HIGH COURT OF GUJARAT

UNITED PHOSPHORUS LTD
Versus
COMMISSIONER OF LABOUR AND 2 ORS

Date of Decision: 26 April 2010

Citation: 2010 LawSuit(Guj) 451

Hon'ble Judges: H K Rathod

Eq. Citations: 2011 5 GLR 4418, 2011 LabIC 1006, 2010 2 CurLR 1045

Case Type: Special Civil Application

Case No: 11053 of 2008

Subject: Civil, Constitution, Labour and Industrial

Editor's Note:
Labour Laws - Industrial Disputes Act, 1947 - Sec 10(1) - Code of Civil Procedure, 1908 - Sec 100, 100(5) - Constitution of India - Art 136, 226 - reference of dispute - order of reference by State Government under Sec 10(1) - challenged on ground that there was settlement between workmen and company and no any industrial dispute or apprehended dispute had come into existence between Bank and Federation and, thus, there was no occasion for making any reference for adjudication by Industrial Tribunal - nature of jurisdiction under Art 226 is supervisory and not appellate - thus, disputed questions of fact between parties cannot be examined by Court in exercise of jurisdiction under Art 226 - therefore, only order of reference of industrial dispute to be adjudicated and not settlement between workmen and company - petitioner company having alternative, effective efficacy remedy to raise all contentions before Industrial Tribunal, where Reference was referred for adjudication by appropriate Government - further, conduct of petitioner in delaying proceedings of reference adjudication by way of filing instant petition and obtaining interim relief thereagainst amounts to misuse of legal machinery discouraged - petition dismissed.

Acts Referred:
Constitution Of India Art 226

Code Of Civil Procedure, 1908 Sec 100
Industrial Disputes Act, 1947 Sec 2(k), Sec 12(5), Sec 10(1), Sec 2(p)

Final Decision: Petition dismissed

Advocates: Hina Desai, K D Gandhi, Mansuri, Nanavati Associates, Shachi Mathur

Cases Cited in (+): 2
Cases Referred in (+): 25

H.K. Rathod, J.

[1] Heard Mr. K.D. Gandhi learned advocate for Nanavati Associates on behalf of petitioner, learned AGP Ms. Mathur for respondent No. 1 and learned advocate Mr. Mansuri for respondent No. 3.

[2] In present petition, the petitioner has challenged the order of reference made by State Government while exercising power under Section 10(1) of the I.D. Act,1947 dated 31.5.2008 (Annexure-A, Page-13 to 16) as well as notice issued by Industrial Tribunal, Baroda dated 12.6.2008 in Reference (IT) No. 63 of 2008 (Annexure-B, Page-18).

[3] In present proceedings, affidavit-in-reply is filed by respondent No. 1, another affidavit-in-reply is also filed by respondent No. 3 Union. An affidavit-in-rejoinder on behalf of petitioner against affidavit-in-reply of respondent No. 3 is also filed. There is an affidavit of Mr. P.R. Mehta, Manager (ER) of petitioner Company is also on record.

[4] Mr. Gandhi learned advocate appearing on behalf of petitioner pointed out in support of challenge made in present petition Page-132 where a letter written to Labour Commissioner dated 1.4.2008 by petitioner (Annexure-L). In the said letter, it has been brought to the notice of Labour Commissioner by petitioner Company that industrial diuspute has been settled between workman and Company on 17.3.2008. Therefore, no reference is required to be made for adjudication of dispute raised in Conciliation Case No. 15 of 2007 by Union. This letter has been signed by Mr. Husain Solanki, Secretary of Rasaynik Kamdar Sangh and Shri Prashant Limaye, General Manager of petitioner Company along with 98 workmen, those who have accepted settlement and copy of notice was also published on notice board on 14.3.2008. Therefore, his submission is that Conciliation Case No. 15 of 2007 where dispute has been raised by Rajya General Kamdar Mandal is already settled between workmen, Union and petitioner Company. He has also referred the letter dated 30.10.2006 of Rajya General Kamdar Mandal. He also referred settlement dated 14.9.2005 which was challenged before Tribunal in Reference (IT) No. 10 of 2004 wherein Industrial Tribunal,

Baroda has held by award dated 27.2.2007 that said settlement is found to be just, fair and reasonable. He has also referred the award passed by Industrial Tribunal in respect of Reference No. 10 of 2004, Exh.86 (Annexure-F, Page Nos. 51 to 100). In the said decision, Industrial Tribunal, Baroda has come to conclusion that settlement arrived at between petitioner Company and Rasaynik Kamdar Sangh, Exh.34, is found to be reasonable, just and proper and on the basis of terms of settlement, award has been passed by Industrial Tribunal, Baroda by an order dated 27.2.2007. This award has been terminated by Rajya General Kamdar Mandal on 30.10.2006 and on 16.1.2007, fresh demand means industrial dispute was raised by respondent No. 3 Union. On 1.3.2007, respondent No. 3 had issued notice to terminate aforesaid award of settlement (Page-51 to 100) and gave fresh charter of demand. Subsequently, there is a settlement under Section 2(p) of the I.D. Act, 1947 with Rasaynik Kamdar Sangh dated 17.3.2008 where each employee has signed the settlement Under Section 2(p) of the I.D.Act,1947. He also referred Page-113 where settlement has been signed by each workman. He also referred a letter dated 16.4.2007 (Annexure-I, Page-111) addressed to Assistant Commissioner of Labour, Bharuch by petitioner Company raising objection against the dispute raised by respondent No. 3 Union. According to petitioner Company, the Rasaynik Kamdar Sangh is recognized Union and respondent No. 3 is not having majority of workmen those who are working with petitioner Company. He also referred to an affidavit (Page-265) of Mr. P.R. Mehta, Manager (ER) of the petitioner Company together with Annexure-I to the said affidavit which bears the signature of each workman those who have accepted the settlement dated 17.3.2008 by which the workmen named in Annexure-I (Page-269) have agreed not to raise industrial dispute against the settlement dated 17.3.2008. He also relied upon to point out that complaint which was made by respondent No. 3 Union in respect of unfair labour practice adopted by petitioner Company has been inquired by Government Labour Officer. At page-173, there is a report of Government Labour Officer dated 19.5.2008 where it has been held that no such unfair labour practice adopted by petitioner Company and complaint which has been filed by concerned employees through respondent No. 3 is found to be incorrect because in all 110 employees were working with petitioner Company and out of that, 32 workmen have been voluntarily joined the Bharti Mazdoor Sangh. Therefore, question of adopting unfair labour practice by petitioner Company does not arise. Therefore, complaint dated 26.3.2008 and 18.3.2008 has been verified by Government Labour Officer and that complaint has been disposed of as no breach of Section 25T has been committed by petitioner Company. Referring to letter dated 2.4.2008 (Annexure-M, Page-148), he submitted that by that letter petitioner Company and Union both jointly requested to Assistant Commissioner of Labour, Bharuch not to initiate further conciliation and not to refer the dispute before the Industrial Tribunal, Baroda in respect to Conciliation Case No. 15 of 2007. On 4.4.2008 a letter (Annexure-O, Page-157) was written by petitioner

Company to Assistant Commissioner of Labour giving reply to complaint filed against petitioner Company and out of 110 employees, 102 employees have accepted the settlement and therefore, according to him, conciliation case which has been initiated in response to dispute raised by respondent No. 3 Union is required to be filed. That after the failure report submitted by Conciliation Officer to appropriate Government, no decision has been taken by appropriate Government and therefore, writ petition being SCA No. 6019 of 2008 was filed by respondent No. 3 Union wherein this Court on 10.4.2008 directed to appropriate Government to consider failure report dated 30.10.2007 and to pass appropriate orders or to take decision under Section 12(5) of the I.D. Act,1947 within a period of one month from date of receiving copy of said order and communicate the same to the petitioner Union and employer. Ultimately, on the basis of direction issued by this Court, a reference has been made to Industrial Tribunal, Baroda which is under challenge. Mr. Gandhi has relied upon the decision of Apex Court in the case of ANZ Grindlays Bank Ltd. (Now known as Standard Chartered Grindlays Bank Ltd.) v. Union of India and Ors., 2005 12 SCC 738. Relevant Para.12, 14 and 16 are quoted as under:

