Sonali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.30047 OF 2022

All India Service Engineers Association …Petitioner

V/s.

Union of India & Ors. …Respondents

Mr. Sanjay Singhvi, senior advocate (not present today) a/w. Ms. Rohini Thyagarajan for the petitioner.
Mr. Anil C. Singh, Additional Solicitor General a/w. Mr. Aditya Thakkar, Ms. Savita Ganoo, Mr. D.P. Singh, Mr. Pranav Thakur, Mr. Amogh Singh and Ms. Smita Thakur for respondent nos.1 and 2 – Union of India.
Mr. Kevic Setalvad, senior advocate a/w. Ms. Sneha Prabhu, Ms. Heena Shaikh, Mr. S.D. Shetty and Mr. Rakesh Singh i/by. M.V. Kini & Co. for respondent nos.3, 4 and 5.
Mr. Vijay Purohit a/w. Ms. Nikita Bangera, Mr. Faizan Mithaiwala and Mr. Samkit Jain i/by. P & A Law Offices for respondent no.6.

WITH
WRIT PETITION (L) NO.30213 OF 2022

Aviation Industry Employees Guild …Petitioner

V/s.

Union of India & Ors. …Respondents

Mr. Ashok D. Shetty a/w. Ms. Rita K. Joshi and Mr. Swapnil P. Kamble for the petitioner.
Mr. Anil C. Singh, Additional Solicitor General a/w. Mr. Aditya Thakkar, Ms. Savita Ganoo, Mr. D.P. Singh, Mr. Pranav Thakur, Mr. Amogh Singh and Ms. Smita Thakur for respondent nos.1 and 2 – Union of India.
Mr. Vijay Purohit a/w. Ms. Nikita Bangera, Mr. Faizan Mithaiwala and Mr. Samkit Jain i/by. P & A Law Offices for respondent no.3.

Mr. Kevic Setalvad, Senior Advocate a/w. Ms. Sneha Prabhu, Ms. Heena Shaikh, Mr. S.D. Shetty and Mr. Rakesh Singh i/by. M.V. Kini & Co. for respondent nos.4, 5 and 6.

WITH
WRIT PETITION (L) NO.30244 OF 2022

Air Corporation Employees Union Western Region-Mumbai …Petitioner

V/s.

Union of India & Ors. …Respondents

Mr. Mihir Desai, Senior Advocate a/w. Mr. Mihir Joshi for the petitioner.
Mr. Anil C. Singh, Additional Solicitor General a/w. Mr. Aditya Thakkar, Ms. Savita Ganoo, Mr. D.P. Singh, Mr. Pranav Thakur, Mr. Amogh Singh and Ms. Smita Thakur for respondent nos.1 and 2 – Union of India.
Mr. Vijay Purohit a/w. Ms. Nikita Bangera, Mr. Faizan Mithaiwala and Mr. Samkit Jain i/by. P & A Law Offices for respondent no.3.
Mr. Kevic Setalvad, Senior Advocate a/w. Ms. Sneha Prabhu, Ms. Heena Shaikh, Mr. S.D. Shetty and Mr. Rakesh Singh i/by. M.V. Kini & Co. for respondent nos.4, 5 and 6.

CORAM: DIPANKAR DATTA, CJ. &
MADHAV J. JAMDAR, J.

DATE: SEPTEMBER 27, 2022

ORAL JUDGMENT [Per Chief Justice**]**

1. A co-ordinate Bench of this Court (cor. Dipankar Datta, CJ. and M. S. Karnik, J.) disposed of Writ Petition (L) No.19001 of 2022, Writ Petition (L) No. 19171 of 2022 and Writ Petition (L) No.20338 of 2022 by a common judgment and order dated 25th August 2022, the operative part whereof reads as follows: -

"48. Regard being had to the ensuing Ganesh Chaturthi festival, which is so passionately celebrated by the people of this State with ritualistic devotion, requiring the members of the petitioners to vacate now would be too harsh. Therefore, we direct as follows:

a) Till 24th September, 2022 but not beyond, the members of the petitioners are permitted to occupy their respective allotted accommodation.

