
(2014) 01 SHI CK 0034
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 4354 of 2009

Rajesh Walia

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 07-01-2014

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (2014) LabIC 1405 : (2014) 3 LLN 382

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Sunil Chaudhary, Advocate for the Appellant; Parmod Thakur, Ms. Meenakshi Sharma, Addl. A.G. and Ramesh Thakur, Asstt. A.G, Advocate for the Respondent

Judgement

Rajiv Sharma, J.—Since common questions of law and facts are involved in all these petitions, the same were taken up together for hearing and are being disposed of by a common judgment. However, in order to maintain clarity, facts of C.W.P. No. 4354 of 2009 have been taken into consideration. The workmen through their association, i.e. Irrigation and Public Health Workers' Union, Sundernagar filed reference No. 59 of 1994. Presiding Judge, Labour Court vide award dated 12.12.1996 partly allowed the same by allowing demand No. 1. The other demands were rejected.

2. It is evident from the record that respondent-State had sought permission of the Labour Court to retrench the petitioner and other co-workmen on 22-10-1994 and 25-10-1994. Order dated 22-10-1994 is on record at page 44 of the paper book. The workmen had filed application u/s 33A of the Industrial Disputes Act, 1947 before the Labour Court on 18.3.1995 against their retrenchment. Labour Court vide judgment dated 3.1.1996 dismissed the application. The question of "last come first go" was taken into consideration qua the workmen, namely, Bhim Singh and Hem Singh. These two workmen had also obtained the stay order from the State Administrative Tribunal. One month notice

was served upon the workmen and compensation was also paid through these notices.

3. Irrigation and Public Health Workers" Union again raised industrial dispute after the retrenchment of the petitioner and similarly situate co-workmen. State Government made reference No. 14 of 1995 to the Labour Court. The Labour Court dismissed reference No. 14 of 1995 vide award dated 17.1.1997 by upholding the retrenchment of the workmen. Irrigation and Public Health Workers Union feeling aggrieved by the award dated 17.1.1997 filed C.W.P. No. 92 of 1997 in this Court. The Court has also called for the record of C.W.P. No. 92 of 1997 and perused the same. C.W.P. No. 92 of 1997 was dismissed by the Court on 18.3.1997. Thereafter, the workmen again raised demand notice dated 9.1.2007 vide Annexure P-4. According to them, the Department retrenched 529 workmen. Some of the workmen junior to the petitioner had approached State Administrative Tribunal. State Administrative Tribunal quashed the retrenchment order. Judicial Review was sought against order passed by the State Administrative Tribunal. This Court dismissed the Judicial Review. Employer also preferred SLP before the Supreme Court and the same was dismissed by the Hon"ble Supreme Court. In nut shell, their demand was that the persons junior to them neither could have been retained nor could they be regularized. They have made several representations for the redressal of their grievance.

4. Reply was filed by the Executive Engineer, Irrigation and Public Health Division, Baggi to the demand notice. Entire history the manner in which the services of the petitioners and other co-workmen were retrenched by seeking prior permission of the Presiding Judge, Labour Court vide order dated 22.10.1994 and 25.10.1994 has been given. Labour Commissioner vide impugned order dated 31.8.2009 has refused to make reference to the Labour Court vide Annexure P-6.

5. The workmen had filed, as noticed above, C.W.P. No. 92 of 1997 in this Court. It was dismissed on 18.3.1997. Since the reference was not made by the State Government, petitioner and similarly situate co-workmen approached this Court by filing Civil Writ Petitions. These were dismissed by the Court on 12.10.2012. Petitioner and similarly situate co-workmen filed L.P. A and the matters were remanded back. It is in these circumstances that all the writ petitions were heard afresh.

6. What emerges from the facts enumerated hereinabove is that the Irrigation and Public Health workers" Union had raised certain demands which led to making reference No. 58/1994 by the State Government to the Labour Court The Labour Court has accepted demand No. 1, as noticed above. The other demands were rejected. However, in the meantime, petitioner and similarly situate co-workmen were retrenched on 16.11.1994. The employer had sought permission of the Labour Court before terminating their services on 22.10.1994 and 25.10.1994. It has come on record that the workmen were served with one month"s notice and compensation was also paid to them. They have challenged

the decision of the employer to retrench their services by filing application u/s 33A of the Industrial Disputes Act, 1947. It was also dismissed by the Labour Court on 3.1.1996. The workmen again have raised industrial dispute and the reference was made by the State Government bearing No. 14 of 1995 to the Labour Court against their retrenchment. The Labour Court dismissed the reference on 17.1.1997. According to the Labour Court, retrenchment was legal. This Court while dismissing the petition filed against reference No. 14 of 1995 has rejected all the contentions raised by the workmen. This Court has observed that plea of Section 25N of the Industrial Disputes Act, 1947 was never raised before the Labour Court. So far as other issue qua principle of "last come first go" is concerned, this Court has categorically held that persons junior to them had obtained stay order from the State Administrative Tribunal. The third contention that the payment of compensation was delayed has already been rejected by the Court. Appropriate compensation was paid along with covering letters in the form of cheques vide Exs. R-35 to R-139. The Court has also observed that the award was passed by the Labour Court on 12.12.1996 in reference No. 58 of 1994 seeking regularization of services of daily wage workers, who had completed three years. This Court has also held that there was no inconsistency between the two awards made on 12.12.1996 and 17.1.1997.

7. The Labour Commissioner has passed a reasoned and speaking order on 31.8.2009 after receiving failure report from Labour Officer-cum-Conciliation Officer, Mandi. He has given the entire history the manner in which petitioner and co-workmen were retrenched on 16.11.1994 and the permission of the Labour Court was sought on 22.10.1994 and 25.10.1994. There is reference to the application preferred by the petitioner and similarly situated co-workmen u/s 33A of the Industrial Disputes Act, 1947 on 3.1.1996. Petitioner in the present case has not made reference to the reference No. 14 of 1995 whereby the Irrigation and Public Health Workers' Union has specifically challenged the retrenchment of three workmen. There is concealment of facts by the petitioner. Their retrenchment was upheld by the Labour Court vide award dated 17.1.1997 and the writ petition was also dismissed.

8. As far as issue of junior persons being retained by the Department is concerned, it is specifically mentioned in the communication dated 31.8.2009 that the junior persons had approached the State Administrative Tribunal and they were re-engaged and thereafter regularized by the Irrigation and Public Health Department. In these circumstances, Labour Commissioner has refused to make reference to the Labour Court for adjudication. There is neither any illegality nor any perversity in the order dated 31.8.2009. The order passed by the Labour Commissioner u/s 12(5) of the Industrial Disputes Act, 1947 is neither judicial nor quasi-judicial. It is only administrative order. Specific reasons have been assigned for not making reference in the present case. It is not incumbent upon the State to make reference in every case.

9. Division Bench of Bombay High Court in Firestone Tyre and Rubber Co. of

India Ltd. Vs. K.P. Krishnan and Others, has considered the scope of Section 10(1) and proviso and Section 12(5) of the Industrial Disputes Act, 1947. Division Bench has held that it is only in two cases that Government is not bound to make a reference when the case falls under the proviso, and the two cases are that the notice is frivolous or vexatious or that the Government considers it inexpedient to make a reference. Division Bench has further held that the Government when applies its mind to circumstances extraneous to the case for reference, then Government cannot rely upon the ground of expediency and say, "we will refuse to make a reference because we think it is inexpedient". Division Bench has held as under:

3. Turning to the Act, there are three important provisions with regard to reference which deal with different sets of circumstances and which confer different powers upon Government. The first is Section 10(1) which gives the power to Government to refer a dispute to a Board or a Court for inquiry or a Tribunal if it is of opinion that any industrial dispute exists or is apprehended. The discretion conferred upon Government in Section 10(1) is in no way qualified or limited.

Then there is an important proviso to Section 10(1); which refers to a dispute relating to a public utility service and a notice u/s 22 has been given. There it makes it incumbent upon the Government to make a reference, but it qualifies that mandatory direction by providing that a reference need not be made if the Government considers that the notice u/s 22 has been frivolously or vexatiously given or that it would be inexpedient to make a reference.

Therefore, it is only in these two cases that Government is not bound to make a reference when the case falls under the proviso, and the two cases are that the notice is frivolous or vexatious or that the Government considers it inexpedient to make a reference. Then we come to Section 12(5) and the first thing to notice about Section 12(5) is that the question of making or not making a reference arises after conciliation proceedings have intervened; in other words, an authority under the industrial law has applied his mind to the dispute raised by the workers; and, therefore, subsection (5) begins by stating.

If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board or Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefore.

Therefore it is obligatory upon the Government under this sub-section to consider the report of the Conciliation Officer. The Legislature makes it incumbent upon the Government to consider this report because it is the report of an authority under the Act who has considered, as we just said, the merits of the controversy, and the Legislature required that before Government made up its mind it should consider what the Conciliation Officer had to say.

After the report is considered, if the Government is satisfied that there is a case for reference then it may make the reference, and the question that has been agitated before us is, what is the proper meaning to be given to the expression "may" used in this context.

6. Mr. Joshi has urged upon us and Mr. Vimadalal has supported him in that contention that we must import into Section 12(5) the language of the proviso to Section 10(1), and Mr. Joshi says that even as in the case of the proviso if Government thinks it inexpedient to make a reference it has been given the power and the discretion not to make a reference, in the first place, it would be opposed to all canons of construction if we were to import the language of Section 10(1) and the proviso to Section 10(1) into the words used by the Legislature in Section 17(5). In the same piece of legislation the Legislature has advisedly used different language in Section 10(1), in the proviso to Section 10(1), & in Section 12(5) & in our opinion there is good reason & good principle why this different language is used. When Government is dealing with a dispute relating to a public utility service various considerations of public policy arise and it is only the Government that is competent to decide whether a reference should be made or not, and therefore, the Legislature used the very wide expression "expediency".

