

(1973) 07 BOM CK 0013

In the Bombay High Court

Case No : O.C.J. Appeal No. 142 of 1972 and Miscellaneous Petition No. 583 of 1972

The Ahmedabad Mfg. and Calico Printing Co. Ltd.

APPELLANT

Vs

The Workmen

RESPONDENT

Date of Decision : 04-07-1973

Acts Referred:

Constitution of India, 1950 — Article 136, 226
Industrial Disputes Act, 1947 — Section 10

Citation : (1974) 76 BOMLR 225

Hon'ble Judges : S.K. Desai, J;Nathwani, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen and Another, AIR 1981 SC 960 : (1981) 42 FLR 309 : (1981) 1 LLJ 489 : (1981) 1 SCALE 515 : (1981) 2 SCC 663 : (1981) 3 SCR 213 : (1981) 13 UJ 350

Nathwani, J.—This is a Letters Patent appeal by the original petitioner from the judgment and order of a single Judge on the Original Side refusing in exercise of Court's discretionary power under Article 226 of the Constitution to issue a writ of certiorari to set aside an award of the Industrial Tribunal and arises in this way.

2. The appellant is the Ahmedabad Manufacturing and Calico Printing Company Ltd., hereinafter referred to as the Company. It is predominantly a textile-manufacturer but has also factories in Bombay manufacturing heavy chemicals and engages about 750 workmen in three such factories. A dispute arose between the Company and the said workmen in respect of seventeen demands raised by the workmen through their unions and on April 12, 1965 the said demands were referred to the Industrial Tribunal u/s 10(2) of the Industrial Disputes Act, 1947, being Ref. (IT) No. 135 of 1965. Before the Tribunal respondents No. 1 who are the workmen were represented by one R.J. Mehta,

President of the concerned trade union. The Tribunal took up for consideration 4 demands, viz., demand Nos. 1, 2, 15 and 16 respectively for basic wages and adjustment, dearness allowance, gratuity and retrospective effect of these demands. On November 30, 1971, the Tribunal signed its award and sent a copy thereof to the parties. It was published on January 20, 1972 in the Maharashtra Government Gazette. In the meanwhile, however, on January 19, 1972 the Company filed in the Supreme Court a petition for special leave to appeal under Article 136 against the award and also filed an application for interim stay of the award. On February 1, 1972 the SLP and the application for interim stay came up for hearing when the Supreme Court granted an ad, interim stay of the award pending admission of the petition and directed the Company to give notice to respondents No. 1's union. The said union appeared and an affidavit in reply was filed on its behalf in the last week of March 1972. On May 5, 1972 the notice of admission came up for hearing before the Supreme Court when respondents No. 1 appeared through their counsel, and the matter was adjourned till after summer vacation and an interim order was passed by consent for payment of certain amounts per month to the workmen. On August 21, 1972, the petition came up for hearing when respondents No. 1 were also present through their counsel. After some arguments on the merits when it appeared from the observations made by their Lordships that the Court was not inclined to exercise its powers to grant leave to appeal the counsel for the Company sought leave to withdraw the petition. The Supreme Court granted such leave. The order runs:

Upon hearing counsel the Court allowed the SLP to be withdrawn.

Four days later, i.e., on August 25, 1972, the Company filed the present petition under Article 226 for setting aside the award on the same grounds. Respondents No. 1 appeared and the said R.J. Mehta filed on their behalf an affidavit in reply dated October 11, 1972 showing cause why the petition should not be granted. On behalf of the Company an affidavit in rejoinder was filed by one R.C. Trivedi on October 16, 1972.

3. The petition came up for hearing before Mr. Justice Kania when three preliminary objections were raised on behalf of respondents No. 1. In this appeal we are concerned with the first objection only, namely, whether in view of the, SLP under Article 136 having been unconditionally withdrawn by the Company, the Court should not exercise its discretion under Article 226 in entertaining the petition but should dismiss the same in limine. Now, the learned Judge determined from the respective affidavits of the parties the circumstances in which the Company unconditionally withdrew its leave application and in view of the same he equated the position arising there from "as if its (Company's) petition for special leave has been dismissed by their Lordships of the Supreme Court without a speaking order"; he also took into account the fact that the present petition raised the same contentions as were raised in the SLP and following a Division Bench decision of this Court in Vasant Vithal Palse and Others Vs. The Indian Hume Pipe Co. Ltd. and Another, held that in the circumstances of

the case it was not a fit case for exercise of Court's discretionary power to grant the writ, and therefore, dismissed the petition in limine. This appeal by the Company is directed against the said order.

