

(1964) 09 KAR CK 0005

In the Karnataka High Court

Case No : Writ Petition No. 2192 of 1963

P.M. Murugappa Mudaliar Rathina Mudaliar and Sons (By M.
Muniswami, Partner)

APPELLANT

Vs

Raju Mudaliar (P) and Others

RESPONDENT

Date of Decision : 18-09-1964

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 10 (1), 10 (1) (c), 2 (k)

Citation : (1965) 1 LLJ 489 : (1965) 2 MysLJ 73

Hon'ble Judges : K.S. Hegde, J;G.K. Govinda Bhat, J

Bench : Division Bench

Judgement

K.S. Hegde, J.—In this petition, under Arts. 236 and 227 of the Constitution, the petitioner prays that this Court may be pleased to call for the records of the proceeding in Reference No. 14 of respondent 3 and quash the award made by him on 12 August, 1963, published in the Mysore Gazette dated 3 October 1963, by issuing a writ of certiorari.

2. The petitioner is the employer and respondent 1 is his ex-employee. The petitioner terminated the services of respondent 1 as per his notice dated 27 June, 1959 with effect from 15 August, 1959.

3. Respondent 1 unsuccessfully pursued several remedies against the petitioner claiming reinstatement or in the alternative retrenchment compensation. It is not necessary to refer to those proceedings as they have no bearing on the points at issue in this case. Suffice it to say that respondent 4 took up his cause and moved the State Government to refer the dispute to the labour court (respondent 3) under S. 10(1)(c) of the Industrial Disputes Act, 1947 (to be hereinafter referred to as the Act). Respondent 2, in its order No. PLM 554 LLD 62, dated 27 March, 1963, referred the said dispute to the labour court (respondent 3). The said reference reads as follows :

"... Whereas the Government of Mysore are of opinion that an industrial dispute

exists between the workmen and management of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons, Robertsonpet, Kolar Gold Fields (Kolar district), on the points noted below;

And whereas the Government of Mysore consider it desirable to refer the dispute for adjudication;

Now, therefore, in exercise of the powers conferred by Clause (c) of Sub-Section (1) of S. 10 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947), the Government of Mysore hereby refer the said dispute for adjudication to the labour court at Bangalore.

Points of dispute

Are the management of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons, IV Cross, Robertsonpet, Kolar Gold Fields, Kolar district, justified in terminating the services of P. Raju Mudaliar with effect from 15 August, 1959 ? If not, is he entitled for reinstatement with benefits of backwages or to any other reliefs ? ..."

4. On receipt of that reference, respondent 3 registered the case as Reference No. 14 of 1963. In the said proceedings, the first party was the workmen represented by the Secretary, Kolar Gold Fields Shop Assistants' Association, Robertsonpet, Kolar Gold Fields (Kolar district), and the second party was the management of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons. The parties were called upon to file their statements. It is not necessary to refer to the statement filed by respondent 1 as it does not bear on the questions that we are called upon to decide. In the statement filed by the petitioner, two objections were taken, namely :

(1) that the dispute referred to respondent 3 is not an "industrial dispute" but an individual dispute; and

(2) that respondent 4 union being no longer in existence, it could not represent respondent 1. [Statements of the petitioner and respondent 1 had not been produced along with the petition. Copies of those statements were made available to us by the learned counsel for the petitioner at the time of the hearing. The correctness of those copies was not questioned by the learned counsel for respondent 1.] On the pleadings the labour court raised the following two issues :

"(1) Whether the dispute in question is only an individual dispute and not an industrial dispute and as such this Court has no jurisdiction to deal with the matter; and

"Whether Kolar Gold Fields Shop Assistants" Association was no longer in existence at the time when the reference was made as alleged by the managements ?"

5. On behalf of the petitioner, one P. Palaniswami, one of the partners, was examined as a witness. The workman, P. Raju Mudaliar, got himself examined.

