HIGH COURT OF GUJARAT

GUJARAT KAMDAR PANCHAYAT
Versus
MAIZE PRODUCTS

Date of Decision: 05 July 2001

Citation: 2001 LawSuit(Guj) 414

Hon'ble Judges: Ravi R Tripathi

Eq. Citations: 2002 2 CLR 550, 2002 1 GLR 567, 2002 4 GCD 2977, 2002 4 LLN 985

Case Type: Special Civil Application

Case No: 11466 and 11469 of 2000

Subject: Labour and Industrial

Editor's Note:
IMP Para : 7, 19, 24, 30, 41

Industrial Disputes Act, 1947 -Sec 2(k), 7(1) & 10 -Preliminary issue - Regarding jurisdiction Tribunal has Fallen into an error when did not decide preliminary issue about its own jurisdiction and proceed to decide application for interim relief -It is clear that the order passed by tribunal Court was passed under provisions of "Clause(c)" of sub Sec(1) of Sec 10 and tribunal does not have any jurisdiction -Tribunal ought to have decided preliminary issue of jurisdiction first before deciding other issues -Held, impugned order passed by tribunal is quashed and set aside -Petition allowed

Acts Referred:
Industrial Disputes Act, 1947 Sec 7(1), Sec 2(k), Sec 10

Advocates: N R Shahani, S I Nanavati, D S Nanavati, D G Shukla, Nanavati & Nanavati Associates, D S Vasavada

Cases Cited in (+): 2

R. R. TRIPATHI, J.

[1] With the consent of the parties, both these matters are taken up for final disposal.

Rule. Learned Counsel appear and waive service of Rule on behalf of respective parties in each of these matters.

[2] In Special Civil Application No. 11466 of 2000, Gujarat Kamdar Panchayat has challenged the order passed below Exh. 3 - an application for interim relief in Reference (I.T.) No. 561 of 1999, whereby the Honourable Tribunal has passed an interim order directing the respondent-Company to take the remaining 64 workers on job if they tender a writing, a proforma of which is provided in the operative part of the order itself, which reads as under :

> I, the undersigned, as was misled, went on strike from 20th October, 1999 and I express my apology for the same and give an undertaking not to claim for the wages for the days lost on account of that. Taking into consideration this application of mine, I may be permitted to resume duties.
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> It is also clarified in the order itself that the order passed below Exh. 3 is subject to the final order which may be passed in the Reference.

[3] The Special Civil Application No. 11469 of 2000 is filed by M/s. Maize Products, who is respondent No. 1, in Special Civil Application No. 11466 of 2000, challenging the orders dated 6th July, 2000 and 9th October, 2000, which are produced at Annexure-A and A-1 in the petition, passed in the same Reference, that is, Reference (I.T.) No. 561 of 1999, regarding the preliminary issue and the order passed below Exh. 3, which is the subject-matter of the earlier petition also. As in this petition, that is, Special Civil Application No. 11469 of 2000, the contention is raised regarding the jurisdiction of the Industrial Tribunal, it was submitted by Mr. Nanavati, learned Advocate appearing for the petitioner-company that if the Court comes to the conclusion that the Industrial Tribunal had no jurisdiction to entertain the reference which was made by an order dated 3rd December, 1999 of the Deputy Labour Commissioner, Ahmedabad Division, Ahmedabad, a copy of which is produced at Annexure-D collectively in this petition, separate adjudication of Special Civil Application No. 11466 of 2000 may not be required. However, the matter was heard at length on both the aspects, namely, the jurisdiction of the Industrial Tribunal and also on merits, that is, as to whether the order passed below Exh. 3 is required to be interfered with by this Court or not.

[4] In Special Civil Application No. 11469 of 2000, it is submitted that the order dated 3rd December, 1999 was passed under the provisions of Sec. 10(1)(c) and under these provisions, the matter is required to be referred to only the Labour Court and not to the Industrial Tribunal. The relevant provisions read as under :

10. Reference of disputes to Boards, Courts or Tribunals :-(1) Where the appropriate Government is of opinion that any industrial dispute exits or is apprehended, it may at any time, by order in writing, -

(a) x x x x x

(b) x x x x x

(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) x x x x x

Mr. Nanavati submitted that as is provided in clause (c), if the matter or dispute relates to any matter specified in the Second Schedule, then, the same is required to be referred to the Labour Court for adjudication. In the order dated 3-12-1999, a reference is made to Item No. 3 of the Second Schedule, but then, the said reference is made only to show that the Deputy Labour Commissioner is authorised with regard to the subject-matter contained in that item coupled with Item No. 10 of Third Schedule. Item No. 3 of Second Schedule and Item No. 13 of Third Schedule read as under :

No. 3 (Second Schedule)

Discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed;

No. 10 (Third Schedule)

Retrenchment of workmen and closure of establishment; and.

Mr. Nanavati submitted that the order refers to clause (c) of sub-sec. (1) of Sec. 10 alone, and therefore, the matter could have been referred to the Labour Court alone and not to the Industrial Tribunal. The references to Item No. 3 of Second Schedule and Item No. 10 of Third Schedule were only to show that the power is conferred on all Deputy Labour Commissioners by a notification dated 26th March, 1973, a copy of which is made available to this Court during the course of arguments by Mr. Shahani, learned Advocate appearing for respondent No. 1 in Special Civil Application No. 11469 of 2000.

[5] Mr. Nanavati submitted that after the petitioner-Company filed its written statement on 10th January, 2000 wherein a preliminary contention was raised in this

regard stating that, the terms of reference are made by the Deputy Commissioner of Labour, Shri M. K. Patel, vide his order dated 17th December, 1999 purporting to be a reference under Sec. 10(1)(c) of the I. D. Act, 1947, and that, Shri M. K. Patel, Deputy Commissioner of Labour, is not empowered to refer such a Reference directly to the Industrial Tribunal, as claimed by him under the guise of the notification dated 26th March, 1973 issued by the State Government. The Deputy Commissioner of Labour issued a Corrigendum dated 12-1-2000, which is produced at Annexure-G, Page 151, which fortifies the submission of non-maintainability of the reference before the Industrial Tribunal.

[6] The learned Member of the Industrial Tribunal, in its order dated 6th July, 2000, has recorded in Paragraph 3 that the Company in its written statement Exh. 7 has raised certain preliminary issues and one of such preliminary issues is that the present Reference is made by the Deputy Labour Commissioner by his order dated 17th December, 1999 under Sec. 10(1)(c) of the I. D. Act and that the said Reference is made without conciliation proceedings, and therefore, the original Reference is liable to be rejected and that the application for interim relief is also not maintainable. It is also recorded that the Company had contended in the written statement that as the Reference is made under Sec. 10(1)(c), the Company has not discharged any workman or has not dismissed any workman from the services, and therefore, the subject-matter does not fall within Item No. 3 of Schedule-II and the subject-matter is also not covered under Item No. 10 of Third Schedule, and hence, the Reference is liable to be rejected. The Reference was required to be made to the Labour Court and instead of that the same is made to the Industrial Tribunal, which has no jurisdiction, hence, the same is liable to be rejected. It is further recorded in the order that, on the basis of the aforesaid contention raised by the petitioner-Company in the written statement, without rejecting the application for interim relief at this stage, an interim order be passed regarding the preliminary issues, will be just and reasonable. Mr. Nanavati submitted that though it was so recorded in paragraph-3 by the learned Member of the Industrial Tribunal, the learned Member without deciding the preliminary issue passed the order on 6th July, 2000 to the effect that, for the reasons recorded hereinabove, notice is ordered under Rule 16 of the Industrial Disputes Act (Rules) to the concerned workmen and after the said notice is issued, the same should be served immediately, and thereafter, with immediate effect, the application for interim relief of the Union shall be heard. The hearing was fixed on 19th July, 2000. Thereafter, application for interim relief was heard and decided by an order dated 9th October, 2000.

[7] Mr. Nanavati submitted that the preliminary issue, raised by the petitioner-Company, was going to the root of the matter, and therefore, the Tribunal ought to have decided the same. He further submitted that the learned Member has committed

an error in deciding the interim application without deciding the preliminary issue raised by the petitioner-Company though the learned Member had in terms recorded that it will be just and proper to pass an order on preliminary issue.

