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(1974) 12 CAL CK 0024

In the Calcutta High Court

Karnani Properties Limited — APPELLANT

Vs

The State of West Bengal and Others — RESPONDENT

Date of Decision : 20-12-1974

Acts Referred:
Companies Act, 1956 — Section 205, 211
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 10(1), 10(4), 10A, 12(2)

Citation : (1974) 12 CAL CK 0024

Hon'ble Judges : R.N. Pyne, J;A.N. Sen, J

Bench : Division Bench

Advocate : Bankim Dutt and Manjusree Dutt, for the Appellant;N.D. Manna (No.5) for the Opposite Party and Parbati Ghosh for the State, for the Respondent

Final Decision : Dismissed

Judgement

1. This writ petition came up for final disposal before Sabyasachi Mukherji, J. and the learned Judge by his judgment and order passed on the 17th and 20th March, 1972 discharged rule and dismissed the said petition of the Company. Against the said judgment and order of the learned trial Judge, the Company has preferred this appeal.

2. The fact of the case material for the purpose of the appeal may be briefly stated. The company was incorporated on the 16th of February, 1950 and the principal object of the Company amongst various other objects and recorded in the Memorandum of Association is : " To acquire by purchase, transfer, assignment or otherwise lands, buildings and landed properties of all description and in particular to acquire from the Karnani Industrial Bank Ltd., of No.3, Synagogue Street, Calcutta the immovable properties now belonging to the said Bank and particularly mentioned in the agreement mentioned in Clause 4 of the Company''s Articles of Association and to that end to enter into and carry into effect with or without modification the said agreement, and to improve, manage and develop the said properties and to let out on lease or otherwise dispose of

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the same." After its incorporation the Company had acquired several mansions, house known as Karnani Mansions situate and lying at premises Nos.21, 23, 25A, 25B, 27A, 29, 31, 33, 35, 37, 39, 43, 45, 47, 55 and 57 Park Street, Calcutta. The business of the Company is to look after and manage the said immovable properties known as Karnani Mansions. It appears that there are about 300 flats located in the said mansions and the said flat is let out to various tenants. It is case of the company that for making the flats attractive to tenants the company provides various extra facilities to the tenants so that by staying at Karnani Mansions the tenants can enjoy some special advantages which are not normally available elsewhere in Calcutta. For this purpose the Company has made elaborate arrangements for supply of water in the flats, free supply of electricity, washing and cleaning of floors and lavatories, lift service, electric repairs and replacing, sanitary repairs and replacing etc. and for enabling the tenants to enjoy these amenities and facilities the company has employed a large number of workmen. It appears that in the business of the company, the company has employed over 50 persons, and the employees of the company can be classified in various categories, namely, sweepers, plumbers, lift-man, durwans, electric and other mistries, mails, bill-collectors and bearers etc. It appears that a dispute arose between the company and its employees earlier and the said dispute was referred to the Industrial Tribunal in accordance with the provisions of the Industrial Disputes Act, 1947. The said matter was heard before the Tribunal for a number of days and a number of witnesses were also examined by the Tribunal. When the matter was being heard by the Tribunal there was settlement between the parties and the parties agreed to certain terms of settlement which were field before the Tribunal. The Tribunal considered the said compromise to be fair and made an award on the 4th February, 1960 on the basis of the said compromise.

3. On the 20th of February, 1960 the said award was duly published in the Gazette in accordance with the provisions contained in section 17 of the Industrial Disputes Act, 1947. The said award was duly accepted and acted upon by the parties concerned and on the basis of the said award the salary of the employees which also included dearness allowance was raised and was pad on the basis of the said award which came into effect on and from the 1st of January, 1963. It appears from Ext. ''C'' filed before the Industrial Tribunal that the Company raised the salary which was inclusive of dearness allowance in 1963 commencing from the month of July of that year. It further appears from the said exhibit that a further increment was given to the employees with effect from November, 1964. The increased salary of the employees was inclusive of dearness allowance and no separate dearness allowance as such was paid to the employees by the company. It, however, appears from the said Ext. ''C'' and also from the evidence of Krishna Kumar Joshi, a Director of the Company who deposed on behalf of the Company before the Tribunal, that the company gave to the employees a further sum byway of temporary dearness allowance from 1965, the maximum amount of the temporary dearness allowance paid was Rs.10/-

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and the minimum amount was Rs.4/-. From the year 1965 onwards the employees of the company were, therefore, getting the salary as increased in November, 1964 along with the temporary dearness allowance. On the 24th of November, the Secretary of the Union of which the employees of the company are members addressed the following letter to the Labour Commissioner, Government of West Bengal

To The Labour Commissioner, Govt. of West Bengal, New Secretariat Building, Calcutta-1

Dear Sir,

Sub : Charter of Demand.

We hereby terminating the award published in the Calcutta Gazette, Extra Ordinary, dated 3.3.60 between M/s. Karnani Properties Limited, Karnani House, 23/21 Gariahat Road, Calcutta-19 and their workmen employed at Karnani Mansion at 25A, Park Street, Calcutta and its Head Office represented by Burabazar Jamadar Sangha, 90, Lower Chitpore Road, Calcutta-7 u/s 19(2) of the Industrial Disputes Act, 1947.

4. We further inform you that the workmen of the concern directly negotiated the employer but it is negatived by the employer outright; Under the circumstances we hereby giving a fresh Charter of Demands through you. Please intervene the matter.

Schedule of Demands.

1. Revision of Grade and Scale and increment of wages.

2. Dearness allowance according to the cost of living index.

3. Revision of leave & holidays.

4. Revision of Provident Fund and gratuity scheme.

5. Revision of Service Conditions.

6. Bonus for the years 1964-65 and 1965-66.

7. Revision of working hours.

8. Uniform & overtime allowance.

Yours faithfully, Said S. N. Pandey Secretary

Copy to:

M/s. Karnani Properties Ltd., Karnani House, 23/21, Gariahat Road, Calcutta-19.

(It may be noted that the letter set out above contains various mistakes. The same has, however, been reproduced in the exact language printed in the paper-book and it is said that the letter printed in the paper book correctly sets out the

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contents of the original letter).

5. It will appear from the letter that the copy of the said letter was sent to the company.

6. The Labour Commissioner appears to have forwarded a copy of this letter to the company. The company by its letter dated 13.2.67 sent a reply to the said letter to the Labour Commissioner and the said letter reads as follows:

To The Labour Commissioner, Government of West Bengal, New Secretariat Buildings, Calcutta

Dear Sir,

Re: Your letter No.S/250/1194/66/LC dated 17.1.67 and the Charter of Demands submitted by Burrabazar Jamadar Sangha by their letter to you dated 24th November, 1966.

With reference to the above, we beg to state as follows:

1. The purported Charter of Demands submitted by the alleged Burrabazar Jamadar Sangha is illegal, invalid and not binding upon our Company.

2. The award of the Labour Court being award No.2368 IR IIL-141/60 dated 20th February, 1960 published in the Calcutta Gazette (Extraordinary) dated 3rd March, 1960 has been and is still in force and the operation of the said award shall continue and the same shall be binding on the parties until the same has been terminated as required by law.

3. That the said award mentioned in the proceeding paragraph has not yet been terminated in the manner required by law.

4. That no notice has been received by our Company from the Burrabazar Jamadar Sangha or any of our staff terminating the said award.

5. That no Charter of Demands was also received by our Company from the Staff employed by our Company or from any Union or Sangha on their behalf.

6. The Burrabazar Jamadar Sangha does not represent the Jamadars or any staff or employee of our Company. In any event, we dispute the right and authority of the said Burabazar Jamadar Sangha to submit the Charter of demand to you or to terminate the operation of the said award.

7. On enquiry we have come to know that no Jamadar or employee of our Company is a member of the said Burrabazar Jamadar Sangha.

8. That the purported demands contained in the Charter of Demands submitted by the said Burrabazar Jamadar Sangha are vague and without particulars and no specific demand has been at all made. In any event, question of bonus cannot be included in the said Charter at all.

9. That there has been no change in the circumstances to justify any revision of

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grade or scale or increment of wages or leave and holidays or Provided Fund and Gratuity or working hours of the staff of our Company.

10. The Jamadars and other staff are paid D.A. by the Company and the purported demand regarding D.A. is vague and illegal.

11. That the alleged Charter of Demands is also otherwise bad, illegal and of a blackmailing nature.

12. That in any event our Company is not an industry. The provision of the Industrial Disputes Act is not applicable to us.

In the circumstances, we humbly request you not to entertain the said Charter of Demands for the facts stated above. You will also please note that the said Charter of Demands is in any event premature and no action can or should be taken by you on the same.

Copy forwarded to; Burrabazar Jamadar Sangha 90, Lower Chitpore Road, Calcutta-7.

Yours faithfully, for Karnani Properties Limited

Director.