The labour court, in the course of its order, mainly dealt with issue (2). It came to the conclusion that though by the time the reference came to be made, the registration of respondent 4 had been canceled, that by itself is not sufficient to show that the union no longer existed. On the evidence before it, it came to the conclusion that respondent 4 union was functioning as a matter of fact, though its registration had been canceled. In that view it found issue (2) against the petitioner. The labour court did not specifically deal with issue (1). While dealing with issue (2), it observed as follows :

"Except producing the letter Ex. M. 1 issued from the Registrar of Trade Unions relating to the cancellation of the registration of the association, nothing is suggested or indicated in the cross-examination that the association was not at all functioning as a matter of fact, that the workman was not a member of that union and that the executive committee of that association had not resolved to sponsor the cause of this workman. The oral evidence of the workman together with the documents referred to above conclusively prove that the individual dispute of the workman, P. Raju Mudaliar, had transformed itself into an industrial dispute and that the present reference is perfectly valid."

6. The labour court appears to have proceeded on the basis that once an individual dispute of a workman is taken up by a labour union, the dispute automatically becomes an industrial dispute. We were told that no evidence was led either by the petitioner or respondent 1 on the question whether the dispute in question was an "industrial dispute" or an individual dispute.

7. In this Court, it was urged on behalf of the petitioner that the petitioner having contested the validity of the reference on the ground that the dispute in question is an individual dispute and not an "industrial dispute," the labour court could not have gone into the merits of the dispute without first deciding the question whether the dispute or an "industrial dispute" In the affidavit filed by the petitioner in this Court, it was asserted that the dispute in question could never have been an "industrial dispute" as respondent 1 was the have been espoused by his coworkers. The petitioner's allegation, that respondent 1 was the only employee of the petitioner on the date of the reference, was not challenged in the counter-affidavit filed by respondent 1. As this question had not been specifically taken up before the labour court, we thought it desirable to assure ourselves about the correctness of the allegation that respondent 1 was the only employee of the petitioner on the date the dispute arose. Therefore, we gave time to the learned counsel for respondent 1 to ascertain from his client whether that Government in the petitioner's affidavit is correct. When the petition was taken up for further hearing on 10 August, 1964, respondent 1 was present in Court. After ascertaining from him, Sri P. P. Bopanna, his learned counsel, informed us that the petitioner's allegation that respondent 1 was the only employee of his on the date the reference arose was correct. In the light of these facts, we have now to consider whether the contention that the labour court had no jurisdiction to proceed with the reference as the dispute in question

is an individual dispute, is valid.

8. It is no longer open to challenge that the dispute of a single worker with his employer is an individual dispute unless that dispute is taken up and sponsored by his fellow workers. The Act does not concern itself with an individual dispute. It provides a machinery for settlement of disputes between an employer and his employees or a substantial section of his employees "Industrial dispute." as defined in S. 2(k) of the Act, means

"any dispute or difference between the employers and employees, or between employers and workmen, or between workmen and workman, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

9. An examination of several provisions in the Act shows that the machinery of the Act has been devised with the object of maintaining industrial peace so as to prevent interference with the public safety or public order or with the maintenance of supplies and services essential to the life of the community or of employment. The Act is based on the necessity achieving collective amity between labour and capital by means of conciliation, mediation and adjudication. The object of the Act is the prevention of industrial strike, strikes and lockouts and the promotion of industrial peace and not to take the place of ordinary tribunal of the land for the enforcement of contracts between an employer and an individual workman. Thus viewed, the provisions of the Act lead to the conclusion that its applicability to an individual dispute as opposed to dispute involving a group of workmen is excluded unless it acquires the general characteristics of an "industrial dispute," viz. the workmen as a body or a considerable section of them make common cause with the individual workman and thus create conditions contemplated by A. 10 of the "Act," which is the foundation of the State governmental action under the Act. The other provisions which follow that section only subserve the carrying out of the objects of the Act specified therein. [See the observations of the Supreme Court in *The Newspapers Ltd. Vs. The State Industrial Tribunal, U.P.*, in a dispute arising under Uttar Pradesh Industrial Disputes Act, the provision of which are in pari materia with the provisions of the Act.] When can a dispute be said to an "industrial dispute" was pointed out by the Supreme Court in *Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate*, . The Court held that having regard to the scheme and objects of the Act and its other provisions, the expression "any person" in S. 2(k) of the Act must be read subject to such limitations and qualifications as arise from the context; the two crucial limitations are

