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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 24th August, 2021
+ **W.P.(C) 8929/2021**
A AND B FASHIONS PVT. LTD. Petitioner
Through: Mr. Vinay Sabharwal, Advocate

versus

RAMESH KUMAR & ORS. Respondents
Through: None for the Respondents.

Mr. Raj Birbal, Ms. Raavi Birbal and
Mr. Gunjan Singh, Advocates
assisting the Court.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through video conferencing.

CM APPL. 27780/2021 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

WP(C) 8929/2021 & CM APPL. 27779/2021 (for interim stay)

3. The present petition challenges order dated 19th March, 2021 by which Mr. Vinay Sabharwal, Id. counsel who was appearing for the Petitioner-Management was not permitted to represent his client before the Industrial Tribunal. His request for conducting the cross-examination of the Respondents-Workmen's witness was also rejected. After recording the statement of the witness, without affording the Petitioner-Management an opportunity for cross-examination, the evidence of the Workmen was closed. The impugned order reads as under:

“19.3.2021

Present: Sh. Rajesh Khanna, AR for the workmen alongwith workmen in person.

Sh. Vinay Sabharwal, Advocate is appearing for and on behalf of the management.

However, AR of the workmen has pointed out to the application filed by and on behalf of the workmen under Section 36 ID Act which was disposed of vide order dated 18.10.2018 in the light of non appearance of the Advocate representing the management earlier and also noting the presence of the representative of the management thereafter, as satisfied.

In the light of this order made on the application under Section 36 ID Act legal representation for the management is not permissible. No one is present on behalf of the management.

Affidavit of evidence of Sh. Tadkeshwar has been tendered in evidence. His examination in chief has been recorded as WW-23. Sh. Vinay Sabharwal, Advocate appearing for and on behalf of the management request for conducting the cross examination of WW-23. Request is declined. Witness is discharged after giving opportunity nil.

WE is closed on statement of the AR for the workman recorded separately.

One application has been filed by and on behalf of the management for recalling of the

workmen whose statement has been recorded on 2.3.2021. In the light of the earlier order dated 18.10.2018, application is dismissed.

With regard to two deceased workmen namely Sh. Vidhya Narain and Sh. Shahbuddin no one is present today. Proceeding qua them is abated.

Put up for ME on 28.5.2021. Advance copy of the affidavit of evidence be supplied to the opposite party one week before the next date. Management is directed to complete its entire evidence within two effective dates. ”

4. Mr. Sabharwal, Id. counsel appearing for the Petitioner-Management submits that this order is completely contrary to the prevailing law on the issue inasmuch as Advocates are permitted to represent the management, so long as there is no objection by the workman or the litigation expenses are paid. He submits that in this case, the Management was being represented by an Advocate on several hearings. The Advocates who had appeared earlier for the Management, were Mr. Neeraj Kumar and Mr. Shashwat Singh Gaur. However, on one occasion, when the authorized representative i.e., the Accounts Manager was appearing on behalf of the Management, an order was passed on 18th October, 2018 recording that the authorized representative i.e., Mr. Sanjeev Jamwal and not Mr. Neeraj Kumar, Advocate was appearing for the Management. The application filed by the Workmen under Section 36 of the Industrial Disputes Act, 1947 was disposed of on that ground.

5. Mr. Sabharwal, Id. counsel submits that the authorized representative of the Management was appearing at the time when pleadings were being exchanged and other procedural formalities were being completed. However, when the matter reached the stage of trial, the Management

thought it fit to engage the services of an Advocate for tendering evidence and conducting cross-examinations. Accordingly, Mr. Sabharwal had been engaged in the matter. However, for the reasons recorded in the impugned order, he was not permitted to represent the Management or cross-examine the witness of the Workmen.

