

(1994) 07 BOM CK 0064
In the Bombay High Court
Case No : Writ Petition No. 39 of 1990

K.H. Kulkarni

APPELLANT

Vs

Bombay Burma Trading Corporation Ltd. and another

RESPONDENT

Date of Decision : 27-07-1994

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 12, 2, 2A

Citation : (1995) 3 BomCR 258 : (1997) 3 LLJ 742

Hon'ble Judges : E S Da Silva, J

Bench : Single Bench

Advocate : M. Sonak, for the Appellant; S.K. Kakodkar, for the Respondent

Judgement

1. The challenge in this Writ Petition is the Award of the Industrial Tribunal dated August 30, 1989 in Reference Case No. IT/ 11/85 whereby the learned Tribunal has held that the action of the employer M/s. The Bombay Burma Trading Corporation Limited, Cochin, Respondent No. 1 in this case (hereinafter called the respondent), in superannuating the services of the petitioner, their Main Depot Keeper, Margao, from May 6, 1982 was legal and justified and, therefore the workman was not entitled to any benefit or relief in the Government Reference.

2. The case of the petitioner is that he was appointed by the Respondent as its Sales Representative on June 4, 1963. However, somewhere in September, 1970, the Respondent alleging that there was a closure of one of its branches, terminated the services of the petitioner and many other employees with effect from September 21, 1970. Thereafter by appointment letter dated October 15, 1970 the petitioner was again offered employment by the Respondent which was accepted by him. In 1982 the petitioner was required by the Respondent to retire on completion of 55 years of age. It was also stated that inspite of that the petitioner was asked to continue for three months more after the date of the forced retirement as no person to relieve the petitioner could be obtained. The petitioner protested against this premature retirement and contended that he

had a right to continue in service until he reached the age of 60 years. As this claim was not accepted, the petitioner raised an Industrial Dispute and the matter was referred to the Labour Commissioner for his decision. However no amicable settlement could be arrived at and the Labour Commissioner accordingly submitted a failure report. The Government upon receipt of the failure report made a reference to the Industrial Tribunal to (Respondent No.2) u/s 10(1)(d) of the Industrial Disputes Act (hereinafter called the Act) on the following terms :

"Whether the action of the employer, M/s. Bombay Burma Trading Corporation Ltd., Cochin in superannuating the services of Shri K. H. Kulkarni, Depot Keeper at Margao, with effect from May 6, 1985, is legal and justified ? If not, to what relief the workman is entitled to ?"

In the Industrial Tribunal both the petitioner and Respondent filed their statements of claim. The Respondent also filed its rejoinder and the Tribunal framed issues for its determination, being one an issue as to whether the employer had proved that the petitioner was not a workman. This issue was subsequently not pressed by the Respondent and therefore evidence was led by both the petitioner and the Respondent on the remaining issues. After the evidence was concluded the Tribunal passed the impugned Award.

3. Mr. Sonak, learned Counsel for the petitioner, while taking me through the Award of the Tribunal sought to impress upon me that the real controversy in this petition centres around the issue as to whether the age of superannuation of the petitioner should be 55 years as contended by the Respondent or 58 or 60 years as claimed by petitioner. In this respect learned Counsel firstly submitted that from the evidence and the Award itself it is seen that in the employment letter of the petitioner there is no mention to the age of his retirement. According to the learned Counsel the mention of the age of superannuation was one of the conditions of the service of employment which should be therefore reflected in the contract of service of the petitioner. It was thus the duty of the employer to make a specific condition of service in the contract of employment with regard to the age of the petitioner's superannuation. In this respect my attention was drawn by the learned Counsel to the case of Hindustan Antibiotics Ltd. Vs. The Workmen and Others, . This was for the purpose of showing that the age of retirement should not be left on the unfettered or absolute discretion of the employer. There should be something fixed either in the standing orders or in the contract of employment. While dealing with this aspect the Supreme Court has held that it was not proper for the Tribunal to give discretion to the employer to raise the age of retirement or not to do so, for, vesting of such uncontrolled discretion in employer might lead to manipulation and victimisation. Reliance was also placed by the learned Counsel on the case of Miss Raj Soni Vs. Air Officer in Charge Administration and another, , for the purpose of showing that an employer should not be given absolute discretion on the matter of age limit of the service of their employees. This was a case under the Delhi Education Act

(1973) and Delhi Education Rules (1973) dealing with retirement of a teacher and on the question of superannuation or retirement age the Court observed that every institution must frame and follow a uniform rule for superannuating its employees and the age of superannuation could not be left to the whims of the employer to retire different employees at different ages.

