
(1986) 07 MP CK 0022
In the Madhya Pradesh High Court
Case No : L.P.A. No. 2 of 1985

M.P. State Co-operative Marketing Federation Limited, Bhopal	APPELLANT
Vs	
Labour Commissioner, Madhya Pradesh, Indore and others	RESPONDENT

Date of Decision : 09-07-1986

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), 2(s)
Madhya Pradesh Co-operative Societies Act, 1960 — Section 55(2), 64

Citation : (1986) JLJ 782 : (1986) MPLJ 630

Hon'ble Judges : K.K. Adhikari, J;B.C. Varma, J

Bench : Division Bench

Advocate : M.M. Sapre, for the Appellant; P.P. Naolekar, for the Respondent

Final Decision : Allowed

Judgement

B.C. Varma, J.

This appeal under clause 10 of the Letters Patent arises out of order dated 11-12-1984 passed by the learned Single Judge (B.M. Lal, J.) in Miscellaneous Petition No. 503 of 1982 whereby the appellant's petition seeking quashing of the proceedings before the Labour Court stands dismissed.

Facts necessary to appreciate the contentions raised in support of this appeal are that the appellant, which is a duly registered co-operative society under the Madhya Pradesh Co-operative Societies Act, 1961 terminated the services of the respondent, Kamal Kant Mal who was then in the employment of the appellant as Assistant Manager (Sales) in Pesticides Factory at Katni. Shri Mal was initially appointed as Marketing Organiser by order dated 18-1-1966 and was later promoted as Assistant Manager (Sales). Shri Mal challenged the termination of his service before this Court in Miscellaneous Petition No. 644 of 1976. A writ of certiorari quashing the termination order was sought for. By order, dated 30-9-1976, that petition was dismissed without notice to the opposite party. The only point then urged by Shri Mal was that his appointment could not be

terminated without prior concurrence of the Registrar of the Cooperative Societies in terms of bye-law 41(3) framed by the appellant Federation. That contention was rejected and the petition was summarily dismissed by a Division Bench of this Court. It may also be mentioned that during the pendency of the petition (M.P. No. 644 of 1976) Shri Mal also resorted to remedy available under the Co-operative Societies Act by moving the Assistant Registrar for decision u/s 55(2) and 64 of the M.P. Co-operative Societies Act. Although this remedy was availed of after the prescribed period, yet the Deputy Registrar condoned the delay and entertained the dispute. The remedy so availed of by Shri Mal did not satisfy him. He, therefore, resorted to the third remedy. This time he took shelter under the Industrial Disputes Act and persuaded the Labour Commissioner to refer a dispute u/s 10(1) of the Industrial Disputes Act to the Labour Court. On being noticed by the Labour Court, the appellant filed preliminary objections attacking the maintainability of the reference on grounds that (i) Shri Mal was not a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947 as Shri Mal was employed mainly as a managerial and administrative capacity and his duties were of supervisory nature, the monthly emoluments being more than Rs. 500/- and (ii) that the order passed in Miscellaneous Petition No. 644 of 1976 holding Shri Mal's termination of service as valid, operated as res judicata or at least constructive res judicata. By order dated 5-3-1982, the Labour Court expressed its opinion that it will not be just to take the issue as to the maintainability of the reference in view of the dismissal of Miscellaneous Petition No. 644 of 1976 separately. In its opinion, the five preliminary issues framed in that case require to be heard and decided together. Aggrieved by this order, the appellant filed Miscellaneous Petition No. 503 of 1982. This was heard on merits by a learned Single Judge of this Court. By order, dated 11-12-1984, it was held that the dispute did arise u/s 2(a) of the Industrial Disputes Act and Shri Mal is a "workman" within the meaning of that Act. The learned Single Judge also held that whether a dispute existed or was apprehended is a matter of subjective satisfaction of the authority concerned and the question is not open for interference in writ jurisdiction. On the question of the proceedings before the Labour Court being barred by the principles of res judicata constructive res judicata, the learned Single Judge is of opinion that as the earlier petition, i.e., Miscellaneous Petition No. 644 of 1976, was dismissed summarily and with out notice to the opposite party and since only one point was agitated in support of that petition, the order passed therein dismissing that petition cannot operate as res judicata. Consequently, it was held that the proceedings before the Labour Court were maintainable. Hence this appeal under clause 10 of the Letters Patent.

