Workmen of Cochin Port Trust

Vs

Board Of Trustees of The Cochin Port Trust and Another

Civil Appeal No. 462 of 1971

(N. L. Untwalia, Jaswant Singh, R. S. Pathak JJ)

05.05.1978

JUDGMENT

UNTWALIA, J. -

1. This appeal by certificate from the judgment and order of the Kerala High Court has been preferred by the workmen of the Cochin Port Trust. The employers are the Board of Trustees of the Cochin Port Trust, Respondent 1 (hereinafter to be referred to as the respondent). An industrial dispute between the appellants and the respondent was referred by the Central Government to Central Government Industrial Tribunal No. 2, Respondent 2. The Tribunal gave an award in favour of the workmen but it has been set aside by the High Court on the application of the respondent filed under Article 226 of the Constitution of India.

2. According to the Union which represented the appellant-workmen, the Traffic Department of the Port Trust is comprised of and assisted by several categories of junior executives for the day to day performance to the shift work of the Cochin Port. Out of the seventeen categories of such junior executives, the first fifteen enumerated in the award from the statement of claim of the Union get Sunday off as a weekly holiday. When the workmen out of the said categories are asked and made to work on a Sunday, they are given a day off on any other working day and are also paid extra half day's wages. On the other hand category xvi - "Labour Supervisors Grade II" and category xvii - "Markers/Sorters/Checkers" have been put on roster off system, that is to say, these two categories of workmen are made to work on Sundays by rotation and get another day off in the week but they do not get extra wages for half a day as are given to the other fifteen categories. On the raising of an industrial dispute, it was referred to the Tribunal in the following terms :

> Whether the demand for changing the "roster off" system to giving Sunday off as the weekly day of rest in respect of Grade II Supervisors and Markers, Sorters and Checkers, is justified ?

The Tribunal decided the reference in favour of the workmen. On behalf of the employers, the Port Trust, the stand taken was that work in the port has got to be carried on all the days of the week including Sunday as the cargo has got to be loaded and unloaded in and from the ship on every day of the week. Porterage labour i.e. porters and others has got to be engaged on each day of the week to do the said work. The roster off categories of workers are, therefore, necessary to be engaged by rotation on Sundays also. They have to work in batches on the roster off system changeable in three months. In other words, some of the roster off category of workmen roughly speaking one-third of the total number of 152 get Sunday off in a particular period of three months and the rest get a weekly day off on some other day of the week. After three months, another batch is given Sunday

off, and so on and so forth, by rotation. Very few workmen out of the total of about 650 of the non-roster off categories are required to work on Sundays as it is generally not necessary to engage them on Sundays for the port work. Their nature of work is such that ordinarily and generally they get Sunday off. If, however, some of them are asked to work on a Sunday, then they get a day off on any other day of the week and are paid half a day's extra wages also. In the case of the roster off workmen it also sometime happens that even on their weekly holiday in a particular period of three months, they are asked to work. In that event, they are not only given a day off on another day of the week but an extra wage for full one day is paid to them.

3. Oral and documentary evidence was adduced by the parties before the Tribunal. The stand taken on behalf of the employers was that if the roster off system was not continued the work in the Cochin Port of loading and unloading of cargo will get dislocated if not altogether stopped. The employers have got the right to arrange and carry on their affairs in the best interests of the industry. By putting certain categories of workmen on the roster off System, no discrimination is shown to them. While the stand taken on behalf of the workmen was that there would be no dislocation or stoppage of work even if the roster off system is discontinued because the two categories of workmen working on this system can always be booked for working on Sundays on terms made available to the similar kind of workmen in the other categories. Since in their case it is not so done, they are debarred of their half day's extra wages and thus are unjustly discriminated.

4. The Tribunal formulated the points of decision in the following terms :

> (i) Whether roster off system in respect of Grade II Supervisors and Markets/Sorters/Checkers should be discontinued ? (ii) Whether Grade II Supervisors and Markers/Sorters/Checkers should be given half day's additional wages and another day off, for working on Sunday ? (iii) Whether the demand of these employees is justified ?