"Expediency" is undoubtedly a question of policy which the Court cannot inquire into, and therefore if the Government were to say with regard to a public utility service that it is inexpedient to make a reference it would be the end of the matter. But when we come to Section 12(5) where there is conciliation proceeding, where there is a report and where an obligation is cast upon Government to peruse that report, the Legislature did not think it proper, and in our opinion rightly so, to give such wide discretion to Government.

It limited its discretion to its satisfaction that there was no case for a reference. No question of expediency would arise in such a case. If the Government took the view that there was no case whatever on merits, that the demands of the workers were frivolous or vexatious, that merely the time of the Industrial Court would be wasted by making the reference, that the decision was a foregone one, undoubtedly all these considerations would lead to the Government being satisfied that there was no case for a reference.

But when Government applies its mind to a circumstance extraneous to the industrial dispute extraneous to the case for reference, then Government cannot rely upon the ground of expediency and say, "We will refuse to make a reference because we think it is inexpedient". That answer the Legislature has not permitted the Government to give u/s 12(5). That answer Government can only give when it deals with the proviso to Section 10(1).

10. Their Lordships of the Hon^{ble} Supreme Court in *The State of Bihar Vs. D.N. Ganguly and Others*, have held that it is not in every case where the parties allege the existence of an industrial dispute that a reference would be made u/s

10(1). It is only where the test of subjective satisfaction of the appropriate Government is satisfied that the reference can be made. Thus, it is clear that the appropriate Government is given an important voice in the matter of permitting industrial disputes to seek adjudication by reference to the industrial tribunal.

11. Division Bench of Bombay High Court has again considered the scope of Sections 10(1) (c), 12(4) and 12(5) of the Industrial Disputes Act, 1947 in *Engineering Staff Union and Others Vs. State of Bombay and Others*, , as under:--

The expression "may" in S. 12(5) of Industrial Disputes Act refers to a duty imposed upon Government. Although the Government undoubtedly has been given power to make a reference, that power has been coupled with a duty in the sense that if on a perusal of the report of the conciliation officer the Government is satisfied that it is a case for reference, the duty imposed upon it clearly arises and the Government could not refuse to discharge that duty. The next part of S. 12(5) makes it obligatory upon Government when it does not make a reference to record and communicate to the parties concerned its reasons therefore. It is perfectly true that the reasons given by the Government are not justiciable in the sense that the Court would not consider the weight or value or the quality or even the adequacy of the reasons given by the Government. But it is equally clear that the reasons which the Government has to give under S. 12(5) must be reasons connected with the perusal of the report and with Government not being satisfied that there is a case for reference. If the reasons have no connection, no bearing and no relevance to this question, then they are not reasons contemplated by S. 12(5) and in such a case it would be open to the Court to ask the Government to give proper reasons which the law requires by S. 12(5) of the Act - vide *Firestone Tyre and Rubber Co. of India Ltd. Vs. K.P. Krishnan and Others*, . It is open to the Government and indeed it may be the duty of Government to consider in each case whether conciliation has failed and whether the demands of the workers are such as required adjudication. Not only when the demands are frivolous such that reasonable people would not put forward, but even if they are not justified, even if they are not appropriate in the context of the times or in the context of financial conditions, it would be open to Government not to refer the disputes to adjudication. To suggest that in any decision of Government the element of decision should be absent is to make S. 12(5) entirely nugatory.

It could not be contended that the only material which the Government is entitled to consider under S. 12(5) is the report made by the conciliation officer. What is made obligatory is the consideration of the report of the conciliation officer. But the Section does not provide that the satisfaction ultimately required by the Government is a satisfaction that can only be based upon the report of the conciliation officer. It would, therefore, be erroneous to suggest that it would not be open to Government to rely on other materials, other facts, other statistics, other than those which appear in the report of the conciliation officer.

All that is relevant and germane to the statutory satisfaction can be availed of by the Government in coming to its conclusion. The satisfaction that the Government has got to arrive at is not a judicial or quasi-judicial act. It does not call for any judicial process although undoubtedly it would be more satisfactory if Government were to discuss various matters in the presence of both the parties before it came to a particular conclusion. But the law does not cast any obligation upon the Government to do so and the very fact, that the legislature has left the matter to the subjective satisfaction of Government clearly shows that any idea or suggestion of judicial process is excluded.

Therefore, when reasons are given and the Court is considering these reasons, if the reasons disclose any extraneous matter taken into consideration by the Government, or if they disclose a failure on the part of the Government to take into consideration any relevant factor required by law, undoubtedly the Court would say that these are not the reasons contemplated by the statute. Now, it is obligatory upon the Government to consider the report of the conciliation officer. If Government were to state in its reasons that it has not taken that report into consideration, obviously the reason would be bad; equally so as laid down in *Firestone T & R. Co. v. K.P. Krishnan* if the Government taken into consideration the conduct of a worker in deciding whether he is entitled to a bonus or any other circumstance which is foreign to any determination as to the question of the right of a worker to get bonus.

12. The judgment rendered by Bombay High Court in *Firestone Tyre and Rubber Co. of India Ltd. Vs. K.P. Krishnan and Others*, was assailed before the Hon'ble Supreme Court. Their Lordships of the Hon'ble Supreme Court in *State of Bombay Vs. K.P. Krishnan and Others*, have held as under:--

5. Let us first examine the scheme of the relevant provisions of the Act. Chapter III which consists of Ss. 10 and 10A deals with reference of dispute to Boards, Courts or Tribunals. Section 10(1) provides that where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute to one or the other authority specified in Cls. (a) to (d). This Section is of basic importance in the scheme of the Act. It shows that the main object of the Act is to provide for cheap and expeditious machinery for the decision of all industrial disputes by referring them to adjudication, and thus avoid industrial conflict resulting from frequent lock-outs and strikes. It is with that object that reference is contemplated not only in regard to existing industrial disputes but also in respect of disputes which may be apprehended. This Section confers wide and even absolute discretion on the Government either to refer or to refuse to refer an industrial dispute as therein provided. Naturally this wide discretion has to be exercised by the Government bona fide and on a consideration of relevant and material facts. The second proviso to S. 10(1) deals with disputes relating to a public utility service, and it provides that where a notice under S. 22 has been given in respect of such a dispute the appropriate Government shall, unless it

considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced. It is thus clear that in regard to cases falling under this proviso an obligation is imposed on the Government to refer the dispute unless of course it is satisfied that the notice is frivolous or vexatious or that considerations of expediency required that a reference should not be made. This proviso also makes it clear that reference can be made even if other proceedings under the Act have already commenced in respect of the same dispute. Thus, so far as discretion of the Government to exercise its power of referring an industrial dispute is concerned it is very wide under S. 10(1) but is limited under the second proviso to S. 10(1). Section 10(2) deals with a case where the Government has to refer an industrial dispute and has no discretion in the matter. Where the parties to an industrial dispute apply in the prescribed manner either jointly or separately for a reference of the dispute between them the Government has to refer the said dispute if it is satisfied that the persons applying represent the majority of each party. Thus, in dealing with this class of cases the only point on which the Government has to be satisfied is that the persons applying represent the majority of each party; once that test is satisfied the Government has no option but to make a reference as required by the parties. Similarly S. 10A deals with cases where the employer and his workmen agree to refer the dispute to arbitration at any time before the dispute has been referred under S. 10, and it provides that they may so refer it to such person or persons as may be specified in the arbitration agreement; and S. 10A(3) requires that on receiving such an arbitration agreement the Government shall, within fourteen days, publish the same in the Official Gazette. Section 10A(4) prescribes that the arbitrator or arbitrators shall investigate the dispute and submit the arbitration award to the appropriate Government and S. 10A(5) provides that such arbitrations are outside the Arbitration Act. Thus cases of voluntary reference of disputes to arbitration are outside the scope of any discretion in the Government. That in brief is the position of the discretionary power of the Government to refer industrial disputes to the appropriate authorities under the Act.

8. Section 12(5) with which we are concerned in the present appeals provides that if, on a consideration of the report referred to in sub-sec. (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefore. This Section requires the appropriate Government to consider the report and decide whether a case for reference has been made out. If the Government is satisfied that a case for reference has been made out it may make such reference. If it is satisfied that a case for reference has not been made out it may not make such a reference; but in such a case it shall record and communicate to the parties

concerned its reasons for not making the reference which in the context means its reasons for not being satisfied that there is a case for reference. The High Court has held that the word "may" in the first part of S. 12(5) must be construed to mean "shall" having regard to the fact that the power conferred on the Government by the first part is coupled with a duty imposed upon it by the second part. The appellant and the company both contend that this view is erroneous. According to them the requirement that reasons shall be recorded and communicated to the parties for not making a reference does not convert "may" into "shall" and that the discretion vesting in the Government either to make a reference or not to make it is as wide as it is under S. 10(1) of the Act. Indeed their contention is that, even after receiving the report, if the Government decides to make a reference it must act under S. 10(1) for that is the only Section which confers power on the appropriate Government to make a reference.

