
(1988) 08 CAL CK 0004
In the Calcutta High Court
Case No : Matter No. 762 of 1984

Indian Cable Co. Ltd.

APPELLANT

Vs

Fifth Industrial Tribunal and Others

RESPONDENT

Date of Decision : 09-08-1988

Acts Referred:

Constitution of India, 1950 — Article 136, 141, 226
Industrial Disputes Act, 1947 — Section 10(1)(c), 11(1), 15, 2(00), 2(S)

Citation : 93 CWN 484

Hon'ble Judges : Ajit Kumar Sengupta, J

Bench : Single Bench

Advocate : Subrata Roy Chowdhury and Tapas Banerjee, for the Appellant;
Partha Sengupta, for the Respondent

Final Decision : Allowed

Judgement

Ajit Kumar Sengupta, J.—In this application under Article 226 of the Constitution the Indian Cable Company Ltd. has challenged two orders of the Fifth Industrial Tribunal. The case of the Indian Cable Company Ltd. is that one Amar Kumar Ghosh was appointed as Assistant Engineer on 20th September, 1965. In 1976 he was promoted to managerial capacity in the scale of Rs.900/- to Rs.1500/- and on the determination of contract of employment his salary was Rs.3,160/- per month. On 24th August, 1981 contract of employment was determined as he was not amenable to discipline, lost his interest and initiative in performance of his duties, late in attendance, used to remain absent without information and was arrogant and indecent with his superiors, etc. The said Amar Kumar Ghosh raised the dispute before the Assistant Labour Commissioner, West Bengal and the company by letter dated 11th December, 1981" denied the facts saying that Shri Amar Kumar Ghosh cannot be treated as a workman as contemplated u/s 2(s) of the Industrial Disputes Act, 1947. But the dispute was referred to the 5th Industrial Tribunal on 14th December, 1982, the issue being as follows : -

whether termination of service of Shri Amar Kumar Ghosh justified? To what

relief, if any, is he entitled?

On 6th August, 1983 a written statement was filed by the company before the 5th Industrial Tribunal where the following preliminary points were taken : -

(a) Reference is not maintainable since there is no Industrial Dispute as Shri Amar Kumar Ghosh is not a workman as contemplated u/s 2(s) of the Industrial Disputes Act, 1947.

(b) Reference is not maintainable as industrial dispute is non-existent as no dispute proper has been raised by Shri Amar Kumar Ghosh with the company.

(c) Reference is not maintainable since the same suffers from the infirmity of non-application of mind being based on incorrect assumption.

(d) Reference is not maintainable since the same is based on extraneous consideration, unrelated to the evidence on record thereby rendering the reference prima facie bad in law.

(e) Reference is not maintainable since the same has been made with the prejudged presumption to the effect that Shri Amar Kumar Ghosh is a workman thereby acting quasi-judicially although the act of making a reference is an administrative act by the appropriate Government.

2. On 2nd December, 1983 the petition was filed praying for hearing of preliminary points raised before going into the merits of the case. On 9th May, 1984 the Fifth Industrial Tribunal passed an order holding that it is necessary to make a threshold part-adjudication of the matter. This order is under challenge.

3. The operative part of the said order is as follows : -

" Considering all the relevant facts and the legal position I hold that it is really not necessary that a threshold part-adjudication of the matter should be made as prayed for by the Company in this case. Therefore, I cannot uphold the contention of Dr. Tapas Banerjee.

Fix 31.5.84 for hearing on merits. The company will adduce evidence first."

4. The next order which is under challenge is the order dated 15th June, 1984. That order was made on the application of the company made on 6th August, 1983 for amendment of the Written Statement.

5. The Company submitted its Written Statement containing the material facts relating to the termination of the contract of employment of Sri A. K. Ghosh. According to the company, due to inadvertence, some material facts which prompted the management to determine the contract of employment were not incorporated in the said Written Statement. The Company therefore, asked for leave to amend the Written Statement by adding a new paragraph numbered as paragraph 1 3A to the Written Statement.

6. Another petition was made with a prayer under Rule 20C(2) of the West

Bengal Industrial Disputes Act, 1958 for Special leave to enable the company to adduce documents mentioned in paragraph 2 of the petition.

7. The Tribunal rejected the prayer for amendment, consequently the prayer for production of additional documents was rejected.

8. Two questions that call for determination are firstly whether the order passed by the 5th Industrial Tribunal to the effect that the preliminary point taken by the petitioner company, namely the respondent No. 3 is not a "Workman" within the meaning of the Industrial Disputes Act, 1947, should be heard along with merits of the case, calls for interference by this Court under Article 226 of the Constitution and secondly, whether the order rejecting the prayer for amendment of the Written Statement manifests any error of law that may be corrected by this court under Article 226 of the Constitution.

9. With regard to the first question Mr. Sengupta the learned Counsel appearing for the respondent No. 3, at whose instance reference was made before the Tribunal, submitted that whether a preliminary point including those touching jurisdiction should be heard at threshold or along with merits, is a question which has fallen for consideration of different courts in various cases. But all the controversies have now been set at rest by the Supreme Court of India in the case of D. P. Maheswari v. Delhi Administration, reported in 1983(4) SCC 293.

10. Learned Counsel contended that the question for determination in D. P. Maheswari (supra), is identical with the question which is involved in the present reference. Mr. Sengupta therefore submits that the court should not permit the employer to delay the disposal of the matter by raising all sorts of preliminary issues and objections.

11. Mr. Sengupta has also relied on the case of Shops & Commercial Workers' Union & Ors. v. Management of Ayurvedic & Unani Tibia College Board, reported in 1980 Lab IC 892 where Delhi High Court held that except for extraordinary reasons Tribunal should decide reference on merits also along with the decision on preliminary objection.

12. It is also submitted by the learned Advocate appearing for the respondent No. 3 that the Supreme Court has taken judicial note of the dilatory tactics adopted by the employers by raising preliminary objection in their attempt to avoid adjudication of the main issue on merit. He has relied on a decision of the Supreme Court in S.K. Verma v. Mahesh Chandra & Anr., reported in 1983(4) SCC 214 where Supreme Court observed that maintainability of reference should not be questioned especially by public sector companies, on mere technical grounds,,

13. Reliance has also been placed in the case, of Workemen Employed by Hindustan Lever Ltd. v. Hindutan Lever Ltd., reported in 1984(4) SCC 392 where the Supreme Court has observed than once a reference is validly made by appropriate Government, Tribunal must adjudicate on merits. Supreme Court

disapproved the practice of raising preliminary objections.