b) If any employee continues to occupy his allotted accommodation till that date, no coercive/adverse action as threatened by the impugned letters/notices be taken against him.

c) Upon expiry of 24th September, 2022, action in terms of the 1971 Act may be taken together with such other action as is available to the respondents in law against those employees who choose not to vacate their respective allotted accommodation.

d) Government of India may make a reference under section 10 of the ID Act by 15th September, 2022 and if reference is not considered expedient for any valid reason, the consequential order may be passed within the same date.

e) Depending on the nature of decision taken by the Government of India, the parties will be at liberty to adopt such course of action in future as permitted by law.

f) Should a reference under section 10 of the ID Act be made by the Government of India to the appropriate Tribunal for adjudication, such Tribunal will be free to decide the rival claims and grant such relief, if at all, in accordance with law.

g) If the Government of India does not make the reference on the premise that there exists no industrial dispute for reference or otherwise, it will be open to the members of the petitioners to work out their remedy in accordance with law.

49. The writ petitions stand disposed of on the aforesaid terms.

> 50. Except to the extent decided by this judgment, all other contentions are kept open.
> 51. All interim applications, including Interim Application (L) No.22361 of 2022 seeking intervention, stand disposed of."

2. In compliance with the direction contained in sub-paragraph (d) of paragraph 48 of the aforesaid order, the Government of India in the Ministry of Labour considered the question of referring the industrial dispute between the management of Air India Limited and the Joint Action Committee of Air India Unions (hereafter "the Joint Committee", for short) *"over the issue of vacation the Residential Quarters and deduction of"* Productivity Linked Incentive ("PLI") amounts. The decision of the Ministry, which was sought to be communicated *inter alia* to the President of the Joint Committee by letter dated 15th September 2022, declined reference in the following words: -

> *"I am directed to refer to the Failure of Conciliation Report No.FOC report No.B7(12)2021-S1 dated 17/08/2022 (Dispute Id No.300015623 dated 31/12/2020) from the RLC (C) Mumbai received in this Ministry on 18/08/2022 on the above mentioned subject and to say that, prima facie, this Ministry does not consider this dispute fit for adjudication for the following reasons:*
>
> *'Joint Action Committee of Air India Unions has raised a demand vide their letter dated 13.10.2021 against the management of Air India Ltd, in respect of continuation of residence of the staff, in their respective quarters, till their retirement. Since this demand is not connected to employment or non-employment or the terms of employment or with conditions of labour, this demand of extraneous nature cannot be construed as an Industrial Dispute as*

> *defined under section 2(k) of the ID Act, 1947. Therefore, this case is not deemed fit to be referred to the Tribunal for adjudication, hence, declined. Further, the principles of res-judicata are also applicable in the instant matter by virtue of Hon'ble High Court of Bombay's order dated 25.08.2022 in WP No.19001 of 2022 read along with decision in WP No.20338 of 2022, as such the matter cannot be re-agitated for adjudication'."*

3. This communication dated 15th September 2022, containing the decision of the Central Government not to refer the industrial dispute, forms the subject matter of challenge in these three writ petitions.

4. Since common questions of facts and law are involved, these three writ petitions have been heard together over the past few days. We propose to dispose of the same by this common judgment and order.

5. The facts leading to the judgment and order dated 25th August 2022 would be evident from a reading thereof. We do not wish to add to the length of this order by repeating each and every factual incident. Suffice it to note, some of the members of the petitioning Association, Union and Guild are in occupation of residential accommodation provided to them by Air India Limited and that such occupants raised an industrial dispute claiming a right to continue to remain in occupation thereof till their respective dates of retirement. Conciliation proceedings having failed, the Labour Commissioner being the Conciliation Officer forwarded the failure report to the Central Government whereupon the impugned decision was arrived at.

