(2005) 09 CAL CK 0041

Calcutta High Court

Case No: C.A.J.O.S.G.A. No. 2160 of 2005, A.P.O.T. No. 451 of 2005 and W.P. No. 1675 of 2004

Howrah Mills Co. Ltd. and Another		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: Sept. 1, 2005

Acts Referred:

- Constitution of India, 1950 - Article 136, 141, 142, 144, 226
- Industrial Disputes Act, 1947 - Section 2
- West Bengal Industrial Disputes Rules, 1958 - Rule 20H

Citation: (2006) 1 CALLT 484 : (2005) 107 FLR 1162 : (2006) 1 LLJ 574

Hon'ble Judges: Maharaj Sinha, J; D.K. Seth, J

Bench: Division Bench

Advocate: Partha Bhanja Chowdhury, A.K. Shaw and Saswati Mitra Dutta, for the Appellant;Manas Sinha and Ramesh Chowdhury, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

D.K. Seth, J.

The Question:

1. A very interesting question has been raised by Mr. Partha Bhanja Chowdhury with regard to the jurisdiction of the Industrial Tribunal to hear preliminary issue going to the root of the jurisdiction at the outset or to decide such issues along with the merit as a rule.

The Appellant : The argument:

2, In order to support his contention, Mr. Bhanja Chowdhury points out that the learned Tribunal has followed the decision in D.P. Maheshwari Vs. Delhi

Administration and Others, , but he submits that the decision in D.P. Maheshwari (supra) has overlooked the decision in The Management of Express Newspapers Ltd. Vs. Workers and Staff Employed under it and Others, . He also points out that the decision in Hussan Mithu Mhasvadkar Vs. Bombay Iron and Steel Labour Board and Another, also supports his contention, which has again directed hearing of the preliminary issue at the outset. He also refers to Rule 20H of the West Bengal Industrial Disputes Rules, 1958, which in the proviso prescribes hearing of a preliminary point at the outset according to the discretion of the learned Tribunal.

3. Referring to the order that has been passed by the learned Tribunal, Mr. Bhanja Chowdhury points out that the learned Tribunal did not apply its mind to the present position and has not considered the decisions and the law applicable on the question. Learned Tribunal cannot act mechanically. The decision given in D.P. Maheshwari (supra) has not laid down any ratio decidendi inasmuch as it was only a sermon that was preached at the beginning of the judgment, which has no binding effect and the decision in D.P. Maheshwari (supra) having been passed, overlooking the decision in Express Newspapers (supra), the decision is per incuriam. In any event, Rule 20H having been enacted through legislation, it has a force of law. The decision in D.P. Maheshwari (supra) having overlooked the effect of the statutory provision and being contrary thereto is per incuriam.

4. He relies on the decisions in C. Mackertich Vs. Steuart and Co., Ltd, and Hooghly Dock & Port Engineers Ltd. v. Tlrird Industrial Tribunal 1992 2 CHN 161 in order to distinguish the decision in D.P. Maheshwari (supra), as was done in the said decisions. He has also relied on the decision of Dalbir v. Singh v. State of Punjab AIR 1979 SC 1384 : 1979 (3) SCC 99; Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, ; The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, ; Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, ; Municipal Committee, Amritsar Vs. Hazara Singh, and Zee Tele Films Ltd. v. Union of India 2005 AIR SCW 2985 in support of his contention in relation to the question of ratio decidendi precedents and obiter dicta respectively.

The Respondent: The Submission:

5. Learned counsel for the Respondent, on the other hand, points out that Rule 20H in proviso, leaves a discretion and not a mandate. He also refers to a decision in Texmaco Ltd. v. State of West Bengal and Ors. 2002 IV LLJ 1229 : 2001 (3) CHN 153, by one of us. (Hon''ble D.K. SETH, J. sitting singly) dealing with similar question and also in a decision in Management ofRangaswami & Co. v. D.V. Jagadish 1992 I LLJ 133. He points out that the decision in D.P. Maheshwari (supra) having been taken at a later point of time having regard to the development in the legal field and the procedural arena, the said judgment being more rational and reasonable is to be followed even if it is assumed that it is in conflict with the decision in Express Newspapers (supra). According to him, the decision in D.P. Maheshwari (supra) did not lay down any absolute proposition. It has left the discretion in appropriate cases

and similarly Express Newspapers (supra) also did not lay down any absolute proposition and has also excepted the discretion.

