Mukand Ltd vs Mukand Staff & Officers Association on 10 March, 2004

Equivalent citations: AIR 2004 SUPREME COURT 3905, 2004 (10) SCC 460, 2004 AIR SCW 3731, 2004 LAB. I. C. 2791, 2004 (3) SCALE 116, 2004 (2) UJ (SC) 1164, 2004 (3) SERVLJ 204 SC, 2004 (3) ACE 172, 2004 (2) LRI 77, 2004 (3) SLT 630, (2004) 3 JT 474 (SC), (2004) 3 ALLMR 839 (SC), (2004) 3 SERVLJ 204, (2004) 5 ALL WC 4365, (2004) 2 CTC 430 (SC), (2004) 2 KER LT 1, (2004) 2 LABLJ 327, (2004) 2 LAB LN 122, (2004) 4 MAD LJ 6, (2004) 3 PAT LJR 79, (2004) 2 SCT 259, (2004) 5 SUPREME 202, (2004) 3 SCALE 116, (2004) 2 JLJR 311, (2004) 3 GCD 2080 (SC), 2004 SCC (L&S) 798, (2004) 101 FACLR 219, (2004) 16 INDLD 621, (2004) 1 CURLR 1062, (2004) 105 FJR 113

Author: Ar. Lakshmanan

Bench: Ar. Lakshmanan

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           CASE NO.:
Appeal (civil)  5601 of 2001

PETITIONER:
Mukand Ltd.

RESPONDENT:
Mukand Staff & Officers Association

DATE OF JUDGMENT: 10/03/2004

BENCH:
Y. K. Sabharwal & Dr. AR. Lakshmanan

JUDGMENT:
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J U D G M E N T WITH CIVIL APPEAL NOS. 7340-7341 OF 2001 Dr. AR. Lakshmanan, J.

The present case raises an important issue of vital public importance, namely, whether the Industrial Tribunal was justified in adjudicating upon the service conditions of employees, who are not "workmen" under the Industrial Disputes Act, 1947 and are hence clearly outside its jurisdiction.

Civil Appeal No. 5601 of 2001 was filed by the appellant-Company against the common final judgment and order of the Division Bench of the High Court of Judicature at Bombay in Appeal No. 194 of 2000. The said appeal was filed by the Company against the judgment dated 01.12.1999 of the learned single Judge in Writ Petition No.1705 of 1998 which was filed by the Company against the award of the Industrial Tribunal in Reference being Reference (IT) No. 3 of 1993 which arose out of

the demands of the respondent-Union.

Civil Appeal Nos. 7340 and 7341 of 2001 were filed by the Union against the judgment and order in Appeal No. 441 of 2000 which was filed by the Union impugning the judgment dated 01.12.1999 of the learned single Judge in Writ Petition No. 1705 of 1998 by which the single Judge had reduced the extent of dearness allowance granted under the award of the Industrial Tribunal.

We shall take Civil Appeal No. 5601 of 2001 filed by the Company against the judgment and order of the Division Bench for consideration and the decision taken on this appeal will also govern the other two appeals filed by the Staff and Officers' Association in Civil Appeal Nos. 7340 and 7341 of 2001.

The appellant-Company concluded a Settlement with the respondent- Association on 14.08.1974 whereby welfare scheme for the staff and officers, jointly funded and managed by the Company and the Association did not create any condition of service. The Company concluded a settlement on 09.06.1982 covering service conditions of all staff and officers including those in Grades 01 and 00. According to the Management, this was a unique settlement in that at the instance the Chairman and Managing Director of the Company, the Association determined for itself and recommended the quantum of increase in emoluments for the staff and officers which the Company accepted and implemented through the said settlement. On 24.02.1989, the appellant-Company concluded a Settlement with the respondent-Association which stated, inter alia, that "It is the Company's contention that a substantial number of the staff, not being 'workmen' under Section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') are not covered by the provisions of the Act. Without prejudice to the rights and contentions of both the parties with regard to the applicability of the provisions of the Act, the parties have reached a comprehensive Settlement covering in addition to the demands made in the said 'Charter of Demands', the issue of annual bonus as well, under Section 12(3) and 18(3) of the Act read with Rule 62 of the Industrial Disputes (Bombay) Rules, 1957 in conciliation proceedings on the following terms".

> "This Settlement did not cover employees in Grade 01 and 00 who are General Foremen or Senior Officers and Asstt. General Foremen or Officers".

On 04.11.1991, the respondent-Association served a Charter of Demands on the Company. Failure report was submitted by Conciliation Officer on 31.10.1992. The Government of Maharashtra, by its Order dated 17.02.1993, referred the dispute for adjudication to the Industrial Tribunal. The text of the Order issued by the Government of Maharashtra is reproduced below:

> "ORDER Industrial Disputes Act, 1947:-
>
> No. ADM 3092/21867/CR 2001/Lab-3. - Whereas the Government of Maharashtra has considered the report submitted by the conciliation Officer under sub-section (4) of section 12 of the Industrial Disputes Act, 1947 (XIV of 1947), in respect of the dispute between M/s. Mukand Ltd., L.B.S. Marg, Kurla, Bombay 400 070 and the workmen employed under them, over the demands mentioned in the schedule appended hereto.

> And whereas the Government of Maharashtra after considering the aforesaid report is satisfied that there is a case for reference to the dispute to an Industrial Tribunal.
>
> Now, therefore, in exercise of the powers conferred by clause (d) of sub-section (1) of section 10 read with sub-section (5) of section 12 of the Industrial Disputes Act, 1947, the Government of Maharashtra hereby refers the said dispute for adjudication to an Industrial Tribunal, Bombay consisting of Shri G.S. Baj, Member constituted under Government Notification, Industries, Energy and Labour Department, No. IDA 0392/CR 69/Lab-3, dated the 31st March, 1992."

The respondent-Association filed its Statement of Claims. The appellant- Company filed its written statement setting out in detail how the demands raised by the respondent-Association, which according to them, were unreasonable and pointing out that the financial position of the Company was not sound. It was also pointed out that barring a few categories of employees, the bulk of employees were not 'workmen' as defined under the Act and that the Industrial Tribunal had no jurisdiction to grant any relief to the employees who are not 'workmen' under the Act.

The Tribunal, by its Part-I Award, directed an ad hoc payment of Rs.500/- per month to all employees in grades 12-00. The appellant-Company on its own effected an additional ad hoc payment in varying amounts grade-wise to employees in grades 00-09. The Tribunal, by its interim Award Part-II, directed payment of employees on the basis of basic pay slab ad hoc amount ranging from Rs. 375/- to Rs.1050/- per month to employees who had not been granted additional ad hoc payment by the appellant- Company. The High Court, by its judgment and order dated 27.01.1996 in Writ Petition No. 342 of 1996 filed by the company against the said Awards, directed the Company to deposit the amounts payable under the interim Award Part-II in the Provident Fund Accounts of the concerned employees instead of disbursing the same to them, and directed the Tribunal to dispose of the Reference on or before 30.04.1996.

On 11.12.1995, the appellant-Company and the respondent-Association concluded a Settlement on annual bonus for four years, without prejudice to their respective rights and contentions as stated in Clause 1 of the said settlement which stated as under:

> "It is the Company's contention that a majority of the staff, on the one hand and the officers on the other are not 'Workmen' under Section 2(s) of the Industrial Disputes Act, 1947 and are also not covered by the provisions of The Payment of Bonus Act, 1965. These contentions of the Company are not, however, accepted by the Association. In the circumstances, it is agreed that this Settlement shall not be cited by either party as evidence of waiver of the contentions of the other and that both the parties shall continue to be at liberty to raise their respective contentions on these issues on all fora."

An affidavit by the Vice-President of the Company - Mr. Krishnan Nair was also filed before the Tribunal affirming the designations and categories of employees of the appellant-Company who are not "workmen" under the Act. The Tribunal passed an award on 26.03.1998 and held that the

appellant was purportedly estopped from contending that the employees were not workmen under the Act and granted all the major demands, including revision in basic salaries, dearness allowance, etc. in toto and rejected certain demands like computer allowance, shift allowance also in toto. According to the appellant, the Award was far in excess of the appellant's financial capacity and the same ignored the well-settled industry-cum-region principle and the status of the employees before him.