(1) the dispute must be a real dispute between the parties to the dispute (as indicated in the first two parts of the definition clauses) so as to be capable of settlement or adjudication by one party to the dispute giving necessary relief to the other, and

(2) the person regarding whom the dispute is raised must be one in whose

employment, non-employment, terms of employment, or conditions of labour (as the case may be) the parties to the dispute have a direct or substantial interest;

10. in the absence of such interest the dispute cannot be said to be a real dispute between the parties; where the workmen raise a dispute as against their employer, the person regarding whose employment, non-employment, terms of employment or conditions of labour the dispute is raised need not be, strictly speaking, a "workman" within the meaning of the Act but must be one in whose employment, non-employment, terms of employment or conditions of labour the workmen as a class have a direct or substantial interest. In Para. 15 of that judgment, S. K. Das, J., who spoke for the Court observed (p. 509) :

"... Ordinary, it is only the aggrieved party who can raise a dispute; but an "industrial dispute" is put on a collective basis, because it is now settled that an individual dispute, not espoused by others of the calls to which the aggrieved party may belong, is not an industrial dispute within the meaning of S. 2(k). As Isaacs, J., observed in the Australian case of *George Hudson, Ltd. v. Australian Timber Workers*" Union 32 C.L.R. 413:

"The very nature of an "industrial dispute" as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers ... It is a battle by the claimants, not for themselves alone."

Section 18 of the Act supports the aforesaid observations, in so far as it makes the award binding not merely on the parties to the dispute, but where the party is an employer on his heirs, successors or assigns and where the party is composed of workmen, on all persons employed in the establishment and all persons who subsequently become employed therein. If therefore, the dispute is a collective dispute, the party raising the dispute must have either a direct interest in the subject-matter of dispute or a substantial interest therein in the sense that the class to which the aggrieved party belongs is substantially affected thereby. It is the community of interest of the class as a whole - class of employers or class of workmen - which furnishes the real nexus between the dispute and the parties to the dispute. We see no insuperable difficulty in the practical application of this test. In a case where the party to the dispute is composed of aggrieved workmen themselves and the subject-matter of dispute relates to them or any of them, they clearly have a direct interest in the dispute. Where, however, the party to the dispute also composed of workmen, espouse the cause of another person whose employment, or non-employment, etc., may prejudicial affect their interest, the workmen have a substantial interest in the subject matter of dispute. In both such cases, the dispute is an industrial dispute."

11. This question again came up before the Supreme Court in *The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another*, . Therein the

Court laid down that a dispute between an employer and a single employee cannot per se be an industrial dispute, but it may become one if it is taken up by the union or a number of workmen; the persons who seek to support the cause of a workman must themselves be directly and substantially interested in the dispute and this would depend on the facts and circumstances of each case; persons who are not employees of the same employer cannot be regarded as so interested that by their support they may convert an individual dispute into an industrial dispute; in each case in ascertaining whether an individual dispute has acquired the character of an industrial dispute, the test is whether at the date of the reference the dispute was taken up or supported by the union of the workmen of the employer against whom the dispute is raised by an individual workman or by an appreciable number of workmen.

12. Similar is the view taken by the Madras High Court in *Visalakshi Mills Ltd. Vs. Labour Court and Another*, . Therein it was held that it is now well-settled that an individual dispute in order to be an industrial dispute must have the collective support from a considerable or substantial number of workmen in the establishment; what a substantial or considerable section would be in a given case would, of course, depend upon the particular facts; that an individual dispute is supported by other workmen will also have to be established either in the form of a resolution of a union of which the workmen may be members or of the workmen themselves, who support the dispute, or in any other manner; in the absence of an indication that there is a concerted understanding on the part of a sizable number of workmen of the establishment, the very basis of a collective bargaining would be wanting. The main object of the Industrial Disputes Act is to conserve and promote industrial peace; It is from that standpoint the Act provides that when a number of workmen forming a substantial or considerable section of workmen working in an establishment make a common cause with an aggrieved workmen in respect of his demands, it should be settled by an adjudication; when there is no evidence of the workmen collectively acting and application; from the mere fact that a general union, at whose instanced an industrial dispute concerning an individual workman is referred for adjudication, has on its rolls a few of the workmen in the establishment as its members, it could not be assumed the individual dispute was converted into a collective dispute; in such a case not only should it be proved that the workmen who are members of the general union formed a substantial or a considerable section of the workmen of the particular mills, but also that in order to vest the dispute, with the character of an industrial dispute, those members participated in or acted together and arrived at an understanding, either by a resolution or by other means, and collectively supported on the date of the reference the demand or the cause of an individual dispute; in ascertaining whether there is such a collective expression and support, reference the to workmen of other establishment who happened to be members of the general union will be irrelevant, for, it is one of the requisites of an "industrial dispute" that the workmen who decide to support an individual

