

(2015) 09 SHI CK 0047

In the High Court Of Himachal Pradesh

Case No : CMPMO Nos. 175, 168, 169, 173, 174, 176, 177, 178, 179, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 202, 203, 207, 208, 221, 222, 224, 225, 226 and 227 of 2015

Managing Director, Crest Steel and Power Ltd.

APPELLANT

Vs

Tara Chand and Others

RESPONDENT

Date of Decision : 09-09-2015

Acts Referred:

Advocates Act, 1961 — Section 30, 30(i), 30(ii)

Bar Councils Act, 1926 — Section 14(1)(b)

Industrial Disputes Act, 1947 — Section 2(gg), 36, 36(1), 36(2), 36(2)(c)

Citation : (2015) LabIC 4562

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Sanjeev Kuthiala, for the Appellant; Varun Rana, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J—Since common question of fact and law raised for consideration, therefore, all these petitions are taken up together for disposal. With the consent of the parties CMPMO No. 175 of 2015 is taken as lead case.

2. The admitted facts of the case are that the respondents-workmen raised industrial dispute, wherein the parties completed their pleadings, but thereafter the respondents moved an application under Section 36(2) of the Industrial Disputes Act, 1947 (for short "Act"), whereby they objected to the appearance of the legal practitioner engaged on behalf of the petitioner.

3. In reply to this application, it was contended that the same was not maintainable and it was further maintained that the respondents had in fact consented for appearance of the counsel, without any demur and once the consent has been given/implied, the same cannot be withdrawn or revoked later. The plea of estoppel was also raised and it was averred that the legal practitioner

had been appearing from the very first day and from the first date of hearing without any objection from the respondents and therefore, the application was not maintainable and being misconceived should be dismissed.

4. The petitioner thereafter moved a separate application under Section 36(4) of the Act for seeking leave to represent the petitioner in the proceedings through the legal practitioner/penal counsel, who had already been representing the petitioner from the commencement of the proceedings.

5. Both these application came up for consideration before the learned Labour Court-cum-Industrial Tribunal, who vide its order dated 17.7.2014 (for short impugned order) allowed the application of the respondents-workmen preferred by them under Section 36(2) and dismissed the application preferred by the petitioner under Section 36(4) of the Act. The petitioner has questioned the impugned order on various grounds taken in the memorandum of the petition.

I have heard the learned counsel for the parties and have also gone through the records of the case.

6. Section 36 of the Act being at the heart of the controversy involved in these petitions is set out herein below for ready reference:

"36. Representation of parties.--(1) A workman who is a party to a dispute shall be entitled to be represented in any proceedings under this Act by -(a) [any member of the executive or other office-bearer] of a registered trade union of which he is a member;

(b) [any member of the executive or other office-bearer] of a federation of trade unions to which the trade union referred to in Clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by [any member of the executive or other office-bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorised in such manner as may be prescribed:

[Provided that, where there is a recognised union for any undertaking under any law for the time being in force, no workman in such undertaking shall be entitled to be represented as aforesaid in any such proceeding (not being a proceeding in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is under consideration) except by such recognised union.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by -

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in Clause (a) is affiliated;

(c) whether the employer is not a member of any association of employers, by

an officer of any association of employers connected, with, or by any other employer engaged in, the industry in which the employer is engaged and authorised in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under this Act or in any proceedings before a Court.

(4) In any 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 other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be."

7. The aforesaid provision came up for consideration before the Hon"ble Supreme Court in case of Paradip Port Trust, Paradip Vs. Their Workmen, AIR 1977 SC 36 : (1977) 43 CLT 419 : (1976) LabIC 770 : (1976) 2 LLJ 409 : (1977) 2 SCC 339 : (1977) 1 SCR 537 and it is apt to reproduce paragraphs 15 to 17, 21 to 24 and 26, which read as under:--

"15. The parties, however, will have to conform to the conditions laid down in section 36(4) in the matter of representation by legal practitioners. Both the 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 qua legal practitioner. This is a clear significance of section 36(4) of the Act.

16. If, however, a legal practitioner is appointed as an officer of a company or corporation and is in their pay and under their control and is not a practising advocate the fact that he was earlier a legal practitioner or has a legal degree will not stand in the way of the company or the corporation being represented by him. Similarly if a legal practitioner is an officer of an association of employers or of a federation of such associations, there is nothing in section 36(4) to prevent him from appearing before the Tribunal under the provisions of section 36(2) of the Act. Again, an office bearer of a trade union or a member of its executive, even though he is a legal practitioner, will be entitled to represent the workmen before the Tribunal under section 36(1) in the former capacity. The legal practitioner in the above two cases will appear in the capacity of an officer of the association in the case of an employer and in the capacity of an office bearer of the union in the case of workmen and not in the capacity of a legal practitioner. The fact that a person is a legal practitioner will not affect the position if the qualifications specified in section 36(1) and section 36(2) are fulfilled by him.

