Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PEITTION NO.89 OF 2024

The Madgaum Urban Co-op. Bank
Ltd., 'Varsha", Near Cine Vishant,
Aquem, Margao, Goa,
Through its Liquidator, Mr S.V. Naik,
63 years of age, Having office
at the Madgaum Urban Co-op. Bank
Ltd. 'Varsha", Near Cine Vishant,
Aquem, Margao, Goa. … Petitioner

Versus

1) The Under Secretary (Labour),
Labour Department, Government of Goa,
Secretariat, Porvorim, Bardez, Goa

2) Shripad Pinge,
BF-4, BS-4, C.D. Patanga Co-op.
Housing Society, Aquem-Alto,
Margao, Goa. ... Respondents

Shri Shivan Desai, with Ms T. Menezes, *Advocates for the Petitioner.*

Shri P. Faldesai, Additional Govt. *Advocate for Respondent No. 1.*

Shri Shivraj Gaonkar, with Mr P. Sirvoicar, *Advocates for Respondent No.2.*

CORAM : M.S. SONAK &
VALMIKI MENEZES, JJ.
RESERVED ON : 06/03/2024
PRONOUNCED ON : 22/04/2024

ORDER *: (Per Valmiki Menezes, J.)*

1. By this Petition, invoking this Court's jurisdiction under Article 226 of the Constitution of India, the Petitioner, a Co-operative Bank, seeks to challenge an order dated 11/02/2020 bearing No.28/4/2020-LAV/124 issued by the Government of Goa, Labour Department, the Appropriate Government under Section 10 of the Industrial Disputes Act, 1947 (ID Act), referring an industrial dispute raised by Respondent No.3 to the Industrial Tribunal of Goa, for adjudication of the same.

The dispute referred to the Tribunal, made at the behest of Respondent No.2, who claims to be a Clerk and a "*workman*" of the Petitioner, is detailed in the Schedule to the impugned order of reference, which is reproduced hereunder:

(1) Whether Shri Shripad Pinge, Junior Clerk, could be construed as workman as defined under section 2(s) of the Industrial Disputes Act, 1947 (Central Act 14 of 1947)?

(2) If answer to the issue No.(1) above, is in affirmative, then whether the action of the management of the Madgaum Urban Co-operative Bank limited, Head Office at Varsha, Aquem-Alto, Margao, Goa, in dismissing Shri Shripad Pinge, with effect from 07/12/2012, is legal and justified?

(3) If answer to issue No.(2) above is in negative then to what relief the workman is entitled to ?

2. The Petitioner also impugns two orders passed by the Industrial Tribunal during the course of the hearing of the reference bearing No.IT/4/2020, the first dated 30/11/2022 and the second dated 7/8/2023; by these orders, the Industrial Tribunal has refused to treat a recast issue framed by it as a preliminary issue. The recast issue is reproduced below for ready reference:

> **2.a.i.1.** Whether the Party II proves that the present reference is not maintainable in view of the findings given in the reference No. IT/59/2003 which operates as res judicate?

3. With the consent of the parties and their Advocates, the matter was finally heard at the stage of admission. We have heard learned Shri Shivan Desai with Ms T. Menezes for the Petitioner, Mr P. Faldessai, Addl. Govt. Advocate for Respondent No.1 and Shri Shivraj Gaonkar, with Shri P. Sirvoicar for Respondent No.2.

4. The facts as stated in the Petition and which may be culled out from the record before us, and which has led to the filing of this Petition, are as under :

(A) The Petitioner claims that Respondent No.2 was appointed at its Margao main branch as a Senior Clerk way back in 1978. On a dispute

being raised by the Union of Respondent No.2 and several other persons claiming to be workmen, raising a Charter of Demands for an increase in wages, by an order of reference dated 26/08/2003 under Section 10 of the ID Act, this dispute was referred for adjudication to the Industrial Tribunal, which ultimately passed an Award on 29/01/2020. In this Award, issue No.2A, as framed by the Tribunal, was whether the employer proved that eight out of twenty members of the Union (including Respondent No.2) were not "*workmen*" as defined under Section 2(s) of the ID Act and therefore, the Tribunal had no jurisdiction to decide the dispute. Issue No.2A was answered against Respondent No.2 holding that he was not a workman.