14. Relying on Order 14, Rule 2 Mr. Sengupta has contended that the issue whether a person is a workman or not is not an issue of law simpliciter. It is a mixed question of law and fact which cannot be decided at the threshold. In this connection, the learned Counsel for the respondent No. 3 has relied on the decision in the case of *Major S. S. Khanna v. Brig. F. J. Dillon*, reported in AIR 1978 Punjab & Haryana 230. It is submitted that the Tribunal cannot be compelled to decide a preliminary issue first, when such a course is not warranted by the Civil Procedure Code. Further, the Tribunal has a greater discretion in the matter of devising its own procedure. He has referred to section 11(1) of the Industrial Disputes Act which gives wide power to the Industrial Tribunals.

15. It is further submitted by the learned Counsel that the scope of interference by the writ court in respect of orders passed by inferior Tribunals has been clearly laid down by the Supreme Court in no uncertain terms in the case of *P. Kasilingam v. P. S. G. College of Technology* reported in 1981(1) SCC 405.

16. Reference has also been made to the case of *Gujarat State Tubes Ltd. v. Gujarat State Tubes Majdoor Sabha*, reported in 1980 LabIC 1004, where the Supreme Court has held that every wrong order cannot be righted merely because it is wrong.

17. In the instant case it cannot be said there has been any gross miscarriage of justice or any error of law, the jurisdiction to follow such procedure as the Tribunal may think fit being clearly vested in the Tribunal by the legislature. It cannot be said that there has been any jurisdictional failure and as such there is no ground for interference under Article 226 of the Constitution. In addition to the above, a reference may also be made to section 15 of the Industrial Disputes Act which itself speaks of expeditions adjudication and the course directed by the Tribunal is wholly in conformity with the spirit of that section.

18. Mr. Sengupta has also relied on a judgment of the Supreme Court in the case of *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*, reported in 1986(3) SCC 156 in support of his contention that change in law as indicated by Supreme Court in *D. P. Maheswari* (supra), should be adopted by the Court to match in tune with the changed ideas.

19. It is also submitted that the process under Article 226 is being used to break the resistance of the workman and the Supreme Court in the case of *D. P. Maheswari* (supra), has clearly disapproved such a course.

20. Mr. Roy Chowdhury, learned Counsel appearing for the writ petitioner has contended that at the material time of determination of contract of employment the salary drawn by Mr. A. K. Ghosh was Rs.3,160/- per month as Assistant Sales Manager. According to him Shri Ghosh was working in a managerial capacity. Plenty of allegedly undisputed documents had been disclosed before the tribunal

which shows that the said A. K. Ghosh was responsible for deciding the priorities of the work orders. He was issuing Instructions and directions to the respective factories at Jamshedpur and Pune for the manufacture of the materials and production programme which was correlated with requirements. It is also contended that he has given decision on behalf of the company on the direction sought for relating to power cable and manufactured goods raised by the customers, Branch Office- and factories. He was also negotiating with the Power Cables and Manufactured Goods Division. He had employees as well as officers subordinate to him whose work he was required to overlook and he had to take decision and also responsibility for ensuring that the matters entrusted to him are conducted in an appropriate way. In other words, according to Mr. Roy Chowdhury, the documents would show that said A. K. Ghosh was not a Workman. Accordingly preliminary point was taken before the Tribunal for hearing before going into the merits of the case. He submitted that it is settled position of law that when the preliminary point touches the jurisdiction of the Tribunal this should be heard and disposed of first before going into the merits of the case. Mr. Roy Chowdhury has relied on several decisions in support of his contention.

21. Reliance has been placed in the case of *Paramount Films of India Ltd. v. State of Madras* reported in 1958(1) LIJ 62. In that case a petition under Article 226 of the Constitution was filed for the issue of a Writ of certiorari to set aside a reference made by the Government u/s 10(1)(c) of the Industrial Disputes Act, 1947. It was held that an order u/s 10(1)(c) of the Act is only administrative in its scope and is therefore outside the purview of the correction by the issue of a writ of certiorari. It was held that there cannot be any writ of prohibition either, directed to the Industrial Tribunal. In that context it was held as follows :-

"It is open to the petitioner to raise the question he has raised here, that there was in law no industrial dispute at all for adjudication even as a preliminary issue, by the industrial tribunal. The industrial tribunal has to decide such a jurisdictional issue in the first instance. If the industrial tribunal arrives at a wrong decision, the aggrieved person will be entitled to challenge the validity of such a decision by an application for the issue of a writ of certiorari."

22. The next decision relied by the learned Counsel is in the case of *Kaleswari Handlooms Factory v. State of Madras* reported in 1958(1) LIJ 587. In that case a petition was moved before the Madras High Court for the issue of a writ of prohibition to restrain the industrial tribunal from proceeding with adjudication and referred to it as Industrial Dispute. The contention was raised that whether the weavers were workmen and if so the disputes between them and the writ petitioner were industrial disputes, had to be decided as jurisdictional issue involving determination of jurisdictional facts, the tribunal had no jurisdiction to determine these issues. Madras High Court held that Industrial Tribunal has jurisdiction to decide what was referred to as Industrial Dispute. That question was not concluded by the Government u/s 10(1)(c) of the Act. The Court did not

express any opinion whether if the Industrial Tribunal is in error in deciding such jurisdictional issue, the appropriate remedy to correct such error is a writ of certiorari or a writ of prohibition. In that case the Court held that the Industrial Tribunal has jurisdiction to decide where it is necessary to do so, whether a given dispute is an industrial dispute. Madras High Court then observed as follows :-

" If it comes to a right conclusion that it is an industrial dispute, it has jurisdiction to proceed further with the adjudication of the dispute. If, however, it comes to the conclusion that the dispute is not an industrial dispute, it can have no jurisdiction to proceed any further. As a statutory tribunal whose jurisdiction is to be sought within the terms of the statute which created it, it cannot give itself jurisdictional issue. If the tribunal wrongly decides such a question, the error can be corrected by appropriate proceedings under Article 226 of the Constitution."

23. Reliance has also been placed on the decision of a Division Bench of Madras High Court in the case of *tviamman Handloom Factory & Ors. v. State of Madras*, reported in 1959(II) LJ 627. The Division Bench affirmed the judgment of the Single Judge in the case of *Kaleswari Handlooms Factory (supra)*, and held as follows :-

" In our opinion, the industrial tribunal has initial jurisdiction to decide that preliminary jurisdictional issue. It is not necessary for us to define the extent of the power of this Court to interfere with the decision of the tribunal on the point. In the appeals before us there has yet been no such decision by the tribunal.