7. It will appear that the Company also sent a copy of this letter addressed by the company to the Labour Commissioner to the Union. On the 29th of July the Government of West Bengal referred the dispute to the 6th Industrial Tribunal u/ s 10 of the Industrial Disputes Act, 1947 and the following issues were referred to the said Tribunal for adjudication.

(1) Fixation of grades and scales of pay of the different categories of workmen, (2) Dearness allowance, (3) Gratuity. In the written statement field by the company before the Tribunal the company objected to the jurisdiction of the Tribunal to entertain the dispute on two principal grounds which are set out in paragraphs 2, 5 and 6 of the Written Statement which read as follows: - (2) that what has been referred to is not industrial dispute, but an individual dispute and as such this Court has no jurisdiction to try this case at all; (5) that there exists as award of the Second Labour Court under G.O. No. 2368-IR dated 20.2.60 published in the Calcutta IR/11L-141/60 Gazette (6th Ordinary) dated 3.3.60 regarding the same issues, which still binds the parties and which has not yet been terminated by either of the parties by any notice as required under the law.

(6) that section 19 of the Industrial Disputes Act, is a bar to the making of the present reference.

After raising the aforesaid objections to the jurisdiction of the Tribunal to adjudicate upon the dispute, the company without prejudice to the aforesaid contentions proceeded to deal with the merits of the dispute in the written statement.

8. It appears that before the Tribunal the company made an application in the

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said reference for hearing of the two preliminary points raised by the company in its written statement.

9. The first preliminary point raised before the Tribunal was that the dispute was not an industrial dispute and the Tribunal therefore, had no jurisdiction to entertain the dispute and make an award. The submission of the company was that the dispute was an individual dispute. The second preliminary objection taken before the Tribunal was that section 19 of the Industrial Disputes Act, created a bar to the making of the present reference. It was submitted that there existed an award of the Second Labour Court dated 4.2.60 published in the Calcutta Gazette dated 20th February, 1960 and the said award which had not been terminated by either of the parties by any notice as required under the law and was therefore binding on the parties. It was contended that as the earlier award had not been terminated and was still binding between the parties, the reference to the Tribunal was bad in view of the provisions contained in section 19 of the Industrial Disputes Act and the Tribunal had no jurisdiction to entertain the reference. The Tribunal for reasons recorded in its order rejected both the contentions of the company and held that the Tribunal had jurisdiction to proceed with the case. The Tribunal then proceeded to adjudicate upon the dispute on merits. On issue No.1 referred to the Tribunal regarding the fixation of grades and scale of pay of the different categories of workmen, the Tribunal held that on the materials available, there could be no fixation of grades and scales of pay of different categories and the Tribunal answered the said issue accordingly. On issue No.2 relating to dearness allowance, the Tribunal taking into consideration that since 1965 there had been a considerable increase in the price index and after noting that price index of the working class in Calcutta had gone up from 460 to 750 points (as in October 1968) expressed the view that the dearness allowance granted by the company to the employees on a temporary basis was exceedingly poor and dearness allowance should be given according to the increased price index. The Tribunal awarded that the sweeper, bearer, helper, mali, mazdoor, liftman, head sweeper, durwan, pumpman and assistant electric mistry, who get lesser amount of wages would get dearness allowance at Rs.20/- per 100 points and on that basis these categories of workmen would get enhanced dearness allowance at the rate of Rs.60/- p.m.; and the plumber, rajmistry, head durwan, electric mistry and driver would get dearness allowance at the rate of Rs.18/- per 100 points and would on that basis get dearness allowance at the rate of Rs.54/- p.m. and the bill collector would also get Rs.18/- per 100 points and would therefore get dearness allowance on that basis at the rate of Rs.54/- p.m. The Tribunal further directed that this rate of dearness allowance fixed by him would remain in force as long as the price index would range from 600 to 800 points and if the price index beyond 100 points the rate of dearness allowance might be revised according to the rate mentioned by the Tribunal and if the price index fell below 600 points it might also be revised accordingly. The Tribunal further directed that the scheme of dearness allowance would substitute temporary dearness allowance which were being paid by the

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Company. So far as issue No.3 which relates to gratuity is concerned, the Tribunal expressed the view that the system of gratuity should be revised and framed a scheme with regard to payment of gratuity. On the basis of the above findings and incorporating the same the Tribunal made its award and the Tribunal directed on the 7th of March, 1969 that the award would take effect from the 1st of January, 1969.

10. The company presented this writ petition under Article 226 of the Constitution challenging the validity of the said award and for the issue of appropriate writs for quashing the said award and obtained a rule from this Court. As noted earlier, the said rule came up for final disposal before Sabyasachi Mukharji J. who was pleased to discharge the rule.

11. Before the learned trial Judge two principal contentions were raised namely, (1) the award was made by the Tribunal without jurisdiction and (2) the said award was untenable, as the award had been made by the Tribunal without taking into consideration the financial ability of the company to pay the additional amount directed to be paid by the said award. The jurisdiction of the Tribunal to make the award was challenged on three grounds. It was challenged firstly, on the ground that the company was not an industry within the meaning of the Industrial Disputes Act as defined in section 2(j) of the Act and the alleged dispute, therefore, could not be considered to be an Industrial Dispute as defined in section 2(k) of the Act. The second ground of challenge was that the earlier award dated 3rd March, 1960 had not been terminated and was, therefore, still subsisting and in the absence of valid termination of the earlier award, there could be no other award. The third and the final ground of challenge was that no dispute was raised between the petitioner company and its workmen prior to the reference before the Industrial Tribunal and as such the Tribunal ha no jurisdiction to deal with the matter. The learned trial Judge for reasons recorded in his judgment negatived all the contentions raised on behalf of the company and the learned trial Judge held that the Tribunal had jurisdiction to make the award and the learned Trial Judge upheld the award of the Tribunal on the merits. On the basis of his findings, as recorded in his judgment, the learned trial Judge discharged the rule and dismissed the petition of the Company.

12. The first contention raised before us in this appeal by Mr. Dutt on behalf of the appellant is that the award made by the Tribunal is without any jurisdiction. He has contended that the award made by the Tribunal is void for want of jurisdiction on two main grounds, namely (1) the Company cannot be considered to be an industry and the Company does not carry on any industrial activity and the dispute between the company and its employees, if any, cannot be considered to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947, and (2) the Tribunal could not in any event entertain the dispute as the earlier award between the Company and the employees had not been terminated in accordance with law.

13. In support of his contention that the Company does not carry on an industry

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and the dispute between the company and its employees cannot, therefore, be an industrial dispute, Mr. Dutt has referred to the definition of ''industry'' in section 2(j) of the Act and also to the definition of ''industrial dispute'' in section 2(k) of the Act. Mr. Dutt has also relied on the definition of the word ''employer'' as given in section 2(g) of the Act. Mr. Dutt has referred to a large number of decisions and he has in fact cited most of the decisions of the Supreme Court and also of the other Courts which have considered the question as to what constitutes an industry within the meaning of section 2(j) of the Act. We do not consider it necessary to mention all the said decisions. For the purpose of record, we however wish to note that Mr. Dutt has cited most of the reported decisions. In our view, no useful purpose can be served by mention in all the decisions cited by Mr. Dutt, as most of the earlier decisions of the Supreme Court have been noted and considered in the later decisions of the Supreme Court. We shall consider the decisions which in our view, are of assistance in determining the question involved in the present proceeding. We may observe that the decisions of the Supreme Court which we shall consider later in our judgment have taken note of most of the earlier decisions. We have however to note that Mr. Dutt has placed particular reliance on the decisions of the Kerala High Court in the case of Palace Administration Board, Tripunithura Vs. State of Kerala, .

Mr. Dutt has argued that in deciding whether the company is an industry and carries on any industrial activity or not, the following tests, in the words of Mr. Dutt, have to be considered:

(1) Has the Company which has let out its properties to various tenants and which happens to be their landlord exploited these properties for the purpose of commercial activities? (2) Is the Company carrying on any commercial activity in the exploitation of the property? (3) Is there any co-ordination or combination between the employer and the employees in the carrying out of the commercial activity with the help of the property as an item of commercial asset? (4) Does the co-ordination or combination of the employer and the employee in exploitation of the property for the return undertaken by the company which is the landlord result in the production or manufacture of any material benefit or asset which may be utilized by the Company at large?