6. Several contentions have been advanced on behalf of the petitioning Association, Union and Guild by Shri. Sanjay Singhvi, learned senior counsel, Mr. Mihir Desai, learned senior counsel and Mr. Shetty, learned counsel, respectively. According to them, the Joint Committee had raised a dispute connected with employment/terms of employment/conditions of labour, which answers the definition of an industrial dispute in section 2 (k) of the Industrial Disputes Act, 1947 (hereafter "the ID Act", for short) and, therefore, the decision declining reference which is wholly unreasoned, is perverse. Since such decision is clearly in the teeth of the provisions contained in section 10(1) of the of the ID Act read with section 12(5) thereof, they have prayed in unison for it to be set aside. Various other contentions have been advanced and several precedents cited by Mr. Singhvi to drive home the point that the decision declining reference is unsustainable in law.

7. *Per contra*, Mr. Anil Singh, learned Additional Solicitor General appearing for the Union of India, Mr. Kevic Setalvad, learned senior counsel appearing for Air India Assets Holding Limited and Mr. Vijay Purohit, learned counsel appearing for the Air India Limited have opposed the prayers in the writ petitions by contending that the decision declining reference is perfectly justified having regard to the antecedent facts and circumstances. Reliance has been placed on multiple authoritative decisions of the Supreme Court to enlighten us on the approach to be adopted by the Court when an order declining reference is assailed under Article 226 of the Constitution of India. We need not refer in detail to any of such contentions that have been raised nor the decisions

which have been cited because, in our opinion, the controversy in issue can be resolved on first principles of law.

8. We have no hesitation to conclude that there has been clear non-compliance with statutory provisions as well as a judicial order, coupled with failure to consider such judicial order in the proper perspective and non-application of mind to the facts and circumstances, for which the writ petitions ought to succeed.

9. There are more reasons than one for our aforesaid conclusion, which we propose to assign hereafter.

10. First, is the basic ground of the decision to decline reference containing no reason(s) for the conclusion reached. It is the statutory mandate in section 12(5) of the ID Act that if a reference under section 10(1) thereof is declined, the appropriate Government shall record and communicate to the parties concerned its reasons therefor.

11. Law, over the years, has developed to such an extent that not only judicial and *quasi*-judicial orders must have the support of reasons, even administrative orders could be rendered vulnerable without the backing of reasons. The requirement to record reasons is, at times, read into a statute even when there is no such express requirement. However, we are dealing with a statute which expressly requires the appropriate Government to record reasons should it refuse a reference on any ground. That apart, the appropriate Government (in this case the Central Government) in terms of the directions contained in paragraph 48(d) of the judgment and order dated 25th August 2022 was also under an obligation to record reasons if a reference were declined.

12. Bearing all the facts and circumstances in mind, we are inclined to a view that the decision declining reference ought to have satisfied the test of "why" [i.e., 'the reasons'] for the "what" [i.e., the conclusion] to stand on. Bare perusal of the order declining reference would reveal that the Central Government referred to the terms of section 2(k) of the ID Act while holding that the demand of the Joint Committee was extraneous and, therefore, could not be construed as an industrial dispute. By what process the finding had been arrived at that the demand of the Joint Committee was extraneous, is conspicuous by its absence. We do not expect detailed reasons to be assigned but some degree of application of mind should have been apparent from the decision which, unfortunately, is absent. Mr. Singh and Mr. Setavad have attempted to supply the "why", but then the "why" should have been there in the decision itself. It cannot be provided during oral arguments. This is the first ground on which we find the decision declining reference to be patently illegal.

13. Secondly, it appears from the impugned decision that the Ministry "*prima facie*" did "*not consider this dispute fit for adjudication …*". Now, law is well settled that when the appropriate Government refers an industrial dispute for adjudication, it is wise and proper to record a *prima facie* satisfaction of both parts of section 2(k) of the ID Act being satisfied, i.e., (i) the dispute is between the parties referred to in the first part of the statutory provision; and (ii) that the dispute pertains to any of the subjects referred to in the

second part of such provision. Reference to a *prima facie* satisfaction of the appropriate Government in relation to existence of an industrial dispute or an apprehended industrial dispute is required to be made so that the Tribunal, to which the reference of an industrial dispute is ultimately made, may proceed for adjudication uninfluenced by any opinion of the appropriate Government. It would, in an appropriate case, be open to the Tribunal to disagree with the *prima facie* satisfaction recorded by the appropriate Government and to say conclusively, on consideration of all relevant and material facts, that an industrial dispute as defined in section 2(k) does not exist and, therefore, no relief can be granted.