9. It is true that S. 12(5) provides that the appropriate Government may make such reference and in that sense it may be permissible to say that a power to make reference is conferred on the appropriate Government by S. 12(5). The High Court was apparently inclined to take the view that in cases falling under S. 12(5) reference can be made only under S. 12(5) independently of S. 10(1). In our opinion that is not the effect of the provisions of S. 12(5). If it is held that in cases falling under S. 12(5) reference can and should be made only under S. 12(5) it would lead to very anomalous consequences. Section 10(3) empowers the appropriate Government by an order to prohibit the continuance of any strike or lock-out in connection with an industrial dispute which may be in existence on the date of the reference, but this power is confined only to cases where industrial disputes are referred under S. 10(1). It would thus be clear that if a reference is made only under S. 12(5) independently of S. 10(1) the appropriate Government may have no power to prohibit the continuance of a strike in connection with a dispute referred by it to the tribunal for adjudication; and that obviously could not be the intention of the Legislature. It is significant that Ss. 23 and 24 prohibit the commencement of strikes and lock-outs during the pendency of proceedings therein specified, and so even in the case of a reference made under S. 12(5) it would not be open to the employer to declare a lock-out or for the workmen to go on strike after such a reference is made; but if a strike has commenced or a lock-out has been declared before such a reference is made, there would be no power in the appropriate Government to prohibit the continuance of such a strike or such a lock-out. Section 24 (2) makes it clear that the continuance of a lock-out or strike is deemed to be illegal only if an order prohibiting it is passed under S. 10(3). Thus the power to maintain industrial peace during adjudication proceedings which is so essential and which in fact can be said to be the basis of adjudication proceedings is exercisable only if a reference is made under S. 10(1). What is true about this power is equally true about the power conferred on the appropriate Government by S. 10(4), (5), (6) and (7). In other words, the material provisions contained in sub-ss. (3) to

(7) of S. 10(1) which are an integral part of the scheme of reference prescribed by Chapter III of the Act clearly indicate that even if the appropriate Government may be acting under S. 12(5) the reference must ultimately be made under S. 10(1). Incidentally it is not without significance that even in the petition made by the respondents in the present proceedings they have asked for a writ of mandamus calling upon the appellant to make a reference under Ss. 10(1) and 12(5).

10. Besides, even as a matter of construction, when S. 12(5) provides that the appropriate Government may make such reference it does not mean that this provision is intended to confer a power to make reference as such. That power has already been conferred by S. 10(1); indeed S. 12(5) occurs in a Chapter dealing with the procedure, powers and duties of the authorities under the Act; and it would be legitimate to hold that S. 12(5) which undoubtedly confers power on the appropriate Government to act in the manner specified by it, the power to make reference which it will exercise if it comes to the conclusion that a case for reference has been made must be found in S. 10(1). In other words, when S. 12(5) says that the Government may make such reference it really means it may make such reference under S. 10(1). Therefore it would not be reasonable to hold that S. 12(5) by itself and independently of S. 10(1) confers power on the appropriate Government to make a reference.

11. The next point to consider is whether, while the appropriate Government acts under S. 12(5), it is bound to base its decision only and solely on a consideration of the report made by the conciliation officer under S. 12(4). The tenor of the High Court's judgment may seem to suggest that the only material on which the conclusion of the appropriate Government under S. 12(5) should be based is the said report. There is no doubt that having regard to the background furnished by the earlier provisions of S. 12 the appropriate Government would naturally consider the report very carefully and treat it as furnishing the relevant material which would enable it to decide whether a case for reference has been made or not; but the words of S. 12(5) do not suggest that the report is the only material on which Government must base its conclusion. It would be open to the Government to consider other relevant facts which may come to its knowledge or which may be brought to its notice, and it is in the light of all these relevant facts that it has to come to its decision whether a reference should be made or not. The problem which the Government has to consider while acting under S. 12(5) (a) is whether there is a case for reference. This expression means that Government must first consider whether a *prima facie* case for reference has been made on the merits. If the Government comes to the conclusion that a *prima facie* case for reference has been made then it would be open to the Government also to consider whether there are any other relevant or material facts which would justify its refusal to make a reference. The question as to whether a case for reference has been made out can be answered in the light of all the relevant circumstances which would have a bearing on the merits of a case as well as on the incidental question as to whether a reference should

nevertheless be made or not. A discretion to consider all relevant facts which is conferred on the Government by S. 10(1) could be exercised by the Government even in dealing with cases under S. 12(5) provided of course the said discretion is exercised bona fide, its final decision is based on a consideration of relevant facts and circumstances, and the second part of S. 12(5) is complied with.

12. We have already noticed that S. 12 deals with the conciliation proceedings in regard to all industrial disputes, whether they relate to a public utility service or not. Section 12(1) imposes an obligation on the conciliation officer to hold conciliation proceedings in regard to an industrial dispute in respect of public utility service provided a notice under S. 22 has been given. If in such a dispute the efforts at conciliation fail and a failure report is submitted under S. 12(4) Government may have to act under S. 12(5) and decide whether there is a case for reference. Now, in dealing with such a question relating to a public utility service considerations prescribed by the second proviso to S. 10(1) may be relevant, and Government may be justified in refusing to make a reference if it is satisfied that the notice given is frivolous or vexatious or that reference would be inexpedient. Just as discretion conferred on the Government under S. 10(1) can be exercised by it in dealing with industrial disputes in regard to non-public utility services even when Government is acting under S. 12(5), so too the provisions of the second proviso can be pressed into service by the Government when it deals with an industrial dispute in regard to a public utility service under S. 12(5).

16. The controversy between the parties as to the construction of S. 12(5) is, however, only of academic importance. On the respondents' argument, even if it is obligatory on Government to make a reference provided it is satisfied that there is a case for reference, in deciding whether or not a case for reference is made Government would be entitled to consider all relevant facts, and if on a consideration of all the relevant facts it is not satisfied that there is a case for reference it may well refuse to make a reference and record and communicate its reasons therefore. According to the appellant and the company also though the discretion is with Government its refusal to make a reference can be justified only if it records and communicates its reasons therefore and it appears that the said reasons are not wholly extraneous or irrelevant. In other words, though there may be a difference of emphasis in the two methods of approach adopted by the parties in interpreting S. 12(5) ultimately both of them are agreed that 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 may be open to challenge in a court of law. It would thus appear that even the appellant and the company do not dispute that if a consideration of all the relevant and germane factors leads the Government to the conclusion that there is a case for reference the Government must refer though they emphasise that the scope and extent of relevant consideration is very wide; in substance the plea of the respondents that "may" must mean "shall" in S. 12(5) leads to the same result. Therefore both the methods of approach ultimately lead to the same crucial enquiry: are the reasons recorded and communicated by the Government

under S. 12(5) germane and relevant or not?

17. It is common ground that a writ for mandamus would lie against the Government if the order passed by it under Sec. 10(1) is for instance contrary to the provisions of Section 10(1) (a) to (d) in the matter of selecting the appropriate authority; it is also common ground that in refusing to make a reference u/s 12(5) if Government does not record and communicate to the parties concerned its reasons therefore a writ of mandamus would lie. Similarly it is not disputed that if a party can show that refusal to refer a dispute is not bona fide or is based on a consideration of wholly irrelevant facts and circumstances a writ of mandamus would lie. The order passed by the Government under S. 12(5) may be an administrative order and the reasons recorded by it may not be justiciable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny; in that sense it would be correct to say that the court hearing a petition for mandamus is not sitting in appeal over the decision of the Government; nevertheless if the court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane then the court can issue, and would be justified in issuing, a writ of mandamus even in respect of such an administrative order. After an elaborate argument on the construction of S. 12(5) was addressed to us it became clear that on this part of the case there was no serious dispute between the parties. That is why we think the controversy as to the construction of S. 12(5) is of no more than academic importance.

18. That takes us to the real point of dispute between the parties, and that is whether the reason given by the appellant in the present case for refusing to make a reference is germane or not. The High Court has held that it is wholly extraneous and it has issued a writ of mandamus against the appellant. We have already seen that the only reason given by the appellant is that the workmen resorted to go slow during the year 1952-53. It would appear prima facie from the communication addressed by the appellant to the respondents that this was the only reason which weighed with the Government in declining to refer the dispute under S. 12(5). It has been strenuously urged before us by the appellant and the company that it is competent for the Government to consider whether it would be expedient to refer a dispute of this kind for adjudication. The argument is that the object of the Act is not only to make provision for investigation and settlement of industrial disputes but also to secure industrial peace so that it may lead to more production and help national economy. Co-operation between capital and Labour as well as sympathetic understanding on the part of capital and discipline on the part of labour are essential for achieving the main object of the Act; and so it would not be right to assume that the Act requires that every dispute must necessarily be referred to industrial adjudication. It may be open to Government to take into account the facts that the respondents showed lack of discipline in adopting go-slow tactics, and since their conduct during a substantial part of the relevant year offended against the standing orders that was a fact which was relevant in considering whether the present dispute should be referred

to industrial adjudication or not. On the other hand, the High Court has held that the reason given by the Government is wholly extraneous and its refusal to refer the dispute is plainly punitive in character and as such is based on considerations which are not at all germane to S. 12(5). This Court has always expressed its disapproval of breaches of law either by the employer or by the employees, and has emphasised that while the employees may be entitled to agitate for their legitimate claims it would be wholly wrong on their part to take recourse to any action which is prohibited by the standing orders or statutes or which shows willful lack of discipline or a concerted spirit of non-co-operation with the employer. Even so the question still remains whether the bare and bald reason given in the order passed by the appellant can be sustained as being germane or relevant to the issue between the parties. Though considerations of expediency cannot be excluded when Government considers whether or not it should exercise its power to make a reference it would not be open to the Government to introduce and rely upon wholly irrelevant or extraneous considerations under the guise of expediency. It may for instance be open to the Government in considering the question of expediency to enquire whether the dispute raises a claim which is very stale, or which is opposed to the provisions of the Act, or is inconsistent with any agreement between the parties, and if the Government comes to the conclusion that the dispute suffers from infirmities of this character, it may refuse to make the reference. But even in dealing with the question as to whether it would be expedient or not to make the reference Government must not act in a punitive spirit but must consider the question fairly and reasonably and take into account only relevant, facts and circumstances. In exercising its power under S. 10(1) it would not be legitimate for the Government for instance to say that it does not like the appearance, behaviour or manner of the secretary of the union, or even that it disapproves of the political affiliation of the union, which has sponsored the dispute. Such considerations would be wholly extraneous and must be carefully excluded in exercising the wide discretion vested in the Government. In the present case it is significant that the company has voluntarily paid three months' bonus for the relevant year notwithstanding the fact that the workmen had adopted go slow tactics during the year, and the report of the conciliator would show prima facie that he thought that the respondents' claim was not at all frivolous. The reasons communicated by the Government do not show that the Government was influenced by any other consideration in refusing to make the reference. It is further difficult to appreciate how the misconduct of the respondents on which the decision of the Government is based can have any relevance at all in the claim for the classification of the specified employees which was one of the items in dispute. If the work done by these employees prima facie justified the claim and if as the conciliator's report shows the claim was in consonance with the practice prevailing in other comparable concerns the misconduct of the respondents cannot be used as a relevant circumstance in refusing to refer the dispute about classification to industrial adjudication. It was a claim which would have benefited the employees in future and the order passed by the appellant deprives