14. Mr. Dutt has submitted that the predominant activity of the company is to let out its properties to various tenants and to realise rents from the tenants in respect of the properties let out to them; and the other services which are rendered by the Company are ancillary to the main and predominant purpose. It is his submission that no activity on the part of the employee is necessary to enable to Company to derive income from the immovable properties owned by the Company and let out to the various tenants. According to Mr. Dutt the main function of the Company is to let out its properties to tenants and to realise rents from them and although it may not be a company which has merely let out its properties yet the Company cannot be considered to be a complex company. Mr. Dutt has contended that as the principal and predominant activity of the

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company is to let out its various flats to various tenants and to realise rents from them, the Company cannot be considered to be an industry and the activity of the Company cannot be said to be an industrial activity, and the services which are rendered by the Company to the various tenants are merely ancillary and incidental to the main and predominant purpose of letting out enabling the Company to earn a higher amount of rent and to attract good tenants. It is the argument of Mr. Dutt that the engagement of employees for the purpose f rendering the additional services to the tenants with a view to serve effectively the main and predominant purpose of letting out the immovable properties does not constitute any industrial activity on the part of the Company and does not make the Company an industry within the meaning of Section 2(j) of the Act. Mr. Dutt has in this connection referred to the unreported decision of a Division Bench of this Court in the case of Ganesh Properties Ltd. and he has commented that the said decision is not right; and he has submitted that the said decision, in any event, is clearly distinguishable, as in the case of Ganesh Properties Ltd., the Company ran a bazaar: and it is his comment that in view of the fact that the Company in the case of Ganesh Properties Ltd. ran a bazaar, the Company came to be considered to be an industry and the activity of the Company was considered to be in the nature of an industrial activity.

15. Mr. Dutt has further argued that the Company in the instant case cannot be considered to be an industry as the income realized by the Company from its immovable properties is not business income but is income from rent. It is argument that under the Income Tax Act the income derived by the Company from the letting out of its immovable properties is considered to be income from rent and is not considered business income and as the income of the property is not business income and does not from a part of the profits and gains from its business for the purpose of assessment under the Income Tax Law, the Company cannot be considered to be a Company which carries on any business activity. In support of his submission that income derived from immovable property is assessed under the Income Tax Act, u/s 9 as income from immovable property and not as business income u/s 10 of the Act. Mr. Dutt has referred to a number of decisions which we do not consider is necessary to set out, as the said provision under the Income Tax Act is well-settled and beyond any dispute.

16. The next point urged by Mr. Dutt in support of his contention that the award is without jurisdiction, is that the award in question has been made without valid termination of the earlier award of the 4th February, 1960 which remained effective and binding between the parties at the time of the present reference and award and the present reference and the award made on the basis thereof are both incompetent in the absence of valid termination of the earlier award. Mr. Dutt has drawn our attention to the earlier award made on 4th of February, 1960 on the basis of settlement arrived at between the Company and its employees on the 11th of January, 1960 and the terms whereof are contained in the petition which was filed before the Tribunal in the said proceeding. Mr. Dutt has submitted that in the absence of proper termination of the earlier award in accordance with

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the provisions contained in section 19 of the Act the said award continues to be binding on the parties and it is not open to any of the parties to raise any dispute or to seek any reference in respect thereof during the period the earlier award remains binding. Mr. Dutt has argued that the earlier award was made on the basis of terms of settlement arrived at between the parties and the said award should be construed to be a settlement within the meaning of section 19(2) of the Act and a notice in writing as stipulated in the said section must be given for effective termination of the settlement. Mr. Dutt has in this connection referred to section 19(2) of the Act which provides as follows: -

Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.

17. In support of his contention that an award made on the basis of a settlement is governed by section 19(2), Mr. Dutt has relied on the decision of the Bombay High Court in the case of Garment Cleaning Works Vs. D.M. Aney and Another, . Mr. Dutt has submitted that in the instant case no notice as required u/s 19(2) has been given by the employees to the employer. Mr. Dutt submits that no document has been disclosed or its there in the records to show that any notice as required u/s 19(2) was ever served by the employees on the employer. Mr. Dutt has argued that in the instant case there is only the charter of demands dated 24.11.66 which was submitted by the employees to the Labour Commissioner and a copy whereof was forwarded by the Labour Commissioner to the employer. It is the argument of Mr. Dutt that the said Charter of Demands dated 24.11.66 cannot be considered to be a notice, as on a proper interpretation it is not a notice of termination and it does not fix the date of termination; and fixing the date of termination, according to Mr. Dutt is an absolute necessity to bring about a valid termination. It is the argument of Mr. Dutt that the charter of demands would operate as an immediate termination of the earlier award and such termination is clearly illegal. Mr. Dutt has further argued that the said charter of demand cannot in any event be considered to be a notice within the meaning of section 19(2) of the Act as the said charter of demand was not addressed to the employer but was addressed to the Labour Commissioner and the said charter of demand was never served by the employees on the Company. Mr. Dutt has further argued that even if it can be said that section 19(2) will have not application and section 19(6) will apply and the award on the basis of settlement has to be considered as an award and provisions relating to termination of the award as contained in section 19(6) will be applicable, the said charter of demand does not satisfy the requirement of section 19(6). The said charter of demand gives not notice termination, does not fix the date of termination and purports to operate as an immediate termination of the Award and the said charter of demands has not been established to have

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been served on the Company. Mr. Dutt, therefore, contends that in the absence of termination of the earlier award the present reference was incompetent and the award made on the basis of the present reference must therefore be held to be void. In this connection Mr. Dutt ha referred to the following decisions (1) South Indian Bank Ltd. Vs. A.R. Chacko, (2) The Workmen of Western India Match Co. Ltd. Vs. The Western India Match Co. Ltd., (3) Management of Bangalore Woollen, Cotton and Silk Mills Co. Ltd. Vs. The Workmen and Another, (4) The Indian Link Chain Manufacturers Ltd. Vs. Their Workmen, (5) Employers of Thungabhadra Industries Ltd. Vs. The Workmen and Another, (6) Anglo India Jute Mills Co. Ltd. Vs. The Fifth Industrial Tribunal of West Bengal and Others, .

18. Mr. Dutt has next addressed us on the merits of the award and has mainly confined his arguments to the provision made in the award with regard to dearness allowance of the employees. He has contended that the Tribunal could not have granted any dearness allowance as such to the employees, as in the scheme of payment to the employees, salary included dearness allowance and dearness allowance formed a part of the salary paid to the employees. It is the contention of Mr. Dutt that as under the scheme salary included dearness allowance, the Tribunal could not have awarded and dearness allowance as such without setting aside the existing scheme which included dearness allowance. To make a provision for payment of dearness allowance without setting aside the salary scheme was, according to Mr. Dutt, the fact that the employer has given an additional sum of money to the employees was not a matter for consideration by the Tribunal. Mr. Dutt has further argued that the amount directed to be paid by the Company as dearness allowance to the employees is beyond the financial capacity of the Company and the Company cannot afford to pay the same. Mr. Dutt argues that before the Tribunal directed payment of any sum, the Tribunal question is also Resjudicata between the parties and the Company is not entitled to agitate the said question in the present proceeding.

20. Mr. Manna has next contended that it is not open to the appellant company to make the case that the earlier dispute between the parties resulted in a settlement which required to be terminated in accordance with the provisions contained in section 19(2) of the Act. He has argued that no such case of settlement requiring termination in accordance with the provisions contained in section 19(2) of the Act was made by the company before the Tribunal and before the learned Trial Judge. He has argued that the case made before the learned Trial Judge proceeded on the basis that there was a previous award which had not been terminated and which remains subsisting at the date of the instant reference on which the present award has been made. In this connection he has drawn our attention to the case made in the written statement filed on behalf of the company the Tribunal and has drawn our attention to paragraphs 5 and 6 thereof. He has also drawn our attention to the case made before the Tribunal on this aspect and has referred to the following observations of the Tribunal while dealing with the preliminary objections raised on behalf of the company before it."

