

(2000) 06 BOM CK 0111
In the Bombay High Court
Case No : Writ Petition No. 755 of 2000

Development Credit Bank Ltd.

APPELLANT

Vs

Mr. Azim A. Charania

RESPONDENT

Date of Decision : 30-06-2000

Acts Referred:

Bombay Shops and Establishments Act, 1948 — Section 17
Constitution of India, 1950 — Article 136, 226, 227
Industrial Disputes Act, 1947 — Section 2
Industrial Employment (Standing Orders) Act, 1946 — Section 9(3)

Citation : (2001) 2 ALLMR 352 : (2000) 4 BomCR 547

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : P.P. Rele, instructed by Piyush Shah, for the Appellant; Mohan Bir Singh, for the Respondent

Judgement

S.S. Nijjar, J.—By this petition under Article 226 of the Constitution of India, the petitioner seeks a writ of certiorari quashing the Part-1 Award dated 3-2-2000 given by Central Government Industrial Tribunal No. II at Mumbai in Reference No, CG1T-2/45 of 1998.

2. The petitioner earlier operated as Development Co-operative Bank Limited but has been converted into a Joint Stock Company known as Development Credit Bank Limited w.e.f. 1-6-1995. The respondent joined the predecessor of the petitioner as a Clerk in 1979. He was progressively promoted as Supervisor, Assistant Officer and, in the year 1988 as an Officer. His qualifications are B.Com. L.L.B. (Gen.). The respondent was also imparted training and was thus well versed in the Banking operations of various departments of the petitioner-Bank. The respondent was also the General Secretary of the Union and, therefore, had the opportunity to defend employees working in the petitioner Bank in the enquiries. According to the petitioner, the respondent is an expert with regard to the rules and regulations of the Bank. The respondent was working as an Officer at Mohammed Ali Road Branch of the petitioner Bank. On a

number of occasions the petitioner has reported for duty rather late. The respondent has disobeyed the written instructions which were issued on 22nd June, 1995. By this letter he was directed to take charge of the Current Accounts Department. The petitioner requested that the instructions be issued in writing. These instructions were issued to him in writing on 27th June, 1995 and 4th July, 1995. Thereafter by his letter dated 4th July, 1995 the respondent is stated to have made false allegations against the petitioner Bank. The respondent also called upon the petitioner Bank to clarify the nature of duties of the Officer's cadre to be performed in the Current Accounts Department. By letter dated 5th July, 1995 the petitioner Bank supplied the necessary list of duties to be performed in the Current Accounts Department by an Officer. The respondent by his letter dated 9th July, 1995 informed the petitioner Bank that the duties enumerated were not of an officer but are managerial and administrative in nature and not connected with his designation. Since he was not working in that post he would not accept the duties and responsibilities. The respondent did not take charge of the Current Accounts Department. He was reporting late for duty from 22nd June, 1995 till 1st July, 1995. The respondent was also remaining absent without prior permission or intimation from 3rd July, 1995; On 14th July, 1995 the respondent was asked to report for duty within 3 days. Respondent, however, by his letter dated 22nd July, 1995 alleged that he was being marked absent and not allowed to resume duties by the petitioner Bank. He was insisting that he would report only to the Cash Book and Reconciliation Department and not to the Current Accounts Department. It is the case of the petitioner that the Bank, therefore, decided to conduct an enquiry. A charge-sheet was issued on 7th September, 1995 to the following effect.

- (i) Wilful insubordination or disobedience of any lawful and reasonable order of the superior.
- (ii) Absence without leave for more than 10 consecutive days,
- (iii) Late attendance for not less than 4 occasions within a month; and
- (iv) Commission of any act subversive of discipline or good behaviour on the premises of the establishment.

Mr. M.V. Mulik was appointed as the Enquiry Officer. Mr. Mulik is not an employee of the petitioner Bank. The respondent though legally trained and well versed in enquiry proceedings was allowed to be represented by a practising Advocate Mr. German I. Fernandes. The petitioner Bank also appointed Mr. B.V. Itty as the Presenting Officer and Mr. N.B. Bijoor as the Advocate for the Bank. The respondent and his defence representative sought adjournments under one pretext or the other raising frivolous objections. According to the petitioner, as a result, for the first 15 sittings no effective enquiry proceedings could be held till 15th May, 1996. On 16th May, 1995, the respondent sought adjournment of the enquiry till re-opening of the High Court on the spacious ground that his Advocate will not be available. The respondent was directed to make alternative

arrangements well in advance and was duly intimated about the enquiry on 20th May, 1996 which he attended. However, respondent walked out of the enquiry proceedings. The Enquiry Officer was, therefore, constrained to complete the enquiry proceedings and submitted the report and finding on 23rd May, 1996 holding the respondent guilty of charges levelled against him. A copy of the report and findings of the Enquiry Officer was sent to the respondent by letter dated 24th May, 1996. The respondent submitted a reply on 25th May, 1996. The Disciplinary Authority after considering the charge-sheet, enquiry proceedings, report and findings of the Enquiry Officer, the respondent's submissions dated 25th May, 1996 and his past record, finding no extenuating circumstances passed an order dismissing the respondent without notice with immediate effect from the date of the order i.e. 28th May, 1996. The respondent preferred an appeal by letter dated 15th June, 1996. The Appellate Authority, after giving a personal hearing upheld the punishment of dismissal of respondent. According to the petitioner, the Vice President of the Union raised an industrial dispute about the dismissal of the respondent which was referred to the Tribunal by the Govt. of India by its order of Reference dated 3rd April, 1998. Pursuant to the order of reference, respondent filed an application on 26th June, 1988 as General Secretary of the Union seeking an adjournment to file the Statement of Claim on the ground that the records of the Union are not readily available. The respondent also filed the Statement of Claim again in the capacity as a General Secretary of the Union on 17th July, 1998. Petitioner Bank filed written statement on 19th August, 1998, inter alia, raising preliminary objection that the respondent had no locus standi as General Secretary to file statement of claim on behalf of the Union and that he was not a workman u/s 2(s) of the Act. Evidence of the respondent as well as the petitioner was taken by affidavit and treated as examination-in-chief. The Tribunal after hearing the parties passed the Part-I Award on 3rd February, 2000 on preliminary issues and objections of the petitioner Bank. It is this Award that is challenged in this writ petition. The issues framed by the tribunal and the findings are as under.