Mr. Nanavati relied upon a judgment of the Apex Court in the matter of Management of Express Newspapers (Pvt.) Ltd., Madras v. The Workers & Ors., reported in AIR 1963 SC 569, wherein the Apex Court was considering the question that when the proceedings before the Industrial Tribunal are at the initial stage, whether the employer can move the High Court regarding the jurisdiction of the Industrial Tribunal. The Apex Court held that, Normally, such question to be decided by the Tribunal itself in the first instance. The Apex Court has observed in Paragraphs 10, 11 and 12 as under : 10. The true legal position in regard to the jurisdiction of the High Court to entertain the appellants petition even at the initial stage of the proceedings proposed to be taken before the Industrial Tribunal, is not in dispute. If the action taken by the appellant is not a lock- out, but is a closure, bona fide and genuine, the dispute which the respondents may raise in respect of such a closure is not an industrial dispute at all. On the other hand, if, in fact and in substance, it is a lock-out, but the said action has adopted the disguise of a closure, and a dispute is raised in respect of such an action, it would be an industrial dispute which industrial adjudication is competent to deal with. The appellant contends that what it has done is a closure and so, the dispute in respect of it cannot be validly referred for adjudication by an Industrial Tribunal. There is no doubt that in law, the appellant is entitled to move the High Court even at the initial stage and seek to satisfy it that the dispute is not an industrial dispute and so, the Industrial Tribunal has no jurisdiction to embark upon the proposed enquiry. (Emphasis supplied)

11. There is also no doubt that the proceedings before, the Industrial Tribunal are in the nature of quasi-judicial proceedings and in respect of them, a writ of certiorari can issue in a proper case. If the Industrial Tribunal proceeds to assume jurisdiction over a non-industrial dispute, that can be successfully challenged before the High Court by a Petition for an appropriate writ, and the power of the High Court to issue an appropriate writ in that behalf cannot be questioned. (Emphasis supplied)

12. It is also true that even if the dispute is tried by the Industrial Tribunal, at the very commencement, the Industrial Tribunal will have to examine as a preliminary issue the question as to whether the dispute referred to it, is an industrial dispute or not, and the decision of this question would inevitably depend upon the view which the Industrial Tribunal may take as to whether the action taken by the appellant is a closure or a lock-out. The finding which the Industrial Tribunal may

record on this preliminary issue will decide whether it has jurisdiction to deal with the merits of the dispute or not. If the finding is that the action of the appellant amounts to a closure, there would be an end to the proceedings before the Tribunal so far as the main dispute is concerned. If, on the other hand, the finding is that the action of the appellant amounts to a lock-out which has been disguised as a closure, then the Tribunal will be entitled to deal with the reference, the finding which the Tribunal may make on this preliminary issue is a finding on a jurisdictional fact and it is only when the jurisdictional fact is found against the appellant that the Industrial Tribunal would have jurisdiction to deal with the merits of the dispute. This position is also not in dispute.

Mr. Nanavati, learned Counsel for the petitioner, submitted that thus, the Apex Court has laid down in clear terms that the Industrial Tribunal will have to examine as a preliminary issue, the question as to whether the dispute referred to it, is an industrial dispute or not and the decision of this question would inevitably depend upon the view, which the Industrial Tribunal may take as to whether the action taken by the appellant is a closure or a lock-out. The finding which the Industrial Tribunal may record on this preliminary issue, will decide whether it has jurisdiction to deal with the merits of the dispute or not. He submitted that in the present case, the learned Member of the Industrial Tribunal has fallen into an error when he did not decide the preliminary issue about its own jurisdiction and proceeded to decide the application for interim relief filed by the Union.

[8] Mr. Nanavati relied upon a judgment of this Court in Special Civil Application No. 1572 of 1999, the matter between Satyadev Chemicals Pvt. Ltd. v. Dakshin Gujarat General Labour Association (Coram : Ms. R. M. Doshit, J.), (Date of Decision : 9-9-1999). Mr. Nanavati submitted that the Court was considering as to whether in case of a preliminary objection with respect to the jurisdiction of the authority and request to decide it as a preliminary issue, where the authority was justified in not deciding the same as a preliminary issue. The Court after taking into consideration the decisions of the Supreme Court in the matter of D. P. Maheshwari v. Delhi Administration & Ors., AIR 1984 SC 153 has held in Para 7 as under :

7. There cannot be any dispute in respect of the principle enunciated in the above two judgments. It is always desirable that all the issues arising in a matter should be decided together and as expeditiously as possible. However, in the present case, the issue is in respect of the inherent jurisdiction of the authority and the application of the Act itself. Further, no evidence is required to be led for deciding the said issue. It is an admitted fact that each of the above-referred 50 employees received monthly wages exceeding Rs. 1600/-. In view of the provision contained in sub-sec. 6 of Sec. 1 of the Act, the provisions of the Act, shall not apply. The

application made before the concerned authority is, therefore, not maintainable. Besides, it is also an admitted fact that all the said employees have also availed of the statutory remedy available under the Industrial Disputes Act, 1947 and have filed recovery application before the Labour Court at Vadodara.

Not only that, the Court also considered that, even remanding of the matter to the authority to decide as to whether the authority has jurisdiction or not. The Court felt it unnecessary on perusal of the provisions of the Act and decide the matter finally and held that the recovery of Wages application made under the Act is not maintainable and the same was rejected by allowing the petition.

[9] Mr. Nanavati, then, relied upon a judgment in the matter between State of Bihar v. D. N. Ganguly & Ors., reported in AIR 1958 SC 1018. Mr. Nanavati submitted that the Apex Court has held that the Government has no power to cancel or supersede the Reference made under Sec. 10(1) of the Industrial Disputes Act. Mr. Nanavati submitted that in the present case, after having issued an order dated 3rd December, 1999, when the matter was pending before the Industrial Tribunal and the written statement was already filed by the petitioner-Company, the authorities came out with another order dated 12th January, 2000 whereby the aforesaid order was sought to be amended by adding the words, and d in Paragraph 2 of the order dated 3-12-1999 after the words clause (c). Mr. Nanavati submitted that the said order dated 12th January, 2000 cannot confer jurisdiction on the Industrial Tribunal inasmuch as the order dated 3rd December, 1999 was very clear and by virtue of that order the Reference was sought to be made under Sec. 10(1)(c). It is only after the written statement was filed by the petitioner-Company, the order dated 12-1-2000 was issued with a view to see that the mistake committed, which might invite trouble to the author of the order, is corrected. Mr. Nanavati submitted that this amounts to exercising the power which is not vested with the Government. Once having exercised the power under Sec. 10(1)(c), there was no reason for the Government to issue second order dated 12th January, 2000. Mr. Nanavati submitted that the Apex Court in the matter of State of Bihar v. D. N. Ganguly (supra) has in terms held that, If the appropriate Government has no authority to cancel or revoke the notification issued under Sec. 10(1), even the bona fides of the Government can hardly validate the impugned cancellation. Mr. Nanavati submitted that in the present case also, the authorities having issued the order dated 3rd December, 1999 making a Reference to the Industrial Tribunal which had no jurisdiction to try the subject-matter of the Reference, the issuance of second order dated 12th January, 2000 could not have improved the position. Mr. Nanavati submitted that issuance of the second order dated 12th January, 2000 cannot repair the damage already caused. He relied upon a judgment of Chandra Spinning and Weaving Mills Ltd. v. State of Mysore & Ors.,

reported at 1964 (2) LLJ 604, wherein the authorities during the pendency of the adjudication proceedings in regard to such reference, the State Government purporting to act under Sec. 10(4) of the Act passed an order amending the prior order of Reference. Such order was held to be of the nature, which will supersede and cancel the prior order of Reference. The second order of Reference was, therefore, quashed and set aside by the High Court. The High Court was pleased to observe that, The legal position that emerges from a careful review of the decided cases on the point is that a reference made by the State Government under Sec. 10(1) of the Act could be amended either by way of addition or modification so long as amendment has not the effect of withdrawing or superseding the reference already made. He submitted that in the present case, by fresh order of 12th January, 2000, the first order stands superseded. He submitted that in fact, by issuing second order, first order is superseded and a fresh Reference is made to the Industrial Tribunal.

[10] Mr. Nanavati submitted that when a preliminary issue was already raised and the Industrial Tribunal was considering also, the same ought to have been decided first. The Industrial Tribunal should have taken into consideration that if it has no jurisdiction, then, it cannot be conferred even by the consent of the parties. In support of this submission, Mr. Nanavati relied upon a judgment of the Apex Court in the matter between Association of Engineering Workers v. Dockyard Labour Union & Ors., reported in 1995 Supp (4) SCC 544, wherein the Apex Court was considering the validity of resorting method of secret ballot with the consent of the parties, which is not otherwise, a prescribed method for verification of the condition required for recognition under Sec. 11 of Unfair Labour Practice Act, 1971, and held that, Even if the method of secret ballot is resorted to with the consent of parties and care has been taken to see that only those employees who had put in more than six months service were allowed to cast their preference for the purpose of determining allegiance and that is not the proper method for verification of the condition required for recognition under Sec. 11, and hence, it was a method which was clearly alien to the statute. Even if secret ballot method is resorted to with the consent of the parties, such consent cannot cure the illegality of substitution of a procedure not prescribed by the Act.