As we have mentioned above, the aggrieved party, that is. the party aggrieved by the decision of the tribunal on the point, can always approach this Court to issue a writ of prohibition to restrain the Tribunal from proceeding with the enquiry."

24. Mr. Roy Chowdhury has heavily relied on the judgment of the Supreme Court in the case of *Management of Express Newspaper v. The Workers* 6: Qrs. reported in AIR 1963 SC 569. In that case the Madras High Court referred to the Industrial Tribunal for its adjudication two industrial issues which had arisen between the appellant, the management of Express Newspapers Ltd. and the respondents, its Workmen. One of the questions raised was whether the strike of the workers and consequent lockout was justified. If the action taken by the management was not a lockout but a closure, bona fide and genuine, the dispute of the respondents might arise in respect of such a closure was not an industrial dispute at all. On the other hand, if in fact and in substance, it was a lockout but the said action had adopted the disguise of a closure and the dispute was raised in respect of such action, it would be an industrial dispute which industrial adjudication was competent to deal with. The Supreme Court in that context held as follows :-

" It is also true that even if the dispute is tried by the Industrial Tribunal, at the very commencement the Industrial Tribunal will have to examine as a preliminary issue the question as to whether the dispute referred to it is an industrial dispute

or not, and the decision of this question would inevitably depend upon the view which the Industrial Tribunal may take as to whether the action taken By the appellant is a closure or a lockout. The finding which the Industrial Tribunal may record of this preliminary issue will decide" whether it has jurisdiction to deal with the merits of the dispute or not. If the finding is that the action of the appellant amounts to a closure, there would be an end to the proceedings before the Tribunal so far as the main, dispute is concerned. If, on the other hand, the finding is that the action of the appellant amounts to a lockout which has been disguised as a closure, then the Tribunal will be entitled to deal with the reference. The finding which the Tribunal may make on this preliminary issue is a finding on a jurisdictional fact and it is only when the jurisdictional fact is found against the appellant that the Industrial Tribunal would have jurisdiction to deal with the merits of the dispute. This position is also not a dispute."

25. Reliance has been placed in the case of *United Beedi Workers Union v. S. Ahmed Hussain & Sons*, reported in 1964(I) LLJ 285. "In that case by an award the Tribunal had declared that the workmen were entitled to be paid the wages at a particular rate, and the deduction in the wages of the workers was unjustified. An objection was raised to the jurisdiction of the Tribunal on the ground that there was no relationship between the employer and the employees and accordingly there could not be any industrial dispute. Tribunal after holding that concerned persons were workmen held on merits that the deduction was unjustified and the management challenged the said award under Article 226 of the constitution. The Single judge quashed the award and thereupon an appeal was preferred before the Division Bench. There the Bench held as follows :-

" But a tribunal functioning under the Industrial Disputes Act has no such power to finally decide whether there is that relationship between the disputes which would justify its assumption of jurisdiction but it has necessarily to decide that point wherever there is a controversy about it. It follows that the tribunal's jurisdiction would depend on the correct determination of the preliminary matter. The existence of the relationship of master and servant can, therefore, be only a matter for objective and not a mere subjective satisfaction of the tribunal, if comes to a correct decision on that question, there can be no doubt that its jurisdiction to seize the main matter with which it is entrusted by the statute cannot be assailed. If, no the contrary, the decision of that co-Material question is erroneously given it will mean that the tribunal has by an erroneous decision given to itself a jurisdiction which it does not really possess."

26. Reeference has also been made to the decision in the case of *Workmen of the Straw Board Manufacturing Company Ltd. v. Strew Board Manufacturing Company Ltd.*, reported in 1974(I) LLJ 499. In that case the award was challenged and ultimately the matter went up by special leave to the Supreme Court at the instance of the workmen. In that case a contention was raised that in the previous awards between the same parties the Tribunals had given a finding and therefore, principle of *res judicata* will apply and the employer will

not be entitled to agitate the same question again. In that context the Supreme Court held as follows :-

" After the written statements and rejoinders, if any, of both the parties are filed and after examination of parties, if any, the Industrial Tribunal of Labour Court may frame such other issues, if any, as may arise from the pleadings. It is clear that these issues are framed by the Tribunal to assist in adjudication. While it cannot be absolutely ruled out that in a given case such an additional issue may sometimes attract the principle of *res judicata*, the heart of the matter will always be : What was the substantial question that came up for decision in the earlier proceedings? Some additional issues may be framed in order to assist the Tribunal to better appreciate the case of the parties with reference to the principal issue which has been referred to for adjudication and on the basis of which, for example, as to whether it is an industrial dispute or not, the jurisdiction of the tribunal will have to be determined. The reasons for the decision in connection with the adjudication of the principal issue cannot be considered as the decision itself to attract the plea of *res judicata*. The earlier question at issue must be relevant and germane in determining the question of *res judicata* in the subsequent proceedings. The real character of the controversy between the parties is the determining factor and in complex and manifold human relations between labour and capital giving rise to diverse kinds of ruptures of varying nuances no cast-iron rule can be laid down."

27. Reliance has also been placed in the case of the Workmen of Hindustan Lever Ltd. & Ors. v. Management of Hindustan Lever Ltd., reported in 1984(I) LLJ 388. In that case several issues were raised before the Tribunal. There the Supreme Court held as follows :-

" Whether, a particular person is a workman or not depends upon factual matrix. Workman is defined in section 2(s) of the Act. The ingredients and the incidents of the definition when satisfied, the person satisfying the same would be a workman. Negatively, if someone fails to satisfy one or other ingredient or incident of the definition, he may not be held to be a workman within the meaning of the expression in the Act. There is no provision in the Act which obliges the Industrial Tribunal or other forums set up under the Act to decide even in the absence of a contention from the employer, a preliminary issue whether the person who has invoked its jurisdiction is a workman or not. There is no such obligation cast statutorily on the Tribunal. If the employer does not raise the contention about the status of the workman approaching the Tribunal, the Tribunal has no obligation to decide the status of the person whether he is a workman or not. Conversely, if the employer agrees not to question the status in future it would only imply it would not be pressed and if pressed should be negated in view of the binding agreement. The resultant situation would be that the Tribunal must proceed on the assumption that no such contention is raised and required to be adjudicated upon. If the contention is not raised, the Tribunal is under no obligation *suo motu* or on its own to raise and decide such a

contention to clothe itself with jurisdiction to adjudicate upon the dispute. The Tribunal derives its jurisdiction by the order of reference and not on the determination of a jurisdictional fact which it must of necessity decide to acquire jurisdiction. Therefore, the Tribunal was clearly in error in holding that the contention canvassed on behalf of the Union would permit it to raise estoppel against a statute."