4. It was next submitted by the learned Counsel that the Tribunal erred in placing reliance in the instant case merely on two or three instances cited by Management to hold that the age of retirement of the petitioner should be according to the prevailing practice followed with regard to its employees, this age being of 55 years. The learned Counsel urged that the prevailing practice should not be the only factor to influence the Tribunal and according to the learned Counsel there should have been on its part consideration of many other factors which have been laid down in various pronouncements of the Supreme Court on the matter. Reliance was placed by the learned Counsel in this regard on the case of *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . This was also a case under the Industrial Disputes (Appellate Tribunal) Act, 1950, namely its Section 7(1)(a), dealing with the decision of the Tribunal to the effect that the system of forced retirement of workmen at the age of 55 was justified. The Supreme Court while discussing the question as to the factors to be taken into account by the Tribunal in fixing the age of superannuation has observed that in fixing the age of superannuation the Tribunal had to take into consideration several relevant factors namely the nature of the work assigned to the employee in the course of their employment, the nature of the wage structure paid to them, the retirement benefits and other amenities available to them. The Tribunal should also bear in mind the character to the climate where the employees work and what is the age of superannuation fixed in comparable industries in the same region and what was generally the practice prevailing in the industry in the past in the matter of retiring its employees. These and other relevant facts had to be weighed by the Tribunal in every case when it was called upon to fix an age of superannuation in an Industrial Dispute. My attention was also drawn in the case of *Workmen of The Bharat Petroleum Corporation Ltd. (Refining Division) Bombay Vs. Bharat Petroleum Corporation Ltd. and Another*, , which was a judgment passed under the Industrial Disputes Act (14 of 1947) and was concerned also with the age of superannuation, namely, with the considerations to be followed for the fixation of the age of superannuation. The Supreme Court after considering various previous decisions on this point has held that in the matter of fixing the age of superannuation, the trend in a particular area was the most important factor, though in the matter of determining the other conditions of service of workmen, the principle of region-elm-industry was by and large the determinative factor. The Court also held that from the various decisions rendered by the Supreme Court and by the Tribunal it was obvious that the trend was to raise the age of superannuation. On facts the Supreme Court held that the age of superannuation of the concerned workmen in the industrial establishment located in the Bombay area should be 60 years. The learned

Counsel contended that this judgment shows that the trend in Bombay in 1984 being that the age of superannuation of the workmen was to be fixed at 60 years it could not be conceived that when the petitioner retired in 1982 the trend in the Cochin region to which the petitioner belonged should be only 55 years. The learned Counsel submitted that in the circumstances the Tribunal could not rely only on the prevailing practice followed in the Respondent's own Company and instead reliance should have been placed by the Tribunal on the very trend in this respect followed in the concerned region. The grievance of the learned Counsel was that while holding differently i.e. while relying for this purpose on the practice followed by the Company itself the Tribunal did not answer the real question which arose before it which was to find out what should be the age of retirement of the petitioner workman.