Issues Findings

1.

Whether the domestic inquiry which was held against the workman was against the principles of natural justice ?

Yes.

2.

Whether the findings of the Enquiry Officer are perverse ?

Does not survive, if survives No.

3.

Whether A.A. Charania is not a workman within the meaning of section 2(s) of

the Industrial Disputes Act of 1947 ?

He is a workman.

3. The Reference of the Industrial Dispute made by the Central Government is as follows :

"No. L-12012/197/97-IR (B.I) WHEREAS the Central Government is of the opinion that an industrial dispute exists between the employers in relation to the management of Development Credit Bank Ltd., Mumbai and their workmen in respect of the matters specified in the Schedule .hereto annexed.

AND WHEREAS the Central Government considers it desirable to refer the said dispute for adjudication;

NOW, THEREFORE, in exercise of the powers conferred by Clause (d) of subsection (1) and sub-section (2A) of section 10 of the Industrial Disputes Act, 1947 (14 of 1947) the Central Government hereby refers the said dispute for adjudication to the Central Government Industrial Tribunal, II, Mumbai. The said Tribunal shall give its award within a period of 6 months.

THE SCHEDULE

"Whether the action of Bank Development Credit Bank Ltd., Mumbai, terminating the services of workman Shri A.A. Charania without observing the principles of natural justice and non payment of wages to the workman Shri A.A. Charania since July, 1995 is justified, if not, what relief should be granted. ?"

4. Mr. Rele, learned Counsel appearing for the petitioner Bank, has submitted that a perusal of the Award clearly shows that the respondent has represented himself before the tribunal. He has however filed the written statement by describing himself as the Secretary of the Union. A perusal of the written statement filed on behalf of the respondent shows that it is styled in the nature of a written statement filed by the Union as each paragraph opens with the phrase "It is the say of the Union". The written statement is signed by the respondent in his capacity as the General Secretary of the Union. Only the verification is signed by the respondent himself without giving the designation of General Secretary, of the Union. It is submitted that respondent could not have done this and he has tried to play a fraud on the Court. According to Mr. Rele, the reference having been made u/s 10(2A) of the Industrial Disputes Act, hereinafter referred to as "the Act", the respondent had no locus standi to pursue the reference in his individual capacity. For this proposition, the learned Counsel has relied on a judgment of the Supreme Court in the case of Ram Prasad Vishwakarma v. Industrial Tribunal, Patna and others, 1961(1) L.L.J. 504. Mr. Rele has submitted that in this case it is categorically held by the Supreme Court that where a reference is made by the Union, the individual workman has no say in the matter. In view of the aforesaid judgment of the Supreme Court, the respondent could not be permitted to hijack a reference which was made at the instance of the Union. He submitted that this is the reason why respondent tried

to play a fraud on the Court by giving an impression that the reference was being pursued by the Secretary of the Union. In view of the above, the learned Counsel submitted that the finding returned by the Tribunal on page 11 of the Award to the effect that the reference has to be treated as a dispute espoused by the workman himself in his individual capacity and not as an Office-bearer of the Union, is wholly perverse and without any justification. Learned Counsel thereafter argued that the respondent has been wrongly held to be a "workman" u/s 2(s) of the Act. He has referred to the evidence given by the Officers of the Bank to show that the respondent was given the list of duties of the officers. It has also come in evidence that the respondent has accepted the benefits which are available to the officers under the officers regulations. There is also evidence to the effect that the witnesses which have been examined by the petitioner Bank were doing the same kind of work which was being performed by the respondent. Therefore, it could not be said that the respondent is a workman whilst persons similarly situated are treated as Officers. It has also come in evidence that the list of duties which have been mentioned in Item Nos. 1 to 11 in paragraph 4 of the affidavit are important jobs to be done by the Officers. Learned Counsel submitted that in the face of these duties the finding of the tribunal is clearly perverse and based on no evidence. Apart from this, the respondent himself stepped into the witness box. He does not say anything about his work in the examination-in-chief. It is only in the cross-examination he says that he was doing clerical work. Apart from this bald statement, there is no material placed on the record by the respondent to actually show the duties that he was performing at the time when the disciplinary action was taken against him. Learned Counsel pointed to paras 17, 18 and 19 of the Award to show that the finding given to the effect that the respondent is a workman is based only on one single factor that the enquiry has been conducted against the respondent under the Model Standing Orders. He submits that the tribunal has wrongly relied on the judgment given by this Court in the case of S.A Sarang v. W.G. Forge & Allied Industries Ltd., Thane and others, 1995(1) C.L.R. 837 to come to the conclusion that merely because the Model Standing Orders have been applied to the workman implies that the employee is a workman within the meaning of the Act. He submitted that there can be no estoppel on the basis of the fact that the charge-sheet has been issued under the Model Standing Orders. These Model Standing Orders are made applicable to all the employees. The enquiry has to be conducted under the Model Standing Orders in view of section 38-B of the Bombay Shops and Establishments Act, 1948, hereinafter referred to as "the Shops Act". This being a statutory provision cannot be treated as an admission that the respondent is a workman. In view of section 38-B of the Shops Act, the petitioner bank had no option but to conduct the enquiry under the Model Standing Orders. He submitted that Sarang's case (supra) turns on its own facts and does not apply to the facts and circumstances of this case. He relies on another judgment of this Court in the case of The Premier Automobiles Ltd. v. The Premier Automobiles Employees Union, 1988(1) C.L.R. 257 wherein this Court has held that the fact that the charge sheet has been issued under the