Before we proceed to consider the contentions raised by Shri M.M. Sapre on behalf of the appellant, we would like to mention that it appears that from order dated 5-9-1981 Annexure L in the original Miscellaneous Petition No. 503 of 1982, that an objection was raised by the appellant to the effect that Shri Mal should be asked to elect between the two proceedings simultaneously taken by

him, i.e., one before the Labour Court and the other before the Deputy Registrar, Co-operative Societies. This prayer was rejected and the direction was issued that as the reference was made to the Labour Court under the Industrial Disputes Act, it shall be heard and decided. It appears that the appellant again pressed the Labour Court to hold the proceedings before it as not maintainable in view of the decision in Miscellaneous Petition No. 644 of 1976. We have earlier mentioned that this objection was not decided on merits and the Labour Court only observed that the question so raised shall be decided with other preliminary issues. This, therefore, makes it clear that the Labour Court had left the question open and undecided. The appellant unnecessarily rushed to this Court invoking its writ jurisdiction.

The Labour Court has not taken any decision on the question whether Shri Mal was a "workman" within the meaning of section 2(s) of the Industrial Disputes Act. The answer to this question shall turn upon the nature of the duties assigned to Shri Mal at the relevant time and the emoluments earned by him. On this issue the parties are not agreed even on questions of facts and, therefore, any decision one way or the other can be taken on the evidence which may be adduced by the parties and for which they must be given due opportunity. We feel that before the learned Single Judge, there was no material on which such a conclusion can be reached and, therefore, the finding that Shri Mal was a "workman" has to be set aside. The matter needs decision by the Labour Court.

The question whether the decision in Miscellaneous Petition No. 644 of 1976, dated 30-9-1976, operates as *res judicata* as regards the proceedings taken on reference u/s 10 of the Industrial Disputes Act before the Labour Court does not appear to be free from difficulty. Now it cannot be disputed, and in fact was not disputed by the learned counsel for the parties, that a decision given on merits even in a writ proceedings operates as *res judicata* between the same parties in subsequent writ proceedings or even in a civil suit brought on the same cause of action, the other ingredients for the applicability of that doctrine being present. In the present case, what has to be borne in mind is that the order in Miscellaneous Petition No. 644 of 1976 was passed without notice to the opposite party and that in support of his claim, Shri Mal had agitated only one point, i.e., that the termination of his service was bad because of prior approval of the Registrar Co-operative Societies was not taken. The contention advanced by Shri Sapre on behalf of the appellant is that although the decision taken in that miscellaneous petition is without notice to the opposite party, yet it is the decision on merits and the order is a speaking order. Shri Mal should have agitated all the grounds available to him in support of that petition including the ground that his termination amounts to retrenchment and was bad for non-payment of retrenchment compensation. The contention raised by Shri Sapre finds support from a decision of the Supreme Court in *Virudhunagar Steel Rolling Mills Limited Vs. The Government of Madras*, which has also been referred to by the learned Single Judge, in paragraph 23 of the impugned order. The learned Single Judge has, however, observed but, in our opinion, without any rational

