(1958) 04 CAL CK 0021

Calcutta High Court

Case No: Matter No. 185 of 1957

D.P. Dunderdale and Others		APPELLANT
	Vs	
G.P. Mukherjee and Others		RESPONDENT

Date of Decision: April 3, 1958

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 19, 2(j)

Citation: 62 CWN 484

Hon'ble Judges: P.B. Mukharji, J

Bench: Single Bench

Advocate: S. Chaudhuri, N. De, E.R. Meyer and B.K. Chowdhury for the Petitioner, for the Appellant;S.K. Acharyya and K.C. Mookerjee of the Respondents, for the Respondent

Judgement

P.B. Mukharji, J.

The point for determination on this application is whether the firm of Calcutta Solicitors called ''Sandersons & Morgans'' can be said to be an industry so as to be liable to have their disputes with their employees determined by the principles and procedure laid down by the Industrial Disputes Act.

2. The application is made by the partners of the registered firm of Solicitors Messrs. Sandersons & Morgans. They all practice in this High Court as Solicitors and attorneys. The application is made under Article 226 of the Constitution of India. It asks for a writ of certiorari and prohibition to quash the order of reference to the Industrial Tribunal, dated the 5th September, 1956 and the interim award made by the Industrial Tribunal on the 6th May, 1957 and to restrain the respondents from giving effect to that award. The Tribunal by its interim award held that the firm of Solicitors Messrs. Sandersons & Morgans carry on a work which is industry within the meaning of Section 2(j) of the Industrial Disputes Act. The respondents include the Industrial Tribunal as well as the Sandersons & Morgans Employees'' Union.

3. A preliminary point on jurisdiction under Article 226 may be disposed of at the outset. The Employees'' Union contends that the decision of the Tribunal cannot be corrected by Certiorari or prohibition under Article 226 of the Constitution on the ground that it is at best an erroneous decision in law on the question of the construction of the different statutory provisions of the Industrial Disputes Act and therefore there is no question of jurisdiction. I am unable to accept that contention. If the firm of Solicitors cannot be said to carry on an industry, then the Industrial Tribunal has no jurisdiction over them to determine a dispute between them and their employees. If the Tribunal has claimed jurisdiction, be it by way of construction of statute or otherwise, then this assumption of jurisdiction, whether by the legal process of construction of statute or by the determination of what is known as "jurisdiction fact," can be supervised under certiorari jurisdiction of this High Court under Article 226 of the Constitution of India. For instance, I should be much surprised, if I am told that if the Government wrongly make an order of reference to an Industrial Tribunal of a domestic dispute between husband and wife as an industrial dispute and the Tribunal proceeds to hold that the home is an industry and, therefore, it has jurisdiction to decide such disputes under the Industrial Disputes Act, then in that event this Court has no jurisdiction to set aside such a reference and such an application of the Industrial Disputes Act to a subject which does not come within its purview at all, on the plea that the Tribunal decides "home" to be industry by a mere erroneous decision in law through a process of construction of the different sections of the Industrial Disputes Act. It is quite true, and I have said so often, that every question of construction of statutes does not always involve a problem of jurisdiction. But this one in the instant case does. I therefore overrule this point of preliminary objection.

4. By an order of reference, dated the 5th September, 1956, the Government referred the dispute between "Messrs. Sandersons & Morgans, Solicitors, Royal Insurance Building, 5 & 7, Netaji Subhas Road, Calcutta, and their employees represented by Sandersons & Morgans Employees'' Union" to the Second Industrial Tribunal on (1) pay and scales of pay, (2) adjustment and fitting in the new scale of pay, if any, (3) dearness allowance, (4) leave, (5) annual bonus, (6) retiral benefit (Provident Fund and Gratuity), and (7) medical aid.

5. The applicants filed their statements before the Tribunal saying:

"The firm states that its partners carry on the profession of lawyers and/or attorneys and that such profession is not an industry within the meaning of the Industrial Disputes Act, 1947. Consequently the Industrial Disputes Act, 1947 has no application to any alleged dispute between the firm and its employees."