17. It must be made clear that there is no scope for enquiry by the Tribunal into the motive for appointment of such legal practitioners as office bearers of the trade unions or as officers of the employers associations. When law provides for a requisite qualification for exercising a right fulfillment of the qualification in a given case will entitle the party to be represented before the Tribunal by such a person with that qualification. How and under what circumstances these

qualifications have been obtained will not be relevant matters for consideration by the Tribunal in considering an application for representation under section 36(1) and section 36(2) of the Act. Once the qualifications under section 36(1) and section 36(2) are fulfilled prior to appearance before Tribunals, there is no need under the law to pursue the matter in order to find out whether the appointments are in circumvention of section 36(4) of the Act. Motive of the appointment cannot be made an issue before the Tribunal.

21. We have given anxious consideration to the above submission. It is true that "and" in a particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discourage representation by legal practitioners as such, and the need for expeditious disposal of cases, we are unable to hold that "and" in section 36(4) can be read as "or".

22. Consent of the opposite party is not an idle alternative but a ruling factor in section 36(4). The question of hardship, pointed out by the Solicitor General, is a matter for the legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of section 36 is clear and unambiguous.

23. Besides, it is also urged by the appellant that under section 30 of the Advocates Act, 1961, every advocate shall be entitled "as of right" to practise in all courts, and before only tribunal section 30(i) and (ii). This right conferred upon the advocates by a later law will be properly safeguarded by reading the word "and" as "or" in section 36(4), says counsel. We do not fail to see some difference in language in section 30(ii) from the provision in section 14(1)(b) of the Indian Bar Councils Act, 1926, relating to the right of advocates to appear before courts and tribunals. For example, under section 14(1)(b) of the Bar Councils Act, an advocate shall be entitled as of right to practise save as otherwise provided by or under any other law in any courts (other than High Court) and tribunal. There is, however, no reference to "any other law" in section 30(ii) of the Advocates Act. This need not detain us. We are informed that section 30 has not yet come into force. Even otherwise, we are not to be trammelled by section 30 of the Advocates Act for more than one reason. First, the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided for with a clear object in view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunals and other authorities. The Industrial Disputes Act is concerned with representation by legal practitioners under certain conditions only before the authorities mentioned under the Act. *Generalia Specialibus Non Derogant*. As Maxwell puts it:

"Having already given its attention to the particular subject and provided for it,

the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language..... or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one." Maxwell on Interpretation of Statutes, 11th Edition, page 169.

24. Second, the matter is not to be viewed from the point of view of legal practitioner but from that of the employer and workmen who are the principal contestants in an industrial dispute. It is only when a party engages a legal practitioner as such that the latter is enabled to enter appearance before courts or tribunals. Here, under the Act, the restriction is upon a party as such and the occasion to consider the right of the legal practitioner may not arise.

26. A lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the Tribunal in the capacity of an office bearer of a registered trade union or an officer of associations of employers and no consent of the other side and leave of the Tribunal will, then, be necessary."

8. From the aforesaid judgment, the following principles can conveniently be culled out.

"(i). Section 36(1) confers an "unbartered" and "absolute right" upon the workman to be represented by a member of the executive or an office bearer of the registered trade unions. Likewise, the employer is also placed at par with the workman in the matter of representation before the Labour Courts, Industrial Tribunals and National Tribunals. Consequently, an employer may also be represented by an "Officer" of the association of employer of which the employer is a member. The right is extended to representation by an Officer of the federation of employer to which the association of employer is affiliated.

(ii). The rights of representation under Section 36(1) of the ID Act are unconditional and are not subject to the conditions laid down in Section 36(4) of the ID Act. Both the sub-sections are independent and stand by themselves.

(iii). Section 36 of the ID Act is not exhaustive in the sense that beside the person specified therein, there can be other lawful mode of appearance of the parties as such (para 13). Such an eventuality has been envisaged by Section 36(2)(c) in case of an employer, who is not a member of an association of employers. The device of representation provided therein would not fit in the case of a Government Department or a Public Corporation as an employer.