basis, that the decision is distinguishable on facts. In that decision, it is held that where a writ petition under Article 226 is disposed of on merits and the order of dismissal is a speaking order, it would amount to res judicata and would bar a subsequent petition under Article 32 of the Constitution on same facts, irrespective of the fact that a notice to the opposite party was or was not issued. The remedy indicated thereunder is to file an appeal. Reference has also been made by the learned Single Judge to the decision in *Hoshanak Singh v. Union of India* (AIR 1979 S.C. 1328). That decision tells us that if the writ petition is dismissed in limine without recording any speaking order (italias ours), such a dismissal would not constitute a bar of res judicata to a subsequent petition on the same cause of action. It would necessarily mean that where order dismissing the petition under Article 226 is a speaking order showing application of mind to the point raised, the decision shall operate res judicata in any subsequent proceedings on the same cause of action under Article 226 of the Constitution. A reading of the order passed in Miscellaneous Petition No. 644 of 1976 would show that it is a well considered speaking order meeting the point raised with reference to the relevant provisions of the bye-laws. Though made in limine, that order is a speaking order.

The question, however, is whether that decision in proceedings under Article 226 shall be res judicata in proceedings before the Labour Court under the Industrial Disputes Act claiming similar relief. In *Union of India (UOI) Vs. Nanak Singh*, a civil suit was held to be barred by principles of res judicata when an earlier writ petition challenging the order of termination of service was dismissed even without deciding the question of competency of authority ordering termination and when in the suit the termination order was attacked on the ground that it was passed by the authority lower in rank than the competent authority. In paragraph 6 of the report, it is pointed out that in order that the previous adjudication between the parties may operate as res judicata, the question must have been heard and decided and that the parties must have an opportunity of raising their contentions thereon. The following observations in *Gulabchand Chhotalal v. State of Gujarat* (AIR 1965 S.C. 1158) were quoted with approval:-

There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matter in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest.

There is no doubt that principles of res judicata apply to industrial proceedings also for the very good reason of avoiding the multiplicity of litigation and re-agitation of the same dispute at issue between the same employer and employees. [See: *Workmen of The Straw Board Manufacturing Co. Ltd. Vs. Straw Board Manufacturing Co. Ltd., and Bharat Hea\y Electricals Ltd., Bhopal vs. R.D. Saxena*, 1982 M.P.L.J. 613.] Other conditions satisfying, we do not see why the proceedings before the Industrial Court should not be held barred by principles of

res judicata embodied in section 11 of the CPC in view of a previous decision on the same subject matter and between the same parties in a petition under Article 226 of the Constitution.

What is res judicata is the final decision on the matter directly and substantially in issue in the former proceedings. A matter which might or ought to have been made a ground of attack or defence in the former suit but which was not so done, too operates as res judicata (constructive res judicata) in view of Explanation IV to section 11 of the Code of Civil Procedure. When a party fails to raise a particular plea which could have been taken in order to support his case, the party cannot be allowed to raise the same plea again. This doctrine of constructive res judicata was held applicable even to the decision rendered in writ petition under Article 226 of the Constitution by the Supreme Court State of U.P. Vs. Nawab Hussain, . In that case, a writ petition challenging the order of termination of an employee was dismissed on merits. He then filed a suit challenging the order of dismissal and raised a ground that the dismissal was by an authority subordinate to the one who appointed him. He was prevented from raising such a plea on the principles of constructive res judicata as he might and ought to have raised such a plea earlier in the writ proceedings. According to Shri Sapre, learned counsel for the appellant, Shri Mal might and ought to have raised all the pleas available to him questioning the termination of his services. He could well have agitated in support of his claim that the termination of his service was bad also because he was a workman and that the termination amounted to illegal retrenchment for want of payment of retrenchment compensation. Shri Naolekar, however, argued that such a plea was not available. In our opinion, the contention raised by Shri Sapre appears to have some force. Such a plea is a plea in support of the relief sought for in earlier writ petition (Miscellaneous Petition No. 644 of 1976). It is not the law that in no case any disputed question of fact can not be determined by the High Court in proceedings under Article 226 of the Constitution, although ordinarily the High Courts do not entertain such controversy in such petition. That, however, done not mean that it has no jurisdiction to do so. If, however, such a plea was raised and the High court refused to entertain the plea and refused to adjudicate upon on the ground that it involved determination of disputed questions of fact, certainly the plea of constructive res judicate could not be said to be available to the appellant. Shri Mal failed to raise that plea in the writ petition when even, according to him, such a plea was available. Failure to raise such a plea which he might and ought to have raised in the petition, prevents him from subsequently raising that plea in proceedings before the Labour Court and the proceedings, therefore, are, in our opinion, barred by the rule of constructive res Judicata.