6. The applicants in their reply stated that the Tribunal had no jurisdiction to entertain the reference and that they took part in the proceedings under protest.

7. By an interim award the Tribunal decides that ''industry'' as defined in Section 2(j) of the Industrial Disputes Act is in the widest possible terms and relied on the observations of the Supreme Court of India in D.N. Banerji Vs. P.R. Mukherjee and Others, and specially on the pronouncement of Chandra Sekhar Aiyar, J. at page 308, namely, "conflicts between capital and labour have now to be determined more from the standpoint of status than of contract." The observations of the Supreme Court of India in that case related to the interpretation of the word "undertaking" in the definition of ''industry'' in the statute. It was not a case of legal profession at all. It was concerned with the question whether a Municipal Corporation could be said to carry on an industry in respect of certain spheres of its statutory functions.

8. The relevant observations of the Tribunal to which exception has been taken in this application is quoted below:

"A lawyer carrying on his profession and earning money by his skill where no capital is employed, cannot be said to be an industry. But such cannot be the case in respect of a firm of Solicitors like the present one. In this firm, each partner does not get the remuneration of professional services rendered by him, but he takes a share of the joint income of all the partners. His income need not be proportionate to the services rendered by him. Not only this, they appoint assistants on salary and the firm trades on the services which it obtains from the assistants, who are not professional men. This complex set up becomes an industry, though an individual practicing will not be an industry. When assistants and other helpers are engaged, the question of capital comes in, in whatever name it may be designated."

9. The Industrial Tribunal thereafter applied the case of Shri Vishuddananda Saraswati Marwari Hospital v. Its Workmen decided by the Labour Appellate Tribunal of India and reported in 1952 LAC 562. that, again, was not a case of legal profession, but the case of a charitable hospital being included as an ''industry'' on the strength of the interpretation of the word "undertaking" in the statute. It is difficult to appreciate how the Tribunal draws a comparison between charitable institutions and hospitals on the one hand and a firm of Solicitors on the other. To my mind it is a wholly untenable and misleading comparison.

10. The Industrial Tribunal thereupon proceeds to state its reasons in the following terms:

When a charitable institution like a hospital comes within the purview of ''industry'' there cannot be any room for doubt that a profitable profession carried on by a firm of attorneys also falls within its fold. Such attorneys can be said to be engaged in a ''business'' and are rendering services to clients. I am fully alive to the fact that the income of this firm is the direct result of the efforts of the partners of this firm, who are also Solicitors. No doubt, the brain work of this firm falls upon the partners. But at the same time the staff employed by them do make some contribution. They do get help from the assistants employed by them on salary. The working staff have

also to make contribution of labour to the operation of this firm by way of maintaining accounts, carrying on correspondence, typing the same and so forth. So there is relationship of employer and employees between the firm and its assistants and staff. In the result I come to the conclusion that there is no merit or force in the preliminary objection, which is accordingly overruled."

11. Finally, the Tribunal supplements this reason by stating that previously there was an industrial dispute between this firm of Solicitors and its employees as early as the 17th January, 1948 and there was a decision by the Tribunal which also had held that it had jurisdiction over the firm of Solicitors. Mr. S. K. Acharyya, appearing for the Union, on the strength of this particular fact of a previous award has tried to argue that the point is res judicata according to the observations of Burn and Co., Calcutta Vs. Their Employees, . The firm of Solicitors at that time was associated with Bengal Chamber of Commerce not as a commercial institution but in its attempt to help the employees to get the benefits of cheap ration, which the Bengal Chamber of Commerce had been procuring for the employees of its members, a fact found by the Tribunal itself. The previous award of the Tribunal was published in the Calcutta Gazette of the 9th June, 1949. One of the issues before the Industrial Tribunal there was whether the Tribunal had jurisdiction to adjudicate against this firm, and the Tribunal came to a finding on that issue that it had jurisdiction.

12. These are the reasons put forward by the Industrial Tribunal in claiming jurisdiction over the firm of Solicitors. The interim award is certainly a speaking order, and the reasons are those which I have stated above.

