
(2011) 09 BOM CK 0164
In the Bombay High Court
Case No : Writ Petition No. 5308 of 2010

Pix Transmissions Limited

APPELLANT

Vs

State of Maharashtra and Maharashtra General Kamgar Union

RESPONDENT

Date of Decision : 21-09-2011

Acts Referred:

Constitution of India, 1950 — Article 141, 226, 227
Contract Act, 1872 — Section 23
Industrial Disputes (Bombay) Rules, 1957 — Rule 11, 3, 4
Industrial Disputes Act, 1947 — Section 10, 10(1), 10(4), 12(4), 12(5)
Minimum Wages Act, 1948 — Section 11(1), 2, 25, 27, 3

Citation : (2012) 3 BomCR 428 : (2012) 2 LLJ 647 : (2012) 1 MhLj 182

Hon'ble Judges : B.P. Dharmadhikari, J;A.P. Bhangale, J

Bench : Division Bench

Advocate : V.R. Thakur and H.V. Thakur, for the Appellant; A.R. Taiwade, AGP for Respondents Nos. 1, 2 and 4 and M.V. Mohokar, for the Respondent

Judgement

B.P. Dharmadhikari, J.—The Petitioner employer has filed this petition under Articles 226 and 227 of the Constitution of India assailing the order of Reference dated 21.1.2010 passed by Respondent No. 2 and referring the controversy to the Industrial Tribunal, Nagpur. The said Reference as reproduced in Schedule appended to the order dated 21.1.2010 is reproduced below:

Whether the members of Maharashtra General Kamgar Union working in M/s General Manager, Pix Transmission Limited, J7, MIDC, Nagpur are entitled for payment of minimum wages as per notification dated 16.4.2007 with arrears ?

2. The challenge raised is basically on the ground that entire controversy as presented to Respondent No. 2 has not been placed for consideration before the Industrial Court and Petitioner/employer is, therefore, precluded from pointing out that the demand of minimum wages as raised is itself erroneous and misconceived. It is further urged that as wages are being paid at a rate which is more than the rate of minimum wages as per settlement dated 14.8.2006 and that settlement was for a period of three years and contained a clause which

prohibited Respondent No. 3 Union from raising any financial demand, the Authority ought to have seen that there was no industrial dispute or dispute as defined in Section 2(k) of the Industrial Disputes Act, 1947. This Court issued notice in writ petition on 28th October 2010 and thereafter the matter came to be admitted on 9th June 2011. Further proceedings in Reference registered as Reference (IDA) No. 1 of 2010 were stayed, but then Petitioner/employer was directed to file appropriate Written Statement before the Authority raising all defences. Accordingly, Written Statement has been filed by the Petitioner/employer. In this background, we have Mr. V.R. Thakur with Mr. H.V. Thakur, Learned Counsel for the Petitioner; Mr. M.V. Mohokar, learned Counsel for Respondent No. 3 and Ms A.R. Taiwade, learned Assistant Government Pleader for Respondents No. 1, 2 and 4.

3. After inviting attention to undisputed facts, Mr. V.R. Thakur has pointed out that the minimum wages payable under the Minimum Wages Act, 1948 were revised on 16.4.2007 and thereafter Respondent No. 3 made a demand of basic wage and DA accordingly. The communication was immediately replied to pointing out that the workmen were receiving more than minimum rate of wages and hence, there was no question of rate specified in 16.4.2007 Notification to be made applicable. After this, Respondent No. 3 invoked Section 2(k) of the Industrial Disputes Act, 1947 and raised very same demand. It was replied to on 6.2.2008. On 5.3.2008 Respondent No. 3 submitted justification in detail of demand made by it mentioning the point in dispute. The Petitioner by way of abundant precaution filed written notes of argument before that Authority on 1.10.2009 giving entire history pointing out that there is no and can be no "dispute" and how demand was erroneous. The Conciliation Officer admitted the matter to conciliation on 6.10.2009 and thereafter the Petitioner submitted a communication adopting their reply defence already on record. On 16.12.2009 Respondent No. 2 submitted a failure report to appropriate Government and then the reference as mentioned supra came to be made to last Respondent Industrial Court.

4. Mr. Thakur contends that the order of Reference dated 21.1.2010 is bad as it does not show any application of mind by appropriate Government and it also suffers from vagueness. He contends that what is referred is not an industrial dispute at all, and in any case, points raised in Petitioner's written notes of arguments before Conciliation Officer have not been kept open. He contends that as Clause 33 of the Settlement prohibited the workmen and Union from raising any dispute either individually or collectively demanding any benefit tending to cast additional financial burden on the Company during the currency of the Settlement, appropriate Government should not have permitted Reference to be made contrary to clause 33. It is further pointed out that the demand itself is contrary to law as settled by Honourable Apex Court in National Engineering Industries Ltd. Vs. State of Rajasthan and Others, and Airfreight Ltd. Vs. State of Karnataka and Others, . Article 141 of the Constitution of India, therefore, required Respondent No. 2 not to make any such Reference. Lastly, it is

contended that grounds raised in defence to assail the demand on merit have not been referred and since those grounds are not referred, Petitioner is not in a position to urge those grounds before the Industrial Tribunal in Reference proceedings. It is, therefore, urged that there is failure to exercise jurisdiction on the part of Respondent No. 2.