> 12. A plain reading of the reference made by the Central Government would show that it does not refer to any dispute or apprehended dispute between the Bank and the Federation (second respondent). It does not refer to any demand or claim made by the Federation or alleged refusal thereof by the Bank. In such circumstances, it is not possible to hold that on account of the settlement dated 18.8.1996 arrived at between the Bank and the Association (third respondent), any dispute or apprehended dispute has come into existence between the Bank and the Federation (second respondent). The action of the Bank in asking for a receipt from those employees, who are not members of the Association (third respondent) but wanted to avail of the benefit of the settlement, again does not give rise to any kind of dispute between the Bank and the Federation (second respondent). Thus, the reference made by the Central Government by the order dated 29.12.1997 for adjudication by the Industrial Tribunal is wholly redundant and uncalled for.
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> 14. Mr. Bhat, learned Counsel for the second respondent, has submitted that this Court should not interfere with the order of the Central Government making a reference under Section 10 of the Act, as the appellant can ventilate its grievances before the Industrial Tribunal itself and if the decision of the tribunal goes against the appellant, the same may be challenged in accordance with law. According to learned Counsel the writ petition is pre-mature as the appellant has got a remedy before the Tribunal to show that the reference is either bad in law or is uncalled for. We are unable to accept the submission made. It is true that normally a writ petition under Article 226 of the Constitution should not be entertained against an

order of the appropriate Government making a reference under Section 10 of the Act, as the parties would get opportunity to lead evidence before the Labour Court or Industrial Tribunal and to show that the claim made is either unfounded or there was no occasion for making a reference. However, this is not a case where the infirmity in the reference can be shown only after evidence has been adduced. In the present case the futility of the reference made by the Central Government can be demonstrated from a bare reading of the terms of the reference and the admitted facts. In such circumstances, the validity of the reference made by the Central Government can be examined in proceedings under Article 226 of the Constitution as no evidence is required to be considered for examining the issue raised.

16. In view of the discussions made above it is manifestly clear that there is no industrial dispute in existence nor there is any apprehended dispute between the appellant-Bank and the Federation (second respondent) and as such there is absolutely no occasion for making any reference for adjudication by the Industrial Tribunal. The reference being wholly futile, the same deserves to be quashed.

4.1 In short, submissions of Mr. Gandhi, learned advocate is that in such circumstances, order of reference dated 31.5.2008 is bad.

4.2 Except that, Mr. Gandhi has not raised any contentions and not cited any decision in support of this submissions.

[5] Mr. M.S. Mansuri learned advocate appearing on behalf of respondent No. 3 submitted that report of Government Labour Officer which has been relied upon by petitioner in respect of unfair labour practice not adopted by petitioner Company, has not been communicated to respondent No. 3 Union. He relied upon affidavit-in-reply filed by Deputy Labour Commissioner (Page-182). Against which, no rejoinder has been filed by petitioner Company. He also submitted that settlement which has been arrived at as per submissions made by Mr. Gandhi but, that settlement has not been produced before Conciliation Officer or before Tribunal. He also submitted that if the settlement is arrived at on 17.3.2008 under Section 2(p) of the I.D. Act, 1947, then such settlement must have to be produced by petitioner Company before the Conciliation Officer where Conciliation Case No. 15 of 2007 is pending. But, in fact, copy of this settlement is not produced by petitioner Company or even other Union has also not produced copy of this settlement dated 17.3.2008 before Conciliation Officer. He relied upon Page-124, Item No. 16 Sub-Clause(2), which is relevant and therefore, quoted as under:

2. Rajya General Kamdar Mandal has submitted its Charter of Demand dtd. 1.3.2007 and of the conciliation proceedings before the Assistant Commissioner of Labour, Bharuch is referred to the Labour Commissioner, Government of Gujarat as the parties could not reach the settlement. However, after the failure report is submitted to the Labour Commissioner, the matter is pending before him. So, under this circumstances the workmen of the company to sign this settlement and accept benefits under this shall not be the party to the disputes if that failure report is accepted and the reference is made to the Industrial Tribunal. The parties to the settlement further agreed that in such case this settlement shall be submitted by the commissioner to Industrial Tribunal and the workmen who have accepted the terms of this settlement shall be out of the reference before the Industrial Tribunal. Further, it is agreed by the parties that for any future industrial dispute on the basis of the Charter of Demand raised by Rajya General Kamdar Mandal or for any litigations on the basis of that charter of demand before any authorities/Court, the workmen, who accept this settlement shall not be the parties to that dispute or any litigations before any Court.

5.1 He also raised contention that aforesaid terms is also one of the terms of settlement. He submitted that petitioner Company is having alternative remedy as well as effective efficacy and statutory to produce settlement before Industrial Tribunal where reference is made by order dated 31.5.2008 and called upon to Industrial Tribunal to decide validity of such settlement if settlement dated 17.3.2008 is really genuine, reasonable and proper. He further submitted that why the Company is afraid in producing settlement dated 17.3.2008 before the Industrial Tribunal, Baroda. He also referred the order of reference being an administrative order because of which no rights or privilege has been adversely affected by order of reference of petitioner Company. He submitted that petitioner company can raise all contentions which are raised before this Court, which are almost relating to disputed question of fact and such cannot be examined under Article 226 of the Constitution of India being a disputed question of facts. He further submitted that the decision relied upon by Mr. Gandhi, in the case of ANZ Grindlays Bank Ltd. (supra) wherein, in Para.16 it has been held by Apex Court looking to the facts which were on record that, there is no industrial dispute in existence nor there is any apprehended dispute between the Bank and the Federation and as such there is absolutely no occasion for making any reference for adjudication by the Industrial Tribunal. The reference being wholly futile, the same deserves to be quashed and therefore, it was quashed. He therefore submitted that aforesaid decision is not applicable to the facts of present case because here, the industrial dispute was raised by respondent No. 3, for that conciliation proceedings was initiated and ultimately, failure report was submitted and then, appropriate

Government has decided to refer the industrial dispute for adjudication to Industrial Tribunal, Baroda. Therefore, aforesaid decision relied upon by Mr. Gandhi is not applicable to the facts of present case. He also submitted that affidavit filed by respondent No. 3 Union may also be considered. He also submitted that earlier settlement where Industrial Tribunal has come to conclusion that Exh.34 settlement produced by petitioner company and Rasaynik Kamdar Sangh is found to be reasonable, just and proper by award dated 27.2.2007, has been challenged by respondent No. 3 Union before this Court in SCA No. 8945 of 2007 wherein Rule has been issued by this Court on 28.4.2007. He also relied upon certain decisions in the case of Tata Chemicals Ltd. v. The Workmen employed under Tata Chemicals Ltd., 1978 AIR(SC) 828; Abad Dairy Dudh Vitran Kendra Sanchalak Mandal v. Abad Dairy, 1999 2 LLJ 1408; The State of Madras v. C.P. Sarathy and Anr., 1953 AIR(SC) 53, in the case of The Jhagrakhan Collieries (P) Ltd. v. G.C. Agrawal Presiding Officer and Ors, 1975 AIR(SC) 171 and in the case of Sultansingh v. State of Haryana,1996 2 SSC 66.