Rule 20H: Express Newspapers: D. P. Maheshwari: How far an absolute proposition: Conflict, if any:

6. After having heard the respective counsel for the parties, it appears that Express Newspaper (supra) was not referred to D.P. Maheshwari (supra); but the fact remains that even in Express Newspapers (supra), the Apex Court however thought that having regard to the nature of the enquiry involved in the decision of the preliminary issue, it would be inappropriate for the High Court to take upon itself the test of determining the relevant acts on affidavits. A proper and more appropriate course to adopt, it thought, would be to let the material facts be determined by the Industrial Tribunal in the first instance. Though it was pointed out that the preliminary issue ought to have been decided first but it had not laid down any absolute proposition as would be apparent from the expression used in the said decision, namely: "We wish to point out that in making this observation we do not propose to lay down any fixed or inflexible rule; whether or not even the preliminary facts should be brought by a High Court in a writ petition, most naturally depend upon the circumstances of each case and upon the nature of the preliminary issue raised between the parties." Similarly, in the decision in D.P. Maheshwari (supra) it was held that: "We think it is better that Tribunals, particularly those entrusted with the task of adjudicating labour disputes, where delay may lead to misery and jeopardize industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution, stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution, nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those, who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them."

7. Thus, these decisions are reconcilable with each other. At the same time, we may not be oblivion of the fact that this decision in Express Newspapers (supra) was decided in 1962, when the delay in disposal was not a burning issue as it is today or as it was in 1983 when D.P. Maheshwari (supra) was decided. It is now true and instances are coming frequently before us that the matters are being delayed on account of procedural technicalities and that the Courts are overburdened with cases and find much more cases to attend than the times permit. It takes a very long time, because of congestion of cases almost in every Court, to decide a case, now a burning issue for which various attempts are being taken for expediting the hearing. Having regard to the present day context viz., the wide difference in Judge-population ratio and Court cases ratio i. e. now a Court is burdened with more

cases than it can attend to, it appears that the decision in D.P. Maheshwari (supra) is of more relevance and omission to consider Express Newspapers (supra) in D.P. Maheshwari (supra), would not affect the efficacy of the decision. This decision appears to be more rational and reasonable in the present day context.

8. Apart from the said fact, Rule 20H lays down the procedure, which in the proviso provides that preliminary issue may be tried. The word ''may'' is to be interpreted as discretionary and not mandatory. Therefore, such a discretion, if overlooked, would not affect the decision in D.P. Maheshwari (supra), so as to render the same per incuriam. Similarly, in view of the discretion left in the Express Newspapers (supra), the oversight of the said decision in D.P. Maheshwari (supra) will not make the same per incuriam. At the same time, in a different context when a matter is taken up and even if it amounts to a sermon, the same would be binding under Article 141 and it was so held by the learned single Judge in Texmaco Limited (supra). We fully endorse the view taken therein viz.:

(i) The sermon that was given in D.P. Maheshwari (supra) was issued at a point of time which was much later than 1963. It has relied on the situation as was appearing in those days that this will lead to unnecessary delay in the matter of disposal. Therefore, it had observed that all Courts should carry out the instructions or sermon preached by it. Article 144 requires that any such discretion or observation given by the Apex Court are to be complied with and all aids are to be extended by all authorities including the judiciary in compliance of the Apex Court''s orders,

(ii) If such observation hints at certain matter to be followed, then it cannot be brushed aside as a sermon without any purpose. Even if it is a sermon, it hints at a particular procedure which is expected by the Apex Court to be followed by the Courts.

(iii) Language of request often employed by the Supreme Court is to be read by the High Court as an obligation in carrying out constitutional mandate under Article 144 of the Constitution of India.

(iv) In D.P. Maheshwari (supra) the sermon preached in paragraph 1, is related of the question which the Supreme Court was addressing itself. It is not something which was said out of context. Neither it was a case of a question which the Supreme Court was not called upon to adjudicate. The sermon is related to the question of delay in a proceeding before the Tribunal on the grounds of decision in preliminary issue, which worried the Apex Court, Thus the observation though a sermon, may not be an obiter. Even if it is so still it is to be respected having regard to the context in which it is given.

(v) It is for the Tribunal to decide whether the decision in preliminary issue is necessary and that it will ensure justice and not protract justice. It has to see whether it will avoid delay or invite delay.

(vi) The decision or the sermon that was preached in D. P. Maheshwari (supra) holds good and needs to be more effective and is required to be followed by all Courts even when it comes into conflict with the ratio decided in Express Newspapers (supra) having regard to the present day situation, even though it may not have been referred to or overruled.

9. This is more so in view of Article 142 of the Constitution apart from the fact that there is no conflict in between D.P. Maheshwari (supra) and Express Newspapers (supra) both of which has not laid down any absolute proposition but had left the discretion of the Court or the Tribunal open in appropriate cases, now to be viewed in the present day context.