5. In support of his contention, strong reliance has been placed upon judgment of Hon''ble Court in the case of Airfreight Ltd. Vs. State of Karnataka and Others, and it is urged that as per ratio therein, when total wages received by members of Respondent No. 3 Union are much more than minimum wages as specified vide Notification dated 16.4.2007, the demand of alleged minimum wages itself could not have been entertained. The view taken by this Court through learned single Judge following this judgment of Honourable Apex Court in the case of Harilal Jechand Doshi v. M.G.K. U. reported at 2000 (2) Mh.L.J. 123 (Bom) is also relied upon in support.

6. Attention is invited to Section 2(h) of the Minimum Wages Act, 1948, to point out definition of "wage" to urge that the contractual wages being paid as per Settlement dated 14.8.2006 are covered thereunder and since those wages are more, there is no question of going to Section 4(1) or then Notification dated 16.4.2007 issued in pursuance thereof. Our attention has been drawn to copy of Settlement to show that all Unions were free to negotiate and three of the Unions have already participated. Various clauses therein are also shown to point out how the Settlement decides wages, production norms and other service benefits. It is contended that because of Section 18(3) of the Industrial Disputes Act, said settlement is binding on all workmen including members of Respondent No. 3 Union. It is urged that to defeat the said Settlement and to get over Clause 33 therein, Respondent No. 3 has chosen to push the irrelevant wage revision using Notification dated 16.4.2007 as an instrument and has raised demands which have got financial effect and impact. Learned Counsel, without prejudice to his contention that nature of dispute as raised by demand and as referred is not still clear, has attempted to show that effort of Respondent No. 3 Union is to discard long established link between production and wages payable. He contends that such contractual wages or workforce cannot be allowed to be bifurcated by taking recourse to such strategy. He further points out that after 16.8.2009 there have been two more Settlements which are to remain in force for a further period of three years and Respondent No. 3 cannot be permitted to thus create an obstacle in smooth working and discipline in the Factory. Attention has been invited to chart available along with the petition to show how each worker is getting substantial amount as gross salary, more than minimum wage payable as per 16.4.2007 Notification.

7. Judgment of Division Bench of this Court in the case of Poona Mazdoor Sabha Vs. Dhutia G.K. and Another (Esco Ltd.), is pressed into service to point out what is the purpose of such Settlement and why it is given finality. Judgment of Hon''ble Apex Court in the case of National Engineering Industries Ltd.'s case

(supra) is also pressed into service to show ingredients necessary for referring the matter to Industrial Court and the binding nature of Settlement. The importance of language employed in Reference and corresponding jurisdictional restraint cast upon the Reference Court are also highlighted with the assistance of this judgment. It is urged that because of this law, the Petitioner is left with no other option but to challenge validity of Reference. Judgment of Hon'ble Apex Court in the case of The Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and Others, is also pressed into service to show what is "dispute". Simultaneously, the reply filed by Respondent No. 3 while opposing notice before admission before this Court is also pressed into service to show what according to Respondent is the "dispute" which has been referred. Judgment of Hon'ble Apex Court in the case of The Secretary Indian Tea Association Vs. Ajit Kumar Barat and Others, is also relied upon to point out the law on the point of such order u/s 10 of the Industrial Disputes Act and parameters for its judicial scrutiny. Reply filed by Petitioner before Conciliation Officer is explained in this background and again attention has been invited to chart filed by Respondent No. 3 to demonstrate how their contention that they are receiving something less than minimum wages, is misconceived.

8. It is urged that for valid Reference, there has to be valid conciliation and for valid conciliation, there has to be a proper or legal demand. Here, as demand made itself is very vague, there is no dispute which can form subject matter of consideration in the light of Section 2(k) of the Industrial Disputes Act. Judgment of Hon'ble Apex Court in the case of The Sindhu Resettlement Corporation Ltd. Vs. The Industrial Tribunal of Gujarat and Others, is pressed into service to buttress this contention.

9. It is further pointed out that Petitioner had also filed Writ Petition No. 3972 of 2008 and that writ petition has been admitted by learned single Judge on 17.6.2009 by directing Conciliation Officer (Respondent No. 2 herein) to decide the question as to whether industrial dispute exists between parties with regard to minimum wages. Learned Counsel contends that after this order, the Conciliation Officer has registered the proceedings and intimated parties accordingly on 7.10.2009. Thereafter Petitioner filed appropriate replies before said officer and those replies have not been properly looked into. Attention is invited to reply affidavit filed by Assistant Commissioner of Labour before this Court on 2.2.2011 to urge that comprehension of that Authority about the dispute even therein again shows confusion. In this situation, Learned Counsel has urged that order of Reference needs to be quashed and set aside and petition deserves to be allowed.