5.2 In short, his submissions is that such a disputed question of facts apparently found from the affidavit of State Government and affidavit of respondent No. 3 Union and these are the questions required to be examined by Industrial Tribunal because it is necessary to lead oral evidence and also to produce documents including settlement dated 17.3.2008 by respective parties. Therefore, he submitted that in such circumstances, petition filed by petitioner company challenging order of reference must have to be dismissed by imposing exemplary costs against petitioner company.

5.3 The substance of submissions made by learned advocate Mr. Mansuri is that intention of the petitioner company is to avoid adjudication of the settlement dated 17.3.2008. Otherwise there is no question of challenging order of reference by petitioner company because if settlement dated 17.3.2008 in fact genuine and valid and not obtained signature of concerned employee by adopting pressurized tactics, then it can be produced before the Industrial Tribunal against the charter of demand raised by respondent No. 3 Union and to invite order of Industrial Tribunal, whether settlement dated 17.3.2008 is just, fair and valid nor not. Then naturally the dispute raised by respondent No. 3 Union become meaningless. But because of such settlement is not just and fair and signature has been obtained by petitioner company and other Union while adopting pressurized tactics as deposed by Deputy Labour Commissioner in his affidavit, therefore, petitioner company is avoiding the adjudication in respect to charter of demand raised by respondent No. 3 Union. Otherwise during the course of conciliation proceedings No. 15 of 2007 why this settlement is not produced on record. Even before the Industrial Tribunal Baroda

also this settlement is not produced on record. It suggests the bad intention, malafide, ulterior motive and oblique motive to avoid adjudication process in respect to demand raised by respondent No. 3 Union. The machinery provided under the Industrial Disputes Act, 1947 should not have to be avoided by challenging such order of reference which has not been adversely affecting either right of petitioner company or workers or other Union.

5.4 Relying upon the decision of Apex Court in the case of Sultan Singh v. State of Haryana, 1996 AIR(SC) 1007, he submitted that order of reference can be made by appropriate Government. For that, even hearing of employer or opportunity to employer is not necessary.

[6] Ms. Mathur learned AGP for respondent No. 1, relying upon affidavit-in-reply filed by Mr. H.R. Shah, Deputy Labour Commissioner, submitted that in Para.12 thereof specific averment has been made by deponent that this is a case of settlement under Section 2(p) of the I.D. Act, 1947 which is binding to the signatory only and not to the workers, who have not individually agreed to the settlement. She submitted that as per the report of the Assistant Commissioner of Labour, Bharuch dated 23.5.2008, in this case signature obtained in settlement by petitioner company is by adopting pressurized tactics. Therefore, appropriate Government has decided to refer the industrial dispute to Industrial Tribunal, Baroda. She relied upon said affidavit-in-reply. She relied upon said affidavit-in-reply, particularly Para.12 to 16, which is quoted as under:

12. I say and submit that this is a case of settlement under Section 2(p) of I.D. Act, 1947 which is binding to the signatory only not to workers who have not individually agreed to the settlement. As per report of Assistant Labour Commissioner, Bharuch dated 23.5.2008. In this case signature obtained in settlement by petitioner company is by pressurized tactics. Therefore appropriate Government has decided to refer the industrial dispute to the industrial tribunal, Vadodara. Therefore all commission of labour deciding to make reference for adjudication and is justified as it is in accordance with law.

13. I say and submit that Government can refer the dispute not only wherein industrial dispute exist but also apprehended. The order of the Government acting under Section 10(1) with Section 12(5) is an administrative nature and not judicial order. Only if it appears from the reasons given then the Government took into account any irrelevant or foreign consideration that the court may interfere. The Government is entitled to make a reference even after its refusal. The Government is entitled to go into prima facie merits of dispute for deciding whether to refer the same or not. The Government is at liberty under Section 10 to refer the dispute to the Industrial Tribunal.

14. I say and submit that the reference was made by the appropriate Govt. on 31.5.2008 i.e. Commissioner of Labour. The tribunal has issued notice on 12.6.2008. When the notice has been passed by the Industrial Tribunal, Bharuch on 12.6.2008, the petitioner has filed the petition on date 5.9.20008 after the delay of 3 months.

15. The definition of the settlement according to the I.D. Act Section 2(p) is as follows:

'settlement means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise then in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to (an officer authorized in this behalf by) the appropriate Government and the conciliation officer.'

16. A settlement arrived at by agreement between the employer and workman otherwise then in the course of conciliation proceeding shall be binding on the parties to the agreement.

[7] Mr. Mansuri has also relied upon affidavit-in-reply filed by respondent No. 3 Union. Relevant Para.1 to 8 are quoted as under:

1. At the outset I say that this petition intends to challenge the administrative order passed by the appropriate Government having full jurisdiction to pass such order is not maintainable as per the settled principles of law, laid down by the Hon'ble Supreme Court and this Hon'ble Court.

That the Hon'ble Supreme Court in a judgment delivered by five Judges bench of the Court reported in in the case of State of Madras v. C.P. Sarthy, 1953 AIR(SC) 53 held that:

It must be remembered that in making a reference under S. 10(1) the Government is doing an administrative act and the fact that it has to form 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. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute

as defind in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the 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 the Government on which it could have come to an affirmative conclusion on those matters.

The Hon'ble Supreme Court in the case of Telco Convoy Drivers Mazdoor Sangh v. State of Bihar, 1989 AIR(SC) 1565 in Para.1, 14 and 16 of the judgment, which are reproduced as under:

1. While exercising power under Section 10(1) the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10. It is true that in considering the question of making a reference under Section 10(1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended". But the formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. Where, as in the instant case, the dispute was whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act. The order of the Govt. refusing to refer the dispute on ground that the persons raising the dispute are not workmen is liable to be set aside, As the Govt. had persistently declined to make a reference under Section 10(1) the Supreme Court directed the Govt. to make a reference.

14. Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in, the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh's case (supra), there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

16. It has been already stated that we had given one more chance to the Government to reconsider the matter and the Government after reconsideration has come to the same conclusion that the convoy drivers are not workmen of TELCO thereby adjudicating the dispute itself. After having considered the facts and circumstances of the case and having given our best consideration in the matter, we are of the view that the dispute should be adjudicated by the Industrial Tribunal and, as the Government has persistently declined to make a reference, under Section 10(1) of the Act, we think we should direct the Government to make such a reference. In several instances this Court had to direct the Government to make a reference under Section 10(1) when the Government had declined to make such a reference and this Court was of the view that such a reference should have been made. See Sankari Cement Alai Thozhiladar Munnetra Sangam v. Govt. of Tamilnadu,1983 1 LabLJ 460; Ram Avtar Sharma v. State of Haryana, 1985 AIR(SC) 915; M.P. Irrigation Karamchari Sangh v. State of M. P., 1985 AIR(SC) 860; Nirmal Singh v. State of Punjab, 1984 AIR(SC) 1619.

I say that, similarly in a case of Abad Dairy Dudh Vitran Kendra Sanchalak Mandal v. Abad Dairy, 1999 SCC(L&S) 1079, the Hon'ble Supreme Court has observed in Para.4 and 5 of the judgment that:

4. We have heard counsel for the appellants as well as counsel for the respondents. We are of the opinion that having regard to the facts of the case as well as the voluminous evidence sought to be adduced by both dies, the question as to whether the members of the Association are workmen or not requires detailed investigation of facts. It is true that there appeared to be certain agreements entered into between the respondents and the appellants but it is the case of the appellants that, agreement apart, there is plenty of evidence in the form of instructions and circulars issued by the respondents which would show that the members of the Association were really workmen and not commission agents as alleged. In fact, in pursuance of the permission given by this Court to file affidavits the parties have filed affidavits running to several pages setting out facts in support of their respective contentions. We have also heard both counsel for the sometime and are satisfied that the issue requires detailed examination of facts and can be satisfactorily adjudicated upon only by a tribunal.