5. The findings of the Tribunal are :

> (1) If other supervisory staff i.e. categories of workers 1 to 15 mentioned in Ex. 1/W is not no roster off system why should Grade II Supervisors (category 16) and Markers/Sorters/Checkers (category 17) be only on roster off system. If they only are continued on roster off system, it would amount to unfair discrimination.
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> (2) It is true that this staff gets one day off according to turn for working on Sunday but they do not get half day's additional wages for working on Sunday. On the other hand, the other supervisory staff, if booked for work on Sunday, get additional half day's wages and some other day off. To this extent there is discrimination in respect of Grade II Supervisors and Markets/Sorters/Checkers who belong to supervisory cadre.
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> (3) The port Trust did not adduce any documentary evidence to show that the supervisory staff in similar industries is put on roster off system although the Deputy Traffic Manager examined on behalf of the Trust said so in his oral evidence.
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> (4) I am of the view that roster off system of Grade II Supervisors and Markers/Sorters/Checkers should be discontinued, that they should be given additional half day's wages and other day off for working on Sundays and that their

demand for discontinuing the roster off system is just and fair. The same deserves to be accepted.

6. The employers had filed special leave petition 451 of 1970 in this Court to challenge the award of the Tribunal but the same was dismissed on March 18, 1970 after perusal of the papers and hearing the Counsel. As usual no reason for dismissal was given in the order. The employers, thereafter, filed a writ petition in the High Court on March 28, 1970. This has been allowed and the award has been quashed. The High Court has taken the view :

> (1) The evidence on both sides is that while the roster staff work at the same strength on Sundays as on week days, so far as the non-roster staff are concerned, only a skeleton staff work on Sundays. That being so, we fail to see how any unfair discrimination is involved in giving Sunday as the weekly holiday for the non-roster staff and one day of the week by rotation as the weekly holiday for the roster staff. How the work of an establishment is to be carried out, how the holidays are to be fixed, are essentially for the management to determine and interference is permissible only if this power is exercised in an unreasonable or unfair manner.
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> (2) That Tribunal also seems to have forgotten that while the non-roster staff are given half-a-day's additional wages as also a compensating holiday for working on their weekly holiday, the roster staff are paid one day's additional wages as also a compensating holiday for working on their weekly holiday. The only difference is that while Sunday is always the weekly holiday for the non-roster staff, the weekly holiday for the roster staff changes once in every three months according to the roster.
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> (3) This is, in effect, retaining the roster system for the weekly day off and compelling the port to pay additional wages for working on Sundays. The question of wages was not referred to the Tribunal and its award seems to be clearly in excess of jurisdiction.
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> (4) Dismissal of the special leave petition by the Supreme Court did not operate as re judicata in the entertainment of the writ petition.

7. Mr. T. S. Krishnamurthy appearing in support of the appeal submitted :

> (1) That the High Court has erroneously overruled the point of res judicata urged on behalf of the appellants.
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> (2) That the award of the Tribunal was just, proper and valid. It was neither beyond the scope of the reference nor did it suffer from any infirmity of law apparent on the face of the record to enable the High Court to upset it in exercise of its writ jurisdiction under Article 226 of the Constitution.

8. In our opinion, none of the contentions raised on behalf of the appellants is correct and fit to be accepted. Mr. G. B. Pai appearing for the respondent rightly pointed out that the judgment of the High Court is correct and sustainable in law.

9. It is well-know that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure 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 or the principle 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 of the Code of Civil Procedure and in many other situations 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, that is, 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 constructive in issue and, therefore, is taken as decided.