5. While making his submissions Mr. Kakodkar, learned Senior Counsel on behalf of the respondent, has observed that the age of superannuation in the establishment where the petitioner was working which was a Cochin establishment was being regulated by the service conditions of its Cochin Office. Learned counsel has invited my attention to the letter of employment of the petitioner which is dated September 10, 1970, namely, to its Clauses 1, 4 and 9. Clause I says that the petitioner would be paid a monthly basic salary of Rs. 327 in the scale for Grade II Rs. 205-12-265-EB-15-400-EB-17-505-20-605 with Dearness Allowance as may be applicable and that the present scale is at the rate of 30 paise per point per month over the Ernakulam C.L.I. base of 400 points. Clause 4 reads that the petitioner would be entitled to leave and other benefits as laid down by the Cochin Branch Rules framed from time to time and that he would be bound by the Service Rules as may be applicable to the Cochin Office. Clause 9 says that in all other aspects the petitioner's employment would be governed by the Service Rules applicable to Cochin Office staff in force from time to time. The finding given by the learned Tribunal was that in respect of the employees of the Cochin Office the age of retirement provided in the concerned Rules should apply to the petitioner and therefore he was bound to be superannuated at the age of 55. There was thus nothing wrong in the finding of the Tribunal because the said finding of fact has been given by the Tribunal on the basis of evidence. The learned Counsel has made a grievance that the petitioner has deliberately suppressed the letter of his appointment by filing the petition in order to derive some benefits from this Court by concealing material facts which could be relevant in adjudicating the petition. The learned Counsel urged that this conduct of the petitioner should be noted and the nature of his appointment should be considered as important to show that the employment of the petitioner was being governed by the same terms and conditions of service applicable to other Cochin employees. Therefore the petitioner could not claim any better conditions of service different from the one enjoyed by other employees of Cochin establishment. Learned Counsel submitted that the evidence led before the Tribunal on behalf of the respondent would show that in Cochin establishment the age of superannuation consistently followed was of 55

years and nobody had been superannuated beyond that age. Thus the petitioner individually could not raise any industrial dispute with regard to the increase of his age of superannuation because he was bound by the service conditions of the establishment to which he belongs, as per the letter of his appointment and accepted by the Union of which he is a member.

6. There is indeed considerable merit in the submissions of the learned respondent's Counsel in this regard. The record of the trial Court shows that a collective dispute on the point of the age of superannuation amongst others was raised by the Union on behalf of the employees of the respondent which have given rise to various settlements arrived at by both the Union and the management of the respondent, the latest one being the settlement of 1984 in which for the first time the age of superannuation was raised by agreement of the parties from 55 to 58 years when throughout right from 1973 the Union was pressing for increasing the age from 55 to 60 years which demands were however dropped every time a settlement was arrived at by the parties on the Charter of demands presented by the Union. This fact by itself means that prior to 1984 the accepted position of the age of superannuation was that the Union had acknowledged that the said age should be 55 years. It is not the case of the petitioner in his pleadings that he was not a member of the Union or that he was not bound by any settlement arrived at by the Union with the management. Therefore, if the Union had acknowledged that prior to the settlement of 1984 the age of superannuation of the workmen of the respondent was 55 years the fact indicates that all the workmen of the respondent including the petitioner had tacitly also accepted the age of 55 years as good age of their retirement which age only in the settlement of 1984 for the first time was raised to 58 years. Thus it could not be said that the petitioner was ignoring the fact that the age of his retirement was 55 years and that he was not fully aware of this position when the letter of his appointment was given to him by the management of the respondent. This much appears to be the correct situation when admittedly after his retirement by superannuation the petitioner applied to the management of the respondent for his re-appointment and this application was granted by the respondent for a period of three months only. With the help of the respondent's learned Counsel I have gone through the correspondence which has been exchanged between the petitioner and the respondent's management in this regard. We may advert first to a letter dated April 2, 1982 addressed by respondent to the petitioner wherein he has informed that as per the terms and conditions of service of the staff of their Cochin Branch and applicable to him he should retire from the services of the Corporation on completion of 55 years of age and that as per their own records he would be completing the age of 55 years on May 6, 1982. The petitioner was then told that he was allowed to avail of the eligible privilege leave to his credit and his accounts would be finally settled on May 7, 1982 and that in case he does not wish to avail of the privilege leave the same could be encashed as a special case. The record does not show either (sic.) the petitioner has produced any reply to this letter objecting to his