4. Two questions arise for determination in this appeal. The first is whether unconditional withdrawal by the Company of its SLP under Article 136 in the circumstances found by the learned Judge is a bar to the competence of this Court to entertain the present petition under Article 226. In other words, respondents No. 1's contention is that this Court has no jurisdiction to grant a rule nisi under Article 226 in view of rejection by the Supreme Court of its earlier petition for leave under Article 136 and the second is whether it is a proper judicial exercise of discretionary power of the Court under the said article to dismiss the petition in limine on the ground that the Company's petition for special leave under Article 136 based on the same contentions was unconditionally withdrawn in the said circumstances.

5. Before advertng to the rival contentions, it is necessary to set out the circumstances in which the Company withdrew the SLP and the said order came to be passed by the Supreme Court.

6. The learned Judge said:

In the case before me, it clearly appears from Paragraph 6 of the affidavit in rejoinder filed by R.C. Trivedi on behalf of the petitioner that merits of the matter were discussed before the Supreme Court when the petition for special leave under Article 136 was taken up. All that he has stated is that the counsel for the petitioner did not argue at length and after some arguments when it appeared from a few preliminary observations from the Bench that the Court was not inclined to exercise its special and extraordinary jurisdiction in the matter, the counsel for the Petitioner Company on instructions, sought leave of the Court to withdraw the petition and this leave was granted.

7. The learned Judge proceeded to observe:

This makes it amply clear that the merits of the petition were discussed before their Lordships of the Supreme Court and that the sole reason, for withdrawal was that the counsel for the Petitioner or its representative then present in the Court, felt that the Court was inclined to dismiss the petition in limine. The averments in the petition and the affidavits in the petition and the affidavits in reply and rejoinder, which I have already referred to, make it amply clear that withdrawal of the petition before the Supreme Court was not by reason of any misapprehension of facts or law and that the withdrawal was unconditional. There was no statement made reserving the right of the petitioner to file a fresh petition in respect of the same subject matter under Article 226 of the Constitution nor was any indication given to the respondents or the Court that the petitioner intended to file any such petition.

8. It may also be noted at this stage that, apart from the present petition being

based on the same contentions for quashing the award as were raised in the special leave petition, there was, as pointed out by Kania, J.

No circumstance shown either in the petition or in the affidavit in rejoinder or in the course of the arguments by reason of which the Supreme Court might have been inclined to refuse to grant special leave. under Article 136 of the Canstitution, but which circumstance would not be relevant in the exercise of discretion in granting of relief by the High Court under Article 226 of the Constitution.

9. It is in the light of the above facts and circumstances that the present contentions will have to be considered....

10. Now, the first point about the competence of the Court to entertain the petition is admittedly raised by respondents No. 1 for the first time before us. Moreover, after hearing the parties we have come to the conclusion that the other point must be answered against the Company. We therefore do not consider it necessary to decide the first question and we express no opinion on the same.

11. As regards the other issue Mr. Sorabjee divided his argument in two parts; first, that there was a basic distinction between withdrawal of a SLP under Article 136 and its rejection or dismissal by the Supreme Court, as in the latter case there is judicial application of the mind but in allowing the withdrawal the Court merely records what transpires in the Court, and, therefore, when the Company withdrew its leave petition it did not want to be visited with the legal consequences of its rejection or dismissal by the Supreme Court; secondly, even assuming that the withdrawal of the SLP was tantamount to its rejection by the Supreme Court, it was one of the factors to be considered by the Court in exercising its special and extraordinary jurisdiction under Article 226 to issue a writ of certiorari and therefore the Court in exercise of its discretionary power could not dismiss a petition in limine on that ground alone without even going into the merits of the petition.