Model Standing Orders is not directly relevant to the decision of the issue as to whether or not the person concerned is a workman. Therefore, according to the learned Counsel, principle of estoppel should not have been applied by the Tribunal. According to the learned Counsel, the entire evidence given by the officers of the Bank has been ignored. For the purposes of the decision as to whether or not the respondent was a workman, the Court has to look at the duties allotted and not the duties actually performed. The Tribunal totally ignored the list of allotted duties which were placed on the record and has gone merely on the basis of the singular fact that the charge-sheet has been issued under the Model Standing Order. In support of this proposition, the learned Counsel has relied on a judgment in the case of *The State Bank of Bikaner and Jaipur v. Shri Hari Har Nath Bhargava* 1971(11) L.L.J. 331. With regard to Issue No. 1 the Tribunal has held that there has been breach of rules of natural justice in the conduct of the enquiry. Mr. Rele submitted that again the finding is wholly perverse. It has been held that there has been breach of rules of natural justice merely because the Enquiry Officer declined to adjourn the enquiry till after the Summer Vacation. The tribunal has totally ignored the affidavit, which has been filed by the Enquiry officer. In this affidavit the Enquiry Officer has given cogent reasons as to why the enquiry could not have been adjourned till after 7th June, 1999. It was made clear to the respondent that if he fails to remain present, the enquiry will be conducted ex parte. It has also been explained that enquiry could not be adjourned as nothing substantial had been achieved in the previous 15 sittings of the enquiry. Therefore, the respondent was given sufficient opportunity to make alternative arrangements. Instead of making alternative arrangements, both the respondent and his Counsel failed to remain present in the enquiry proceedings. Thus the enquiry proceedings were conducted ex parte. Therefore, it cannot be held that there has been a breach of rules of natural justice. Mr. Rele submitted that if an employee chooses to walk out of the enquiry then the Enquiry Officer has the right to conclude the enquiry ex parte. The employee will have to suffer the consequences of not remaining present. In support of this proposition, the learned Counsel relied on the case of *Brooke Bond India (Private) Ltd. v. Sitbba Roman (S) and another*, 1961(11) L.L.J. 417 and *Lakshmi Devi Sugar Mills Ltd. v. Ram Sarup and others*, 1957(1) L.L.J. 17. In view of the above, it is submitted by Mr. Rele that the impugned order deserves to be quashed and set aside.

5. On the other hand, Mr. Singh, learned Counsel appearing for the respondent, submits that the writ petition is not maintainable as at this stage the Tribunal has merely given an opportunity to the petitioner to lead evidence. He relies on a decision in the case of *The Cooper Engineering Ltd. v. P.P. Mundhe*, AIR 1957 S.C. 1900. Learned Counsel also relied on a judgment in the case of *D.P. Maheshwari v. Delhi Administration and others*, AIR 1984 S.C. 153. In view of the above it is submitted by Mr. Singh that there is no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issues. All the points urged in the

present petition can be decided if and when the final award is challenged by the petitioner. He further submits that the finding of the Tribunal that the enquiry had been held against the principle of natural justice is based on cogent reasons and, therefore, does not call for any interference in the writ jurisdiction. He submitted that the respondent was facing two enquiries, both of which were fixed on 16th May, 1996. The Enquiry Officer adjourned one of the enquiries to 8th June, 1996. However, the enquiry in the present case was adjourned without giving any date. In both the cases the respondent had sought an adjournment on the same grounds. One of the ground was that his mother-in-law was ill and he had to travel to Rajasthan and, therefore, he will not be available. The second ground for seeking adjournment was that the Advocate of the respondent would not be available due to Court vacations. These pleas were accepted in one of the enquiries and rejected in the other enquiry. He has further submitted that the Enquiry Officer was biased as the enquiry has been completed ex parte in undue haste. The enquiry proceedings had been completed with a closed mind in order to punish the respondent. The enquiry was deliberately adjourned to 20th May, 1996 to compel the respondent to cross examine the witnesses of the petitioner in the absence of the Advocate. The Enquiry Officer examined six witnesses on 20th May, 1996. The enquiry report was completed within a period of two days. The findings were submitted to the disciplinary authority on 23rd May, 1996 holding the respondent guilty of the charges levelled against him. The respondent was given three days time to submit a reply to the enquiry report. No further opportunity was granted to the respondent inspite of the request made by letter dated 25th May, 1996. The Disciplinary Authority passed the order of dismissal on 28th May, 1996. Appeal filed against this order has also been dismissed. Learned Counsel further submits that the Tribunal has come to the correct conclusion that the reference which is subject matter of the Award falls u/s 2-A of the Act. The respondent was, therefore, entitled to pursue the reference in his individual capacity. For this proposition the learned Counsel relied on a decision in the case of National Asphalt Products Construction Co. v. N.M. Kothari and others, 1977 Lab.I.C. 1300. Learned Counsel further submitted that it is not necessary that the particular provision should be mentioned in the reference order. Failure to mention section 2-A in the reference order would not lead to the conclusion that there is no triable industrial dispute. This is a matter entirely for the Labour Court/Industrial Court to decide. For this proposition, the learned Counsel relied on a judgment in the case of Steel Authority of India Ltd. v. Hindustan Steel Employees Union and others, 1997 Lab.I.C. 987. It is submitted by Mr. Singh that the finding of the Tribunal to the effect that the respondent is a workman cannot be permitted to be challenged in the present writ petition under Article 226 of the Constitution of India. He submits that findings of fact have been returned by the Tribunal which are based on evidence. Therefore, this Court would not be justified in interfering with the findings of fact as this Court would not reappreciate the evidence like an Appellate Authority. For this proposition, the learned Counsel relied on a judgment in the case of Sadhu Ram Vs. Delhi Transport Corporation, . Even according to the pleaded case in the petition, the