them of that benefit in future. Any consideration of discipline cannot, in our opinion, be legitimately allowed to impose such a punishment on the employees. Similarly, even in regard to the claim for bonus, if the respondents are able to show that the profits earned by the company during the relevant year compared to the profits earned during the preceding years justified their demand for additional bonus it would plainly be a punitive action to refuse to refer such a dispute solely on the ground of their misconduct. In this connection it may be relevant to remember that for the said misconduct the company did take disciplinary action as it thought fit and necessary, and yet it paid the respondents bonus to which it thought they were entitled. Besides, in considering the question as to whether a dispute in regard to bonus should be referred for adjudication or not it is necessary to bear in mind the well established principles of industrial adjudication which govern claims for bonus. A claim for bonus is based on the consideration that by their contribution to the profits of the employer the employees are entitled to claim a share in the said profits, and so any punitive action taken by the Government by refusing to refer for adjudication an industrial dispute for bonus would, in our opinion, be wholly inconsistent with the object of the Act. If the Government had given some relevant reasons which were based on, or were the consequence of, the misconduct to which reference is made it might have been another matter. Under these circumstances we are unable to hold that the High Court was in error in coming to the conclusion that the impugned decision of the Government is wholly punitive in character and must in the circumstances be treated as based on a consideration which is not germane and is extraneous. It is clear that the Act has been passed in order to make provision for the investigation and settlement of industrial disputes, and if it appear that in cases falling under S. 12(5) the investigation and settlement of any industrial dispute is prevented by the appropriate Government by refusing to make a reference on grounds which are wholly irrelevant and extraneous a case for the issue of a writ of mandamus is clearly established. In the result we confirm the order passed by the High Court though not exactly for the same reasons.

13. Their Lordships of the Hon^{ble} Supreme Court in *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, have held that Government is not precluded from considering prima facie the merits of dispute and refuse to refer dispute u/s 10 of the Industrial Disputes Act, 1947. Their Lordships have further held that court is not sitting in an appeal over the order and is not entitled to consider the propriety or the satisfactory character of the reasons given by the said Government. It would be idle to suggest that in giving reference to a party for refusing to make a reference u/s 12(5), the appropriate Government has to write an elaborate order indicating exhaustively all the reasons that weighed in its mind in refusing to make a reference. However, it is no doubt desirable that the party concerned should be told clearly and precisely the reasons why no reference is made, because the object of Section 12(5) appears to be to require the appropriate Government to state its reasons for

refusing to make a reference, so that the reasons should stand public scrutiny, but that does not mean that a party challenging the validity of the Government's decision not to make a reference can require the Court in writ proceedings to examine the propriety or correctness of the said reasons. If it appears that the reasons given show that the appropriate Government took into account a consideration which was irrelevant or foreign, that no doubt, may justify the claim for a writ of mandamus. Their Lordships have held as under:--

6. This argument must be rejected, because when the appropriate Government considers the question as to whether a reference should be made under S. 12(5), it has to act under S. 10(1) of the Act, and S. 10(1) confers discretion on the appropriate Government either to refer the dispute, or not to refer it, for industrial adjudication according as it is of the opinion that it is expedient to do so or not. In other words, in dealing with an industrial dispute in respect of which a failure report has been submitted under S. 12(4) the appropriate Government ultimately exercises its power under Sec. 10(1) subject to this that S. 12(5) imposes an obligation on it to record reasons for not making the reference when the dispute has gone through conciliation and a failure report has been made under S. 12(4). This question has been considered by this Court in the case of the State of Bombay Vs. K.P. Krishnan and Others, . The decision in that case clearly shows that when the appropriate Government considers the question as to whether any industrial dispute should be referred for adjudication or not, it may consider, prima facie the merits of the dispute and take into account other relevant considerations which would help it to decide whether making a reference would be expedient or not. It is true that if the dispute in question raises questions of law, the appropriate Government should not purport to reach a final decision on the said questions of law, because that would normally be within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal. But it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its powers to make a reference should be exercised under S. 10(1) read with S. 12(5), or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Govt. may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not. It must, therefore be held that a prima facie examination of the merits cannot be said to be foreign to the enquiry which the appropriate Govt. is entitled to make in dealing with a dispute under S. 10(1), and so, the argument that the appropriate Government exceeded its jurisdiction in expressing its prima facie view on the nature of the termination of services of appellants 2 and 3, cannot be accepted.

8. Besides, in dealing with this contention, it is necessary to remember that in entertaining an application for a writ of mandamus against an order made by the

appropriate Government under S. 10(1) read with S. 12(5), the Court is not sitting in appeal over the order and is not entitled to consider the propriety or the satisfactory character of the reasons given by the said Government. It would be idle to suggest that in giving reasons to a party for refusing to make a reference under S. 12(5), the appropriate Government has to write an elaborate order indicating exhaustively all the reasons that weighed in its mind in refusing to make a reference. It is no doubt desirable that the party concerned should be told clearly and precisely the reasons why no reference is made, because the object of S. 12(5) appears to be to require the appropriate Government to state its reasons for refusing to make a reference, so that the reasons should stand public scrutiny; but that does not mean that a party challenging the validity of the Government's decision not to make a reference can require the Court in writ proceedings to examine the propriety or correctness of the said reasons. If it appears that the reasons given show that the appropriate Government took into account a consideration which was irrelevant or foreign, that no doubt, may justify the claim for a writ of mandamus. But the argument that of the pleas raised by the appellants two have been considered and not the third, would not necessarily entitle the party to claim a writ under Art. 226.

14. Learned single Judge of Madras High Court in *Workmen in Southern Textiles Limited Sulur (by Secretary, Coimbatore Textile Workers' Union v. State of Madras (Secretary to Government, Department of Industries, Labour and Co-operation) and others*, 1965 (2) Labour Law Journal 73 has held that appropriate Government is not bound to base its decision only on the facts brought to its notice by the conciliation officer u/s 12(5) of the Act but could take into consideration other relevant information or facts brought to the notice. Learned single Judge has held as under:--

The Government was certainly entitled to take into account the fact that the concerned worker was tried and convicted in a criminal Court for the assault for which he was dismissed by the management. The Government need not confine its attention only to the failure report submitted by the conciliation officer under S. 12(5) of the Industrial Disputes Act, 1947. It could take into account all relevant circumstances and information brought to its notice, including the confidential report, submitted by the conciliation officer which would enable it to make a decision whether to make a reference or not under S. 10 of the Act. In such a case it is not necessary for the Government to indicate exhaustively all the reasons that weighed in its mind in refusing to make a reference but what is important to find out is whether the reasons actually given by the Government showed that it took into account a consideration which was irrelevant and foreign. That, no doubt, might justify a claim for a writ of mandamus.

It is also clear that, when examining the facts of the case, for the purpose whether they justify prima facie the making of a reference under S. 10 or not the Government cannot be considered as giving a final decision on disputed questions of fact. The Government would be justified in referring to the record of

the enquiry, before the domestic tribunal and also the conciliation officer's report for coming to the conclusion on prima facie grounds whether the enquiry was regularly conducted or not.

Applying the principles stated supra to the fact of the Writ Petition No. 766 of 1963 it was held that the order of the State Government declining to refer the dispute for adjudication was correct and proper, the Union was called upon by the conciliation officer to prove the collective expression of the will of the workers to take up the dispute by producing all the relevant records and registers, which it failed to do. Hence, the conciliation officer was perfectly justified in commenting upon this aspect in his report. Whether the union had the capacity to represent the case of dismissed worker was certainly a fact germane to the reference, and the Government, therefore, were justified in referring to it. On the further reason given by the Government that the enquiry was duly held and was a proper enquiry that was also within the competence of the Government to consider for prima facie purposes, under S. 12(5) of the Industrial Disputes Act.

15. Division Bench of Punjab and Haryana High Court in *Workmen of Oswal Weaving Factory Vs. State of Punjab*, has held that the State Government while exercising its powers u/s 10(1) read with Section 12(5) of the Industrial Disputes Act exercises administrative functions and not judicial or quasi judicial function. The appropriate Government has discretion to refer or not to refer any dispute to a labour court or tribunal, but such discretion has to be exercised in accordance with the provisions of the Act itself. Division Bench has further held that the State Government can decline to make a reference only on two grounds, i.e.

(a) that there is no industrial dispute which can be referred;

(b) that it is not expedient to make a reference in the circumstances of the case.

