed patently passed without jurisdiction.

11. The Writ jurisdiction of this Court, thus, cannot be exercised, as there seems no perversity in the Award and the same is not passed without jurisdiction. The Petitioner has not been able to point out any ground of challenge in this behalf. Therefore, the Writ is not maintainable against the impugned Award dated 11th of July, 2018, in absence of having been passed without jurisdiction.

12. The Petitioner, in this case, has not only challenged the *ex-parte* Award passed against him by the learned Commissioner, but also the Order rejecting the application for setting aside the said *ex-parte* Award, holding that he has no jurisdiction to review his Award to set aside the same. This requires to be examined in terms of the applicable statutory provision on the subject.

13. Section 32 of the Workmen's Compensation Act, 1923 empowers the State Governments to make Rules to carry out the purpose of the Act. Clause (c) of Sub-Section (2) of Section 32 reads, thus:

“32. Power of the State Government to make Rules:

(1) The State Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a)

(b)

(c) for prescribing the procedure to be followed by Commissioners in the disposal of cases under this Act and by the parties in such cases.”

In exercise of the powers conferred by Sub-Section (2) of Section 32 of the Act of 1927, as afore-stated, the Government of Jammu & Kashmir has enacted the Jammu & Kashmir Workmen's Compensation

Rules of 1972. Rule 41 of the Rules of 1972 prescribes application of certain provisions of the Code of Civil Procedure, 1977. It will be profitable to reproduce Rule 41 of the Jammu & Kashmir Workmen's Compensation Rules of 1972 for the convenience, as under:

“41. Certain provisions of the Code of Civil Procedure, 1977:

Save as otherwise expressly provided in the Act or these rules the following provisions of the First Schedule to the Code of Civil Procedure, 1977, namely, those contained in Order V Rule 9 to 13 and 15 to 30; **Order IX; Order XIII**; Rule 3 to 10; Order XVI; Rule 2 to 21; Order XVII and Order XXIII, Rule 1 and 2 shall apply to proceedings before Commissioners in so far as they may be applicable thereto:

Provided that—

For the purpose of facilitating the application of the said provisions, the Commissioner may construe them with such alteration not affecting the substance, as may necessary or proper adopt them to the matter before him;

The Commissioner may for sufficient reasons proceed otherwise than in accordance with the said provisions, if he is satisfied that the interests of the parties will not thereby be prejudiced.”

14. Reverting to the facts and circumstances of the present Writ Petition, the first contention raised by the learned Counsel for the parties regarding maintainability of the Writ Petition, instead of appeal, has to be appreciated at the first instance.

15. In terms of Rule 41 of the J&K Workmen's Compensation Rules of 1972, amongst other provisions of the Code of Civil Procedure, Order IX Rule 13 of CPC, which deals with setting aside of an *ex-parte* decree passed in absence of the Defendant, has also been made applicable.

16. The Petitioner, while exercising his right to seek setting aside the *ex-parte* Award, moved a motion before the learned Commissioner to set aside the Award in question. The learned Commissioner, however, instead of deciding the Petitioner's application on merits, disposed of the same for want of jurisdiction. In view of the clear provision of applicability of the provisions of Order IX Rule 13 of the Code of Civil Procedure as provided under Rule 31 of the J&K Workmen's Compensation Rules of

1972 to the proceedings before the learned Commissioner, this Court is of the considered opinion that the learned Commissioner has taken a fallacious and erroneous view to hold that there was no jurisdiction vested in him to consider the application for setting aside the *ex-parte* Award. A similar view was taken by the Hon'ble High Court of Karnataka in a case titled '**United India Insurance Co. Ltd. V. Nanjunda Swamy & Ors.**', reported as 'IV (2013) ACC 515 (Kar.)'.

17. In view of the above legal position, the learned Commissioner appears to have committed an error by holding that the Commission has no powers of review and, thus, rejected the application for setting aside the *ex-parte* Award, though with the applicability of Order IX Rule 13 of the Code of Civil Procedure, which provides for setting aside of the *ex-parte* Decree/ Award, the Commissioner, in view of Rule 41 of the J&K Workmen's Compensation Rules of 1972, was competent enough and had jurisdiction to consider the application for setting aside the *ex-parte* Award.

18. The next contention raised by the learned Counsel for the Petitioner, through the medium of this Petition, was that the recovery notice dated 22nd of June, 2020, issued after rejection of the application for setting aside the *ex-parte* Award, be set aside. Since, the application for setting aside the *ex-parte* Award has been wrongly decided by the learned Commissioner, without dealing the same on merits, therefore, the recovery notice dated 22nd of June, 2020 shall also be a travesty of justice.

19. Having regard to the aforesaid discussion and observations made hereinabove, this Court is of the considered opinion that the Writ Petition is not maintainable against the *ex-parte* Award in view of the availability of alternate and efficacious remedy of statutory appeal, as such, the Writ Petition is not maintainable to that extent. However, since the application of the Petitioner for seeking setting aside the *ex-parte* Award had not been decided on merits by the Commissioner, the Order dated 12th of February, 2020, whereby the application for setting aside the *ex-parte* Award dated 11th of July, 2018 has been rejected, is not sustainable and is liable to be set aside.

20. Viewed thus, this Writ Petition is **disposed** of, on the following terms:

- i. The Petition is rejected, insofar as it relates to seeking setting aside of the impugned *ex-parte* Award dated 11th of June, 2018 passed by the Respondent-Commissioner, being not maintainable;
- ii. The Petition is partly **allowed** with regard to challenge to the impugned Order dated 12th of February, 2020, whereby the application for setting aside the *ex-parte* Award was rejected by the Respondent-Commissioner, as a result thereof, the impugned Order dated 12th of February, 2020 is set aside, with a further direction to the Commissioner to consider the application afresh and decide the same on merits, after hearing both the parties; and
- iii. Till fresh consideration of the application for setting aside the *ex-parte* Award by the Respondent-Commissioner, the recovery notice dated 22nd of June, 2020, shall not be given effect and that the fate of the same shall be governed by the orders to be passed by the Commissioner in this behalf.

21. Writ Petition is, thus, **partly allowed**, on the above terms, along with any connected CM pending therewith.

22. Record, if any, be sent down, along with a copy of this Judgment.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR

December 29th, 2023

"TAHIR"

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| i. | Whether the Judgment is speaking? | Yes. |
| ii. | Whether the Judgment is reporting? | Yes. |