5. We are of the opinion that neither a writ proceedings in the High Court nor an appeal under Article 136 is the proper forum in which these factual contentions and allegations should be gone into. The High Court itself has observed at various places in its judgment that the nature of the dispute between the parties and the facts and circumstances were such; that a writ petition was not the appropriate forum to enter into such facts but seems to have allowed itself to be persuaded to

go into the question perhaps because the counsel on both sides were not adverse to hat course. We however think that the High Court should not have done this but, instead, should have directed the Government to refer the disputes between the parties to an industrial tribunal, making the issue of the jurisdictional fact viz. As to 'whether the appellants are workmen ?' also one of the terms of reference. We say this because, though there are agreements between the parties, not only is the interpretation of the agreements a matter of dispute, it will also be necessary to consider whether the agreement reflects the real position or whether the conduct of the parties and other material placed on record show that the appellants were employees as suggested by the appellants and not commission agents as suggested on behalf of the respondents. Also, the only ground on which the State Government declined to make a reference was that the appellants were not workmen. This view is not so obvious or patent on the facts before us. In the circumstances, we think the best course is to set aside the order of the High Court and direct that the matter be gone into by an industrial tribunal after the Government has made an appropriate order. We, therefore, allow these appeals, set aside the order of the High Court and direct the State Government to refer to an industrial tribunal all the disputes between the parties including the preliminary question whether the appellants are workmen within the meaning of Industrial Disputes Act or not.

Coming to the facts of this petition the petitioner has claimed that it has enter in to a settlement with regards to the demands of workmen with so called majority union and respondent No. 3 union is a minority union then certainly it's a matter of detail adjudication by the Industrial Tribunal that any legal, binding, just fair settlement is exists ? Whether the workmen have voluntarily and by free will accepted it. Whether such settlement is binding upon the members of respondent Union ? Whether such settlement if arrived then why not produced in conciliation proceeding for scrutiny ?

It is also clearly emerges that all above disputes are questions of disputed facts and facts only. Therefore such disputes cannot be decided in a writ petition without being first adjudicated by the adjudication under the Industrial Disputes Act.

Therefore on this count also present petition is not required to be entertained.

2. I say that it is also settled principle of law laid down by the Hon'ble Supreme Court in a case between Tata Chemicals Ltd. It's workmen reported in , AIR 1978 SC 828 that the settlement arrived between employer and workman outside the course of conciliation is not binding upon the union which is not a party to it and

even a minority union the relevant observation made in this regard as reproduced as under:

An analysis of Clause (p) of Section 2 of the Act would show that it envisages two categories of settlement (i) a settlement which is arrived at in the course of conciliation proceeding i. e. which is arrived at with the assistance and concurrence of the Conciliation Officer who is duty bound to promote a right settlement and to do everything he can to induce the parties to come to a fair and amicable Settlement of the dispute and (ii) a written agreement between employer and workmen arrived at otherwise than in the course of conciliation proceeding. For the validity of the second category of settlement, it is essential that the parties thereto should have subscribed to it in the prescribed manner and a copy thereof should have been sent to an officer authorised in this behalf by the appropriate Government and the Conciliation Officer. A bare perusal of the above quoted section would show that whereas a Settlement arrived at by agreement between the employer and the workmen otherwise than in the course of conciliation proceeding is binding only on the parties to the agreement, a settlement arrived at in the course of conciliation proceeding under the Act is binding not only on the parties to the industrial dispute but also on other persons specified in Clauses (b), (c) and (d) of Sub-section (3) of Section 18 of the Act. In the instant case as the agreement concerned was not arrived at during the course of conciliation proceeding, it could not, according to Section 18(1) of the Act bind anyone other than the parties thereto

The Hon'ble Supreme Court even further proceeded to hold that:

The theory of implied agreement by acquiescence sought to be built up on behalf of the appellant on the basis of the acceptance of the benefits flowing from the agreement even by the workmen who were not signatories to the settlement is of no avail to the appellant Company and cannot operate as an estoppel against the Sangh or its employees.

Considering the above mentioned legal position the claim of petitioner that there cannot be any reference of industrial disputes after so called private agreement and acceptance of benefits by workman is not true and justified and petitioner has got no legal right to question the 'reference' on such bases I say that if at all any legal and valid as well as just and fair settlement is exist then it is for the industrial Tribunal to decide such question in proper adjudication after appreciating 'evidence'.

3. I further say and submit that in case of settlement outside the conciliation proceedings the Hon'ble Supreme Court in a case of Jagarkhan Collieries and Workman reported in , AIR 1975 SC 171 : SCLJ 1950-83 Vol-9 P.103 has categorically held that:

According to the scheme of Section 18, read with Section 2(d), an agreement, made otherwise than in the course of conciliation proceedings, to be a settlement within the meaning of the Act must be a written agreement signed in the manner prescribed by the Rules framed under the Act. As rightly pointed out by Mr. Ramamurthy, learned Counsel for the Respondents an implied agreement by acquiescence, or conduct such as acceptance of a benefit under an agreement to which the worker acquiescing or accepting the benefit was not a party, being outside the purview of the Act, is not binding on such a worker either under Sub-section (1) or under Sub-section (3) of Section 18. It follows, therefore, that even if 99 per cent. of the workers have impliedly accepted the agreement arrived at on October 22, 1969, by drawing V.D.A., under it, it will not - whatever its effect under the general law put an end to the dispute before the Labour Court and make it functus officio under the Act.

In the instance case the officer who conducted the conciliation proceeding was not duly appointed conciliation officer. So the settlement could not be deemed to be a settlement arrived at in the course of conciliation proceedings. Even if Ninety-Nine percent of the employees had taken advantage of beneficent provisions of the settlement, the settlement will not be binding on other employees not parties to the settlement. It will not put an end to the dispute before the labour Court and make it functus officio' under the Act, nor will it affect the rights of other employees to claim before the labour Court.

Looking to the above pronouncement of the Hon'ble Court the petitioner employer has no cause of action to challenge the legality of the reference because the so called settlement on the bases of which this reference is challenged is admittedly a private agreement and not a conciliation settlement it is also admitted fats that such settlement is not accepted by all the workers employed by petitioner there is also no evidence that whoever have accepted it have accept voluntarily and by free consent therefore, such settlement itself is not affecting rights of respondent Union and its members and industrial disputes continues.

4. I further say and submits that even when a reference with regards to the Industrial Disputes is made and during which any settlement is arrived and if such settlement is disputed and challenged by group of workmen then the Tribunal is required to adjudicate upon the issues of justness, fairness and valuntary

acceptance of settlement. The Hon'ble Supreme Court has laid down such principle of law in case of Hurbortson Ltd. v. Their workmen and other, 1977 1 LLN 24.

Even in this case if we look upon the so called settlement the parties to is are fully conscious about aforesaid principle and hence they appears to have agreed to get the issue of legality of such settlement to be determined by Industrial Tribunal as mentioned in last paragraph of this so called settlement.

I therefore say that petitioner company accepting such legal position once agreed to such course now estopped from challenging this reference by filing this petition therefore this petition is an ill advice act and therefore, deserves to be rejected.

5. I say that the petitioner company and its management is having a history of large scale victimization and commission of unfair labour practice which was recorded by the Industrial Tribunal in its part I award in Reference No. 10 of 2003 a copy of such award is annexed hereto and marked as Annexure-R-I.

The aforesaid award was challenged and Hon'ble Division Bench of this Hon'ble Court is pleased to confirm the same in SCA No. 3987 of 2005 the copy of the judgment is annexed herewith and marked as Annexure-R-2.

