

(2005) 06 BOM CK 0043
In the Bombay High Court
Case No : Writ Petition No. 119 of 1992

Sagar Moreshwar Satpute and Others	APPELLANT
Vs	
Sharda Industries and Engineering Works Ltd. and Others	RESPONDENT

Date of Decision : 06-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 227
Industrial Disputes (Bombay) Rules, 1957 — Rule 79A
Industrial Disputes Act, 1947 — Section 2, 2(14), 25C, 25E, 25F

Citation : (2006) 3 BomCR 419 : (2006) 108 FLR 439 : (2006) 2 LLJ 21 :
(2005) 4 MhLj 824

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

Bench : Single Bench

Advocate : S.D. Thakur, for the Appellant; R.B. Puraik, S. Chatterjee and S.S. Sahasrabuddhe, for the Respondent

Judgement

B.P. Dharmadhikari, J.—In this writ petition under Articles 226 and 227 of Constitution of India challenge is to the order dated 26-2-1991 passed by respondent No. 2 Deputy Commissioner of Labour in application (IDA) No. 3 of 1988 u/s 33-C(1) of Industrial Disputes Act. Said application was filed by present petitioners claiming salary for the period from 1-9-1987 to 31-8-1988.

2. Respondent No. 1 is an engineering industry covered by provisions of Bombay Industrial Relations Act, 1946. It manufactures steel bars and a unit manufacturing bigger bars is known as Bada Mill while the unit manufacturing steel bars with less gauge is known as Choti Mill. The petitioners are employees engaged in Choti Mill. The number of employees is above 100 and the respondent No. 1 was not extending same service conditions to his employees working in both Mills. It appears that petitioners were getting 8.33% bonus while the employees of Bada Mill were being paid 20% bonus. Petitioner state that grievance in this respect and was made by them with respondent No. 2 and on 20-11-1985 and understanding was arrived at between parties. However, this

was to the annoyance of respondent No. 1 and hence on 21-11-1985, the respondent No. 1 displayed a notice in Hindi that because of shortage of raw material Choti Mill would be kept closed with effect from 21-11-1985 for indefinite period for which lay-off would be given. Workers were advised to mark their attendance at 9 AM everyday. As this was in violation of Section 25M of Industrial Disputes Act, 1947, the petitioners filed on 12-2-1986 Application (BIR) 36 of 1986 before First Labour Court, Nagpur seeking declaration of illegal change. On 5-8-1987, the Labour Court declared lay-off to be illegal and void but held that it did not amount to illegal change. It further directed said respondent to withdraw offer of alternate work given by it by giving individual notices or by displaying a notice to that effect on factory premises within two days. In above proceedings, the petitioners also moved application for interim relief and on 12-5-1986 the Labour Court directed employer to pay wages to the petitioners for the period from 22-11-1985 till date of its order. Employer challenged this interim direction before Industrial Court and Industrial Court directed him to pay wages for the period from 22-11-1985 to 10-1-1986. On 10-9-1987, the petitioners filed application u/s 33-C(1) for recovery of salary between 11-1-1986 to 31-8-1987. A certificate was accordingly issued by respondent No. 2 but inadvertently period mentioned therein was from 25-11-1985 to 10-11-1986. The said certificate was challenged by respondent No. 1 in writ petition and on 26-4-1988, the Division Bench was pleased to set aside that certificate. Thereafter on 1-8-1988 the respondent No. 2 issued recovery certificate for Rs. 234090/- only in favour of petitioners for period 11-1-1986 to 31-8-1987. This certificate was challenged by employer in writ petition 56 of 1989 but on 14-2-1989 said writ petition was rejected in motion hearing. The employer/present respondent No. 1 thereafter approached Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 4282 of 1989 and on 26-9-1989 said SLP was allowed to be withdrawn. It appears that thereafter respondent No. 1 challenged said certificate again in Writ Petition 2327 of 1990 and on 13-3-1991 this Court issued "Rule" in it and made it returnable early. The petitioners received this payment on 16-5-1990.