6. Mr. Sabharwal, Id. counsel submits that it is the usual practice before Labour Courts that Advocates appear and represent the management as well as the workmen. Workmen are engaging experts, though they may not be enrolled as Advocates. He points out that in the present case, Mr. Rajesh Khanna, authorized representative for the Workmen is one such representative of the trade union, regularly appearing for workmen before the Labour Courts. He submits that the Management would be enormously prejudiced if the Workmen are permitted to be represented by an expert and the Management is not allowed to engage an Advocate. Reliance is placed upon the judgment of the Supreme Court in ***Thyssen Krupp Industries India Private Limited v. Suresh Maruti Chougule & Ors. [Civil Appeal No. 6586/2019, decided on 21st August, 2019]***, wherein the earlier judgment of the Supreme Court in ***Paradip Port Trust, Paradip vs. Their Workmen (1977) 2 SCC 339*** has been referred to a larger Bench.

7. Considering the nature of the issue raised, some counsels who regularly appear before the Labour Courts were called upon by this Court to make submissions in this regard. Mr. Raj Birbal and Ms. Raavi Birbal, who are present in the hearing, submit that the legal position is well-settled that Advocates are allowed to appear before the Labour Courts, as decided by the Division Bench of this Court in ***M/s Bhagat Brothers v. Paras Nath***

Upadhyay, (2008) 149 DLT 381. The judgment in *Thyssen Krupp Industries India Private Limited (supra)* is also reiterated.

8. Mr. Gunjan Singh, ld. counsel who regularly appears for workmen before the Labour Courts and before this Court was also asked as to what the position on ground is. He submits that the workmen do engage Advocates regularly and, in any case, so long as litigation expenses are paid, both the workmen and the management are permitted to be represented through Advocates.

9. Considering the nature of the matter, Mr. Sabharwal, ld. counsel was requested to telephonically inform Mr. Rajesh Khanna, the authorized representative for the Workmen, to join the proceedings. Mr. Sabharwal, ld. counsel submits that Mr. Khanna when contacted telephonically, has declined to appear before this Court as he is not an Advocate. Advance copy of the petition is already served. Intimation by counsel upon directions of the Court was also given. However, the AR of the workmen has not appeared. Considering the above, this Court proceeds further in the matter.

10. The only question that has arisen in the present matter is in respect of the representation of Advocates before Labour Courts. Section 36 (4) of the Industrial Disputes Act, 1947 reads as under:

“36. Representation of parties. -

...

(4).In any proceedings [before a Labour Court, Tribunal or National Tribunal], a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and [with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be].”

11. A perusal of the above provision clearly shows that both parties i.e., the workmen and the management, are permitted to be represented by a legal practitioner with the consent of the other party and with the leave of the Court. This provision has been considered by the Supreme Court in ***Paradip Port Trust (supra)***, wherein it has been held as under:

“16. If, however, a legal practitioner is appointed as an officer of a company or corporation and is in their pay and under their control and is not a practising advocate the fact that he was earlier a legal practitioner or has a legal degree will not stand in the way of the company or the corporation being represented by him. Similarly if a legal practitioner is an officer of an association of employers or of a federation of such associations, there is nothing in Section 36(4) to prevent him from appearing before the tribunal under the provisions of Section 36(2) of the Act. Again, an office-bearer of a trade union or a member of its executive, even though he is a legal practitioner, will be entitled to represent the workmen before the tribunal under Section 36(1) in the former capacity. The legal practitioner in the above two cases will appear in the capacity of an officer of the association in the case of an employer and in the capacity of an office-bearer of the union in the case of workmen and not in the capacity of a legal practitioner. The fact that a person is a legal practitioner will not affect the position if the qualifications specified in Section 36(1) and Section 36(2) are fulfilled by him.

17. It must be made clear that there is no scope for enquiry by the tribunal into the motive for appointment of such legal practitioners as office-bearers of the trade unions or as officers of the employers' associations. When law provides for a

requisite qualification for exercising a right, fulfilment of the qualification in a given case will entitle the party to be represented before the tribunal by such a person with that qualification. How and under what circumstances these qualifications have been obtained will not be relevant matters for consideration by the tribunal in considering an application for representation under Section 36(1) and Section 36(2) of the Act. Once the qualifications under Section 36(1) and Section 36(2) are fulfilled prior to appearance before tribunals, there is no need under the law to pursue the matter in order to find out whether the appointments are in circumvention of Section 36(4) of the Act. Motive of the appointment cannot be made an issue before the tribunal.