The Decisions : The Principles : How stand:

10. The decision in H.M. Mhasvadkar (supra) was deciding a question as to whether a person was a workman or not. The Apex Court held that before that it should have decided as to whether the establishment was an industry. But the Apex Court had held that instead of deciding the question as to whether the establishment was an industry, the preliminary issue with regard to workman should have been decided first. The Supreme Court was called upon to decide as between the two preliminary issues, which should be decided first. This decision of the two Judges quorum, did not consider D.P, Maheshwari (supra) and therefore, we would not be bound by the said decision so. far as it might come in conflict with D.P. Maheshwari (supra). However, in the said decision, it was held that Hussan Mithu Mhasvadkar Vs. Bombay Iron and Steel Labour Board and Another, :

5. On a careful consideration of the respective submissions of the learned Counsel on either side, we are of the view that in a case of the nature where the Labour Court as well as the High Court entertained doubts'' about the status of the appellant as a workman within the meaning of Section 2(s) of the Industrial Disputes Act, instead of embarking upon an adjudication in the first instance as to whether the Respondent-Board is an industry or not so as to attract the provisions of the Industrial Disputes Act, ought to have refrained from doing so and taken up the question about the status of the appellant for adjudication at the threshold and if only the finding recorded was against the appellant refrained from adjudicating on the larger issue affecting the various kinds of other employees, as to the character of the Board, as an industry or not. The larger issue should have been entertained for consideration only in a case where it is absolutely necessary and not when the claim before it could have been disposed of otherwise without going into the nature and character of the undertaking itself. For the said reason and also having regard to the submission made by the learned senior counsel for the respondents itself that the question as to whether the applicant falls within the definition of ''workman'' may itself be considered on the supposition that, the Board is an industry, we propose to deal with the status of the appellant as to whether he is a workman or not at the first instance and if necessitated on account of our decision

on that issue undertake the larger issue for our consideration and decision. The question as to what constitutes an industry for the purposes of the Industrial Disputes Act and what are those undertakings or establishments or activities which answer the definition of ''industry'' in Section 2(j), has been laid down authoritatively in several decisions of this Court, including the one in the Bangalore Water Supply and Sewerage Board case (supra) and what remains is to apply to individual cases, the principles laid down therein to adjudge the character of the activity or an undertaking or institution in a given case on the touchstone of the principles laid down therein. In view of this position in law, it becomes all the more necessary to first undertake an adjudication of the question as to status of the appellant.

11. This decision in H.M. Mhasvadkar (supra) does not lay down absolute proposition. The expression that "the larger issue should have been entertained for consideration only in a case where it is absolutely necessary and not when the claim before it could have been disposed of otherwise without going into the nature and character of the undertaking itself." Therefore, it does not seem that H.M. Mhasvadkar (supra) following Express Newspapers (supra) has created a dent in the ratio in D.P. Maheshwari (supra) so as to invalidate the ratio laid down in the latter for'' being called per incuriam lessening its binding effect on the High Court.

12. In D.P. Maheshwari Vs. Delhi Administration and Others, :

It was just the other day that we were bemoaning the unbecoming devices adopted by certain employers to avoid decision of industrial disputes on merits. We noticed how they would raise various preliminary objections, invite decision on those objections in the first instance, carry the matter to the High Court under Article 226 of the Constitution and to this Court under Article 136 of the Constitution and delay a decision of the real dispute for years, sometimes for over a decade, industrial peace, one presumes, hangs in the balance in the meanwhile. We have now before us a case where a dispute originating in 1969 and referred for adjudication by the Government to the Labour Court in 1970 is still at the stage of decision on a preliminary objection. There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that Tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardize Industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues (emphasis supplied). Nor should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and

Article 136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are required to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all Tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manners of preliminary objections and journeyings up and down. It is also worthwhile remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special Tribunals at interlocutory stages and on preliminary issues.

13. Whereas Express Newspapers (supra), as observed earlier, has not laid down any absolute proposition. Having considered these two decisions, we do not find such inconsistency so as to accept one and discard the other. On the other hand, the position in law appears to be reconcilable. That apart the High Court is free to follow the decision that appears to have taken a more rational approach, in case of conflict between the two decisions of the Apex Court. So far as Rule 20H is concerned, the same has a statutory force. This cannot be disputed. The effect thereof has already been discussed above and we need not dilate the same once again.