[11] Mr. Nanavati submitted that it is clear that a Reference can be made only to a Labour Court under the provisions referred to in the order dated 3-12-1999 i.e. Sec. 10(1)(c). He further submitted that even as per the Union, the matter was regarding dismissal and reinstatement of the workmen and a statement of claim to that effect was filed before the authorities, a copy of which is produced at Annexure-E Page 104 and from that, it is clear that the subject-matter was that of the jurisdiction of Labour Court alone.

[12] Mr. D. S. Vasavada, learned Advocate appearing for Gujarat Mazdoor Panchayat - Respondent No. 2 submitted that in the facts of the case, the Government ought not to have made the reference at all. He submitted that as the majority of the workmen have already signed and submitted their undertaking, the remaining workmen should also have adopted the same path in the interest of industrial peace. He submitted that it is a well settled position of law that the Government has to exercise its discretion of making a reference or not so as to see that the adjudication does not raise spirit of discontent on the part of majority of the workmen. In support of his submission, he relied on a judgment of this Court in the matter between Atic Employees Union v. State of Gujarat, reported in 1984 (2) LLJ 336. Mr. Vasavada submitted that this Court has held that, If the State Government in exercise of the discretion found that referring such a dispute for adjudication would raise spirit of discontent on the part of a substantial number of workmen, who had already signed such undertaking and resumed work, and it would amount to giving fillip to industrial unrest on the spot, and in that view, if the reference is refused, it cannot be said that such discretionary order of the State Government is in any way perverse or uncalled for or it is liable to be interfered with in exercise of the powers under Art. 226 of the Constitution of India.

[13] Mr. Vasavada submitted that as out of 187 employees, 104 employees have already signed the undertaking and in that view of the matter, if the matter is now reopened, it is going to create a feeling of discontent on the part of these 104 workmen, who have already signed the undertaking. Not only that, he further submitted that it will also amount to giving premium to the persons, who continued to be out of work and did not resume the work along with the majority of the workmen. Mr. Vasavada placed heavy reliance on the second paragraph of the said judgment wherein it is said that, About 500 and odd employees however refused to sign those undertaking and raised an industrial dispute for reference to the appropriate authority under the Industrial Disputes Act. Mr. K. S. Nanavati for the concerned informs us that subsequently, a large number of employees who had signed undertaking and resumed work and working peacefully and if any dispute is now raised by the remaining employees for adjudication of the Tribunal about the illegality of the said undertaking, peace and tranquillity in the campus is likely to be affected and a substantial number of employees who have signed the undertaking are likely to raise further dispute. He further submitted that the Court has held in clear terms that, If the State Government in exercise of its discretion found that referring such a dispute for industrial adjudication would raise spirit of discontent on the part of a substantial number of workers who had already signed such undertakings and resumed work and it would amount to giving fillip to industrial unrest on the spot, and in that view, if the reference is refused, we cannot say that such discretionary order of the State Government is in

any way perverse or uncalled for and or it is liable to be interfered with in exercise of our powers under Art. 226 of the Constitution of India.

[14] Mr. Vasavada also emphasised that in view of the fact that in the present case also, majority of the workmen have already signed undertakings and given to the management, and hence, the observations made by this Court in the aforesaid judgment in Paragraph 4 are squarely applicable to the facts of the present case. Paragraph 4 of the judgment reads as under :

> In view of the aforesaid amicable arrangement between the parties, in our view, any reference at this stage would be totally academic and not in the interest of the workmen or the respondent-Company or in the interest of industrial peace and harmony. Even on this additional ground, the order of the first respondent stands justified and is not required to be interfered with at this stage. However, we may clarify that in the backwages proceedings, which may be initiated by the petitioner-Union on behalf of the concerned employees, all the legal pleas can be raised by both the sides in challenge and defence of the undertakings.
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> Mr. Vasavada submitted in the alternative that the matter should have been
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> referred to the Labour Court only more so when the provisions of Sec. 10(1)(c)
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> were referred to in the letter.

[15] Mr. N. R. Shahani, learned Advocate appearing for the respondent No. 1 - Gujarat Kamdar Panchayat, submitted that to appreciate the real nature of the dispute, taking into consideration the scheme of the Act, is necessary. He submitted that to start with, the definition of the Industrial Disputes is in clause (k) of Sec. 2 which reads as under :

> industrial dispute means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. Mr. Shahani submitted that in the present case also, there is definitely a matter of difference, if not dispute between employer and workmen, and therefore, it squarely falls within the definition of word, industrial dispute. Mr. Shahani, then, invited the attention of the Court to Sec. 2A, the title of which is dismissal, etc., of an individual workman to be deemed to be an industrial dispute. Mr. Shahani submitted that in fact, in the year 1965, the said Sec. 2(A) was inserted with an object to see that dismissal, etc., even that of an individual workman is included in the definition of the word, industrial dispute (emphasis supplied). Mr. Shahani, then, submitted that officers

for conciliation are provided in Sec. 4 of the Act while Sec. 7 provides for the `Labour Court. He submitted that in sub-sec. (1) of Sec. 7, it is provided as under :

The appropriate Government may, by notification in the Official Gazette, constitute one or more Labour Courts for the adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under this Act.

Mr. Shahani submitted that though it is clearly mentioned that the Labour Courts will be adjudicating all industrial disputes relating to any matter specified in the Second Schedule, it does not mean that this is the only exclusive work to be discharged by the Labour Court. He submitted that broader meaning is required to be given to the words, for performing such other functions as may be assigned to them under this Act. Mr. Shahani submitted that giving broader meaning will be in consonance with the reading of Item No. 6 of Second Schedule and Item No. 11 of the Third Schedule. The Item No. 6 of Second Schedule reads as under :

Second Schedule :

6. All matters other than those specified in the Third Schedule. Item No. 11 of the Third Schedule reads as under :

Third Schedule :

11. Any other matter that may be prescribed.

Mr. Shahani submitted that on applying the rule of harmonious construction, when the subject-matter under reference has a relation with the matter listed in the Third Schedule, the same is not required to be assigned to the Labour Court as the same will not fall within the jurisdiction of the Labour Court. On the other hand, by virtue of Item No. 11 of Third Schedule, the Industrial Tribunal will have the jurisdiction over any other matters over and above the matters which are listed in the Third Schedule.

[16] Mr. Shahani, then, referred to Sec. 10 of the Industrial Disputes Act. The title of the Sec. 10 is, Reference of Disputes to Boards, Courts or Tribunals. Sub-sec. (1) of Sec. 10 reads as under :

10(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may any time, by order in writing, ...

It is, then, provided that the industrial dispute can be referred to the Board, the Court of Inquiry, the Labour Court or the Tribunal for adjudication. Mr. Shahani,

then, drew the attention to clause (c) of sub-sec. (1) of Sec. 10, which reads as under :

(c) refer the dispute or any matter appearing to be connected with, or relevant to the dispute, if it relates to any matter specified in the Second Schedule to a Labour Court for adjudication; or

He submitted that in sub-sec. (1) of Sec. 10, it is provided not only for the disputes which are in existence, but it also provides for the disputes which may be even apprehended. Meaning thereby, they might not have come into existence, but they are only at the stage of apprehension. He further submitted that the dispute which is apprehended by the Government and not by the party, who may have a bias about the dispute, can be referred to. He submitted that in view of that order dated 3rd December, 1999 making a reference to the Industrial Tribunal, is not only legal, but also just and proper as the word, chhatni i.e. retrenchment in English, is used. Mr. Shahani, submitted that in the second paragraph of the order, the author of the order has referred to Item No. 3 of Second Schedule and Item No. 10 of Third Schedule also. The order is passed making the reference of the subject-matter mentioned in the Schedule.