3. In the meanwhile on 26-8-1988 petitioners filed another application u/s 33-C(1) for recovery of salary amount of Rs. 143667/- only for the period from 1-9-1987 to 31-8-1988. This application was heard by respondent No. 2 on 24-1-1991 and he rejected it on 26-2-1991. Said respondent accepted the story of respondent No. 1 that on 7-8-1987 it displayed a notice as per orders of Labour Court dated 5-8-1987 and in spite of said notice, petitioners did not report for duty. It held that there was no lay-off after 7-8-1987 and as workers did not join duty, they did not earn salary. He also observed that learned counsel for employees Shri Thakur did not dispute the fact of displaying notice dated 7-8-1987. He rejected the argument based upon "res judicata" advanced by employees. He also considered limited scope of jurisdiction available to him in the matter and found that there is fundamental dispute as to the existence of layoff itself. He found that there is bona fide dispute about entitlement of

petitioners to the wages and such dispute cannot be decided under limited jurisdiction u/s 33-C(1) of Industrial Disputes Act. It is this order which is challenged in present writ petition.

4. On 15-1-1992 while issuing rule in the matter, this Court directed that it should be listed along with Writ Petition 2327 of 1990 for final hearing. However, both the counsels state that Writ Petition 2327 of 1990 is already dismissed the default. I have heard Advocate S. D. Thakur for petitioners and advocate R. B. Puranik for respondent No. 1 employer. Nobody appears for remaining respondents.

5. Advocate Thakur contended that reasons put forth by respondent No. 2 to reject the application of petitioners are per se perverse and also erroneous. He contends that in view of clear provisions of Section 25M(8) of Industrial Disputes Act, respondent No. 2 was not right in concluding that there was dispute about entitlement of petitioners to full salary. He argues that in view of the judgment of Labour Court dated 5-8-1987 and also previous adjudication confirmed right up to Hon"ble Apex Court, respondent No. 2 erred in holding that there is any dispute about existence of lay-off after 7-8-1987. He stated that the petitioners have been paid their full salary for period even after 7-8-1987 i.e. upto 31-8-1987 and, said finding operated as res judicata between parties in the matter. He further argued that alleged notice dated 7-8-1987 was never displayed and the observation of respondent No. 2 that he did not dispute fact of its display are perverse. He also invites attention of Court to the grounds C, H, I and K of his petition in this respect. He states that employer could have raised this plea and could have disclosed said notice in earlier litigation between parties. He contends that the defence as taken is false and by way of afterthought. He further states that alleged notice is not in prescribed proforma and has been prepared only in English while the provisions of Model Standing Orders require such notice to be displayed in Hindi as all the workers understand only that language. He further asserts that in any case alleged notice does not have the effect of withdrawing lay-off.

6. Advocate Puranik for employer states that after lay-off notice dated 21-11-1985, there was meeting between parties on 10-1-1986 in presence of Deputy Labour Commissioner and petitioners agreed to perform alternate work/job and employer agreed to protect their salary. Accordingly, notice of alternate work was published on 11-1-1986. He states that as per explanation to Section 25M of Industrial Disputes Act there could not be in the lay-off after 11-1-1986. He states that therefore after 11-1-1986 there was no lay-off in force and hence, on 5-8-1987 Labour Court also did not ask employer to withdraw lay-off. He relies upon the order dated 5-8-1987 of Labour Court to substantiate his stand that on 7-8-1987 when employer published/displayed the notice, there was no lay-off and as such there was no question of withdrawing it. He invites attention of Court to provisions of Section 25M on one hand and provisions of Section 25E and 25C of Industrial Disputes Act on the other hand to comment upon the

difference in the scheme. He contends that direction issued by Labour Court was complied with by withdrawing offer of alternate work. He states that the scope of power u/s 33-C(1) of IDA is very limited and order passed by respondent No. 2 is in accordance with law and calls for no interference in writ jurisdiction. He further states that compliance with order of Labour Court was pointed by employer in his reply dated 14-6-1988 before respondent No. 2 and it was specifically stated therein that the petitioners have not joined the duties. He contends that copy of said reply was also filed in SLP before Hon"ble Apex Court. He further states that the order dated 5-8-1987 by Labour Court is not an "award" u/s 2(14) of IDA and hence proceedings in the Section 33-C(1) are not maintainable. In support he has relied upon the judgment of this Court between Jugilal Laxminarayan Yadav and Another Vs. State of Maharashtra and Others, . He argued that disputed questions cannot be gone into by respondent No. 2 in limited jurisdiction u/s 33-C(1) and in support he relies upon the judgment of Hon"ble Apex Court between Fabril Gasosa v. Labour Commissioner reported at 1997 (1) C.L.R. 589. He is also relied upon another ruling of Delhi High Court reported at 1997 (1) C.L.R. 744 between Colcom Plastic Limited v. Union of India and of Bombay High Court reported at 2003 (111) C.L.R. 342 between Parekh and Co. v. S. M. Valvi, Assistant Commissioner for same purpose. He further states that notice dated 7-8-1987 was duly displayed and this fact is proved by employer on record. He contends that principles of res judicata therefore do not have any application and the order passed by respondent No. 2 deserves to be maintained.