Division Bench has held as under:--

(3) If an appropriate Government declines to make a reference on any of the above-mentioned two permitted grounds, the decision of the Government would not be amenable to a writ or direction of the High Court and it would not be open to the High Court to compel the Government to make a reference. The High Court will not sit in appeal over the decision of the appropriate Government on any of the above-mentioned two matters.

(4) An appropriate Government can be compelled by a writ in the nature of mandamus to consider the matter as required by S. 12(5) of the Act and then to exercise its discretion under S. 10(1) in accordance with law, if it is either admitted or proved that conciliation proceedings had taken place and a report had been submitted by the conciliation officer under S. 12(4) but that the State Government had not seen the report or taken it into consideration at all in deciding whether to make a reference or not.

(5) A writ of mandamus would also issue if the Government declines to make a reference under S. 12(5), without recording reasons for such refusal and without

communicating the same to the parties.

(6) Appropriate writ would also issue to the State Government if it is admitted or proved that the refusal to make a reference is not bona fide or is actuated by malice or is based on consideration which are extraneous and wholly irrelevant and are not germane to the statutory consideration on which the reference can be declined.

16. Learned single Judge of Madras High Court in *Madura Sugars Staff Union v. State of Madras and another*, 1968 Lab IC 1328 has laid down the principles to be observed by Government while making reference Labour Court has under:--

The principles were classified as six in number:

(1) In making a decision about a reference under Sec. 10 the Government need not confine itself to the Conciliation Officers' report. It can go into other facts which came to its notice and which are relevant for the purpose.

(2) The Government can go into facts and find out whether a prima facie case for reference has been made out on the merits.

(3) Where there is a disputed question of fact, the Government cannot reach a final conclusion on those facts and it will be for the Labour Court to reach a conclusion.

(4) The Government should exercise its discretion bona fide in the matter of deciding whether to make a reference or not.

(5) When the Government declines to make a reference it is obliged to state its reasons; but it need not record all the reasons in the sense that the reasons should be exhaustive. The reasons which are given should be relevant and should not be extraneous to the subject-matter.

(6) If the Government makes a reference, the Court cannot in a writ petition go into the question whether it acted properly in making the reference.

17. Division Bench of Orissa High Court in *Kartikeswar Panda v. State of Orissa and another*, 1971 Labour Law Journal 71 has laid down the following principles the manner in which power of discretion has to be exercised by the Government u/s 12(5) of the Industrial Disputes Act, 1947:

The discretion of the Government u/s 10 has to be exercised by the Government bona fide and on a consideration of relevant and material facts set out in Section 10.

In taking a decision to refuse to refer the dispute the Government must consider the report of the Conciliation Officer and the reason why the conciliation failed. The order u/s 12(5) must disclose on the face of it that all the aforesaid relevant facts and circumstances have been considered and that its refusal to refer is not reached by non-consideration of all the aforesaid facts and circumstances or by considering matters wholly irrelevant and extraneous and not germane.

18. Their Lordships of the Hon^{ble} Supreme Court in *Hochtief Gammon Vs. State of Orissa and Others*, have laid down the following principles to determine the right of Government to refuse to make a reference as under:--

It is apparent the State Government had not applied its mind to facts placed before it. There was at least an arguable case on the point as to who was liable to pay bonus and in that case the company would have been a necessary and appropriate party. Even if the Government thought that the company was not a necessary party, the question as to who was liable to pay the bonus was a very relevant question and that made the company a necessary or at least a proper party. The attitude of the appellant had throughout been that their contract was a cost contract, that the company had to pay labour and while they had employed the workmen, the employer was really the company. That contention may or may not be upheld ultimately by the Tribunal. Ultimately if the Tribunal should hold that the appellant is the party responsible for payment of bonus, the question as between the company, on the one hand and the appellant on the other, may have to be decided by arbitration, as provided between them or otherwise. It appears, therefore, that not only was this an appropriate question is to be referred for adjudication, but even the company should be interested in getting itself impleaded as a party so as to put forward any contention it may have as regards the question whether bonus was payable and if so the quantum thereof, as also the question as to who would be liable to pay the bonus instead of adopting an ostrich like policy.

The power of the Courts in relating to orders of the Government the matter of making references for adjudication is no longer in dispute (vide *State of Bombay Vs. K.P. Krishnan and Others*, and the *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, .

The days when courts declined to interfere with non speaking orders are over. Even in England, the Courts have traveled very far since those days. Needless to say that Courts in India which function under a written Constitution with Fundamental Rights to citizens, have exercised for greater powers than in England. Therefore, the decisions of Courts in England as regards powers of Courts, "surveillance" as Lord Pearce calls it, or the control the judiciary has over the Executive, as Lord Upjohn puts it, indicate at least the minimum limit to which Courts in this country would be prepared to go in considering the validity of the orders of the Government and its officers.

19. Learned single Judge of Kerala High Court in *Workmen of Oswal Weaving Factory Vs. State of Punjab*, has held that even in a case where power is exercised by the Government u/s 10(1) of the Industrial Disputes Act, 1947, if the Government is of the opinion that no reference need be made, the satisfaction reached by the Government, even if it be subjective, is open to examination to the extent of scrutinizing the reasons indicated in the order u/s 12(5) to see whether they are irrelevant or extraneous.

20. Division Bench of Patna High Court in *Secretary Barauni Tel Shodhak Mazdoor Union v. State of Bihar and others*, 1977 Lab IC 483 has held that though the decision of the appropriate Government u/s 12(5) not to make a reference is only an administrative act and not a judicial or quasi judicial adjudication, nonetheless the statute itself requires that in case the Government takes a decision not to make a reference, it must record the reasons therefore. The Division Bench has also gone into the scope of writ of mandamus. Division Bench has held as under:--

6. In order to appreciate the arguments advanced by the learned counsel for the rival parties, the relevant provision has to be examined in some greater details.

The object of the Act is not only to make provision for investigation and, settlement of industrial disputes, but, also to secure industrial peace so that it may result in more production and improve national economy. Cooperation between capital and labour is essential for maintenance of increased production and industrial peace.

Section 12(5) of the Act provides that if, on a consideration of the report of the Conciliation Officer, the appropriate Government is satisfied that there is a case for reference.... It may make such reference". The first part of sub-section (5) does not require much consideration in this case as the power to refer the dispute u/s 10 to the Tribunal rests with the appropriate Government, and for that purpose, it may give reasons or may not do so. The only order of reference is the satisfaction of the appropriate Government. It is the second part of sub-section (5) dealing with the contingency of the refusal to make a reference, with which we are concerned in this case. This provision contemplates that if the appropriate Government does not make such a reference, "it shall record and communicate to the parties concerned its reasons therefore". The consideration of the report of the Conciliation Officer, therefore, is a necessary condition for taking its final decision by the State Government, that is, either to make a reference or not to make a reference.

7. The statement in the impugned order to the effect, that the Government had considered the report of the Conciliation Officer as well as the surrounding facts and circumstances, does not per se appear to me to be the compliance of the mandatory requirement of recording the relevant reasons for refusing to make a reference of the disputes. In order to illustrate the point, I would do it better to extract only one of the reasons which have been indicated in the counter-affidavit as a ground for refusal to refer one of the items of disputes, Item No. 10 of the disputes relates to the cases of Jai Jai Ram and Bhagwan Tiwary, Assistant Purchase Assistants. They were designated as purchase assistants along with one or more persons who had been promoted as a senior purchase assistant, and the disputes so far promoting and designating them as senior purchase assistants. Paragraph 15 of the writ application deals with the case of these two persons, and this paragraph has been replied to in paragraph 13 of the counter-affidavit, where it has been stated:

The question of designating these workmen as senior purchase assistants does not arise as the post of senior purchase assistant is in higher scale and can be filled up by promotion of Assistant Purchase Assistant on the basis of merit and seniority as per promotion policy of the management. Therefore, this case was not referred to for adjudication.

I have quoted from the counter-affidavit only one instance to bring home the point as to what actually the reason was or could be for taking the decision by the Government. Specific reasons have been given with respect to each of the fourteen items of disputes in the counter-affidavit. Before, however, recording a concluded opinion, I deem it necessary to consider the scheme of the relevant provision of the Act and the authorities cited at the bar. The report of the Conciliation Officer which is required to be filed under sub-section (4) of Section 12, after the close of the investigation is to be sent by him only to the appropriate Government "setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof.... And the reasons on account of which, in his opinion, a settlement could not be arrived at." The scope of the enquiry and investigation of the Conciliation Officer under the very scheme of the Act is entirely different and the appropriate Government has to take the own decision either for making a reference or not to make reference. In the latter case, however, it must record reasons for taking that view and communicate it to the parties concerned. Whereas it is true that the decision of the appropriate Government u/s 12(5) not to make a reference as well settled by a series of decisions, is only an administrative act, and not a judicial or quasi-judicial adjudication, the power resting with the appropriate Government. Nonetheless, the statute itself requires that in case the Government takes a decision not to make a reference, it must record the reasons therefore.

8. As observed by the Supreme Court in the case of *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, the appropriate Government need not give "an elaborate order that weighed in its mind in refusing to make a reference", it is desirable that the party concerned should be "told clearly and precisely the reasons why no reference is made.... So that the reasons should stand public scrutiny". This provision has apparently been made in order to prove an objective test which may be subjected to judicial scrutiny. It is, however, again well settled that once the reasons are stated, it is not open for the court in a writ proceeding to examine the propriety or the correctness of the said reasons, but at the same time the order is liable to a judicial scrutiny by a writ court to examine as to whether the reasons for refusing to make a reference are irrelevant or foreign. In other words, if the court is satisfied that the reasons given by the appropriate Government for refusing to make a reference are extraneous and not germane to the disputes under consideration, then the court can issue and would be justified in issuing a writ of mandamus. This proposition has been very clearly laid down by the Supreme Court in *State of Bombay Vs. K.P. Krishnan and Others*, as well as in the case of *Bombay Union of Journalists*

(supra).