The learned Single Judge has referred to a decision of this Court in Union of India (UOI) and Another Vs. Sharmanand, to support his conclusion that the proceedings before the Labour Court are not barred by res judicata Speaking on behalf of the Full Bench, in that case, Shiv Dayal J. (as he then was) pointed out, in paragraph 15, that it was clear from the decision in the earlier writ petition

that there the Division Bench was not asked to apply its mind to the question whether the principles of natural justice could be applied to a case of master and servant. In subsequent paragraph, it was observed that "where a question of law was not specifically decided in a writ petition, it cannot operate as constructive res Judicata in a subsequent suit on the ground that that point must be deemed to have been raised in the petition and decided against the party who lost in those proceedings." The following observations from that Judgment may well be quoted:-

It is only the general principle of res Judicata which is applied to writ petitions, but constructive res Judicata, which is a special and artificial creation of res Judicata, enacted by that section of the Code of Civil Procedure, cannot generally be applied to writ petitions.

These observations by themselves do not exclude the applicability of principles of constructive res Judicata even to decisions rendered in writ proceedings. What appears from the observations in paragraph 17 of the report is that the decision of the Full Bench was influenced by the fact that the decision rendered in earlier writ petition and which decision was said to be operative as res Judicata was a pure question of law relating to the jurisdiction of the Court, i.e., whether the Court could grant relief on the applicability of principles of natural justice. It was observed that the principles of res Judicata can apply to a decision, right or wrong, in respect of a question of fact, or a mixed question of law and fact, but where the question is one purely of law and it relates to the jurisdiction of the court, the party affected by the decision cannot be precluded from subsequently challenging the validity of that order. Such obviously is not the case in hand. The learned single Judge has, however, quoted the fourth conclusion mentioned in paragraph 20 of that judgment. Analysed properly, it would only mean that where what is decided is a specific question, it will not be just to say that some other question should be taken as implicitly decided when the decision does not show application of mind by the Court to that specific question said to be implicitly decided in the question actually decided. That certainly is not the case here. It is not Shri Sapre's contention that the point raised before the Labour Court was implicitly decided in answering the question raised in writ petition (Miscellaneous Petition No. 644 of 1976). The contention is based upon the rule of constructive res judicata as embodied in Explanation IV to section 11 of the Code of Civil Procedure. It is not a case where it can be said that the High Court in deciding the writ petition (Miscellaneous Petition No. 644 of 1974) did not have jurisdiction to entertain the dispute or that a question of jurisdiction raised was wrongly decided. The decision of the Full Bench of this Court in Sharmanand's case (supra) therefore, is not attracted to the present case.

In our opinion, the objections raised by the appellant before the Labour Court, far from being frivolous are substantial. The Labour Court committed an error in not deciding these objections before proceeding to the lengthy process of trial of many disputed questions of fact. Instead, as the question raised had to be

decided only on admitted facts and if decided in favour of the appellant, could have brought the proceedings before the Labour Court to an end, we feel that it was the bounden duty of the Labour Court to have returned a finding thereon instead of avoiding a decision on that question.

For the reasons aforesaid, we allow this appeal and set aside the impugned order of the learned Single Judge. Disagreeing with him, we hold that the proceedings before the Labour Court initiated by the respondent Shri Mal are barred by principles of constructive res judicata and, therefore, not maintainable. This is a part from the question whether Shri Mal can be said to be a "workman" within the meaning of section 2(s) of the Industrial Disputes Act to enable him to invoke that jurisdiction. We, however, leave the parties to bear their own costs of the litigation throughout.