[17] On perusal of the order dated 3rd December, 1999, it is clear that in the second paragraph, notification dated 26th March, 1973 is referred to. The same is referred to for showing the conferment of the power on the Deputy Labour Commissioner. From the reference in Paragraph 2 of the order, it cannot be said that Item No. 3 of the Second Schedule and Item No. 10 of the Third Schedule are referred to for passing of the order in question. On reading the second paragraph, it is clear that reference to those items of Second and Third Schedule is only to state that the Deputy Labour Commissioner is conferred power to make a reference by order dated 26th March, 1973. Paragraph 3 of the said order is in plain words and there is no ambiguity. It reads that, Shri A. K. Patel, Deputy Labour Commissioner, Ahmedabad, under the powers conferred, refers the matter to the Industrial Tribunal No. 5, Ahmedabad. There being no ambiguity in the words contained in Paragraph 3, there is no question of construing the order in the manner suggested by Shri Shahani. The author of the order has committed an error as under Sec. 10(1)(c), the matter could have been referred to the Labour Court only. This does not mean that the author of the order had no power to refer the matter to Industrial Tribunal, but at the same time, the fact remains that the provision under which the reference is made does not empower the authority to make the reference to the Industrial Tribunal.

[18] Mr. Shahani, learned Advocate appearing for respondent No. 1, submitted that the Industrial Tribunal has not committed any error in postponing the decision on the

preliminary issue. He submitted that as per the law laid down by the Apex Court, the Industrial Tribunal was well within its bounds in postponing the decision on the preliminary issue. Mr. Shahani placed reliance upon the decision of the Apex Court in the matter between D. P. Maheshwari v. Delhi Administration & Ors., reported in AIR 1984 SC 153. Mr. Shahani invited the attention of this Court to Paragraph 1 of the judgment which reads as under :

> It was just the other day that we were bemoaning the unbecoming devices adopted by certain employers to avoid decision of industrial dispute on merits. We noticed how they would raise various preliminary objections, invite decision on those objections in the first instance, carry the matter to the High Court under Art. 226 of the Constitution and to this Court under Art. 136 of the Constitution and delay a decision of the real dispute for years, sometimes for over a decade. Industrial peace, one presumes, hangs in the balance in the meanwhile. We have now before us a case where a dispute originating in 1969 and referred for adjudication by the Government to the Labour Court in 1970 is still at the stage of decision on a preliminary objection. There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that Tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Art. 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Art. 226 of the Constitution nor the jurisdiction of this Court under Art. 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill-afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Art. 226 and Art. 136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all Tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeying up and down. It is also worthwhile remembering that the nature of the jurisdiction under Art. 226 is supervisory and not appellate while that under Art. 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with

the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues.

Mr. Shahani, then, referred to Para 5 wherein, the Apex Court has quoted the paragraph from the judgment of the learned single Judge of the High Court. Paragraph 5 of the judgment reads as under :

Curiously enough, the learned single Judge of the High Court affirmed the finding of the Labour Court that D. P. Maheshwari was not employed in a supervisory capacity. He said,

In the face of this material and the admitted hypothesis the conclusion that the respondent was not mainly employed in a supervisory capacity is certainly a possible conclusion that may be arrived at by any Tribunal duly instructed in the law as to the manner in which the status of an employee may be determined. It is, therefore, not possible for this Court to disturb such a conclusion having regard to the limited ambit of review of the impugned order.

Having so held, the learned single Judge went on to consider whether the workman was discharging duties of a clerical nature. He found that it would be difficult to say that D. P. Maheswari was discharging routine duties of a clerical nature which did not involve initiative, imagination, creativity and a limited power of self direction. The learned single Judge did not refer to a single item of evidence in support of the conclusions thus recorded by him. He appeared to differ from the Labour Court on a question of fact on the basis of a generalisation without reference to specific evidence. No appellate Court is entitled to do that, less so, a Court exercising supervisory jurisdiction. Referring to the finding of the Labour Court that the workman was discharging mainly clerical duties, the learned single Judge observed, It is erroneous to presume, as was apparently done by the Additional Labour Court, that merely because the respondent did not perform substantially supervisory functions, he must belong to the clerical category. This was an unfair reading of the Labour Courts judgment. We have earlier extracted the relevant findings of the Labour Court. The Labour Court not only found that the workman was not performing supervisory functions but also expressly found that the workman was discharging duties of a clerical nature. The Division Bench which affirmed the judgment of the learned single Judge also read the judgment of the Labour Court in a similar unfair fashion and observed, It is no doubt true that the Labour Court held that the appellants evidence showed that he was doing mainly clerical work. As we read the order as a whole, it appears that in arriving at this conclusion the Labour Court was greatly influenced by the fact that the appellant was not employed in a supervisory capacity. We have already pointed out that the Labour Court did not

infer that the appellant was discharging duties of a clerical nature from the mere circumstance that he was not discharging supervisory functions. The Labour Court considered the entire evidence and recorded a positive finding that the appellant was discharging duties of a clerical nature. The finding was distinct from the finding that the appellant was not discharging supervisory function as claimed by the Company. We would further like to add that the circumstance that the appellant was not discharging supervisory functions was itself a very strong circumstance from which it could be legitimately inferred that he was discharging duties of a clerical nature. If the Labour Court had drawn such an inference it would have been well justified in doing so. But, as we said, the Labour Court considered the entire evidence and recorded a positive finding that the workman was discharging duties of a clerical nature. The Division Bench, we are sorry to say, did not consider any of the evidence considered by the Labour Court and yet characterised the conclusion of the Labour Court as perverse. The only evidence which the Division Bench considered was that of M. W. I. Shri K. K. Sabharwal and under the impression that the Labour Court had not considered the evidence of K. K. Sabharwal, the Division Bench observed, The non-reference to the said evidence while discussing the point in issue, would clearly vitiate the order of the Labour Court. This was again incorrect since we find that the Labour Court did consider the evidence of M. W. I fully.

Mr. Shahani also relied upon a judgment of the Apex Court in support of his submission that the Court below has not committed any error in not rendering any decision on preliminary issue, after having recorded a fact of existence of the preliminary issue, in the matter between National Council of Cement and Building Materials v. State of Haryana & Ors., reported in 1996 (2) LLJ 125. The Apex Court was pleased to hold that no interference is called for when the Industrial Tribunal after agreeing to decide preliminary issue, decided to hear preliminary issue along with other issues on merits. It was held that discretion exercised by the Industrial Tribunal was just and proper and further that it was rightly not interfered with by the High Court. Mr. Shahani relied upon Paragraphs 11, 12 and 16 which read as under :

11. Usually, whenever a reference comes up before the Industrial Tribunal, the Establishment, in order to delay the proceedings, raises the dispute whether it is an industry as defined in Sec. 2(j); or whether the dispute referred to it for adjudication is an industrial dispute within the scope of Sec. 2(k) and also whether the employees are workmen within the meaning of Sec. 2(s). A request is made with that these questions may be determined as preliminary issues so that if the

decision on these questions are in the affirmative, the Tribunal may proceed to deal with the real dispute on merits.

12. We, however, cannot shut our eyes to the appalling situation created by such preliminary issues which take long years to settle as the decision of the Tribunal on the preliminary issue is immediately challenged in one or the other forum including the High Court and proceedings in the reference are stayed which continue to lie dormant till the matter relating to the preliminary issue is finally disposed of.

16. The facts in the instance case indicate that the appellant adopted the old tactics of raising a preliminary dispute so as to prolong the adjudication of industrial dispute on merits. It raised the question whether its activities constituted an industry within the meaning of the Industrial Disputes Act and succeeded in getting a preliminary issue framed on that question. The Tribunal was wiser. It first passed an order that it would be heard as a preliminary issue, but subsequently, by change of mind, and we think rightly, it decided to hear the issue along with other issues on merits at a later stage of the proceedings. It was at this stage that the High Court was approached by the appellant with the grievance that Industrial Tribunal, having once decided to hear the matter as a preliminary issue, could not change its mind and decide to hear that issue along with other issues on merits. The High Court rightly refused to intervene in the proceedings pending before the Industrial Tribunal at an interlocutory stage and dismissed the petition filed under Art. 226 of the Constitution. The decision of the High Court is fully in consonance with the law laid down by this Court in its various decisions referred to above and we do not see any occasion to interfere with the order passed by the High Court. The appeal is dismissed, but without any order as to costs.

[19] Mr. Shahani in support of his contention also relied upon a decision of the High Court of Himachal Pradesh in the matter between M/s. Gaberiel India Ltd. v. State of H. P. & Ors., reported in 1995 (2) LLJ 975, wherein, according to Mr. Shahani, the High Court of Himachal Pradesh was pleased to hold that, Labour Court can avoid deciding preliminary issue before deciding other issues and in doing so, Labour Court does not commit any illegality which is required to be corrected by this Court.