Being aggrieved by the Award of the Industrial Tribunal, the appellant filed Writ Petition No. 1705 of 1998 before the High Court at Bombay. The High Court issued rule and granted conditional stay subject to the condition, inter alia, that the petitioner- Company pays to the employees 50% of the increased salary and allowances awarded by the Tribunal, in addition to the existing salary and allowances with effect from the date of publication of the Award, and that in case it is held ultimately that the said employees were not entitled to the payments so made, the amount shall be adjusted by the appellant in future wages.

Learned single Judge passed another Order on the same date in the Company's Writ Petition No. 1704 of 1998 against another Award passed by another Tribunal in Reference (IT) No. 70 of 1998 relating to the Company's daily-rated workmen at its factory at Kurla while admitting the said writ petition, directing the Company to pay to the said daily-rated workmen 50% of the increase in the allowances granted by the said Award except certain allowances specified therein. The appellant filed an appeal before the Division Bench against the said interim order dated 05.10.1998. The appeal was disposed of stating that the said order was a discretionary order and did not warrant any interference at the interim stage. The Association filed contempt petition in the High Court on the ground that the Company was deducting from retrial benefits of the employees the amount that were paid to them under the interim order dated 05.10.1998. By its order dated 19.02.2000 in the said petition, the Company was directed to deposit in the High Court a sum of Rs. 9,52,205/- recovered thus from the employees.

The Vice President of the Company filed an affidavit before the learned single Judge on 24.06.1999 whereby he placed on record the facts on the financial position of the Company. The affidavit affirmed, inter alia, the fact that CRISIL progressively down-graded the Company's financial standing and that by its letter dated 01.04.1999, the said credit rating agency further down-graded the Company's rating from "BBB_" to "BB" and further that the said down-graded followed the down-grading done earlier as under:-

> Year Year Year Year Year Rating Rating Rating Rating Rating 1995 AA 1996 AA- 1997 A+ 1998 BBB+ 1999 BB The said letter from CRISIL showed that the rating "AA" indicated "high safety", while "BB" indicated "Inadequate Safety". The rating as above showed that the Company had been down-graded by as many as 9 notches between 1995 and 1999.
>
> On 01.12.1999, the learned single Judge passed judgment and order modifying the impugned Award and held that there was community of interest between the workmen and non-workmen as they worked and functioned in the same grades and

that the Company had concluded Settlements covering both categories of employees in the past, and further that in the facts of the case, the workmen could espouse the cause of the non-workmen. The learned single Judge disallowed the granting of one component of D.A. viz., basic linked variable D.A. He confirmed all other increases in emoluments granted by the Tribunal. The Review Petition filed by the Association against the judgment of the learned single Judge was also rejected by Order dated 15.02.2000. Both the appellant and the respondent preferred separate appeals challenging the judgment of the learned single Judge. In the appeal, the Company filed its Annual Report for the year 1999-2000 which reported a profit of Rs. 5.85 crores but showed that when capital profits i.e. profits from sale of land and of shares owned by the Company in other companies are excluded, there was, in fact, a loss amounting to Rs. 9.45 crores. The Company also submitted statements relating to basic pay etc. to the Division Bench during the course of hearing. According to the appellant-Company, they suffered a loss of Rs. 40 crores during the financial year 2000-01 as per the audited financial results and a chart showing the financial position of the Company from 1991- 92 to 2000-01 was also filed.

The Division Bench passed its judgment partially modifying the learned single Judge's Order by reducing (i) one of the 3 components of Dearness Allowance granted by the Tribunal viz. the D.A. fixed in terms of percentages of basic pay, grade-wise (ii) the number of service increments; (iii) the gratuity from 21 days to 15 days; and (iv) by changing the effective date for increase in emoluments from 17.02.1993 to 01.01.1996. The Division Bench affirmed the decision of the learned single Judge on all other points. The Order casts as retrospective burden of approximately Rs. 35 crores upto March, 2001 and prospective gross burden of Rs. 7 crores per annum.

As already stated, the special appeals were filed against the common judgment by the respective parties. According to counsel for the appellant, the High Court has failed to correct the jurisdictional error in granting revision of the service conditions of employees who are admittedly not 'workmen' under the Act on the ground, inter alia, of community of interest and also the error in granting revision of service conditions of employees in breach of established principles of wage adjudication. This Court granted leave to appeal to both parties and directed the appellant-Company not to make any recovery from the employees of the amounts paid on the basis of the interim Awards passed by the Tribunal or by the High Court.

We have heard Mr. Ashok H. Desai, learned senior counsel appearing for the appellant-Company and Mr. K.K. Singhvi, learned senior counsel appearing for the respondent - Staff & Officers' Association. Both the learned counsel advanced lengthy arguments. In support of their contentions, they invited our attention to the various documents and records filed before the Industrial Tribunal, before the High Court and before this Court and also relied on many rulings of this Court. In assailing the award and of the judgment of the High Court, Shri Ashok H. Desai, learned senior counsel appearing for the Company, made the following submissions:-

(i) The Reference is limited to the dispute between the appellant- Company and the `workmen' employed by them.

(ii) The Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference.

(iii) There are no pleadings by the respondent-Staff & Officers' Association regarding `community of interest' or `estoppel'.

(iv) The High Court and this Court have the jurisdiction and the power to interfere with the award of the Tribunal.

(v) The phrase "any person" in Section 2(k) and Section 18 of the Act does not include `non-workmen'.

(vi) The finding of the Court below that there is `community of interest' between the `workmen' and the `non-workmen' is based on misconstruing of evidence and disregarding of vital facts.

(vii) The `non-workmen' cannot be given the status and protection available to the `workmen' under the Act.

(viii) Estimation/computation of the total wage packet, which is a vital task in wage adjudication, has not been done by any of the Courts below.

(ix) Financial burden of the award passed by the Tribunal is wrongly assessed by the Tribunal, as observed by the learned single Judge;

however, neither the learned single Judge nor the Division Bench assessed the burden of their own judgment and order. The omission is fatal to the legality of the impugned order.

(x) The industry-cum-region principle has not been followed nor have the comparisons be made in accordance with the well-settled law.

(xi) Assessment of the appellant-Company's financial capacity by the Courts below is riddled with serious errors.

(xii) The subsequent developments relating to the financial position of the appellant-Company need to be kept in mind.

(xiii) The award, after its infirmities are cured, should be made applicable only to the `workmen' and not to the `non-workmen'.

(xiv) The appellant-Company, however, undertakes to ensure that the total wage packets of the `non-workmen', to whom the award further modified as above will not be applicable, are not lower than the total wage packets available to the `workmen' under the said award.

The above submissions were sought to be countered on behalf of the respondent-Staff & Officers' Association. Mr. K.K. Singhvi, learned senior counsel appearing for the Staff & Officers' Association submitted that essentially there was no revision of basic wages from 1972 and only ad-hoc increases had been granted from time to time of the special pay and allowances. There was thus an urgent and pressing need for wage revision. He made the following submissions:-

> (i) It is submitted by the respondent-Staff & Officers' Association that the decision of the Tribunal, on a question of fact, which it has jurisdiction to determine, is not liable to be questioned in proceedings under Article 226 of the Constitution of India unless at the least it is shown to be fully unsupported by the evidence. He cited the judgments of this Court in the following cases:
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> (a) Ebrahim Aboobakar & Anr. vs. Custodian General of Evacuee Property, [1952] SCR 696 at 702 (Five Judges)
>
> (b) Dharangadhara Chemical Works Ltd. vs. State of Saurashtra [1957] SCR 152 (Four Judges)
>
> (c) Syed Yakoob vs. K.S. Radhakrishnan & Ors., [1964] 5 SCR 64 (Five Judges)
>
> (d) Parry & Co. Ltd. vs. P.C. Pal & Ors. [1969] 2 SCR 976 (three Judges)
>
> (e) Ouseph Mathai & Ors. vs. M. Abdul Khadir, (2002) 1 SCC 319 (Two Judges)
>
> (ii) This Court while exerecising its power under Article 136 of the Constitution of India in an appeal from the judgment of the High Court rendered in exercise of its power under Articles 226 and 227 of the Constitution of India will exercise the same power which the High Court could exercise and will not interfere with the finding of fact recorded by a Tribunal. The following decisions were cited in the cases of Parry & Co.

Ltd. vs. P.C. Pal & Ors. (supra) and Fuel Injection Ltd. vs. Kamgar Sabha & Anr., (1978) 1 SCC 156 for this proposition.