dispute should be workmen of the employer concerned and should also have a direct and substantial interest in the dispute raised. From these decisions, it is clear that an individual dispute can become an "industrial dispute" only if the grievance of an employee is taken up by his fellow-workers or a substantial section of them working under the same employer. The fact that his grievance has been taken up by a union, consisting of workmen having no interest in his dispute, cannot convert that dispute into an "industrial dispute." In the determination of that dispute, those workmen can have no interest. The determination of his dispute, one way or the other, cannot in the very nature of things affect them directly or indirectly. As found earlier respondent 1 was the only employee of the petitioner. The workmen who are the members of respondent 4 union can have no community of interest in the dispute existing between respondent 1 and the petitioner. It is immaterial for them in what manner that dispute is resolved. Hence the dispute between respondent 1 and the petitioner is quite clearly an individual dispute and not an "industrial dispute." Consequently, the reference made by respondent 2 to respondent 3 relates to an individual dispute, which means that respondent 3 had no jurisdiction to decide that dispute.

13. Sri Bopanna, the learned counsel for respondent 1, tried to distinguish the decisions of the Supreme Court referred to earlier on the ground that in all those cases the disputes were between working journalists and their employers, and the definition of a "working journalist" differs from the definition of a workman" and consequently. Those decisions have no bearing on the point under consideration. This submission is neither factually correct nor legally sustainable. The decision of the Supreme Court in *Workmen of Dimakuchi Tea Estate* case 1985 I 11j 500 (vide supra), dealt with a dispute between the workmen of the Dimakuchi Tea Estate and the management of that estate. Further, I see no distinction in principle between disputes between "working journalists" and their employers and the "workmen" and their employers.

14. The next contention of Sri Bopanna was that respondent 2 having referred the dispute in question to respondent 3 as an "industrial dispute," there is a presumption that it is an "industrial dispute"; it was for them petitioner to rebut that presumption; the petitioner has not adduced any evidence to show that the dispute in question is not an "industrial dispute" and therefore, the labour court's conclusion that it is an "industrial disputes" is not open to challenge. In support of this contention, he placed reliance on the decisions of the Labour Appellate Tribunal of India in *Snow White Food Products, Ltd. v. Nagaswami* 1952 I 11j 326; *G. S. Chatterjee v. India Paint, Colour and Varnish Company, Ltd.* 1952 II 11j 834, and *Lipton, Ltd. v. Their workmen* 1956 I 11j 319. These decisions undoubtedly support his contention. But, in my opinion, these decisions do not lay down the law correctly. It is now well-settled that the Government in making a reference under S. 10(1) of the Act is not discharging any judicial or quasi-judicial function. An order of reference under S. 10 is purely an administrative order. If that is so, about which there was no dispute, then that order cannot in

any manner give rise to any presumption in law. If the jurisdiction of the labour court is challenged by the employer, as it has been done in this case, on the ground that the dispute is an individual dispute, then the labour court must first go into the question whether the dispute is an "industrial dispute" or not; the existence of an industrial dispute is jurisdictional fact; unless the labour court finds the dispute to be an "industrial dispute," it cannot proceed to determine the dispute referred to it. It is for the party who contends that the dispute is an "industrial dispute" to establish that fact. In *Kripa Printing Press, Putli Bowli, Hyderabad by Yeshwant Rao Vs. Presiding Officer Labour Court, Hyderabad and Another*, the High Court of Andhra Pradesh held that the order of reference under S. 10 of the Industrial Disputes Act is an administrative order; the labour court, strictly speaking, is not concerned with the validity of the reference but with its own jurisdiction to adjudicate upon the matter; that jurisdiction to adjudicate upon the existence of an "industrial dispute"; further it is also well-settled that a dispute between an individual workman and the management can become an "industrial dispute" when that dispute is sponsored by his union or a number of fellow-workers; when the validity of the reference relating to single workman is challenged on the ground that what is referred is only an individual dispute and not "industrial dispute" it is for the workman to show that his cause has been sponsored by his union or by a number of workmen of his class. Labour court is a statutory tribunal exercising a special jurisdiction and as such when its jurisdiction is challenged. It is for the person involving its jurisdiction to establish the facts upon which the jurisdiction rests.