...

19. The matter of representation by a legal practitioner holding a power of attorney came up for consideration before the Full Bench of the Appellate Tribunal of India in the year 1951 (see Kanpur Hosiery Workers' Union v. J.K. Hosiery Factory, Kanpur [(1952) 1 LLJ 384]). The provision for representation which applied to the Appellate Tribunal was Section 33 of the repealed Industrial Disputes (Appellate Tribunal) Act, 1950. This section corresponds to Section 36 of the Industrial Disputes Act with which we are concerned. Although the Appellate Tribunal rejected the claim of the party to be represented by the legal practitioner on the basis of a power of attorney, with which we agree, the reasons for its conclusion based solely on the ground of Section 36 being exhaustive do not meet with our approval. The Appellate Tribunal took the view that the Act intended to restrict the representation of parties to the three classes of persons enumerated in sub-sections (1) and (2) of Section

33. *The Appellate Tribunal was of the view that sub-sections (1) and (2) of Section 33 were intended to be exhaustive of the persons (other than the party himself) who might represent either of the party. Since holding of a power of attorney is not one such mode the claim of the legal practitioner failed, according to the Appellate Tribunal. The Rajasthan High Court in Duduwala & Co. v. Industrial Tribunal [AIR 1958 Raj 20 : (1959) 1 LLJ 75] took the same view. Our attention has been drawn to the decisions of the Calcutta and Bombay High Courts wherein a contrary view has been taken with regard to the interpretation of Section 36 as being exhaustive [see Hall & Anderson Ltd. v. S.K. Neogi [(1954) 1 LLJ 629 (Cal)] and Khadilkar (K.K.) General Secretary, Engineering Staff Union, Bombay v. Indian Hume Pipe Company Ltd., Bombay [(1967) 1 LLJ 139 (Bom)]]. For the reasons already given by us we are of opinion that the views of the Labour Appellate Tribunal and that of the Rajasthan High Court in this aspect of the matter are not correct and the Calcutta and Bombay High Courts are right in holding that Section 36 is not exhaustive.*

...

26. A lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the tribunal in the capacity of an office-bearer of a registered trade union or an officer of associations of employers and no consent of the other side and leave of the tribunal will, then, be necessary."

From the judgement in ***Paradip Port Trust (supra)*** it is clear that there is no absolute bar and if consent is given by the workmen, a lawyer can appear before the Labour Court.

12. The judgment in ***Paradip Port Trust (supra)*** has again been considered in ***Thyssen Krupp Industries India Private Limited (supra)***, wherein the Supreme Court has opined that the question as to whether the provisions of the Industrial Disputes Act, 1947 or the Advocates Act, 1961 would prevail is required to be considered by a larger Bench. However, in the said case, the Supreme Court clearly directed that the workman is at liberty to engage an Advocate, so long as his fee is paid by the management, and the management can also be represented by an Advocate. The relevant portion of the judgment of the Supreme Court in ***Thyssen Krupp Industries India Private Limited (supra)*** is set out hereinbelow:

“11. The learned senior counsel for the appellants and the Bar Council of India submitted that the Advocates Act is a special Act and that the ID Act is a general Act. According to them, Section 30 of the Advocates Act overrides Section 34 of the ID Act. As stated earlier, this Court in Paradip Port Trust, was of the opinion that the ID Act is a special piece of legislation and the Advocates Act is a general piece of legislation with regard to the subject matter of appearance of lawyers before the labour courts. In the context of matters pertaining to industrial disputes and the mechanism provided for resolution of the disputes, we have no doubt that the ID Act is a special piece of legislation. However, whether the Advocates Act is a general piece of legislation with respect to the subject matter of appearance of lawyers in labour courts, needs a detailed consideration. Section 30 of the Advocates Act confers a right on an advocate to

practice before any Tribunal. Applying the test laid down by this court in Ashoka Marketing, it is doubtful whether the Advocates Act can be termed a general piece of legislation in respect of the subject matter in dispute. As the judgement in Paradip Port Trust is by a Bench of 3 judges, and taking into account the importance of the issues raised in these cases, we are of the considered opinion that these matters be referred to a larger Bench.

