(1985) 02 CAL CK 0003

Calcutta High Court

Case No: None

Dipak Puri		APPELLANT
	Vs	
5th Industrial Tribunal and Others		RESPONDENT

Date of Decision: Feb. 19, 1985

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11
- Constitution of India, 1950 - Article 226, 32
- Industrial Disputes Act, 1947 - Section 2A, 36

Citation: 89 CWN 772 : (1986) 2 LLJ 157

Hon'ble Judges: U.C. Banerjee, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

U.C. Banerjee, J.
This application is directed against an order passed by the 5th Industrial Tribunal being Order No. 40 dated 15th September, 1982.

2. On 19th January, the Government of West Bengal Labour Department referred the dispute between M/s. Met Industries of 166 Jessore Road, Calcutta-55 and their workmen represented by E.M.C. Mazdoor Union and Electrical Manufacturing Co. and other workmen Union. The issues referred to the Industrial Tribunal are as follows:

1. Whether the lockout of the factory with effect from 7th July, 1977 is justified?

2. Whether the closure of the factory with effect from 20th October, 1977 is real -

3. To what relief, if any, are the workmen entitled?

3. After the commencement of the proceeding the Tribunal on 23rd February, 1980 re- fused the prayer of the workmen for leave to be represented by lawyer. The matter came up before this Court under Article 226 of the Constitution on 24th April, 1981 before P.C. Borooah J. (as he then was). At the hearing neither the two Unions nor the Company appeared before the learned Judge. The matter was dealt with ex parte and Borooah J. passed an order, the relevant extract of which is set out herein below:

...The two Unions for reasons best known to the office bearers of the said Unions abandoned the workmen and stopped taking any interest in the dispute which was referred for adjudications. The workmen who were thus left in a helpless condition should therefore be given an opportunity of having their case properly represented before the Tribunal. It is nobody''s case that the workmen are literate enough to conduct their own case.

Under the circumstances, I set aside the impugned order and direct the Tribunal to permit a lawyer to represent the case of the petitioners under the provisions of Section 36 of the Industrial Disputes Act.

The Rule is thus made absolute but without any order as to costs.

4. The order of this Court was duly communicated to the Tribunal. The Company thereafter moved an application before the Tribunal challenging the locus standi or authority of Sri Jamuna Mistri and 16 others who have claimed themselves to be the workmen of the company and also to be represented by a lawyer before the Tribunal. The Tribunal interpreted the order as a direction to permit a lawyer to represent the case of the workmen before it. While dealing with the matter the Tribunal in its order stated:

I grant leave to them to be represented by a lawyer and regarding consent of the other side as required u/s 36 of the Industrial Disputes Act, the matter cannot be agitated further in view of the clear direction of the Hon''ble High Court upon this Tribunal to permit a lawyer to conduct the case of Jamuna Mistri and 16 others." This finding of the Tribunal is under challenge in this petition though the respondents contended that the petition under consideration is barred under the doctrine of res judicata or constructive res judicata.

5. Considering the nature of the dispute and the points raised, Section 36(4) of the Industrial Disputes Act is to be considered in the proper perspective with which it was engrafted on the statute book, Section 36(4) provides that in a proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be The language used by the legislature is unambiguous and in my view on a true and proper interpretation of the provisions of the statute it leaves no manner of doubt that a party to a dispute may be represented by a lawyer upon the

fulfilment of two conditions viz. (1) consent of other party, (2) leave of the Tribunal. These two conditions are not mere matters of formality to give a full play of the statutory provisions of legal representation. The conditions are mandatory in nature. Consent of the other party is a requirement which cannot be given a go by. Question of any inference in regard to the consent, as contended, does not and cannot arise. The requirement is to be complied with in order to give effect to the provisions u/s 36(4). While it is true that silence may sometimes be deemed to be consent, but in my view, the language used in Section 36(4) does not warrant any such situation. It must be an express consent and not an implied one. This view finds support in the decision of the Supreme Court in the case of Paradip Port Trust, Paradip Vs. Their Workmen, In that decision the Supreme Court observed:

The party, however, will have to conform to the conditions laid down in Section 36(4) in the matter of representation by a legal practitioner both consent of the opposite party and the leave of the tribunal will have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner. This is the clear significance of Section 36(4) of the Act.

The Supreme Court further observed that it is true that ''and'' in a particular context and in view of the object and purpose of a particular legislation may be read ''or'' to give effect to the intent of the legislature but having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceeding before a Tribunal, intention of the law being to discourage representation by legal practitioner, as such the need for expeditious disposal of cases "and" cannot be read as "or" in Section 36(4) of the Industrial Disputes Act.