15. For the reasons mentioned above, I am of the opinion that the petitioner having objected to the jurisdiction of respondent 3 on the ground that the dispute referred is an individual dispute it was for respondent 1 to establish that it was an "industrial dispute." He having failed to do so, the reference should have been dropped. In view of the wrong approach adopted by respondent 3, I should have remanded the case back to it but for the fact that it is now admitted that respondent was the only employee of the petitioner on the date of the reference.

16. Under the circumstances set out above, the dispute between and the petitioner and respondent 1 can never be considered as an "industrial dispute." No other worker could have been interested in that dispute. Such a case is not within the contemplation of the Act.

17. For the reasons mentioned above, this petition is allowed and the order of the labour court impugned in the proceedings is quashed.

18. In the circumstances of this case, I direct the parties to bear their own costs.

19. Note : I have perused the order proposed to be made by my learned brother Bhat, J.

20. Nowhere in his pleadings in this Court, the petitioner has taken the contention that the concern run by him is not an "industry" as defined in the Act.

Such a contention was also not taken at the hearing of the case. Consequently, there was no occasion for the learned counsel to refer to the decisions cited by my learned brother in his order. I have not examined that question, as the same was not put in issue in the case. The said contention does not appear to have been taken before the labour court (respondent 3). Hence it is not likely that the same would be taken before the State Government. At any rate, it was not the case of the petitioner that he had taken that contention before the State Government or placed the required material before it to decide that contention. Hence it may not be fair to criticize the Government for not going into that question assuming that it erred in proceedings on the basis that the concern run by the petitioner is an "industry."

21. Govinda Bhat, J. :- This petition preferred, under Art. 226 of the Constitution of India, by a firm of cloth merchants carrying on business under the name of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons, at Robertsonpet, is directed against the award passed by the labour court, Bangalore (respondent 3), in Reference No. 14 of 1963 on 12 August, 1963, and published by the State of Mysore (respondent 2) in the Mysore Gazette dated 3 October, 1963, on a reference made by respondent 2 under S. 10(1)(c) of the Industrial Disputes Act, 1947 (Central Act XIV of 1947), hereinafter referred to as the Act.

22. Respondent 1 (P. Raju Mudaliar), an employee of the petitioner, whose services had been terminated with effect from 15 August, 1959 by notice dated 27 June, 1959, was directed by the award to be reinstated to his former post with continuity of service, and to pay him his back-wages at the rate of Rs. 85 per month from the date of termination of his service to the date of his reinstatement, and a sum of Rs. 100 as costs was awarded to the first party before respondent 3.

23. The petitioner has challenged the award, which will hereinafter be referred to as "the award" on the ground that the dispute between the petitioner and respondent 1 was not an industrial dispute coming within the definition of the term as defined under the Act, and therefore, respondent 2 had no jurisdiction to make the reference under S. 10(1)(c) and respondent 3 had no jurisdiction to adjudicate on the reference, and that the entire proceedings resulting in the award and its publication in the official Gazette by respondent 2 are without jurisdiction, and therefore null and void.