28. Reliance has also been placed on the following observations made by me in *Shyam Sundar Gupta v. Deokinandan Poddar & Ors.*, reported in 90 CWN 478.

" At the outset, I would like to dispose of one of the contentions raised as to whether I should hear the entire matter and dispose of all the issues at a time. It is true that the Court has to give judgment on all issues. But where a issue of law is raised relating to the jurisdiction and determination of this issue, one way or other would dispose of the cause finally. Such issue may be determined independently of other issues. If the preliminary issue which affect the very entertainment or maintainability of the election petition is decided in favour of the respondent No. 1 the petition has to be dismissed in entirety. Once it is held that this Court has no. jurisdiction to try or entertain the election petition because of the nature of dispute raised therein, the Court cannot thereafter decide any question on merits. The objection to the jurisdiction has been taken in the first two issues raised and these are being determined before taking evidence on its merits."

29. In substance, the contention is firstly the Tribunal has to decide the preliminary issue regarding jurisdiction, and if the jurisdictional fact is decided against the workmen, the Tribunal should not proceed thereafter with the adjudication on merits. In other words, if the finding is that there is no industrial dispute the question of deciding whether dismissal of an employee is justified or not, cannot be gone into.

30. Mr. Roy Chowdhury has contended that the judgment in the case of *P. P. Maheswari* (supra), has not altered the settled position of law as laid down by the Supreme Court in the case of *Management of Express Newspapers* (supra), and the decision of the Supreme Court in *Workmen of Hindustan Lever Ltd.* (supra), and several other decisions referred to above. It has been pointed out that in paragraph 1. of the judgment in *D. P. Maheswari's* case, certain observations were made on the facts of that case regarding hearing of preliminary points separately. This was not the ratio decidendi of the judgment as will appear from paragraph 2 of the judgment itself which begins with the words "having surmonised as above." According to Mr. Roy Chowdhury, it is not the ratio decidendi but only a sermon. It has been pointed out that in deciding *Maheswari's* case, the Supreme Court did not overrule or even consider the previous Supreme Court decisions of benches having the same strength, namely, three Judges. The case of *Maheswari* did not deal with the point of jurisdictional issue at all. Mr. Roy Chowdhury has also submitted that even in *Maheswari's* case, the Supreme Court left the discretion to the Tribunal as will be evident from

paragraph 1 of the judgment itself. The Supreme Court stated that "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 willful consequences." It has been submitted that such discretion has to be exercised in accordance with law and not arbitrary. In the case of *Sant Raj v. C. P. Singla* reported in AIR 1985 SC 617, the Supreme Court observed how the discretion, has to be exercised in a given case :

" In the present case, the Labour Court having held that the termination of services of the appellants would constitute retrenchment and as the pre-requisite for a valid retrenchment having not been satisfied, the termination of service was bad, yet in the facts of the case in his discretion declined to grant the relief of reinstatement. Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of reason and justice and not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself, (see *Sharp v. Wakifield*, 1891 AC 173). Discretion means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful. See *In S. G. Jaisinghani v. Union of India*, 1967(2) SCR 703 : AIR 1967 SC 1427."

31. Mr. Roy Chowdhury, however, has contended that the Bench consisting of three Judges which considered *Maheswari's* case could not or did not overrule the previous judgments of the Benches of equal strength. It is the contention that in the case of *Zaved Ahmed v. State of Maharashtra* reported in AIR 1985 SC 231, the two Judges Bench held that the Supreme Court sits in divisions of two or three Judges for the sake of convenience and it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of the two Judges. The observation of the Supreme Court may be referred to.

" The case also raises the further question whether a Division Bench of three Judges can purport to overrule the Judgment of a Division Bench of two Judges merely because there is larger than two. The Court sits in Divisions of two and three Judges for the sake of convenience and it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of two Judges. Vide *Young v. Bristol Aeroplane Co. Ltd.* 1944(2) All ER 293. It may be otherwise where a Full Bench or a Constitution Bench does so."

32. He has also contended that after the previous decision is overruled by a larger Bench then the previous decision is completely wiped out and earlier rulings remain in force unless expressly overruled by a larger Bench. In *Ramdas Bhikaji Chaudhari v. Sadanand & Ors.*, reported in AIR 1980 SC 126, the two Judges Bench of the Supreme Court laid down as follows:-

" It is well-settled that whenever a previous decision is overruled by a larger

Bench the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been overruled, and the court would have to decide the cases according to law laid down by the latest decision of this court and not by the decision which has been expressly overruled."

33. In the case of Warnan Rao & Ors. v. Union of India & Ors., reported in AIR 1981 SC 271, a five Judges Bench of the Supreme Court laid down as follows :-

" And yet, I hold to what I have earlier stated in Ambika Prasad Misra, 1980(3) SCC 719 : AIR 1980 SC 1762. What the learned Chief Justice has in mind, if, with respect, I may venture to speak, is that in constitutional issues over stress on precedents is inept because we cannot be governed by voice from the grave and it is proper that we are ultimately right rather than be consistently wrong. Even so, great respect and binding value are the normal claim of rulings until reversed by larger benches. That is the minimum price we pay for adoption of the jurisprudence of binding. precedents. I leave it at that because the learned Chief Justice has held the impugned Act good in its own right. Enough upto the day is the evil thereof."

34. Relying on these decisions, Mr. Roy Chowdhury contended that the Supreme Court did not overrule its previous decisions and being Benches of equal strength (i.e. three Judges) and not a larger Bench, it could not overrule the earlier decision. He has also submitted in any event, if the latest judgment of the Supreme Court is to be followed such-judgment delivered by the Supreme Court in the case of Workmen of Hindustan Lever Ltd. (supra), should be followed by this Court where the Supreme Court has held that there is no provision in the Act which obliges the Industrial Tribunal or other forums set up under the Act to decide even in the absence of a contention from the employer, a preliminary issue whether the person who has invoked its jurisdictional fact which it must be of necessity decide to acquire jurisdiction. The Supreme Court then proceeded to hold ordinarily, the Tribunal after ascertaining on what issue the parties are at variance raises to focus attention on points of dispute, In Industrial adjudication issues are of two types : (i) those referred by Government for adjudication and set out in the order of reference and (ii) incidental issues which are sometimes the law or issues of mixed law and fact. The Tribunal may as well frame preliminary issues "if the point on which the parties are at variance, as reflected in the preliminary issue, would go to the root of the matter,

35. The contention of Mr. Roy Chowdhury that the case which has been relied on by the respondents are contrary to the earlier decisions of the Supreme Court. He has submitted that the Delhi High Court in the case of Shops & Commercial Workers Union v. Management of Ayurvedic & Unani Tibbia College Board (supra), did not clearly read the law as it is against the well-settled principles laid down by the Supreme Court both before and after the Maheswari's case. He has also submitted that the observations of the Delhi High Court are based on very special facts. On the contrary, the decision of the Madras High Court, as relied upon by him, is to the effect that the industrial tribunal would decide the issue of

preliminary jurisdiction first.