(B) On 14/10/2006, the Petitioner issued a show cause notice to Respondent No.2 alleging therein that he had indulged in acts of fraud and dishonestly connected with sanction and disbursement of three loans; a formal charge-sheet was served on Respondent No.2 on 21/02/2007 for these acts of misconduct, which, after an inquiry was held on the same, the Respondent No.2 was dismissed from service on 07/12/2012. The order of termination was challenged before the Registrar of Co-operative Societies under the Goa Co-operative Societies Act in 2016, seeking a reference of the dispute for adjudication. The Registrar of Co-operative Societies rejected the dispute, holding that such a challenge could not be entertained in terms of Section 83 of the Goa Co-operative Societies Act, 2001. The order was challenged all the way to the Supreme Court, where

the Special Leave Petition of Respondent No.2 was dismissed on 14/02/2018, observing therein that any finding recorded in the impugned order shall not come in the way of Respondent No.2 questioning the same in an independent proceedings, in accordance with law.

(C) Thereafter, Respondent No.2 raised a demand for reinstatement in service of the Petitioner which, was ultimately referred by the impugned order of reference on 11/02/2020 by the Government of Goa for adjudication to the Industrial Tribunal. On notice being issued by the Tribunal to the parties, Respondent No.2 filed his Claim Statement on 7/8/2020, claiming therein that at the time of issuance of the charge-sheet, the nature of work assigned to him was that of an accountant, and he was predominantly carrying out duties which were manual and clerical in nature; he claimed that he was not performing any managerial, administrative or supervisory duties. Respondent No.2 has detailed the nature of his duties in paragraphs 4 to 9 of the Claim Statement.

The Petitioner filed its Written Statement before the Tribunal on 06/01/2021, wherein it raised a preliminary objection to the maintainability of the reference, stating that the same was bad in law, with non-application of mind and without considering the written and documentary evidence, including the earlier Award passed by the Industrial Tribunal. A perusal of the entire Written Statement, however, discloses that there is no denial of the contents

of paragraphs 4 to 9 of the Claim Statement, which referred to the duties carried out by Respondent No.2 at the time the charge-sheet was issued to him, and by which, he claimed to be a workman.

(D) On completion of pleadings, the Tribunal framed issues on 08/02/2021, the first being whether Respondent No.2 proves that he was a "*workman*" as defined under Section 2(s) of the ID Act and the second being whether he proves that the action of dismissal *w.e.f.* 07/12/2012 was illegal and unjustified. An application for re-framing of issues was filed by the Petitioner on 08/07/2021, and by order dated 11/11/2021, the same was partly allowed, and the first issue was recast in the manner quoted in para 2 above. In this order, at para 10 thereof, the Tribunal specifically recorded that it would not try or treat this issue as a preliminary issue.

(E) Without challenging this order, the Petitioner filed yet another application dated 20/09/2022, seeking trial of the recast first issue as a preliminary issue, which application was rejected by the Tribunal on 30/11/2022, which is impugned herein. Yet another application came to be filed by the Petitioner on 01/12/2022 to set aside the order passed on 30/11/2022, which was also rejected on 07/08/2023, holding that the Industrial Tribunal was *functus officio* and had no power to recall its earlier order. This order is also impugned before us in the present Petition filed on 05/01/2024.