(iv). A legal practitioner, who is appointed as an officer of Company or Corporation can represent them subject to certain conditions. The first condition is that he must be on their pay rolls and under their control. The second is that if

a legal practitioner is appointed as an officer of a company or corporation then the mere fact that he was earlier a legal practitioner or he has a law degree to his credit was not to stand in the way of the Company or the Corporation being represented by such a person. Section 36(3) of the ID Act imposes a complete embargo on representation by a legal practitioner by either party to the dispute before the Court or in any conciliation proceedings under the Act.

(v). In the matter concerning representation by a legal practitioner the parties are required to conform to the conditions laid down in Section 36(4) of the ID Act. The consent of the opposite party and the leave of the Labour Court or Tribunal have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner.

(vi). If a legal practitioner becomes an officer of an association of employer or a federation of such association of employer which is affiliated to such a federation within the meaning of Sub-section 2 (a) and 2(b), then he can represent an employer. Merely because such an officer has been earlier a legal practitioner or he is a law graduate or has acquired legal acumen otherwise would not impede his appearance. Likewise, an "office bearer" of a trade union or a member of its executive would be entitled to represent the workmen before the Tribunal under Section 36(1) in his capacity as the office bearers or member of its executive, even though, he is a legal practitioner.

(vii). The expression "office bearer" or any member of the executive in relation to trade union as per Section 2(gg) of the ID Act means the body by whatever name called to which the management of the affairs of the trade union is entrusted. An "office bearer" in relation to a trade union would include any member of its executive. However, the expression "Officer" used in Section 36(2) has not been defined in the ID Act. In the absence of any definition, some controversy is likely to arise and no single test nor an exhaustive test can be laid down for determining as to who is an officer in absence of a definition in the Act. When such a question arises the Tribunal, in each individual case would be required to determine on the materials produced before it whether the claim is justified.

(viii). No advocate could claim a right to practice by placing reliance on Section 30 of the Advocates Act. That Act has to give way to ID Act because it is a special piece of legislation with the avowed aim of labour welfare. The mode of representation before adjudicatory authorities has to be regulated by keeping that object in view. Moreover, the matter is not to be viewed from the point of view of a legal practitioner but from that of the employer and the workmen, who are the principal contestants in an industrial dispute. In ID Act, restriction is upon a party as such and the occasion to consider the right of the legal practitioner to practise before every court as per provisions of Section 30 of the Advocates Act would not arise."

9. Similar issue came up for consideration before the learned Division Bench of

this Court in Cement Corporation of India Vs. Presiding Officer, Labour Court and Others, (1999) 1 LLJ 1276 : (1999) 1 ShimLC 91 , wherein it was held that an application under Section 36(4) of the Act can be allowed only when the other party and Court consent to this. It was observed as under:--

"2. The petitioner-Cement Corporation of India has challenged the order dated 19.10.1995 passed by the Presiding Officer, Labour Court/Industrial Tribunal, Himachal Pradesh, Shimla, whereby despite the objection of the petitioner-Corporation, the application of the workmen for engagement of a legal practitioner was allowed. Section 36 of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) provides for representation of parties. Sub-section (4) of Section 36 is as under:--

"In any 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 other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be."

3. Sub-section (4) of Section 36 of the Act came for consideration of the learned Judges of the Supreme Court in Paradip Port Trust, Paradip Vs. Their Workmen, AIR 1977 SC 36 : (1977) 43 CLT 419 : (1976) LabIC 770 : (1976) 2 LLJ 409 : (1977) 2 SCC 339 : (1977) 1 SCR 537 , and they have held that for the engagement of a legal practitioner both the consent of other party as well as the permission of the Labour Court/Labour Tribunal is required. The observations of the learned Judges of the Supreme Court in paragraphs 21 and 22 are relevant. These are:

"21. We have given anxious consideration to the above submission. It is true that "and" in a particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discourage representation by legal practitioners as such, and the need for expeditious disposal of cases, we are unable to hold that "and" in section 36(4) can be read as "or".

22. Consent of the opposite party is not an idle alternative but a ruling factor in section 36(4). The question of hardship, pointed out by the Solicitor General, is a matter for the legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of section 36 is clear and unambiguous."

4. In view of the above law laid down by the Supreme Court, we have no hesitation to hold that the impugned order passed by the Presiding Officer of the Labour Court/Industrial Tribunal is wrong, illegal and against sub-section (4) of Section 36 of the Act. Therefore, we allow the writ petition and quash the impugned order (Annexure P-3). No order as to costs."