(ii) While exercising powers under Article 226 of the Constitution of India, for issuance of a writ of certiorari or any other writ against an award of Industrial Tribunal, the High Court will normally not take into consideration facts arising subsequent to the date of the award.

(iii) The Industrial Tribunal by its award raised the necessary issues in regard to the financial soundness of the Company to bear the burden and recorded the finding in favour of the Staff & Officers' Association.

(iv) The Industrial Tribunal also recorded the finding that the charts regarding the financial position of various comparable companies, which were prepared on the basis of the information submitted

by the witnesses of the Company, will have to be believed and considered.

(v) The findings of the Industrial Tribunal were based on the evidence on record and the High Court ought not to have interfered with those findings. It was submitted that the learned single Judge has erred in interfering with the DA Scheme framed by the Industrial Tribunal and that the learned single Judge did not compare the total wage packet of Mukund with the comparable concerns. The Division Bench had exceeded its jurisdiction and take into account event subsequent to the passing of the award and secondly, in confirming the reduction in DA made by the learned single Judge. The Industrial Tribunal having exercised its discretion and having deprived the workmen of the benefit of the award from 1.1.1992 to 17.2.1993, there was no reason whatsoever for the High Court to interfere with the discretion of the Tribunal. Though the learned single Judge confirmed that finding, but the Division Bench without any reason whatsoever interfered with the said discretion and deprived the workmen the benefit of the revision in service conditions for four years. The Division Bench completely lost sight of the fact and effect that the employees who had retired or had ceased to be in service of the company between 1.1.1992 to 1.1.1996 would not only not get any benefit under the award but such of them who had retired or had ceased to be in service after 19.1.1994 will have to refund the benefit they got under the interim awards granted on 19.1.1994 and 18.9.1995.

(vi) The Division Bench also erred in interfering with the Gratuity Scheme granted by the Industrial Tribunal and confirmed by the learned single Judge of the High Court. Arguing further, the learned senior counsel would submit that the Industrial Tribunal took into consideration the fact that the daily-rated workers of the Company at the Kalwe Plant, as per agreement dated 15.2.1994, were entitled to Gratuity of 21 days and, therefore, had granted Gratuity of 21 days' basic + DA to the staff concerned in the reference. The learned single Judge confirmed the said finding. However, the Division Bench interfered with the finding on the ground that the Gratuity Scheme at Kalwe Plant was on the basis of minimum attendance whereas the award gave a flat rate of Gratuity of 21 days to all the employees.

(vii) The Division Bench erred in interfering with the service increments given by the Industrial Tribunal. It interfered with the service increments only on the ground that they thought it appropriate to restructure the increments.

(viii) The Company should not be allowed to rely on documents which are not part of the Record. It is to be noted that the Company has filed an application for bringing additional documents on record to show that the financial condition of the Company had deteriorated after passing of the award. It was submitted by the learned counsel that subsequent events are not at all relevant for the purpose of assailing the award, but may be relevant if and when demands are made either by the workmen or the Company and when demands are made either by the workmen or the Company for subsequent period and a Reference in that regard is given by appropriate Government. It was, therefore, submitted that the application for bringing on record the additional documents be rejected. According to him, there are no operating losses, but the losses are mainly on account of the interest on borrowing for huge investments made in associate/subsidiary/group companies and for the expansion of the steel making capacity by setting up a new project at Hospet.

Learned senior counsel appearing for the respondent-Staff & Officers' Association made additional submissions on behalf of the workmen. Regarding the financial clause contained the Statute, he has made further submissions reiterating the submissions made earlier.

We shall now analyse the submissions made by the learned senior counsel appearing on either side with reference to the pleadings, documents, records and also with reference to the judgments cited.

The Reference is limited to the dispute between the Appellant-Company and the `workmen' employed by them.

We have already referred to the order of Reference dated 17.2.1993 in paragraph supra. The dispute referred to by the order of Reference is only in respect of workmen employed by the appellant-Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its award. Even assuming, without admitting, that the Reference covered the non-workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the `non- workmen'.

It was submitted by the learned counsel appearing for the respondent that under the Act, the dispute can be raised only by the workmen with the employer and that the workmen, however, can, in appropriate case, espouse the cause of non-workmen because under the definition of `industrial disputes' under clause (k) of Section 2 of the said Act, the dispute may not only be related to workmen but to any person including non-workmen, provided, however, that there is community of interest between the `workmen' and the `non-workmen'. It was further submitted that apart from the fact that admittedly there are workmen in all the grades and that the workmen from one grade look forward to promotion in the next grade comprising workmen as well as non- workmen, the provisions of clause (d) of sub-section (3) of Section 18 of the Act make the award not only binding on the workmen but also on the non-workmen who may be in employment on the date of the dispute or may have subsequently become employed in the establishment. It was further submitted that clause (d) of sub-section (3) of Section 18 purposely uses both the expressions, namely, `workmen' and `persons' and, therefore, both the expressions will have to be given their proper meaning. `Workmen' has been defined under clause (s) of Section 2 of the Act. The expression `person' has not been defined and, therefore, that expression will have to be given its normal meaning. In this regard, learned counsel invited our attention to clause (42) of Section 3 of the General Clauses Act, 1897 which states that `person' shall include any Company or Association or body of individuals whether incorporated or not. This is an inclusive definition giving extended meaning to the word `person'. He also drew our attention to the Black Law Dictionary, 4th Edition, on page No.1299, it is stated that the word `person' in its natural and usual signification includes woman as well as man. Reliance was placed on the decision of this Court in the case of Workmen of Dimakuchi Tea Estate vs. The Management of Dimakuchi Tea Estate, (1958) SCR 1156 (three Judges). While dealing with the definition of `industrial dispute' contained in Section 2(k) of the Act, this Court observed as under:-

> "Therefore, when Section 2(k) speaks of the employment or non-employment or the terms of employment or the conditions of labour of any person, it can only mean the employment or non- employment or the terms of employment or the conditions of labour of only those persons in the employment or non-employment or the terms of employment or with the conditions of labour of whom the workmen themselves are directly and substantially interested....."

. . . . . .
....

> " Section 18 of the Act supports the aforesaid observations, in so far as it makes the award binding not merely on the parties to the dispute, but where the party is an employer, on his heirs, successors or assigns and where they party is composed of workmen, on all persons employed in the establishment and all persons who subsequently become employed therein. If, therefore, the dispute is a collective dispute, the party raising the dispute must have either a direct interest in the subject matter of dispute or a substantial interest therein in the sense that the class to which the aggrieved party belongs is substantially affected thereby. It is the community of interest of the class as a whole - class of employers or class of workmen - which furnishes the real nexus between the dispute and the party to the dispute. We see no insuperable difficulty in the practical application of this test. In a case where the party to the dispute is composed of aggrieved workmen themselves and the subject matter of dispute relates to them or any of them, they clearly have a direct interest in the dispute. Where, however, the party to the dispute also composed of workmen, espouse the cause of another person whose employment, or non-employment, etc., may prejudicially affect their interest, the workmen have a substantial interest in the subject matter of dispute. In both such cases, the dispute is an industrial dispute."

Learned counsel also cited the decision in the case of Anil Kumar Upadhyaya vs. Sarkar (P.K. & Ors.), 1961 2 LLJ 459 and, in particular, conclusion No.4 arrived at page 467 which reads as under:

> "No.4 : From the provisions of clause (b), sub-section(3) of Section 18 of the Act, it is to be implied that the Tribunal has power to summon parties other than parties to the order or reference, to appear in the proceedings as parties to the dispute. This has a reference to proper and necessary parties, as such parties need not necessarily belong to the category of employer or workman."

Reliance placed on conclusion No.4 by the learned counsel appearing for the respondent is misplaced. In our view, conclusion No.4 needs to be read in the context of the preceding and succeeding conclusions in the said judgment. The text of conclusion Nos. 1 to 7 is as under:

> "(1) An industrial dispute under the Act arises between an employer and his workmen, where the employer (sic) is concerned.

(2) Such a dispute can only be referred for adjudication by an order made by the appropriate Government under the Act. There is no express provision in the Act or the Rules framed thereunder, for adding in party to the adjudicating proceedings other than parties to the reference, by the adjudicating Court or Tribunal.

(3) Such a power may be granted by prescribing rules and/or making the relevant provisions of the Code of Civil Procedure, but so far it has not been done.