SUBMISSIONS :

5. Shri Shivan Desai, learned Advocate for the Petitioner, contends that the order of reference was made without applying its mind to the Award of the Industrial Tribunal, which has in terms, decided issue No.2A therein, which was the question as to whether the Respondent No.2 was a workman, covered by the provisions of the ID Act, and once this issue was finally decided, the Appropriate Government, ignoring a relevant fact for his decision, has mechanically made a reference of the dispute raised by the Respondent No.2, to the Tribunal. He, therefore, submits that the order of reference has been passed without any application of mind and ignoring relevant factors, and is, thus, arbitrary. Shri Desai further submits that the dispute challenging the order of termination dated 07/12/2012 was raised before the Conciliation Officer and Reference Authority only in the year 2020, thereby implying that the Respondent No.2 had accepted that he was not a workman, covered by the provision of the ID Act, having raised a dispute under the Co-operative Societies Act only in the year 2016. Such a delay was clearly due to the fact that raising of a dispute on the claim of being a workman was an afterthought, which fact has not been considered by the Government before taking a decision of making a reference of the same to the Tribunal.

The Petitioner further submitted that the order of reference was for the decision of an issue which was decided and thus would be hit by the doctrine of *res judicata* inasmuch as it sought to revive the issue which had attained finality, the Industrial Tribunal, in its Award having held that the

Respondent No.2 was not a workman. He further submits that this being a position, assuming that this Court does not set aside the order of reference, it would be fair and proper for this Court to set aside orders of the Industrial Tribunal dated 30/11/2022 and 07/08/2023 by which the Tribunal refused to treat recast issue No.1 as a preliminary issue and decide the same; it was submitted that this issue goes to the root of the jurisdiction of the Industrial Tribunal to proceed and decide merits of the reference, since if the Respondent No.2 were held not to be a "*workman*", the reference would fail. Shri Desai relies upon the following Judgments to substantial his arguments :

(i) *Workmen of the Straw Board Manufacturing Co. Ltd. vs. M/s. Straw Board Manufacturing Co. Ltd.* , reported in (1974) 4 SCC 681;

(ii) *D.P. Maheshwari vs. Delhi Admn.,* reported in (1983) 4 SCC 293;

(iii) *Sagarmal vs. Distt. Sahkari Kendriya Bank Ltd,* reported in (1997) 9 SCC 354;

(iv) *Taluka Panchayat, Visnagar vs. Ichhaben Shivram Dave,* reported in 1999 SCC (L&S) 1083;

(v) *National Engg. Industries Ltd., vs. State of Rajasthan*, reported in (2000) 1 SCC 371;

(vi) *Nedungadi Bank Ltd. vs. Madhavankutty,* reported in (2000) 2 SCC 455;

(vii) *Prabhakar vs. Sericulture Deptt.*, reported in (2015) 15 SCC 1;

(viii) *Fertilisers & Chemicals Travancore Ltd. vs. Employees Assn.*, reported in (2019) 11 SCC 323; and

(ix) *Rajendra Tribhuvandas Navare vs. Solapur Municipal Corporation and ors.*, reported in 2004 SCC OnLine Bombay 155;

6. Shri Shivraj Gaonkar, learned Advocate for Respondent No.2 submits that the Petition is barred by delay and laches as the order of reference was made way back on 10/02/2020, more than four years ago. He submits that even after the first Award dated 29/01/2020 was passed, the Petitioner chose not to challenge the order of reference and instead submitted itself to the jurisdiction of the Tribunal by filing its Written Statement on 06/01/2021 and thereafter, participated in the proceedings by seeking recasting of issues on the very question raised in this Petition and inviting adverse orders thereon. He further submits that the decision in the earlier Award on the issue No.2A, holding Respondent No.2 not to be a workman, was in any case, published in the Official Gazette on 27/02/2020 after the order of reference was made, and in any event, the issue relates to, whether the Respondent No.2 answered the description of "workman" as on the date of the Charter of Demands/first order of reference, which was prior to the year 2003, while the present claim relates to whether this Respondent was a workman as on the date of his termination, or when the charge-sheet was issued to him in the year 2007. He further submits that the scope of challenge to an order of reference is

extremely limited, since such an order is essentially an administrative order and the Appropriate Government is not vested with any jurisdiction to assess evidence or the value of documents placed before it, before making such an order.