It is submitted that the petitioner has continuously made efforts to brake the strength of respondent Union by terrorizing the workers of respondent Union all office bearers, active worker either suspended and dismissed on false charges or transferred to other places with malafide intentions. Several proceedings in respect of such illegal activities of the petitioner company are pending with Industrial Tribunal Vadodara. The Hon'ble High Court in SCA No. 16159/05 is pleased to direct the Commissioner of Labour of investigate and prevent the incidents of unfair labour practice by the petitioner Annexure-R-3 is a copy of such order.

However ignoring this order and without giving any reasonable opportunity to the respondent Union the Industrial Tribunal has passed an award Annexure-F to this petition therefore the respondent Union is constrained to file SCA No. 8945 of 2007. The Hon'ble High Court after issuing notice heard the matter on dated 28.4.08 and considering the prima facie case issued a Rule in the said petition, the copy of petition (without annexure) is annexed herewith and marked as Annexure-R-4.

I say that a perusal of facts of aforesaid petition it becomes clear that petitioner company is in habit of committing unfair labour practice and escaped from its liability by using political pressure with the aid of the so called trade union attached with the ruling party in the State.

6. Under the circumstances and in view of the all above I say that this petition is not maintainable and petitioner has no cause of action.

7. I say that except mentioned herein above I deny all the averments contentions and submissions of the petitioner company in their memo of petition Para.1 to 15 and grounds Nos. A to J. I reserve my right to file detail para wise reply to this petition here after and this affidavit in reply is filed with limited purpose to oppose admission and interim relief in this petition.

8. I say that petitioner's reliance to the judgment of Hon'ble Supreme Court in the case of National Engineering' case is totally misconceived, misleading and absolutely unjustified. The case referred by the petitioner is concern with the settlement U.S. 19(3) (A settlement before conciliation officer i.e. tripartite settlement) but here in this case the so called settlement upon which the petitioner relies is admittedly a bipartite private settlement and same is also under dispute too.

I therefore say that the aforesaid case has no application to the facts of this case.

[8] It is necessary to note that affidavit-in-rejoinder which has been filed by petitioner company against the reply of respondent No. 3 Union wherein reliance has been placed in a reported decision in the case of ANZ Grindlays Bank Ltd. (supra), more particularly Para.14 but, Para.16 of the very decision has not been quoted and same has been ignored by petitioner company which considered by this Court as referred above.

[9] I have considered both affidavits filed by petitioner; one is rejoinder and another is affidavit of Mr. P.R. Mehta. The question is that in such circumstances, against the challenge which has been made by petitioner Company, the order of reference made by appropriate Government under Section 12(5) of I.D.Act,1947 dated 31.5.2008, whether petition can be entertained by this Court while exercising power under Article 226 of the Constitution of India or not. This question is to be examined by this Court in light of the factual background as narrated by this Court hereinabove. The law on this subject has been made clear by Apex Court that disputed question of facts cannot be examined by this Court in petition under Article 226 of the Constitution of India. In this case, dispute itself is apparently from bulky record produced by petitioner company is found. The settlement dated 17.3.2008 with other Unions, according to petitioner company, has been accepted by almost all workmen, even though during the pendency of Conciliation Case No. 15 of 2007 before the Conciliation Officer, Bharuch, copy of this settlement is not produced by petitioner company before Conciliation Officer. The settlement has been challenged by respondent No. 3 Union on the ground that signature of concerned workmen has been obtained by adopting pressurized tactics as

per affidavit of appropriate Government. The genuineness of the settlement itself is under challenge and petitioner company has challenged order of reference dated 31.5.2008 based on very settlement dated 17.3.2008 which settlement has been challenged or disputed by respondent No. 3 Union on the ground that signature of concerned workmen has been obtained by adopting pressurized tactics.

9.1 In light of this apparent dispute between petitioner company and respondent No. 3 Union as well as other Union i.e. Rasaynik Karmachari Sangh (Bharti Mazdoor Sangh). Therefore, such disputed facts whether settlement dated 17.3.2008 is valid, just and proper or not and dispute raised by respondent No. 3 Union is genuine or not and whether respondent No. 3 Union is entitled to raise such dispute after terminating the settlement award by notice dated 30.10.2006 and on 16.1.2007, fresh dispute charter of demand raised by respondent No. 3 Union. Therefore, these are the questions and disputed facts raised before this Court while challenging order of reference made by appropriate Government dated 31.5.2008, this Court cannot entertain said petition for resolving disputed facts and petitioner company is having a remedy to raise all kinds of contentions which are raised before this Court, before Industrial Tribunal, Baroda where reference is made being Reference No. 63 of 2008. Therefore, considering this being a disputed question of facts between both parties ‼ petitioner company and respondent No. 3 Union, in such circumstances challenge to order of reference made by appropriate Government, such petition cannot be entertained and maintainable because right of petitioner company is not adversely affected by the action or order of State authority and petitioner company is entitled to raise all kinds of contentions which are raised before this Court and this Court cannot examine disputed questions of facts having several cause of action, then petitioner can pursue the remedies before the Industrial Tribunal, Baroda and therefore, this petition is not maintainable. That view has been taken by this Court in the case of Apollo Tyres Limited v. Commissioner o Labour and Anr.,2008 1 CLR 114. Relevant discussions of aforesaid decisions are in Para.4 to 10 which are quoted as under:

4. I have considered the submissions made by the learned Advocate Mr. KC Raval before this Court. Considering the submission of learned advocate Mr. Raval that the order of reference is bad, learned advocate Mr. Raval has not been able to point out as to which right of the company is violated by respondent No. 1 by making an order of reference. Unless and until it is successfully demonstrated by the party challenging an order of reference that it is violative of any right of the petitioner, such party cannot be permitted to challenge the order of reference only on the ground that the reference is bad. Even if it is believed that the order of reference is bad, then also, that would, ipso-facto, not entitle such party to challenge the same

before the higher forum. So long as the right of the petitioner company not adversely affected by the respondent No. 1 while passing the order of reference, this Court cannot entertain the petition only on that ground. Writ petition is maintainable only when right of the parties are adversely affected by the action or order of the State Authority. Learned Advocate Mr. Raval has not been able to point out before this Court that because of the order of reference made by respondent No. 1, any right of the petitioner has been adversely affected. Therefore, on this count, writ petition is not maintainable. Apart from that, whatever contentions raised by the petitioner in this petition before this Court can be raised by the petitioner even before the industrial tribunal as well while participating in the reference proceedings and the petitioner can participate in the reference proceedings without prejudice to his rights and contentions to challenge the order of reference if the ultimate orders of the tribunal are adverse to the petitioner, then same can be challenged therefore, on that ground also, writ petition challenging order of reference is not maintainable. Therefore, according to my opinion, petitioner is having alternative effective remedy to raise all these contentions before the industrial tribunal and the tribunal is competent enough to adjudicate or decide it on the basis of the record which can be produced by the respective parties before the tribunal. So, the petitioner is having alternative equally efficacious remedy to raise all these contentions before the industrial tribunal and therefore also this petition is not maintainable because petitioner has not been able to point out that any right of the petitioner has been adversely affected by order of reference.

5. Further, whether the union is representing substantial number of workmen or not; whether the individual dispute under Section 2A is to be converted into a dispute under Section 2K or not; in respect of the settlement, whether that settlement has been accepted by each workman or not and whether the union which has raised dispute is entitled to raise the dispute in respect of suspended employees or not and whether all these contentions raised by the petitioner in this petition for challenging order of reference were raised by the petitioner in conciliation proceedings or not, all these are the disputed questions of fact which cannot be appropriately dealt with and decided by this Court in a petition under Article 226 of the Constitution of India. There is nothing on record to show that the petitioner has raised any of such contentions before the conciliation officer. All these are the disputed questions of fact requiring appreciation of evidence and the petitioner is having ample opportunity to raise preliminary contention before the industrial tribunal in respect of whatever contention raised before this Court and the industrial tribunal can, on the basis of the evidence and record produced by the

parties, examine the same but this Court cannot examine all these disputed questions of fact in a petition under Article 226 of the Constitution of India.

