MANU/MH/0598/2007

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IN THE HIGH COURT OF BOMBAY

Writ Petition No. 1240 of 2007 and Chamber Summons No. 194 of 2007

Decided On: 16.08.2007

Appellants: **Sarva Shramik Sanghatana a trade union registered under the Trade Unions Act, 1926**
Vs.
Respondent: **State of Maharashtra, through the Secretary to the Government of Maharashtra, Industries, Energy and Labour Department, The Commissioner of Labour and Century Industries Textiles Limited a Company registered under the Companies Act, 1956**

Hon'ble Judges/Coram:
Swatanter Kumar, C.J. and S.C. Dharmadhikari, J.

Counsels:
For Appellant/Petitioner/Plaintiff: K.K. Singhvi, Sr. Adv. and Susheel Mahadeshwar, Adv.,i/b., Ranjana Todankar, Adv. in Writ Petition No. 1240 of 2007 and S.C. Naidu, Adv., C.R. Naidu andi/b., Co. in Chamber Summons No. 194 of 2007

For Respondents/Defendant: Milind More, Assistant Government Pleader, for Respondent Nos. 1 and 2 and J.P. Cama, Sr. Adv., i/b., S.M. Naik, Adv. for Respondent No. 3

Case Note:
Labour and Industrial - Jurisdiction - Section 250 of the Industrial Disputes Act, 1947 - Commissioner of Labour allowed Company to withdraw closure Application to close down its textile undertaking - Hence, this Writ Petition - Whether, withdrawal of earlier application for closure would operate as bar in law for entertainment of subsequent Application filed within year of such withdrawal - Held, on first application no permission was sought by company and closure had not become effective from date on which it was intended to be so - However, letters to management showed that due participation of workmen and support averment of management that withdrawal was not mala fide or intended to frustrate any possible order - Further, record showed that there was genuine attempt made at behest of Commissioner of Labour with intervention of Labour Minister to amicably settle dispute - Though, authority in its discretion could reject application entirely or allow same without any specific or implied dissection - Moreover, implied bar of non entertainment of application within period of one year would hardly had any application where order was one of withdrawal of application with reservations - Thus, conditions precedent to exercise jurisdiction under Section 250 of the Act were not satisfied - Therefore, it could not be held that subsequent application was either hit by principles of constructive res judicata abandonment or were even against public policy - Writ Petition dismissed.Ratio Decidendi"Withdrawal of earlier Application shall not operate resjudicata for entertainment of subsequent Application filed within year of such withdrawal."

JUDGMENT

Swatanter Kumar, C.J.

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith. Heard the learned Counsel for the parties.

2. Simple and short but a question of some public and legal importance arises for consideration of the Court in the present writ petition:

> Whether withdrawal of an earlier application for closure would operate as a bar in law for entertainment of a subsequent application filed within a year of such withdrawal.

3. Necessarily, such question has to be answered with reference to the facts and circumstances of the case in which such a question arises. The petitioner is a trade union registered under the Trade Unions Act, 1926. Nearly 230 workers out of a total of 275 workers of respondent No. 3 are members of the petitioner Union. Century Industries Textiles Limited, a Company registered under the Companies Act, 1956, respondent No. 3 herein, is the employer of these workmen. On 13th February, 2007, the Company made an application to the Commissioner of Labour under Section 250 of the Industrial Disputes Act, 1947, hereinafter referred to as "the Act", seeking permission to close down its textile undertaking known as "Century Mills". The application of the Company came up for hearing on different occasions during the period from 28th February, 2007 to 5th April, 2007. The Union filed its objections to the closure application on 20th March, 2007, to which a rejoinder was filed by the Company on 26th March, 2007. The parties filed documents and even arguments on the application were heard on 5th April, 2007, and after the hearing was complete, the matter was reserved for orders on the closure application on the same day. Even, according to the petitioner, on 9th April, 2007, the Minister for Labour, Government of Maharashtra, invited the management of the Company and the representative of the petitioner Union to discuss the problems faced by the Century Mill workers and the management. An intimation of this meeting was given to all the parties by the Deputy Commissioner of Labour, vide his letter dated 5th April, 2007. As referred to in paragraph 5 of the petition, the respondent Company, on 11th April, 2007, wrote a letter to the concerned Minister, a copy of which is at Exhibit C to the petition. The relevant part of the said letter reads as under:

> This has reference to the discussions held in the joint meeting of Century Mill Management, Rashtriya Mill Mazdoor Sangh, Sarva Shramik Sanghatana and Mr. Ajay Govind Singh and others, kindly convened by you on 9th April, 2007 in Mantralaya, on the above subject.
>
> At the above mentioned meeting kindly convened by you on 9th April, 2007, after hearing all the parties concerned, you suggested that all the parties concerned should meet and discuss the problems of about 277 workers who did not opt for the VRS with a view to arriving at a mutual settlement, if possible. It is hardly necessary for us to mention that the management is always willing to discuss any problems of workers across the table with a view to finding out an amicable solution. We have, therefore, to request you kindly to advise the Labour Department (i.e. Commissioner of Labour's Office) to take appropriate steps in the matter.
>
> However, our application dated 13th February, 2007, submitted to the

Commissioner of Labour under Section 250(1) of the I.D. Act needs to be decided within a period of 60 days. However, in order to create a conducive atmosphere for discussing the problem of 277 workers and for considering various other options, we propose to withdraw our above mentioned application dated 13th February, 2007 but reserve our right to submit the said application under Section 250(1) of the I.D. Act, as and when necessary.

We are informing the Commissioner of Labour accordingly.

4. On that very day, the Company also wrote a letter to the Commissioner of Labour. The relevant part of the said letter reads as under:

This has reference to our application dated 13th February, 2007, submitted under Section 250(1) of the Industrial Disputes Act, to your goodself for permission for closure of the textile undertaking at Worli called as Century Mills, for the detailed reasons given in the Annexures to the said application.

The hearing of the said application has been completed and the decision is awaited. However, thereafter certain developments have taken place, which have led the management to consider various other options. However, there is hardly any time to consider the feasibility of the options as the application for permission for closure dated 13.02.2007 has to be decided within mandatory period of 60 days. Hence, the management has decided to withdraw the said application dated 13.02.2007 made under Section 250(1) of the I.D. Act. However, this is without prejudice to our right to submit the said application as and when necessary and the management reserves its right to do so. Hence the Management may please be permitted to withdraw the present application dated 13.02.2007 filed under Section 250(1) of the Industrial Disputes Act, 1947.

5 . According to the petitioner, no notice was given to them of the Company's application dated 11th April, 2007, for withdrawal of the closure application dated 13th February, 2007. Vide order dated 12th April, 2007, the Commissioner of Labour allowed the Company to withdraw the said closure application. It is the case of the petitioner that in its application, the Company had not sought either the permission to file a fresh application nor such a permission was granted by the Deputy Commissioner of Labour vide his order dated 12th April, 2007. The relevant part of the said order, a copy of which is annexed as Exhibit D to the petition, reads as under:

...

4 . The Applicant Company vide letter dated 11.4.2007 has submitted an application with following contentions. "Certain developments have taken place which left the Management to consider various other options, hence the Applicant Company has decided to withdraw the application dated 13.2.2007 without prejudice to the rights to submit the said application, as and when necessary'. The Applicant Company has, therefore, requested to allow them to withdraw the application dated 13.2.2007.

5. Considering the above request made by the Applicant Company vide letter dated 11.4.2007, I have no hesitation to allow the Applicant Company to withdraw the closure application dated 13.2.2007. I, therefore, pass the

following order.

ORDER

The Applicant Company M/s. Century Textiles and Industries Limited, Pandurang Budhkar Marg, Worli, Mumbai 400 030 is allowed to withdraw the application dated 13.2.2007 seeking permission for closure of its textile mill situated at Worli, Mumbai under Section 250(1) of the Industrial Disputes Act, 1947.

6. On 21st April, 2007, the Deputy Commissioner of Labour invited all the parties to discuss the problems. The Deputy Commissioner of Labour who dealt with the application at the relevant time retired on 30th April, 2007. The Company wrote a letter to the Commissioner of Labour stating that no amicable solution could be resolved as a result of the adamant attitude taken by the workmen. Even if a limited number of workmen were available, the mill could not be run as they were all scattered at different places. They were prepared to arrive at a settlement with the remaining 275 workmen on mutually acceptable terms.