36. I have given my anxious consideration to the contentions raised by the learned Counsel. It is no doubt true that in *Management of Express Newspaper (supra)*, the Supreme Court observed that the finding which the Industrial Tribunal may record on the preliminary issue will decide whether it has jurisdiction to deal with the merits of the disputes or not. The finding that the Tribunal may make on the preliminary issue will determine whether the Tribunal will proceed further to deal with the merits of the disputes. In that case, the question was whether the action of the management amounted to lockout or a closure. It is not a case where the dismissal or termination of a workman was an issue. It cannot be disputed there has been a change in the law from *D. P. Maheswari*. Most of the cases since *Maheswari* have emphasised that preliminary issue and the issue on merits should be decided one after another.

37. The Supreme Court in *D. P. Maheswari* held that:

"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 misrepute and jeopardise industrial peace should decide all issues in dispute at the same time without trying some of them as preliminary issues."

(Emphasis Supplied)

38. The reason which prompted the court to think in that way which is evident from the following sentence occurring in the said judgment.

" After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeys up and down."

39. In *D. P. Maheswari*'s case, the Labour Court tried the question whether he was a workman as defined in section 2(s) of the Industrial Disputes Act as a preliminary issue, It is the agony of the affected person i.e., workman as a result of following such a course of deciding preliminary issue first that prompted the Supreme Court to make the aforesaid observations. Here, in the instant case an identical prayer has been made by the petitioner-company before the Fifth Industrial tribunal and as such there is no reason not to follow the course directed by the Supreme Court. Expeditious disposal is required as the dismissed workman cannot wait for decades to get his justice from the Tribunal. That is the reason why the Supreme Court directed the course as follows :-

" A threshold part-adjudication in a case of termination of service where the affected person is thrown out of employment is bound to lead to many woeful consequences, the person being out of employment."

40. Delhi High Court in *Shops and Commercial Workers Union (supra)*, held that except for extra ordinary reasons Tribunal should decide reference on merits along with the preliminary issues. In that case, a preliminary point relating to jurisdiction, namely, that the particular establishment in respect of which an order of reference was made was not an industry, was taken before the Industrial Tribunal and the Tribunal sustained the preliminary objection and held that the reference was incompetent. The workmen being aggrieved came to the High Court. The reference was made before the Tribunal on 20th November, 1966. There was inordinate delay in the disposal of the matter before the Tribunal. In that context the Delhi High Court observed as follows : -

" This course of deciding only the preliminary point has necessitated the matter to be remitted to the Tribunal for decision on merits with inevitable suffering to the workmen who are till not sure of their status after being on the road for the last 13 years. A highly unsatisfactory situation indeed. It is precisely to avoid such a none too complementary position that courts insist that the Tribunal should decide a reference fully even when the matter of jurisdiction is raised before it. Had the decision been given on merits of disputes between the parties this delay of remand back to the Tribunal would have been avoided and the matter decided finally here."

(Emphasis Supplied)

41. In *D. P. Maheswari* the Supreme Court emphasised that a time has arrived for reversal of a policy when it was thought prudent to decide preliminary issue first. The reason is that the delay may lead to misery and jeopardise industrial peace and accordingly all issues in dispute should be decided at the same time without trying some of them as preliminary issues. Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction should not be stifled by preliminary objections. The Delhi High Court also in *Shop and Commercial Workers' Union* held that the Tribunal should decide a reference fully whenever a matter of jurisdiction is raised before it. In *S. K. Verma's* Supreme Court recorded the fashion of the employer to urge preliminary objections. The Supreme Court held : -

" There appear to be three preliminary objections which have become 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 corporations will henceforth refrain from raising needless objections, fighting needless litigations and adopting needless postures."

42. The above observations make it abundantly clear that the Supreme Court is also conscious of the fact that it has become a fashion to raise preliminary points whenever an industrial dispute is referred to a tribunal for adjudication and one such objection is, as is in the instant case, that the incumbent is not a workman. The latter part of the aforesaid observation of the Supreme Court, though made in respect of public sector corporations, would be equally applicable to employers of private sector corporations also. They cannot be permitted to avoid decision on merit by raising preliminary objection as the industrial law does not make any difference between a private sector employer and public sector corporation. Neither did the Supreme Court intend to limit the observations made in *S. K. Verma's* (supra), only to public sector corporation. The intention was as it appears, is to lay down a general principle which is evident from the decision rendered in *Workmen Employed by Hindustan Lever Ltd. v, Hindustan Lever Ltd.* (supra), where the Supreme Court has observed thus :-

" It is most unfortunate that all those unhealthy and injudicious practices reported to for unduly delaying the culmination of civil proceedings have stealthily crept in, for reasons not" un-known, in the adjudication of industrial disputes for the resolution of which an informal forum and simple procedure were devised with the avowed object of keeping them free from the dilatory practices of Civil Courts. Times without number this Court, to quote only two, *D. P. Maheswari v. Delhi Administration* and *S. K. Verma v. Mahes Chandra*, disapproved the practice of raising frivolous preliminary objection at the instance of the employer to delay and defeat by exhausting the workmen the outcome of the dispute, yet we have to deal with the same situation in this appeal by special leave."

43. The Supreme Court in the above decisions has laid down in no uncertain terms that informal forum and simple procedure were devised with the avowed object of keeping them free from the dilatory practices of Civil Courts.