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In the second place, it is submitted by the learned advocate for the Company that there exists an award of the second Labour Court dated 20.2.60 published in the Calcutta Gazette dated 3.3.66 regarding the same issues which still binds the parties which has not been terminated by either of the parties by any notice as required under the law. In the circumstances it is contended that section 19 of the Industrial Disputes Act is a bar to the making of the present reference." Mr. Manna has also referred to the following observations of the learned trial Judge in his judgment where the learned trial Judge has noted the contention raised on behalf of the Company in this regard -" It was contended secondly that the award passed by the Tribunal was without jurisdiction because of two reasons. It was stated that there was a previous award which was dated 3rd March 1960 and the said award was still subsisting. The said award had not been terminated. Therefore, it was urged that the present reference was invalid and without jurisdiction. It was also contended that there was no dispute raised between the petitioner company and its workmen prior to the reference before the Industrial Tribunal and as such the Tribunal had no jurisdiction to deal with the matter". Mr. Manna argues that the only case made by the company before the Tribunal and the learned trial Judge has been that the present award is bad as the earlier award remains subsisting and had not been terminated and at no stage of the proceeding a case has been made that there has been no termination of settlement in accordance with the provisions contained in section 19(2) of the Act. Mr. Manna has argued that even in the grounds of appeal no ground has been taken to the effect that the present award is bad as there was an earlier settlement of the disputes between the parties which had not been properly terminated in accordance with the provisions contained in section 19(2) of the Act. Mr. Manna has submitted that this question cannot be agitated for the first time before the court of appeal as this question is not a pure question of law and involves investigation into various facts. Mr. Manna ha argued that settlement has a particular and peculiar meaning under the Industrial Disputes Act and has been defined in section 2(p) of the Act which provides ''settlement'' means a settlement arrived at in the course of conciliation proceeding and includes a written agreement, between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to the appropriate Government and conciliation officer. Mr. Manna has pointed out that the manner of signing and the form of settlement are both prescribed in West Bengal Industrial Disputes Rules, 1958. Rule 68 of the said rules lays down the manner of settlement and form ''J'' in the schedule contains the necessary form Mr. Manna contents that the relevant facts which go to show that the required formalities relating to settlement of a dispute between the parties to make it a settlement within the meaning of section 2(p) have to be pleaded and proved and the said facts will necessary require investigation. In the absence of necessary averments relating to the relevant facts and in the absence of a proper case being made out with regard to the settlement, the case of a settlement requiring termination in accordance with the provisions contained in

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section 19(2) of the Act, according to Mr. Manna cannot be made out for the first time at this stage. Mr. Manna has further argued that in any event the award made on the basis of the compromise by the Tribunal in the instant case cannot be considered to be a settlement within the meaning of section 2(p) of the Act. It is his contention that in the instant case the earlier award was made by the Tribunal on the basis of a compromise arrived at by and between the parties in course of the adjudication proceeding and as the award itself indicates the Tribunal applied its mind to the compromise, accepted the same as the compromise appeared to be fair and made the award on the basis of the compromise. The Tribunal had earlier gone into the reference and had heard evidence and when the hearing was continuing before the Tribunal the parties arrived at the compromise and the Tribunal, on being satisfied that the compromise was fair, made the award on the basis of the compromise. Though the said award was made by the Tribunal on the basis of the compromise it was clearly an award made by the Tribunal within the meaning of the Act and in this connection Mr. Manna has drawn our attention to the definition to ''award'' as given in section 2(b) of the Act which read as follows:

''Award'' means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal and includes an arbitration award made u/s 10A.

21. Mr. Manna submits that by the previous award there was a final determination of the dispute the Tribunal though the determination of the dispute before the Tribunal though the determination might have been on the basis of the compromise. Mr. Manna has argued that the said determination by the Tribunal cannot be considered to be a settlement within the meaning of the said Act and for the purposes of the Act ''settlement'' and ''award'' have been treated on a different footing. It is the argument of Mr. Manna that a settlement of industrial dispute to be a ''settlement'', within the meaning of the Act has to be arrived at in the course of the conciliation proceeding and the settlement will also include a written agreement between the employer and the workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to the appropriate Government and the conciliation officer. Mr. Manna contends that an award made by the Tribunal whether on the basis of any compromise before the Tribunal or otherwise upon hearing can never be considered to be a ''settlement'' within the meaning of the Act as the requirements of a "settlement" and an award to make the same valid and effective in law are entirely different. Mr. Manna has criticized the decision of the Bombay High Court in Garment Cleaning Works Vs. D.M. Aney and Another, which has been relied on by Mr. Dutt and has contended that in the said decision the Bombay High Court has not considered properly what is really intended to be a settlement within the meaning of the Act.

22. Mr. Manna has next contended that the earlier award has been validly

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terminated. He has referred to the provisions contained in section 19(6) of the Act which deals with the question of termination of an award and which provides as follows:

Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of 2 months has elapsed from the date on which notice is given by any party bound by the award, to the other party of parties intimating its intention to terminate the award. He has argued that notice contemplated by section 19(6) is not a notice of any particular duration and notice is intended to be an intimation of the termination and the termination is to take effect on the expiry of a period of 2 months from the date of receipt of the intimation. He has argued that u/s 19(6) notice need not be a notice in writing. He has pointed out that the Union addressed the letter to the Labour Commission on 24.11.66 and the company replied to the said letter on 13.2.67 and the company had also forwarded a copy of its reply to the Labour Commissioner to the Union and these facts are beyond question. He argues that the company had, therefore, clear notice of the intention of the Union to terminate the award. The order of reference was made on 29.7.67 long after the expiry of the period of 2 months and according to Mr. Manna, there was therefore a clear termination of the award and the order of reference3 and the award made thereon are perfectly valid. Mr. Manna has contended that an intimation to the Labour Commissioner of the intention to terminate the award constitutes sufficient notice of termination of the award and in support of this contention he has relied on the decision of the Supreme Court in the case of The Indian Link Chain Manufacturers Ltd. Vs. Their Workmen, . He has also referred to the decision of the Supreme Court in the case of Management of Bangalore Woolen Cotton and Silk Mills Co. Ltd. v. Workmen and Anr. reported in AIR 1969 S.C. 585 Mr. Manna has further submitted that the conduct of the parties clearly indicates and establishes that the award was considered not to be binding between the parties and the company has granted increments to the employees in 1963 and 1964 and has also granted temporary dearness allowance of Rs.10/- from 1965 to the employees. According to Mr. Manna if the award had remained subsisting and retained its binding character, these increments and the grant of temporary dearness allowance could not have been made by the company. It is the contention of Mr. Manna that the award must have been terminated and had been treated as not binding between the parties and as the award had ceased to be binding on the parties, the company could grant the said increments in 1963 and 1964 and make provision for temporary dearness allowance. It is the contention to Mr. Manna that the conduct of the parties clearly establishes that the award must have been properly terminated and the parties must have accepted the position that the award was no longer binding between the parties. Mr. Manna has referred to the decision of the Supreme Court in the case of Employers of Thungabhadra Industries Ltd. Vs. The Workmen and Another, Mr. Manna has further submitted that even the requirements of section 19(2) are satisfied in the instant case, as the letter to the Labour Commissioner is in

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writing and much more than he stipulated period of 2 months had elapsed from the date of receipt of the said letter by the Labour Commissioner and also from the date of receipt of a copy of the said letter by the company from the Labour Commissioner, although according to Mr. Manna Section 19(2) has no application in the instant case and the company is not entitled to make any such case at this stage. Mr. Manna has also submitted that the Tribunal and the learned trial Judge on a consideration of the relevant materials have come to the conclusion that there has been a valid termination of the award and this conclusion is essentially a conclusion of fact and this Court should not interfere with the said finding of fact at this stage.

23. Mr. Manna has submitted that the award of the Tribunal granting dearness allowance is clearly justified on merits and the Tribunal has made the said award on a proper consideration of the relevant materials. Mr. Manna does not dispute the proposition that the financial capacity of the employer to pay is undoubtedly a relevant factor in considering wages which are not minimum wages. He, however, contends that it was for the company which has special knowledge as to its financial capacity to establish before the Tribunal by proper and cogent evidence the financial capacity of the company. It is his contention that the company did not produce any materials before the Tribunal which could got to show that the amounts awarded by the Tribunal were beyond the financial capacity of the company. Mr. Manna has argued that in considering the financial capacity the Tribunal has only to consider the gross profits and the liability of the company for payment of taxes is not a relevant consideration and in support of this contention he has relied on the decision of the Supreme Court in case of Unichem Laboratories Ltd. Vs. The Workmen, . Mr. Manna has argued that there were sufficient materials before the Tribunal to come to the necessary conclusion on the question of the amount to be paid by the company as dearness allowance and the Tribunal on a proper consideration of the relevant materials has come to its conclusion. He argues that this finding of the Tribunal is a finding of fact and it cannot be considered that the finding of the Tribunal is perverse. According to Mr. Manna the Tribunal has correctly appreciated the evidence and he argues that even if the court is inclined to take a different view on its own appreciation of the evidence, the finding of the Tribunal in this proceeding should not be interfered with. Mr. Manna has argued that the document sought to be disclosed at this stage and which are contained in Part IV of the Supplementary Paper Book cannot be considered by this Court as those documents were not made available to the Tribunal and there is no explanation as to why many of the documents which were then available were not produced before the Tribunal. It is the contention of Mr. Manna this Court in this proceeding should not consider any document unless the said document has been placed before the Tribunal for consideration. He has further submitted that in any event the documents contained in Part V now sought to be disclosed and relied on for the first time are wholly irrelevant and they offer no material assistance in considering the question. Mr. Manna has pointed out that the validity of the award before this

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Court has not been challenged on any other grounds and according to Mr. Manna there is no merit in any of the contentions raised.