10. Mr. M.V. Mohokar, Learned Counsel appearing for Respondent No. 3 Union has at the outset pointed out that in the petition as filed, filing of earlier writ petition i.e. Writ Petition No. 3972 of 2008 or order dated 17th June 2009 therein has not been pointed out and thus, there is suppression of material fact. According to Learned Counsel, the Petitioner had agreed to submit to jurisdiction

of Conciliation Officer and permitted him to decide the question whether an industrial dispute existed between the parties with regard to minimum wages. Respondent no. 2 has accordingly exercised jurisdiction available to him in accordance with law and hence, the Petitioner is estopped from challenging the order of Reference. He has invited attention to Section 2(k) of the Industrial Disputes Act to point out how it is very widely worded and it is contended that present controversy about receipt or no receipt of minimum wages in accordance with the provisions of Minimum Wages Act, 1948 is definitely covered by the phrase "industrial dispute". He has further contended that in present matter, this Court is not concerned with Section 2(h) of the Minimum Wages Act which defines "wages", but the provisions of Sections 3 and 4(1) need to be given more importance. He contends that appropriate Government has fixed basic rate of wage and special allowance in relation to establishment of Petitioner and because of mandate of said provision, the members of Respondent No. 3 are entitled to receive the same. In this backdrop, inviting attention to communication containing grievance of no receipt of said minimum wage made on 4.10.2007 and its immediate rejection, he contends that thus a dispute about wages arose. Hence, shortly thereafter an industrial dispute u/s 2(k) was rightly raised by Respondent No. 3. He further states that the employer has increased wages each time as per relevant Agreement/Settlement, but then that increase is on the condition or basis of increased production and, therefore, it cannot be treated as payment of minimum wage. He contends that this practice is going on since 1986 and hence, Respondent No. 3 is justified in demanding minimum wage as per basic rate and the special allowance as notified u/s 4(1) of the Minimum Wages Act. He has also invited attention to reply submitted by Petitioner before Respondent No. 2 on 6.2.2008 to urge that this linkage between contractual wages and the increased production is accepted by employer. Because of this, according to him, an obligation is cast upon a workman to give more production to earn that contractual wage and hence, the same cannot be read as minimum wage. Clause 4 of the Settlement dated 14.8.2006 is pressed into service to show that it impliedly amends basic wage payable under Minimum Wages Act. He further points out that even as per Settlement, the dearness allowance/special allowance is payable as per Notifications of the Government of Maharashtra issued from time to time. He has also invited attention to various other clauses, but then urged that Clause 23 is most important clause. He points out that entitlement to receive contractual wages is dependent upon the agreed higher production and wages payable under the Settlement can be deducted in proportion with the shortfall of percentage in such production. He points out that as per Clause 30, all earlier agreements right from the year 1986 are declared applicable and continue to govern the workmen. He has further pointed out that though Clause 33 of the Settlement prohibits Respondent No. 3 from raising any dispute or demand having financial implication, still the Petitioner has paid bonus in accordance with the provisions of Payment of Bonus Act, 1965 and he, therefore, submits that when it is question of compliance with statutory provisions, Clause 33 is not applicable. According to him, when provisions of

Minimum Wages Act, 1948 cast statutory obligation upon employer, Clause 33 cannot be an answer to that obligation. He states that contractual rate of wages being paid to members of Respondent No. 3 Union, being for a particular production i.e. increased production, it is not a minimum wage, and hence members of Respondent 3 are entitled to minimum wages in accordance with Notification dated 16.4.2007. He explains that for earning minimum wages, there is no question of giving any particular production. He has relied upon the attendance card of one Premlal Hirkane for the month of September 2007 and salary slip of said employee for said month to show that contractual rate has not been put on either the muster-cum-wage card or then the salary slip. By utilizing basic rate of Rs. 105.39 per day mentioned in the salary slip, he has attempted to show how the said wage for 26 days works out to Rs. 3000/only, a figure less than minimum wage. Similar effort is made by him by pointing out subsequent charts in relation to one Narendra, Mohammad and Yogiraj Dahat. He points out position prevailing prior to revision of minimum wages on 16.4.2007 and then speculative position by adopting minimum wage as per that Notification. According to him, thus each worker becomes entitled to more amount from Petitioner over and above the contractual wage as disclosed in chart placed on record by the Petitioner. He has undertaken this exercise of calculation and computation in relation to all three employees and also attempted to correlate it with the figures disclosed by Petitioner in chart filed by them. However, we do not find it necessary to go into these charts and details. He contends that these charts prepared by Respondent No. 3 were before Conciliation Officer. Similarly, charts prepared by Petitioner were also before Conciliation Officer. Conciliation Officer has, after looking into these charts, arrived at a particular conclusion and that conclusion is subjective and administrative one. He has also commented upon charts produced by Petitioner to show that though under Settlement, the allowances are payable under various heads, only few of them (6 or 7) have been chosen by Petitioner to add to the figure of basic wage in an attempt to show that their rate of basic wage is more than the basic wage notified u/s 4(1) of the Minimum Wages Act.

11. He has further contended that Respondent No. 2 has admitted the matter to conciliation on 6.10.2009 and that order was never challenged by Petitioner and has not been questioned even in this petition. He further states that order of Reference dated 21.1.2010 needs to be construed along with Failure Report. He points out that more than two years period was spent in conciliation proceedings and when both these documents are read together, it becomes apparent that after understanding the exact nature of dispute, the matter has been referred to Industrial Court by passing an appropriate order of Reference keeping all rival contentions open for the Industrial Court. He has invited attention to provisions of Section 12 (4) and (5) as also Section 10(1)(d) of the Industrial Disputes Act to contend that Respondent No. 2 was satisfied with material and thought it fit to make Reference, that satisfaction is sufficient to sustain the order of Reference. He has also relied upon judgment Harnam Singh and Others Vs. Punjab State