7. However, on 11th May, 2007, the respondent Company filed a fresh application to the Commissioner of Labour for permission to close the Century Mills. A copy of this letter is annexed at Exhibit G to the petition. Entertainment of the said application was opposed by the Union primarily on the ground that the application for withdrawal of the closure application dated 13th February, 2007 was moved fully knowing that the matter had been argued and was reserved for orders. There was no prayer in the application seeking liberty to file a fresh application on the same cause of action. The respondent Company had abandoned the proceedings for permission to close the undertaking and fresh application cannot be filed under Section 250 of the Act on the same cause of action. The petitioner, while relying upon the judgment of the Supreme Court of India in the case of Sarguja Transport Service v. State Transport Appellate Tribunal MANU/SC/0114/1986 : [1987]1SCR200 , contended that no subsequent application can be filed under the provisions of Section 250 and that it was not in public interest to harass the workmen by filing successive applications. It is stated that nothing was materialised in the meeting with the Minister on 9th April, 2007 and the application dated 11th May, 2007 is mala fide. Claiming that the application dated 11th May, 2007 is barred for all the above reasons, the petitioner has filed this petition under Article 226 of the Constitution of India praying that the Deputy Commissioner of Labour, respondent No. 2 herein, should be directed not to take any further proceedings in relation to the closure application dated 11th May, 2007.

8. The facts averred in the writ petition are not much in controversy, except to the extent that the subsequent application for closure filed by the respondent Company is neither barred in law nor on the facts of the case. It is stated that there were compelling and good reasons for withdrawing the said application and the said application was withdrawn without prejudice to the rights of the management to bring in a fresh application. The application was not mala fide and was, in fact, bona fide and for valid reasons. It is contended that there are more than 7300 workers working in the mills of respondent No. 3 and the matter had already been settled and there was no claim by all the workmen except 230 workmen on whose behalf the writ petition has been filed. It is even averred in the reply that the respondent Company could not run even if they were to be denied the permission for closure with 275 workmen and it was, therefore, just and proper to file the subsequent application

seeking closure of the mills.

9. The petitioner, while relying upon the judgment of the Supreme Court in the case of Sarguja Transport Service (supra), had contended that in order to prevent a litigant from abusing the process of the Court, second suit on the same cause of action, where first suit was withdrawn without leave of the Court, would not be proper. Firstly, in that case the Court was concerned with the provisions of Order 23 Rule 1 of the Code of Civil Procedure as to whether or not a subsequent suit would be maintainable. Applying the principle of res judicata and abandonment, the Court held as under:

> The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. Invite beneficial non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in Sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in Sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in Sub-rule (3) in order to prevent the abuse of the process of the Court. The Court further held that the principle underlying Rule 1 of Order 23 of the Code should be extended in the interest of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy and the following observations in the case of Daryao v. State of U.P. MANU/SC/0012/1961 : [1962]1SCR574 , were of no assistance in the facts of that case. "If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other.

10. Reliance was also placed upon the judgment of the Gujarat High Court in the case of Laxmidas Ramji v. Smt. Lohana Bai Savita Tulsidas and Ors.

MANU/GJ/0082/1970 : AIR1970Guj73 , where the Court stated the principle that where a suit is withdrawn without prejudice to his lawful rights and remedies, it cannot mean to convey in any manner that he claimed liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim as required under Order 23, Rule 1 Clause (2) of the Civil Procedure Code. The permission was limited for withdrawal and could not be inferred so as to be a permission to institute a fresh case.

11. It may be noticed that both the above judgments relied upon by the petitioner related to the issue and/or applicability of the principles of abandonment as contemplated under Order 23 Rule 1 of the Code to writ jurisdiction. None of these cases embark upon discussion in relation to the provisions of the Industrial Disputes Act. This Act is, on the one hand, a self-contained statute whereas, on the other hand, it is -13- a special law governing a limited class of people for limited kind of disputes stated under that law. Chapter VII deals with miscellaneous provisions. Section 11 of the Act deals with the procedure and power of Conciliation Officers, Boards, Courts and Tribunals. Sub-section (3) of Section 11 states that every Board, Court, Labour Court, Tribunal and National Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure when trying a suit in respect of matters relating to enforcement of attendance of persons, compelling the production of documents and material objects, issuing commissions or such other matters as may be prescribed. In other words, the provisions of the Civil Procedure Code in general are not applicable to Industrial Tribunal and they have a very limited and specific scope in regard to applications under the Act. Furthermore, Section 250 itself specifies its own procedure and regulation provides how an application filed under Section 250 of the Act is to be entertained and decided by the appropriate Government. The provisions of Section 250 do not enunciate any specific procedure except to the extent that a reasonable opportunity of hearing be given to the employer or the workmen, as the case may be, and after examining the genuineness and adequacy of the reasons, the Appropriate Government has to pass an order granting or refusing permission to close down an undertaking. Reference to the relevant provisions of Section 250 would be appropriate at this stage.

