

**1995 (2) G. L. H. 1054
M. R. CALLA, J.**

(Shree) Digvijay Cement Co. Ltd....Petitioner
Versus
Hirasingh Jamnadas & Ann...Respondents [*@page1054*]

Special Civil Application No. 258 of 1990*

D/- 27-9-1995

*Writ Petition u/S. 227 of Constitution challenging the order of Asstt. Labour Commissioner, Jamnagar dt. 18-10-1989 making a reference of industrial dispute to Labour Court, Rajkot

Industrial Disputes Act, 1947 - S. 10 - Reference - Dispute regarding date of birth and age of superannuation - Age of superannuation as per certified standing orders 60 years - Dispute about date of birth not a genuine dispute - Workman already paid wages upto age of 65 years and for sometime thereafter - Civil Court's findings against the workman - No useful purpose will be served by referring the dispute - Order of reference vitiated by non-application of mind and non-consideration of relevant material -Order quashed.

It is of course true that when the question comes for making a Reference to the Industrial Tribunal and the concerned authority or the functionary working under the Industrial Disputes Act proceeds to make a Reference taking it to be a case of industrial dispute, ordinarily it has to be presumed that it is a genuine dispute and there cannot be any quarrel with this proposition of law. However, in the facts and circumstances of this case, it is very clear from the reading of the order of the Appellate Court dated 30-9-88 that it could not be taken to be a case of genuine dispute and when the respondent-workman, who according to the recorded date of birth should have retired in the year 1980, was not made to retire, continued even after attaining the age of 60 years upto the age of 65 years in 1985, was paid further salary upto April 1986 under the injunction of the Civil Court, how any authority, i.e. Assistant Labour Commissioner considered it to be a case of genuine industrial dispute, more particularly in the light of the order passed by the Assistant Judge, Jamnagar. Having considered the material in its entirety and the order passed by the Assistant Judge, Jamnagar, I am of the considered opinion that no useful purpose can be served by making a Reference under S. 10 with regard to the controversy in question raised by the respondent-workman. It would simply be an exercise in futility and would further prolong the agony of the litigation and the wholesome provisions of Industrial Disputes Act are not meant so as to encourage any litigious perseverance. Throughout the respondent-workman had enough innings where he could show that his date of birth should be taken to be 15-11-1930 instead of 30-11-1920 and he has also served according to his recorded date of birth of year 1920 upto the age of 65 years and has also been paid for one year more even after attaining the age of 65 years and the overall view of the case, on the basis of the available material makes it clear that it was not at all a case for making Reference and it appears that the Assistant Labour Commissioner has not addressed himself to the relevant material and the reasons germane for the purpose of deciding the question of making a Reference and he has passed the order making the Reference without application of mind and without taking into consideration the relevant material and particularly the material which had become available in the judicial proceedings. (Para 4)

Appearances :

Mr. Buch for Mr. K. S. Nanavati, learned Counsel for the petitioner
Mr. P. C. Master, learned Counsel for the respondents. [*@page1055*]

M. R. CALLA, J.:-

1. This Special Civil Application is directed against the order dated 18-10-89 passed by the Assistant Labour Commissioner, Jamnagar making a Reference to the Labour Court at Rajkot for decision of an industrial dispute.

2. The respondent No.1-workman had been appointed as a Foreman with the petitioner-Company on 1-1-74. At that time the respondent-workman in his bio-data had given his date of birth as 30-11-1920. It is the common case of the parties that in the Standing Orders, which had been certified by the Certifying Officer under the Industrial Employment (Standing Orders) Act, 1946, no age of superannuation was fixed, but age of superannuation was prescribed, in the Model Standing Orders, to be 60 years. According to the date of birth of 30-11-1920, which was given out by the respondent-workman in his bio-data, the respondent-workman could have been made to retire on attaining the age of 60 years, i.e. in the end of November, 1980, but in fact the respondent-workman was not retired and he continued in the services even after November 1980. It has been submitted by the learned Counsel for the petitioner that amendments were made in the Standing Orders in the year 1984 and the same was certified on 21-5-84 and by this amendment in the Standing Orders, the age of superannuation was prescribed to be 60 years. Against this certification of the Standing Orders in 1984, the Union of the workman preferred Appeal before the Industrial Court and this Appeal was dismissed by the Industrial Court. The Union preferred Special Civil Application No. 3975 of 1985 and this Special Civil Application, challenging the certification of the Standing Orders prescribing the age of superannuation to be 60 years, was dismissed by the High Court on 8-8-85 and the Standing Orders thus become applicable from the date they were certified.

3. In the meanwhile, the respondent-workman was made to retire on 31-5-85 although according to the petitioner he should have been retired in the year 1980 itself. The respondent-workman preferred a Civil Suit No. 500 of 1985 in the Court of Civil Judge (J.D.), Jamnagar and on the strength of the injunction order passed by the Civil Court (J.D.), Jamnagar, the petitioner had to pay salary to the respondent-workman upto April 1986. Thereafter, the main suit was dismissed on 3-5-86. It is also the common case of the parties that the Court had examined the question of jurisdiction and found that the Civil Court had no jurisdiction to entertain this dispute although the merits of the case had also been gone into. The controversy raised by the respondent-workman in this Civil Suit was that his date of birth should be taken as 15-11-1930 instead of 30-11-1920 and he should be made to retire accordingly. Thus, according to the respondent-workman, had his date of birth been taken as 15-11-1930, he could not be retired before November 1990. The respondent-workman also preferred an Appeal before the District Court, Jamnagar and this Appeal was also dismissed by the District Court on 30-9-88. Thus having failed before the Civil Courts in the litigation, the respondent-workman now sought to invoke the provisions of the Industrial Disputes Act, 1947 and sought to raise the dispute about his date of retirement to be computed on the basis the date of birth is 15-11-1930 instead of 31-11-1920 and in this regard, the impugned order has been passed by the Assistant Labour Commissioner at Jamnagar on 18-10-89 making a Reference for adjudication under Section 10(1) of the Industrial Disputes Act, 1947. [@page1056]