Electricity Board and Others, to substantiate his contention about limited scope of challenge available under Article 226 or 227 in such circumstances. He contends that all disputed questions being raised by Petitioner can be looked into by Reference Court. For said purpose, he has also relied upon judgment of larger Bench of Hon''ble Apex Court in *Abad Dairy Dudh v. Abad Dairy and Ors.* reported at 1999 LLJ (II) 1408 (SC). He states that precedents relied upon by Petitioner are prior to judgment cited by him and being later in point of time, judgments relied upon by him need to be followed. Judgment in the case of *Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others*, , delivered by the Division Bench of this Court and reported at *Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others*, is also pressed into service to urge that language employed in Reference order is not decisive. Division Bench view of Orissa High Court in *Utkal Galvanizers v. State of Orissa and Ors.* reported at *Utkal Galvanizers (P) Ltd. Vs. State of Orissa and Others*, and Division Bench of this Court in *Philips India and Anr. v. P.N. Thorat and Ors.* reported at 2006 (I) CLR (Bom) 708 is also relied upon to urge that such disputed matters must be left for determination by the Industrial Court during adjudication of Reference proceedings. Support is drawn from *PRS Permacel v. Johnson and Johnson Employees Union and Ors.* reported at 2008 (III) CLR (Bom) 160 (Division Bench judgment of this Court) with arguments that though judgment in the case of *National Engineering Industries Ltd. v. State of Rajasthan*, (supra) relied upon by the Petitioner has been considered by said Division Bench, similar disputed questions are left open for adjudication before the Reference Court.

12. He has contended that here there is no dispute about applicability of Minimum Wages Act or then rate stipulated thereunder on 16.4.2007. The defence of contractual wage is without any merit and totally irrelevant, and hence, in these circumstances, impugned order of Reference is in accordance with law and does not warrant any interference. Mr. Mohokar points out that from 1.11.2007 Petitioner has started paying dearness allowance as per notification dated 16.4.2007. In support of his contention that Clause 33 of Settlement cannot operate as bar to demand for minimum wages, he points out that Section 25 of the Minimum Wages Act, prohibits contracting out and he also relies on the provisions of Section 23 of the Contract Act to urge that such Settlement will otherwise be opposed to law and public policy and, therefore, void.

13. Judgment of Hon''ble Apex Court in *Muir Mills Co. Ltd., Kanpur Vs. Its Workmen*, is relied upon to urge that basic wage never includes incentives or production related payments. Judgment of Division Bench of Gujarat High Court in the case of *Somiben Mathurbai Vasava Vs. Lalji Hakku Parmar Leather Works Company*, is pressed into service to point out how the provisions of Section 25 of the Minimum Wages Act are construed. Judgment of Hon''ble Apex Court in *MOIL v. Chandi Lal and Ors.* reported at 1991 (I) CLR (SC) 357 (SC) is also pressed into service to show that cash value of concessions not recognized u/s 11(1) of the Minimum Wages Act cannot form part of basic wage under the Minimum Wages Act. Judgment of Hon''ble Apex Court in the case of *Delhi Cloth and*

General Mills Co. Ltd. Vs. The Workmen and Others, is pressed into service to show that it is open to Petitioner to demonstrate before Industrial Court that dispute which has been referred is not at industrial dispute at all so as to attract provisions of the Industrial Disputes Act. He contends that as this opportunity is available to the Petitioner before Industrial Court, no interference is warranted in the present petition. Other judgment of Hon"ble Apex Court in the case of Oswal Agro Furane Ltd. and Another Vs. Oswal Agro Furane Workers Union and Others, is also pressed into service for said purpose and to point out that Authority while making an order of Reference exercises the administrative jurisdiction and hence that order cannot be subjected to scrutiny as a quasi-judicial order. According to him, said order needs to be construed in the light of entire material looked into by Conciliation Officer and mentioned in failure report.

14. Thereafter Learned Counsel has attempted to explain how various judgments relied upon by Learned Counsel for Petitioner are not applicable. According to him, in judgment of Hon"ble Apex Court in the case of Air Freight Ltd v. State of Karnataka, (supra) the VDA was already included in DA as per the legal provisions prevailing in Karnataka State and because of it, a finding that it could not have been demanded over and above the dearness allowance, has been reached. We find it appropriate to refer to distinguishing features as contended by Learned Counsel while considering various judgments little later, if found necessary. He has, therefore, prayed for dismissal of writ petition as, according to him, no prejudice whatsoever will be caused to the Petitioner.

15. Mrs. A.R. Taiwade, learned Assistant Government Pleader has also supported the order of Reference. She contends that Conciliation Officer is acting in administrative capacity and hence, he is not required to record reasons in detail. According to her, role of Conciliation Officer is only to facilitate negotiations between parties and Respondent No. 2 made an effort to bring about settlement between parties. As that settlement could not be reached, he submitted a Failure Report. She contends that it is not obligatory for Respondent to record any reasons while submitting such failure report or then to record any finding as to why such Reference is necessary. According to her, order of reference needs to be viewed in the background of demand made by Respondent No. 3 and reply defences raised by Petitioner. She, therefore, supports the arguments of Mr. Mohokar, Learned Counsel for Respondent No. 3 and urges that Petitioner has not been put to any prejudice and all defences and contentions raised before this Court are still open to Petitioner and can be looked into by Reference Court.