proposed retirement on superannuation at the age of 55 years on May 6, 1982. On the contrary we find that on April 14, 1982 the petitioner wrote back to the respondent enclosing a duplicate copy of the letter, dated April 2, 1982 duly signed as an acknowledgment which means that by doing so, the petitioner has accepted his proposed retirement on superannuation on completion of the age of 55 years on May 6, 1982. The letter further shows that the petitioner has expressed to the respondent his domestic problem and difficulties and in this connection he had made a request that he should be given an extension in service as a favour, taking into account his sincere and loyal services to the Company for the last 17 years. Again this portion of the petitioner's letter clearly discloses his mind to the extent that it reveals that the petitioner till this time never found his retirement on superannuation at the age of 55 years as something which was violating his rights to continue rendering services to the respondent beyond that age of 55 years. Neither did he claim any right to continue to work for the Company even after that age of superannuation. The prayer made in the letter for extension of service as a favour totally, rules out any intention on his part to claim such extension as a matter of right. In reply to this letter the respondent addressed to the petitioner the letter dated May 3, 1982 re-appointing him to the job on temporary basis for a period of three months from May 7, 1982 on a consolidated salary of Rs. 500 per month. The letter makes it clear that his services would stand automatically terminated at the end of these three months i.e. on August 6, 1982 for which they will be arranging a substitute by July, 1982 and he would have to hand over the charge of the post. In this respect there is also another letter addressed to the petitioner by the Managing Director of the respondent dated April 26, 1982, informing the petitioner that the age of retirement from the Corporation of the workmen is 55 years and it would not be fair on others if an exception was made to this rule in specific circumstances and therefore he is unable to intervene in this matter on his behalf. It appears that this is in respect of a letter which on the same date April 14, 1982 the petitioner has addressed to one Mr. Cherian, Marketing Manager of the respondent, to intervene on his behalf with regard to the request made to the Company to give him an extension in service.

As a matter of fact in this connection there is also another letter dated August 12, 1982 addressed by the petitioner to the said Cherian wherein he had informed him that as per his instructions he had relinquished the charge of the respondent's Margao Depot on August 2, 1982 i.e. after the termination of the re-appointment period of three months. In this same letter the petitioner brings to the notice of Cherian that by letter dated April 14, 1982 he had requested him to give him an extension in service for a period of two years in view of incomplete education in Medical College of his son and nephew who were depending upon him and that he had been told during his visit to Goa that his retiring age was 55 years and no exception to this rule was desirable. However, since he had learnt that an extension for a period of three years beyond the age of 55 years could be given at the discretion of the Management, he felt that

there was nothing wrong to accede to his request for an extension of two years only taking into consideration the services rendered by him from 1963 to 1982 to the best of his ability, honesty and integrity. He therefore made a specific prayer to Cherian to recommend his request to the Company so as to enable him to get an extension for two years. This letter again makes the position clear to the fact that the petitioner was always aware that the age of his retirement was 55 years irrespective of the fact that the said age had not been mentioned as a condition of service in the contract of his employment and that after his retirement by superannuation he was only desirous of getting an extension of his services in the exercise of the Management's discretion in this regard. There is nothing in this letter which suggests that the petitioner intended to assert before the respondent any right to get such extension or re-appointment of his service. It is only by letter dated October 19, 1982 that the petitioner for the first time chose to raise the dispute before the respondent and stated that since no retirement age was fixed for him either in his original appointment letter, dated July 19, 1963 issued by the respondent's Bombay Office or in the letter, dated September 10, 1970 transferring his services to Cochin Office his services were subject to medical fitness since no retirement age was fixed for him (sic.). The petitioner further contended that he was still physically and mentally fit to continue his work as usual and as such his retirement with effect from May 6, 1982 was wrongful, unjust and illegal. He therefore claimed that he was entitled to be in the same post with continuity of service with full back wages from May 6, 1982 and other benefits accrued to him therefrom. This letter was written by the petitioner inspite of the fact that by a previous letter dated May 21, 1982 addressed to the respondent, the petitioner has clearly accepted his retirement on superannuation and claimed benefits from his retirement as well as settlement of his dues namely Provident Fund and other benefits while at the same time acknowledging the fact of his temporary appointment order passed after the retirement by superannuation. There is no doubt that this letter is to be deemed as the best evidence against the petitioner in his attempt to create a case for him that on attaining the age of 55 years he has not retired on superannuation and therefore he was entitled to continue in service of the respondent, thus and at the same time disproving the petitioner's claim that no age of superannuation was stipulated in the service conditions of his appointment, the reason why he was supposed to continue in service till the time he was physically fit to work for the respondent.