(4) From the provisions of Clause (b), Sub-section(3) of Section 18 of the Act, it is to be implied that the Tribunal has power to summon parties other than parties to the order of Reference, to appear in the proceedings as parties to the dispute. This has a reference to proper and necessary parties, as such parties need not necessarily belong to the category of employer or workmen.

(5) The power to be implied from the provisions of clause (b) is to summon such a party. The form of summons has not yet been prescribed, but under sub-section(1) of Section 11, the Tribunal may issue summons in its own form and follow such proceedings with regard to it as it may think fit, until rules framed under the Act deal with such matter.

(6) The Form D 1 is not an appropriate form of summons for that purpose.

(7)Clause (b) of sub-section(3) of Section 18 clearly contemplates that not only there should be such a summon but that the party summoned should have an opportunity to show that he has been summoned without proper cause. Such an opportunity is not given when the party is added as a party without any notice to him, and is compelled to join in the whole reference proceedings."

In the said case, following its conclusions as above, the High Court held as under:-

"That being the law on the subject, it is clear that the order made by the Tribunal on 24th December, 1959 is not in accordance with law. The Tribunal has not issued any summons as contemplated by clause (b) of sub-section (3) of Section 18 and has not given any opportunity to the petitioner to contest the service of such a summons."

In the present appeal, it is not the contention of the respondent-Staff & Officers' Association that the Tribunal, after considering the material before it, arrived at a finding that the non-workmen are a necessary party to the reference or that it complied with the requirement of issuing summons to the non-workmen under Section 18 of the Act, in accordance with law.

Learned counsel appearing for the respondent cited the judgment of this Court in the case of Hochtief Gammon vs. Industrial Trinbunal. Orissa, 1964 (2) LLJ 460. Gajendragadkar P.B., CJ. While speaking for the Bench in considering the implied power of the Industrial Tribunal to add parties observed as under :

> "This question has been considered by the Madras High Court in two reported decisions. In P.G. Brookes vs. Industrial Tribunal, Madras and Ors. , 1953 (II) LLJ 1, the Division Bench of the said High Court has held that Section 18(b) by necessary implications gives power to the Tribunal to add parties. It can add necessary or proper party. He need not be the employer or the employee. In that particular case, the party added was the receiver and it was found that unless the receiver was added as a party to the reference proceedings, the adjudication itself would become ineffective. In the words used by the judgment, the party added was not a rank outsider or a disinterested spectator, but was a receiver who was vitally concerned with the proceedings before the Tribunal and whose presence was necessary to make the ultimate award effective, valid and enforceable."

In our view, the ratio of the above judgment has not supported the respondent's contentions.

After referring to the decision of the Madras High Court in P.G. Brookes vs. Industrial Tribunal, (supra), in Radhakrishna Mills Ltd., Coimbatore vs. Special Industrial Tribunal, Madras and Ors. (1954 (1) LLJ 295) and to the decision of the Calcutta High Court in Anil Kumar Upadhyaya vs. P.K. Sarkar & Ors. (1961(II) LLJ

459), this Court has gone on to observe in the said judgment as under:

> "It would be noticed that in all these decisions, the implied power of the Tribunal to summon additional parties in the reference proceedings is confined only to cases where such addition appeared to be necessary for making the reference complete and the award effective and enforceable. Such a power cannot be exercised to extend the scope of the reference and to bring in matters which are not the subject matter of the reference and which are not incidental to the dispute which has been referred."

In the present case, the non-workmen are not necessary parties. The reference is complete, covering as it does "Mukund Ltd. and the workmen employed by them." The award, in our opinion, can be made effective and enforceable in respect of the workmen after its infirmities are cured. It was submitted that in fact settlement of 1989, for instance, did not cover the employees in Grades 01 and 00 and yet, the same was implemented by the parties thereto. The finding of the High Court that the `workmen' and the `non-workmen' belong to the same class, in our view, is erroneous. The question of class to which the employees belong is to be decided not on the basis of the Grades in which they are placed but on the basis of their duties, responsibilities and powers as laid down in Section 2(s) of the Act.

In the instant case, the parties have adduced detailed evidence, documentary as well as oral, on the duties, responsibilities and powers of the employees but the Tribunal totally side-stepped the said evidence running into more than thousand pages on the ground that the Company is estopped from raising the issue of the status of the employees under the Act, i.e. whether they are `workmen' or not. The Tribunal arrived at its decision erroneously by ignoring the fact that (a) the Company had not waived its rights or contentions on the issue in any of the settlements between the parties, (b)

the settlement of 1989 concluded despite all the pre-existing facts including previous settlements, "without prejudice" to the rights and contentions of the parties on the issue, as already submitted, and (c) the settlement of 1995 concluded during the pendency of the Reference before the Tribunal which stated inter alia that "both the parties shall continue to be at liberty to raise their respective contentions on these issues on all fora. In fact the appellant-Company had identified the positions in terms of job titles i.e., designations of employees who are not `workmen' under the Act by affidavit dated 5.7.1995 of Mr. Krishnan Nair. The facts affirmed in the said affidavit were proved by examination of witnesses and were also admitted to be correct by General Secretary and witness of the Association vide paragraph 95 of his evidence which reads as under:

> "Annexure-1 of Ex. C-29 is now shown to me, designation mentioned therein under respective grades are broadly correct. Grades are based on the job and responsibilities of the various categories in the Grade. In the hierarchy in a typical production shop are downwards to upwards i.e., daily-rated workmen, supervisors 2 to 7, supervisors, foremen."

It was further submitted by the learned counsel for the respondent that award rendered at the instance of the workmen with regard to the conditions of service of the workman/employed in Grade 12 to 00 would have surely affected the non-workmen working in the same factory in the same grades and they would have been required to be given an opportunity to be heard by the Industrial Tribunal. There is, therefore, no doubt that there is community of interest between the workmen who raised the dispute and the non-workmen working in those grades whose cause the workmen had espoused. It is true that the contention on behalf of the workmen all throughout has been that all the employees concerned in the Reference are workmen under the Act. In the alternative, it has been contended that assuming without admitting that some of the employees are non-workmen, the Association can espouse the cause of the non- workmen and it is on this footing that the High Court has held that the workmen were entitled to espouse the cause of non-workmen placed in the same Grades. The above submission has no force.

In the event, the Tribunal never adverted to the factual material including the evidence anywhere in its award. The Tribunal neither considered the factual material before it nor applied the law thereto.

We, therefore, hold that the reference is limited to the dispute between the Company and the Workmen employed by them and that the Tribunal, being the creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference.

Community of Interest or estoppel According to Mr. Ashok H. Desai, learned senior counsel appearing for the appellant-Company, there are no pleadings either on the issue of `community of interest' or on the issue of `estoppel' in the Statement of Claim filed by the respondent- Staff & Officers' Association before the Tribunal. The law, on this point, is well-settled in a catena of cases. This Court , in its recent judgment in the case of Bondar Singh & Ors. vs. Nihal Singh & Ors., (2003) 4 SCC 161 , held as under:

> "It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into."

In this view of the matter, we are of the opinion that the findings rendered regarding `community of interest' or `estoppel' in the absence of pleadings by the Association, cannot at all be looked into.

Jurisdiction and power of this Court to interfere with the award of the Tribunal Elaborate and lengthy submissions were made by both the learned counsel appearing on either side and many rulings were cited on this issue. Mr. Ashok H. Desai, learned senior counsel appearing for the Company, submitted that the High Court and this Court have the jurisdiction and power to interfere with the award of the Tribunal and cited the judgment of this Court in the case of Union of India vs. Tarachand Gupta & Bros. , 1971(1) SCC 486. This Court quoted, inter alia, the following passage from Anisminic Ltd. vs. The Foreign Compensation Commissioner, Lord Reid at pages 213 and 214, 1969(1) All ER 208:

> ".....But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

After quoting the above passage, this Court went on to observe in its above- mentioned judgment as under:

> "To the same effect are also the observations of Lord Pearce at page 233. R. v. Fulham, Hammersmith and Kensington Rent Tribunal is yet another decision of a tribunal properly embarking on an enquiry, that is, within its jurisdiction, but at the end of its making an order in excess of its jurisdiction which was held to be a nullity though it was an order of the kind which it was entitled to make in a proper case.
>
> "22. The principle thus is that exclusion of the jurisdiction of the Civil Courts is not to be readily inferred. Such exclusion, however, is inferred where the statute gives finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the courts would normally do in such a proceeding before it. Even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. The word "jurisdiction" has both a narrow and a wider meaning. In the

> sense of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction."