16. Mr. V.R. Thakur in reply has invited attention to additional submissions filed on behalf of Petitioner on 19.9.2011 to demonstrate how Respondent No. 3 has created a fictitious pay structure. According to Learned Counsel, there is an attempt to mislead this Court. Various judgments cited by him show that it is not necessary to correlate each component constituting wages, contractual in this case, with other components under prescribed minimum wage. When gross wages being paid by Petitioner are more than minimum wages and only one

wage is payable to its workmen, it indicates that no industrial dispute exists. He further urged that order passed by this Court admitting earlier writ petition on 17th June 2009 has got no bearing on the controversy herein. Failure Report has been submitted thereafter and Reference order has also come into picture even thereafter. The defects pointed out could not have been visualized on 17th June 2009 and impugned Reference order itself provides to the Petitioner a cause of action. He reiterates contentions raised earlier and contends that judgments cited by Respondent No. 3 are not applicable in present facts. He, therefore, prays for quashing of the Reference order.

17. The objection to the maintainability of petition or then contention about suppression of material facts by the Petitioner needs to be dealt with first. The perusal of order dated 17.06.2009 in Writ Petition No. 3972 of 2008 reveals that subject matter of that petition is stay to transfers effected by Petitioner by the Conciliation Officer. It clearly shows that the parties jointly requested this Court (learned Single Judge) and accordingly Conciliation Officer was directed to decide the question as to whether Industrial dispute exists between the parties with regard to minimum wages. This Court directed Conciliation Officer to issue notice under Rule 11 of Industrial Dispute (Bombay Rules) and then proceed to decide conciliation in accordance with law. It is apparent that thus parties only agreed to expeditious disposal of pending conciliation proceedings and it does not show and it cannot be accepted that the parties had relinquished their right to challenge any future adverse finding or step taken by the Conciliation Officer. The parties definitely were not aware of the result of conciliation proceedings and it cannot be said that they have acquiesced in the matter. Therefore, same order and proceedings before this Court are not relevant insofar as present controversy where challenge is to subsequent exercise of his powers by the Conciliation Officer is concerned. Cause of action to file this petition has accrued only after the impugned reference. The preliminary objection raised by Shri Mohokar, Learned Counsel is, therefore, without any merit.

18. The contention that demand as raised is no demand in the eye of law or is contrary to provisions of law or then there exists no industrial dispute now, needs consideration. In the case of *Airfreight Ltd. v. State of Karnataka*, (supra) the Hon'ble Apex Court has considered the provisions of Section 27 of Minimum Wages Act, 1948, and notification issued by Karnataka Government on 19.08.1987 along with relevant provisions of Karnataka Shops and Commercial Establishments Act, 1961. The perusal of this judgment shows that the employer there had filed a writ petition before the High Court of Karnataka challenging the notification dated 19.08.1987 and an order of Labour Officer dated 31.07.1997, as according to the employer, the said notification fixing Minimum wages was not applicable to it. The Single Judge of that High Court dismissed that writ petition and on 16.10.1998, and Division Bench maintained that order. The Respondent employees before the Hon'ble Apex Court had contended that the Appellant - Company was required to pay variable Dearness Allowance on the basis of notification issued u/s 3 read with Section 5 of Minimum Wages Act. One of the

contentions of the Appellant before the Hon''ble Apex Court was that the Appellant - company was paying more than minimum wages and it had not bifurcated the same as basic wage and dearness allowance. It was contended that Minimum Wages Act does not require such bifurcation. The Hon''ble Apex Court had considered this argument and in para 11 has recorded a finding that contention about non application of notification as Appellant - company was paying more than minimum wage had no substance. In para 12, the Hon''ble Apex Court has found that the employer is not prohibited from paying "fair" or "living" wages. In para 13, the contention that as wages paid by the Appellant - company included basic wage (+) plus dearness allowance, therefore, direction issued by Labour Officer to pay additional VDA to the employees was illegal, has been considered. The consideration in para 14 reveals that DA there was to be calculated every year on 1st April on the basis of average of indices of preceding 12 months i.e. January to December and a provision there also stipulated that wherever the prevailing rates of wages were higher, those higher rates would continue to be paid. On the basis of these facts and notification, the Hon''ble Apex Court appreciated the stand before it and found that contention of Learned Counsel for the Respondent - employee was without any substance because notification fixed minimum wages which included Dearness Allowance. The Hon''ble Apex Court also found that contention that notification fixed minimum wage in two parts was also without any basis. It is also concluded that the provision requiring prevailing higher rate of wages to be continued cannot be construed as providing for payment of VDA over and above higher wages. The contention of counsel for the Appellant - company was thus accepted. More discussion in this respect is in paras 20 and 21 of said judgment. It is not necessary for this Court to comment further on this judgment because the law has been applied by the Hon''ble Apex Court after facts had crystallized. This view is then followed by the learned Single Judge of this Court in the case of Harilal Jechand v. Maharashtra General Kamgar Union, (supra). The matter before the learned Single Judge arose out of a ULP complaint and in para 14, it is observed that in cases where the employer is paying total sum which is higher than minimum wages under Minimum Wages Act, including the cost of living index (VDA), he is not required to pay VDA separately. Conclusions are recorded on these lines in para 19 by the learned Single Judge. Both these judgments do not show that controversy looked in to was not an industrial dispute and finding recorded therein on merits is of no assistance at this stage when facts here are still not settled.