14. The decision of the Karnataka High Court in Management of Rangaswami & Co, v. D.V. Jagadish (supra), has attempted to give a harmonious construction of the ratio of the decision in D.P. Maheshwari (supra) and Express Newspapers (supra) in the following manner 1992 I LLJ 133 :

13. ...Therefore, we have already pointed out that it would depend upon the facts and circumstances of each case, and the Tribunal or the Court seized of the matter has to decide whether in a given case, the issue raised touching the jurisdiction should be tried as a preliminary issue. In: view of this, it is not possible to hold that the Supreme Court in D.P. Maheshwari''s case (supra) has laid down that an issue touching the jurisdiction of an Industrial Tribunal or a Labour Court should not or: need not be tried as a preliminary issue. The decision in Management of Express Newspapers (P.) Ltd. v. Workers and Ors. (supra) has not been referred to in D.P. Maheshwari''s case. Therefore, the'' proposition laid down in Express Newspapers case read with the decision in Maheshwari''s case, it emerges that it is open to the Industrial Tribunal or the Labour Court in a given case to try the issued touching the jurisdiction as a preliminary issue; but it has to consider whether in the facts and circumstances of the case, it is necessary to decide the issue touching the jurisdiction as a preliminary issue or decide1 the same along with other issues.

14. In the instant case, the Labour Court is required to decide the question as to whether the 1st Respondent was a ''workman'', whereas the Labour Court held that

it is not necessary to decide the same for the purpose of granting interim relief and the same can be decided at a later stage. At the later stage, if it is held that the 1st Respondent is not a ''workman'', he would not be entitled to any relief whatsoever in the dispute raised by him including the interim relief claimed by him. In that event, the interim relief ordered by the Labour Court would be without jurisdiction. Therefore, in the facts and circumstances of the case, the issue raised by the appellant touching the jurisdiction of the Labour Court was required to be decided as a preliminary issue. This is sufficient to dispose of the writ appeal."

15. However, the decision of the Karnataka High Court having a persuasive value may not impress us much except as discussed above in view of the fact that the decision in D.P. Maheshwari (supra) has taken a pragmatic view having regard to the practical situation arising in such a case.

16. The decision in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, and the ratio of the decision therein does not help us much. So far as the decision in Dalbir Singh (supra), Dhanwanti Devi (supra), M.R. Apparao (supra), Hazara Singh (supra), and Zee Tele Films Ltd. (supra) are concerned, there is no doubt about the proposition laid down therein. The principles are well settled. These principles have little bearing on the issue we are dilating with. Therefore, we need not deal with the said decision in detail.

Conclusion:

17. It is our everyday experience that the poor employees or workman has to fight for day in and day out starving over a long period of time, while the Court involves itself in deciding niceties of the law at the behest of the employer, a mighty opponent, interested in dragging its feet and delay the process in order to take the wind out of the balloon through which the workman attempts to survive. An approach which helps achieving the object and improves the efficacy of the system, is to be preferred than an approach even though sound on legal proposition, but have the effect of eroding the efficacy and adversely affecting the system inviting the ultimate decision at a later point of time allowed to be obtained independent of the merits and then to be challenged in different hierarchy of the judiciary at the cost of inordinate delay in a series of battle and inviting remand and then another series of battle and then again inviting remand, as we experience almost everyday.

18. For the reasons foregoing, we do not think that there is any inconsistency between D.P. Maheshwari (supra) and Express Newspapers (supra), as has been sought to be pleaded by Mr. Bhanja Chowdhury, when both had left the matters at the discretion of the Court and has not laid down any absolute proposition that in every case the preliminary question is to be decided only at the time of hearing. It has been left to the discretion as to whether it was involving a decision on merit through evidence and prima facie it does not appear to be a clear cut or full proof

case. This has to be decided by the learned Tribunal. When the cases are border line or marginal or is not clear, then it would be wise to decide such cases along with the merit. The discretion by the Tribunal can be exercised only in exceptional cases where the materials placed by the parties are such that on the face of it, the question is apparent and it goes at the root of the jurisdiction then such issues can be taken up, but if such decision is dependent on taking up elaborate evidence, in that event, it would be wise to be decided along with the merit instead of taking evidence only in respect of a particular issue keeping the other issues waiting.

Order:

19. Having gone through the order of the learned Tribunal and the written statement of the employer, we do not find that it is an exceptional case where the preliminary issue can be tried at the outset. Learned Tribunal was right in deciding to hear the Preliminary issue along with the merits. We, therefore, affirm the order of the learned single Judge and that of the learned Tribunal.

20. Learned Tribunal shall decide the reference on merit and the preliminary issues together as early as possible, preferably within one year from the date of communication of this order.

21. The appeal is thus disposed of with the observation made above. There will, however, be no order as to costs.

22. Let xerox certified copy of this Dictated Order be supplied to the parties, if applied for the same.

Maharaj Sinha, J.

23. I agree.