24. Mr. P. P. Ghosh, learned counsel appearing on behalf of the State has contended before us that the award of the Tribunal in the instant case is valid and should be upheld. He has argued that in the instant case the company must be considered to be an industry and the dispute between the company and its employees must necessarily be an industrial dispute. According to Mr.Ghosh, letting out of the flats to the tenants undoubtedly follows from ownership but letting out normally need not involve rendering of any of the services and the owner is entitled to let out by virtue of his ownership of the property, but is under no obligation to render the services as owner to the tenants to whom the owner lets out the properties. Mr. Ghosh argues that if an owner merely lets out the property to tenants and receives rent in consideration for such letting out without doing anything else, the owner cannot be considered to carry on any industry. It is, however, the argument to Mr. Ghosh that rendering of services and material benefit with co-operation of workers enabling the company to earn income or larger income, makes the position entirely different and in such a case the company must be considered to be carrying on an industry within the meaning of the Act. Mr. Ghosh has argued that the word industry as defined in section 2(j) of the Act has been construed in various decisions of the Supreme Court and other courts and he has referred to some of the decisions of the Supreme Court which were also cited by Mr. Dutt. Mr. Ghosh has referred to the decision of the Supreme Court in the case of Secretary, Madras Gymkhana Club Employees'' Union Vs. Management of the Gymkhana Club, and has pointed out that the earlier cases have all been referred to and considered in this particular decision. Mr. Ghosh has also referred to the decision of the Supreme Court in the case of Cricket Club of India Vs. Bombay Labour Union and Another, , the case of The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, and the case of Management of The Federation of Indian Chambers of Commerce and Industry Vs. Their Workman, Shri R. K. Mittal, . Relying on these decisions and the principles laid down therein Mr. Ghosh has submitted that the company in the instant case must be considered to be an industry as the company for the purpose of its business of earning income from its properties renders services for material benefit with the co-operation of its workers for enabling the company to earn more profits. Mr. Ghosh has next contended that the company has never made the case of a settlement and the case always made by the company has always been one of award and it is the contention of Mr. Ghosh that the settlement or compromise has undoubtedly merged in the award and the settlement has no independent existence. Mr. Ghosh has finally contended that the Tribunal and the learned trial Judge have on a proper consideration of the relevant materials come to the conclusion that thee has been a valid termination of the award and the amounts awarded as dearness allowance are justified and at this stage this Court should not interfere with the said findings and in any event no grounds have been made out for any interference with the said findings.

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25. The first question that falls for determination is whe4ther the company is an industry within the meaning of the Industrial Disputes Act. Section 2(j) defines an industry in the following terms:

''Industry'' means a business, trade, undertaking, manufacture or calling of employees and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen", The definition makes it clear that to be an industry within the meaning of the Act, the word is not intended to be used in the sense it is understood in common parlance and the word has a very wide connotation. The Supreme Court in the case of The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others, has observed at page 1085: "..... as we have already made it clear, the definition of the word "industry" is couched in words of very wide denotation". This definition of industry has come up for consideration in various decisions of the Supreme Court. In the case of Secretary, Madras Gymkhana Club Employees'' Union Vs. Management of the Gymkhana Club, , the Supreme Court while dealing with this definition observed at pages 561-561 -

The definition'' of ''industry'' is in two parts. In its first part it means any business, trade, undertaking, manufacture or calling of employers. This part of the definition determines an industry by reference to occupation of employers in respect of certain activities. These activities are specified by five words and they determine what an industry is and what the cognate expression "industrial" is intended to convey. This is the denotation of the term or what the word denotes. We shall presently discuss what the words, ''business, trade, undertaking, manufacture or calling'' comprehend. The second part views the matter from the angle of employees and is designed to include something more in what the term primarily denotes. By the second part of the definition any calling, service, employment, handicraft or industrial occupation or avocation of workmen is included in the concept of industry. This part gives the extended connotation. If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot define ''industry''. An industry is not to be found in every case of employment or service. An individual who employs a cook and gets service from his employee whose avocation is to serve as a cook but as the activity of the individual is neither business, or a trade, nor an undertaking, nor manufacture, nor calling of an employer there is no industry. By the inclusive part of the definition the labour force employed in an industry is made an integral part of the industry for purposes of industrial disputes although industry is ordinarily something which employers create or undertake." The Supreme Court has further observed at pages 562-563. "Our task is to give meanings to the words which are intended to lay down the full connotation. Taking each operation by itself and determining on the basis of facts whether it is an industry without attempting to pin point whether it is a business, or a trade, or an undertaking or manufacture, or calling of employers, is to ignore somewhat

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the guidance afforded by the statute through its own dictionary. Therefore, while we accept the views expressed uniformly we think any view which seems contradicted by later decisions because it was unrelated to the words of the definitions should not be allowed to harden. We also take the opportunity of relying a little more on the guidance from the Act.

The principles so far settled come to this. Every human activity in which enters the relationship of employers and employees, is not necessarily creative of an industry. Personal services rendered by domestic and other servants, administrative services of public officials, service in aid of occupations of professional men, such as doctors and lawyers, etc. employment of teaches and so on may result in relationship in which there are employers on the one side and employees on the other but they must be excluded because they do not come within the denotation of the term "industry". Primarily, therefore, industrial disputes occur when the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation, is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expression trade, business and manufacture. The word ''trade'' in this context bears the meaning which may be taken from Halsbury''s Laws of England. Third Edn., Vol. 38 p. 8(a) exchange of goods for goods or goods for money; (b) any business carried on with a view to profit, whether manual, or mercantile, as distinguished from the liberal arts or learned professions and from agriculture; and business means an enterprise which is an occupation as distinguished from pleasure. Manufacture is a kind of productive in which the making of articles or material (often on a large scale) is by physical labour or mechanical power. Calling denotes the following of a profession or trade.

26. The Supreme Court thereafter proceeds to hold at page 563-'' It is, therefore, clear that before the work engaged it can be described as an industry, it must bear the definite character of ''trade'' or ''business'' of ''manufacture'' or ''calling'' or must be capable of being described as an undertaking in material goods of material services. Now in the application of the Act, the undertaking may be an enterprise of private individuals. On the other hand it may not. It is not necessary that the employer must always be a private individual who carries on the operation with his own capital and with a view to his own profit. The Act in terms contemplates cases of industrial disputes where the Government or a local authority or a public utility service may be the employer."

27. The Supreme Court has further held tat the same page -

Next where the activity is to be considered as an industry, it must not be casual but must be distinctly systematic. The work for which labour of workmen is required, must be productive and the workmen must be following any employment,, calling or industrial avocation. The salient fact in this context is that the workmen are not their own masters but render service at the behest of

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master. This follows from the second part of the definition of industry. Then again when private individuals are the employers, the industry is run with capital and with a view to profits. The two circumstances may not exist when Government or a local authority enter upon business, trade, manufacture or an undertaking analogous to trade.

28. The decision of the Supreme Court in the case of Madras Gymkhana Club came to be considered by the Supreme Court in the case of Cricket Club of India Vs. Bombay Labour Union and Another, . In this decision the Supreme Court quoted in extenso the observations made in the case of Madras Gymkhana Club and reiterated the principles enunciated therein. As the Supreme Court was of the opinion that the Club was essentially a members'' club whose main activity was to promote the game of cricket, the Supreme Court held that the Club could not be considered to be an industry within the meaning of the Act. The Supreme Court observed at page 285 -''

It is, in fact, an activity in the course of promotion of the game of cricket and it is incidental that the Club is able to make an income on those few occasions which income is later utilized for the purpose of fulfilling its other objects as incorporated in the Memorandum of Association. The holding of the Test matches is primarily organized by the Club for the purpose of promoting the game of cricket. This activity by the Club cannot, by itself, in our opinion, lead to the inference that the Club is carrying on an industry" The Supreme Court further held at the same page -

In our opinion, the Tribunal was right in holding that the circumstance of incorporation of the Club as a Limited Company is not of importance. It is true that, for purposes of contract law and for purposes of suing or being sued, the fact of incorporation makes the Club a separate legal entity; but, in deciding whether the Club is an industry or not, we cannot base our decision on such legal technicalities. What we have to see is the nature of the activity in fact and in substance. Though the Club is incorporated as a Company i8t is not like and ordinary company constituted for the purpose of carrying on business. There are no share-holders. No dividends are ever declared and no distribution of profits takes place. Admission to the Club is by payment of admission fee and not by purchase of shares. Even this admission is subject to balloting. The membership is not transferable like the right of shareholders. There is the provision for expulsion of Member under certain circumstances which feature never exists in the case of a shareholder holding share in a Limited Company. The membership is fluid. A person retains rights as long as he continues as a Member and gets nothing at all when he ceases to be a Member, even though he may have paid a large amount as admission fee. He even loses his rights on expulsion. In these circumstances, it is clear that the Club cannot be treated as a separate legal entity of the nature of a Limited Co. carrying on business. The Club, in fact, continues to be a Members'' Club without any shareholders and, consequently, all service provides in the Club for Members have to be treated as activities of a self

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serving institution.