19. Shri Thakur, Learned Counsel has pointed out that the reference itself is bad because there is no application of mind by appropriate Government before making it and it also suffers from vagueness. His contention is what is referred therein does not constitute industrial dispute and bar operating vide Clause 33 in Settlement to such dispute has not been looked into. He has further urged that grounds available to the Petitioner to assail reference pressed into service before the Conciliation Officer have not been looked into and are not reflected in

impugned reference order. The perusal of judgment of the Hon''ble Apex Court in the case of *National Engineering Industries Ltd. v. State of Rajasthan*, (supra), reveals that there the Hon''ble Apex Court after referring to its various earlier judgments has found that jurisdiction of the Industrial Tribunal in dealing with such reference is limited by Section 10(4) of the Industrial Disputes Act, to the points specifically mentioned in reference and matters incidental thereto. While considering this issue in para 17, the Hon''ble Apex Court has also made observations which indicate binding nature of settlement and in para 23, the Hon''ble Apex Court has noted that dispute which can be referred for adjudication, must necessarily, be an industrial dispute which alone would clothe the appropriate Government with power to make the reference and Industrial Tribunal to adjudicate it. In para 24, it has been noted that High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute and none was apprehended which could be the subject matter of reference. Thus, a resulting question of jurisdiction of the Industrial Tribunal, then would be examined by the High Court in its writ jurisdiction. The Hon''ble Apex Court has also found that when there is a dispute that settlement is not bonafide in nature or that it has been arrived at on account of fraud, misrepresentation or concealment of facts or even corruption and other inducements, it could be the subject matter of yet another industrial dispute which an appropriate Government may refer for adjudication after examining the allegations. In para 27, the Hon''ble Apex Court has concluded that the Industrial Tribunal cannot go into the question of validity of the reference. In para 28, it is noted that State Government failed to give due consideration to the direction of the High Court and in such situation, State Government was bound to recall the reference. It could not have directed the Appellant to raise its objection before the Industrial Tribunal for which that Tribunal certainly lacked jurisdiction. All relevant considerations were not looked into by State Government before making reference and, therefore, a wholesale reference was found bad by the Hon''ble Apex Court.

20. In the case of *Nedungadi Bank Ltd. v. K.P. Madhavankutty*, (supra) the Hon''ble Apex Court has noted that when dispute was attempted to be raised after lapse of seven years of the dismissal, it does not become an industrial dispute and the appropriate Government cannot in a mechanical fashion make the reference of the alleged dispute terming it as industrial dispute. It is noted that purpose of reference is to keep industrial peace in an establishment and the reference impugned was found to be destructive to the industrial peace. It is also found that in appropriate circumstances, the High Court can interfere in writ jurisdiction.

In the case of *The Secretary Indian Tea Association Vs. Ajit Kumar Barat and Others*, , the Hon''ble Apex Court has in para 5 held that an order issued under Order 10 of Industrial Disputes Act, is an administrative order and the appropriate Government is entitled to go into the question whether an industrial dispute exists or apprehended, after its subjective satisfaction in this respect on

the material on record, the reference can be made. It is found that no "lis" is involved in this process. In para 7, law on the point is briefly summarized and it is noted that appropriate Government would not be justified when without satisfying itself on facts and circumstances brought to its notice, the reference was made. The Hon''ble Apex Court has also noted that it is open to a party to show that what was referred by the Government was not an industrial dispute within the meaning of Industrial Disputes Act. Para 10 also shows similar finding and the Hon''ble Apex Court has found that appropriate Government has to form an opinion whether an employee is a workman and thereafter has to consider as to whether the Industrial Dispute exists or apprehended.

21. In the case of Harnam Singh v. Punjab State Electricity Board, (supra) the Hon''ble Apex Court had considered a challenge to reference on the ground that Government had not taken note of contention raised by the Respondents before it. In para 4, the Hon''ble Apex Court has found High Court wrong in examining the matter as if it was sitting in appeal on reference made. It is held by the Hon''ble Apex Court that the scope of investigation in such matter is very limited and the two issues involved there could not have been decided except by adjudication by concerned competent authority. Those two objections or issues are that the Appellants before the Hon''ble Court were not working with the Respondent - employer and that the reference proceeded on assumption that the Appellants were workmen and their services were terminated without any notice, charge-sheet, enquiry, in violation of Section 25F of Industrial Disputes Act. Discussion in para 6 reveals that the effort of the Learned Counsel for the Respondent to show inconsistencies in the claim made by the Appellants was not countenanced by Hon. Apex Court. There, it has been observed that those issues can be adjudicated only by Competent Authority like the Labour Court or the Industrial Tribunal. The Hon''ble Apex Court has, therefore, refused to express any opinion on the issues in controversy. Abad Dairy Dudh Vitran Kendra Sanchalak Mandal v. Abad Dairy, (supra) is the judgment of Larger Bench of the Hon''ble Apex Court. In para 5 there, the Hon''ble Apex Court has found the High Court wrong in deciding the question and observes that it should have directed the Government to refer all disputes between the parties to the Industrial Tribunal, making the issue of the jurisdictional fact i.e. Whether the Appellants are workmen ?; also one of the terms of reference. The Hon''ble Apex Court has found that though there was agreement between the parties, the interpretation of agreement was a matter of dispute and it was also necessary to consider whether the agreement reflected the real position or whether the conduct of the parties and other material placed on record disclosed that the Appellants were employees as suggested by the Appellants and not commission agent as suggested by the Respondent. The only ground on which the State Government there had declined to make reference was that the Appellants were not workmen. In the result, the Hon''ble Apex Court directed the State Government to refer all disputes between the parties to an Industrial Tribunal.