7. Section 25C of Industrial Disputes Act prescribes right of workman for laid off compensation. Section 25E states that no compensation shall be payable to such workman if he refuses to accept any alternative employment. Section 25M prohibits lay-off without prior permission of appropriate government. Explanation at the end of this section states that if employer offers any alternative employment to such workman, he shall not be deemed to be laid off. However, this issue is not open for adjudication because of orders of this Court dated 14-2-1989 in Writ Petition 56 of 1989. In said order, this Court has observed "Reliance was placed on a meeting between the representatives of the workers and the recognized Union before the Labour Officer to the effect that employees would join the alternative employment offered by petitioner. This evidently would proceed on the basis that there was a proper lay-off, which evidently prima facie was not the case." Moreover, the Labour Court in its order dated 5-8-1987 in B.I.R. case No. 36 of 1986 observed that "The lay-off dated 22-11-1985 is illegal and void but it does not amount to an illegal change. M/s Sharda Industries and Engineering Works Limited, Nagpur is hereby directed to withdraw the offer of alternate work by giving notice to the individual applicants except applicants Nos. 2 and 22 and if that was not practicable by displaying a notice to that effect on the factory premises within two days of the date of this order." The Labour Court in its order dated 5-8-1987 found that even offering alternative employment amounted to giving of lay-off (paragraph 22 of order) and in the impugned order, respondent No. 2 has noticed this finding. In this background, it is not open to

respondent No. 1 to contend that there was no lay-off after 11-1-1986 or in any case, after 7-8-1987. In Writ Petition 56 of 1989, question of salary upto 31-8-1987 was involved and, as such this issue was also relevant there and ought to have been raised there. The respondent No. 2 has granted salary from 11-1-1986 to 31-8-1987 to the petitioners and as such, the finding that lay-off continued upto 31-8-1987 has attained finality and cannot be reopened by the employer.

8. Respondent No. 2 has observed that Advocate Thakur has not disputed the contention of employer about displaying the notice dated 7-8-1987. Advocate Thakur has very much disputed this position and in writ petition, perusal of ground C, H, I and K reveal that the petitioners are very much challenging this version of employer. If, any such notice was really displayed, it was obligatory for employer to point out the same to the office of respondent No. 2 immediately before said respondent decided the matter on 26-4-1988. The certificate issued on 26-4-1988 was challenged in writ petition which was allowed by this Court and this could have been pointed out even in that writ petition. Not only this, when the proceedings began afresh before respondent No. 2, displaying of notice could have been pointed out even at that juncture. Respondent No. 2 corrected his mistake and issued proper revenue recovery certificate on 1-8-1988. This was also challenged in writ petition and thereafter in SLP in those proceedings also employer could have produced notice dated 7-8-1987. However, employer has vaguely mentioned in his reply before respondent No. 2 that order of Labour Court was complied with. However mode and manner in which it was so complied are not pleaded at all. Thus, the defence which was relevant to oppose the claim of petitioners was not taken at the time when it was required to be taken. The same therefore, cannot be allowed to be taken now. The finding that lay-off continued upto 31-8-1987 has become final and operates as *res judicata* between parties. Even if it is presumed (because of allegation in reply) that such defence was taken, it was either rejected or not considered by respondent No. 2 while issuing certificate on 1-8-1988, by this Court while dismissing Writ Petition 56 of 89 and the SLP came to be withdrawn. In such circumstances, again because of principles of *res judicata*, such a plea cannot be allowed to be reagitated. It is to be noted that though SLP was withdrawn on 26-9-1989, actual payment has been made to workers in pursuance of earlier revenue recovery certificate on 16-5-1990. Thus, the employer ought to have pleaded and pointed out the fact that he had displayed notice on 7-8-1987 as early as possible.