Mr. Shahani placed reliance on Paragraph 5 of the judgment, which reads as under :

5. It was thereafter submitted that the Labour Court by not deciding to try issue No. 4 as a preliminary issue before deciding other issues, had committed an illegality, which deserves to be corrected by this Court, while exercising its extraordinary writ jurisdiction. A perusal of Annexure Page 9 would indicate that

the petitioners filed the application on the date of examination of witnesses. The Presiding Officers of the Labour Court gave a copy of the said application to the other side for filing its reply by the next date. It has neither decided the application nor refused to treat issue No. 4 as a preliminary issue or decide the same as alleged. Indeed, the Labour Court in the context of an application for re-framing issues could not have given any such decision. Indeed, as far as Labour Courts adjudication is concerned, piecemeal recording of evidence and decision has got to be avoided. No injustice will be done to any party if the trial of all issues proceed together. But, at the time of writing the award, the Labour Court should first decide the preliminary issue, if any, and proceed to decide other issues only when decision on preliminary issue may not be sufficient to dispose of the reference. Learned Counsel for the petitioners has relied on The Rawalpindi Transport Company (P) Ltd. v. State of Punjab and Ors., 1962 (I) LLJ 552 and Voltas Limited v. Its Workmen 1961 (I) LLJ 323, to submit that preliminary issue should be decided first. These cases, in our opinion, do not lay down any law of universal application. They really follow the existing law that if the Court is prima facie of the opinion that a decision on preliminary issue is likely to dispose of the entire case, the issue should be tried to be as a preliminary issue and not otherwise. Considering the nature of issue No. 4 which relates to the validity of reference in the context of submissions of the petitioners, it does not appear to be a case where it will be in the interest of justice to try and decide issue No. 4 before trying and deciding other issues. Under the circumstances, this Court would not find any justification for the submission aforesaid.

In the present case, the preliminary issue raised is regarding the jurisdiction of the Industrial Tribunal which goes to the root of the matter and as is held by the Apex Court such issue ought to have been decided first.

[20] Mr. Shahani submitted that Item No. 10 of the Third Schedule is, Retrenchment of workmen and closure of establishment. He submitted that word, and, is not to be read in such a manner so that it gives a meaning to the effect that retrenchment of a workman as a consequence of closure of establishment. Two incidents - retrenchment and closure of Establishment are to be considered as two separate subjects. He further clarified that retrenchment may be even without closure of establishment, and therefore, in the present case, chhatni, that is, retrenchment, as a subject was rightly referred to the Industrial Tribunal for adjudication.

[21] Mr. Shahani, next invited the attention of the Court to the term, unfair labour practice in clause r(a) of Sec. 2 of the Act. Clause r(a) of Sec. 2 of the Act reads as under :

unfair labour practice means any of the practices specified in the Fifth Schedule.

He then pointed out that it is specifically provided in Item No. 8 of Part I of Fifth Schedule that, insisting upon individual workmen, who are on a legal strike to sign a good conduct bond, as a pre-condition to allowing them to resume work, amounts to unfair labour practice. It was then submitted that in the present case also, the employer insisted upon signing of the undertaking and did not allow the workmen to resume duty without signing such undertaking, which, according to Mr. Shahani, amounted to unfair labour practice. He further submitted that when there is an insistence of the employer for signing a good conduct bond, it is to be held as unfair labour practice and the same is to be condemned by the Court. He further submitted that in the present case, the Labour Court having felt that insistence of the employer for signing the undertaking and that too, making it a precondition to allow them to resume duty, was not proper. The Industrial Tribunal, therefore, passed the order that the undertaking as it is prescribed in the operative part of the order may be signed by the remaining 64 workmen. He further submitted that this suggestion was as a via media to find out a solution to the problem and to see that the remaining workmen are also allowed to resume duty so that they start earning their livelihood.

[22] Mr. Shahani submitted that the order making reference dated 3rd December, 1999, is sought to be amended by another order dated 12th January, 2000, which is absolutely in accordance with law. Mr. Shahani, in support of his submission, relied upon a judgment of this Court in the matter between School Glass India Pvt. Ltd. v. Assistant Commissioner of Labour & Conciliation Officer, reported in 2000 (2) CLR 884. It is laid down by this Court once the reference of a dispute is already made, subsequent order passed by the authority to amend the reference already made is well within the jurisdiction and power of the authority. Mr. Shahani submitted that in the case before this Court, a reference was already made under Sec. 10(1)(d), and thereafter, the authority had issued the order wherein the petitioner of that petition was ordered to be joined as respondent No. 2. It was held that the authority was within its power to amend the reference already made to the Labour Court. Mr. Shahani submitted that the Court has also laid down that while making the amendment of an order of reference, no show-cause notice is required to be issued to the petitioner of that petition, before joining the petitioner as respondent No. 2 and that the Court has further held that no prejudice is caused to the petitioner inasmuch as the petitioner will have every opportunity to file written statement, raise all its contentions including that it is not a necessary party.

[23] Mr. Shahani invited the attention to the contents of Paragraph 4 wherein the Court has referred to a judgment of Rajasthan High Court in the case of Rashtradoot

Dainik Press v. Rajasthan Samachar Patra and Karmachari Sangh, reported in 1977 LIC 1061. Paragraphs 4 and 5 of the said judgment read as under :

4. I have considered the submissions made by Mr. Raval, the learned Advocate for the petitioners herein. I have considered the decision of the Rajasthan High Court in case of Rashtradoot Dainik Press v. Rajasthan Samachar Patra Karmachari Sangh, reported in 1977 LIC 1061. The Rajasthan High Court has observed in case of Rashtradoot Dainik Press (supra) that since the appropriate Government is entitled under Sec. 10(1) of the Act to make an independent reference or even a supplemental reference in respect of a matter pending adjudication before the Tribunal, it can by a subsequent notification amend the earlier reference which is merely in the nature of addition to or application of the issues already referred to the Industrial Tribunal. It has also been observed in the said decision that this is so because amending a reference relating to a pending dispute by way of addition or amplification thereof is not inconsistent with any of the provisions of the Act and such a course would not defeat the purposes of the Act. In the said decision, the case of River Steam Navigation Co. Ltd. v. Redhanath Hazarika, reported in AIR 1960 Assam 39 has also been considered by the High Court of Rajasthan. In the said decision of the River Steam Navigation Co. Ltd. (supra), it has been held by the High Court of Assam as under :

If it was open to the State Government to make a fresh reference under Sec. 10 of the Act and if the same Tribunal could deal with the matter arising in the subsequent reference, then, it could not be understood as to why the amendment of the earlier reference by adding another dispute to the same could not be permitted.

After the aforesaid observations, it was further held as under:

The power to make the amendment of nature with which we are concerned in the present case, therefore flows from Sec. 10 itself; because if in a given case by some mistake or oversight a person or a party, whose presence was necessary for a proper adjudication of the Industrial Dispute is not made a party, then, it would be a clear duty of the Government making reference under Sec. 10 to make such a person a party to the dispute, even by a subsequent notification. Otherwise, the reference itself would be rendered infructuous and the duty or the obligation which the statute imposes upon the Government would not be carried out. It was open to the Government to make under Sec. 10 an independent reference concerning any matter not covered by previous reference, the fact that it took the form of an amendment to the existing reference and not an additional reference was a mere technicality which did not merit any consideration. I should think that sub-sec. (5)

of Sec. 10 or Sec. (5) of Sec. 20 which though in terms may not be applicable to an amendment of this character, do in addition support the inference that such amendment would be permissible in law to give effect to the provisions of the statute.

5. In the said decision, well known decision of D. N. Ganguly, reported in AIR 1958 SC 1018 (supra) has been considered by the High Court of Rajasthan, and therefore, taking into consideration the decision of the Rajasthan High Court, the Government is having power to make under Sec. 10 by amending existing reference pending before the Labour Court.

Mr. Shahani submitted that in the present case also, the author of the order in question dated 3rd December, 1999, that is, Deputy Labour Commissioner, had power and that power was a joint power so far as Item No. 3 of Second Schedule and Item No. 10 of Third Schedule are concerned. He submitted that the Deputy Labour Commissioner, having joint power, has rightly exercised the same and he could have exercised the same only jointly and not segregating the same in two different items. Mr. Shahani, then, submitted that Item No. 3 of Second Schedule, wherein the question regarding discharge or dismissal of workmen including reinstatement of, or grant of relief to workmen wrongfully dismissed is concerned, can also be considered by the Industrial Tribunal when it has power to consider the retrenchment of workmen and as submitted before, the said retrenchment of a workman is not necessarily as a consequence of closure of establishment. Mr. Shahani submitted that though in the statement of claim, the word used is Kam bandh, that is, stoppage of work and/ or cessation of work, the same amounts to chhatni, that is, retrenchment, and therefore, the authority has rightly referred the said matter by using the word chhatni in the impugned order.