findings returned by the Tribunal are based on oral as well as documentary evidence. The Tribunal has also taken into consideration the nature of duties performed by the respondent. The bank had all along treated the respondent as a workman. Even the enquiry proceedings had been conducted under the Model Standing Orders. Had the respondent been actually promoted as an Officer his service conditions would have been governed by the Officers Rules and Regulations. This position is admitted by witnesses of the Bank. He further submitted that the justification which is sought to be given on the basis of the Shops Act is wholly misconceived. Section 38-B of the Shops Act merely makes the provisions of the Industrial Employment (Standing Orders) Act, 1946 applicable to the establishments covered by the Shops Act. Learned Counsel refers to section 2(i) of the Industrial Employment (Standing Orders) Act, 1946 to show that the definition of workman is the same as the definition of the workman as given in section 2(s) of the Act. Learned Counsel relies on a judgment in the case of C.N. Bhaskaran and Sri S.A. Patil and M/s. Gannon Dunkerley & Co., 1986(1) L.L.J. 163. He further submitted that it is the nature of duties and not the designation which will determine as to whether the respondent is a workman. For this proposition the learned Counsel relies on a judgment of this Court in the case of Smt. Sunita B. Vatsaraj Vs. Karnataka Bank Ltd. and another, .

6. I have given due consideration to the submissions made by the learned Counsel. In Ram Prasad Vishwakarma's case (*supra*) the Supreme Court has laid down the law that a dispute between an individual workman and an employer could not be an industrial dispute as defined in section 2(k) of the Act unless it is taken up by a Union of the workman or by a considerable number of workmen. The Supreme Court was considering number of workmen. The Supreme Court was considering a matter where an industrial dispute was raised on the question of dismissal of a workman by the Union and was referred along with a number of other disputes to the Industrial Tribunal, Bihar, by a notification dated 29th April, 1955. It was the case of the workman that the dispute had been fraudulently compromised by the Union. Thus the question before the Supreme Court was whether when a dispute concerning an individual workman is taken up by the Union, of which the workman is a member, as a matter affecting workmen in general and on that basis a reference is made under the Act, the individual workman can claim to be heard independently of the Union. This question was answered in the following words:

"The Union, through this officer, filed a written statement on his behalf. Upto 12 January 1957 when the appellant filed his application for separate representation, this officer was in charge of the conduct of the proceedings on behalf of the appellant. Never before that date, the appellant appears to have raised any objection to this representation. The question is, whether, when thereafter he thought his interests were being sacrificed by his representative, he could claim to cancel that representation and claim to be represented by somebody else. In deciding this question, we have on the one hand to remember

the importance of collective bargaining in the settlement of industrial disputes, and, on the other hand, the principle that the party to a dispute should have a fair hearing. In assessing the requirements of this principle, it is necessary and proper to take note also of the fact that when an individual workman becomes a party to a dispute under the Industrial Disputes Act he is a party, not independently of the union which has espoused his cause."

The aforesaid view was taken by the Supreme Court on the basis of the observations made in an earlier judgment in the case of Central Provinces Transport Service Ltd. v. Raghunath Gopal Patwardhan, 1957(1) L.L.J. 27. It was held that a dispute between an employer and a single employee cannot per se be an industrial dispute but it may become one if it is taken up by a union or a number of workmen. These observations, however, are of no assistance to the case of the petitioner as at that time when the judgment was rendered by the Supreme Court, section 2-A had not been inserted in the Act. By Act No. 35 of 1965 section 2-A was inserted in the Act w.e.f. 1-12-1965. The aforesaid section reads as under :

"2-A. Dismissal, etc. of an individual workman to be deemed to be an industrial dispute. Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute."

A bare perusal of the aforesaid section makes it clear that dismissal of an individual workman is deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute. A plain reading of the aforesaid section makes it clear that an individual workman is entitled to seek a reference and to pursue the same. This view of mine also finds support from the Division Bench judgment of this Court in the case of National Asphalt Products Construction Co. v. N.M. Kothari and others, 1977 Lab.I.C. 1300. In that case the company had raised a preliminary objection before the Labour Court that the dispute referred under the reference order dated 24th September, 1968 was not an industrial dispute within the meaning of the Act but was only an individual dispute. The Labour Court held that in view of the amendment of the Act by introduction of section 2-A, the dispute would become an industrial dispute and hence the reference was maintainable. The writ petition was filed against the aforesaid finding of the Labour Court. It was, inter alia, contended before the High Court that since the dispute had not been espoused by majority of workmen it did not fall within the purview of Clause (k) of section 2 of the Act. This contention was rejected on facts as the High Court found that the dispute had been espoused by majority of the workmen. Thereafter the Division Bench observed as follows :