6. In Philips India Limited and Another And P.N. Thorat, Asstt. Commissioner of Labour and Conciliation Officer and Ors. reported in 2006-I-LLJ page 1013, order of reference was challenged by the employer before the Division Bench of Bombay High Court. Workmen were contending fraud committed by employer in implementing settlement for Voluntary Retirement Scheme. It was held that the dispute involved triable issues requiring evidence to be led and, therefore, employer's challenge was held to be not sustainable. Relevant observations made by the Division Bench of the Bombay High Court in the said decision in para 12 are reproduced as under:

'12. From the above, what emerges is that there are serious triable issues. The contention of the Union and the workmen is that fraud has been practised upon them. If the workmen are able to succeed in proving that the agreement was entered into by playing fraud, it will be open for them to avoid the settlement. This issue cannot be answered by this Court at this stage as it would require evidence to be led. Prima facie a Division Bench of this Court in the very proceedings has taken note that the employees involved in both the writ petitions would be workmen. The Apex Court, however, left that question to be decided. At any rate the expression workmen considering Section 2(s) of the ID Act would include ex-workmen. That contention of the management that they are not workmen would require adjudication of facts. Based on these findings and the issue of pensionary benefits under V it will have to be considered whether the dispute partakes of an industrial dispute. This again would be premature for this Court to decide at this stage and it will be open to the petitioners to raise all issues before the Industrial Tribunal to which the reference is made. Similarly the contention of the employer that they have complied with the terms of the settlement and consequently there is no industrial dispute and that the employees cease to be workmen will have to be adjudicated upon by the Tribunal.

7. Similar question has been examined by the Division Bench of Delhi High Court in DD Gears v. Secretary (Labour) and Ors., 2006 LabIC 1462 wherein reference of an industrial dispute to the industrial tribunal was challenged. It was held that no writ petition should be entertained against a mere reference as not affecting rights of the parties. It was held in para 19, 20, 21 and 22 of the said judgment as under:

19.The learned Single Judge rejected the Writ petition and hence this appeal.

20. In our opinion, we cannot interfere with the reference order under Section 10(1) of the Industrial Disputes Act because that order does not affect the rights of the parties. Hence the Writ petition against that order is liable to be dismissed.

21. It is well settled that a writ petition lies only when the rights of some party has been adversely affected. A mere reference under Section 10(1) of the Industrial Disputes Act does not effect any one, rights and hence no writ petition should ordinarily be entertained against a mere reference under Section 10(1), as such a petition is premature.

22. It is only when an a ward is given by the Labour Court or Tribunal that a writ petition should be entertained.

8. In the instant case also, mere reference has been made by respondent No. 1 and petitioner is unable to point out how it is adversely affecting the rights of the company. Petition is also involving disputed questions of fact which cannot be appropriately dealt with and decided in a writ petition under Article 226 of the Constitution of India. Therefore, in view of the aforesaid two decisions, petition is not sustainable in law.

9. In Sanjay Sitaram Khemka v. State of Maharashtra and Ors., 2006 5 SCC 255, maintainability of petition involving questions of fact was considered by the apex court. It was held that the matter involving disputed questions of fact cannot be dealt with by the High Court in exercise of its power of judicial review. Relevant observations made in para 8 and 9 of the judgment by the apex court are reproduced as under:

'8. Having regard to the allegations and counter allegations made by the parties before us, we are of the opinion that no relief can be granted to the petitioner in this petition. The writ petition has rightly been held by the High Court to be involving disputed questions of fact. The petitioner has several causes of action wherefor he is required to pursue specific remedies provided therefor in law.

9. A writ petition, as has rightly been pointed out by the High Court, for grant of said reliefs, was not the remedy. A matter involving a great deal of disputed questions of fact cannot be dealt with by the High Court in exercise of its power of judicial review. As the High Court or this Court cannot, in view of the nature of controversy, as also the disputed questions of fact, go into the merit of the matter; evidently no relief can be granted to the petitioner at this stage. We are, therefore, of the opinion that the impugned judgment of the High Court does not contain any factual or legal error warranting interference by this Court in exercise of its jurisdiction under Article 136 of the Constitution.[See: 2007 (6) MLH 406]

[10] Therefore, in view of the above observations made by the Supreme Court, Bombay High Court, as well as the Delhi High Court as referred to above, and also considering the facts of the present case which involves disputed questions of fact and also considering the fact that the petitioner is not able to contend that the order of reference is adversely affecting its right, according to my opinion petition is not maintainable against order of mere reference made by respondent No. 1 as petitioner is having specific remedy before the industrial tribunal to raise all the contentions raised in this petition before the tribunal because the questions raised in this petition are such which would require evidence to be led and appreciation thereof. According to my opinion, petitioner herein is having several causes of action for which petitioner is required to pursue specific remedy before the tribunal and this Court cannot decide such disputed questions of fact in exercise of the powers under Article 226 of the Constitution of India. It is more so when the petitioner is not alleging any mala fides against respondent No. 1. Further, it is not the case of the petitioner that the industrial tribunal is not having power to examine the preliminary contention which may be raised by the petitioner in respect of the contentions raised by the petitioner in this petition before this Court, meaning thereby, tribunal is having powers under Section 10(1) and 10(4) of the ID Act, 1947,so, tribunal is competent to decide all the contentions that may be raised by the petitioner before it including the preliminary contention as well and can participate in the reference proceedings without prejudice to its rights and contentions in respect of the preliminary contention and if the ultimate outcome is adverse to the petitioner, then, petitioner can challenge the same on all grounds available to him including the contentions raised by petitioner before this Court against the order of reference. In view of that also, this petition is not maintainable in law.

10. Similar view has been taken by the Division Bench (Coram: Markandeya Katju, CJ. and Madan B. Lokur, J.) of Delhi High Court in the case of D.D. Gears Ltd. v. Secretary (Labour) and Ors., 2006 4 LLJ 387. Relevant observations of aforesaid decisions are in Para.20 to 22 which are quoted as under:

20. In our opinion, we cannot interfere with the reference order with the reference order under Section 10(1) of the I.D. Act,1947 because that order does not affect the rights of the parties. Hence the writ petition against that order is liable to be dismissed.

21. It is well settled that a writ petition lies only when the rights of some party has been adversely affected. A mere reference under Section 10(1) of the I.D. Act,1947 does not affect (sic) anyone, rights, and hence no writ petition should ordinarily be entertained against a mere reference under Section 10(1), as such a petition is premature.