44. It is true in *S. K. Verma*, the judgment of the Court has delivered by Chinnappa Reddy, J. In that case, the Supreme Court did not consider its previous judgment nor had the previous judgment been distinguished or dissented from. In *Hindustan Lever Ltd.* the judgment of the Court was delivered by Desai, J. where Chinnappa Reddy, J. was also a member of the Bench. There, the Supreme Court held that preliminary issue on jurisdictional question should be decided first. The observation of the Supreme Court regarding determination of the preliminary issue first must be considered in the context and setting of facts in such case. The observation made in the *D. P. Maheswari* and the subsequent decisions of the Supreme Court were made in the context of the

alarming facts noted by the Supreme Court. In those cases, either the matter was pending for more than a decade or frivolous issues have been raised to delay the matter. It was the agony of a dismissed employee that prompted the Supreme Court to lay down that all the issues should be tried together. The Supreme Court noted the unhealthy and injudicious practice resorted to for unduly delaying the culmination of the proceeding. If the Industrial Tribunal was constituted for expeditious disposal of the disputes, if it was truly meant to be an informal forum and simple procedure was devised with the object of keeping them free from the dilatory practice of Civil Courts, the employer cannot by insisting on the decision of preliminary issue first, delay the proceeding and defeat by exhausting the workmen the justice which he is entitled to. In the changed context, if a preliminary issue is raised and decided first and the merits are not decided, the party aggrieved would have the right to come before the High Court challenging the determination so made. Thereafter the decision of the High Court, one way or other, may take the matter up to the Supreme Court and if ultimately the Supreme Court holds that there was an industrial dispute or the concerned person was a workman, in that event, the Tribunal has to enter into that controversy on the merits of the case whether the dismissal or termination was justified or not. This inordinate delay, in disposing of the industrial dispute has prompted the Supreme Court to lay down that the preliminary objection should be decided along with the merits. It may be that in all cases, issues raised are not frivolous nor are they raised with the object of delaying the matter and it may ultimately be sustained by the Tribunal, but the question is whether having regard to the delay" involved in the ultimate decision in the case, decision on merits should be deferred after the finality on the preliminary issue is carried out. If at every stage the aggrieved party moves this court and the highest Court of the land, it may not be finalised, even after long untold misery and sufferings to the dismissed employee, in my view where a workman challenges his dismissal or termination before the Tribunal, all issues concerning the dispute in such a case must be decided at the same time. In such a case even if the preliminary issue is raised it should not be treated as a preliminary issue in isolation with other issues but one of the issues along with the issues on merits so that there is no inordinate delay in the termination of the proceedings one way or the other before the Tribunal. Although it was the avowed object of the Industrial Disputes Act to leave to the complicated procedure of Civil Courts but unfortunately there is neither expedition nor simplicity. The procedural delay in disposal of the cases before the Tribunal, would defeat justice in many cases.

45. The position may not be the same where the dispute is not with regard to the dismissal or termination of a workman where the delay may not affect the workman so much. It cannot be disputed that when a jurisdiction at point is decided by the Tribunal whether a concerned person is a workman or not and if such issue is held against the workman, then the tribunal may not go into the question whether the termination was justified or not. The decision of the jurisdictional fact would finally dispose of the matter and the question. of

decision on merits would not ordinarily arise. When the jurisdiction of the Tribunal depends on the determination of the jurisdictional fact as in the case of *Shyam Sundar Gupta* (supra) or where the jurisdiction of the Tribunal depends on the determination of a question of law, determination of which would dispose of the case finally, the question of proceeding any further in the matter after such determination would not arise. But the Industrial Tribunal derives its jurisdiction by the order of reference and not on the determination of a jurisdictional fact. After it acquires jurisdiction by reference, it can decide all issues.

46. But the employer being in a better bargaining position and capable of raising resistance to the workman, may at every stage of the proceeding come before the Court and delay the hearing of the matter. That will cause great injustice and hardship to a dismissed employee. Accordingly in my view, without departing from the principles laid down earlier, the Supreme Court observed that the preliminary issue should be decided along with the merits so that inordinate delay in disposing of a matter may not defeat justice. There has been a vast change in the industrial sphere of this country since 1963 when the *Express Newspaper's* case was decided. The alarming increase in the number of industrial disputes and consequent delay in the disposal cannot be lost sight of in determining the question whether the Tribunal should decide the preliminary question first, or all the issues one after another. Even if the Supreme Court did not consider in *S. K. Verma*, the previous decision of the Supreme Court in the *Express Newspapers* laying down that the decision of jurisdictional fact should be determined first and that if the determination of the jurisdictional fact disposes of the reference, the Tribunal should not proceed further to hear the reference on merits, but such decision shall have to be read in the context of the change in the society and the reaction of the Court to the agony and misery of the dismissed workman. It is only to expedite the matter for which the Tribunal, was constituted, the procedure had to be laid down by the Supreme Court that the "threshold part adjudication" should not be made. The procedure has to evolve because the advantage was being taken by the employer in holding up the proceeding for a number of years.

47. There is another aspect in *D. P. Maheswari's* case. The Supreme Court has left the discretion to the Tribunal to decide whether the preliminary issue should be decided first or not. In the first paragraph of the judgment the Supreme Court stated that "Tribunals and Courts who are requested decide preliminary questions must therefore ask themselves whether such threshold part adjudication, is really necessary and whether it will not lead to other useful consequences." It is true that such discretion has to be exercised in accordance with law and not arbitrarily but the question is even if the Tribunal decided not to go into the preliminary issue separately and determines both the issues on merits as well as on the preliminary issue, neither of the parties is without remedy when the Award is made. At that time challenge can be thrown against the Award of the Tribunal even on the preliminary issue decided by the Tribunal. A contention was raised that there will be manifest injustice not only to the company but also to

the alleged workmen if all the issues are tried together, elaborate evidence is gone into and ultimately it may be found that the alleged workman is not a workman, the whole exercise would be futile. Both the parties at least would know at the award stage where they stand and they will not be required to undertake journeys up and down for the determination of the question.

48. The Tribunal which is created to decide disputes expeditiously cannot be compelled to decide preliminary issue first. It has a greater discretion in the matter of devising its own procedure. Section 11(1) of the Industrial Disputes Act, 1947 gives wide powers to the Industrial Tribunals which provides as follows :-

" Subject to any rules that may be made in this behalf, an Arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the Arbitrator or other authority concerned may think fit."

49. The power of the Tribunal being so wide and the legislature in its wisdom having conferred such wide power on the Tribunal, its hands cannot be tied down by directing it to decide preliminary points first. Even if the Tribunal refuses to use discretion on sound principles and in the light of the observations made by the Supreme Court it cannot be said that by not deciding the preliminary issue first the tribunal has exercised its discretion arbitrarily. A reference may also be made in this connection to the provisions of the Code of the Civil Procedure. Even the Civil Procedure Code does not permit trying of such preliminary issues piecemeal. In this connection reference may be made to Order 14, Rule 2 of the Code :-

" 2(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court, shall, subject to the provisions of sub-rule(2) pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to.....

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue."