Mr Gaonkar relies upon the following Judgments to buttress his submissions :

(1) *Workmen of the Straw Board Manufacturing Co. Ltd. vs. M/S Straw Board Manufacturing Co. Ltd*. reported in (1974) 4 SCC;

(2) *Karnataka Power Transmission Corporation Ltd. & Anr. Vs. Amalgamated Electricity Co. Ltd. & Ors*. reported in (2001) SCC 586;

(3) *Voltas Ltd. v. State of Maharashtra & Ors*. reported in 2013 (6)Mh.L.J 57-64;

(4) *D.P. Maheshwari vs. Delhi Admn.,* reported in (1983) 4 SCC 293;

(5) *Malabar Hill Citizen Forum v. Commr Labour & Ors*. reported in (2018) 1 CLR 55; and

(6) *Jamia Masjid v. Sri K. Rudrappa (SD) Thr. LRs*, reported in (2022)9 SCC 225.

Shri Pravin Faldessai appearing for the Appropriate Government supports the order of reference and adopts the submissions made by the

Respondent No.2.

DISCUSSIONS :

7. At the outset, we are unable to accept the submission of the Petitioner that the order of reference could be held to be arbitrary and contrary to the provisions of Section 10 of the ID Act merely because Respondent No.2 raised an industrial dispute in challenge to the order of termination dated 07/12/2012 only in the year 2019; from the record, it was clear that the Respondent No.2, as advised, was pursuing his remedy invoking the provisions of the Goa Co-operative Societies Act, which was ultimately negated on the SLP being dismissed by the Supreme Court only on 14/02/2018. This delay, apart from the fact that it can be explained from the above facts, could, in any case, be considered by the Tribunal whilst passing its Award if it concludes that Respondent No.2 is a workman and for the purpose of deciding either quantum of back wages or compensation. Mere delay, if any, would not be the sole justification to refuse to make an order of reference.

8. In *D.P. Maheshwari* (supra), the Supreme Court, considering the trend adopted by employers before industrial adjudicators of raising preliminary issues and seeking directions from the High Court to hear such issues first before deciding the merits of a reference, has deprecated the practice of Tribunals to hear issues piece-meal and has held that all issues, in normal course, should be held and decided simultaneously to avoid delays in workmen obtaining relief. It has further castigated the practice of

High Court interfering in its jurisdiction under Article 226 of the Constitution of India with the process of the Industrial Tribunal, in stopping proceedings, so that a preliminary issue may be decided by the Tribunal, first. The relevant text in the Judgment of *D. P. Maheshwari* (supra) is quoted here below :

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

Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections journeyings up and down. It is also worth while remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."

9. The Supreme Court *in S.K. Verma vs. Mahesh Chandra*, reported in (1983) 4 SCC 214, in the context of preliminary objections raised by employers to stall adjudication of industrial proceedings on merits, has observed at para 2, as below :

"There appears to be three preliminary objections which have became quite the fashion to be raised by all employers, particularly public sector corporations, whenever an industrial dispute is referred to a tribunal for adjudication. One objection is that there is no industry, a second that there is no industrial dispute and the third that the workman is no workman. It is a pity that when the Central Government, in all solemnity, refers an industrial dispute for adjudication, a public sector corporation which is an instrumentality of the State instead of welcoming a decision by the Tribunal on merits so as to absolve itself of any charge of being a bad employer or of victimisation etc. should attempt to evade decision on merits by raising such objections and never thereby satisfied, carry the matter often times to the High Court and to the Supreme Court, wasting public time and money. We expect public sector corporations to be model employers and model litigants. We do not expect them to attempt to avoid adjudication or to indulge in luxurious litigation and drag: workmen from court to court merely to vindicate, not justice, but some rigid technical stand taken up by them. We hope that public sector corporation will henceforth refrain from raising needless objections, fighting needless litigations and adopting needless postures."