The authority has no application to the facts of the present case as there is no question of change of forum from Labour Court to Industrial Tribunal is involved. Amendment of reference on the lines involved in this case is definitely different than the one which is involved in the present case. In the present case, second order dated 7-1-2000 cannot be said to be in the nature of addition or amplification of the subject-matter of the first order dated 3-12-1999.

[24] Mr. Shahani submitted that the Apex Court in the matter of M/s. Dabur Pvt. Ltd., Deoghar, Bihar v. Its Workmen, reported in AIR 1968 SC 17, has laid down a law to the effect that the Government can correct the mistake and that such correction does not amount either to withdrawal of the reference or cancellation of the reference to Labour Court. In this case before the Apex Court, the Government of Bihar referred an industrial dispute under Sec. 10(1) of the Industrial Disputes Act, 1947 to the Labour

Court, Patna, and then the Government issued an Order by way of corrigendum substituting, Ranchi for Patna in the original order of reference. The Apex Court held that, The Government was well within its power in correcting the mistake and that such correction will not amount either to a withdrawal of the reference from or cancellation of the reference to Labour Court. Paragraph 3 of the judgment reads as under :

> 3. Mr. Gokhale, appearing on behalf of the appellant, emphatically urged that both the Labour Court, Ranchi as well as the Patna High Court were wrong in holding that the reference to the Labour Court, Ranchi, was competent even after the reference, 63 had originally been made to the Labour Court, Patna. He relied on the principle laid down by this Court that once the Government has made a reference to a particular Labour Court, it is that Labour Court which becomes seized of that industrial dispute, and thereafter, the Government has no jurisdiction either to withdraw that reference or cancel it. In this case, however, as is clear from the judgment of the High Court, the question that arose was entirely different. The High Court has clearly held that this was not a case where the Government either withdrew or cancelled the reference to the Labour Court, Patna. The High Court has held that, from the facts stated by the appellant in the writ petition filed in that Court, it appeared that the alteration in the order of reference was a mere correction of a clerical error, because by mistake Patna had been mentioned in place of Ranchi in the first notification. The second notification merely corrected that mistake. Mr. Gokhale wanted us to hold that the High Court was wrong in its view that the Government had merely made correction of a clerical error and that we should accept the submission on behalf of the appellant that, in fact, the State Government had first intentionally referred the dispute to the Labour Court, Patna, and issued the corrigendum only when the Government decided that the reference should go to the Labour Court, Ranchi and not Labour Court, Patna, because Labour Court, Patna had no jurisdiction to entertain the reference. We are unable to accept this submission made on behalf of the appellant. The High Court drew an inference from the facts stated in the writ petition filed by the appellant itself that this was a case of mere correction of a clerical error. This finding recorded by the High Court on the basis of the facts given in the writ petition is not now open to challenge in this special appeal, particularly because even a copy of that writ petition has not been made a part of the paper-book before us. We cannot see how any objection can be taken to the competence of the State Government to make a correction of a mere clerical error. The finding that it was a clerical error means that the Government in fact intended to make the reference to the Labour Court, Ranchi, but, while actually scribing the order of reference, a mistake was committed by the writer of putting down Patna instead of Ranchi. Such a clerical error can always be corrected and such a correction does not amount either to the

withdrawal of the reference from or cancellation of the reference to, the Labour Court, Patna. The High Court was, therefore, right in rejecting this contention on behalf of the appellant.

In the case before the Apex Court, the question of change of forum from Labour Court to Industrial Tribunal was not involved. On the contrary, the Apex Court has held that such correction would not amount to either withdrawal of reference or cancellation of the reference. In the facts of the present case, by the second order dated 7-1-2000, the reference made to Industrial Tribunal is sought to be validated which was otherwise not valid.

[25] Mr. Shahani also relied upon a judgment of Himachal Pradesh High Court referred earlier in the matter between M/s. Gaberiel India Ltd. v. State of Himachal Pradesh & Ors., (supra), wherein it was held that an order making reference will not be invalid only because a particular relevant provision is not mentioned and some other provision is mentioned. In other words, mere non-mentioning of a particular provision in the order of reference would not invalidate the reference.

Mr. Shahani submitted that in the present case also, in the impugned order, clause (d) of sub-sec. (1) of Sec. 10 was not mentioned in third paragraph. That clause (d) is sought to be added by the second order and issuance of that second order is objected. He submitted that it should have been assumed that the power is exercised under the provisions of Sec. 10(1)(d) as the subject-matter under reference is chhatni i.e. retrenchment. The subject-matter is covered under Item No. 10 of Schedule III, which is to be referred to an Industrial Tribunal. Therefore, not mentioning clause (d), cannot vitiate the order of reference.

The submission of Mr. Shahani though quite attractive and appears to be applicable to the facts of the case on hand also, cannot be applied for the reason that clause (d) deals with matters to be referred to Industrial Tribunal while clause (d) deals with matters which are to be referred to Labour Court. In such a situation, by mentioning clause (c), referring the matter to Industrial Tribunal cannot be said to be a case similar to that of the one which was before the High Court of Himachal Pradesh, and hence, that authority cannot be applied to the facts of the present case.

[26] Mr. Shahani next submitted that in the present case, the Government has already made an order of reference and it is the settled position of law that the power to make a reference is a discretionary and administrative in character and real existence of an Industrial Dispute or apprehension of an industrial dispute is to be decided by the Government which cannot be questioned before the Court on the ground of adequacy

or sufficiency of material for forming of the opinion by the Government. Mr. Shahani relied on a judgment of the Apex Court in the matter between Avon Services Production Agencies Pvt. Ltd. v. Industrial Tribunal, Haryana Faridabad & Ors., reported in AIR 1979 SC 170. He invited the attention of the Court to Paragraph 6 of the judgment which reads as under :

> 6. Sec. 10(1) of the Act confers power on the appropriate Government to refer at any time any industrial dispute which exists or is apprehended to the authorities mentioned in the Section for adjudication. The opinion which the appropriate Government is required to form before referring the dispute to the appropriate authority is about the existence of a dispute or even if the dispute has not arisen, it is apprehended as imminent and requires resolution in the interest of industrial peace and harmony. Sec. 10(1) confers a discretionary power and this discretionary power can be exercised on being satisfied that an industrial dispute exists or is apprehended. There must be some material before the Government on the basis of which it forms an opinion that an industrial dispute exists or is apprehended. The power conferred on the appropriate Government is an administrative power and the action of the Government in making the reference is an administrative act. The formation of an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. Thus, the jurisdictional facts on which the appropriate Government may act are the formation of an opinion that an industrial dispute exists or is apprehended which undoubtedly is a subjective one, the next step of making reference is an administrative act. The adequacy or sufficiency of the material on which the opinion was formed is beyond the pale of judicial scrutiny. If the action of the Government in making the reference is impugned by a party it would be open to such a party to show that what was referred was not an industrial dispute and that the Tribunal had no jurisdiction to make the Award but if the dispute was an industrial dispute, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before Government, on which it could have come to an affirmative conclusion on those matters.
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> In the present case, what is challenged is not the opinion of the Government and hence, this authority has no application to the facts of the case.

[27] Mr. Shahani submitted that in view of the settled legal position, once the Government has decided to make a reference, there is no question of interfering with the same merely on the ground that the word clause (d) are not sought to be added by

a subsequent order. Mr. Shahani submitted that once the Deputy Labour Commissioner had a power to make a reference, he is not denuded of the power only because clause (d) is not mentioned in the order.

Mr. Shahani is not right in view of the fact that in absence of mentioning of clause (d) reference could not have been made to the Industrial Tribunal.