22. It is only when an award is given by the Labour Court or Tribunal that a writ petition should be entertained.

[11] This Court (Coram: K.A. Puj, J.) had an occasion to decide identical question where order of reference made by appropriate Government has been challenged in the case of Indian Institute of Management v. Gujarat Mazdoor Sabha and Ors., 2006 4 LLJ 554. In this matter, on behalf of IIM, learned Senior Advocate Mr. K.S. Nanavati had appeared and raised almost all kinds of contentions which are raised before this Court and also relied upon judgment of Apex Court in the case of National Engineering Industries Ltd. v. State of Rajasthan and Ors., 2000 AIR(SC) 469. On behalf of other side, Mr. Mukul Sinha had appeared and he also relied upon decisions which are almost relied by Mr. Mansuri appearing on behalf of respondent No. 3 Union in present case. After considering submissions made by both learned advocates at length, the finding has been given by this Court in Para.26 which is quoted as under:

26. After having heard the learned advocates for the parties and after having gone through the pleadings of the parties made before the Assistant Labour Commissioner and after having carefully considered the contentions raised in the present petition as well as the authorities cited before the Court, the Court is of the view that the impugned order passed by the Assistant Labour Commissioner, Ahmedabad does not call for any interference of this Court while exercising its extraordinary writ jurisdiction under Articles 226 and 227 of the Constitution of India. While making the reference, the Assistant Labour Commissioner has observed that the industrial dispute pertaining to the matters regarding 16 lady workers is required to be referred to the Labour Court while exercising his powers vested in him under Section 10(1)(c) of the Industrial Disputes Act and the dispute was as to whether these 16 ladies should be reinstated in service in their original posts with full back wages for the intervening period. During the course of conciliation proceedings, the petitioner has filed its reply and counter reply was filed on behalf of the Union. The plain reading of the reply as well as counter reply makes it clear that the petitioner has raised the dispute as to whether these 16 ladies are the employees of the petitioner or whether the petitioner is an 'Industry'. The Union has filed its counter reply, wherein it is stated that these 16 ladies were the employees of the petitioner. The Assistant Labour Commissioner is not competent to decide as to whether these 16 ladies are the employees of the petitioner. It requires adjudication and proper forum for adjudication is either the Industrial Tribunal or Labour Court. The Assistant Labour Commissioner has to merely discharge his function as an administrative officer. He has to record prima facie subjective satisfaction and after having come to this subjective satisfaction, he has to refer the dispute to the Labour Court or to the Industrial Tribunal.

Whether particular person is an employee of the institute or not, requires leading of evidence oral as well as documentary. This could be done only at the level of either the Labour Court or Industrial Tribunal where both the parties do get the opportunity of leading their evidence. It is held by the Courts on number of occasions, that the proceedings should not be terminated prematurely. If the reference is rejected, the Conciliation Officer has to record the reasons for that under Section 12(5) of the Act. However, while making the reference, it is not necessary to record any reason. Merely because the reasons are not recorded while making the reference, it cannot be said that the order is without application of mind. It is also important to note here that before the Assistant Labour Commissioner, the award passed by the Industrial Tribunal in the case of NID was pointed out wherein on similar situation, the Industrial Tribunal has come to the conclusion that those 31 ladies were the employees of National Institute of Design. It was also pointed out that the petition was pending before this Court being Special Civil Application No. 8549 of 1988. The Court has also considered the relevant observations made by the Hon'ble Supreme Court in the decision of State of Madras v. C.P. Sarathy (supra) wherein, in no uncertain terms, the Supreme Court has observed that if the dispute was an industrial dispute as defined in the Act, its factual existence and expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash and set aside the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion. The Court has also considered the binding judgment of the Supreme Court and observations made therein which are squarely applicable to the facts of the present case. The determination of the questions or issues which are raised in this petition requires examination of factual matters and for that purpose, all relevant materials including oral as well as documentary evidence will have to be led before the Labour Court and same are required to be considered. If this is the situation then in that case, the Government could not arrogate unto itself the power to adjudicate on the question and hold that 16 ladies were not the workmen within the meaning of Section 2(s) of the Act and terminate the proceedings prematurely. This issue will have to be decided by the Industrial Tribunal or the Labour Court on the basis of the materials to be placed before it by the parties. Simply because the dispute is raised before this Court regarding employer-employee relationship or whether the petitioner is an 'industry' or not, the order making reference passed by the Assistant Labour Commissioner cannot be quashed and set aside.

[12] Recently, the Apex Court has examined aforesaid aspect in the case of S.B. Minerals v. MSPL Ltd., 2010 AIR(SC) 1137. Relevant observations are quoted as under:

> 1. The respondent filed a suit for declaration and injunction Against the petitioner. The suit was decreed. The petitioner filed an appeal and the first appellate court allowed the appeal and dismissed the suit. Feeling aggrieved, the respondent filed a regular second appeal under Section 100 of the Code of Civil Procedure (for short 'CPC'). By order dated 8.10.2009, the High Court admitted the appeal formulating three substantial questions of law. In view of the urgency expressed, the High Court directed that the appeal be set down for final hearing in November, 2009.
>
> 2. The respondent has sought leave to file an appeal against the 'order' of admission of the second appeal. The petitioner contends that the case did not involve any substantial question of law and the second appeal ought not to have been admitted.
>
> 3. Sub-section (5) of Section 100 CPC provides that a second appeal shall be heard on the substantial questions of law formulated by the Court. It also provides that the respondent, at the hearing of the second appeal, can argue that the case does not involve such questions. Thus the substantial questions of law formulated by the High Court are not final, and it is open to the petitioner herein (who is the respondent in the pending appeal) to demonstrate during hearing that no substantial question of law arose for consideration in the case and that the second appeal should be dismissed.
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> 4. An order admitting a second appeal is neither a final order nor an interlocutory/interim order. It does not amount to a judgment, decree, determination, sentence or even 'order' in the traditional sense. It does not decide any issue but merely entertains an appeal for hearing.
>
> 5. The scope of Article 136 is no doubt very wide. Special leave to appeal can be granted under Article 136 against any judgment, decree, determination, sentence or order passed or made by any court or tribunal, in any case or matter. There are no limitations upon the discretionary power of this Court under Article 136, except those which are self-imposed. One recognised area where the discretion is not exercised is where the remedy by way of an appeal or revision is available against the order. Another recognised area is where the subject matter is stale or frivolous or cantankerous or where the stakes or issue involved is so small and negligible, that grant of leave or even issue of notice will cast a heavy burden in terms of expense, time and energy on a poor or ordinary respondent.

6. There is a third recognised area of exclusion relating to orders which do not decide any issue. Orders admitting a petition/ appeal /revision, or orders issuing notice to show cause why a petition/appeal/revision should not be entertained, or an order merely adjourning a case, fall under this category. Extraordinary situations leading to irreversible injustice can of course be exceptions to the exclusion. This case falls under the third category of exclusion, but does not fall under the exception to the exclusion.

7. It is a matter of concern that there is a noticeable increase in the number of special leave petitions against such 'non-orders' referred to as orders.

8. The special leave petition is dismissed.

[13] Recently, the Madras High Court has examined aforesaid aspect in the case of Pradeep Stainless India Pvt. Ltd. v. The Joint Commissioner of Labour and Anr. in W.P. No. 3094 of 2010, decided on 18.2.2010. Relevant observations are in Para.30 to 40 are quoted as under:

30. In fact, the power of the conciliation officer as well the State Government to refer a dispute is more of a administrative character and it is not a quasi judicial power. A Constitution Bench of the Supreme Court as early as in the year 1953 in its judgment in State of Madras v. C.P. Sarathy, 1953 SCR 334 paragraph 16 observed as follows:

16. This is, however, not to say that the Government will be justified in making a reference under Section 10(1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry, and it is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But, it must be remembered that in making a reference under Section 10(1) the Government is doing an administrative act and the fact that it has to form 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. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But if the dispute was an industrial dispute as defined in the Act, its factual existence and the

expediency of making a reference in the circumstances of a particular case are matters entirely for the 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 the Government on which it could have come to an affirmative conclusion on those matters. The observations in some of the decisions in Madras do not appear to have kept this distinction in view.

31.The Supreme Court subsequently in its judgment in Avon Services Production Agencies (P) Ltd. v. Industrial Tribunal, 1979 1 SCC 1 held in paragraph 6 as follows:

6. Section 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. Section 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 (see State of Madras v. C.P. Sarathy).

32. A division bench of the Patna High Court in Mohini Sugar Mills v. State of Bihar, 1967 2 LLJ 209 opined that if the Government makes a reference under S.10 by including in it several items in dispute between the employer and the employees, and if the Tribunal concerned holds that, in respect of some items in dispute, the order of reference is incompetent, the tribunal itself must refuse to give any decision on those points and confine its Award only to those disputes in respect of which a valid reference is made and it has jurisdiction to adjudicate on the same. This opinion of the division bench of the Patna High Court was quoted with approval by a division bench of this Court in Ramakrishna Mills Ltd. Case (cited supra).