"8. We are further of the view that even assuming that the dispute was not

supported by any of the other workmen, it was still capable of being referred to adjudication u/s 10 of the said Act, since it was an industrial dispute within the meaning of section 2-A of the said Act. The contention raised by Mr. Ramaswami relates more to the form than to the substance of the dispute, because after the amendment of the Industrial Disputes Act by addition of section 2-A, which came into force on 1-12-1965, the distinction between a dispute or difference arising out of discharge, dismissal, retrenchment or termination of the services of an individual workman in any other manner, raised by the workman concerned and that raised on his behalf by other workmen, has no significance, as far as its reference and adjudication is concerned. It must be remembered in this connection that neither Clause (k) of section 2 nor any other provision in the said Act mentions a Union of workmen or other workmen in connection with the raising of a dispute. It is only the interpretation placed by the Courts on the definition "industrial dispute" given in the said Clause (k) which requires that the dispute to be an industrial dispute should be a collective dispute and not an individual dispute. This was necessary because disputes between a workman or workmen on the one hand and the employer on the other, for the resolution of which the Act has been placed on the Statute book, may be of various kinds. Such disputes may relate to the general conditions of service in which all the workmen are interested or it may relate to the termination of service of a workman or workmen, in which others are not interested. If a dispute relating to the general conditions " of service is allowed to be raised by an individual workman, that would defeat the very purpose and the object of the said Act, and it was to prevent this, that although the Act did not in so many words state so, the definition of the expression "industrial dispute" in the said Clause (k) was interpreted to mean collective dispute espoused by a substantial number of workmen, as distinguished from individual dispute, unsupported by other workmen. Since this definition of industrial dispute was likely to lead and did lead to hardship .in cases of dispute of individual workmen arising out of termination of their services, it was necessary to make provision for raising of such disputes by individual workmen, although the same were not supported by other workmen. It was to meet this need that section 2-A was introduced in the said Act. It must also be remembered in this connection that by the said section 2-A what an individual workman is allowed to raise as an industrial dispute is only a dispute arising out of the termination of his services by either of the various modes. He cannot raise any other dispute as an industrial dispute. This being so, all that was done by section 2-A was to widen for the purpose and to the extent discussed above the definition of "industrial dispute" given in Clause (k) of section 2 of the said Act. Therefore, whether the dispute referred to in the order of reference is an industrial dispute within the meaning of Clause (k) of section 2 or section 2-A of the said Act, is of no consequence so far as the power of the Labour Court to adjudicate the same is concerned. In one case, it will be the workman of an employer collectively who will be a party to dispute and in the other case, it will be the individual workman or workmen concerned. So long as the dispute is one arising out of the termination of service of an employee in one

of the various manners, it will constitute an industrial dispute capable of being referred to adjudication u/s 10 of the said Act.

9. The source of power to make the reference of an industrial dispute for adjudication lies in section 10 of the said Act. There is no provision in section 10 which requires the Government to mention, while making the reference, that it is doing so in connection with an industrial dispute as defined in section 2(k) or 2-A of the said Act. Hence a mere absence of reference either to section 2(k) or section 2-A of the said Act in the order of reference will not go to show that it is not an industrial dispute within the meaning of either of the two provisions. Nor is the order of reference assailable on the ground that it does not indicate whether the dispute referred is under one or the other of the two provisions, since the law does not require the Government to do so. If a question does arise as to whether a dispute is one as defined u/s 2(k) or section 2-A, it is for the adjudicating authority to ascertain the same from the material on record."

A Division Bench of the Calcutta High Court in the case of Steel Authority of India (supra) agreed with and quoted the aforesaid observations. In paragraph 22 after quoting the above observations, it is observed as follows :

"It is already been noted in the instant case that the material indicates that the industrial dispute u/s 2-A of the Act has arisen on the next day of the order of termination and even the co-workers of Ravi Soren were agitated about the termination and had threatened industrial unrest the matter was referred to conciliation but such proceeding failed and the failure report was duly submitted to the Government. This dispute also related to the status of complaining woman in the family of the deceased worker. Thus the dispute in essence was an individual dispute, though supported by some of the workmen. Therefore, whether the dispute referred to in the order of reference is an industrial dispute within the meaning of Clause 2 (k) or section 2-A of the said Act is of no consequence so far as the power of the Tribunal to adjudicate the same is concerned. The facts of this authority are almost similar to the instant case. The learned Counsel for the appellant submitted that this authority would not solve the problem as the parties would not know as to the nature of the dispute before the tribunal decides the issue and it would/ may effect their rights and liabilities. There is no merit in the submission. In the instant case the Company knew from the very beginning that industrial dispute u/s 2-A of the Act has arisen as the concerned workman namely Ravi Soren had demanded reinstatement on the next day of the termination of service. With respect, we fully agree to the proposition of law as laid down in National Asphalt Production Construction Co. case, 1977 Lab.I.C. 1300 (supra)."

Thereafter in paragraph 24, the Calcutta High Court rejected the submission that there is a vast difference between the dispute which is collective dispute and a dispute that is an individual dispute. It was held as follows :

"... The Government commits the case or the issue for adjudication and not the

parties. If industrial dispute in terms of section 2-A of the Act has come into existence, the Government has merely to consider whether it is expedient to refer the dispute or commit the case for adjudication. If the Government inadvertently or wrongly or even deliberately commits the dispute for adjudication u/s 2K of the Act, the Tribunal has still power for adjudication if from material it could be said that the dispute has come into existence u/s 2-A of the Act by operation of law. The Tribunal in doing so, would not go beyond the term of reference as the term of reference was whether the termination of service was justified or not justified. The formal defects in the citation of reference order will not oust the jurisdiction of the Tribunal for the reasons already mentioned in the foregoing parts of the judgment. There is thus no ground for interference in the order of the learned Single Judge of the writ Court."