7. On the other hand the record also shows that the Union of the respondent's employees has raised in the past several demands on behalf of the workmen and various settlements had been arrived at between the Management and the Union in this regard. With the help of Mr. Kakodkar again I have gone through the charter of demands presented by the Union to the respondent from 1973 to 1983 and I am satisfied that in this Charter of 1980 the question of age of superannuation of the workmen was consistently raised by the Union and the demand was made that such age should be raised from 55 to 60 years. However

in the settlements which were reached between the parties such demand was always given up by the Union and as such the increase of the superannuation age remained as not pressed by the workmen. Only in the Charter of demands presented in 1983 which has culminated in the settlement of 1984, that it was agreed that the said age, against the demand of increase from 55 to 60 years, was to be enhanced to 58 years to take effect from the date of signing the agreement. This fact by itself shows that till 1984 the age of retirement of the workmen of the respondent's Company was always accepted by the Union and the workmen as well as being 55 years which is therefore to be deemed as one of the existing conditions of service with regard to their retirement by superannuation. Thus the increase of age from 55 to 58 years has occurred only as a consequence of a collective demand raised by the Union and in relation to an issue which became the subject-matter of a settlement to which the petitioner as a member of the Union is certainly bound. It would not therefore lie in the petitioners mouth to raise thereafter individually a dispute with regard to the age of superannuation by reopening what has been agreed by the Union in 1983 by a settlement arrived at in 1984 and this also in connection with his purported retirement in the year 1982 when admittedly the petitioner attained the age of 55 years and accepted the termination of his services on account of superannuation. It thus follows that the petitioner could not raise such a dispute which obviously affects all the employees of the respondent. The petitioner could raise u/s 2-A only a dispute concerning him individually. He could not obviously step into the shoes of the Union under the guise of Section 2-A of the Act. Section 2-A is only a complement of Section 2(k) and cannot certainly substitute Section 2(k). Section 2-A is a provision which enables an individual workman to raise and avail of the benefits of the Act as far as a reference of the dispute involving him is concerned when the employer discharges, dismisses or retrenches or otherwise terminates his services when any dispute or difference arises between him and the employer in connection with discharge, dismissal, retrenchment or termination irrespective of the fact that no other workman or any punishment of workman is a party to that dispute. It is only a deeming provision which can thus complement the general provision of Section 2(k) and not supplement it. Mr. Kakodkar is therefore right when he contends that all the authorities cited by Mr. Sonak refers to disputes raised by the Union and not individually by the workmen u/s 2-A. Being so the reference made on behalf of the petitioner appears to be ex facie incompetent. Mr. Kakodkar says that the petitioner could not smuggle a reference u/s 2(k) and thus cause a reference to be made in this case u/s 2-A.. The submission seems to be correct and deserves acceptance. When there is a settlement arrived at between the Management of a Company and the Union representing its workmen with regard to a dispute raised by the Union on behalf of the employees no dispute can be raised during the pendency of the settlement even by the Union itself and much less by an individual workman who is bound by the said settlement. It is not disc the case of the petitioner that he has pleaded that he was not a member of the Union who signed a settlement with the respondent. Mr. Sonak has stated that there is some