10. Keeping the principles laid down by the Supreme Court in *D. P. Maheshwari* (supra) and *in S.K. Verma* (supra) in mind, we proceed to examine whether the order of reference or the two orders impugned herein, passed by the Tribunal should be interfered with.

We take note of the fact that even though the Petitioner claimed that issue No.2A decided in the first Award holding the Respondent No.2 not to be a workman, was published in the Official Gazette on 27/02/2020, the Petitioner chose not to throw a challenge to the order of reference until January 2024. We also note that after receiving notice from the Tribunal in February 2020, the Petitioners, instead of challenging the order of reference, chose to subject themselves to the jurisdiction of the Tribunal by filing its Written Statement on 06/01/2021 and then seeking recasting of issue No.1 by its application at Exhibit 10 on which, the Tribunal passed an order dated 11/11/2021, actually recasting the first issue. Thus, the Petitioner clearly intended to lead evidence on recast issue No.1 to prove that the references were not maintainable in view of the finding on issue No.2A rendered in the first Award. There is also no explanation in the Petition for the delay in throwing a challenge to the order of reference four years after it was made. This conduct of the Petitioner, by itself, would disentitle the Petitioner to any extraordinary writ from this Court in its jurisdiction under Article 226 of the Constitution of India.

11. The above facts, by themselves, would constitute enough of material to invite a dismissal of this Petition on the ground of unexplained delay in

throwing a challenge to the order of reference dated 10/02/2020. But, apart from that, we also note the conduct of the Petitioner who, having taken the burden of proving recast issue No.1 on itself, i.e. to prove whether the reference was not maintainable in view of the findings given by the Tribunal in issue No.2A in its Award dated 29/01/2020, has avoided leading evidence on this issue and instead, chosen to challenge the order of reference itself. This conduct of the Petitioner of avoiding to lead evidence or somehow attempting to delay the proceeding before the Tribunal is exactly what the Hon'ble Supreme Court refers to as an "*unbecoming device*" in D.P. Maheshwari (supra) and an "*attempt to evade decision on merits*" as referred to in *S.K. Verma* (supra). Therefore, the Petitioner's conduct disentitles it to our discretion, invoking the extraordinary jurisdiction under Article 226 on which count we dismiss the Petition.

12. Apart from these reasons, we note that the first Award holds that Respondent No.2 failed to prove that he was a "*workman*" in relation to general demands raised in a Charter of Demands, which relates to the year 1999. The said award records that conciliation proceedings on that demand took place in 2002, and on the failure of the same, the government made a reference on 26/08/2003 for adjudication of these demands by the Industrial Tribunal. Thus, issue No.2A in that Award related to whether Respondent No.2 was a workman at that relevant time, *i.e.* 1999 or 2002. In the Claim Statement filed before the Tribunal in the present case, the workman seeks to challenge his order of termination of services, which is dated 07/12/2012, on which date, according to his pleadings in paragraphs 4 to 9 of the Claim Statement, he was performing the duties which were

clerical and manual in nature. Thus he claims that he was a workman as on the date of the termination of his services.

The pleadings in paras 4 to 9 of the Claim Statement are not specifically denied in the Written Statement of the Petitioner. Thus, a very clear issue arises as to whether he was a workman or not on the date of his termination, which is an issue which requires evidence and would be obviously dealt with by the Tribunal while deciding the issues framed by it.

13. The jurisdiction and scope of the Appropriate Government under Section 10 of the ID Act to examine the material to conclude whether an industrial dispute exists is, by now, well settled. The power is purely administrative in nature and the Appropriate Government would not weigh any evidence before it, which would be the exclusive jurisdiction of the industrial adjudicator on receiving the reference. In *State of Madras vs. C.P. Sarathy* reported in AIR 1953 SC 53, the Supreme Court has held that in making a reference under Section 10(1), the Government is doing an administrative act, and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function, does not make it any less administrative in character. It further held that Courts could not canvass the order of reference closely to see if there was any material before the Government to support its conclusion as if it was a judicial or quasi-judicial determination.