From the above it becomes apparent that there is much substance in the submissions made by Mr. Singh that the respondent workman was entitled to pursue the reference. Merely because the reference is not styled as a reference u/s 2-A of the Act would not change the nature of reference. A perusal of section 2-A of the Act clearly shows that the dispute must relate to the termination of an individual workman. The dispute can, therefore, be either pursued collectively by the Union or individually by the concerned workman. An individual workman cannot pursue a dispute which is raised collectively by a large number of workmen but there is express authority provided u/s 2-A to enable the workman to pursue the reference with regard to illegal termination, or dismissal from service. I, therefore, do not agree with the submission of Mr. Rele to the effect that the respondent did not have locus standi to pursue the reference. I am of the considered opinion that the Tribunal has not committed any error in giving the finding that the dispute falls u/s 2-A of the Act. The Tribunal has also come to the correct conclusion that even though the respondent had filed a Statement of Claim as the General Secretary of the Union, the verification is signed by him in his personal capacity. The rejoinder was also filed by the respondent in the capacity of a workman and not as an office-bearer of the Union. The Tribunal has come to the correct conclusion that the dispute has to be treated as a dispute espoused by the workman himself in his individual capacity and not as the office-bearer of the Union. I am also of the considered opinion that there is no fraud committed by the respondent by describing himself as the General Secretary of the Union. It just so happened that during the pendency of the reference the respondent lost the post of General. Secretary of the Union.

7. The Tribunal has given a finding of fact to the effect that respondent is a workman. This finding has been arrived at after noticing the definition of workman given u/s 2(s) of the Act. It has been noticed by the Tribunal that the duties performed by the workman have been affirmed in Exhibit-14. It is to be noticed that the charge-sheet has been issued under Model Standing Orders. Even the Enquiry Officer affirmed that the enquiry was conducted under the Model Standing Order. It was not even disputed that so far as the enquiries and the conduct of the Officers are concerned, they are governed under the Officers

Service Rules and Regulations and not under the Model Standing Orders. The Tribunal has also given a finding of fact that even fees of the Union were deducted from respondent's salary and were directly sent to the Union. Thus in my view the Tribunal came to the correct conclusion that the management had always treated the respondent as a workman. In coming to the aforesaid conclusion the Tribunal relied on a judgment of this Court in S, A. Sarang's case (supra). In this case Srikrishna, J., has held that the mere description of the petitioner as a "Security Supervisor" would not per se convert him into a Supervisory Officer so as to fall within the exclusory provision contained in Clause (iv) of section 2(s) of the Act. It has been held that the law on the subject is clear that irrespective of the designation, it is the actual work done by the employee which is determinative of whether he falls within the scope of the definition of workman u/s 2(s) of the Act or he falls within the exclusory provision in Clause (iv) of section 2(s) of the Act. In paragraph 6 of the judgment, it is observed as follows.

"6..... If an employer continuously and consistently proposes and takes action against its employee on the footing that he is covered by the Model Standing Orders thereby implying that the employee is a workman within the meaning of the Act, then such employer must be estopped from denying the said fact when a dispute regarding the dismissal of the employee finally lands up before an Industrial adjudicator."

The facts in the present case are almost at par with the facts in Sarang's case. It is a matter of record that two charge-sheet have been issued against the respondent on 7th September, 1995 and 16th October, 1995. Both the charge-sheets have been issued under the Model Standing Orders. Both the enquiries have been conducted under the Model Standing Orders. It has also come in evidence that the Officers of the Bank are governed by the Rules and Regulations and not under the Model Standing Orders. Therefore, the aforesaid observations of Srikrishna, J., would be squarely applicable to the facts and circumstances of this case. I, therefore, hold that the Bank was estopped from claiming before the Tribunal that the respondent was not a workman. I also do not see much force in the submission of Mr. Rele to the effect that the Tribunal has given the finding on the issue that the respondent is a workman merely because the enquiry has been conducted under the Model Standing Orders. A perusal of the impugned Award shows that the Tribunal has painstakingly adverted to all the evidence which has been led by the workman as also by the management witnesses. These are findings of fact based on evidence and ought not to be interfered with in these proceedings unless and until the Court comes to the conclusion that they are perverse. It is settled law that this Court while exercising jurisdiction under Article 226 of the Constitution does not reappreciate the evidence. That is the function of the trial Court or the Appellate Court. The wide supervisory jurisdiction of the High Court under Article 226 has to be exercised with great circumspection. The High Court cannot convert itself into an Appellate Court over the Labour Court or the Tribunal. Nor can the High Court substitute its own

finding of fact in place of the findings returned by the competent fact finding authority. I do not find any perversity in the findings which have been given by the Tribunal. It has been specifically affirmed by respondent No. 3 that he was never entrusted with any duty done by an officer nor he had any supervisory role to play. Even Dhiren Parekh and Prakash Govani, the officers on behalf of the Bank who narrated the duties of the officers did not depose that respondent had done the duties as narrated by them. On the contrary it is very clear from Exhibit 17 i.e. letter dated 22nd June, 1995 that the Manager had asked the workman to take charge of the Current Accounts Department. The respondent had- refused to take charge on the ground that the duties involve administrative and managerial functions. Therefore, it cannot be said that the findings given by the industrial Tribunal are not based on any evidence. 8. I also do not find much substance in the submission of Mr. Rele to the effect that the enquiry was conducted under the Model Standing Orders in view of section 38-B of the Shops Act. Section 38-B of the Shops Act reads as under:

"38-B. Application of Industrial Employment (Standing Orders) Act to establishments.---The provisions of the Industrial Employment (Standing Orders) Act, 1946, in its application to the State of Maharashtra (hereinafter in this section referred to as "the said Act"), and the rules and standing orders (including model standing orders) made thereunder from time to time, shall, mutatis mutandis, apply to all establishments wherein fifty or more employees are employed and to which this Act applies, as if they were industrial establishment within the meaning of the said Act."