10. In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this Court, on almost all grounds which were in the subsequent writ proceeding agitated in the High Court. There is no question, therefore, of applying the principles of constructive res judicata in this case. What is, however, to be seen is whether from the order dismissing the special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award. A writ proceeding is a different proceeding. Whatever can be held to have been decided expressly, implicitly or even constructively while dismissing the special leave petition cannot be re-opened. But the technical rule of res judicata, although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial that the issues must have been decided. It is not safe to extend the principle of res judicata to such an extent so as found it on mere guesswork. To illustrate our view point, we may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the writ petition is dismissed after contest by a speaking order obviously it will operate as res judicata in any other proceeding, such as, of suit, Article 32 or Article 136 directed from the same order or decision. If the writ petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an alternative remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of res judicata. Of course, a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly even if one writ petition is dismissed in limine by a non-speaking one word order 'dismissed', another writ petition would not be maintainable because even the one-word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter; then no merit can be deemed to have

been necessarily and impliedly decided and any other remedy of suit or other proceeding will not be barred on the principle of res judicata.

11. There are several decisions of this Court dealing with the doctrine and principles of res judicata. We may refer to only a few. In Daryao v. The State of U. P. ((1962) 1 SCR 574, 591 : AIR 1961 SC 1457) Gajendragadkar J., delivering the judgment of this Court elaborately discussed the rule of res judicata and ultimately held that where the High Court dismisses a writ petition after hearing the matter on the merits on the ground that no fundamental right was proved or contravened a subsequent petition to the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same party would be barred by the general principles of res judicata. A page 591 says the learned Judge :

> In such a case the point to consider always would be what is the nature of the decision pronounced by a court of competent jurisdiction and what is its effect.

This passage lends support to the principles of res judicata enunciated by us above. In Daryao's case the conclusions are stated at page 592. Two situations, namely, (1) disposal of the writ application on merits and (2) its dismissal not on merits but on the ground of laches of the party or the availability of an alternative remedy, enabled us to state what we have said above. The dismissal of a writ petition in limine with a reasoned order may or may not constitute a bar. It will depend upon the nature of the order. "If the petition is dismissed in limine", says the learned Judge, "without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighted in the mind of the court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32." We have thought it proper to elucidate this aspect of the matter a bit further to indicate that dismissal of a writ petition in limine by a non-speaking order could certainly create a bar in the entertainment of another writ petition filed by the same party on the same cause of action.

12. This decision was followed in P. D. Sharma v. State Bank of India ((1968) 3 SCR 91, 94 : AIR 1968 SC 985 : (1969) 1 LLJ 513 : 1968 Lab IC 1223) wherein it was held that the summary dismissal of a writ petition under Article 226 challenging the order of the Labour Court was no bar to the entertainment of an appeal under Article 136 from the same order of the Labour Court. Hedge, J. has stated at page 94 thus :

> From the order of the High Court it is not possible to find out the reason or reasons that persuaded it to reject the appellant's petition. An appeal under Article 136 against an order can succeed even if no case is made out to issue a writ of certiorari.

Mr. Krishnamurthy rightly pointed out that the lines extracted above indicate that the scope of the proceeding under Article 136 was wider than that of a writ petition. But he was not right in saying that dismissal of a special leave petition under Article 136 must necessarily bar the entertainment of a writ petition under Article 226. In a recent decision of this Court in State of Uttar Pradesh v. Nawab Hussain ((1977) 3 SCR 428 : (1977) 2 SCC 806 : 1977 SCC (L&S) 362), Shinghal, J. delivering the judgment on behalf of the Court applied the principles of constructive res judicata and held that a suit to challenge the order of dismissal from service after dismissal of the writ petition on merits was not maintainable although a new ground of attack was made out in the suit which had

not been taken in the writ petition. This was so on the application of the principle of constructive res judicata. It will be useful to quote a passage from page 431 which runs as follows (SCC p. 810, para 5) :

> Reference in this connection may be made to Ex Parte Thompson (6 QB 720). There A. J. Stephens moved for a rule calling upon the authorities concerned to show cause why a mandamus should not issue. He obtained a rule nisi, but it was discharged as it did not appear that there had been a demand and a refusal. He applied again saying that there had been a demand and a refusal since then. Lord Denman, C.J., observed that as Stephens was making an application which had already been refused, on fresh materials, he could not have "the same application repeated from time to time" as they had "often refused rules" on that ground. The same view has been taken in England in respect of renewed petition for certiorari, quo warranto and prohibition, and, as we shall show, that is also the position in this country.