statement given by the petitioner before the Tribunal to the effect that he is not a member of the Union. It may be so, but the fact remains that as already mentioned the petitioner has not made a plea to this effect or even a ground to support this case in the petition and therefore no evidence is permissible to be led by a party who has not pleaded a fact in support of a case sought to be made before a writ Court. Besides according to Mr. Kakodkar the reference is also incompetent as its very wording stands. According to the learned Counsel there cannot be a reference u/s 10(1) challenging the petitioner's superannuation u/s 2-A which refers to a case wherein an employer has discharged, dismissed, retrenched or otherwise terminated the services of an individual workman. Learned Counsel submits that the said provision contemplates an overt action of the employer and cannot predicate a case of superannuation. It was urged by the learned Counsel that as regards his superannuation the petitioner knew very well that he would have to quit when he had reached the age of 55 years. He was aware that he had to vacate his job on attaining the age of superannuation. Even conceptually, learned Counsel says, super annuation is not involving any act of the employer. The respondent in the letter addressed to him somewhere in April, 1982 has not sought to terminate the petitioner's services by any act of the Management and the petitioner was only reminded that it was time for him to vacate or quit the job. According to learned Counsel there was no such termination or otherwise caused by the employer. Thus obviously the reference made on behalf of the petitioner was outside the ambit of Section 2-A. The reference to the extent that superannuation was caused by any action of the employer in superannuating him is wrong and incompetent because the employer could not superannuate the petitioner. The learned Counsel reiterated that the superannuation was a fact which would arise by operation of the law or institute regulating the terms and conditions of the service of the petitioner namely with regard to the age of his retirement and thus superannuation was the result of an action of the law and not of the employer.

8. Mr. Sonak in turn has joined issue with the submissions of the respondent's learned Counsel and insisted that the reference made by the Government on behalf of the petitioner was very much maintainable. He has submitted that although it is the respondent's contention that the dispute was to be raised by the Union such issue which was raised by the respondent before the Tribunal was rejected although the respondent wanted it to be reopened again before this Court. The learned Counsel while agreeing that Section 2(k) contemplates a case of collective dispute and Section 2-A amounts only to a deeming provision and a fiction created by the statute whereby a situation is carved out wherein even an individual workman can maintain an industrial dispute so far the terms and conditions of service are concerned, the real dispute in this case was whether the petitioner could have been superannuated at the age of 55 years or not. It was the petitioner's case that his services were wrongly terminated on account of an undue superannuation which was imposed upon him. Thus it was perfectly a competent dispute which the petitioner was entitled to raise within the meaning

of Section 2-A and the Tribunal was wrong in saying that such dispute was not maintainable. In the alternative the learned Counsel contended that the petitioner was also falling within the category of a workman whose services had been terminated within the meaning of Section 2-A. There is no doubt that when the petitioner raised the dispute his services were terminated. Thus the action of the employer in causing the termination of his service by superannuation would at least amount to retrenchment within the meaning of Section 2(oo) of the Act. It was submitted by the learned Counsel in this regard that since the contract of employment admittedly does not contain a stipulation with regard to the age of superannuation and his letter of appointment is silent on this issue therefore the dispute raised by the petitioner was very much an industrial dispute within the scope and meaning of Section 2(k) r/w Section 2-A of the Act.

9. With due regard to the learned Counsel it is difficult to appreciate the said submission made by him on behalf of the petitioner. Indeed Section 2(oo) defines "retrenchment" as meaning termination of service for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action. However the Section carves out certain situations which are excluded from the meaning of the definition namely sub-clause (b) which refers to retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf. Admittedly, as contended by Mr. Sonak, there is no such stipulation in the employment contract of the petitioner with regard to the age of his superannuation. However this does not mean that in the absence of such stipulation termination of the petitioner's services on superannuation may amount to retrenchment of his services. As submitted by Mr. Kakodkar one must read the terms of reference made by the Government on behalf of the petitioner and there is nothing in the reference which discloses the intention of the Government to make a reference on account of the alleged retrenchment which the petitioner himself has not even pleaded in this petition. Further the clauses of the letter of appointment of the petitioner, namely clause 9, shows that there is an implied reference to the Cochin Rules of Service which must be thus read as amounting to a stipulation regarding the petitioner's conditions of service including the one in respect of the age of his retirement. Therefore and although there are no framed Rules in this regard the practice followed and tacitly accepted by the employees who have also acted upon such practice in the respondent's establishment is to be deemed as a part of the contract regarding the service conditions of the petitioner's appointment as a workman at the respondent's Company.