14. However, the situation would be different when the appropriate Government declines a reference. In such a case, a decision has to be arrived at to the effect that either no industrial dispute exists or is apprehended, or that there are sufficient reasons for not making the reference to the Tribunal. However, such decision ought to bear the final conclusion arrived at by the appropriate Government and not a tentative conclusion. When a reference is declined, there is no question of the Tribunal considering the legality and validity of the relevant decision. But when the writ court is approached challenging the decision, it would be open to the court to closely scrutinize the order/decision declining the reference to ascertain whether all relevant and material facts were considered while such an order was made or the decision was taken. The very fact that the Central Government has reached only a *prima facie* satisfaction, on facts and circumstances, leaves room for doubt as to whether there are

certain other material and relevant facts which the Central Government had left out of consideration for which it restrained itself from expressing a decision, final and conclusive. We have been left guessing why "*prima facie*" was referred to in the decision.

15. Thirdly, the decision declining reference also refers to the principles of *res judicata* barring re-agitation of the same issue for adjudication. We have read the judgment and order dated 25th August 2022 in between the lines. What was barred by *res judicata* and against whom that principle would apply has clearly been delineated therein. The question of reference, which could be made under section 10(1) read with section 12(5) of the ID Act, was never a matter for consideration before the coordinate Bench when the writ petitions were instituted. In fact, once the failure report was submitted by the Conciliation Officer during the pendency of the earlier round of litigation, the need for a reference or the lack of it did arise. Over and above that, except to the extent decided by the said judgment and order dated 25th August 2022, all contentions were kept open. Thus, while the Court required the Central Government to exercise the power to make a reference to the Tribunal for adjudication, if at all, it is axiomatic that it had not expressed any opinion on the aspect of a reference that was required to be made. Mr. Singh fairly conceded that the point of *res judicata* has not been well taken but sought to rely on the doctrine of severability to sustain the first part of the impugned decision. We do not think that the doctrine would have any application here. The ultimate object would play a significant role. The Central

Government was not in favour of making a reference, as is clear from the decision. It intended to reinforce its decision by assigning the additional reason of *res judicata*. Assuming that the first part of the decision was valid and the second part invalid, it needs ascertainment whether the valid part and the invalid part are so inextricably mixed up that the same form part of a single scheme which is intended to be operative as a whole; if that is so, then the whole must go and there is no question of severability. We hold on a reading of the impugned decision that the Central Government did not intend to make the reference by its decision, which being composite in character, must go as a whole.

16. The fourth and final reason for which the decision declining reference is liable to be interdicted is that the Central Government does not appear to have considered the dispute/demand raised by the Joint Committee touching deductions of PLI amounts effected by the management. This part of the demand of the Joint Committee appears to have been completely overlooked by the Central Government. Non-application of mind is, thus, writ large.

17. For the reasons aforesaid, we are of the clear opinion that the decision declining reference is indefensible. Such decision, contained in the communication dated 15th September 2022 is quashed and set aside. The matter is remitted to the Central Government for a fresh decision to be taken in accordance with law as early as possible, preferably by 12th October, 2022.

18. On the verge of conclusion of hearing, we have been shown a document by Mr. Shetty. It appears to have been

issued by the Chief Human Resources Officer of Air India Engineering Services Limited whereby the requirement to advise the employees "*to vacate the Company Accommodation*" by 28th October 2022 has been stressed upon. The said document is taken on record and marked 'X' for identification.

19. In view of such communication, the prayer for protection from dispossession till a decision is taken in terms of this order does not survive for consideration. We would expect the respondent companies to abide by the same.

20. We make it abundantly clear that beyond 28th October 2022, action may be taken in accordance with law against those employees who fail to vacate the accommodation provided to them by Air India Ltd. in terms of the Housing Allotment Rules.

21. The writ petitions are disposed of with no order as to costs. All contentions on merits are left open.

(MADHAV J. JAMDAR, J.) **(CHIEF JUSTICE)**