[28] Mr. Shahani also submitted that the wordings of reference are not the decisive factor while deciding the tenability of a reference. Mr. Shahani relied upon a judgment of the High Court of Bombay in the matter of Sheshrao Bhaduji Hatwar v. Presiding Officer, First Labour Court & Ors., reported in 1992 (1) LLJ 672. The Court held therein that, Mere wording of the reference is not decisive in the matter of tenability of a reference. It may contain the defence or may not. If points of difference are discernible from the material before the Court or Tribunal, it has only one duty and that is to decide the points on merits and not to astute to discover formal defects in the wording of the reference. Mr. Shahani submitted that in the present case also, once the order of reference is made, only because the words clause (d), are not mentioned, should not be the reason for quashing the order. According to him, it will amount to discovering formal defects in the wordings of the reference and that is not the duty which is cast upon the judicial forums. Mr. Shahani relied upon the observations made in Paragraph 7 of the judgment which reads as under :

7. Legal position is thus clear that the mere wording of the reference is not decisive in the matter of tenability of a reference. It may contain the defence or may not. If points of difference are discernible from the material before the Court or Tribunal, it has only one duty and that is to decide the points on merits and not to be astute to discover formal defects in the wording of the reference. From the order of reference dated December 6, 1982 made in the case at hand, it is clear that the Schedule referred to the demand of the worker. It has reference also to the report of the Conciliation Officer which spells out the controversy between the parties. In this background, it cannot be said that the reference is made on the assumption that it was a case of termination and the only point left for adjudication was about the nature of relief to be granted to the workman. Undoubtedly, the reference is not happily worded. Unfortunately, that is generally the case as Supreme Court has observed. But that will not justify short-circuiting the reference by ignoring the basic background and subjecting the poor workman to untold misery and hardship involved in moving the machinery over again after a period of 8 years. That would be wholly unjust and empty formality. Even in civil jurisprudence mere framing of a vague issue does not vitiate the trial in the absence of prejudice. It is nobodys case before us that they did not know what controversy was really referred. Very fairly

the learned Counsel for the parties did not dispute that inspiration behind the approach of everyone to the point was the case of Sitaram Shirodkar (supra).

[29] Mr. Shahani further submitted that even in absence of the words, clause (d), by referring the matter to an Industrial Tribunal, no prejudice is caused to the employer, and therefore, even on that ground, no interference is called for from this Court and the matter is required to be dismissed.

[30] Mr. Nanavati in rejoinder submitted that matter of jurisdiction is a root question and if a particular forum does not have jurisdiction, the same cannot be conferred even by the consent of the parties. Mr. Nanavati submitted that the question of jurisdiction should have been decided as a preliminary issue as it goes to the root of the matter. Mr. Nanavati invited the attention of the Court to the judgment of the Apex Court in the matter of The Workmen of M/s. Hindustan Lever Ltd. & Ors. v. The Management of M/s. Hindustan Lever Limited, reported in 1984 (1) LLJ 388. Mr. Nanavati also pointed out that it may be noted that the judgment in the case of D. P. Maheshwari v. Delhi Administration, reported at AIR 1984 SC 153 is also decided by the same Bench while in this case, the same Bench has held that, Ordinarily, the Tribunal after ascertaining on what issue, that parties are at variance raises issues to focus attention on points in dispute. In Industrial adjudication, issues are of two types, (i) those referred by the Government for adjudication and set out in the order of reference and (ii) incidental issues which are some times the issues of law or mixed issues of law and fact and Industrial Tribunal, as well, framed preliminary issues if the point on which the parties are at variance, as reflected in the preliminary issues would go to the root of the matter. But, the Tribunal cannot travel beyond the pleadings and arrogate to itself the power to raise issues which the parties to the reference are precluded or prohibited from raising to writ if the employer does not question the status of the workman, the Tribunal cannot suo motu raise the issue and proceed adjudicate upon the same and throw out the reference on the sole ground that the concerned workman was not the workman within the meaning of the expression of the Act. And it is not obligatory upon the employer necessarily to raise the contention that the concerned workman was not a workman within the meaning of the expression under the Act, and therefore, the Tribunal was wholly in error in holding that if the contention of the Union were to prevail, the well laid rule of the estoppel against a statute would be violated.

[31] Mr. Nanavati submitted that in that view of the matter, in the present case, the Tribunal, having come to the conclusion that the point of jurisdiction is one of the preliminary issue, has recorded the same in Paragraph 7 of the award to the effect that, This reference is made by an order dated 3-12-1999 only under Sec. 10(1)(c) and that the reference made under Sec. 10(1)(c) can be made only to the Labour Court and has thereafter, declined to decide the same. He submitted that the learned

Member ought to have decided preliminary issue first as the issue regarding the jurisdiction goes to the root of the matter and would have disposed of the entire matter.

[32] Mr. Nanavati submitted that even in the case of M/s. Gaberiel India Ltd. v. State of Himachal Pradesh (supra), the judgment which is relied upon by the learned Advocate, Mr. Shahani, it is specifically mentioned in paragraph-5 that, But, at the time of writing the award, the Labour Court should first decide the preliminary issue, if any, and proceed to decide other issues only when decision on preliminary issue may not be sufficient to dispose of the reference. Mr. Nanavati submitted that it is further observed in the same judgment that, If the matter before the Labour Court for adjudication requires recording of evidence, the same cannot be in piecemeal, but it is very much necessary that at the time of writing the award, the Labour Court should first decide the preliminary issue. He submitted that in the present case, the learned Member of the Industrial Tribunal, having recorded the issue of jurisdiction as a preliminary issue, has avoided to give decision on that issue and has passed the impugned order. Mr. Nanavati also submitted that no law can have a universal application, but, at the same time, when the Court is prima facie of the opinion that the decision of preliminary issue is likely to dispose of the entire case, the issue should be tried as a preliminary issue. He further submitted that in the present case, the issue regarding the jurisdiction is the one which is going to the root of the matter and it ought to have been decided as preliminary issue first before deciding any other issues.

[33] Mr. Nanavati then pointed out the words used in Sec. 10(1), it may

> at any time, read with clause (c) refer the dispute ..... , to a Labour Court
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> for adjudication. He submitted that the words, it may is required to be read as shall for its correct interpretation. For this, he relied upon a judgment of Andhra Pradesh High Court in the matter of M/s. Hyderabad Asbestos Cement Products Limited v. Mohamad Argobasi Enterprises & Anr., reported in AIR 1989 AP 286. Mr. Nanavati submitted that he is conscious that Civil Procedure Code is not applicable to the proceedings before the Labour Court as well as the Industrial Tribunal. He said that for drawing an analogy, he is relying upon this judgment wherein Andhra Pradesh High Court, while considering the provisions of Order 14, Rule 2 (after amendment in 1976), has held that word may is to be interpreted as shall. For the ready perusal, Order 14, Rule 2 is reproduced hereunder :
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> Where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of an issue of law only it may try that issue first if that issue relates to -

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time-being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue. (Emphasis supplied)

Mr. Nanavati submitted that the Andhra Pradesh High Court has held that the word, may here is to be interpreted as shall. He relied upon the observations of the Court in Paragraph 6 of the judgment, which reads as under :

6. It is quite plain from the language of Rule 2 of Order 14 that any point pertaining either to the jurisdiction of the Court or a law which bars the suit to be tried may at first be decided as a preliminary point though the normal rule is that the Court shall pronounce judgement on all issues, which mandate, however, is subject to the provisions of sub-rule (2). It is essentially based on an object which has been deliberately introduced by the Amendment Act, 1976 in order to see that the 1 is unnecessarily is not protracted and would not cause any harassment to the parties if it could be decided that 1 is itself is not maintainable in the Court and thus avoiding the avoidable litigation in the Court.

[34] He submitted that whenever a question regarding the jurisdiction of the Court is concerned, it is always an important question, decision of which will dispose of the entire case, and therefore, there are all the reasons that the same should be decided as a preliminary issue and first in point of time. Mr. Nanavati submitted that the Apex Court has considered this aspect of deciding the preliminary issue in a matter pertaining to election, in the matter between Ravinder Singh v. Janmeja Singh & Ors, reported at 2000 (8) SCC 191. Mr. Nanavati submitted that while considering Sec. 83 of the Representation of the People Act, 1951, the Apex Court has held that, Sec. 83 of the Act is mandatory in character and requires not only a concise statement of material facts and full particulars of the alleged corrupt practice, so as to present a full and complete picture of the action to be detailed in the election petition but under the proviso to Sec. 83(1) of the Act, the election petition levelling a charge of corrupt practice is required, by law, to be supported by an Affidavit in which the election petitioner is obliged to disclose his source of information in respect of the commission of that corrupt practice. The Apex Court has further observed that, The reason for this insistence is obvious. It is necessary for the election petitioner to make such a charge with full responsibility and to prevent any fishing and roving inquiry and save the returned candidate from being taken by surprise. The Apex Court held that, In the absence of proper affidavit, in the prescribed form, filed in support of the corrupt

practice of bribery, the allegation pertaining thereto could not be put to trial and has held that the defect is fatal in nature.