50. The question whether the third respondent is a workman or not is a mixed question of fact and law and elaborate evidence has to be taken on this point. This is not an issue of law only and as such even the principle of Civil Procedure Code, if applied, does not permit deciding such preliminary issue at the threshold. It is, therefore, evident, that even the CPC does not permit the course suggested by the petitioner viz., deciding the preliminary issue at the threshold. When the issue is a mixed question of law and fact evidence has to be taken.

Reliance has been placed on various correspondence, orders etc. to establish that the third respondent is a work man. The Tribunal has to decide this issue which is not an issue of law but an issue mainly of fact where upon determination of the facts the conclusion has to be drawn as a conclusion of law. If evidence has to be taken for the purpose of finding out whether the person concerned is a workman or not, evidence can simultaneously be taken also on the merits of the case. This will not only save time but also money and above all the agony of the parties.

51. The change in the course of law as clearly pointed out in D. P. Maheswari's case is a change which the Court had to adopt to march in tune with the changed ideas and the ideologies of the changing society, that being the role of law in a society as pointed out by the Supreme Court in Central Inland Water Corporation Ltd. v. Brojonath Ganguly & Anr., reported in 1986(3) SCC 156 wherein paragraph 26, the Supreme Court has observed as follows :-

" The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep with the heart beats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist to wit, Sydney Smith, said : "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies."

52. In D. P. Maheswari, the Labour Court tried the question whether he was a workman as defined in sec. 2(S) of the Industrial Disputes Act as a preliminary issue. It is the agony of the affected person Shri D. P. Maheswari, as a result of following such a course of deciding preliminary issue first that prompted the Supreme Court to make severe criticism of the tendency of the employee to stifle the jurisdiction of the Tribunal by all sorts of preliminary objections and journeys up and down. Here, in the instant case, an identical prayer has been made by the petitioner-company before the Fifth Industrial Tribunal and as such there is no reason not to follow the course directed by the Supreme Court. A threshold part adjudication in a case of termination of service where the affected person is thrown out of employment is bound to lead to many woeful consequences, the person being out of employment and as such the Tribunal in the instant case has acted absolutely in accordance with law by directing that instead of threshold part adjudication the preliminary issue will be heard along with merits. Where course adopted by the Tribunal does not cause prejudice to the parties, the parties get ample opportunity to adduce evidence in support of all claims and contentions. Issues of fact and law, even if such course is not in conformity with the strict legal principles of natural justice are not violated, the Tribunal should be allowed to proceed with the matter and dispose of it finally.

53. In that view of the matter, I am unable to accept the contention of Mr. Roy Chowdhury that the Tribunal should not decide the merits at this stage but should only decide the preliminary issue as to whether the third respondent is a

workman or not.

54. In the premises the order of the Tribunal that no threshold part adjudication of the matter should be made has to be sustained. In other words the preliminary point whether the third respondent is a workman or not shall be heard along with merits.

55. Before I take up the issue as regards amendment, it must be mentioned that four years have already passed in this court. The question is not whether the delay is attributable to the management or the workman. The fact remains that whether a preliminary point should be decided first by the Tribunal or not has been made the subject matter of this writ. In such a case court should be slow to interfere with the discretion of the Tribunal.

56. Writs should only issue in grave cases where Tribunal acts wholly without jurisdiction or in excess of it, or refuse to exercise the jurisdiction vested in them, or there is an error apparent on the face of the record. But such act, omission, error or excess must result in manifest injustice. If the discretion is not exercised by the tribunal in favour of the Management and even if it is assumed that such discretion regarding hearing of preliminary issue has been arbitrarily refused it will result in manifest injustice, the award may still be assailed on the determination of all issues.

57. In *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Majdoor Sabha* reported in 1980 Lab IC 1004 the Supreme Court observed that every wrong order cannot be righted merely because it is, wrong. The Supreme Court held:-

" It can be quashed only if it is vitiated by the fundamental flaws of gross miscarriage of justice, absence of legal evidence, perverse misreading of facts, serious errors of law on the face of the order, jurisdictional failure and the like."

58. In the instant case it cannot be said there has been any miscarriage of justice or any error of law. The jurisdiction to follow such procedure as the Tribunal may think fit being clearly vested- in the Tribunal by the legislature, it cannot be said that any injustice or prejudice has been caused to the petitioner. There is no jurisdictional failure either of section 15 of the Industrial Dispute Act which speaks of expeditions adjudication and the course adopted by the Tribunal is holly in conformity with the sprit of that section.

59. The termination of service of the third respondent took place with effect from 24.8.81 and the reference to the Tribunal was made on 14.12.82. Six years have passed since the termination and the employer has already been successful in dragging the proceeding by filing the writ petition on 6th July, 1984. Four years have already passed since the filing of the writ petition and it is to avoid this none to complimentary position that the courts insist that the Tribunal should decide the reference fully even when the matter of jurisdiction is raised before it the process under Article 226 should not be allowed to break the resistance of the workman as pointed by Supreme Court in *D. P. Maheswari*, where Supreme

Court observed :-

" Neither the jurisdiction of the High Court under Article 226 nor the jurisdiction of the Supreme 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 on peripheral issues avoiding decisions on issues more vital to them. Article 226 and Article 136 not meant to be used to break the resistance of workman in this fashion."

60. The other grievance of the writ petitioner is against the order rejecting the prayer for amendment of the written statement. The question is. whether the order manifests any error of law that may be corrected by this court under Article 226 of the Constitution.

61. In the application for amendment of the written statement it was clearly averred that the termination of the contract of employment of the 3rd respondent was made legally and bona fide but due to inadvertence some material facts which prompted the management to determine the contract of employment were not incorporated and as such the employer intended to incorporate a new paragraph being paragraph 13A to the written statement filed on 5th August, 1983. The said paragraph 13A is as follows:

Paragraph 13A

" The basic factor which prompted the Management to termine the contract of employment of Shri Amar Kumar Ghosh, are that he was not amenable to discipline. He totally lost his interest and initiative in the performance of his duties. He was invariably late in coming to office. He used to remain absent without information. He was very arrogant and indecent with his superiors both in Calcutta as well as in the Branches. In spite of repeated advice, Shri Ghosh did not mend his conduct and improve hi pperformance. Consequently on a review of the said facts and circumstances it was decided that retention of a senior managerial personnel like Shri Amar KumarGhosh, in the service of the Company would be detrimental to the interest" of the organisation and as such by a letter dated 24.8.1981 the contract of his employment was terminated."