12. In regard to the first part of Company's argument, Mr. Bhabha countered it by saying that the unconditional withdrawal of the SLP by the Company in the above circumstances amounted to its giving up further proceedings with respect to the award. No doubt, a party has a right to withdraw a proceeding from a Court in which it is pending and therefore, in the present case the Company had a right to withdraw its special leave petition, but what is important in this connection are the aforesaid circumstances in which the Company withdrew the same. It is in the context of the said circumstances that the effect of unconditional withdrawal of petition is to be considered. It is obvious that after some arguments on merits were heard on behalf of the Company and it was felt from the observations then made by their Lordships that the Court was inclined to dismiss the petition in limine that the Company withdrew its leave petition without giving any indication whatsoever to the Court or respondents. No. 1 or

their counsel that the Company wanted to file a petition under Article 226 to challenge, the award. The learned Judge, in the circumstances, took the view that the Company should not be placed in a better position than if its petition for special leave had been summarily rejected by the Supreme Court without a speaking order; in other words, he held that the unconditional withdrawal was tantamount to a summary rejection of the leave petition by the Supreme Court. In our opinion, it cannot be said that in the circumstances the above finding is unreasonable or arbitrary. We, therefore, hold that the Company has failed to make good this part of its argument.

13. In regard to the other point that the summary rejection of the leave petition by the Supreme Court should not be taken into consideration de hors the merits of the case, it is strongly urged for the Company that in a given case this particular factor may be outweighed by other factors relating to the merits of the case and a party might show that in spite of the said factor unless the Court in exercise of its discretion interfered with the impugned award, substantial injustice would occur to it, and therefore, while such a factor may be considered and given due weightage in exercise of its special and discretionary power it cannot be transformed into a sole factor for refusing to issue a writ of certiorari. In this connection, Mr. Sorabjee invited our attention to the well-established rule that though ordinarily a writ of certiorari will only lie where there is no other¹ equally effective remedy or where no gross delay had occurred in petitioner's asserting his rights, the Court can and would in exercise of its discretion issue the writ even in such cases where there had been a breach of principles of natural justice or where, otherwise, substantial or gross injustice would occur to the petitioner, and cited the following cases:--on alternative remedy, (i) The State of Uttar Pradesh Vs. Mohammad Nooh, (ii) Shri Mahadeo Paikaji Kolhe Yavatmal Vs. The State of Bombay, and (iii) an unreported decision of the Supreme Court in Union of India v. Hariram, Shamji Thakkar (1968) Civil Appeal No. 794 of 1967, decided on February 5, 1968 (Supreme Court) (Unrep.) and on delay, (i) Moon Mills v. Industrial Court. Bom. AIR [1967] S.C. 1450, 69 Bom.LR 594 (ii) P.B. Roy Vs. Union of India (UOI), and (iii) an unreported. decision of this Court by Mr. Justice Tendolkar in Jagjiwandas II. Doshi v. The State of Bombay. (1952) O.C.J. Misc. No, 47 of 1951, decided by Tendolkar J., on January 9, 1952 (Unrep.) He also contended that the power to grant SLP under Article 136 was in practice a limited one in comparison with that of High Court to issue a writ of certiorari under Article 226. He argued that the Supreme Court would grant leave to appeal only in exceptional or special circumstances and/or where substantial and gross injustice would follow unless the leave was granted though, no doubt, once such leave was granted the ambit of appellate power for interference was wider, but in a proceeding under Article 226 the scope of discretionary power to grant relief was wider and, therefore, for instance, in a case of illegality apparent on the face of record the Supreme Court might refuse to grant leave for appeal--and yet the High Court may grant relief on the same ground in a writ petition under Article 226. In support of his contention he strongly relied on a decision of

the Kerala High Court in *The Board of Trustees of the Cochin Port Trust Vs. The Workmen of the Cochin Port Trust and Another*, Ker where Raman Nair C.J. observed as follows (p. 203) :

Before coming to this Court, the petitioner had moved the Supreme Court for special leave to appeal from the award under Article 136 of the Constitution. Its application for the purpose was dismissed by the Supreme Court by an order dated 18-3-1970. That order, it is conceded, gave no reasons for the dismissal. It is true that in appeal the entire case is before the appellate Court and that, therefore, the scope for interference is much wider than in a proceeding under Article 226 of the Constitution. But then, the grant of special leave under Article 136 is in practice hedged in by very stringent conditions, such leave is granted very sparingly and the Supreme Court has repeatedly said that it will be granted only in exceptional cases see, for example, *Pritam Singh Vs. The State*, It is not in every case where interference under Article 226 of the Constitution would be justified that leave to appeal under Article 136 is granted; indeed that writ petition would lie might be a consideration for declining leave. That being so, we do not think that the refusal of special leave in this case stands in the way of the petitioner either as a precedent or on principles of *res judicata*.