This Court in its judgment in the case of Cellular Operators Association of India & Ors. vs. Union of India & Ors., (2003) 3 SCC 186, held as under:

> "……The question, therefore, that remains to be considered is, whether from the judgment of the Tribunal, the contentions raised by the appellants can be held to be a substantial question of law, which requires interference with the order of the Tribunal..."
>
> "But the conclusion of the Tribunal that nothing should be allowed to stand in the way of pursuing the objective of increasing teledensity in the country and that the decision being a policy decision, is not liable to be interfered with by the Tribunal, cannot be sustained inasmuch as the main grievance of the cellular operators was to the effect that the Tribunal did not consider several materials placed before it on the question of level playing field nor has it given any positive finding on that. ... On this issue, according to Mr. Chidambaram and Mr. Vaidyanathan, huge materials had been produced and the Tribunal never applied its mind to those materials, being swayed away by the question that this being a policy decision, cannot be interfered with by the Tribunal."

Per contra, Mr. K.K. Singhvi, learned senior counsel appearing for the Staff & Officers' Association cited the case of Ebrahim Aboobakar & Anr. vs. Custodian General of Evacuee Property, (supra) in which this Court observed as under:

> "It is plain that such a writ cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice... But once it is held that the court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a court has jurisdiction to decide rightly as well as wrongly."

Relying on these observations, this Court in the case of Dharangadhara Chemical Works Ltd. vs. State of Saurashtra (supra) , observed as under:

> "It is equally well settled that the decision of the Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under

Article 226 of the Constitution unless at the least it is shown to be fully unsupported by evidence."

In the case of Syed Yakoob vs. K.S. Radhakrishnan & Ors. (supra), the Constitution Bench of this Court observed as under:

"The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226, has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however, grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said findings, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Syed Ahmed Ishaque, Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam and Kaushalya Devi v. Bachittar Singh.

It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of

> law recorded by an inferior Court or Tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or describe adequately all cases of errors which can be appropriately, described as errors of law apparent on the face of the record. Whether or not, an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

In the case of Parry & Co. Ltd. vs. P.C. Pal & Ors. (supra) , this Court observed as under:

> "The grounds on which interference by the High Court is available in such writ petitions have by, now been well established. In Basappa v. Nagappa it was observed that a writ of certiorari is generally granted when a court has acted without or in excess of its jurisdiction. It is available in those cases where a tribunal, though competent to enter upon an enquiry, acts in flagrant disregard of the rules of procedure or violates the principles of natural justice where no particular procedure is prescribed. But a mere wrong decision cannot be corrected by a writ of certiorari as that would be using it as the cloak of an appeal in disguise but a manifest error apparent on the face of the proceedings based on a clear ignorance or disregard of the provisions of law or absence of or excess of jurisdiction, when shown, can be so corrected. In Dharangadhara Chemical Works Ltd. v. State of Saurashtra this Court once again observed that where the Tribunal having jurisdiction to decide a question comes to a finding of fact, such a finding is not open to question under Art. 226 unless it could be shown to be wholly unwarranted by the evidence. Likewise, in the State of Andhra Pradesh & Ors. v. S. Sree Ram Rao this Court observed that where the Tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person can ever have arrived at that conclusion interference under Art. 226 would be justified."

In the case of Ouseph Mathai & Ors. vs. M. Abdul Khadir (supra), this Court observed as under:

> "It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals, resulting in grave injustice to any party."

In support of his contention that this Court while exercising its power under Article 136 of the Constitution of India in an appeal from the judgment of the High Court rendered in exercise of its powers under Articles 226 and 227 of the Constitution of India will exercise the same power which the High Court could exercise and will not interfere with the finding of facts recorded by a Tribunal, learned counsel cited the judgment in the case of Parry & Co. Ltd. vs. P.C. Pal & Ors. (supra). In the said case, this Court held as under:

> "Since this is an appeal arising from a writ for certiorari, we also would not interfere with the conclusions arrived at by the Tribunal except on grounds on which the High Court could have done."

In the case of Fuel Injection Ltd. vs. Kamgar Sabha (supra), this Court observed as under:

> "..... But the present appeals are from a judgment of the High Court under Art. 226 and so the jurisdiction of this Court in entertaining an appeal by special leave under Art 136 must ordinarily be confined to what the High Court could or would have done under Art. 226."

In our view, the material that was placed before the Tribunal was not considered or discussed and that there was, as such, no adjudication by the Tribunal. The whole award of the Tribunal, in our view, is liable to be set aside on the ground of non- application of mind by the Tribunal to the material on record. In the first place, the Tribunal has no jurisdiction to entertain and decide a dispute which covered within its fold "persons who are not workmen". That the material on record before the Tribunal as regards the comparable concerns was admittedly "sketchy" and incomplete as observed by the learned single Judge of the High Court and that the award based on such material could not have been sustained.

In the instant case, the employer and the employees by their conduct in concluding settlements in the past could not create for, or confer upon, an adjudicating authority jurisdiction, where none existed, in respect of employees to whom the provisions of the Act are not applicable. This apart, the employer had not waived his right to raise the issue of the status of the employees under the Act in any of these settlements. The employer cannot held to have waived his rights regarding the issue of the status of the employees under the Act in the absence of any of the settlements concluded by them with their employees. The High Court has come to the conclusion that there are grave and fundamental errors, including the errors in assessing financial capacity, burden etc. in the award of the Tribunal. In the instant case, the Tribunal did not have the jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non-workmen. The Division Bench has erred in holding that there is a community of interest between the workmen and the non-workmen and holding further that the workmen can raise a dispute regarding the service conditions of non-workmen. This reasoning, in the absence of any pleading regarding the community of interest, is fallacious.

It was not open to the High Court, in exercise of writ jurisdiction, to modify an award which, at its very basis, was flawed as it lacked proper application of the fundamentals of wage adjudication. The Tribunal, in this case, has exceeded its jurisdiction. It has embarked upon an enquiry against non-workmen and, therefore, the decision of the Tribunal is a non-compliance with the provisions of the Act. Therefore, the determination by a Tribunal on a question other than the one which Statute directs it to decide, would be a decision not under the provisions of the Act and, therefore, in exercise of its jurisdiction is liable to be set aside.

It is proved by the appellant that the decision of the Tribunal is wrong and without jurisdiction or in excess of it. This Court has jurisdiction to render justice to the wronged party, namely, the appellant and set aside the same. It is showed before us that the decision of the Tribunal is not fully supported by evidence. We, therefore, hold that this Court has jurisdiction and power to interfere with the award of the Tribunal. The phrase "any person" in Section 2(k) and Section 18 of the Act does not include "non-workmen".

Section 2(k) and Section 18 are reproduced hereunder:

> "(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any persons"

18. Persons on whom settlements and awards are binding.- (1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

(2) Subject to the provisions of sub-section (3), an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.

(3) A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a case where a notification has been issued under sub-section (3A) of section 10A or an award of a Labour Court, Tribunalor National Tribunal which has become enforceable shall be binding on-

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

According to Mr. Ashok Desai, learned senior counsel, the phrase "any person"

> in Section 2(k) and Section 18 of the Act includes a non-workman who was a workman but retired, resigned or otherwise left the services of the employer during the pendency of the dispute under reference. It also includes a person who was not a workman when the dispute was referred for adjudication but joined the services of the employer as a workman during the pendency of the proceedings. In this regard, it may be pointed out that the contention of the respondent-Association that the phrase "any person"

employed in Section 2(k) and Section 18 covers non-workmen was not accepted in Narendra Kumar Sen case reported in AIR 1953 Bombay 325, the Dimakuchi Tea Estate case (supra) reported in (1958) SCR 1156, the Reserve Bank of India case reported in (1996) 1 SCR 25 and in the Greaves Cotton Company Limited case reported in (1971) 2 SCC 658. This Court in those cases has also rejected the contention regarding 'community of interest' between workmen and non-workmen. The learned single Judge, by misconstruing the meaning of the ratio in the judgments above cited, arrived at his conclusion vide para 22 of his judgment which read as under:

> "22. It would, therefore, appear that the consistent view of the Supreme Court is that the non-workmen as well as workmen can raise a dispute in respect of matters affecting their employment, service conditions etc., where they have a community of interest, provided they are direct and not remote."

The fact is that in each and every case above cited, the contention that workmen can raise a dispute in respect of the non-workmen was rejected by the Court. This issue is, therefore, answered in

favour of the Company.