The above passage amply supports the view expressed by us above. We have thought it proper to give some additional reasons to call out the identical principle.

13. We may now advert very briefly to some of the decisions of the High Court cited at the Bar. In The Management of Western India Match Co. Ltd., Madras v. The Industrial Tribunal, Madras (AIR 1958 Mad 398, 403) it was pointed out, at page 403 (para 18) but in our opinion in somewhat too broad a term that -

> The right to apply for leave to appeal to the Supreme Court under Article 136 of the Constitution if it could be called a "right" at all cannot be equated to a right to appeal. Obviously a High Court cannot refuse to entertain an application under Article 226 of the Constitution on the ground that the aggrieved party could move the Supreme Court under Article 136 of the Constitution. That the Supreme Court declined to exercise its discretion in favour of the petitioner by granting the leave asked for cannot, in our opinion, affect the jurisdiction vested in the High Court under Article 226 of the Constitution.

14. The law so broadly stated is not quite accurate although substantially it is correct to the extent we have pointed out above. A learned single Judge of the Kerala High Court followed the aforesaid Bench decision of the Madras High Court in S. I. Emmatty, Proprietor Jai Hind Motor Service, Ernakulam v. C. Venkitaswami Naidu (AIR 1959 Ker 291). In Bansi v. Additional Director, Consolidation of Holding, Rohtak (AIR 1967 Punj 28) it was held that when a petition under Articles 226 of the Constitution has been dismissed in limine, it cannot again be revived by the same petitioner by another petition on substantially the same allegations. It has further been rightly pointed out that such a dismissal in limine not on merits but for laches or on the ground of availability of alternative remedy does not bar a second petition under Article 32, and we may add, any other proceeding available in law. For the reasons stated in our judgment, we approve of this decision. The appellants placed reliance upon the decision of the Calcutta High Court in Haridas Malakar v. Jay Engineering Works ((1975) 2 LLJ 26 (Cal HC) wherein following the decision of the Madras High Court in the case of Western India Match Co. the learned Judge has said at page 29 that he respectfully agreed with the view of the learned Judges of the Madras High Court. We have already pointed out the inaccuracy in the broad statement of the law in the Madras decision. In any event it does not help the appellants at all.

15. Coming to the merits of the award made by the Tribunal it would suffice to point out that the Tribunal did not find the roster off system was not necessary for the successful working of the port work as deposed to by the Deputy Traffic Manager of the Port Trust. No discrimination could be found in the roster off system as such. It was found in the matter or non-payment of extra half a day's wages. The error of law apparent on the face of the award was that if roster off system was necessary for the supervisory staff and the porterage labour, then the roster category of the workmen was a class by itself and equating such workmen with other categories of the workmen who were very seldom required to work on Sundays was obviously a wrong application of the principles of discrimination. In substance and in effect the award went beyond the scope of reference although in form in which the final order was made it did not do so. The Tribunal exceeded its jurisdiction is saying that categories xvi and xvii of the workmen could be always made to work on Sundays but they should be given additional half day's wages besides a day off for working on Sundays. This is an entirely different kind of relief which the Tribunal purported to grant. It was not within the terms of the reference. On the findings of the Tribunal the point of refence ought to have been answered by saying merely that the demand for changing the roster off system in respect of the two categories of the workmen was justified or not justified. We would, however, like to observe that it may be open to the workmen to raise an industrial dispute demanding half day's extra wages on account of their being asked to work on Sundays on the basis of the roster off system. Even though the system may not be unjustified, yet it may be possible for the workmen to press and justify their demand of extra half day's wages. Giving them one day's full wages when, per chance, they are asked to work on their off day may not be a compensation fit to be equated with the said demand. This is not a matter on which we are called upon to express any opinion as to whether such a demand would be justified or not or whether it should be acceded to. But what we want to emphasize here is that the relief granted by the Tribunal was beyond the scope of the reference.

16. For the reasons stated above, we dismiss this appeal but in the circumstances make no order as to costs.

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