He also invited our attention to three Supreme Court cases, namely, (i) *The State of Andhra Pradesh Vs. I.B.S. Prasada Rao and Others*, (ii) *Hindustan Antibiotics Ltd. Vs. The Workmen and Others*, and (iii) *Balvantrai Chimanlal Trivedi, Manager, Raipur Mfg. Co. Ltd., Ahmedabad Vs. M.N. Nagrashna and Others*, .

14. Mr. Bhabha for respondents No. 1 urged that as the Company had approached the highest Court in the land for getting redress and had unconditionally withdrawn its application for leave in the circumstances mentioned above the Company had by such conduct disabled itself from getting discretionary relief from the Court; that the Company having chosen one of the two modes of relief open to it viz., leave to appeal to the Supreme Court under Article 136, and having exhausted that remedy it would not be a proper and sound exercise of discretionary power to issue a writ in the present petition and that to refuse the writ would be in consonance with the anxiety of the Court to prevent an abuse of its process and to respect and accord finality to the result flowing from Company's withdrawal of the petition for special leave and relied upon the following rulings:--(i) *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, (ii) *Jagdish Narain Maltiar Vs. The State of Bihar and Others*, (iii) *Junagadh Salt and Allied Chemical Works Vs. The State of Gujarat and Others*, and (iv) *Ratilal Balabhai Nazar v. Raneshodhbhai Shankerbhai Patel*. (1969) Civil Appeal No. 986 of 1967, decided on October 17, 1969 (Supreme Court) (Unrep.) He also pointed out that the reason why the Supreme Court proceeds to decide an appeal under Article 136 on merits and does not dismiss it on preliminary objection is that the decision on merits given by the Court or the Tribunal below would otherwise bind the parties which might involve hardship or injustice to the party complaining of such decision and for that purpose cited the

ruling of the Supreme Court in Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, .

15. In our opinion, however, it is not necessary to examine the above contentions, which are recorded out of deference to the wishes of counsel, as this point is concluded by a Division Bench ruling of this Court in the Indian Hume Pipe Co.'s case (supra). Before referring to that case, however, it is necessary to refer to an earlier case of the Madras High Court in Western India Match Co. v. Industrial Tribunal. AIR [1958] Mad. 398 In that case the Western India Match Co. had made an application to the Supreme Court for special leave to appeal under Article 136 against the award of the Industrial Tribunal. The Supreme Court rejected that application. Subsequently, the Company filed a petition under Article 226 to quash the award *inter alia*, on the "ground that the Industrial Tribunal had violated the principles of natural justice inasmuch as it did not allow it an opportunity to examine a witness, i.e. conciliation officer, to prove an agreement between it and the workmen in regard to the method of calculating compensation to be paid to the workmen for loss of excess of store purchase quota. Workmen resisted the petition on two grounds; first, that there was no violation of principles of natural justice, and secondly that in view of the rejection of Company's application for special leave, the petition should be dismissed without going into the merits of the contentions put forward by the Company. The Division Bench of the Madras High Court heard the petition and went into the merits of Company's contention in regard to the violation of principles of natural justice and found that the Company had made out a case for the issue of a writ of certiorari but came to the conclusion, though not without hesitation, that in view of the rejection by the Supreme Court of Company's application for special leave, it would not be proper exercise of discretion to issue the writ. The Company went in appeal by special leave to the Supreme Court. The Supreme Court held on merits that there was no violation of principles of natural justice and therefore it did not consider it necessary to decide the other issue, namely, whether the High Court was justified in refusing to issue the writ on the ground that Company's application for special leave had been rejected earlier by the Supreme Court. Thus the point that arises in this appeal was left open by the Supreme Court.

16. Next, turning to the authority of this Court in the Indian Hume Pipe Co. 's case, the facts were as follows:--After the award was made by the Industrial Tribunal the concerned trade union made an application for leave to appeal against the award but it was rejected. After that four individual workmen filed a writ petition in this Court under Article 226 challenging the award without disclosing the fact that the earlier application for leave by the Trade Union was rejected. Mr. Justice Abhyankar who delivered the judgment held that the petitioners were guilty of suppressing the fact of the earlier application for special leave having been rejected by the Supreme Court. He further held following the Western India Match Co.'s case that in view of the refusal by the Supreme Court to grant special leave it was not a case in which Court should be inclined to

adjudicate the merits of the award but that in exercise of its discretion the Court should refuse to issue the writ. The Division Bench, therefore, dismissed the petition on both the above grounds.