A perusal of this section would show that it has been inserted in the Shops Act for making applicable the provisions of Industrial Employment (Standing Orders) Act, 1946 to the shops and other establishments, which earlier were not governed by the aforesaid Act. Therefore, all this section means is that the Industrial Employment (Standing Orders) Act, 1946 were applied to the shops and establishments covered under the Shops Act as if they were industrial establishments within the meaning of the Industrial Employment (Standing Orders) Act. By virtue of section 38-B the provisions of the Industrial Employment (Standing Orders) Act, 1946 are incorporated into the Shops Act. This view of mine finds support by a Division Bench judgment of this Court in the case of C.N. Bhaskaran and Sri S.A. Patil and M/s. Cannon Dunkerley & Co., 1986(1) L.L.J. 163. In paragraph 8, the Division Bench observed as follows.

"Shri Menon, learned Counsel appearing for the appellant also did not dispute this definition. But, however, according to him, section 9(3) of the Industrial Employment (Standing Orders) Act, 1946 must be read as integral part of section 38-B of the Bombay Shops and Establishments Act, especially in the absence of any notification having been issued by the Government in regard to the number of employees employed in the establishment. This submission, in our opinion, is wholly misconceived. It is well settled that the phrase "Mutatis Mutandis", is often used in legislation in applying or extending legislative

provisions to same or similar circumstances or to same or similar subjects. It is nothing but a rule of adaptation. If the contentions of Shri Menon is accepted it will amount to adding some words in section 38-B and, in our opinion, this is not permissible. Section 38-B of the Shops and Establishments Act makes no provision for the number of employees that the establishment (covered by Bombay Shops and Establishments Act) should employ for the satisfaction of the condition imposed by section 1(3) of the Industrial Employment (Standing Orders) Act. In our opinion, the interpretation placed by the learned Single Judge on section 38-B of the Bombay Shops and Establishments Act, is perfectly legal. By section 38-B, in effect the provisions of the Industrial Employment (Standing Orders) Act, 1946 are engrafted into the Bombay Shops and Establishments Act, 1948 with only the necessary consequential changes in points of detail in so far as they are applicable."

In view of the above, it would not be possible to accept the submission of Mr. Rele to the effect that the enquiry was conducted against the respondent under the Model Standing Orders due to the mandate of section 38-B of the Shops Act. I am of the considered opinion that the enquiry was conducted against the respondent under the Model Standing Orders as he had all along been treated and accepted to be a workman. Therefore, I do not find any infirmity in the findings of the Industrial Tribunal on Issue No. 3 holding that the respondent is a workman.

9. The Tribunal has come to the conclusion that the domestic enquiry has been held against respondent in breach of the principles of natural justice. As noticed earlier, Mr. Rele had submitted that the findings of the Tribunal on Issue No. 1 is perverse and based on no evidence. He had made elaborate submissions which have been noticed in the earlier part of the judgment. A perusal of the award shows that the Industrial Tribunal took note of the fact that two charge-sheets had been issued against the respondent dated 7th September, 1995 and 16th October, 1995. The hearing of both the enquiries was fixed for 16th May, 1996. In both the enquiries a request was made for adjournment of the hearing of the enquiry on two grounds. Firstly it was stated that the respondent will not be available as his mother-in-law was not keeping well and he, therefore, has to proceed to Jaipur in Rajasthan. It was also stated that due to summer vacation of the High Court the advocate would not be available till 7th June, 1996. The Enquiry Officer adjourned the enquiry which was conducted into the charge-sheet dated 16th October, 1995 to 8th June, 1996. The enquiry which is based on the charge sheet dated 7th September, 1995 on the same request being made was simply adjourned without fixing any date. Thereafter hearing of the enquiry was fixed on 20th May, 1996. The Tribunal rejected the submission of the petitioner management to the effect that the respondent could well engage the services of another advocate. In paragraphs 25, 26 and 27 the Tribunal has set out the reasons for rejecting the submissions made by the petitioner-management. Apart from this, Mr. Singh has pointed out to the Statement of Claim filed by the respondent. In paragraph 8 of the Statement of Claim it has been stated that on

a number of earlier occasions the respondent was representing the union in various Court cases. It is also stated that on 16th May, 1996 the enquiry was adjourned without fixing the next date of enquiry. The respondent was informed the next date of enquiry through a notice in the "Mid-day" newspaper dated 18th May, 1996. The respondent came to know about the next date of enquiry i.e. 20th May, 1996 through the newspaper report. Even on that date, the respondent could not reach the enquiry in time. He had earlier informed the enquiry officer by telephone that he would be arriving late. The enquiry officer and the management representative went out of the enquiry room and later returned to tell the respondent that he need not wait and he was directed to leave the place of enquiry. The enquiry proceedings were not given to the respondent for the hearing on 20th May, 1996. The Tribunal has also observed that the Bank had examined six witnesses in the enquiry, all in the absence of the respondent. In such circumstances the Tribunal was perfectly justified in coming to the conclusion that there has been a breach of natural justice in the conduct of the enquiry. Much has been made by Mr. Rele of the finding returned by the Tribunal on Issue No. 2. A perusal of the same clearly shows that the Tribunal has initially come to the conclusion that in view of the finding on Issue No. 1 to the effect that the domestic enquiry has been conducted against the principles of natural justice, issue No. 2 would not survive. However, the Tribunal examined the findings on the basis of the evidence which were available before the Enquiry Officer and came to the conclusion that the findings are not perverse. No capital can be made by the management of this finding returned by the Tribunal. The Tribunal examined the evidence which had been adduced by the witnesses of the management, before the Enquiry Officer without cross examination. All the witnesses had supported the case of the management. On the basis of the unrebutted evidence, the Tribunal came to the conclusion that the findings are not perverse. This finding cannot be used against the respondent. The final finding will now have to be given by the Tribunal after the witnesses of the petitioner Bank are subjected to cross-examination by the respondent or his representative. It is only after the evidence has been led that the Tribunal will give a finding as to whether or not the petitioner is able to justify its action. Mr. Singh has also taken the Court through the day to day proceedings of the enquiry. I have perused the proceedings and I am constrained to observe that there has been a clear breach of rules of natural justice. On the same day i.e. 16th May, 1996 one enquiry has been adjourned to 8th June, 1996 and for the same reasons the adjournment has been refused in the other enquiry. There was no justification in asking the respondent to make alternative arrangements for the enquiry which was being conducted on the basis of the charge-sheet dated 7th September, 1995 and to grant the adjournment in the enquiry based on the charge-sheet dated 16th October 1995. Six witnesses have been examined on 20th May, 1996. All have been examined in the absence of the respondent and his advocate. It is the accepted case that the respondent and the petitioner were permitted to be represented through advocates in view of the gravity of the charges levelled against the respondent. If that was the real