9. There cannot be any debate about application of principles of *res judicata* in Welfare Labour Jurisdiction. In AIR 2005 SCW 1714, *Lal Singh Ram Singh v. Assist. Executive Engineer*, Appellant/workman before Hon"ble Apex Court challenged termination of his service as in violation of Section 25F of Industrial Disputes Act and the Labour Court granted him relief of reinstatement without other benefits like backwages, continuity etc. The employer as also appellant both challenged this award of Labour Court in separate writ petitions before

learned single Judge of High Court of Karnataka. The learned single Judge dismissed the petition of employer and allowed the petition of workman. Employer challenged dismissal of his writ petition by filing writ appeal before Division Bench and the same came to be dismissed without even issuing notice to workman. The employer thereafter filed another writ appeal against the order of learned Single Judge allowing writ petition of workman and the Division Bench, unaware of earlier rejection of writ appeal by another Division Bench, reversed the finding of Labour Court holding that workman did not put in continuous service of 240 days. The workman thereafter approached Hon"ble Apex Court and the Hon"ble Apex Court noted that the conclusion that workman was entitled to benefit of Section 25F was not open to challenge because order of reinstatement passed by Labour Court was challenged before learned single Judge and thereafter in writ appeal by employer unsuccessfully, and said finding was final and binding and operated as res judicata. It held that the question whether workman had established that he had put in 240 days of continuous work immediately prior to his dismissal, was not a question available for second Division Bench to be considered afresh. In Bhanu Kumar Jain Vs. Archana Kumar and Another, in paragraph 30 Hon"ble Apex Court observes that "res judicata debars a Court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in latter proceedings. The doctrine of res judicata creates a different kind of estoppel viz. Estoppel by Accord."

10. In the case of Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, , the Apex Court has held :-

"It is well-known that the doctrine of res judicata is codified in Section 11, CPC but it is not exhaustive, Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 and in many other situation also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, i.e. it must be deemed to have been necessarily decided by implication, then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided. "

11. In *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, Hon"ble Apex Court held that in view of explanation IV to Section 11 CPC it could not be said that the earlier judgment would not operate as res judicata as one of the grounds taken in the subsequent petition was absent in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined therein but as to every other matter which the parties might and ought to have raised in offence or defence and ought to have got it decided as incidental to or essentially connected with the subject matter of the litigation between them. The Hon"ble Apex Court in the case of *P.K. Vijayan Vs. Kamalakshi Amma and Others*, has held that it is a sheer abuse of the process of the Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just that the parties do raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive res Judicata to prevent raising of the same at a later point of time and thereby it must be deemed that they are waived.

12. The Labour Court, on 5-8-1987 directed the respondent to issue individual notices to the employees withdrawing offer of alternate employment and permitted display of notice, only if such individual notice was not practicable. Employer has not stated why he did not serve individual notice. The matter was very much pending between parties and even during pendency of matter, employer could have brought this fact to the notice of individual employee. It is thus clear that employer was avoiding providing work to petitioners and therefore only did not disclose this fact even to the authorities/Courts. Even if it is presumed that notice dated 7th August, 1987 was really displayed, effect thereof needs to be considered. Said notice is as under :-

"Notice.

Since found practically difficult to serve individual notices to all concerned without prejudice to its rights, the management in conformity with the directions issued by the First Labour Court Nagpur in B.I.R. case No. 36/86 decided on 5-8-1987, call off forthwith the offer of alternative employment vide notice dated 11-1-1986 came to be issued at the instance of employees and their Union, and the consensus reach between parties in the meeting held on 10-1-1986 in the office of Deputy Commissioner of Labour, Nagpur. All concerned may please take notice.

Sd./ Manager."

Question is whether this has the effect of withdrawing lay-off. It is important to note that in this notice, the management/employer has not called upon the employees to report back for their normal duty. If notice dated 11-1-1986 is withdrawn, it would mean that position prevailing on that day would stand restored. In the absence of such notice, what was prevailing on 11-1-1986 was a lay-off which has been declared illegal and void by Labour Court on 5-8-1987.