21. Division Bench of Gujarat High Court in *Woollen Mill Kamdar Sangh, Jamnagar Vs. State of Gujarat and Another*, has held that when the State Government in exercising its discretion u/s 10 acts in a cavalier fashion, the High Court can interfere under Article 226 of the Constitution of India. Division Bench has held as under:--

The State Government has passed its order under a complete misconception of its jurisdiction in labour matters and has not borne in mind the most relevant facts in this case, especially of the statutory change in law which had been made after the enactment of Section 11A, because in case of such industrial dispute relating to discharge or dismissal of a single workman even if the reference was made and the Tribunal was satisfied that the order of discharge or dismissal was not justified, it can set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thought fit, or give such relief to the workman including the lesser punishment instead of discharge or dismissal as the circumstances of the case might require.

If the State Government seeks to exercise its power in a cavalier manner without applying its mind to the relevant aspects and the relevant statutory guidelines which are evolved for exercising this discretion, the High Court can surely review the discretion in such cases as it is in complete contravention of the statute.

22. Division Bench of Kerala High Court in *Workmen of J. and P. Coats (India) Pvt. Ltd. Vs. State of Kerala and Others*, has held that it is obligatory on the part of the Government to set out in the communication issued to the parties clearly and precisely, the grounds on which the request for reference was being declined. Division Bench has held as under:--

4. u/s 12(5) of the Act, whenever the appropriate Government takes a decision not to refer a dispute for adjudication there is a mandatory duty cast on it to record its reasons in support of the said conclusion and to communicate such reasons to the parties concerned. It is, therefore, obligatory on the part of the Government to set out in the communication issued to the parties, clearly and precisely, the grounds on which the request for reference was being declined. The Government cannot, therefore, be heard to say that in addition to the reasons mentioned by them in the order certain other relevant facts or grounds not disclosed in the order had also weighed with them in reaching the conclusion that no reference need be made. We are in respectful agreement with the view taken by Poti, J. that where the termination of the service of a workman is liable to be challenged not merely on the ground that the action was taken by the management mala fide but also on various other grounds, such as irregularities in the conduct of the domestic enquiry, victimisation or unfair labour practice, etc., it will be wholly illegal on the part of the Government to refuse to refer the dispute to arbitration on the sole ground that the action of the management is not mala fide. As pointed out by Gajendragadkar, J., in *State of Bombay Vs. K.P.*

Krishnan and Others, ; the question as to whether a case for reference has been made out has to be considered by the Government in the light of all the relevant circumstances which would have a bearing on the merits of the case as well as on the incidental question as to whether a reference should nevertheless be made or not. It will be wholly wrong on the part of the Government to confine the scope of its examination of the matter only to the question whether or not the action taken by the management was mala fide and to shut out from consideration all other relevant aspects. Such a disposal of the matter will not be a proper exercise of the function vested in the Government u/s 12(5) of the Act, Judged in the light of the above principle, it must be held that the State Government acted illegally in refusing to make a reference of the dispute on the sole ground mentioned in Exh. P. 1, namely, that the Government did not find anything prima facie mala fide on the part of the management in having dismissed the two workmen. In the counter-affidavit filed on behalf of the State Government certain aspects not referred to in the order Ext. P. 1 have been attempted to be relied on in justification of the Government's decision that there was no case for making a reference of the dispute. As already pointed out earlier in this judgment, it is incumbent on the Government to pass a speaking order communicating to the concerned parties the reasons that weighed with the Government in arriving at the decision not to refer the case.

23. Learned single Judge of Karnataka High Court in V. Shivashankar v. State of Karnataka and others, 1981 Lab IC 648 has held that it is clear from Sections 10(1) and 12(5) that making a reference vests in the discretion of appropriate Government. However, if it does not make a reference, it is mandatory for it to record and communicate to parties concerned its reasons therefore clearly and specifically. Learned single Judge has held as under:--

7. Thus, reading Section 10(1) and Section 12(5) of the Industrial Disputes Act, 1947, it becomes clear that making a reference vests in the discretion of the appropriate Government. But, when the appropriate Government does not make such a reference, it shall record and communicate to the parties concerned its reasons therefore.

26. The decision of the Kerala High Court in the case of Workmen of J. and P. Coats (India) Pvt. Ltd. Vs. State of Kerala and Others, referred to supra, also makes this position clear. It is stated therein that it is obligatory on the part of the Government to set out in its communication clearly and precisely the grounds on which the request for reference was being declined. The Government cannot, therefore, be heard to say that in addition to the reasons mentioned in the order certain other relevant facts or grounds, not disclosed in the order, had also weighed with them in reaching the conclusion that no reference need be made. Hence, I am constrained to hold that it is unwarranted for the Government to say that in addition to the reasons mentioned in the order, certain other relevant facts and grounds, not disclosed in the order, had also weighed with them in reaching the conclusion that no reference need be made.

24. Their Lordships of the Hon^{ble} Supreme Court in *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, have held that when a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi-judicial Tribunal by an administrative authority namely the appropriate Government. There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Their Lordships have held as under

5. We have considered the rival contentions raised before us. The High Court apparently has relied upon the following passage in *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, :

... But it would not be possible to accept the plea that the appropriate Government is precluded from considering even *prima facie* the merits of the dispute when it decides the question is to whether its power to make a reference should be exercised u/s 10(1) read with Section 12(5) or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not.

We find that the approach made by the High Court was wrong and the reliance on the above passage on the facts of this case, is misplaced and unsupportable. This Court had made it clear in the same Judgment in the sentence preceding the passage quoted above that it was the province of the Industrial Tribunal to decide the disputed questions of fact.

...Similarly, on disputed questions of fact, the appropriate Government, cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal....

Therefore, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. S. 10 permits appropriate Government to determine whether dispute "exists or is apprehended" and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2), adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi judicial Tribunal by an administrative authority namely the Appropriate Government. In our opinion, the reasons given by the State Government to decline reference are beyond the powers of the Government under the relevant Sections of the Industrial Disputes Act. What the State Government has done in this case is not a *prima facie* examination of the merits of the question involved.

To say that granting of dearness allowance equal to that of the employees of the Central Government would cost additional financial burden on the Government is to make a unilateral decision without necessary evidence and without giving an opportunity to the workmen to rebut this conclusion. This virtually amounts to a final adjudication of the demand itself. The demand can never be characterised as either perverse or frivolous. The conclusion so arrived at robs the employees of an opportunity to place evidence before the Tribunal and to substantiate the reasonableness of the demand.

7. There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S. 10 and S. 12(5) of the Industrial Disputes Act nugatory.

25. Their Lordships of the Hon'ble Supreme Court in *Workmen of Syndicate Bank, Madras Vs. Government of India and Another*, have laid down the principles to determine the duty of the Government and factor to be considered before passing order u/s 10 of the Industrial Disputes Act, 1947. Their Lordships have also held that it would not be right for the Government of India to refuse to make the reference on the ground that the charges of misconduct against the worker were proved during a duly constituted departmental enquiry and penalty was imposed on the worker after following the required procedure.

26. Their Lordships of the Hon'ble Supreme Court in *Ram Avtar Sharma and Others Vs. State of Haryana and Another*, has considered the nature of power exercised by appropriate Government while deciding to make or not to make reference of an industrial dispute and circumstances under which writ court can interfere with the decision of the appropriate Government. Their Lordships have held as under:--

4. The view that while exercising power under Sec. 10(1), the Government performs administrative function can be supported by an alternative line of reasoning. Assuming that making or refusing to make a reference under Sec. 10(1) is a quasi judicial function, there is bound to be a conflict of jurisdiction if the reference is ultimately made. A quasi-judicial function is to some extent an adjudicatory function in a list between two contending parties. The Government as an umpire, assuming that it is performing a quasi-judicial function when it proceeds to make a reference, would imply that the quasi-judicial determination of *lis prima facie* show that one who raised the dispute has established merits of the dispute. The inference necessarily follows from the assumption that the function performed under Sec. 10(1) is a quasi judicial function. Now by exercising power under Sec. 10, a reference is made to a Tribunal for adjudication and the Tribunal comes to the conclusion that there was no merit in

the dispute.

5. Prima facie a conflict of jurisdiction may emerge. Therefore the view that while exercising power under Sec. 10(1) the function performed by the appropriate Government is an administrative function and not a judicial or quasi judicial function is beyond the pale of controversy.

6. Now if the Government performs an administrative Act while either making or refusing to make a reference under Sec. 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of its. That would certainly be in excess of the power conferred by Sec. 10. Section 10 requires the appropriate Government to be satisfied that an industrial dispute exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justices or industrial peace and harmony. Every administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on the irrelevant, extraneous or grounds not germane to the exercise of power it is liable to be questioned in exercise of the power of judicial review. In *State of Bombay v. K.P. Krishnan and Ors.* (1) it was held that a writ of mandamus would lie against the Government if the order passed by it under Sec. 10(1) is based or induced by reasons as given by the Government are extraneous, irrelevant and not germane to the determination. In Such a situation the Court would be justified in issuing a writ of mandamus even in respect of an administrative order. May be, the Court may not issue writ of mandamus, directing the Government to make a reference but the Court can after examining the reasons given by the appropriate Government for refusing to make a reference come to a conclusion that they are irrelevant, extraneous or not germane to me determination and then can direct the Government to reconsider the matter. This legal position appears to be beyond the pale of controversy.