13. I shall first attempt to analyse the reasons given by the Tribunal itself to see if they provide a good cause for bringing the profession of a firm of Solicitors within the meaning of "industry" as defined by the Industrial Disputes Act. The Tribunal concedes that money earned by professional skill is not ''industry'' when there is no capital employed. But it wants to make a distinction in respect of the firm of Solicitors in the instant case. the first distinction that it puts forward is that the partners do not get the remuneration of professional services but take a share of the joint income of all the partners and that a partner''s income need not be proportionate to the services rendered by him. I see no reason why this should make a principle of difference at all. The total income of the firm of Solicitors is the result of their professional skill and professional services rendered by them. How does it matter in what proportions the total income is divided into shares as private arrangement between the different partners who are normally governed by the terms and contract of partnership? Income earned by professional skill and professional services can naturally be divided into shares which justifiably and properly vary according to the ability, seniority and speciality of each partner. The quality and cause of such income are not changed by the manner of its distribution as between the partners inter-se. The second reason given by the Tribunal is that the firm appoints assistants on salary and "trades on their services" although it

concedes that an individual Solicitor practicing will not be an industry even if he employs assistants. Again, I fail to see the logic of this principle. An individual Solicitor can certainly employ a typist and a book-keeping accountant, but the money that he earns is not by the book-keeping accountant nor by the typist but by reason of the professional skill which he employs himself and which is personal and individual to him. The same reason applies to a firm of Solicitors who employ paid assistants. This is not "trading" on the assistants'' services. The main reason which the Tribunal provides in the interim award appears where it says that although "the brain work of the firm falls upon the partners" yet "the staff employed by them also do make some contribution, such as, maintaining accounts, carrying on correspondence, typing the same and so forth." Here, again, I think there is a very great confusion and there is a fallacy in the basic reason. The distinctive work of a Solicitor is not the work of book-keeping and of actual typing His skill is the skill of law. It is true that in communications and in keeping of books of account help is needed and for that purpose a staff is employed. But I cannot see how employment of typists and correspondence clerks of accountants can convert a profession which remains by its nature the personal work depending on the individual corporate and professional skill of the Solicitor or Solicitors concerned, into an industry so long, of course, as the Solicitors and their firm carry on the work of Solicitors.

14. The characteristic test of an industry is expounded in the Australian decision of the Federated Municipal and Shire Council Employees'' Union of Australia v. The Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne & Ors. reported in 26 Commonwealth Law Reports, 508. There is critical discussion of the meaning of the expression ''industrial dispute'' in the Australian context and under the Australian Constitution. The judgment of Isaacs and Rich, JJ. at page 554 of that report is relevant on this application because the learned Judges there emphasize the co-operation between labour and capital as the significant and distinctive test of "industry." On the basis of that test of co-operation the Australian decision draws the following conclusion at pages 554-5 of that report:

"It excludes, for instance, the legal and the medical professions, because they are not carried on in any intelligible sense by the co-operation of capital and labour and do not come within the sphere of industrialism. It includes, where the necessary co-operation exists, disputes between employers and employees, employees and employees, and employers and employers. It implies that ''industry,'' to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense, as if it alone affected the result, but it must be acting and be considered in association with its co-operator ''capital'' in some form so that the result is, in a sense, the outcome of their combined efforts."

15. I understand that D. N. Sinha, J. in the case of Brij Mohan Bagaria Vs. N.C. Chatterjee and Others, comes to the conclusion that an individual Solicitor who carries on his profession depending upon his own intellectual skill is not brought

within the word "industry" as defined by the Industrial Disputes Act.