The findings of the Court below that there is 'community of interest' between the workmen and the non-workmen is based on misconstruing of evidence and disregarding of vital facts.

In this regard, learned senior counsel for the appellant brought to our notice the evidence of Mr. Krishnan Nair that the employees are interested in promotions because of financial benefits, a universal fact, has been misconstrued by the Courts below as proof of community of interest between the workmen and the non-workmen. The evidence of Mr. Krishnan Nair reads as follows:-

> "57. It is true that the employees are promoted from the lower grade to upper grade as the case may be, on merits. It is true that once a workman is not always a workman. On promotion he comes out of that category. I agree that wages scales of different grades of M.R.W. are in hierarchy. But I deny there being any cooperation. I cannot say whether the employees in the lower grade have an interest in the promotional grade because of financial benefits. I say that it is not true to say that they are interested. Now the witness says that the employees will be naturally interested in promotional post because of the financial benefits and for the reasons known to them."

The learned single Judge vide para 22 of his judgment arrived at the conclusion as under:

> "The Company's witness Mr. Nayar has also admitted in his evidence existence of community of interest between them. Under the circumstances the tribunal has rightly come to the conclusion that the respondents have a substantial interest in the subject matter of the dispute and there is a community of interest between the respondents and those whose case they have espoused."

After quoting verbatim the relevant part of the evidence of Mr. Krishnan Nair as above, the counsel for the appellant-Company made the following submissions before the Division Bench (pages 96-97 Volume-II of the Company's appeal before this Court).

> "It is submitted that the Tribunal has nowhere cited the above statement of the Appellant Company's witness in support of its conclusions. It is respectfully submitted that the Learned Single Judge grievously erred in re- appraising the evidence of the Company's witness on this vital issue. It is further submitted that the witness had, by his statement quoted above, stated only that the employees are interested in promotions because of the financial benefits and that the said statement by the witness, while stating the obvious which is indeed a universal fact, in no way amounted to admission of any community of interest between employees in workmen and non-workmen categories. It is respectfully submitted, to illustrate the point, that a Typist may become interest in, and may rightfully aspire form promotion at some indeterminate point in his future career to the post of Managing Director but such interest does not establish a community of interest between Typists and the

> Managing Director. It is submitted that no material whatsoever was placed by the Respondent Association and that no evidence was on record either before the Tribunal or before the Learned Single Judge to show community of interest between the two categories of employees. The Learned Single Judge erred in picking up an isolated statement made by the Company's witness, in total disregard of the central thrust of the whole body of his evidence and in holding that the Company's witness admitted, in his evidence, existence of such community of interest between the workmen and the non-workmen, wholly misconstruing the meaning of the evidence on a vital issue which goes to the root of the dispute and on such misinterpretation, the Learned Single Judge has built up the ratio of this Judgement on the issue of the status of the employees under the Act and the jurisdiction of the Tribunal."

We have perused the Division Bench judgment on this aspect. The Division Bench has not even adverted to, much less dealt with, the above submissions while confirming the learned single Judge's ruling on this issue. The Division Bench has also ignored the cumulative effect of the Settlements of 1989 and 1995 which were concluded between the parties without prejudice to their respective rights and contentions on the status of the employees under the Act.

It is pertinent to refer to the Settlement of 1995 in this context. Clause 1 of the Settlement of 1995 concluded during the proceedings in the reference when the issue was already before the Tribunal, stated:

> "Clause 1 of this Settlement reads : "It is the Company's contention that a majority of the staff, on the one hand and the officers on the other are not 'workmen' under Section 2(s) of The Industrial Disputes Act, 1947 and are also not covered by the provisions of The Payment of Bonus Act, 1965. These contentions of the Company are not, however, accepted by the Association. In the circumstances, it is agreed that this Settlement shall not be cited by either party as evidence of waiver of the contentions of the other and that both the parties shall continue to be at liberty to raise their respective contentions on these issues on all fora."

It is thus seen that the High Court has not only disregarded of vital facts but also misconstrued the evidence of the witness of the Company. This issue is answered accordingly in favour of the Management.

The non-workmen cannot be given the status and protection available to the workmen under the Act.

The above submission of learned counsel for the appellant is well founded under the Act. Disputes can be raised only by the workmen with the employer. The workmen, however, can in appropriate cases espouse the cause of non-workmen if there is community of interest between the workmen and the non-workmen. In the instant case, it is an admitted fact that the community of interest or estoppel has never been pleaded and the findings rendered by the High Court on this issue is in the absence of pleadings. If the non-workmen are given the status and protection available to the

workmen, it would men that the entire machinery and procedure of the Act would apply to the non-workmen with regard to their employment/non-employment, the terms of employment, the conditions of labour etc. This would cast on the appellant-Company the onerous burden of compliance with the provisions of the Act in respect of the non- workmen. In our view, the situation is not envisaged by the Act which is solely designed to protect the interests of the workmen as defined in Section 2(s) of the Act.

Estimation/Computation of the total wage packet, which is a vital task in wage adjudication, has not been done by any of the Courts below.

It is argued that individual items in the wage packets can, and often do, vary very considerably among comparable concerns. Hence, estimation/computation of the total wage packets for different categories of employees and comparison of the total wage packets among comparable concerns is essential. As rightly pointed out by learned counsel for the appellant that none of the Courts below have admitted to estimate/compute the total wage packets resulting from their awards/judgments for any of the categories of employees. This is a fatal omission in the award/judgment. There has been no acceptable reply from counsel for the respondent-Association on this issue.

The basic pay and increment structure, found to be higher than in comparable concerns by the Learned Single Judge, remain unchanged by the Learned Single Judge himself or by the Division Bench. Along with the high rate of Dearness Allowance granted by the Order of the Division Bench, these have cascading effect on other items or emoluments like House Rent Allowance which is already high at 12.5% of Basic pay plus DA and Leave Travel Allowance which is fixed at one month's basic pay the amounts specified in the Award.

The Tribunal had granted in toto the demands relating to scales of basic pay and increment structure except the demand for the merger of grades 12 and 11 into grade

09. The result has been a disproportionate increase in the basic pay and annual increments. Neither the Learned Single Judge nor the Division Bench attempted to remedy the situation. There is no discussion or analysis in support of the decision to grant the demand in respect of scales of basic pay in toto, as has been done by the Courts below.

The Learned Single Judge has observed vide paragraph 38 of his judgment, which is at page 167 of Vol.II of the Company's Appeal, that "the revised basic wage and the increment structure is comparatively higher than the comparable concerns" but has left the situation unchanged. The Division Bench, too, has left it unremedied. While doing so, the Courts below totally ignored the cascading effect of the high basic wage and dearness allowance not only on Provident Fund, Gratuity and Superannuation but on other items of emoluments viz., one component of DA which is related to basic pay, House Rent Allowance and Leave Travel Allowance. Annexure P-7 at pages 132 to 136 of Vol. I of the present Appeal contain comparative data on Total Wage Packet, Basic plus DA, DA, HRA and LTA in the Appellant Company under the Order of the Division Bench vis-`-vis the seven other companies adopted for comparison. The data show that the Appellant Company, despite its poor financial capacity and performance, now ranks among the eight companies (seven plus the

Appellant Company) No.1 in respect of Total Wage Packet, No.4 in respect of Basic plus DA, No.6 in respect of DA, No.1 in respect of House Rent Allowance (HRA) and No.1 in respect of Leave Travel Allowance. The rate of variable DA now stands raised from Rs.1.72 to Rs.3.00 for every change of 5 points in the Consumer Price Index which is disproportionately high but has been left unchanged by the Division Bench.

The 'CHARTS ON INCREASES IN EMOLUMENTS GRANTED BY THE COURTS BELOW' tendered by the Appellant Company as directed by this Court during the hearing of the present Appeal contain the relevant particulars of the demands in dispute and the Orders by the Courts below thereon.

The time-tested system and practice of allowances linked to grades has been changed by the Award and the change, which is drastic, continues under the impugned Order of the Division Bench.

For decades in the pre-Award period, the allowances like House Rent Allowance, Leave Travel Allowance etc. were higher for the higher grades and there were thus financial benefits because of promotions when the employees were promoted from the lower to the higher grades and entrusted with higher responsibilities. Under the Award of the Tribunal, the allowances are linked to basic pay and are de- linked from the grades, a situation that has been left without any modification by the learned single Judge as well as by the Division Bench. There is no application of mind or any discussion or analysis or any reason adduced in support, of the abovementioned change in the time-tested system and practice anywhere in the Award/Judgements of the Courts below. As a result, financial benefits arising from promotions are rendered nugatory - in fact, the Award has virtually abolished the financial benefits on account of promotions."