reason for permitting the respondent to be represented by an advocate, there was no earthly reason to deprive the respondent of the services of the advocate on the lame excuse that one of the enquiries cannot be adjourned to 8th June, 1996 whereas the other had already been adjourned to that date. In my view, this is a clear arbitrary decision taken by the Enquiry Officer and is in breach of rules of natural justice. This unseemly haste does not come to an end only with the ex parte proceedings on 20th May, 1997. The Enquiry Officer submitted the findings to the disciplinary authority on 23rd May, 1996. These were served on the respondent on 24th May, 1996 along with a show cause notice. The respondent was directed to make the submissions about the findings of the Enquiry Officer on or before 27th May, 1996. This show cause notice was delivered to the respondent by hand delivery/speed post registered A.D. Respondent replied by letter dated 25th May, 1996. He submitted that the findings of the Enquiry Officer ran into 44 pages. He submitted that the Enquiry Officer seems to have relied on extraneous material of which he was not aware. He also sought time for one month to give instructions to the defence representative who was presently stated to be out of Bombay on vacation. He, therefore, sought time for one month for filing the reply. These submissions were also brushed aside by the disciplinary authority. The respondent was dismissed from service without notice by an order dated 28th May, 1996. Thus within two days of the close of the evidence, the findings of the Enquiry Officer were recorded and sent to the disciplinary authority. The disciplinary authority in turn took only one day to consider the findings of the Enquiry Officer and came to the tentative conclusion that the guilt of the respondent has been established. The respondent was given 3 days time to give his reply to the findings of the Enquiry Officer. The request for further time was declined. Within a period of 8 days from 20th May, 1996 the fate of the respondent had been sealed. If this is not enough, the appeal filed by the respondent met the same fate. I am of the considered opinion that there has been breach of rules of natural justice at every stage of the conduct of this enquiry. In such circumstances I do not find any infirmity in the award given by the Industrial Tribunal.

10. At the very start of the arguments, I had suggested to Mr. Rele that the matter ought not to be decided on merits at this stage as the arguments which are open to the petitioner Bank at this stage would also be open to them while challenging the final award in the event the same was given against the petitioner Bank. Mr. Rele, however, invited the Court to give the decision on the legal issue involved. Time and again the Supreme Court has laid down the law as to what is the best course to adopt in case where preliminary issues are raised. Reference may be made to the observations made by the Supreme Court in two of the cases. In the case of *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, the Supreme Court considered the question as to whether when a domestic enquiry held by an employer is found by the Labour Court as violative of the principles of natural justice there is any duty cast upon that Court to give an opportunity to the employer to adduce evidence afresh before it and whether

failure to do so would vitiate the award. The Supreme Court observed as follows :

"22. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will also be legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication."

In the present case, the Industrial Tribunal has done nothing but followed/ the dicta laid down by the Supreme Court by permitting the employer to lead evidence to justify the dismissal. A perusal of the observations above clearly shows that the Supreme Court disapproved the efforts of any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter if worthy can be agitated even after the final award, it was keeping these observations in view that this Court had observed at the initial stage that the petition ought to be withdrawn with the rider that the same issues can be agitated at the time when the final award is given. However, Mr. Rele insisted that the legal issues involved in the present case need to be decided at this stage only. I have done my modest best. The misery which a dismissed employee faces has been highlighted by the Supreme Court again in the case of *D.P. Maheshwari v. Delhi Administration and others*, AIR 1984 S.C. 153. In the opening paragraph of the aforesaid judgment the Supreme Court has emphasised that neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of the Supreme Court under Article 136 of the Constitution 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. As noticed earlier, in the present case all the issues which have been agitated by the Bank could well have been agitated after the final award had been given. The Court is not oblivious of the fact that it is in the interest of the petitioner Bank to challenge the Part-I Award for two reasons, (i) Delay of the final adjudication and thus putting financial and mental pressure on the workman, (ii) Avoidance of the payment of legal dues in the event the award is made against the Bank. If the Award had been challenged when the respondent had been ordered to be reinstated in service, the petitioner

would only get stay of the Award by complying with section 17-B of the Act. This eventuality can be avoided by challenging the Part-I Award. In my view, adoption of this kind of course by managements is to be discouraged. In spite of the aforesaid observations of the Supreme Court, the present petition was admitted and operation of the Part-I Award was stayed. In view of the fact that the proceedings have been pending against the respondent for the past 5 years it would be in the interest of justice that the Tribunal is directed to dispose of the complaint finally within fixed period.

11. For the reasons stated above, I find no merit in the writ petition. The petition is dismissed with costs. Rule is discharged. The Industrial Tribunal is directed to decide the complaint within a period of three months of the receipt of the copy of this order. Costs Rs. 5,000/-. Certified copy expedited.

12. Petition dismissed.