250.

Procedure for closing down an undertaking.

(1) ...

(2) Where an application for permission has been made under Sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) ...

(4) ...

> (5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under Sub-section (2) or refer the matter to a Tribunal for adjudication:
>
> > Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

A bare reading of the above provision shows that a restricted jurisdiction is vested in the appropriate Government and it is expected to follow the procedure in conformity with the principles of natural justice, that is grant of reasonable opportunity of being heard and notice.

12. The Constitution Bench of the Supreme Court in the case of Orissa Textile & Steel Ltd. v. State of Orissa and Ors. 2002 (1) CLR 831, while defining the scheme under the amended provisions of Section 250 of the Act, held as under:

> In Excel Wear's case it has been held that under Section 250 (as it then stood), even if the reasons are adequate and sufficient, approval could be denied in purported public interest or security of labour. It was submitted that even now permission to close could be refused even if the reasons were genuine and adequate. It was submitted that this was a substantive vice which still prevailed in the amended Section 250.
>
> We do not read Excel Wear's case to mean that permission to close must always be granted if the reasons are genuine and adequate. The observations relied on, in Excel Wear's case, are in the context of an order under Section 250 (as it then stood), based on subjective satisfaction and capable of being arbitrary and whimsical. Now the amended Section 250 provides for an enquiry after affording an opportunity of being heard and provides that the order has to be a reasoned order in writing. The order cannot be passed arbitrarily and whimsically. Now the appropriate government is exercising quasi judicial functions. Thus the principles laid down in Meenakshi Mills' case would now apply.

In this very case, the Supreme Court also clearly stated that granting or refusing permission had to be in writing, contain reasons and there was no discretion with the Government not to conduct an enquiry but it only conferred discretion on the Government to determine the nature of the enquiry. In other words, what would be the procedure in compliance to the provisions of Section 250 of the Act is left to the discretion of the appropriate Government in so far as they fully and absolutely satisfy the ingredients of notice, reasonable opportunity of being heard and passing a reasoned order upon due application of mind. In the present case, the contention that no leave was sought from the Labour Commissioner for filing a fresh application at the time of withdrawal of the earlier application which results in complete bar to filing of an subsequent application is a matter which needs to be discussed by us at some length.

13. Undisputedly the first closure application was filed by the company on 13th February 2007. The period of 60 days as contemplated under the provisions of Section 250 thus would expire on 12th April 2007.

After filing of the reply, rejoinder and the documents, arguments were heard on 5th

April 2007. In the meanwhile a meeting was arranged with the Labour Minister of the Maharashtra on 9th April 2007 to resolve the dispute between the parties and to examine possible measure which could be taken for the welfare of the workmen as well. On 11th April 2007 by a detailed letter the management had informed the Commissioner of Labour that they would be withdrawing the application so as to amicably resolve the dispute between the parties. On the very same day an application for withdrawal of the application dated 13thFebruary 2007 filed under Section 250 by the management was filed with the following prayers:

> However, this is without prejudice to our right to submit the said application as and when necessary and the management reserves its right to d so. Hence the management may please be permitted to withdraw the present application dated 13thFebruary 2007 filed under Section 250 of the Industrial Disputes Act, 1947.

14. The order passed by the Commissioner of Labour, Mumbai on 12th April 2007 on the said application for withdrawal has already been quoted above.

15. The Constitution Bench of the Supreme Court in the case of Orissa Textile and Steel Ltd. v. State (supra) held that before passing an order, the Appropriate Government is bound to make inquiry and the same cannot be dispensed with, but the discretion is about the nature of the inquiry. Section 250 sets out a procedure for closing down an undertaking. The procedure is applicable when an employer intends to close down an undertaking of an industrial establishment to which Chapter VA is applicable. The mandate is upon the employer, who intends to close down an undertaking, to apply in the prescribed manner for prior permission at least 90 days, before the date on which intended closure is to become effective. The application has to be made to the Appropriate Government stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall be served simultaneously on the representative of the workmen in the prescribed manner.