14. *C.P. Sarathy* (supra) was followed by the Supreme Court in *Ram Avtar Sharma and ors. vs State of Haryana* reported in AIR 1985 SC 915

taking the view that making a reference under Section 10(1), being an administrative act, the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis. It held that such a course would certainly be in excess of powers conferred by Section 10, which requires the Appropriate Government to be satisfied that an industrial dispute exists or is apprehended.

15. Keeping these principles in mind, we are unable to accept the argument of the Petitioner that the Appropriate Government ought to have considered the findings of the Industrial Tribunal in the first Award on the question of whether the Respondent No.2 was a workman, that too as on the date of his termination, and refused to make the order of reference. This submission cannot be countenanced for further reason that the Award of the Tribunal was passed on 29/01/2020 and published on 27/02/2020 in the Official Gazette, whilst the order of reference was made a few days prior to that on 11/02/2020. In any event, we are of the opinion that the Appropriate Government would travel beyond its powers under Section 10 of the ID Act if it entered into the arena of appreciating the findings in the Award and the evidence led before the Tribunal in the first dispute, which is impermissible. Even the issue of res judicata, assuming applicable, is a seriously disputed question of law and fact in the present case. Therefore, based only on the previous award, it is not possible to conclude that the issue of Respondent no 2's status as a workman stands concluded against Respondent No. 2. The scope of our jurisdiction under Article 226 of the Constitution of India of judicial review of an order of reference under Section 10 is narrow and restricted and is of the opinion that the order of

reference, in this case, was within the powers vested in the Appropriate Government, we refrain from interfering with it. For these reasons, we reject the submission of the Petitioner and hold that the order of reference dated 11/02/2020 does not call for any interference.

16. This takes us to the question of whether the two orders of the Tribunal dated 30/11/2022, refusing to treat recast issue No.1 as a preliminary issue and that dated 07/08/2023, refusing to recall or review its order dated 30/11/2022, call for any interference. The order dated 30/11/2022, in our opinion, has correctly refused to treat the recast issue No.1, which was reframed by order dated 11/11/2021, as a preliminary issue, as it is in complete consonance with the view taken by the Supreme Court in *D.P. Maheshwari* (supra) and *S.K. Verma* (supra). The order of the Tribunal dated 11/11/2021, in line with the view taken by the Supreme Court that industrial adjudication should not be done piece-meal and all issues are required to be taken up for decision together, has specified that the recast issue would not be treated as a preliminary issue. The impugned orders dated 30/11/2022 and 07/08/2023 passed by the Tribunal refused to review this position for reasons stated in the order, they being that the Industrial Tribunal has a very limited power to review its decisions. It is well settled that the Industrial Tribunal is only vested with the power to carry out an administrative review for correction of clerical or such errors but is not vested with the power of reviewing its orders or awards on their merits. In our opinion, the Tribunal has correctly dismissed the Petitioner's two applications by passing the impugned orders dated 30/11/2022 and 07/08/2023, which do not call for any interference.

17. Respondent No.2 was dismissed on 14.02.2018. Due to the Petitioner's several applications, the reference has not proceeded. All this appears to be an attempt to wilt Respondent No.2's resolve to pursue the industrial dispute. The extraordinary and equitable jurisdiction under Article 226 cannot be invoked to tire out a dismissed employee and deny him adjudication before the Tribunal. The Tribunal must now expeditiously dispose of the reference.

18. For the reasons stated above, we dismiss this Petition and direct the Tribunal to dispose of the reference expeditiously. There shall be no order for costs.

VALMIKI MENEZES, J. **M.S. SONAK, J.**