10. In my view what is ultimately material in this whole controversy is the very fact, otherwise abundantly proved from the documentary evidence on record; that the petitioner was fully aware and very well knew that the age of his superannuation was 55 years as per the practice followed in the respondent's establishment as an implied condition of his contract of employment. Mr. Sonak has however sought to controvert the respondent's learned Counsels

submissions on the maintainability of the petition to the extent that it was contended by Mr. Kakodkar that reference u/s 2-A would be available for the petitioner only in the event of his services having been terminated on account of an overt act of the employee. Thus, according to Mr. Kakodkar, superannuation operates not due to an act of the respondent but instead had occurred on the strength of the operation of law and no reference could have been made in his behalf by the Government with regard to the dispute sought to be raised by him u/s 2A. Mr. Sonak has also taken an exception to Mr. Kakodkar's contention that in this regard one has to go through the phraseology of the reference itself to collie to the conclusion that as per the very words of the same Reference the same had to be held as impermissible and incompetent. The learned Counsel for the petitioner has taken me through the definition of the word superannuation in the Concise Oxford English Dictionary according to which superannuation means retiring a person with a pension or discharge as too old for a position of working or to render it auxilliary. It was submitted by learned Counsel that superannuation does not therefore mean something which operates automatically but instead would imply an action of the employer in retiring the petitioner with a pension. It was further submitted that the words "otherwise terminate the service" in Section 2-A does not also refer to any overt act of the employer but instead to the fact of the termination of service howsoever it is produced. Reliance was placed in this regard on the case of The State Bank of India Vs. Shri N. Sundara Money, , wherein it has been held that while dealing with Section 2(oo) the expression "termination" in the definition of the word "retrenchment" embraces merely the act of termination howsoever produced.

11. I have gone through the decision cited by the learned Counsel and I have no, doubt that similar to retrenchment, superannuation amounts also to termination of service of a workman. However Section 2(oo) defines "retrenchment" as termination by the employer. Thus the provision contemplates a situation in which the termination of the service of the workman has been caused or done by an overt act of the Management. Besides the decision does not deal with the case of superannuation but instead with a clause of automatic cessation of the service of a workman. Thus the only conclusion which in my view is permissible to be drawn from the ruling is that like retrenchment superannuation also amounts to termination of service. Nowhere in the said ruling it is said that superannuation may be equated to retrenchment as a matter of course although in exceptional circumstances provided in sub-clause (b) of Section 2(oo) termination of service on account of superannuation may be deemed as being retrenchment of the service of a workman. Mr. Sonak has also sought to dispute the argument advanced by Mr. Kakodkar that the terms of the reference should be construed strictly and therefore in the instant case the very wording of the reference which contemplates a situation of superannuation having been caused by the Management of the respondent would rule out the possibility of such reference being maintainable in terms of Section 2-A of the Act. According to the learned Counsel the terms of reference should be instead liberally construed and

the Court should look at the pleadings and other circumstances while dealing with the scope of such reference. It was urged that reference under the Act could not be compared with the reference under the Industrial Disputes Act and should be rigidly construed. My attention was drawn in this regard to the case of Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others, . This was a case under the Industrial Disputes Act namely dealing with Section 10(1)(c) read with Section 12(5) and the question which arose was whether the petitioner whose services had been terminated should be reinstated with back wages. The employer's contention was that the petitioner had abandoned the service and that such dispute was not reflected in the reference. The Labour Court held the reference as not maintainable. A Division Bench of this Court reversed the finding of the Labour Court by holding that the impugned award could not be sustained since it was based on too hyper technical and a pedantic view of the matter and sacrifices substance for the form, an approach impermissible in labour jurisprudence. The Court observed in this regard that there is a long line of decisions of the Supreme Court taking a view that an order of reference should be liberally construed and the reference should not be rendered incompetent merely because it is made in general terms and it is always permissible for the Labour Courts or the Tribunals to construe the reference in the light of the backdrop against which it is made and to bring out the real dispute for its decision. The Court has relied on several decisions of the Supreme Court in the matter and also held that the Tribunal must look to the pleadings of the parties to find out the exact nature of the dispute and the mere wording of the reference was not decisive in the matter of tenability of a reference. If points of difference are discernable from the material before the Court or Tribunal, it has only one duty and that is to decide the points on merits and not to be astute to discover formal defects in the wording of the reference.