The facts are not in dispute and they lie within a narrow compass. Briefly stated, the facts are :

The petitioner is a firm carrying on business as cloth merchants at Robertsonpet, Kolar Gold Fields, in Mysore State, and respondent 1 was working as a salesman in their shop on a salary of Rs. 85 per month until his services were terminated with effect from 15 August, 1959 by issue of a notice dated 27 June, 1959. Respondent 1 preferred an appeal under S. 41 of the Mysore Shops and Establishments Act, 1948, claiming a sum of Rs. 2,851-4-0; but that appeal was

dismissed after contest. Thereafter, the Kolar Gold Fields Shops Assistants" Association, Robertsonpet, of which respondent 1 was a member, approached the Labour Commissioner and at the instance of the Labour Commissioner, respondent 2 referred, by their order dated 29 March, 1963 in No. PLM 554 LLD 62, purporting to be a reference under S. 10(1)(c) of the Act, the following point of dispute for adjudication. The said order reads thus :

"Whereas the Government of Mysore are of opinion that an industrial dispute exists between the workmen and the management of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons, Robertsonpet, Kolar Gold Fields (Kolar district), on the points noted below :

And whereas the Government of Mysore consider it desirable to refer the dispute for adjudication.

Now, therefore, in exercise of the powers conferred by Clause (c), Sub-section (1), of S. 10 of the Industrial Disputes Act. 1947 (Central Act XIV of 1947), the Government of Mysore hereby refer the said dispute for adjudication to the labour court at Bangalore.

Points of dispute

Are the management of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons, IV Cross, Robertsonpet, Kolar Gold Fields, Kolar district justified in terminating the services of P. Raju Mudaliar with effect from 15 August, 1959 ? If not, is he entitled for reinstatement with benefits of backwages or to any other relief ?

(By order and in the name of the Governor of Mysore)"

24. On receipt of the reference, respondent 3 issued notice to the parties. The first party before respondent 3 purported to be the workmen represented by the secretary, Kolar Gold Fields Shops Assistants" Association, Robertsonpet, and the second party purported to be the management of P. M. Murugappa Mudaliar, Rathina Mudaliar & Sons, Robertsonpet (petitioner-firm). In their pleadings before respondent 3, the petitioner contended, inter alia, that there was no industrial dispute which respondent 3 had jurisdiction to adjudicate upon under the Act, and the dispute between the petitioner and respondent 1 was not an industrial dispute. The other contention is not material for the purpose of this writ petition. On the main contention, respondent 3 framed the following issue :-

"Whether the dispute in question is only an individual dispute and not an industrial dispute and as such this Court has no jurisdiction to deal with the matter ?"

The second issue (which as already mentioned is not relevant for the purpose of this writ petition) was :

"Whether Kolar Gold Fields Shops Assistants" Association was no longer in existence at the time when the reference was made as alleged by the management ?"

25. Respondent 3 answered issue(2) against the petitioner, and it gave no issue(1). It went into the question on the merits of the termination of the services of respondent 1, and came to the conclusion that it was not made in good faith because the employee had demanded a higher rate of salary. The question, whether or not the dispute referred was an industrial dispute which the labour court had jurisdiction to adjudicate upon, was not considered and answered by respondent 3.

26. The question whether a dispute referred for adjudication under the Act to a labour court or tribunal is an "industrial dispute" coming within the scope of the Act, is a matter relating to the jurisdiction of the labour court or tribunal. When the Government makes a reference under S. 10, a point of dispute for adjudication, the labour court or the tribunal has initial jurisdiction to entertain the reference and call upon the parties to file their pleadings, and if one of the parties raises the contention that the dispute is not an industrial dispute, an issue has to be raised on that contention and the labour court or the tribunal, as the case may be, has to give a finding on that issue. If the labour court or the tribunal comes to the conclusion that the dispute referred for adjudication is not an industrial dispute, the matter comes to an end and it cannot proceed further; on the contrary, if it finds that the dispute is an industrial dispute, it has jurisdiction to proceed further and adjudicate upon the point of dispute and make an award. The contesting party, however, is not precluded from challenging the decision of the tribunal that the point of disputes is an industrial dispute, since it is a matter on which the jurisdiction of the tribunal rests. Being a jurisdictional issue, This Court, under Art. 226 of the Constitution, is entitled to consider the correctness of the finding of the tribunal on the jurisdictional fact.