16. No doubt industry as defined in Section 2(j) of the Industrial Disputes Act not only includes business, trade and manufacture, but also includes an undertaking or a calling. Nevertheless, however wide that definition is, all human endeavour has not thereby become "industry" within the meaning of the Industrial Disputes Act. All human endeavour is industry in the literary sense but is not industry in the industrial sense. The word "undertaking" or "calling" in the context of this statutory definition bears an industrial connotation, for words, like men, speak the language of the place where they are born and brought up. In an expanding society with broadening concept of business and industry the word ''industry'' is also enlarging its ambit, scope and aspiration. Even then outside the expanding horizon of industry in an industrial civilization and in an industrial democracy there still remains a vast world of individual work and individual endeavour depending on individual skill, excellence and peculiarity personal to the individual or individuals concerned. That vast world does not come within the increasing glitter and glamour of industry. That still remains outside the omnivorous touch of industry. One such world is the word of private endeavour and private excellence personal to the individual concerned. Learned professors, understood in their professional sense, such as the professions of medicine and of law are not normally industries unless some outstanding feature of industry is added to them. For instance, it has been said in the reported decisions that a medical man by running a hospital and druggist shop (where permitted) can become an industry and that a lawyer by running a business of legal publications can similarly be an industry. But it must be emphasized that in doing so they are no longer following their professional career but doing something which is mainly business.

17. The Indian Supreme Court in D. N. Banerji''s case, 1952 SCR 302 at pages 307-8 very clearly expressed this vital aspect of the problem of industry where it said:

"It is also clear that every aspect of activity in which the relationship of employer and employee exists or arises does not thereby become an industry as commonly understood. We hardly think in terms of an industry where we have regard, for instance, to the rights and duties of master and servant, or of a Government and its Secretariat or the members of a medical profession working in a hospital. It would be regarded as absurd to think so."

18. The Tribunal in this case misread this Supreme Court decision and failed to apply the true principle laid down by that decision.

19. The central question therefore is, what is the outstanding or unfailing and distinctive test of industry in the industrial sense. As Chief Justice Marshal in the leading American decision says in McCulloch v. Maryland, 4 Wheaton 316 that words are always mitigated by the context. So does the Supreme Court of India in that very same case of Brij Mohan Bagaria Vs. N.C. Chatterjee and Others, say the set up and

context are also relevant for ascertaining what exactly was meant by the terminology employed." Neither etymology nor dictionary is a self-sufficient guide for a true interpretation and construction of statutes. The context of industry in the Industrial Disputes Act must be understood within the frame of reference of the Industrial Disputes Act. Fundamental to the action of industrial dispute is the notion of an industry where conflict between labour and capital has to be avoided. Industrial Disputes Act has for its aim in the preamble "settlement of industrial disputes." The purpose of the Act is to bring in harmony between the relationship of labour and capital. The normal inequality of bargaining power between labour and capital is one of the reasons why the statute in a welfare democracy today intervenes to help and safeguard labour to solve the disputes. The principle on which this intervention is based is not far to seek. It is that the product of industry is regarded as a joint venture of labour and capital. The shareholders and directors of a company arrange the capital, raise the share money and provide the management. The workers provide the labour and thus join in manufacturing and producing the product. The capital of the employer is wedded to the labour of the employees. The final product, therefore, is the result of the co-operation between labour and capital. Industry is a partnership between labour and capital and the industrial product is the result of that co-operation and partnership. They each have a share in building the product of industry. Both capital and labour are impressed on the product of industry. That is the basic and distinctive test of industry for the settlement of whose industrial disputes the Constitution of India as well as special statutes like the Industrial Disputes Act and many other statutes have made zealous provisions for the industrial welfare of the country.

20. But where the product is not the joint result of labour and capital, then the very basic test of industry is absent. A thinker or a statesman or a philosopher who produces a work which embodies the result of his research, study and ideas does not carry on an industry. The fact that the result of such thought can be produced in print and paper if printers, publishers and other persons help in producing the work does not mean that the work is joint. The work remains the individual effort. The publication of the work is not the work itself. Similarly a professional man like a lawyer or a Solicitor who renders his professional services to his clients and provides them with his professional skill and experience does an individual work. The fact that communications have to be carried on and correspondence has to be typed by a typist, the fact that accounts have to be kept which usually have to be done by accountants and the fact that assistants are employed to assist, do not make the result or the product joint as in an industry. The product remains the individual product. A Solicitor who gives legal advice to his client may give it orally, or may write it in his own hand. The fact that instead of writing his legal advice in his own hand he employs a typist does not make it an industry, nor does it make the legal advice the joint product between him and the typist. The fact that Solicitors often have to act as directors of companies for whom the act or administer estates for

their clients by reason of the fact that they are Solicitors do not mean their work is any the less of a Solicitor.

