GALIGAMUWA
v.
AIR LANKA LTD.,

COURT OF APPEAL.
H. W. SENANAYAKE, J.
C.A. 293/84
L.T. NO. 21/2045/83
OCTOBER 12th AND DECEMBER 04th, 1992.

Industrial Law – Default of appearance – Regulation 28 of Regulations framed under Section 39 of the Industrial Disputes Act – Duty to apply first to the Tribunal – Inherent right of the Tribunal – Power of the Appellate Court.

Where the Labour Tribunal had dismissed the application of the applicant for non – appearance.

Held :

(1) The Tribunal has the inherent right to set aside its own orders if the order was made *per incuriam* or on non – service of notice or summons on the parties or on only good cause being shown by the defaulting party for absence on the date of inquiry.

(2) The Applicant – Appellant should have made his petition to the original Tribunal. He could have explained his default and satisfied the Tribunal that there was good cause for his default.

(3) Regulation 28 which permits the Tribunal to proceed with the matter notwithstanding the absence of a party without sufficient cause being shown, is not mandatory and must be considered with reference to the facts in each case.

(4) The Appellate Court has the power and the right to intervene but not in all *ex parte* orders.

APPEAL from the order of the Labour Tribunal.

Faiz Mustapha, P.C. with *H. Withanachchi* for appellant.

J. B. L. de Silva for respondent.

Cur. adv. vult.

March 12, 1993.

SENANAYAKE, J.

This is an appeal against the order of the learned President dated 24.5.84 where he dismissed the application of the Applicant for default of appearance.

The learned Counsel for the Applicant-Appellant in his written submissions put the matters in issue under three heads :

a. Whether the Labour Tribunal was acting reasonably and justifiably in dismissing the application in the absence of the Applicant.

b. Whether the Appellate Court can intervene in a matter where the dismissal was made *ex parte* for non-appearance.

c. Whether the Appellant has explained his default satisfactorily.

With reference to issue (a) the submission was that the Tribunal had dismissed the application on a presumption that the Appellant was no longer interested in his application, and he submitted that such presumption is not warranted in every case as the non-appearance as in the present case was beyond the control of the Appellant. He further submitted that the learned President should have borne in mind Regulation 28 framed under the provisions of Section 39 of the Industrial Disputes Act.

The said regulation reads as " if without sufficient cause being shown any party to any proceedings before an Industrial Court or any Arbitrator or a Labour Tribunal fails to attend or to be represented, the Court or Arbitrator or Labour Tribunal as the case may be, may proceed with the matter notwithstanding the absence of such party."

His position was that there was a duty cast on the Tribunal in view of the fact the Respondent had admitted termination, to inquire into the matter in accordance with the equitable jurisdiction vested with the Labour Tribunal under the Industrial Disputes Act. I cannot agree with the submission of the learned Counsel. Each case has to be viewed on the particular facts of the case. In the instant case the Applicant was a Probationary. The Tribunal was aware of the pleadings filed before it. It clearly established that the Applicant's services were terminated when he was on Probation. It is settled law that the Applicant in such instance must prove that the Respondent acted with malice and or *mala fide*. There was no evidence for the Learned President to consider such a position unless the Applicant has given evidence or led some evidence. In my view the Regulation 28 is not mandatory and must be considered with reference to the facts in each case.

The learned Counsel submitted that the Appellate Court could intervene. I am of the view the Appellate Court had the power and the right to intervene but not in all *ex parte* orders. The Applicant-Appellant was aware of the date of inquiry and if he was ill it was his duty to communicate the fact and submit the relevant medical certificates to the Tribunal. The Tribunal was in a better position to examine the documents and his petition and affidavit and make a suitable order. The Tribunal has the inherent right to set aside its own orders if the order was made *per incuriam* or on non-service of notice or summons on the parties or any good cause being shown by the defaulting party for absence on the date of inquiry. In my view the Applicant-Appellant should have made his petition to the original Tribunal. This court has expressed this view earlier and I do not see any reason to take a different view on this matter with all due respect to the decisions cited by the Learned Counsel.

The Applicant–Appellant had the opportunity and a duty to explain his position to the Tribunal but he had taken time to come to the Appellate Court when he could have explained his default and satisfied the Tribunal that there was good cause for his default. The original Court had no opportunity to test the Applicant either regarding the averments in the affidavit or the Medical Certificate.

I am unable to agree with the submission of the learned Counsel. In the circumstances I affirm the order and dismiss the appeal with costs fixed at Rs. 500.

Appeal dismissed.