16. A reference can usefully be made to Rule 76C of the Industrial Disputes (Central) Rules, 1957 and Form QA annexed to these Rules, which makes the intention of the Legislature apparent. The application seeking prior permission for closure is to be made before the effective date. It can be made earlier than the period provided in Sub-section (1) of Section 250. However, it has to be at least 90 days before the date on which the intended closure is to become effective. In this case, after the letter dated 11.4.2007 and the order of 12th April 2007 there is no application pending on the file of the Appropriate Government. Therefore, there is no impediment in making another application within the meaning of Sub-section (1) of Section 250 and apply for prior permission before the intended closure becomes effective. The effective date may be the same or may undergo a change. However, when no order within the meaning of Sub-sections 2 and 4 of Section 250 has been made, then, we do not see how another or fresh application is not maintainable.

17. In the present case, the application seeking permission was made on 13.2.2007. The effective date of closure stated therein is 13.8.2007. As the facts would indicate that on this application an order refusing permission or granting permission has not been made. The application is not pressed and the intention, not to press same was made clear by the 3rd respondent on 11.4.2007. Such being the case, in the facts peculiar to this case, so also in the light of the contents of the letter of the company dated 11.4.2007, the deeming fiction has also not come into play. When the application itself was not pressed, further consequences would not follow. They

would follow only if the stage of Section 250(2) is reached and the order contemplated thereunder is passed or the same is not communicated.

18. This is not a case where we are called upon to decide the ambit and scope of the powers conferred by the Code of Civil Procedure or otherwise permitting withdrawal of any proceedings or suit. Therefore, the controversy as to whether the withdrawal is simpliciter or with liberty to file fresh proceedings, is something, which need not be gone into in the facts and circumstances of the present case. When there is intention to close down an establishment and the law mandates making of an application within the period specified before the intended closure becomes effective, but, when no adjudication takes place on the application because same is not pressed, there is no prohibition in law in making another application. When there is intention to close down the undertaking, then, the application must be in conformity with the Act and the Rules is what is laid down. On that application permission has to be either granted or refused. The words used are "prior permission". Therefore, the closure will become effective from the effective date mentioned in the application upon permission being granted. In other words, closure will be with effect from that date. Until the permission is granted it is only an intended act. The law postulates grant of permission prior to the closure becoming effective. If the permission is granted, then, the closure is effective. If permission is not granted then a fresh application can be made only after the period specified in Section 250(4). However, when the application is neither pressed nor the deeming fiction coming into play in this case, then, second application is maintainable. Hence, it would be necessary to mention the date of intended closure in the application. If the earlier application is not pressed at all, then, the closure would not be effective from the date mentioned therein. No permission is sought with regard to this effective date of closure. Thus, on the first application, in the present case, no permission was sought by the company. Therefore, closure has not become effective from the date on which it was intended to be so. There was no prior permission in the eyes of law. Hence, first exercise is futile and meaningless.

19. The permission now sought would be fresh round within the meaning of Section 250(1). That fresh exercise is permissible because the Appropriate Government has neither refused nor granted permission in terms of the earlier application. When there was no adjudication at all then the company is not precluded from undertaking fresh exercise and such fresh exercise has to be carried out in accordance with law. We see no impediment in the given facts and circumstances for such fresh attempt by the company. Hence, whether the earlier application was withdrawn simpliciter or with liberty to file fresh one, is a matter of no consequence at all. The intention can be expressed once or more than once. If it is expressed more than once and permission is sought on that basis, it does not mean that the application itself would not lie. In other words, once an application to close down was made in writing but that application was not pressed same intention can be made subject matter of another written application and which course being not prohibited, is permissible in law. The employer has merely done this which causes no prejudice to the petitioner union. Uptil now closure is only intended and not become effective, is an admitted position. Therefore, one more application is not going to make any difference.

20. It is evident from the application for withdrawal and the order passed thereon that there was a composite prayer made by the applicant that they would be withdrawing the application without prejudice to their rights to submit the said application as and when necessary and with this reservation that application was sought to be withdrawn. The Commissioner of Labour noticed this fact in paragraph 4

of his order as it is clear that in paragraph 5 of the order the Commissioner observed that the request made by the company can be allowed without hesitation and permitted to withdraw the closure application dated 13th February 2007.