27. Their Lordships of the Hon''ble Supreme Court in *V. Veerarajan and others Vs. Government of Tamil Nadu and others*, have held that the appropriate Government cannot decline a reference on irrelevant and extraneous grounds and cannot decide disputed questions of law and fact. Their Lordships have held as under:

5. The seven grounds given in support of the order refusing to make a reference have been challenged by Mr. Ramamurthi as irrelevant. The facts that the Company manufactures and supplies certain items to the Defence Department of the Union of India and there was industrial unrest followed by violence and stoppage of work, according to learned counsel, are not germane and relevant for the purpose of deciding as to whether the dispute raised by the six workmen should be referred to industrial adjudication. So far as the third ground is concerned, according to Mr. Ramamurthi, it is in effect repetition of the earlier grounds which this Court found to be irrelevant. The language has been changed and the grounds have been made descriptive and detailed. Coming to the 4th

ground it is contended that all the 154 delinquent workmen had accepted their guilt when negotiation for a settlement was undertaken. There was no justification for the employer to discriminate between 134 workmen who were restored to service and the remaining 20 including the six appellants to whom reemployment was not given. Mr. Ramamurthi states that ground No. 5 is totally irrelevant. Similarly, ground Nos. 6 and 7 are not at all material and do not justify the refusal to refer the dispute. In support of the appeal the learned counsel has further contended that in a series of decisions beginning with the case of *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, this Court has clearly laid down that it is open to the State Government to take the broad features into consideration while exercising jurisdiction under S. 10(1) of the Act. If the dispute in question raises a question of law the appropriate Government should not purport to reach a final conclusion on the said question of law because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions for that again would be the province of the Industrial Tribunal. Gajendragadkar, J. as he then was speaking in that case indicated:

...it would not be possible to accept the plea that the appropriate Government is precluded from considering even *prima facie* the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised u/s 10(1) read with the Section 12(5), or not. If the claim made is patently frivolous or "is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not. It must, therefore, be held that a *prima facie* examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute u/s 10(1)....

Mr. Ramamurthi also placed reliance on the decision in the case of *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, where it has been said

There, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. Section 10 permits appropriate Government to determine whether dispute "exists or is apprehended" and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2) adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi judicial Tribunal by an administrative authority namely the appropriate Government. What the State Government has done in this case is not a *prima facie* examination of the merits of the question involved.

There may be exceptional cases in which the State Government may, on a proper

examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render Section 10 and Section 12(5) of the Industrial Disputes Act nugatory".

10. The criticism advanced by Mr. Ramamurthi in regard to the reasons given by the State Government seem to be well founded and we are of the opinion that the respondent-State Government should have a direction to refer the dispute for adjudication by the Labour Court. The State Government's order should be made within one month from to day and the Labour Court to which the dispute may be referred shall have a direction to dispose of the reference within four months thence from the date of receipt of the reference. The appellants shall be entitled to costs. Hearing fee is assessed at Rs. 3,000/- and is recoverable from the Respondent No. 1.

28. Division Bench of Madras High Court in *Shaw Wallace and Co. Ltd. Vs. State of Tamil Nadu and Others*, has held that normal rule is that Government should refer the claim and the following exceptions have been indicated to refuse the claim by the Government:

- (a) the claim is very stale;
- (b) the claim is opposed to the providers of the Act;
- (c) the claim is inconsistent with any agreement between the parties;
- (d) the claim is patently frivolous;
- (e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse;
- (f) the person concerned is not a workman as defined by the Act.

29. Division Bench of Delhi High Court in *Wings Wear Corporation Vs. Workmen of Wings Wear Corporation*, has held that the appropriate Government is not empowered to decide the merits of the industrial dispute under the garb of giving reasons for refusal to make a reference. Division Bench has held as under:

36 Therefore, we Find that the reasons given by the appropriate Government purport to decide the industrial dispute itself which the Government has no power to do. Further, we find that insertion of Section 11A has not altered the scope of the power of the appropriate Government u/s 10 read with Section 12(5) of the Act.

37. Accordingly, we modify the judgment of the learned single judge with respect to the power of the appropriate Government to decide the merits of the industrial dispute under the garb of giving reasons for refusal to make a reference. On the

other points, we uphold the judgment of the learned single judge.

30. Division Bench of Gujarat High Court in N.D.D.B. Employees Union Vs. State of Gujarat and Others, has held that u/s 10(1), the Government or the concerned authority can prima facie decide from the evidence whether the person raising the industrial dispute is a "workman" within the definition of Section 2 (s) of the Industrial Disputes Act. Consideration of prima facie evidence would not empower the Government to adjudicate the dispute either on law or facts and decide it finally, but from the record, if it is apparent without any detailed investigation that the person raising the industrial dispute is not a "workman" as defined in Section 2 (s), then the Government is not entitled to make a reference by assigning reasons for doing so as provided u/s 12(5) of the Act. It was not a fit case for the Government to straightway refer the matter for adjudication. Division Bench has held as under:

11. He further submitted that adequacy or sufficiency of the material, while refusing to make reference, is not justifiable and it is for the Government to decide whether there is sufficient material for refusal of the reference. For this purpose, he relied upon paragraph 6 of the decision of the Supreme Court in the case of Avon Services Production Agencies (P) Ltd. Vs. Industrial Tribunal, Haryana and Others, , which is as under:

6. Section 10(1) of the Act confers powers on the appropriate Government to refer at any times any industrial dispute which exists or is apprehended to the authorities mentioned in the Section for adjudication. The opinion which the appropriate Government is required to form before referring the dispute to the appropriate authority is about the existence of a dispute or even if the dispute has not arisen, it is apprehended as imminent and requires resolution in the interest of industrial peace and harmony. Section 10(1) confers a discretionary power and this discretionary power can be exercised on being satisfied that an industrial dispute exists or is apprehended. There must be some material before the Government on the basis of which it forms an opinion that an industrial dispute exists or is apprehended. The power conferred on the appropriate Government is an administrative power and the action of the Government in making the reference is an administrative act. The formation of an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. Thus, the jurisdictional facts on which the appropriate Government may act are the formation of an opinion that an industrial dispute exists or is apprehended which undoubtedly is a subjective one, the next step of making reference is an administrative act. The adequacy or sufficiency of the material on which the opinion was formed is beyond the pale of judicial scrutiny. If the action of the Government in making the reference is impugned by party it would be open to such a party to show that what was referred was not an industrial dispute and that the Tribunal had no jurisdiction to make the award but if the dispute was an industrial dispute, its factual existence and the expediency of

making a reference in the circumstances of a particular case are matters entirely for Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no martial before the Government on which it could have come to an affirmative conclusion on those matters see *State of Madras Vs. C.P. Sarathy and Another*, .

From the aforesaid decision, it can be said that the power conferred on the appropriate Government is an administrative power and the action of the Government in making the reference an administrative act. The adequacy or sufficiency of the material on which the opinion not to refer the dispute is formed is beyond the pale of judicial scrutiny. If the matter does not pertain to industrial dispute, there is no question of making reference.

15. In our view, these questions are not required to be dealt with at this stage because the Deputy Labour Commissioner has not assigned any specific reasons for arriving at the conclusion as provided u/s 12(5) of the Industrial Disputes Act that the persons are not the workmen of the respondent No. 3. Therefore, in any set of circumstances, considering the controversy between the parties, in our view, this would not be a fit case for this Court to straightway refer the matter to the Industrial Tribunal as it is sought to be contended by the petitioner. Hence the order passed by the Deputy Labour Commissioner, Annexure "D" is required to be quashed and set aside. The State Government is required to pass appropriate order in conformity with the provisions of Section 12(5) and Section 10(1) of the Industrial Disputes Act. While deciding the question, the jurisdiction of the State Government, as stated above, would be only limited to find out prima facie from the evidence on the record whether the persons mentioned in Annexure "A" are workmen as defined u/s 2(s) of the Industrial Disputes Act. It would also be open to decide prima facie whether the relationship of employer and employees exists between the respondent No. 3 and the employees without finally adjudicating the dispute either on facts or law. It may consider prima facie the merits of the dispute and take into account other relevant considerations, which would help it to decide whether making a reference would be expedient or not.

31. Division Bench of Madras High Court in *Workmen of Sundaram Industries Ltd. Vs. Sundaram Industries Ltd. and Another*, has held that appropriate Government has power to decline to refer dispute for adjudication and the disclosure of reasons cannot be characterized as adjudication. Division Bench has held as under:

14. We are also unable to accept the contentions of Mr. Prakash stating that the Government cannot decline to refer the dispute for adjudication by giving reasons which determine the lis between the parties and that the power u/s 10(1) is an administrative power and the Government cannot adjudicate the dispute. We are unable to accept this contention. While coming to the conclusion for not referring the dispute for adjudication, the Government has to necessarily

refer the reasons thereof. Merely disclosing the reasons for declining reference which is incumbent on the Government cannot be equated with and Compared with adjudication. Section 10 read with Section 12(5) of the Act confers very wide discretion on the appropriate Government either to refer or refuse to refer an industrial dispute. In this case the Government have bonafidely exercised its discretion and had decided to decline reference. While passing the administrative orders u/s 12(5) of the said Act, the Government is not prevented from considering the merits of the dispute raised by the workmen prima facie. Section 12(5) of the Act does not make it obligatory on the part of the Government to make reference of all disputes raised by workmen automatically. It has got discretion to refer or not to refer the dispute. Therefore, while considering the prima facie case on merits, the Government has found that the reasons for transfer of the workmen are genuine business reasons and has thus disclosed the reasons relevant to the dispute. This would not tantamount to adjudication, as alleged by the appellant union. On proper consideration of the facts of the dispute, the Government, in our view, has exercised its power vested in them u/s 10 read with Section 12(5) of the Act. The workmen of the appellant union have not made out a case for issue of mandamus as prayed for. The writ petition is devoid of any merits and legal efficacy. None of the contentions raised by the appellant union is tenable nor the relief's sought for by them is sustainable in the eyes of law. Under these circumstances, the writ appeal fails and is dismissed. The order of the Learned Judge dated April 26, 1994 in W.P. No. 16715 of 1991 impugned in this writ appeal is confirmed. However there will be no order as to costs.