22. Division Bench of this Court in the case of Sheshrao Bhaduji Hatwar v.

Presiding Officer, First Labour Court, (supra) has considered similar controversy in para 7 and found that mere wording of reference is not decisive in a matter of tenability of reference. It may contain the defence or it may not contain it. If points of difference are discernible from the material before the Court or Tribunal, it has only one duty, and that is to decide the points on merits and not be astute to discover formal defects in the wording of the reference. It is also held that the reference order before it referred to schedule which contained demand of the worker and to the report of the Conciliation Officer which spelt out the controversy between the parties. In this background, Division Bench found that reference could not have been said to be made on the assumption that it was a case of termination and only point left for adjudication was about the nature of relief to be granted to the workman. The Division Bench has also noticed that it was nobody's case before it that they did not know the controversy really referred. The Division Bench of Orissa High Court in the case of Utkal Galvanizers (P) Ltd. v. State of Orissa, (supra), has made similar observations after noticing that decision whether there exists an industrial dispute or industrial dispute was/is apprehended, is an administrative decision which is taken by the Government on the basis of some material which is placed before it. The opinion about it is subjective opinion of appropriate Government. However, it granted employer before it, leave to raise all such objections before the Industrial Tribunal. Philips India Ltd. v. P.N. Thorat, Assistant Commissioner of Labour and Conciliation Officer and Ors., (supra) is Division Bench judgment of this Court which again adopts a similar course. It is noted that there were serious triable issues and even the contention of employer that as they had complied with terms of settlement, consequently there was no industrial dispute, was subjected to the adjudication by the Tribunal by Division Bench. PRS Permacel Private Ltd. v. Johnson and Johnson Employees Union and Ors., (supra) is again a Division Bench judgment of this Court which holds that the order of reference before it was so wide that parties were free to adduce appropriate evidence to substantiate their respective pleas. The judgment in the case of National Engineering Industries v. State of Rajasthan and Ors., (supra) relied upon by the Petitioner is also looked into by this Division Bench in para 9 and thereafter in para 13. In para 14, it is noticed that in some cases while answering the reference made to it by appropriate State Government, the Industrial Court may decide ancillary questions and there is no impediment in doing so.

23. The parties have cited various judgments on the question whether industrial dispute exists or does not exist. Shri Mohokar, Learned Counsel for Respondent No. 3 has relied upon the judgment in the case of Oswal Agro Furnae Ltd. v. Oswal Agro Furnae Workers Union and Ors., (supra) where the Hon'ble Apex Court has pointed out the difference between administrative functions and quasi judicial functions. We do not find it necessary to go into that aspect in present matter.

24. In M/s. Muir Mills Company Ltd., Kanpur v. Their Workmen and Anr., (supra) the Hon'ble Apex Court has found that basic wage looked into by it did not

include incentive and production bonus. Phrase basic wage, in its ordinary meaning and as it is normally understood, has been appreciated by the Hon"ble Apex Court and its relevant observations in para 11 onwards reveal how that phrase is normally required to be understood. Here, there is settlement between the parties and also provisions of Minimum Wages Act. It is, therefore, not necessary for us to record any conclusive finding at this stage on said issue. *Somiben Mathurbai Vasava v. Lalji Hakku Parmar Leather Works Company*, (supra) is the judgment of Division Bench of Gujarat High Court where the said Bench has considered the provisions of Section 25 of Minimum Wages Act and the remedies available under Minimum Wages Act as also Industrial Disputes Act. We do not find discussion therein of much assistance insofar as present controversy is concerned. *Manganese Ore (I) Ltd. v. Chandi Lal Sadu and Ors.* reported at 1991 (1) CLR (SC) 357 is the judgment of the Hon"ble Apex Court which considers the question whether the attendance bonus and cash worth of essential commodities are part of wages. In the process, the Hon"ble Apex Court has noted in para 12 that Section 4(1)(iii) of Minimum Wages Act mentions only such "cash value of the concession" as have been authorised as "wage in kind" under subsection (3) of Section 11 of that Act. It is found that there was no such notification by appropriate Government for supply of essential commodities at concessional rate and hence cash value thereof could not have been treated as wage in kind and deducted from the minimum wages. It is obvious that this consideration and also consideration of question whether attendance bonus constituted a wage are the questions answered by the Hon"ble Apex Court on the basis of facts available to it. The same, therefore, cannot be taken recourse to till the facts crystallize.

25. Shri Thakur, Learned Counsel for the Petitioner has relied upon the judgment in the case of *Sindhu Resettlement Corporation v. Industrial Tribunal*, (supra). The perusal of said judgment reveals that there the dispute raised was only in relation to retrenchment compensation and there was no demand for setting aside termination and for grant of reinstatement. The observations made therein are in this background and the said observations, therefore, cannot be applied until and unless facts in present matter also crystallize. The Hon"ble Apex Court has noted that if no dispute was raised by the employees (Respondents before it) with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, has to be a dispute between the employer and employees. A mere demand to a Government, without dispute being raised by the workmen with their employer, cannot become an industrial dispute. Consequently, the material before the Tribunal was found not to show any industrial dispute as was purported to be referred by State Government to the Tribunal. Facts show that the Tribunal, after hearing the parties, gave its Award on 10th August, 1961, directing reinstatement of Respondent No. 3 and payment of back wages from 21st February, 1958. The Appellant before Hon. Apex Court challenged this award before the High Court of Gujarat by a petition under

Articles 226 and 227 of the Constitution, but the petition was dismissed. Consequently, the Appellant came up to Apex Court by special leave. Thus law has been applied on the findings on facts proved before the tribunal.