21. It is a settled principle of law that an application as well as order have to be read in its entirety for their proper construction and it will be impermissible to take out few lines of the order or the application and arrive at a conclusion in abstract. Another aspect of this proposition of law is that an application for withdrawal has to be allowed as prayed for or rejected in the discretion of the concerned authority, but the authority may not have jurisdiction or discretion to dissect the prayer and grant a part thereof when that was not the prayer of the party before the authority. The doctrine of entirety of this dimension cannot be applied to a composite prayer as the court grants or refuses what is prayed for. Droit ne done plus que soit demaunde. A Division Bench of this Court in the case of Mr. Mario Shaw v. Mr. Martin Fernandes and Anr. 1996 (2) BCR 536 has held as under:

> Now I will deal with other part of the submission of the learned Counsel Ms Purohit says that the order of the Cooperative Court clearly shows that the dispute was withdrawn unconditionally and if that is so, the initiation of the present proceedings on the same cause of action is barred by Sub-rule (4) of Rule 1 of Order 23. The submission must be rejected for more than one reason. In the first place, it is not permissible for the petitioner to approbate and reprobate at the same time. Before the Cooperative Court, the petitioner specifically contended that the Cooperative Court has no jurisdiction to try the dispute. If the Cooperative Court has no jurisdiction , then, surely, the bar under Order 23, Rule 1 of the CPC will not operative. It is an age old principle that a party shall not at the same time affirm and disaffirm the same transaction affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice. In Shah Mukhun Lall v. Baboo Sree Kishen Singh12 M.I.A. 157 Lord Chelmsford observed:
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> > A man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this committee to the consideration of Indian Appeals, as one applicable also in the courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice.
>
> Once having questioned the jurisdiction of the Cooperative Court, it is not now open for the petitioner to say that the dispute before the Cooperative Court was maintainable and, therefore, the present proceedings, which are instituted without the leave of the Cooperative Court are not maintainable.
>
> There is one more reason for rejecting the petitioner's contention. Admittedly, the application made by the respondents before the Cooperative Court was for withdrawal of the dispute with a liberty to file fresh proceedings. If that is so, the Cooperative Court was clearly in error in passing an order of withdrawal without granting permission to initiate fresh proceedings. It is well settled that if an application is made for withdrawal of

the suit with liberty to file a suit, it is not open for the Court to grant only permission for withdrawal without liberty to institute the proceedings, though it is open for the Court to reject such application. Thus I do not find any merit in this petition and the same is dismissed summarily.

22. The prayer of the management was for withdrawal of the -26- application without prejudice to its right to file the same again. The expression "without prejudice" has received consistently definite connotation and meaning and there is no dispute with regard to the applicability of this expression to the procedural law. In the case of Superintendent (Tech I) Central Excise IDD Jabalpur and Ors v. Pratap Rai MANU/SC/0400/1978 : 1978CriLJ1266 , the court held as under:

> ...The Appellate Collector has clearly used the words "without prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term 'without prejudice' has been defined in Black's Law Dictionary as follows:
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> > Where an offer or admission is made 'without prejudice', or a motion is denied or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no right or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See also Dismissal Without Prejudice'.
>
> Similarly, in Wharton's Law Lexicon the author, while interpreting the term 'without prejudice', observed as follows:
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> > The words import an understanding that, if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offer, "without prejudice", to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.
> >
> > The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties not even by a judge in determining whether or not there is good cause for depriving a successful litigant of costs.... The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'. In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according t law were not barred. It is true that the Appellate Collector does not say in so many words that the case is remanded to the Assistant Collector but the tenor and the spirit of the order clearly shows that what he intended was that fresh proceedings should be started against the respondent after complying with the rules of natural justice. Thus, in our view a true interpretation of the order of the Appellate Collector would be that the order of the Assistant Collector was a nullity having violated the rules of natural justice and having been vacated the parties would be relegated to the position which they occupied before the order of the Assistant

Collector was passed. In this view of the matter the Assistant Collector had ample jurisdiction in issuing the notice against the respondent in order to start fresh adjudicatory proceedings in accordance with law.