21. I, therefore, hold that the applicant firm of Solicitor carry on the profession of lawyers and Solicitors which is not an industry within the meaning of the Industrial Disputes Act and that the Industrial Disputes Act has no application to any dispute between such firm and its employees.

22. It remains now to determine the question raised about the effect of previous award of the Tribunal between the firm and its employees. That award was published on the 9th June, 1949. It decided that the previous Tribunal had jurisdiction to decide a dispute between a firm of Solicitors and their employees. It must be noted here that this award of the 9th June, 1949 was before the Constitution came into force. The Constitutional remedies under Article 226 of the Constitution therefore were not available then. That award spent its force within a year thereafter in 1950 because the Government did not extend the period of that award under the law then in force. At that time the amendment to Section 19 of the Industrial Disputes Act had not come in.

23. The doctrine of res judicata as expounded by the Supreme Court in Burn & Co.''s case (Burn and Co., Calcutta Vs. Their Employees,) arose in connection with the interpretation of Section 19 of the Industrial Disputes Act during the currency of an award already made and as understood u/s 19 of the Act. the Supreme Court held that an award given on a matter in controversy between parties after full hearing concluded the matter for the purposes of that section and for the currency of the award. The question there related to the fact of basic wages. Here the question is more fundamental and I do not think the principle of res judicata can be invoked here. The principle of res judicata is governed by the doctrine of the competence of the Court whose decision is put forward as a bar. It requires that the decision must be given by a competent Court having jurisdiction to decide the point. An Industrial Tribunal is not such a Court when it assumes jurisdiction outside the Act under which it acts. It is not a Court of general jurisdiction to finally decide its own jurisdiction. The Industrial Tribunal is not a Court of general jurisdiction competent to decide this question in a manner so as to exclude the powers of this High Court today under Article 226 of the Constitution to examine its assumption of jurisdiction. If, therefore, in the exercise of its powers the High Court comes to the conclusion under Article 226 of the Constitution that the Tribunal has no jurisdiction to decide a dispute between the applicant and its employees on the ground that the applicant does not carry on any industry at all within the meaning of the Industrial Disputes Act, then the High Court can set aside such assumption of jurisdiction. A previous award of the Tribunal deciding that issue could not be held in that event to be res judicata barring the Constitutional remedy by the High Court. Finally on this point of res judicata it is always necessary to remember the fundamental difference between the award of a Tribunal and a decree or order of a Civil Court. The award of the

Industrial Tribunal u/s 19 of the Industrial Disputes Act is not perpetual and conclusive like the Civil Court''s decree or order. It is expressly said to be of limited duration, for which it remains effective and in force u/s 19 of the Act, unlike the decree or order of a Civil Court. The reason behind the principle of res judicata is to give finality to a decision but its application is considerably modified when the statute itself says as in Section 19 of the Industrial Disputes Act that the is not final for all times but operative only for the time specified in the section, so that the scope of res judicata is confined to the period of currency of the award under that section and not beyond that time or else the award will be extended by the application of res judicata to a period longer than the statute permits. For instance, an award deciding a question of scales of pay after it has spent its force on the expiry of the time stated in Section 19 of the Industrial Disputes Act is not a bar to a subsequent reference on the same point of scales of pay on which a fresh award can be given. But where the decree or order of a Civil Court has become final no further litigation is permissible to re-agitate the point decided by the previous decree or order. The reason for this difference lies in the changing nature of industrial problems.

24. For these reasons I hold that there is no industry and no industrial dispute within the meaning of the Industrial Disputes Act in the present case. I hold further that the employees of the petitioner cannot be described as workmen within the meaning of that word in the Industrial Disputes Act. I make the Rule absolute and set aside the order of reference, dated the 5th September, 1956 and set aside and quash the interim award, dated the 6th May, 1957 of the Second Industrial Tribunal. I also direct and order a writ of certificate quashing the said interim award and all proceedings thereunder, and a writ of prohibition prohibiting the respondents from proceeding with the adjudication. There will be no order as to costs.