10. Learned counsel for the petitioner would vehemently argue that the judgment in Paradip Port Trust's case supra had been rendered nearly four decades ago, when the Trade Union movement in this country was in its infancy and the workmen and the industries were then treated as two unequals. However, the Trade Union movement has now become nearly 70 years old and crossed its age of infancy long back. A number of very good Trade Unions, who have acquired knowledge, legal acumen and skill are defending the working class and very often these dedicated and reputed Trade Union Leaders are more than a match to even best of the legal practitioners before the Labour Court or Tribunal. Similarly, they have many seasoned office-bearers of a number of Trade Unions functioning in this country, who have also acquired rich experience in the field of legal background and therefore, there is no longer a fight amongst unequals. This being the situation, the judgment in Paradip's case supra has to be considered keeping in view these developments and changed conditions. In support of his submissions has relied upon T.K. Varghese Vs. Nichimen Corporation, (2001) 4 BomCR 168 : (2001) 4 BOMLR 917 : (2001) 90 FLR 91 : (2002) 4 LLJ 1018 : (2001) 3 MhLj 711 , Salvation Army Vs. Sunil J. Ingle, (2005) 5 BomCR 851 : (2005) 107 FLR 932 and Samarendra Das Vs. M/s. Win Medicare Pvt. Ltd., (2014) 2 LLN 637 : (2014) LLR 345 .

11. I am unable to agree with the aforesaid submissions, as it cannot be disputed that the judgment of Hon''ble Supreme Court is the law of land and is binding on all. That apart, even if we assume that there is no judgment rendered by the Hon''ble Supreme Court on the subject, even then decision of learned Division Bench of this Court is binding upon this Court and this Court is bound to follow such decision.

12. This Court cannot swerve from the path of judicial decorum and propriety. In the hierarchical system of Courts, it is necessary for each lower tier to accept loyally the decision of the higher tiers. The doctrine of binding precedent is the merit of promoting a certainty and consistency in judicial decisions and enables an organic development of law.

13. Dealing with the question regarding rule of precedent, the Hon''ble Supreme Court in a recent judgment in Sundeep Kumar Bafna Vs. State of Maharashtra and Another, AIR 2014 SC 1745 : (2014) AIRSCW 2115 : (2014) CriLJ 2245 : (2014) 4 JT 486 : (2014) 4 SCALE 215 has held as under:--

"13. The Constitution Bench in Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., AIR 1989 SC 1933 : (1989) 66 CompCas 466 : (1989) 178 ITR 548 : (1989) 2 JT 427 : (1989) 1 SCALE 1337 : (1989) 2 SCC 754 : (1989) 3 SCR 316 : (1989) 74 STC 313 , has come to the conclusion extracted below:

"27. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges? There is no

constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges....."

14. This ratio of Raghbir Singh was applied once again by the Constitution Bench in Chandra Prakash and Others Vs. State of U.P. and Another, (2003) SCC(L&S) 827 . We think it instructive to extract the paragraph 22 from Chandra Prakash in order to underscore that there is a consistent and constant judicial opinion, spanning across decades, on this aspect of jurisprudence:

"Almost similar is the view expressed by a recent judgment of a five-Judge Bench of this Court in Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, (2002) 111 CompCas 299 : (2002) 174 CTR 580 : (2003) 90 ECC 878 : (2002) 144 ELT 7 : (2002) 254 ITR 99 : (2001) 10 JT 347 : (2001) 8 SCALE 384 : (2002) 1 SCC 1 : (2001) AIRSCW 5016 : (2001) 8 Supreme 548 . In that case, a Bench of two learned Judges doubted the correctness of the decision a Bench of three learned Judges, hence, directly referred the matter to a Bench of five learned Judges for reconsideration. In such a situation, the five-Judge Bench held that judicial discipline and propriety demanded that a Bench of two learned Judges should follow the decision of a Bench of three learned Judges. On this basis, the five-Judge Bench found fault with the reference made by the two-Judge Bench based on the doctrine of binding precedent.

15. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with

that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."

14. Adverting to the facts of the present case, it would be noticed that admittedly the petitioner had not sought leave nor obtained consent of the respondents for engagement of a legal practitioner, which in terms of the learned Division Bench judgment of this Court in Cement Corporation's case supra was not permissible. The mere fact that the legal practitioner had appeared on number of occasions, as contended by the learned counsel for the petitioner, would, therefore, be of no avail.

In view of the aforesaid discussion, more particularly the binding force of the judgment rendered by the Hon"ble Supreme Court in Paradip Port Trust (supra) and learned Division Bench judgment of this Court in Cement Corporation (supra), I find no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their costs. The Registry is directed to place copy of this judgment on connected files.