6. Undoubtedly the language used in the order passed by this Court in the earlier matter could have been slightly more expressive. But the intent in my view does not pose any difficulty. The first part of the sentence "Direct the Tribunal to permit a lawyer to represent the case of the petitioners" in the order would have to be read in the proper perspective and along with the next part viz. "under the provisions of Section 36 of the Industrial Disputes Act." Reference to Section 36 in the said order in my view has made the position clear and the direction to the Tribunal, as is apparent is subject to the provisions of Section 36 of the Industrial Disputes Act. "Direction to Tribunal" cannot be treated to be an independent direction dehors the statute. The second part of the sentence viz., "under the provisions of Section 36 has made the position very clear, true meaning being that the Tribunal is directed subject to the provisions of Section 36 or the Tribunal is to act in accordance with the provisions of Section 36 in the matter of permitting a lawyer to represent the case. It is to be noted in this context that the same learned Judge has issued the rule nisi in the matter under consideration and also passed an interim order of injunction restraining the respondents from proceeding with the matter further till the disposal of the Rule after having heard both the parties. Though it is true that issuance of rule nisi may not be a very material factor, but in my view the factum of

the issuance of rule nisi and the grant of an order of injunction from further proceeding with the matter before the Tribunal by the selfsame learned Judge cannot be overlooked absolutely.

7. In that view of the matter, in my view, the Tribunal lias thus committed an error in interpreting the order of this Court. In that view of the matter the contention that the application is barred under the doctrine of res judicata or constructive res judicata does not and cannot arise. The earlier order passed by Borooah J. (as he then was) cannot be termed to have decided the issue in the matter under consideration. The learned Judge passed an order and the Tribunal interpreted it in a particular manner. The writ petitioner not being satisfied with the interpretation has moved this Court and the view I have taken clearly indicate that the Tribunal was in error in interpreting the order in that manner. But since detailed submissions were made I feel inclined to express my view in regard to the said issue.

8. The doctrine of res judicata is one of the most salutary principles of law which seeks to protect the protractive and repetitive litigation between the same parties. A decision once pronounced by an authority competent to pronounce if, on a matter in issue between the parties, after a full enquiry should not and ought not to be permitted to be reagitated. The statutory provision as contained in S. 11 of the CPC in terms may be inapplicable but the principle underlying has universal application as the same is barred on considerations of public policy. The Supreme Court in the case of Burn & Co, v. Their Employees reported in 1957 1 LLJ 226 while dealing with the question in regard to the doctrine of res judicata has laid down that there are good reasons why this principle should be applicable to the decisions of Industrial Tribunal also. The 1976 amendment to the Code has introduced explanations (VII) and (VIII) to Section 11 which can in no uncertain terms be said to have been engrafted in the statute book for the purpose of giving a wider amplitude as it was existing prior to the amendment. In the case of Madan Mohan Damma Mal Ltd. and Another Vs. The State of West Bengal and Another, . the Supreme Court held that constructive res judicata which is a special and artificial form of res judicata should not generally be applied to writ petitions filed under Article 32 or Article 226 of the Constitution of India. The decision of the Supreme Court in Bombay Gas Company v. Jagannath Pandurang reported in 1975-II L.L.J. 345 and Ors. however categorically stated that the doctrine of res judicata is a wholesome one which is applicable not merely to matters governed by the provisions of the CPC but to all litigations. It proceeds on the principle that there should not be unnecessary litigations and whatever claims and defences are open to parties should all be put forward at the same (time?) provided no confusion is likely to arise by so putting forward all such claims. The Supreme Court in Pandurang''s case also relied upon two earlier decisions of the Supreme Court, viz. Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, and Daryao and Others Vs. The State of U.P. and Others, . The Supreme Court with approval referred the observation in Devi Lal Modi''s case (supra) that the general principle underlying the doctrine of res

judicata is ultimately based on consideration of public policy. One important consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final unless they are modified or reversed by the appellate authority; and the other principle is that no one should be made to face the same litigation twice over, because such a process should be contrary to the consideration of fair play and justice.

9. The same point came up for consideration before the Supreme Court in the case of The Mumbai Kamgar Sabha, Bombay Vs. Abdulbhai Faizullabhai and Others, wherein the Supreme Court observed that so long as the ruling in Pandurang''s case (supra) stood, the Industrial litigation is no exception to the general principle underlying the doctrine of res judicata. In that decision however the Supreme Court has expressed its doubt about the extension of the sophisticated doctrine of constructive res judicata to industrial law which is governed by special methodology of conciliation, adjudication and consideration of peaceful industrial relations where collective bargaining and pragmatic justice claim precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues.