27. Normally, when the labour court or a tribunal fails to give its finding on a material issue as in this case, we would have been inclined to quash the award and direct respondent 3 or make an award afresh in accordance with law. But, on the facts of this case, we consider that course is unnecessary, and would only lead to unnecessary expenditure and waste of time of the labour court. In Para. 8 of the affidavit filed by one of the partners of the petitioner-firm, it was specifically averred that respondent 1 was the sole employee under the petitioner-firm and there were no other employees. The said averment was not disputed in the counter-affidavit filed on behalf of respondent 1. We asked Sri P. P. Boppana, learned counsel appearing for respondents 1 and 4, whether he would like to have an opportunity to file a counter-affidavit challenging the correctness of that statement in the affidavit of the petitioner. Sri Boppana fairly conceded after consulting his client that respondent 1 was the sole employee and his services were terminated by the petitioner, the dispute, even assuming that the business carried on by the petitioner is an industry, it was an individual dispute and not an industrial dispute as defined in S. 2(k) of the Act. The first party before respondent 3 - the labour court - purports to be the "workmen." The order of reference under S. 10(1)(c), of the Act made by respondent 2 also refers to an alleged dispute between the workmen and the management of the

petitioner-firm. If respondent 1 was the sole employee, it is beyond one's imagination to comprehend as to how there could exist a dispute between "the workmen and the management of P. M. Murugappa Mudaliar." Rathina Mudaliar & Sons, Robertsonpet." There were no workmen but only one employee. My learned brother Hegde, J., has elaborately dealt with this question and it is unnecessary for me to deal with the same. I entirely agree with his reasoning and conclusion that the dispute, even assuming that the business carried on by the petitioner is an industry, was an individual dispute and not an industrial dispute, and therefore, respondent 3 had no jurisdiction to proceed with the adjudication.

28. If the judgment of my learned brother had rested with that finding and not proceeded to consider the question of burden of proof and the correctness of a number of decisions of the Labour Appellate Tribunal of India, there would have been no occasion for me to write a separate opinion. In my opinion, the question whether the burden is on the management or the workmen to establish that the dispute referred for adjudication is an industrial dispute or an individual dispute, is unnecessary for the decision of this case. If the decision, however, was necessary, with great respect to my learned brother, I find myself unable to concur with his view, and I shall briefly state my reasons.

29. I should like to approach this question on first principles. The appropriate Government under S. 10, has the jurisdiction to make a reference to the labour court or the tribunal for adjudication of a dispute which it considers as an industrial dispute; the order under S. 10 is undoubtedly in the nature of an administrative decision. Under S. 12(5), the Government is not bound to make a reference on receipt of the conciliation officer; on a consideration of the report, the Government, if satisfied that there is a case for reference, may make such a reference; but where the Government does not make such a reference, it has to record and communicate to the parties concerned its reasons therefor. If, in refusing to make a reference, Government is influenced by reasons which are wholly extraneous or irrelevant, or which are not germane, then its decision is open to challenge in a Court of law, as held by the Supreme Court in *State of Bombay Vs. K.P. Krishnan and Others*, . The order made under S. 10 read with S. 12(5), is an administrative decision. When the Government makes an order under S. 10, the labour court or the tribunal, as the case may be, has the jurisdiction to entertain the reference and proceed to adjudicate upon the point of dispute referred to it. If the management does not contend that the point of dispute referred is not an industrial dispute, the tribunal may straightway proceed to adjudicate upon the dispute. If the initial burden is on the workmen to establish that the dispute is an industrial dispute and not an individual dispute, then, even though the management may not raise any contention and remain *ex parte*, the workmen have to lead evidence and establish that the dispute is an industrial dispute and not an individual dispute. As observed by the Supreme Court in *Western India Match Company, Ltd., Madras v. Industrial Tribunal, Madras*, and another 1962 I Lj 629, an industrial tribunal is not bound by the

strict rules of procedure of the Evidence Act, 1872. The question of burden of proof is a matter of procedure resting on the Indian Evidence Act, which is not applicable to adjudications under the Act. In my opinion, the issue, if the management raises, has to be decided on the material on record without placing too much reliance on the question of burden of proof.

30. On the admission made on behalf of respondents 1 and 4 at the bar, since respondent 1 was the sole employee of the petitioner, the case is one resting on admission of the party and no question of burden of proof arises.