...
13. The workman is at liberty to engage an advocate, and the fee of the said advocate shall be paid by the Management. The appellant shall be permitted to be represented by an Advocate. As this direction is being given in view of the complaint of the workman that he is suffering due to the delay it is deemed that the workman has no objection to the appellant engaging an advocate. The Labour Court is directed to proceed with Reference IDA No. 121 of 2016 expeditiously and decide the matter within a period of six months from today."

13. The judgment of the Id. Division Bench of this Court, quoted by Ms. Birbal, is also apt in this context. The Id. Division Bench in **Bhagat Brothers (supra)** considered the other case law and decisions dealing with the constitutional validity of Section 36 (4) to finally observe as under:

"10. While interpreting Section 36(4) we must remember a crucial fact that when the Industrial Disputes Act was enacted in the year 1947 the trade union movement in this country was in its infancy and was absolutely a novice before the adjudication machinery. The Legislature had visualized a legal battle between two unequals before the Industrial Adjudicators. In order to bring about and maintain fairness and equality,

*the Legislature provided under Section 36 of the Act how the parties would be represented in the proceedings under this Act. However, there has been sea change in the circumstances. A large number of small employers have also come up in the industrial scene. They cannot be denied the service of a legal practitioner when they are dragged into industrial litigations. Trade unions have also become financially well off to engage services of legal practitioners. Many a times union representatives appearing for the workmen are extremely knowledgeable and possess vast experience in the field. Constitutional validity of Section 36(4) has been upheld by this Court in *The Cooperative Store Limited, New Delhi v. O.P. Dwivedi, P.O. Industrial Tribunal –II & Others* 1988 1 LLJ 135. However, thereafter when the same issue came up before the Allahabad High Court, Markandeya Katju, J (as he then was) vide his decision reported in 1992-1- LLN 972 (*ICI India Ltd. v. Labour Court (IV) & Another*) has held that Section 36(4) of the Industrial Disputes Act and a similar provision i.e. Section 6-I(2) of the UP*

Industrial Disputes Act are ultra vires of the Constitution. In view of our finding that there was implied consent it is not for us to re-examine the constitutional validity of Section 36(4) but we feel that in the changed circumstances a fresh look is necessary at Section 36(4). With these observations, we allow the appeal and set aside the order of the Labour Court as also of the learned single Judge and hold that the management is entitled to be represented by a legal practitioner before the Labour Court.”

14. Apart from the above decisions, there have been divergent views expressed by various High Courts on the question of whether there was

consent – implied or expressed, and whether leave ought to be granted by the Adjudicator concerned. Judicial decisions on the question of consent, including implied consent, have primarily turned on the facts of each case. Courts have noted factors such as whether the advocates were appearing in robes (*Samarendra Das v. M/s Win Medicare Pvt. Ltd. [W.P.(C) 5159/2013, decided on 11th February, 2014]*), whether the appearance was given as an advocate (*Ved Prakash Dubey, Jai Prakash Dubey & Ram Bachan Soni v. M/s Maheshwari Gas Service [LPA 162/2016, decided on 24th November, 2016]*), etc. However, with the recent decision of the Supreme Court in *Thyssen Krupp Industries India Private Limited (supra)*, the clear conclusion would be that a legal practitioner can represent the management before the Labour Court, if the litigation expenses for the workman to engage the advocate are paid by the management. Moreover, in *Bhagat Brothers (supra)* the Id. Division Bench has also noted factors that would tilt towards allowing Advocates to appear before the labour courts including the fact that it would prejudice small employers etc.,

15. The facts of the present case show that the Management was earlier being represented by Mr. Neeraj Kumar, an Advocate, which is recorded in order dated 18th October, 2018, which reads as under:

“18.10.2018

*Present: Some of workmen alongwith A.R.
Sh. Rajesh Khanna.
Sh. Sanjeev Jamwal, A.R. for the management.*

From perusal of file, it is clear that an application u/ s 36 of J.D. Act was filed on behalf of the workmen by Sh. Rajesh Kumar, Id. A.R. for the workmen. But on the very first date of appearance,

Memo of Appearance was filed on behalf of Sh. Neeraj Kumar, Advocate. Admittedly Sh. Neeraj Kumar is not appearing in the present matter after 15/12/15. It has been submitted by Sh. Sanjeev Jamwal, Ld. A.R. for the management that he is only person, who will be representing the management in the present matter. On this, Ld. A.R. for the workmen has no objection if the application u/ s 36 ID Act is disposed off as satisfied. In view of this the application u/ s 36 of ID Act is therefore disposed off.