23. The expression "without prejudice" used in an application for withdrawal of an application filed by the management cannot be ignored. It was obligatory on the part of the authority to consider the said application in its entirety and keeping in view the fact that there was a composite prayer. In fact the intent of the order, even if not read in favour of the management, cannot be construed so as to bring a bar for filing of a fresh application. The management, which reserved its right, can file the same again. Even if we apply constructively the principle alike to the CPC proceedings before the authority concerned, still there would be no bar in view of what we have discussed above, unless there was clear abandonment of the claim. We have no hesitation in coming to the conclusion that the withdrawal was a neither mala fide nor vexatious. From Exhibit E1 it is clear that even after 9th April 2007 efforts were being made by the parties to resolve the disputes. Letters written to the management show due participation of the workmen and support the averment of the management that withdrawal was not mala fide or intended to frustrate any possible order. If that be so, there was no compulsion on the part of the authority concerned to permit withdrawal of the application as the authority retired on 30th April 2007, while the period of 60 days as contemplated by the provisions would have expired on 12th April 2007. It will be unfair to draw an inference of bias in the mind of the Labour Commissioner for either party. It is interesting to note that according to the petitioner Union withdrawal of the application was for the reason that the Labour Commissioner was likely to reject that application. If that be so, expiry of 60 days would have tilted in favour of the management as then the permission would be deemed to have been granted on the expiry of the period of 60 days. It had no intention to subject the workmen to repeated proceedings. On the contrary, the record before the court clearly shows that there was genuine attempt made at the behest of the Commissioner of Labour with intervention of the Labour Minister to amicably settle the dispute. The petitioner Union had knowledge of the letter written by the management of the company to the Minister where specific reasons were given that in order to amicably resolve the issue the application for closure was being withdrawn with liberty to revive the same. This fact was duly noticed even by the Commissioner of Labour, Mumbai in his order impugned in this petition. Another limitation which the company had expressed for presenting the fresh application was that with the limited workmen the industry in any case could not function, as it had employed thousands of workmen and with 275 workmen it would not be possible for the management to run its business.

24. Another argument raised on behalf of the petitioner was that the second application would be barred by the principle of resjudicata. We have already stated that there was no abandonment of its rights by the management while filing the application for withdrawal as the language in the prayer clause is unambiguous and it does not leave scope for any doubt. Furthermore, the principle of resjudicata would be applicable only when there has been adjudication or determination of the issues by the competent authority. This principle is no more resintegra and has been squarely answered by different judgements of the Supreme Court including MANU/SC/0319/1981 : (1981)ILLJ489SC Ahmedabad Manufacturing and Calic Printing Co. Ltd. v. The Workmen and Anr. where the court not only explained the principle of resjudicata but even went to the extent of holding that where Special Leave Petition filed in the Supreme Court has been dismissed in limine and on the

same facts and grounds had been withdrawn unconditionally, the writ petition before the High Court could have been dismissed on the ground that it was hit by the principle of resjudicata.

The court also cautioned that it will not be proper to enter into the area of conjecture and to come to a conclusion on the basis of extraneous evidence that the court intended to reject the leave petition on merits. The order must be read as stated in its entirety. Rule of resjudicata, although a wholesome rule, is based upon a public policy and cannot be stretched too far to bar a trial of an identical issue in a separate proceeding, merely on the basis of presumption that the issue must have been decided by the court. Also refer Kunhayammed and Ors. v. State of Kerala and Anr. MANU/SC/0432/2000 : [2000]245ITR360(SC) .

25. On this premise, we do not find any merit in the submission raised on behalf of the petitioners. In the case of Laxmidas Ramji (supra) the clear distinguishing feature is that in that case admittedly the application for withdrawal of the suit was only without prejudice but not with a specific prayer that the plaintiffs in that case should be permitted to withdraw the suit and bring a fresh suit on the same cause of action. In apparent contradistinction to that, in the present case, there was a specific prayer for leave to file the same again. The authority in its discretion could reject the application entirely or allow the same without any specific or implied dissection.

26. The submission made on behalf of the petitioner serves no end and purpose in law. If the petitioner's argument is accepted, then the consequence is that whenever an application is withdrawn by the employer or no permission sought qua it, same is deemed to have bee refused and fiction being not provided in law, we cannot read the same in it.

27. Under the provisions of various sub-clauses of Section 250 of the Act the scheme of the self contained provision is demonstrably clear. Under Section 250(4) the appropriate government has jurisdiction to grant or refuse permission, which shall remain in force and binding on the parties for a period of one year from the date of such order. This order of the appropriate government is obviously subject to the limitations specified under Sub-clause (5). It is not the case before us where the appropriate government has exercised its power vested in it under Sub-section (5). What is intended to become final and binding on the parties is grant or refusal of the prayer to close the unit and no other order. The implied bar of non entertainment of an application within a period of one year would hardly have any application where the order is one of withdrawal of the application with reservations.