29. In dealing with the question whether the Club could be considered to be an industry as the Club owned various immovable properties of considerable value some of which were being used for residential purpose by the members of the Club and some of which had been let out for use as shops and offices by business concerns, the Supreme Court on the facts of the case has held at page 281 that "it would appear that once those buildings have been let out to other persons as shops and offices, thee would be no need to all for the Club to maintain an employee-staff in order to look after those buildings " and the Supreme Court has further held at the same page that "so far as the residential buildings are concerned where it appears that some employees must be contributing their labour, the principal consideration for holding that it does not amount to an activity of the nature of an industry is that this residential accommodation is provided exclusively for the Members of the Club.

30. In the case of the The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, , the Supreme Court had occasion to consider the meaning of the word industry as defined in Section 2(j) of the Act and the Supreme Court also considered various other decisions of the Supreme Court including the decision in the case of Madras Gymkhana Club. The Supreme Court observed at pages 1411-1422 -

In dealing with this definition this Court in the Secretary, Madras Gymkhana Club Employees'' Union Vs. Management of the Gymkhana Club, attempted to keep the two notions concerning employers and employees apart and gave the opinion that the denotation of the term ''industry'' is to be found in the first part relating to employers and the full connotation of the term is intended to include second part relating to workmen. It was, therefore, concluded:

If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot defined ''industry''... By the inclusive part of the definition the labour force employed in an industry is made an integral part of the industry for purposes of industrial disputes although industry is ordinarily something which employers create or undertake.

31. These observations need to be somewhat qualified. It is to be noticed that this definition modifies somewhat the definition of ''industry'' in Section 4 of the Commonwealth Conciliation and Arbitration Act (1909-1910) (Acts. Nos. 13 of 1904 and 7 of 1910) of Australia where the definition reads:

''Industry'' means business, trade, manufacture, undertaking, calling, service or employment, on land or water, in which persons are employed for pay, hire, advantage or reward, excepting only persons engaged in agricultural, viticultural, horticultural, or dairying pursuits.

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Although the two definitions are worded differently the purport of both is the same. It is not necessary to view our definition in two parts. The definition read as a whole denotes a collective enterprise in which employers and employees are associated. If does not exist either by employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employees and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocation as detailed in the definition and employ workmen who follow one of the avocations detailed for workmen. The definition no doubt seeks to define ''industry'' with reference to employers'' occupation but includes the employees, for without the two there can be no industry. An industry is only to be found when there are employers and employees the former relying upon the services of the latter to fulfill their own occupations.

32. But every case of employment is not necessarily productive of an industry. Domestic employment, administrative services of public officials, service in aid of occupations of professional men, also disclose relationship of employers and employees but they cannot be regarded as in the course of industry.

33. The question what constitutes an industry within the meaning of the Act as defined in section 2(j) came up for consideration before the Supreme Court in the case of the Management of The Federation of Indian Chambers of Commerce and Industry Vs. Their Workman, Shri R. K. Mittal, . While dealing with this question the Supreme Court considered many of its earlier decisions including the decisions in the case of Madras Gymkhana Club, Cricket Club of India and Safdarjung Hospital Upon a review of the various earlier decisions the Supreme Court held at pages 777-778.

In our view, the linch-pin of the definition of industry is to ascertain the systematic activity which the organization is discharging namely whether it partakes the nature of a business or trade. If it is that and there is co-operation of the employer and the employees resulting in the production of material services, it is an industry notwithstanding that its objects are charitable or that it does not make profit or even where profits are made, they are not distributed among the members.

34. The following observations of the Supreme Court at page 776 may also be usefully noted -

We had occasion to point out during the course of the argument of the learned Advocate for the Appellant that the case under the Income Tax Act are of little assistance in determining whether an organization, association or undertaking is an industry notwithstanding the fact that its main object is charitable. There is no doubt and it has not been denied by the learned Advocate for the Respondent

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that the object of the Federation and even for that matter if it is the main object, sub serves general public utility and therefore charitable. But nevertheless its activity may be commercial so as to satisfy the definition of an ''industry'' as explained and elucidated in the latter cases of this Court particularly that in the The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, .

35. In the facts of the instant case and in the light of the principles enunciated by the Supreme Court we have no hesitation in coming to the conclusion that the company in the instant case is an industry within the meaning of the Act. There can be no doubt that the company in the instant case carries on business. The Memorandum of Association of the Company and the facts and circumstances of the case clearly establish that the company in the instant case is a real estate company doing business in real property. The fact that rental income of the company is assessed under the income tax Act as income derived by way of rent and not as income from business is of no consequence in considering whether the company is carrying on business to make it an industry within the meaning of the Industrial Disputes Act and the decisions relied on by Mr. Dutt which go to show that rent received from immovable properties is not to be considered for the purpose of assessment under the income tax act as income or profits or gain from business, are wholly irrelevant and of no assistance. For the purpose of assessment to income tax under the income tax Act, different sources of income have been classified and the income of an assessee is taxed on the basis of the provisions contained in the income tax Act, and in accordance therewith, an income may be considered to belong to a particular category or source of income for assessment under the income tax Act. The said classification of sources for assessment under the income tax Act is of no consideration in considering the nature of activity carried on by any person for determining whether the activity is a trading activity or not for the purpose of the Industrial Disputes Act. As we have earlier noted the Supreme Court in the case of the Management of The Federation of Indian Chambers of Commerce and Industry Vs. Their Workman, Shri R. K. Mittal, has apply pointed out at p. 776 that the cases under the income tax Act are of little assistance in determining whether an organisation, association or undertaking is an industry or not. The principal object of the company for which the Company was incorporated is, as recorded in the Memorandum of Association of the Company, to acquire by purchase, transfer, assigns or otherwise lands, buildings and landed properties of all descriptions and in particular to acquire from the Karnani Industrial Bank Limited the immovable properties now belonging to the said Bank and to improve, manage and develop the properties and to let out the same on lease or otherwise dispose of the same. The principal business of the Company is, therefore, to deal with real property. The income which the Company derives is not from mere letting out of the properties to the tenants. The tenants pay not only for mere occupation of the property but also for the enjoyment of the various services which are rendered by the Company to the tenants and to which services the tenants are entitled as a matter of right for their occupation of the premises. The

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tenants therefore make the payment which constitute the main source of income of the Company in consideration of their occupation of the premises and of the enjoyment of the various other amenities and benefits to which they are entitled as a matter of right. These benefits and amenities which the tenants in occupation enjoy and which form a part of the material consideration for which the tenants make the payments to the company are in the nature of material services rendered to the tenants. The services which are rendered to the tenants and about which there does not appear to be any dispute are:

(1) elaborate arrangements for supply of water, (2) free supply of electricity, (3) washing and cleaning of floors and lavatories, (4) lift services, (5) electric repairs and replacing, (6) sanitary repairs and replacing etc., For offering these services to the tenants, the Company has employed a number of workmen and these service which undoubtedly confer material benefits on the tenants and constitute material services, are rendered by the employees. In the instant case that there is a relationship between the employer and employee is not in dispute and it is beyond doubt that the Company is engaged in business. The employees of the Company, engaged in their respective calling or employment do their work for rendering the services. In the instant case an ''industry'' must therefore be considered to exist, as there is a relationship between the employers and employees, the former engaged in business, trade, undertaking manufacture or calling of employees and the latter engaged in calling, service, employment, handicraft or industrial occupation or avocation; and there is an enterprise in which the employers follow their avocation as detailed in the definition and employ workmen who follows one of the avocation detailed for workmen. Activity carried on by the Company is undoubtedly not casual and is distinctly systematic. The work for which labour of workmen is required is clearly productive of the services to which the tenants are entitled and which also form a part of the consideration for the payments made by the tenants. We further note that the company carries on its business with a view to profits; it makes profits, it has shareholders and it declares dividends out of the profits earned. Though it is not necessary that there must be a profit motive, in the instant case the profit motive is very much there and there can be no manner of doubt that the enterprise or undertaking of the Company clearly amounts to trade or business in a commercial sense. In the instant case, therefore, there is clearly a systematic activity on the part of the company which clearly pertakes the nature of a business or trade. As we have already noted earlier, the employers have employed a number of workmen for rendering various benefits and amenities which the persons who come into occupation of the various flats as tenants are entitled as a matter of right and the said amenities and benefits constitute a part of the material consideration along with their occupation for which they make the payment to the Company. There is no doubt that the various benefits and amenities offered to the tenants constitute material services rendered to them. In the instant case, therefore, there is co-operatio9n of the employer and the employee resulting in the production of material services. The requirements of

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''industry'' as defined in section 2(j) of the Act are, therefore, clearly satisfied in the instant case.