32. Their Lordships of the Hon"ble Supreme Court in Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others, have held that when Government's refusal to make reference of dispute is found to be unjustified, court can direct the Government to make a reference to appropriate Tribunal.

Their Lordships have held as under:

11. It is true that in considering the question of making a reference u/s 10(1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended", as urged by Mr. Shanti Bhusan. The formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. In the instant case, as already stated, the dispute is as to whether the convoy drivers are employees or workmen of TELCO, that is to say, whether there is relationship of employer and employees between TELCO and the convoy drivers. In considering the question whether a reference should be made or not, the Deputy Labour Commissioner and/or the Government have held that the convoy drivers are not workmen and, accordingly, no reference can be made. Thus, the dispute has been decided by the Government which is, undoubtedly not permissible.

13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power u/s 10(1) of the Act, the

function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See *Ram Avtar Sharma and Others Vs. State of Haryana and Another*, ; *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, ; *Shambu Nath Goyal Vs. Bank of Baroda*, .

14. Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in, the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function u/s 10(1) of the Act. As has been held in *M.R Irrigation Karamchari Sangh's case (supra)*, there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

33. Their Lordships of the Hon"ble Supreme Court in *Hindustan Steel Works Construction Ltd. and Another Vs. Hindustan Steel Works Construction Ltd., Employees Union*, have held that normally it is for the State Government to take a decision in the matter of reference when a dispute is raised, the direction as noted has been given in the circumstances indicated, however in some cases, the Supreme Court after noticing that refusal by the appropriate Government to refer the matter for adjudication was prima facie not proper, directed reference instead of directing reconsideration. Their Lordships have held as under:

17. Normally, it is for the State Government to take a decision in the matter of reference when a dispute is raised, the direction as noted above has been given in the circumstances indicated above.

18. In some cases, this Court after noticing that refusal by appropriate Government to refer the matter for adjudication was prima facie not proper, directed reference instead of directing reconsideration. (See *Nirmal Singh Vs. State of Punjab and Others*, , *Sankari Cement Alai Thozhilalar Munnetra Sangam v. Management of India Cement Ltd. (1983) 1 Lab LJ 460*; *V. Veerarajan and others Vs. Government of Tamil Nadu and others*, , *Sharad Kumar Vs. Govt. of NCT of Delhi and Others*, .

34. Their Lordships of the Hon"ble Supreme Court in *Rashtriya Chemical and Fertilizers Ltd. and Another Vs. General Employees Association and Others*, have held that court may interfere only when it finds that the appropriate

Government's refusal to make a reference of a dispute is unjustified. In such circumstances, the court may direct the Government to make a reference. Their Lordships have held as under:

9. The exception to the above is, when the Court finds that the appropriate Government refuses to make a reference of a dispute is unjustified. In such circumstances, the court may direct the Government to make a reference Sankari Cement Alai Thozhilalar Munnetra Sangam, Tamil Nadu Vs. Government of Tamil Nadu and Another, ; V. Veerarajan and others Vs. Government of Tamil Nadu and others, and Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others, .

35. Their Lordships of the Hon"ble Supreme Court in Sarva Shramik Sangh Vs. Indian Oil Corporation Ltd. and Others, have held that a writ of mandamus would be issued to appropriate Government to reconsider the refusal to make a reference, where:

- (i) refusal is on irrelevant, irrational or extraneous grounds;
- (ii) refusal is a result of appropriate Government examining merits of dispute and pre-judging/adjudicating/determining the dispute;
- (iii) refusal is mala fide or dishonest or actuated by malice, and
- (iv) refusal ignores material available in failure report of Conciliation Officer or is not supported by any reason.

Their Lordships have held as under:

37. Thus it can safely be concluded that a writ of mandamus would be issued to the appropriate Government to reconsider the refusal to make a reference, where (i) the refusal is on irrelevant, irrational or extraneous grounds; (ii) the refusal is a result of the appropriate Government examining the merits of the dispute and prejudging/adjudicating/determine the dispute; (iii) the refusal is mala fide or dishonest or actuated by malice; (iv) the refusal ignores the material available in the failure report of the Conciliation Officer or is not supported by any reason.

38. This case is squarely covered by the decisions in Ram Avtar Sharma and Others Vs. State of Haryana and Another, and Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others, . The State Government has examined the merits of the dispute and has refused to make the reference on the ground that the workers were not the employees of IOC, when the very dispute that required reference was whether the workers should be considered as the employees of IOC.

39. In view of the above we allow this appeal and direct the Central Government to reconsider the matter in the light of the observations above and take an appropriate decision on the request for reference of the dispute to the Industrial adjudicator.

40. As and when the State Government makes the reference, it is for the Industrial Tribunal to consider the dispute on merits, on the basis of materials placed before it, uninfluenced by the observations of the High Court or this Court.

36. Their Lordships of the Hon''ble Supreme Court in *Kuldeep Singh Vs. G.M., Instrument Design Development and Facilities Centre and Another*, have laid down the following tests for consideration for making reference:

(30) In view of the above, law can be summarized that there is no prescribed time limit for the appropriate Government to exercise its powers u/s 10 of the Act. It is more so in view of the language used, namely, if any industrial dispute exists or is apprehended, the appropriate Government "at any time" refer the dispute to a Board or Court for enquiry. The reference sought for by the workman cannot be said to be delayed or suffering from a lapse when law does not prescribe any period of limitation for raising a dispute u/s 10 of the Act. The real test for making a reference is whether at the time of the reference dispute exists or not and when it is made it is presumed that the State Government is satisfied with the ingredients of the provision, hence the Labour Court cannot go behind the reference.

31. It is not open to the Government to go into the merit of the dispute concerned and once it is found that an industrial dispute exists then it is incumbent on the part of the Government to make reference. It cannot itself decide the merit of the dispute and it is for the appropriate Court or Forum to decide the same. The satisfaction of the appropriate authority in the matter of making reference u/s 10(1) of the Act is a subjective satisfaction. Normally, the Government cannot decline to make reference for laches committed by the workman. If adequate reasons are shown, the Government is bound to refer the dispute to the appropriate Court or Forum for adjudication.

37. In the instant case, decision not to make reference has been taken after due application of mind. The Entire facts of the case having been taken into consideration. The Commissioner has not decided the case on merits, as argued. The decision is neither mala fide nor dishonest. Relevant material has been taken into consideration while declining the reference by the Commissioner.

38. The following principles can be culled out from the judgments cited hereinabove:

(i) The Government is not bound to make a reference when precisely the notice is frivolous or vexatious or that the Government considers it inexpedient to make a reference. However, the Government cannot say, "we will refuse to make a reference because we think it is inexpedient";

(ii) The power to make a reference is coupled with a duty in the sense that if on a perusal of the report of the conciliation officer the Government is satisfied that it is a case for reference, the duty imposed upon it clearly arises and the Government cannot refuse to discharge that duty;

(iii) Refusal to be given under S. 12(5) must have the reasons connected with the perusal of the report of the Conciliation Officer and with Government not being satisfied that there is a case for reference;

(iv) In case the reasons have no connection, no bearing and no relevance to this question, then they are not reasons contemplated by S. 12(5) and in such a case it would be open to the Court to ask the Government to give proper reasons;

(v) Wide discretion has to be exercised by the Government bona fide and on a consideration of relevant and material facts.

(vi) Though the appropriate Government is not required to pass very elaborate order indicating exhaustively all the reasons that weighed in its mind in refusing to make a reference, however, it is desirable that the party concerned should be told clearly and precisely the reasons why no reference is made in view of the object of Section 12(5) of the Industrial Disputes Act, 1947;

(vii) If the reasons given show that the appropriate Government took into account a consideration which was irrelevant or foreign may justify the claim for a writ of mandamus;

(viii) The appropriate Government is not bound to base its decision only on the facts brought to its notice by the conciliation officer u/s 12(5) of the Act but can take into consideration other relevant information or facts brought to the notice;

(ix) The State Government can decline to make a reference only on two grounds, i.e.

a. there is no industrial dispute which can be referred;

b. it is not expedient to make a reference in the circumstances of the case.

(x) The Government should exercise its discretion bona fide whether to make reference or not;

(xi) It must be ensured that the refusal to refer is not reached by non-consideration of all the relevant facts and circumstances or by considering matters wholly irrelevant and extraneous and not germane;

(xii) the decision of the appropriate Government not to make a reference is only an administrative act and not a judicial or quasi judicial adjudication, nonetheless the statute itself requires that in case the Government takes a decision not to make a reference, it must record the reasons and convey to the party concerned;

(xiii) If the State Government exercises its power in a cavalier manner without applying its mind to the relevant aspects and the relevant statutory guidelines which are evolved for exercising this discretion, the High Court can surely review the discretion in such cases as it is in complete contravention of the statute;

(xiv) It is obligatory on the part of the Government to set out clearly and precisely, the grounds on which the request for reference was declined;

- (xv) The claim should not be stale;
- (xvi) The reference cannot be denied on unjustified grounds;
- (xvii) In case the reference has been rejected without application of mind, the High Court can issue mandamus directing the State Government to make reference;
- (xviii) Refusal should not be mala fide or dishonest actuated by malice;
- (xix) Refusal should not be as a result of appropriate Government examining merits of dispute and prejudging/adjudicating/determining the dispute; and
- (xx) Making of reference should be a rule and denial an exception.

Accordingly, in view of discussion and analysis made hereinabove, there is no merit in the writ petitions and the same are dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.