26. Here, the fact of agreement dated 14.08.2006 between the parties is not in dispute. The monthly wages being paid by the Petitioner to all its workers including members of Respondent No. 3 - Union are also not in dispute. The comparison as made may show that the total sum being paid by the Petitioner is more than the rate of basic wage plus special allowance as declared by the State Government from time to time. Respondent No. 3 has also contended that this practice is being followed by the Petitioner since 1986. However, their effort is to show that whatever is being paid to them as contractual wage is not recognized as minimum wage under Minimum Wages Act, 1948. For that purpose, Respondent No. 3 has invited our attention to various attendance cards and salary slips and has also made an attempt to demonstrate some inconsistencies therein. The effort has also been made to show how basic wage claimed to be paid by the Petitioners is not appearing in those documents. The Petitioners have filed their counter before this Court and justified their action and pointed out the incorrectness in the contentions raised before us. They also rely upon the charts filed by them to show how actual wage paid exceeds minimum wage. It is clear that disputes of such nature and questions incidental thereto arising between the parties cannot be resolved by us in this petition for the first time. Law as expounded in various judgments above can be applied only after the facts settle.

27. The Hon"ble Apex Court in the case of Delhi Cloth and General Mills Company Ltd., v. Their Workmen, (supra) while considering the scope and ambit of dispute of a reference order u/s 10(1)(d) of Industrial Disputes Act, has found that the Tribunal has to look to the pleadings of parties to find out exact nature of dispute because in most of the cases, the order of reference is so cryptic that it is impossible to cull out there from the various points about which the parties were at variance leading to the trouble. As the order of reference was based on the report of the conciliation officer, the Hon"ble Apex Court has held that it was certainly open to the management to show that the dispute which had been referred was not an industrial dispute at all so as to attract jurisdiction under the Industrial Disputes Act. The Hon"ble Apex Court has, however, observed that parties cannot be allowed to go a stage further and contend that the foundation of the dispute mentioned in the order of reference was nonexistent and that the true dispute was something else. It has been held that Section 10(4) of the Act does not make the Tribunal competent to entertain such a question.

28. In Lokmat Newspapers Pvt. Ltd. v. Additional Labour Commissioner and Ors. reported at 2007 (3) Mah.L.J. 27 one of us (B.P. Dharmadhikari, J.) has observed while following the Division Bench in case of Sheshrao Hatwar v. P.O. First Labour Court and Ors. (supra) that many times the reference may be cryptic and vague and not properly worded. In such cases it is the duty of the adjudicating authority to examine the pleadings, documents etc. and to locate the exact

nature of dispute. Rule 3 and 4 of Bombay Rules under IDA do not require any particular language to be used and it can not be said that Respondent No. 2 has in any way violated these Rules. Such order has to only reveal a finding that upon perusal of failure report said Respondent was prima facie satisfied about existence of dispute.

29. In the light of this discussion and views of the Division Benches of this Court reached after appreciating the judgments of Hon''ble Apex Court referred to supra, we find that in present matter, the reference Court has to understand the controversy before it in the light of the demand made, replies filed by the Petitioner before and after Conciliation commenced as also its written notes of arguments before said Respondent 2. Reference language employs wide words and requires liberal interpretation. Basic question is whether members of Respondent 3 union are entitled for payment of minimum wages as per notification dated 16.4.2007 and also about their entitlement to its arrears needs to be gone into. Its due comprehension is not possible without ascertaining the facts or history leading to the demand. Some questions incidental in nature which may arise are 1 - Whether in cases where workmen have been receiving more than minimum wages as contractual wage, demand for minimum wage is legally sustainable? and, 2 - If such more wages i.e. contractual wages have always been correlated with production due to binding settlements, a demand intended to snap that link can constitute an industrial dispute u/s 2(k) of Industrial Disputes Act, 1947? Whether dispute referred is or is not an industrial dispute, also can not be answered as relevant facts having bearing on it are in dispute between parties. Hence, it is open to the Industrial Court to find out whether in facts proved before it, there exists any industrial dispute so as to enable it to exercise its jurisdiction. The contention of Respondent No. 3 is contractual wage is not a minimum wage and it is entitled to more amount on that count, if basic wage as per notification dated 16.04.2007 is applied. This controversy could not have been answered by Conciliation Officer or Appropriate Government. The Industrial Tribunal, therefore, while considering and adjudicating controversy referred to it will definitely not be embarking upon an enquiry, not permitted to it or not expected of it. We, therefore, find that all contentions raised or available to assail the impugned order of reference and also in defence thereto are open to the Petitioner and can be raised by it before the Industrial Court to which the matter has been referred.

30. In this situation, we do not find any case made out warranting any further observations and interference. However, in view of the clarification which we have recorded, we partly allow the petition and dispose of the same. Rule is made absolute accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.