36. As most of the decisions which have been referred to by Mr. Dutt have been dealt with by the Supreme Court in the decisions we have considered, we do not think any useful purpose could be served by considering the other decisions and we have, therefore, not dealt with the same. We must, however, add that the decisions of the Division Bench of this Court in the case of Workmen of Sri Ganesh Properties (Pvt. Ltd.) (In Appeal No.289 of 1969 from matter No.316 of 1965 unreported) clearly lends support to the view that we have taken and the decision of the Division Bench appears to conclude this question. In the case of Ganesh Properties (Pvt. Ltd.) the Division Bench on a consideration of the facts which are more or less similar to the facts of the instant case and on a consideration of various decisions of the Supreme Court held that the Company was in industry and the dispute between the company and its employees was in industrial dispute. The distinction sought to be made by Mr. Dutt that the decision in the case of Ganesh Properties (Pvt. Ltd.) turned mainly on the question that the Company in the said case run a bazaar is, in our opinion, not tenable. The decision of the Kerala High Court in the case of Place Administration Board v. State of Kerala, reported in AIR 1960 Kerala 151 is not of any great assistance and is clearly distinguishable. In the case before the Kerala High Court there was no question of the employees rendering any material services and the essential element of co-operation of the employer and the employee resulting in the production of material services was lacking. In any event, the decisions of the Supreme Court are biding on this Court and it is also our duty to follow the decision of the Division Bench of this Court which has been given on a proper consideration of the decisions of the Supreme Court. The learned trial Judge has carefully considered the facts of the instant case and also some of the decisions of the Supreme Court and the decision of the Division Bench of this Court in the case of Ganesh Properties (Pvt. Ltd.). The learned Trial Judge has rightly held:

Organising the supplies of services, like water electricity etc. are equally providing material services. It is abundantly clear from the case of the petitioner that the various flats as contended by the petitioner were of peculiar nature and because of these peculiar advantages together with the services provided in these flats that the tenants had been attracted. In providing these services there was an organisation. As a result of that organisation the services were organised and provided to the tenants. In that effort both the workmen and the petitioner combined in the concept of industry as now defined by the Industrial Disputes Act. It must, therefore, be held that the petitioner was carrying on an industry and the present dispute was within the jurisdiction of the Tribunal.

37. The contention that the dispute between the Company and its employees is not an industrial dispute has been advanced only on the basis that the Company is not an industry and therefore the dispute with the Company cannot be considered to be an industrial dispute and on no other basis. As we have held

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that the Company in the instant case is an industry, the contention of Mr. Dutt that the dispute sought to be referred is not an industrial dispute must necessarily fail. In the facts of the instant case the dispute which has been referred to the Tribunal clearly satisfies the requirements of an ''industry dispute'' as defined in section 2(k).

38. We now proceed to deal with the second ground urged by Mr. Dutt in support of his submission that the award in the instant case is void for want of jurisdiction on the part of the Tribunal to make the same. The second ground urged by Mr. Dutt is that the Tribunal was not competent to make the award as the earlier award which was made on the basis of the settlement between the parties has not been validly terminated. The main argument of Mr. Dutt has been that the earlier award made on the basis of a settlement between the parties could only be terminated in accordance with the provisions contained in section 19(2) of the Act which provides for termination of a settlement. This contention of Mr. Dutt that the earlier award, though in the form of an award was indeed in the nature of a settlement between the parties and there could only be a valid termination in accordance with. The provisions contained in section 19(2) which provides for termination of a settlement between the parties was not raised at any earlier stage of the proceeding. This contention was not raised before the Tribunal and also before the learned trial Judge. In our opinion, Mr. Manna the learned counsel for the Union, rightly contends that it is not open to the appellant company to raise this plea for the first time at this stage of the appeal. This question cannot be considered to be a pure question of law. A settlement which can be validly terminated in accordance with the provisions contained in section 19(2) of the Act must necessarily be a settlement as defined in section 2(p) of the Act. To make it a ''settlement'' within the meaning of the Act the necessary requirements of settlement as laid down in the statute and the rules have to be satisfied. Whether the necessary requirements have been satisfied or not will involve an investigation into facts; and in the absence of necessary averment of the relevant facts, it is not possible to come to any conclusion as to whether there is any settlement requiring termination in accordance with the provisions contained in section 19(2) of the Act. This question cannot, therefore, be considered to be a pure question of law and cannot be agitated at this stage. In the absence of necessary averments and as no such case had been made at the earlier stages of the proceeding. We are unable to entertain this plea at this stage. Even if, we were inclined to allow the appellant to raise this plea, we would not have accepted the same. This plea, in our opinion, is clearly without any substance. For attracting the provisions contained in section 19(2) of the Act, the settlement must be a settlement as defined in section 2(p) of the Act. The materials on record do not establish that the requirement of ''settlement'' as defined in section 2(p) are satisfied. There mere fact that the parties to the dispute have agreed to settle their disputes does not make the settlement between the parties, a ''settlement'' within the meaning of the Act. To be a ''settlement'' within the meaning of the Act, the settlement must conform to the

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definition given in section 2(p) and must satisfy the necessary requirements thereof. If the parties to the settlement choose to arrive at the kind of settlement of the disputes between them without observing and following the formalities and requirements necessary to be followed to make it a ''settlement'' effective within the meaning of the Act, the settlement so arrived at will not be a ''settlement'' within the meaning of the Act and effective as such. An award does not necessarily cease to be an award merely because the same is made on the basis of a settlement arrived at between the parties. An interim or a final determination of any industrial dispute or any question relating there to by any Labour Court, Industrial Tribunal or National Tribunal, even though the determination is arrived at on the basis of any compromise or settlement between the parties, will be award within the meaning of section 2(b) of the Act. Section 15 of the Act clearly lays down that where an industrial dispute has been referred to a Labour Court, Tribunal or National Tribunal for adjudication, it shall hold its proceedings expeditiously and shall, as soon as it is practicable on the conclusion thereof, submits its award to the appropriate Government. The proceedings may terminate as a result of compromise or settlement between the parties or otherwise and the conclusion may be arrived at on the basis of such settlement or compromise or otherwise, but the duty of the Tribunal in any case is to submit its award to the appropriate Government. Section 10(4) which lays down that "Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto", makes it clear that the Tribunal''s jurisdiction is confined to the points referred to it and matters incidental thereto and the Tribunal is not competent to adjudication upon any other matter which has not been referred to the Tribunal. In the earlier case the compromise between the parties before the Tribunal related to points which were referred to the Tribunal and matters incidental thereto and the Tribunal after applying its mind to the compromise came to the necessary conclusion which the Tribunal submitted to the appropriate Government and the conclusion of the Tribunal on the basis of the compromise resulted in a final determination of the industrial dispute or any of question relating thereto referred to the Tribunal and the earlier award made by the Tribunal on the basis of the compromise was, therefore, an award within the meaning of the Act. The other formalities relating to an award including due publication thereof in accordance with law have all been complied with. The decision of the Bombay High Court in the case of Garment Cleaning Works Vs. D.M. Aney and Another, , in our opinion, is not an authority for the proposition that an award made on the basis of a settlement or compromise between the parties necessarily ceases to be an award and loses its character as an award within the meaning of section 2(b) of the Act and becomes a ''settlement'' within the meaning of section 2(p) of the Act. It is undoubtedly open to the parties to the dispute to arrive at a settlement before the Tribunal and if the settlement relates to the points of dispute for adjudication

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before the Tribunal and matters incidental thereto, it may undoubtedly, be the duty of the Tribunal to accept the same and arrive at its conclusion on the basis thereof. The mere fact that there has been a settlement of the dispute pending adjudication before the Tribunal, will not, however, necessarily make it a ''settlement'' within the meaning of section 2(p) of the Act, unless the necessary requirements of the said section are complied with. If it can be contended that the decision of the Bombay High Court lays down the proposition that when ever a compromise or settlement is arrived at between the parties with regard to the subject matter of dispute before a Tribunal and an award is made by the Tribunal on the basis of such compromise or settlement, the award will not be an award within the meaning of the Act and there will be a ''settlement'' within the meaning of the Act between the parties, we have to observe with very great respect that we are unable to accept this view. Whether a particular award of a Tribunal is an ''award'' within the meaning of the Act or result in a ''settlement'' within the meaning of the Act must necessarily depend on the facts and circumstances which will go to show whether the requirements of "award" or ''settlement'' as defined in the Act have been complied with. In the case of State Bihar v. D. N. Ganguly and others reported in AIR 1959 S.C. 1018 the Supreme Court observed at page 1023: -