62. The tribunal observed that there has been some delay in making the application for amendment of the written statement but such delay is not unconscionable. The Tribunal rejected the prayer for amendment on the following terms :-

" What emerges from the above discussion is that the employer cannot be allowed to justify the termination of services of an employee on a ground on which the termination was never based. This is an advantage accruing to the employee in the case before us. By the proposed amendment this advantage will be taken away from him. Therefore, the principles as laid down in the case reported in AIR 1969 SC 1267 cited by the learned lawyer for the employer do not have any application in the instant case.

In the circumstances, I find no justification for allowing a petition for amendment of the "written statement. The prayer is accordingly rejected."

" As the petition for amendment is rejected so there is no necessity of allowing the third petition under Rule 20C(3) of the West Bengal Industrial Disputes Rules, 1958. This is an off-shoot of the petition for amendment of the written statement of the Company."

63. It has been contended by Mr. Sengupta for the 3rd respondent that it has been stated in para 7 of. the written statement of the third respondent that in effecting the termination of service of the workman, amounting to retrenchment within the meaning of section 2(00) of the Industrial Disputes Act, section 25F of the said Act was clearly violated, inasmuch as neither any retrenchment compensation or one month's wage as provided therein, was offered or paid to him. In reply to the said paragraph the petitioner-company in its written statement has taken the stand that as Sri Ghosh is not a workman there is no scope for applicability of the provisions of the Industrial Disputes Act, not to speak of section 25F of the said Act. It was the only defence of the petitioner-company to a case of retrenchment that the third respondent is not a workman. It has nowhere been pleaded in the written statement of the company that the service of the third respondent was terminated as a punishment inflicted by way of disciplinary action or there was any allegation against third respondent or his termination was by dismissal for misconduct. In fact the order of termination clearly shows that even at the time of termination no allegation was made against the respondent No. 3. Even in paragraph 13 of the written statement filed by the company it has been clearly stated that by virtue of the enabling position in the letter of appointment the contract of employment was terminated legally and bona fide by paying Sri Ghosh one month's salary in lieu of notice. The relevant clauses of the letter of appointment are clauses 8 and 9. Clause 8(f) speaks of termination by dismissal for misconduct and clause 9 clearly says that "if your services are terminated by the company under clause 8(f) then the termination will be summary dismissal without notice or pay in lieu thereof". In this case, admittedly one month's salary in lieu of notice was given. So it cannot be contended that it was dismissal for misconduct and as such there is no escape from the position that it is a case of retrenchment without complying with section 25F of the Industrial Disputes Act.

64. By the said amendment the petitioner has sought to make a number of allegations against third respondent. Such allegations are not permitted to be made for bringing the termination within dismissal for misconduct as the same would be contrary to the case made out by them in the original written statement. Realising this difficulty the learned lawyer for the Company had submitted before the Tribunal that the proposed amendment has been sought for only to establish that the termination of contract of employment was not an arbitrary or capricious act. In other words, this was for showing justification of termination. But since in the instant case admittedly section 25F of the

Industrial Disputes Act has not been complied with it is not open to the Tribunal to entertain the question of justification of retrenchment as held in the above decision. In that event the amendment is irrelevant and extraneous as has been held by the Tribunal. Mr. Sengupta has submitted that when there was no compliance with section 25F it was not necessary to consider other points namely justification of order of retrenchment.

65. Dr. Banerjee has submitted that for the ends of justice amendment should have been allowed particularly when the Tribunal found that there was no change in the nature of the case of that company.

67. I have considered the rival contentions. The Tribunal has specifically held firstly that there has been no delay in making the application for amendment, secondly the Tribunal also held that the amendment will not change the nature and character of the case. The Tribunal held as follows:-

" It is not the case of the learned lawyer for the workman that the proposed amendment will change the nature of the case of the Company. Broadly stated, the case of the Company is that Shri, A. K. Ghosh was not a workman under the Industrial Disputes Act but was a member of the Managerial staff. The case of the employee is that he did not belong to the class of managerial staff but was a workman. In the letter of termination of service marked Annexure C to the written statement filed by the workman, no reasons have been assigned why the contract of service was terminated. By the proposed amendment the backdrop of the termination of the service of contract has been sought to be introduced. So, it cannot be said that the proposed amendment changes the nature of the case of the company."

(Emphasis Supplied)

68. In my view if an application for amendment is made without any delay the Tribunal should not reject such amendment on the ground that the employer cannot be allowed to justify the termination of service of an employee on which the termination was never based. If a new ground is taken it will be for the company to prove and the workman concerned will get the opportunity in the proceeding to rebutt the evidence that may be adduced by the employer. The workman will also be at liberty to adduce evidence. The question of any prejudice would not arise. The principles governing the allowing of the amendment under the CPC may not strictly apply in the proceeding before the Tribunal. Justice should be done not only to the workman but also to the management. There should be fair adjudication of the disputes before the Tribunal. Accordingly the amendment which does not change the nature and character of the case should have been allowed by the Tribunal. It is now well-settled that amendment should be allowed at any stage of the proceeding unless such amendment causes prejudice to the opposite party. Since the amendment would not change the nature and character of the case, it will not spring any surprise on the workman and the workman will have the opportunity before the Tribunal to rebutt any

evidence if produced. Reference may be made in this connection to a decision of the Supreme Court in the case of Jai Jai Ram Mancharlal v. National Building Material Supply, reported in AIR 1969 SC 1267 wherein it has been held as follows :-

" Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court has always given leave to amend the pleadings of a party, unless it is satisfied that the party applying. was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and however, late the proposed amendment the amendment may be allowed if it can be made without injustice to the other side."

69. The principles laid down by the Supreme Court will apply to the facts of this case. There is allegation of mala fide or injury to the opposite party and amendment without causing injustice to any of the parties must be allowed. For the reasons aforesaid I am unable to accept the contentions of Mr. Sengupta that Tribunal was right in dismissing the application for amendment. In my view the Tribunal ought to have allowed the amendment.

For the reasons aforesaid, this application is allowed in part with following directions :-

(a) The Tribunal is directed to allow the amendment prayed for by the Company within three weeks from" the date of communication of this order.

(b) The third respondent will be at liberty to file additional written statement dealing with the amendments if so advised within one week after the amendment is effected.

(c) After the amendment is allowed and affected the Tribunal shall proceed to hear the matter. The Tribunal shall decide the preliminary issue" and issues on merits one after another. Tribunal shall hear and dispose of the reference as expeditiously as possible but preferably within six months from the date of communication of this order.

(d) If any of the parties is aggrieved by the determination on preliminary issues or on merits, they will be at liberty to agitate the same after the award is made by the Tribunal and not otherwise.

The Tribunal and all parties shall act on the signed copy of the operative part of the judgment and order.