4. I have heard learned Counsel and have also gone through the judgment dated 30-9-88 rendered by the Assistant Judge at Jamnagar in Regular Civil Appeal No. 54 of 1986. The learned Assistant Judge at Jamnagar has rendered an elaborate judgments dealing with the following 8 issues on which the parties had gone on trial :

"1. Whether learned trial Judge has committed an error in holding that as per bio-data given by the plaintiff he has reached at the age of 60 years on the date of the impugned retirement order ?

2. Whether learned trial Judge has committed an error in holding that the plaintiff is not able to prove that the impugned retirement order No. PE-85-747 dtd. 29-4-85 is illegal, invalid and against the principles of natural justice ?

3. Whether learned trial Judge has committed serious error in holding that the plaintiff has not been able to prove that his birth date is 15-11-30 ?

4. Whether the appellant proves that the termination order passed by the defendant vide Ex. 34 effecting the services of the plaintiff on the ground of superannuation is contrary to the service contract, against the

principles of natural justice and equity ?

5. Whether the appellant proves that the amended standing orders of the defendant-company are not applicable to the service of the plaintiff and hence the plaintiff's service cannot be terminated on the ground of superannuation ?
6. Whether the learned trial Judge has committed serious error of law and facts as per the contention of the appeal memo ?
7. Whether the judgment and decree passed by the learned trial Judge are just and proper ?
8. What order ?"

The findings on issue Nos. 1 to 6 are in negative, i.e. against the respondent-workman and on issue No. 7 it has been held by the Appellate Court that the judgment and decree passed by the learned trial Judge was just and proper. He has accordingly dismissed the appeal. The question of jurisdiction has also been dealt with and the finding of the Trial Court that Civil Court had no jurisdiction has also been upheld. The question of jurisdiction had not been decided at the initial stage and it has been decided at the time of final decision when the parties had already joined issues in the main controversy. It had also gone on trial after leading evidence and precipitating a situation in which the court had to give its finding and the Trial Court as well as the Appellate Court has come to the conclusion that the respondent-workman had miserably failed to prove that his birth date was 15-11-1930 and this conclusion is based on the evidence and material produced by both the sides. It is of course true that when the question comes for making a Reference to the Industrial Tribunal and the concerned authority or the functionary working under the Industrial Disputes Act proceeds to make a Reference taking it to be a case of industrial dispute, ordinarily it has to be presumed that it is a genuine dispute and there cannot be any quarrel with this proposition of law. However, in the facts and circumstances of this case, it is very clear from the reading of the order of the Appellate Court dated 30-9-88 that it could not be taken to be a case of genuine dispute and when the respondent-workman, who according to the recorded date of birth should have retired in the year 1980, was not made to retire, continued even after attaining the [page1057] age of 60 years upto the age of 65 years in 1985, was paid further salary upto April 1986 under the injunction of the Civil Court, how any authority, i.e. Assistant Labour Commissioner considered it to be a case of any breach to the industrial peace so as to take it to be a case of genuine industrial dispute, more particularly in the light of the order passed by the Assistant Judge, Jamnagar. Having considered the material in its entirety and the order passed by the Assistant Judge, Jamnagar, I am of the considered opinion that no useful purpose can be served by making a Reference under Section 10 with regard to the controversy in question raised by the respondent-workman. It would simply be an exercise in futility and would further prolong the agony of the litigation and the wholesome provisions of Industrial Disputes Act are not meant so as to encourage any litigious perseverance. Throughout the respondent-workman had enough innings where he could show that his date of birth should be taken to be 15-11-1930 instead of 30-11-1920 and he has also served according to his recorded date of birth of year 1920 upto the age of 65 years and has also been paid for one year more even after attaining the age of 65 years and the overall view of the case, on the basis of the available material, makes it clear that it was not at all a case for making Reference and it appears that the Assistant Labour Commissioner has not addressed himself to the relevant material and the reasons germane for the purpose of deciding the question of making a Reference and he has passed the order making the Reference without application of mind and without taking into consideration the relevant material and particularly the material which had become available in the judicial proceedings. The argument of the learned Counsel for the respondent-workman that once Civil Courts found that it had no jurisdiction, they could not have considered the question of date of birth and, therefore, anything stated in those orders by the Civil Courts cannot be considered against him, does not impress me for the simple reason that it is the respondent-workman who had invoked the jurisdiction of the Civil Court and, therefore, even if the Civil Courts had come to the conclusion that they had no jurisdiction and that the respondent-workman should have invoked the Forum under Industrial Disputes Act, such a conclusion was arrived at only at the time of the final decision of the suit and the Appeal at a juncture when they had already gone into the merits of the main controversy and, therefore, the respondent-workman now in this writ proceedings cannot be allowed to approbate and reprobate at the same time and this contention raised on behalf of the respondent-workman is hereby rejected. Consequentially the order passed by the Assistant Labour

Commissioner on 18-10-89, which is impugned in this Special Civil Application, cannot be sustained in the eye of law.

5. The upshot of the entire discussion is that this Special Civil Application succeeds and the impugned order is hereby quashed and set aside. The proceedings in the Reference pending before the Labour Court, Jamnagar now would consequentially stand quashed. Rule is made absolute accordingly with no order as to costs.

(AKC) Rule made absolute.