Heard. It is submitted by both the parties that there is no document for admission/ denial. Out of the pleadings of the parties, following issues are framed:

- 1. As per the terms of reference.*
- 2. Relief*

No other issue arises or is pressed. PF/DM and list of witnesses be filed within 15 days from today. Ld. AR for workman is directed to supply advance copy of affidavit to Ld. AR for the management one week prior to the next date of hearing.

Put up on 07/02/2019 for WE.”

16. Mr. Sabharwal, Id. Counsel submits that one Mr. Shashwat Singh Gaur was also appearing as an Advocate in this matter for the Management. A perusal of the impugned order also shows that the Labour Court records that the Advocate who was earlier appearing for the Management was thereafter replaced by the authorized representative. Thus, initially, there appears to have been consent for the Management to be represented by an Advocate.

17. Be that as it may, any litigation before the Labour Court has various stages. Initially, the pleadings and other procedural formalities are completed between the parties. At that stage, the management and the

workmen may choose not to expend their resources by engaging Advocates. However, as the matter reaches trial, it would be inapt to say that the management or the workmen would not be entitled to engage Advocates or legal practitioners to represent them, in accordance with law. If the Management wishes to be represented by a legal practitioner, the Court can consider the question of whether the workman has given consent or not, whether impliedly or otherwise. The Court, upon finding consent, may also award litigation expenses to permit the legal practitioner to appear for the Management. This is clearly the spirit of the judgment in *Thyssen Krupp Industries India Private Limited (supra)*.

18. The impugned order shows that though the advocate Mr. Sabharwal, for the Management was present on the date of hearing i.e., 19th March, 2021, the Labour Court has observed that no one is present on behalf of the Management. Such kind of treatment cannot be meted out to an Advocate who was present in court on a particular date. The Court has justified the same by recording that an earlier application under Section 36(4) has been disposed of at a time when the Authorized Representative of the Management was appearing. This approach is fallacious. The Labour Court could have adjourned the matter to enable the Management to put forward its case as to why it requires the services of an advocate at the stage of cross-examination. Thereafter, the Labour Court, after perusing the record ought to have given a finding as to whether there was implied consent at any stage of the proceedings for the Management to be represented by an advocate. The Court could have also considered whether litigation expenses could be paid to the workman. To completely oust the opportunity for cross-examination, even while the advocate for the Management was present,

would be contrary to the spirit of *Thyssen Krupp Industries India Private Limited (supra)*. Such an approach would cause irreparable prejudice to the Management.

19. In view of the above legal position and the facts of this case, the impugned order is clearly not sustainable. The same is accordingly set aside.

20. Under these circumstances, it is directed that the parties shall appear before the Labour Court on 20th September, 2021. On the said date, the Labour Court would firstly, after hearing the submissions on behalf of the parties, decide the question as to whether the Management can be represented by an advocate and on what terms and conditions. Thereafter, the Management would be given an opportunity to cross-examine the witness whose statement was recorded on 19th March, 2021. If the Management prays for an opportunity to cross-examine other witnesses of the Workman whose cross-examination was earlier not permitted, an application may be moved before the Labour Court, which shall be considered in accordance with law. After the cross-examination of the workman's evidence, the Management's evidence shall be recorded.

21. The writ petition is allowed in the above terms. All pending applications are also disposed of.

22. This Court appreciates the assistance rendered by the ld. counsels Mr. Raj Birbal, Ms. Raavi Birbal and Mr. Gunjan Singh, who were present in Court today.

PRATHIBA M. SINGH
JUDGE

AUGUST 24, 2021/mw/T
(corrected and released on 26th August, 2021)