The financial burden of the award passed by the Tribunal and the High Court. Lengthy submissions were made by counsel for both sides. Counsel for the appellant invited our attention to the observation made by the learned single Judge and of the Division Bench. The learned single Judge observed vide para 29 of his judgment as under:

> "I may, however, hasten to add that Mr. Rele is right in criticising the tribunal for not considering the total financial burden which is likely to be borne by the company as a result of the award passed by the tribunal. Even according to the association the total burden on account of the award comes to Rs. 35.30 crores and the net burden for the year 1999 for the monthly rated employees and daily rated workmen at Kurla would be around Rs.10 crores. The tribunal has obviously committed an error in holding that the yearly burden on account of the award would be within the range of 3.3 crores to 3.7 crores and works out to mere 6 to 7 percent of the total profits of the company. As a matter of fact the burden on account of the present award itself works out to about 25% of the gross profit and this fact will have to be borne in mind while fixing the wage structure and the concerned employees.
>
> The Learned Single Judge has not however adverted to the above position anywhere else in his Judgement later. Further, he has not estimated the burden that would

result from his own judgement.

In paragraph 22 of its Judgement, which is at pages 51-52 of Vol.I of the present appeal, the Division Bench observed inter alia:

"We would be revisiting the question of financial burden at a later stage of the judgment once again in considering the appropriate relief, if any, that should be granted in these proceedings."

Later in the Judgement however, vide paragraph 28 thereof which is on pages 76 to 78 of Vol.I of the present Appeal, the Division Bench, after reproducing some of the submissions made by both the parties, observed:

"We have duly taken into account the rival submissions and have carefully considered the figures which have been submitted before us by both the sides. The Court will have also necessarily to have regard to the impact of the financial performance of the Company over a period of time. This includes the financial difficulties faced by the Company in 1998-99. Having regard to the financial burden under the award of the Tribunal as modified by us we are of the considered view that the award of the Tribunal as modified should be made operative not from 17th February, 1993 as directed by Industrial Tribunal but, with effect from 1st January 1996."

The Division Bench failed to recognise that the relief granted as above is only a one-time relief and that it does not reduce the prospective burden of the modified Award. But for the observation that the rival submissions have been duly taken into account and carefully considered, there is no discussion or analysis of the submissions by the parties on the hotly contested issue of the financial burden of the Award vis-`-vis the Company's financial capacity.

It is further submitted that the reference to gross burden and net burden after taking into account the tax payable by the Company in the Award/Judgement of the Courts below are not relevant in view of the subsequent developments as the Appellant Company has not been paying any tax since the year 2000-2001.

The Division Bench, like the Learned Single Judge, has in fact nowhere estimated the financial burden that would result from its own judgement. This is an omission that is fatal to the legality of the Order impugned in the present Appeal.

The Industry-cum-region principle has not been followed nor have the comparisons been made in accordance with the well-settled law.

The Companies adopted for comparison are not comparable in terms of the nature of the business, sales turnover, employee strength, profits and other relevant parameters. The comparisons are also incorrect, as these have been made as between categories of employees, which are not comparable.

The Learned Single Judge, vide paragraph 31 of his Judgement which is at page 159 of Vol.II of the Company's Appeal, has observed:

> "The data furnished by the association in respect of the comparable concerns is also not complete in many respects. It seems that the data furnished is mainly in respect of the posts of peons, clerks, telephone operators, watchmen, supervisors etc. and it seems that the data concerning the staff and officers working in grade 00 to grade 5 is rather incomplete and sketchy. The claim of the workers will have to be examined keeping in mind these aspects of the matter."

The Learned Single Judge, however, has not adverted to these aspects of the matter anywhere else in his Judgment later. The Division Bench, too, has not remedied the flaw in this aspect in its own Judgement.

Assessment of the appellant-Company's financial capacity by the courts below is riddled with serious errors:

> The Tribunal on this issue relied entirely on the data submitted by the Association in respect of the Company's financial capacity. The award dealt with this topic in two short paragraphs, namely, paras 63 and 64 thereof.
>
> "63. I have perused the Balance Sheets and the charts submitted by the Union and I am of the opinion that the information tabulated by the Union is satisfactory and correct and the computation of the gross profits is on well laid down principles of various adjudicating authorities.
>
> 64. It is the contention of the Union that the financial position of the Company is very sound. It is the Company's contention that the financial position is not very sound. It means that the financial condition of the Company is quite good."

In arriving at its conclusion as above, the Tribunal ignored the serious errors pointed out by the Company which may be seen on page 159 of Volume-III of the present appeal in the data submitted by the Association. The Tribunal considered average gross profit at Rs. 56.25 crores for the years 1991-92 to 1996-97, as against Rs. 34.22 crores as computed corrected by the Company. Learned single Judge vide para 28 of his judgment stated, inter alia, as under:

> "...It is true that the company has been registering losses in the last year but that may be particularly due to the factor of recession which has affected the industries in general. If we examine the material on record it is seen that the company's business is consistently growing."

Again the learned single Judge vide para 29 of his judgment went on to observe:

> "In the light of the material placed before me it is not possible to agree with Mr. Rele that the company's financial position is not sound and the company is doing badly."

The Division Bench adopted, vide para 22 of its judgment, the gross profit for six years from 1991-92 to 1996-97 at Rs. 250.418 crores and average profit per year at Rs. 41.736 crores based on Krishnan Nair's affidavit dated 04.06.1999. In doing so, the Division Bench ignored the fact that the said data on profits included capital profits i.e., profits from sale of the shares in other companies owned by the Appellant Company and from sale of land etc. which had not accrued from the Company's normal business operations. The Division Bench in fact had before it the data on profits excluding capital profits, which the Tribunal also had before it, but failed to take these data into account. The relevant data are available vide Annexure P-4 on page 121 of Vol.I of the present Appeal. As may be seen from the said data, the total gross profit for the years from 1991-92 to 1996-97 was only Rs.205.32 crores as computed corrected by the Company after excluding capital profits. The Division Bench also had before it relevant data for the period upto and including the year 1999-2000. Despite the declining trends in the financial performance of the Company as evident from the data, the Division Bench concluded, inter alia, vide paragraphs 19.8 and 19.9 of its Judgement, which are on pages 37-39 of Vol.I of the present Appeal, as under:

> "In the present case, these economic and financial indicators reflective of the performance and financial health of the employer establish beyond doubt that this is a company which is financially sound."

The Division Bench further observed:

> "The figures content in the annual accounts relating to the share capital, reserves and surplus, fixed asses, investments, networth and profits among other economic indicators are, in my view sufficient to indicate the financial health and standing of the Company"

In any event, the Appellant Company became a 'Potentially Sick Industrial Company' under Section 23 of the Sick Industrial Companies (Special Provisions) Act, 1985.

The fact that the Courts below were in grave error in their conclusions, which were arrived at by ignoring vital facts and submissions placed before them by the Appellant Company, is clear from the subsequent developments which are pointed out briefly.

Subsequent developments relating to the financial position of the appellant- Company need to be kept in mind.

On this issue also arguments were advanced by both the learned senior counsel at length. Mr. Ashok Desai, learned senior counsel, heavily relied on the ratio of the judgment in the Ahmedabad Millowners Association case reported in (1966) 1 SCR 382, the trends in respect of the change in the Company's financial capacity and the subsequent developments relating thereto need to be considered by this Court, keeping in mind that the Company has to bear the burden of the modified

award for several years to come. The judgment in the Ahmedabad Mill Owners Association case observes, inter alia, as under:

> "The problem of constructing a wage-structure must be tackled on the basis that such wage-structure should not be changed from time to time. It is a long-range plan; and so, in dealing with this problem, the financial position of the employer must be carefully examined. What has been the progress of the industry in question; what are the prospects of the industry in future; has the industry been making profits; and if yes, what is the extent of profits; what is the nature of demand which the industry expects to secure; what would be the extent of the burden and its gradual increase which the employer may have to face? These and similar considerations have to be carefully weighed before a proper wage-structure can be reasonably constructed by industrial adjudication."