[35] Mr. Nanavati relied on the observations of the Supreme Court in Para 13 and 14 which reads as under :

> 13. The learned single Judge of the High Court dismissed the election petition on deciding issue No. 5, which was treated as a preliminary issue and read thus :
>
> Whether the election petition lacks in material facts and particulars, necessary to constitute complete cause of action for setting aside of the election of Respondent 1, within the meaning of Sec. 83, read with Secs. 100(1)(d)(iv) and 123 of the Representation of People Act?
>
> For what we have said above, the order of dismissal of the election petition, without putting it to trial, cannot be faulted with.
>
> 14. For our reasons, which are somewhat different from the ones given by the High Court, we find that the decision of the High Court to non-suit the election petitioner by deciding the preliminary issue against him is well merited. There is no merit in this appeal. It, consequently, fails and is hereby dismissed. There shall, however, be no order as to costs.

[36] Mr. Nanavati submitted that even with the consent of the parties, jurisdiction cannot be conferred on an Industrial Tribunal, which is not vested in it under the law.

[37] Mr. Nanavati, learned Advocate, next submitted that when the words of the Statute are very clear and there is no ambiguity, the words used are to be given full meaning is the golden rule of construction and the same is to be applied. According to him, that is the law laid down by the Apex Court in the matter of M/s. Girdhari Lal & Sons v. Balbir Nath Mathur, reported in AIR 1986 SC 1499, wherein the Apex Court has said in Paragraph 6 as under :

> It may be worthwhile to restate and explain at this state certain well known principles of Interpretation of Statutes : Words are but mere vehicles of thought.
>
> They are meant to express or convey ones thoughts. Generally, a persons words and thoughts are coincidental. No problem arises then, but, not in frequently, then are not. It is common experience with most men, that occasionally there are no adequate words to express some of their thoughts. Words which very nearly express the thoughts may be found but not words which will express precisely. There is then a great fumbling for words. Long winded explanations, and in conversation, even gestures are resorted to. Ambiguous words and words which

unwittingly convey more than one meaning are used. Where different interpretations are likely to be put on words and a question arises what an individual meant when he used certain words, he may be asked to explain himself and he may do so and say that he meant one thing and not the other. But, if it is the legislature that has expressed itself by making the laws and difficulties arise in interpreting what the legislature has said, a legislature cannot be asked to sit to resolve those difficulties. The legislatures, unlike individuals, cannot come forward to explain themselves as often as difficulties of interpretation arise. So the task of interpreting the laws by finding out what the legislature meant is allotted to the Courts. Now, if one person puts into words the thoughts of another (as the draftsman puts into words the thoughts of the legislature) and a third person (the Court) is to find out what they meant, more difficulties are bound to crop up. The draftsman may not have caught the spirit of the legislation at all; the words used by him may not adequately convey what is meant to be conveyed; the words may be ambiguous; they may be words capable of being differently understood by different persons. How are the Courts to set about the task of resolving difficulties of interpretation of the laws? The foremost task of a Court, as we conceive it, in the Interpretation of Statutes, is to find out the intention of the legislature. Of course, where words are clear and unambiguous no question of construction may arise. Such words ordinarily speak for themselves. Since the words must have spoken as clearly to legislators as to Judges, it may be safely presumed that the legislature intended what the words plainly say. This is the real basis of the so-called golden rule of construction that where the words of statutes are plain and unambiguous effect must be given to them. A court should give effect to plain words, not because there is any charm or magic in the plainness of such words but because plain words may be expected to convey plainly the intention of the Legislature to other as well as Judges. Intention of the legislature and not the words is paramount. Even where the words of statutes appear to be prima facie clear and unambiguous it may some times be possible that the plain meaning of the words does not convey and may even defeat the intention of the legislature; in such cases there is no reason why the true intention of the legislature, if it can be determined, clearly by other means, should not be given effect. Words are meant to serve and not to govern and we are not to add the tyranny of words to the other tyrannies of the world.

He further submitted that the question of resorting to other sources, to gather the intention of the Parliament may arise only when the words are not plain and simple. He submitted that in the present case, the legislature has in no uncertain terms provided in clause (c) of sub-sec. (1) of Sec. 10 that, The dispute if it relates to any matter specified in the Second Schedule,, the matter is required to be

referred to the Labour Court. He submitted that there is no ambiguity about the words and that being so, there is no question of going to any other source to decide the intention of the legislature. He submitted that even on the second aspect that, the object and purpose of enactment shall not get frustrated, it cannot be said that by referring a matter to the Labour Court will, in any manner, frustrate the object and purpose of enactment. He submitted that a simple question before the Court in this matter is that if there are two forums created under the same statute and the same statute has demarcated the field of operation of these two forums, then, there is no reason for which one forum should be preferred over the other, more particularly, when there is a clear provision.

[38] Mr. D. S. Vasavada, learned Advocate appearing for respondent No. 2, submitted in rejoinder that in the present case, it was a matter of individual workman to choose his own path and in that choosing, majority of the workmen have chosen to give an undertaking. He submitted that even at the cost of repetition, he would submit that, once a substantial number of workmen have already signed the undertaking and resumed work, it would bound to give fillip to industrial unrest on the spot and is likely to raise spirit of discontent on the part of those workmen. He submitted that if the remaining workmen do not execute a writing as suggested by the Honourable Tribunal, there are all chances that a feeling of discontent will take over with the employees who have already given that writing.

[39] Mr. D. S. Vasavada also referred to the judgment of the Apex Court in the matter of Association of Engineering Workers v. Dockyard Labour Union & Ors., (supra) and submitted that even when the method resorted to decide the question of recognition under Sec. 11 of secret ballot was though a better method, the same was not approved by the Apex Court. He submitted that similarly, in the present case also, even with the consent of the parties, the matter could not have been referred to the Industrial Tribunal.

[40] In the rejoinder, Mr. Shahani submitted that provisions of Civil Procedure Code are not applicable to the proceedings before the forums under the Labour laws, and therefore, even analogy should not be drawn from the judgment under the Civil Procedure Code. He submitted that it is being a labour matter and interference at this stage by this Court in the order of the Industrial Tribunal will cause further delay of the proceedings which will affect the workmen, who are involved in these proceedings and who are out of job as the petitioner, employer, is insisting upon executing a writing before they could be allowed to resume work.

[41] From the aforesaid submission of both the sides, it is clear that the order dated 3rd December, 1999, was passed under the provisions of clause (c) of sub-sec. (1) of

Sec. 10, and therefore, the Industrial Tribunal does not have any jurisdiction. The Industrial Tribunal ought to have decided the preliminary issue of the jurisdiction first before deciding other issues as the issue of jurisdiction is always going to the root of the matter. It is also to be noted that even after having noted that a preliminary issue about the jurisdiction is raised and attention is focussed, there was no reason for the Tribunal to postpone the decision on the preliminary issue of such nature the decision of which would have disposed of the entire case. So far as recording of the evidence is concerned, the same could have been undertaken, but, while recording decision, the decision on the preliminary issue ought to have been recorded first.

[42] In the result, the order below Exh. 20 in Reference (I.T.) No. 561 of 1999 is hereby quashed and set aside. The order of reference dated 3rd December, 1999, Annexure-D (Collectively) is hereby quashed and set aside.

It will be open to respondent No. 1 - Gujarat Kamdar Panchayat, to approach the authorities and to make demands afresh related to the subject-matter of these petitions and for making a reference within one week from the date of receipt of copy of this order. It is further directed that the authority shall decide the application made by the respondent No. 1 within 3 weeks from the date of receipt of the same in accordance with law.

Rule is made absolute to the aforesaid extent only in Special Civil Application No. 11469 of 2000.

Rule is discharged in Special Civil Application No. 11466 of 2000. Direct Service is permitted.

Dated : 7-8-2001

In view of the order passed in Misc. Civil Application No. 1297 of 2001 dated 7-8-2001, the following further order is passed :-

After the aforesaid judgement and order was signed, it was requested by Mr. Shahani, learned Advocate, that the status quo may be directed to be maintained by the respondent No. 1 (in Special Civil Application No. 11466 of 2000), more particularly in view of the fact that after 5-7-2001 orders were passed on 20-7-2001 by the respondent No. 1-Company discharging 64 workers. Mr. Nanavati, learned Advocate for the respondent No. 1-Company makes a statement that none of the 64 workmen will be relieved by the Management for a period three weeks after the date of making a reference.