12. The submission of the learned Counsel is no doubt well conceived and I am in full agreement with him. Indeed Mr. Kakodkar has sought to find fault on the apparent wording of the reference in order to demolish the attempt of the petitioner to adjudicate the dispute by the Tribunal. I do not share his view in the matter which appears to be not a sound proposition in law. What matters in this type of disputes relating to a reference is the real issue which was sought to be adjudicated by the Government by making a reference in Court. Mere words and phraseology adopted in making the reference should not be therefore the sole consideration in deciding whether the reference is or not maintainable on facts or in law. However in the instant case I have already held that in my view the reference appears to be incompetent not on account of its wording but instead because the issue or dispute having been already a subject matter of a settlement arrived at by the Union on behalf of the workmen of the respondent's Company which is binding on the petitioner irrespective of the fact of his being or not a member of the Union the petitioner was certainly not entitled to raise a similar dispute which although could have concerned him individually as far as his retirement on superannuation is concerned was certainly also affecting

generally all the workmen and had been therefore the subject-matter of the settlement arrived at in the year 1984. Besides the dispute sought to be raised by the petitioner was with regard to the year 1982, the year of his retirement on superannuation, when at the relevant time that issue although raised by the Union had been already given up or dropped by the workmen at the time of the prevailing settlement arrived at in the year 1980.

13. Mr. Sonak has also raised contention with regard to the clauses of his appointment letter that once the letter of appointment admittedly does not contain a condition regarding the age of his retirement a reference to Clause 9 made by the respondent's learned Counsel would become irrelevant and meaningless since throughout the hearing it was found that there were no rules framed by the respondent regulating the terms and conditions of service of the workmen. Indeed the submission, although apparently appealing, cannot be considered in the facts and circumstances of this case bearing in mind that in spite of the failure of the respondent to show that there were framed rules regulating the service conditions of their employees, namely on the aspect of age of their retirement on superannuation, there is internal evidence to show that the practice consistently followed in this regard has been tacitly approved and accepted by the workmen and the petitioner was not able to point out a single case wherein any workman of the respondent's Company has been allowed to continue in service beyond the age of 55 years which is the age of superannuation to be applied indistinctly to all its employees. Therefore the submission of Mr. Sonak, that reliance placed by Mr. Kakodkar on the decision of a Single Judge of this Court in the case of *Deyabhai Fakhir v. Patel Bombay-Burma Trading Corp. Ltd. and Others*, 1987 (54) FLR 389, is not attracted in the facts of the case because admittedly that decision was given on a different situation wherein rules were existent and therefore the Court held that the workmen could not plead ignorance of those rules being the employee of the Company for 15 years and had already availed of the benefit of the said rules does not appear to have any merit. I say so because once it was held that the absence of rules becomes meaningless when the evidence shows that the respondent's workmen conditions of service had been always governed and regulated by the practice prevailing in the Company's establishment which was accepted by the workmen including the petitioner and were known to them the question of the rules being existent or not in this regard appears to be totally irrelevant and immaterial.

14. Lastly it may be stated that the authorities cited by the learned petitioner's Counsel are clearly distinguishable not only because they were given on facts but also passed in relation to different Statutes and in all cases it seems that the disputes raised before the Tribunal were done collectively by the Union and not by the individual employee. Thus nothing survives in this petition which is therefore bound to be rejected.

15. In the result the petition fails and is hereby dismissed. Rule is accordingly

discharged with. However no order as to costs.