28. Section 250 does not specify the conditions which should be fulfilled for grant of permission. The Section is not only in the nature of a fetter on the exercise of right but a provision which empowers the Government to be a shutter on the exercise of the right, irrespective of the fact that reasons to close down the industry are followed and may even be beyond the control of the employer but still not in public interest. While discretion is vested in the appropriate Government, the same has to be exercised in consonance with the scheme of the Act and thus is incapable of being inferred from any reasons or grounds. 29. The legal fiction of bar arising out of a period specified under Section 250 of the Act cannot be stretched beyond that the point and it must be read and construed so as not to create situation and facts which ought not to exist at the relevant time. The provisions of Section 250 have a limited application as they do not apply to different situations and are restricted in their scope to grant or refuse permission for closing the industry. The Supreme Court in

the case of Maruti Udyog Ltd. v. Ram Lal and Ors. MANU/SC/0056/2005 : (2005)ILLJ853SC , referred to the Constitution Bench judgment of the Court in the case of K. Prabhakaran v. P. Jayarajan MANU/SC/0025/2005 : AIR2005SC688 , and relied upon the following opinion of the Court which would be, to some extent, relevant for determination of the controversy in the present case.

> A legal fiction presupposes the existence of the state of facts which may not exist and then works out the consequences which flow from that state of facts. Such consequences have got to be worked out only to their logical extent having due regard to the purpose for which the legal fiction has been created. Stretching the consequences beyond what logically flows amounts to an illegitimate extension of the purpose of the legal fiction....

30. In the case of Oswal Agro Furnane Ltd. and Anr. v. Oswal Agro Furane Workers Union and Ors. MANU/SC/0104/2005 : (2005)ILLJ1117SC , while discussing the scope of Section 250 of the Act, it was held by the Supreme Court that an agreement which opposes public policy as laid down in Sections 250 and 25N would be void and of no effect, having regard to maxim ex turpi cause non oritur actio. The Court also held that permission of the appropriate Government was a sine qua non for a legal closure of the industrial unit. The requirement was held to be mandatory. The dicta of the Supreme Court in these cases clearly indicate that the discretion is with the Government to grant and/or refuse the permission. The application of these provisions is very limited and any bar on expressed or implied principles would have to be strictly construed. It would not be permissible that any order passed by the appointed authority of the appropriate Government would tantamount to an order as contemplated under Section 250(4) of the Act. The legal consequence of finality stated in that provision would also be attracted only where the order is of the nature stated in that provision. An interpretation or approach that any order would amount to or be equal to an order of granting and/or refusing permission creates an imbalance in the very application of the statutory object sought to be achieved by these provisions. We are of the considered view that it would neither be permissible nor appropriate to treat the order of withdrawal as an order refusing to grant the permission. The consequences following under Section 250(4) and (5) should deemed to have followed. In the facts and circumstances of the case, the withdrawal of the application dated 13th February, 2007, does not amount to cessation of the cause of action. Viewing it from another angle, withdrawal not being equitable to an order refusing permission, the bar of one year, as contended by the learned Counsel for the petitioner, would not be attracted and subsequent application could be filed at any point of time. In law there is dissection between an act of a party and an order of an appropriate authority. Order granting or refusing permission for closure is to be passed by the authority in accordance with the principles of basic rule of law and giving reasons upon due application of mind. While withdrawal is an act of the party and the Labour Commissioner in his wisdom could allow or reject the application for withdrawal, having exercised his discretion and permitting withdrawal of the application, the Labour Commissioner has not fallen in error of jurisdiction. The conditions precedent to exercise jurisdiction under Section 250 are not satisfied and, therefore, it cannot be held that the subsequent application is either hit by the principles of constructive res judicata, abandonment or are even against public policy.

31. For the reasons aforestated, we find no merit in this writ petition. The same is dismissed, leaving the parties to bear their own costs. Rule is discharged. Ad interim order dated 27th June, 2007, is vacated.

32. In view of the dismissal of the writ petition, no orders are required to be passed in the Chamber Summons. The same is also disposed of accordingly.