17. In our opinion, the ratio of the Indian Hume Pipe Co.'s case, so far as the exercise of discretionary power under Article 226 is concerned, is applicable to the facts of the present case and Kania J. was, with respect, right in considering himself bound by it. Mr. Sorabjee, however, has assailed this authority. He urges that the decision in this case was given per incuriam because the question was not raised whether the Court in exercise of its discretion should refuse the writ without going into the merits of the case, but it was assumed that the Court had such discretion. He pointed out that an authority will be binding on a point only if the point was raised and considered and relied upon a decision of this Court in Parappa Ningappa v. Mallappa Kallappa (1955) 58 Bom.LR 404 and an English case in Morelle Ld. v. Wakeling. [1955] 2 L.R Q.B. 379 He also contended that the ratio of the decision in Western India Match Co. 's case is erroneous as it does not take into account the position that though a refusal by the Supreme Court to grant leave under Article 136 does not operate as res judicata so far as a writ application under Article 226 is concerned, still the High Court in exercise of its discretionary power under Article 226 will refuse to issue the writ on that ground without going into the merits of the case. He next tried to argue that the attention of the Division Bench was not drawn to the Supreme Court cases cited above in regard to exercise of discretionary power where alternative remedy is available or gross delay occurs.

18. In our view, there is no force in the above contentions. The question whether in the exercise of its discretionary jurisdiction under Article 226 the Court should refuse to grant a writ without going into merits was specifically raised in India Hume Pipe Co.'s case. A perusal of the judgment leaves no doubt on this point. In para. 3 of the judgment at p. 329 are set out the preliminary objections raised by the respondent-Company, including the following: that the petition was "in any case no longer tenable in view of the highest Court in the land having refused to exercise its discretionary jurisdiction in entertaining an appeal against the award". Further in para, 6 Abhyankar J. observed (p. 330) :

We also are unable to hold that we should entertain this petition now and adjudicate it on merits when the Supreme Court has thought fit not to admit the petition for special leave--

(Italics by us).

19. The learned Judge then proceeded to quote a passage from the above Madras case in regard to the propriety or desirability of entertaining the petition and concluded as follows (p. 331) :

Thus, in our opinion, this is not a petition which could have been entertained or in any case these are not the circumstances in which we should be inclined to adjudicate on the merits of the award in view of the petition filed on behalf of the

Union which represented the petitioners also was filed before the Supreme Court and was rejected.

(Italics by us).

From the above passages it is quite clear that the question of exercise of discretionary power under Article 226 to refuse a writ without going into the merits was specifically raised and considered and was answered in the affirmative. It may be that in that case there was not as elaborate or as full an argument on the question as we had before us in the instant case. But this might have been due to the fact that in the Madras case which was followed by this Court, principle of natural justice was violated and the case called for issue of a writ of certiorari and yet the Court in the exercise of its discretion refused to quash the award on the sole ground that Company's application for special leave under Article 136 was rejected by the Supreme Court. In any case the fact that the matter was not fully argued does not affect the binding nature of the precedent provided the point was raised and decided by the Court.

20. Lastly, the ratio of cases relating to exercise of discretionary power in cases where alternative remedy exists or gross delay occurs is not binding in the present case where we have to consider the effect of rejection by the Supreme Court of an application for special leave as it involves different consideration of finality of litigation. It may be relevant here to point out that it is not always the case that before dismissing the writ petition in exercise of its discretionary jurisdiction under Article 226 the merits also must be considered; for instance the Court, in the exercise of its discretion will dismiss the writ petition in limine on ground of suppression of any fact relating to the petition without going into the merits of the case.

21. In our opinion, the decision in Indian Hume Pipe Co.'s case was not given per incuriam and the same is binding upon us. We, therefore, hold that the learned Judge has properly exercised his discretion in refusing to issue the writ.

22. In the result, the appeal fails and is dismissed with cost. Cost of this appeal to be taxed on long cause scale with two counsel certified.