According to Mr. Desai if the Company succeeds in its appeal, it will have to recover Rs. 18 crores already paid to the employees including both workmen and non- workmen and if it does not, it will have to bear the burden of having to disburse a further sum of Rs.15.45 crores by way of balance of arrears for the period since 01.01.1996.

Opposing Mr. Singhvi, learned senior counsel for the respondent-Association, contended that the High Court and this Court while exercising powers under Article 226 and 32 of the Constitution for issuance of any writ against an award of the Industrial Tribunal will normally not take into consideration facts arising subsequent to the date of the award. Arguing further, he would submit that a writ will be issued to set aside an award of the Industrial Tribunal on the material placed on record before the Tribunal and under sub-section 3 of Section 19 of the Act, it is, inter alia, provided that an award shall, subject to the provision of that section remain in operation for a period of one year from the date on which the award becomes enforceable under Section 17A. Under sub-section 6 of Section 19, it is, inter alia, provided that notwithstanding the expiry of the period of operation under sub-section 3, the award shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award. The above provisions show that an award remains binding on the parties firstly for a period of one year from the date of its publication and secondly until a period of two months has elapsed from the date on which the notice of termination is given by any party bound by the award, and no demand can be raised pertaining to that award during that period.

It was, therefore, submitted by Mr. Singhvi that if a party to an award can raise fresh dispute subsequent to the award and to take into account events subsequent to that award it will harm the interest of the workmen and that the superior court exercising its power will not entertain such a plea. We are unable to countenance the said submission. In the instant case, the total accumulated loss suffered by the appellant- Company as on 31.03.2003 is Rs. 225 crores. The appellant-Company is now covered by Section 23 of the Sick Industrial Companies (Special Provisions) Act, 1985 and has become a 'Potentially Sick Industrial Company' as defined thereunder. The Company has suffered a further loss of Rs. 64.22 crores according to the audited results for the first half of the

year 2003-04. If the estimated loss for the third quarter of 2003-04 is also taken into account, the net-worth of the Company stands totally eroded.

Opposing this submission Mr. Singhvi submitted subsequent events are not at all relevant for the purpose of assailing the award, but may be relevant if and when demands are made either by the workmen or the Company for subsequent period and a reference in that regard is given by appropriate government. He, therefore, submitted that the application for bringing on record the additional documents should be rejected. Mr Singhvi further submitted that the compilation filed by the Management "financial position of the appellant-Company" require a lot of explanation and comments for which evidence will have to be led. Without prejudice to the above submission, Mr. Singhvi drew our attention to the auditor's notes appended to the balance sheet relating to loans and advances etc. read with item 3 (vi) of the report of the auditor to the members. According to him, the balance-sheet clearly shows that there are no operating losses but the losses are mainly on account of the interest on borrowing for huge investments made in associate/subsidiary/group companies and for the expansion of the steel making capacity by setting up a new project at Hospet (where alone about Rs. 600 crores have been invested) etc. and that borrowings were mainly used for such investments and for loans and advances to associate, subsidiary and group companies which have not been recovered.

Concluding his arguments, Mr. Ashok Desai submitted that the award, after its infirmities are cured, should be made applicable only to the workmen and not to the non-workmen. We see merit and substance in the above submission. We, therefore, set aside the award and of the judgments of the single Judge and of the Division Bench of the High Court and hold that the award should apply only to the workmen and that the workmen should not, in the facts and circumstances of the case, be permitted to raise demands/disputes on behalf of the non-workmen. We place on record the undertaking given by the appellant-Company before us ensuring that the total wage packets of the non-workmen to whom the award further modified as above will not be applicable, are not lower than the total wage packets available to the workmen under the said award.

The appellant-Management has a prima facie case on merits and the balance of convenience is entirely in their favour. We also hold that the employer and the employees by their conduct in concluding settlements in the past cannot create or confer upon an adjudicating authority jurisdiction where none existed in respect of employees to whom the provisions of the Act are not applicable. In the instant case, the employer had admittedly not waived their right to issue the status of the employees under the Act in any of the said settlements. The High Court, both the learned single Judge and of the Division Bench had stepped into the shoes of the adjudicating authority and virtually modified/altered the award in vital respects like basic linked variable D.A., D.A. fixed in forms of percentages of basic pay, service increments, gratuity and effective dates for increase in emoluments.

The Industrial Tribunal did not have jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non-workmen. The learned single Judge and the Division Bench of the High Court failed to appreciate that parties cannot by their conduct create or confer jurisdiction on an adjudicating authority when no such jurisdiction exists. We have already noticed

that the Division Bench has erred in holding that there is community of interest between the workmen and the non-workmen and holding further that the workmen could raise a dispute regarding the service conditions of non-workmen.

The High Court further failed to appreciate that in order to secure revision of their own grades or other items of emoluments, it was not necessary for employees who are 'workmen' under the Act to agitate also for the revision of the emoluments of those who are not 'workmen', and that as such the 'workmen' in the present, have no direct or substantial interest in the revision of emoluments of employees who are not 'workmen', nor could the workmen be held to be vitally interested in the terms of employment of the non-workmen.

The High Court also failed to appreciate that 'workmen' as well as non-workmen being in the same grade did not imply that the distinction between the two categories ceased to exist, or that they belonged to the same class.

The Division Bench has further erred in relying on the various settlements concluded between the parties in the past regarding the service conditions of the employees including the settlement of 1974 relating to welfare scheme. Both the Division Bench and the learned single Judge failed to appreciate that none of the said settlements contained any provision, or even a whisper thereof, of any waiver by the appellant-Company of its rights with regard to the status of the employees under the Act.

During the pendency of the proceedings in this Court, supplementary affidavit was filed by the Vice President, Finance of the appellant-Company bringing to this Court's notice certain crucial events that have occurred subsequent to the admission of the appeal, which have a vital bearing on the case. It is stated therein that the appellant-Company is in dire financial straits. The Company has already placed on record financial difficulties which it has been encountering. The present affidavit was placed on record with the updated situation as at present. The Company has suffered a loss before tax of about Rs. 210 crores in the financial year 2002-03 which was reduced to Rs. 157 crores after considering waivers and reduction in interest rate aggregating to Rs. 53 crores on the basis of concessions given by the banks and financial institutions under a restructuring package. The loss as stated above follows a loss before tax of Rs. 111 crores in the previous financial year i.e. year 2001-02 and that the losses as above are without taking into account the arrears payable to the employees amounting to Rs. 15.45 crores. The appellant being suffered a further loss before tax at Rs. 40 crores in the first quarter of the current year i.e. year 2003-04 as per the unaudited financial results and the accumulated loss is Rs. 269 crores as on 30.06.2003 leaving a net worth of Rs. 28 crores. Along with the affidavit annexures were filed for the year ended 31.03.2003. According to the learned senior counsel, the Company has now become a potentially sick industrial Company as defined by The Sick Industrial Companies (Special Provisions) Act, 1985 since there has been an erosion of more than 50% in the Company's peak net worth in the four preceding years on the basis of the audited financial results for the financial year 2002-03. The Appellant Company is required under the provisions of Section 23 of the said Act to report the fact of such erosion to the Board for Industrial and Financial Reconstruction within sixty days from the date of finalisation of the duly audited accounts of the Company for the financial year 2002-03 and also to take further actions

specified in the said provisions. The appellant-Company is now in the process of submitting the necessary report to the Board for Industrial and Financial Reconstruction as required under the said Act. On account of adverse market conditions and unviability of the business, the appellant-Company was compelled to close down permanently its Machine Tools Division at Ballabgarh in Haryana with effect from 18.12.2002. Several other details in regard to the sickness of the company has also been furnished. Since we are remitting the matter to the Industrial Tribunal, it is for the appellant-Company to place the additional materials before the said Tribunal for its adjudication. During the pendency of the proceedings before the High Court and of this Court, certain directions were given in regard to the disbursement of certain amounts. The amounts already paid will be adjusted towards future payments after fresh adjudication.

In the circumstances of the case, we are of the opinion it is proper to remit the matter back to the Industrial Tribunal for adjudication according to law since there are grave and fundamental errors including errors in assessing financial capacity burden etc. in the award of the Tribunal.

The Industrial Tribunal is directed to adjudicate the claim of the workmen alone within six months from the date of receipt of this judgment.

In the result, Civil Appeal No. 5601 of 2001 filed by Mukand Ltd. is allowed and Civil Appeal Nos. 7340-7341 of 2001 filed by Mukand Staff and Officers Association are dismissed. No costs.