The Labour Court as also this Court found that offer of alternative employment did not put an end to lay-off. Thus, by withdrawing said offer, layoff was not automatically withdrawn. Employer therefore ought to have issued notice calling upon individuals to join back their previous duties and then only it could have been possible to hold that there was no lay-off. It is clear that the alleged notice dated 7th August, 1987 does not have the effect of withdrawing lay-off and it does not effect any change insofar as entitlement of workers to salary is concerned. The earlier order dated 1-8-1988 in this respect covered the entire field and ought to have been followed by respondent No. 2 by issuing recovery certificate for salary for period from 1-9-1987 to 31-8-1988. There is absolutely no reason or justification for taking any other view of the matter. Rule 79-A of the Industrial Disputes (Bombay) Rules, 1957 prescribes form of notice of commencement and termination of lay-off and states that such notice is to be given within seven days of such termination or commencement, as the case may be. The notice of termination of lay-off is required to be issued in form XXIII-B. As per said form, the employer has to serve a notice upon the Commissioner of Labour informing him that lay-off has ended on particular date. Perusal of impugned order reveals that employer has not served any such notice. In such circumstances, respondent No. 2 could not have taken cognizance of alleged notice dated 7-8-1987 allegedly displayed by respondent No. 1 to deny issue of recovery certificate in favour of petitioners. Said action of respondent No. 2 is erroneous/perverse and also without jurisdiction.

13. It is also to be noticed that the earlier notice of lay-off was in Hindi and, from record it appears that all the petitioners understand only Hindi. The Labour Court vide its order dated 5-8-1987 directed withdrawal of offer of alternative employment by individual notice. The provisions of Model Standing Orders in relation to exhibition of notices state that any notice, order, charge-sheet, communication or intimation which is personal i.e. meant for individual employee and is given in writing under the Standing Orders, it shall be in the language understood by employee concerned. Such an important notice therefore, if displayed by employer, ought to have been in Hindi. Even other notices i.e. general notices are required to be in English and in principle original language of the district in which the undertaking is situated. It will thus be seen that the order dated 5-8-1987 could be held to be complied with only if employer proves that he displayed notice in accordance with the requirements of Standing Orders. Perusal of impugned order reveals that employer has not proved it and also respondent No. 2 has overlooked this requirement. In any case, therefore, the effect is, there is no publication of notice withdrawing lay-off and as such respondent No. 2 could not have refused to issue recovery certificate. There was no serious dispute about any fact to enable respondent No. 2 to hold that it cannot take cognizance of the matter u/s 33-C(1). The impugned order of respondent No. 2 dated 26-2-1991 is therefore unsustainable and deserves to be quashed and set aside.

14. There cannot be any dispute about the entitlement of petitioners to full

salary. Number of employees is admittedly more than one hundred and lay-off was given without mandatory previous permission from State Government. Section 25M(8) declares that such a lay-off is illegal from the date on which petitioners had been laid off and it further declares that petitioners are entitled to all benefits under any law for the time being in force as if they had not been laid off. In view of this mandatory provision, the amount of salary is due to petitioners under chapter V-B of Industrial Disputes Act itself and respondent No. 2 could have issued recovery certificate u/s 33-C(1) thereof. The period of claim is from 1-9-1987 to 31-8-1988 and application is filed on 26-8-1988 i.e. within one year. Labour Court had on 5-8-1987 itself declared lay-off to be void and illegal. The recovery certificate issued u/s 33-C(1) on 1-8-1988 has been upheld right up to Hon"ble Apex Court. In such situation, it was not open for respondent No. 1 to contend that there was no lay-off after 11-1-1986 or after 7-8-1987 or after 31-8-1987. It will also not open for respondent No. 2 to deny recovery certificate on any such ground for period between 1-9-1987 to 31-8-1988. The argument of respondent No. 1 that the determination by Labour Court under B.I.R. Act is not an "award" is also unacceptable in this background. Reliance upon Jugilal Laxminarayan Yadav and Another Vs. State of Maharashtra and Others, is also misconceived because there the learned Single Judge of this Court has not considered case falling under chapter V-B of Industrial Disputes Act. The argument of petitioners that determination of industrial dispute or of any question contemplated by Section 2(b) by any Labour Court is "award" (emphasis added) need not be considered as said issue does not squarely fall for consideration here. In view discussion above, it is not necessary to make reference to other cases cited by Advocate Puranik to show the limited scope of jurisdiction available to respondent No. 2. The scope of jurisdiction is not disputed by petitioners at all. What they contend is that there controversy fits in four corners of the statute and there is no adjudication involved.

15. In the result, I hold that refusal to issue recovery certificate by respondent No. 2 is unsustainable and the said order dated 26-2-1991 at ANNEXURE-F with the petition is hereby quashed and set aside. Respondent No. 2 is directed to issue appropriate recovery certificate for the sum of salary claimed by petitioners for the period between 1-9-1987 to 31-8-1988 in their favour and against respondent No. 1 Rule is made absolute accordingly. However there shall not be any order as to costs.