10. Subsequently the Supreme Court also considered the doctrine of res judicata in the case of State of U.P. Vs. Nawab Hussain, : where the general principles of the doctrine had been explicitly laid down by the Hon''ble Supreme Court. The Supreme Court observed: -

The principle of estoppel per res judicata is a rule of evidence. As had been stated in Marginson v. Blackburn Borough Council (1939)2 K.B. 426 it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) The finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of community as a matter of public policy and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon, it is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the Courts to recognise that a cause of action which results in a judgment must lost its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment or give rise to another cause of action on the same facts. This is what is known as the general principles of res judicata,

11. The Supreme Court further observed that these simple but efficacious rules of evidence have been recognised for long as appears from the decision of the Supreme Court in the case of Gulabchand Chhotalal Parikh Vs. State of Bombay

(Now Gujarat), . The Supreme Court observed that Section 11 of the CPC covers almost the whole field and has admittedly served the purpose of the doctrine but it relates to suits and former suits and has in terms no direct application to a petition for the issue of a high prerogative. The general principles of res judicata and constructive res judicata have however been acted upon in case of renewed application for a writ. The Supreme Court referred to the decision of Ex parte Thompson (1845)6 Q.B. 721 wherein Lord Denman C.J. observed that as Stephen was making an application which had already been refused on fresh materials he could not have the same application repeated from time to time as they had often refused rules in that ground. The same view lias been taken in England in respect of renewed petitions for certiorari, quo warranto and prohibition. The Supreme Court concluded by saying that the position in this country is also the same.

12. From the above enunciation of law it is clear that though res judicata simpliciter is not applicable to writ petitions but the extension of the doctrine of res judicata which has often been termed as constructive res judicata cannot be said to be of very restrictive in its application, but covers the entire field of litigation. In a modern society in my view the Courts cannot shut its eyes in regard to the stark realities of life. Judicial harassment should not be permitted in a civil suit or in a writ petition or in the field of industries. Proverbial saying justice delayed means justice denied has also a bearing in the matter of applicability of the doctrine of constructive res judicata in writ petition. Litigants should not be permitted to go on with the litigation on the selfsame issue over and over again. The matter must reach a stage of finality even though Section 11 of the CPC in terms not applicable in writ matters. In my view considering the purpose for which Industrial Disputes Act has been engrafted in the statute book and the socio economic conditions of the country it would be positive injustice if the doctrine of constructive res judicata is given a narrower meaning than is intended to subserve. The doctrine of constructive res judicata ought not and should not be restricted in its applicability.

13. The other contention raised in this application on behalf of the writ petitioner is that the reference itself has become infructuous and the Tribunal has had no jurisdiction to proceed with the matter any further. Dr. Mukherjee canvassing the same submitted that since the Unions espoused the cause of the workmen and the order of reference has been made in pursuance thereof question of continuation of the proceedings by a small section of employees independently of the Union does not and cannot arise.

14. It is true that the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion to settle only disputes which involve the rights of workmen as a class excepting however the cases governed by Section 2A of the Act. The importance of collective bargaining cannot be minimised but the said considerations have little bearing in the facts of this case. The issue in the case under consideration is whether the proceedings

initiated by the properly authorised union can be continued by the workmen, though a small section, since the Agent is not taking any interest in the matter.

15. In my view, the writ Court ought not to take upon itself of adjudicating the same. If the initiation is in accordance with law, the Tribunal assumes jurisdiction and point under consideration ought to be allowed to be dealt with by the Tribunal as envisaged under the statute. Suffice it to say however that simply because the seal of the Unions is absent, the writ Court ought not to strike down the order of reference. In this context reference may be made to the decision of the Supreme Court in the case of The Bombay Union of Journalists and Others Vs. The ''Hindu'', Bombay and Another, . The other decisions cited in this regard do not have, in my view, any relevance in the facts of the case under consideration.

16. In that view of the matter the order of the Tribunal is set aside and the matter is remitted back to the Tribunal for disposal in the light of the observations made herein. Since long time has elapsed it is desired that the Tribunal will deal with the matter as expeditiously as possible and preferably within a period of three months from the date of the communication of this order.

17. The Rule is thus made absolute to the extent indicated above. There will he, however, no order as to costs.

18. Operation of the order is stayed for a period of two weeks as prayed.

Petition partly allowed.