It is, however, urged that if a dispute referred to the industrial tribunal u/s 10(1) is settled between the parties, the only remedy for giving effect to such a compromise would be to cancel the reference and to make the proceedings out of the jurisdiction of the industrial tribunal. The argument is based on the assumption that the industrial tribunal would have ignore the settlement by the parties of their dispute pending before it and would have to make an award on the merits in spite of the said settlement. We are not satisfied that this argument is well-founded. It is true that the Act does not contain any provision specifically authorising the industrial tribunal to record a compromise and pass an award in its terms corresponding to the provisions of O. XXIII, R, 3 of the Code of Civil Procedure. But it would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on the merits even after it is informed that the dispute has been amicably settled between the parties. We have already indicated that the amicable settlements of industrial disputes which generally lead to a industrial peace and harmony are the primary object of this Act. Settlements reached before the conciliation officers or boards are specifically dealt with by sections 12(2) and 13(3) and the are made binding u/s 18. There can, therefore, be no doubt that if an industrial dispute before a tribunal is amicably settled the tribunal would immediately agree to make an award in terms of the settlement between the parties. It was stated before us at the Bar that innumerable awards had been made by industrial tribunals in terms of the settlements between the parties. In this connection we may incidentally refer to provisions of section 7(2) (b) of the Industrial Disputes Act (Appellate Tribunal) Act, 1950. (XLVIII of 1950), which expressly refer to an award or decision of an industrial tribunal made with the consent of the parties. It is true that this Act is

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no longer in force; but when it was in force, in providing for appeals to the Appellate Tribunal set up under the said Act, the legislature had recognised the making of awards by the industrial tribunals with the consent of the parties. Therefore, we cannot accept the argument that cancellation of reference would be necessary in order to give effect to amicable settlement of the dispute reached by the parties pending proceedings before the industrial tribunal." The aforesaid observations of the Supreme Court in our view, indicate that an award can be made by the Tribunal with the consent of the parties. The award made by the Tribunal with the consent of the parties in the earlier proceedings was an award within the meaning of section 2(b) of the Act and was not a settlement as a contemplated in section 2(p) of the Act. The said award, therefore, could be terminated in accordance with the provisions contained in section 19(6) of the Act. Whether an award has been validly terminated or not must necessarily depend on the facts and circumstances of each case. In the facts of the instant case we have no doubt that the said award has been validly terminated. For a valid termination of the award in accordance with the provisions contained in section 19(6) of the Act, no notice in writing necessary. Section 19 (6) lays down that an award shall continue to be binding on the parties even after the expiry of the period of operation thereof until a period of 2 months has elapsed from the date of which a notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award. In the instant case the letter of the Union addressed to the Labour Commissioner is dated 24.11.66 and in the said letter there is a clear intimation of the intention of the employees to terminate the same. The said letter was sent to the Company and the Company undoubtedly became aware of the intention of the Union to terminate the said award and the said fact is clear from the letter of the Company dated 13.2.67. The order of reference in the instant case was made on 29.7.67 long after the expiry of the period of 2 months. Notice as contemplated in section 19(6) of the Act has, in our opinion, to be construed liberally and if any case it is established that any party bound by the award had knowledge of the intention of the other party to terminate the award and the period of two months had elapsed from the date thereof, the requirement of section 19(6) is substantially complied with. The decision of the Supreme Court in the case of The Indian Link Chain Manufacturers Ltd. Vs. Their Workmen, is, in our view, is an authority for the proposition that in the facts and circumstances of a case a letter addressed to the Labour Commissioner may amount to a valid notice of termination of an award even u/s 19(2) of the Act. The Supreme Court observed at page 350 -

In our view the letter of 20th March, 1965 must at any rate be deemed to be a notice of termination, because there is a categorical statement that the settlement has been terminated on 31.12.64. Even if there is no evidence of written notice terminating it on the date specified, the letter which said that it had so terminated must be taken as the requisite notice, if so, the reference to adjudication under the Act has been made long after the expiry of the two

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months i.e. on 27.12.65." The letter of 20th March, 1965 referred to by the Supreme Court was a letter addressed to the Assistant Labour Commissioner. In the instant case, in the letter to the Labour Commissioner dated 24-11-66 there is a categorical statement that the award has been terminated. To the said letter the Company replied on 13.2.67 and the order of reference was made long after the expiry of the period of 2 months i.e. 29-7-67. Even, if the appellant to be permitted to urge that the award resulted in a ''settlement'' requiring termination in accordance with the provisions contained in section 19(2) of the Act and even if we were inclined to hold that there was any substance in the aid contention of the appellant, even then on the basis of this decision of the Supreme Court in the Link Chain case we would have held that the award in the instant case had been validly terminated in accordance with the provisions contained in section 19(2) of the Act. As, in our opinion, the award in the facts and circumstances of this instant case has been validly terminated, we have not considered it necessary to refer to all the decisions cited from the Bar.

39. The conduct of the parties in the present case also goes to indicate to our mind that the award was not considered to be binding on the parties and was treated by the parties as having been terminated. Unless the award was treated as terminated and not binding on the parties, the appellant could not have granted to the employees the further increments in 1963-64 and the further temporary dearness allowance from 1965. The Tribunal on a proper consideration of the relevant materials has come to the conclusion that the earlier award had been validly terminated before the reference to the Tribunal of the present dispute. The finding of the Tribunal has rightly been upheld by the learned trial Judge who as observed in his judgment -"The Tribunal has so held on the facts. We find nothing irregular and illegal in such finding. It is apparent that either by direct process of receipt of the copy of the letter from the workmen or through the copy sent by the Labour Directorate the employer came to know that the workmen had given notice of the termination to terminate the said award". This ground that the award in the instant case is void as there has been no valid termination of the earlier award when the present reference was made, urged by Mr. Dutt, must, therefore, fail. The next and the only other contention urged by Mr. Dutt relates to the merits of the award and it is Mr. Dutt''s contention that the award must be considered to be bad as in making ghd award the Tribunal has not considered the financial capacity of the company and the financial capacity of the Company does not permit the Company to pay the further sums awarded by way of dearness allowance to the employees under the award. It is on this ground mainly the validity of the award has been challenged on its merits. It was essential for the Company to lead proper evidence before the Tribunal to establish its financial capacity. In our opinion, the documents which are now sought to be relied upon and which are contained in Part IV of the Supplementary Paper Book cannot be allowed to be used at this stage to support the argument of Mr. Dutt that the Company is not financially capable to meet the burden of the further liability sought to be imposed upon it by the award. With

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regard to any findings of facts by the Tribunal, the Court does not normally interfere in this proceeding, unless the finding of the Tribunal appears to be perverse on any of the recognized grounds of perversity. In considering any such finding arrived at by the Tribunal the Court should generally consider the materials which were made available to the Tribunal and fresh or further materials which were not before the Tribunal should not normally be allowed to be placed before the Court in a Writ petition for determining whether the finding of the Tribunal is justified or not. In the instant case, no proper grounds have even been made out for not producing the materials which were then available at the time of the hearing before the Tribunal or why the documents now sought to be relied upon, were not produced even before the learned trial Judge. In our opinion, it will not be proper for this Court to consider the said documents contained in part IV of the Supplementary Paper Book and sought to be relied upon for the first time at this stage. Even, if we would consider any of the said document and we were inclined to consider the same, in our view, the said documents would be of no particular assistance to the Company. The document contained in the said supplementary Paper Book Part IV, now sought to be relied upon by the company consist mainly of balance sheet and assessment orders. It must be considered to be firmly settled by the decision of the Supreme Court in the case of Unichem Laboratories Ltd. Vs. The Workmen, that while computing gross profits for the purpose of revising wage structure and dearness allowance the provision made for taxation, depreciation and development rebate cannot be deducted; and the provisions of the Companies Act contained in sections 205 and 211 and the principles of accountancy involved in preparation of profit and loss accounts have no relevance or hearing when considering a revision of wages and dearness allowance. It is not doubt true that the financial condition of the Company and its capacity to pay are relevant factors to be taken into consideration by the Tribunal in making an award. As this proposition, in our opinion, is well settled, we have not considered it necessary to refer to the various authorities cited by Mr. Dutt. It is, however, for the Company to place all the relevant materials before the Tribunal to enable the Tribunal to judge the financial condition of the company and its capacity. Material facts which can throw any light on this aspect are primarily within the knowledge of the company. In the instant case on the materials on record the Tribunal appears to be clearly justified in making the award. The materials on record before the Tribunal including the evidence of Kishan Kumar Joshi, one of the Directors of the Company adduced on behalf of the company, establish that the amount awarded by the Tribunal was not beyond the financial capacity of the company. The fact that dearness allowance might have formed a part of the wages or salaries of the employees makes no difference to the position in the instant case. The Tribunal on a proper consideration of the entire evidence which the Tribunal had before it, came to its finding, and, in our opinion, no grounds have been made out for any interference with the said finding of the Tribunal. The learned Trial Judge has also carefully considered this contention which was raised before him and the learned trial judge has rightly rejected the same.

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40. All the contentions raised on behalf of the appellant, therefore, fail. The appeal must, therefore, be dismissed. The appeal is hereby dismissed with costs.

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