33. It will not be out of place to mention that even in case of a reference under Section 10(1), principles of natural justice will not attracted. Even if demands of the workmen are altered or reconsidered by the State Government, such attacks based on principles of natural justice cannot be pressed into service. This was held so by a Full Bench of this Court in G. Muthukrishnan v. Administrative Manager,1980 1 LLJ 215. The idea being on a reference the matter will be heard by a judicial forum like the Tribunal/Labour Court.

34. The Supreme Court vide its decision in Bharat Heavy Electricals Ltd. v. Anil, 2007 1 SCC 610, speaking for the Bench through S.H. Kapadia, J. had observed as follows:

18. ...There is a difference between an individual dispute which is deemed to be an industrial dispute under Section 2-A of the said 1947 Act on the one hand and an industrial dispute espoused by the union in terms of Section 2(k) of the said 1947 Act. An individual dispute which is deemed to be an industrial dispute under Section 2-A concerns discharge, dismissal, retrenchment or termination whereas an industrial dispute under Section 2(k) covers a wider field. It includes even the question of status. This aspect is very relevant for the purposes of deciding this case. In Radhey Shyam v. State of Haryana it has been held after considering various judgments of the Supreme Court that Section 2-A contemplates nothing more than to declare an individual dispute to be an industrial dispute. It does not amend the definition of industrial dispute set out in Section 2(k) of the Industrial Disputes Act, 1947 [which is similar to Section 2(l) of the said 1947 Act]. Section 2-A does not cover every type of dispute between an individual workman and his employer. Section 2-A enables the individual worker to raise an industrial dispute, notwithstanding, that no other workman or union is a party to the dispute. Section 2-A applies only to disputes relating to discharge, dismissal, retrenchment or

termination of service of an individual workman. It does not cover other kinds of disputes such as bonus, wages, leave facilities, etc.

35. The Supreme Court vide its judgment in Anz Grindlays Bank Ltd. v. Union of India, 2005 12 SCC 738 held in paragraph 14 as follows:

[14] Mr Bhat, learned Counsel for the second respondent, has submitted that this Court should not interfere with the order of the Central Government making a reference under Section 10 of the Act, as the appellant can ventilate its grievances before the Industrial Tribunal itself and if the decision of the Tribunal goes against the appellant, the same may be challenged in accordance with law. According to learned Counsel the writ petition is premature as the appellant has got a remedy before the Tribunal to show that the reference is either bad in law or is uncalled for. We are unable to accept the submission made. It is true that normally a writ petition under Article 226 of the Constitution should not be entertained against an order of the appropriate Government making a reference under Section 10 of the Act, as the parties would get opportunity to lead evidence before the Labour Court or Industrial Tribunal and to show that the claim made is either unfounded or there was no occasion for making a reference. However, this is not a case where the infirmity in the reference can be shown only after evidence has been adduced. In the present case the futility of the reference made by the Central Government can be demonstrated from a bare reading of the terms of the reference and the admitted facts. In such circumstances, the validity of the reference made by the Central Government can be examined in proceedings under Article 226 of the Constitution as no evidence is required to be considered for examining the issue raised.

The stage to scrutinise an order of reference will come only if the Government takes a decision under Section 10(1) of the I.D. Act. But the above decision cannot be extended to deal with the parleys held by a statutory conciliation officer.

36. Finally, it will not be out of place to state that the Supreme Court in D.P. Maheshwari v. Delhi Admn., 1983 4 SCC 293 forewarned the High Courts from entering into the arena of deciding preliminary issues and then making the entire machinery in the industrial dispute derailed at the instance of the employers. In paragraph 1 of the said judgment, the Supreme Court had observed as follows:

1. It was just the other day that we were bemoaning the unbecoming devices adopted by certain employers to avoid decision of industrial disputes 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 Article 226 of the Constitution and to this Court under Article 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 Article 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 Article 226 of the Constitution nor the jurisdiction of this Court under Article 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. Article 226 and Article 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 journeyings up and down. It is also worthwhile remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 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.

37.The Supreme Court in the very same judgment gave a note of caution which is as follows:

7. We are clearly of the opinion that the High Court was totally unjustified in interfering with the order of the Labour Court under Article 226 of the Constitution....

38. The Industrial Disputes Act is the only machinery provided for the workmen to have their grievance settled either by conciliation or by adjudication. There is no other third option open to the workmen. If attempt made by the management to

thwart the proceedings by seeking a writ of prohibition, the very machinery will be jeopardized and the workmen will lose faith in the machinery created for the purpose of resolving the grievances of the workmen.

39. It will not be out of place to refer to a recent judgment of the Supreme Court in Harjinder Singh v. Punjab State Warehousing Corporation, in Civil Appeal No. 587 of 2010 (arising out of SLP(C) No. 6966/2009), dated 05.01.2010, wherein G.S. Singhvi, J. had observed as follows:

23. ...It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employers # public or private.

40. A.K. Ganguly, J., in his concurring opinion had observed as follows:

46. At this critical juncture the judges' duty, to my mind, is to uphold the constitutional focus on social justice without being in any way mislead by the glitz and glare of globalization.

41. In the light of the above, the writ petition will stand dismissed. No costs. Consequently, connected miscellaneous petition stands closed.

14. In view of aforesaid decisions of this Court, Madras High Court, Delhi High Court as well as Hon'ble the Apex Court and also considering the facts of present case where dispute between both parties are apparently found from the record itself because according to petitioner company, settlement dated 17.3.2008 is legal and valid settlement. Against that, Mr. Mansuri has challenged genuineness and validity of such settlement which is not binding to respondent No. 3 Union and its members and said settlement where signature has been obtained by adopting pressurized tactics as per affidavit filed by State authority, appropriate Government and while referring the dispute by appropriate Government, no legal right or fundamental right of petitioner company has been adversely affected. It is merely order of reference of industrial dispute for adjudication. Therefore, this Court cannot examine such disputed facts between the parties while exercising powers under Article 226 of the Constitution of India and petitioner company is having alternative, effective efficacy remedy to raise all these contentions before Industrial Tribunal, Baroda where Reference No. 63 of 2008 which has been referred for

adjudication by appropriate Government and get adjudicated the contentions which are to be raised by petitioner company that settlement dated 17.3.2008 is legal and valid. Therefore, on these grounds, according to my opinion, the petition filed by petitioner company is not required to be entertained by this Court. Otherwise also, it is not maintainable in law. Therefore, contentions raised by learned advocate Mr. Gandhi cannot be accepted and hence, rejected. Therefore, there is no substance in present petition. Accordingly, present petition is hereby dismissed. Notice is discharged. Interim relief, if any, stands vacated.

[15] It is necessary to note the conduct of petitioner company to challenge order of reference made by appropriate Government dated 31.5.2008. At least about 2 years are likely to be over, the adjudication is not started before Industrial Tribunal, Baroda because of pendency of present petition and interim relief obtained by petitioner company against proceedings of Reference No. 63 of 2008. So petitioner company has easily got 2 years' delay by filing merely petition in this Court which amounts to mis-use of legal machinery and legal proceedings and avoid industrial adjudication by way of filing said petition so that workmen may not be able to get minimum relief or adjudication of industrial dispute and therefore, such approach of petitioner company cannot be encouraged by this Court. Therefore, according to my opinion, cost is also required to be imposed upon petitioner company. Same is quantified at Rs. 25,000/-. Such cost is required to be deposited by petitioner company in this Registry of this Court within a period of one month from date of receiving copy of present order.