31. In my opinion, the reference, as also the award, are clearly without jurisdiction for one other reasons also, viz., that the business carried on by the petitioner-firm is not an "industry." On the uncontroverted facts, the petitioner-firm is carrying on the business of a cloth shop at Robertsonpet, Kolar Gold Fields, Apart from the shop in question, it has no other cloth business. The firm has two partners - P. M. Murugappa Mudaliar and Rathina Mudaliar Sons. The business that is carried on is one of selling cloth in their shop, and respondent 1 was a salesman in that shop. Respondent 4 is an association of shop assistants at Robertsonpet, Kolar Gold fields. The petitioner's shop is a shop as defined in the Mysore Shops and Establishments Act, 1948. Respondent 1, as stated earlier, preferred an appeal, under S. 41 of the Mysore Shops and Establishments Act, against the termination of his services and claimed compensation. That appeal was dismissed.

32. In my opinion, the shop of the petitioner and the business carried on therein by the partners is not an "industry" as defined in S. 2(j) of the Act; and that respondent 1 was not a "workman" as defined in S. 2(s) of the Act. It is necessary to refer to the definition of the words "industry" and "workman" in the Act :

"2(j). "industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

"2(s). "workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled. manual, supervisory, technical or clerical work for hire or reward ... and includes, for the purposes any proceedings under this Act in relation to an industrial dispute ..."

33. The important test for deciding whether any business, trade or a calling of an employer constitutes an industry within the meaning of the Act, is not only the character of the activities indicated by the words included in the definition but their form and organization in relation to the employed labour force as an active and creative agent for achieving the fruits of the activity. It should be an activity which is predominantly carried on by employment of organized labour force for the production or distribution of goods or for rendering of material services to the community at large or a part of such community. An activity pertaining to or in relation to private and personal employment has to be excluded from the

definition of the industry." In *Firm Tulsiram Sadanand Sarda Vs. Assistant Commissioner of Labour, Nagpur*, a Bench of the Bombay High Court has considered this question elaborately. The Supreme Court in *The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others*, has laid down as follows :

"... the concept of industry postulates partnership between capital and labour or between the employer and his employees. It is under this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words, the co-operation between capital and labour or between the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co-operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human activity in which capital and labour co-operate or employer and employees assist each other is an industry. The distinguishing feature of an industry is that for the production of goods or for the rendering of service, co-operative between capital and labour or between the employer and his employees must be direct and must be essential."

34. Supposing a hawker employs a labour to carry his basket, can it be said that the business of a hawker is an industry ? Can the business of a petty shopkeeper like that of a pan-shop be said to be an industry if an assistant or a servant is employed to sweep and clean the shop ? Every form of employment does not make the trade or business of an employer an industry. On the facts of the case, when two partners of a firm carrying on the business of a clothe shop in a small town like Robertsonpet employ a shop assistant as a salesman, that business, in my opinion, does not come within the definition of "industry." Rightly, respondent 1 had preferred an appeal under S. 41 of the Mysore shops and Establishments Act, 1984, which was applicable to him and he lost in the contest. Therefore, the dispute was not an industrial dispute which respondent 2 had jurisdiction to refer for adjudication to respondent 3. Though in the above form the proposition was not formulated by the learned counsel for the petitioner, either in the petition or in his arguments before us, in my opinion, that question arose on the contention that the dispute is not an "industrial dispute," for in the first instance, there must be an "industry" before there could be an industrial dispute. Therefore, I put the question to the learned counsel for the respondents as to how the shop of the petitioner can come within the definition of an industry; but the learned counsel was unable to submit any convincing answer.

35. What is an industrial dispute has been settled by innumerable decisions of the Supreme Court. If respondent 2 had only applied its mind, there would have been no occasion for making the reference, by which the time of the labour court has been wasted and the parties have been put to unnecessary expense. The appropriate Government, when it makes a reference under the status, should not

act mechanically. It must apply its mind and if satisfied that there is a prima facie case, its duty is to make a reference.

36. For the above reasons, the order I propose to make is that the reference made by respondent 2 under S. 10(1)(c) in No. PLM 554 LLD. 62, dated 27 March, 1963, and the resulting award published in the Mysore Gazette dated 3 October, 1963 should be quashed, and in the circumstances of the case, the parties should be directed to bear their own costs.