

Genesis of Industrial Jurisprudence: Government's Discretion to refer Industrial Disputes for Adjudication

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I Introduction:

Industrial evolution, division of labour and developing economy have given rise to various problems in the society and industrial dispute is one of them. It is only due to maladjustment between capital and labour, between demand and supply as well as between poverty and aristocracy¹.

Exploitation is a by-product of such maladjustment. In the present world the framers of our constitution have taken due and sufficient care to protect weaker sections of society from exploitation and labour laws are one of them². In the present state of affairs and complexities, the dispute between working class and employers are not only limited to them, but affects the community at large. An industrial dispute directly or indirectly affect the whole system, society and economy. Hence, legislature and the government could not remain idle of the grave and dangerous consequences of industrial disputes, whether existing or even apprehended. Delivery of speedy justice has been the global cry of the present days³.

To overcome on these situations the Industrial Disputes Act, 1947 was enacted which embodies both substantive and procedural law, aimed at promoting industrial peace and preventing industrial strife⁴. It incorporates provisions for inter alia, "the investigation and settlement of industrial disputes"⁵. Accordingly, it seeks to bring about resolution of industrial disputes through the process of conciliation⁶,

¹ M.P. Srivastava, "Reference of Industrial Dispute for Adjudication", F.L.R., Vol.69.,Law Publishing House, Allahabad. 1994., P.13.

² Ibid. at P.14-15

³ Puneet Sharma, "Apex Court on: The impact of delay on reference under the Industrial Disputes Act 1947", Lab I.C., Vol.17.,All India Reporter Private Ltd, Nagpur., 2009, P.257.

⁴ S.S. Visweswaraiyah, "Discretionary Referrals: compulsory Adjudication and the Industrial Disputes Act, 1947",JILI, Vol.32., The Indian Law Institute, New Delhi., 1990., P.1.

⁵ See long title of Industrial Disputes Act, 1947.

⁶ See Section 4, Industrial Disputes Act, 1947.

arbitration⁷ and adjudication⁸. Also it envisages the constitution of a court of inquiry, an ad hoc body, by the appropriate government⁹ for the purpose of making “an inquiry into a matter connected with or relevant to an industrial dispute¹⁰. The idea behind this is based on the concept that contented working force can play an important role in making meaningful contribution in the progress of national economy. Whereas the frustrated lot may destroy the whole structure, in turn to secure industrial peace & justice¹¹.

The Act provides for two tier system to redress the industrial dispute i.e. conciliation and Arbitration as well as Adjudication. The first step is to negotiate the dispute through mediation, bipartite and tripartite system with or without the intervention of the government. The second step is to adjudicate the dispute through arbitration or adjudication machinery constituted under the Act in a prescribed manner¹².

In the words of Krishna Iyer J:

The soul of the statute is not the contract of employment, uniformity of service conditions or requirement rules, but conscionable negotiations, conciliation and adjudication of disputes and differences animated by industrial justice, to avoid a collision which may spell chaos and imperil the national efforts at increasing the tempo of production¹³.

Notwithstanding the fact that the Act contemplates and provides for the above methods, it appears, that none of the statutorily contemplated machineries, has come out unscathed. E.g. G. Raman Jun remarked that, the conciliation machinery has become a fifth wheel to the coach, arbitration is not available for one reason or the other and adjudication stands condemned as a time consuming futile exercise at litigation¹⁴. Compulsory process which has cut at the roots of the trade union organization¹⁵. It is also “discriminatory”,¹⁶ since the ultimate powers to make or not to make a reference to an adjudicatory body resides in the appropriate government¹⁷.

⁷ See Sections 10A (1) to (5), Industrial Disputes Act, 1947.

⁸ See Sections 7A, 7B, 7C and See also S.s. 10(1)(c), (d), (1A) of the Act.

⁹ The “appropriate government” under the Act may be either the central government or one of State governments for definition Sec .2 (a) of the Act.

¹⁰ Section 3(1), (2) of the Act.

¹¹ M.P. Srivastava, supra note 1, at P.15.

¹² O.P. Malhotra`s., *The Law of Industrial Disputes*, Vol.1, 6th ed., Butter worth`s Publications, New Delhi, 2004., P.9.

¹³ Life Insurance corporation of India v/s. D.J. Bahadur , 1980 Lab I.C. 1218(S.C.) as per Krishna Iyer J.

¹⁴ View of G. Raman Jun, quoted by S.S. Viswerwaraiah in supra note 4., P.2.

¹⁵ V.V.Giri., ‘*labour problems in Indian Industry*’, 3rd ed., Asia Publishing house, Bombay, 1972., P.90.

¹⁶ Report of National Commission on Labour 1969. P.325.

¹⁷ Section 10(1), Industrial Dispute Act, 1947.

Under the Industrial Disputes Act, Adjudication cannot be demanded by a disputant party as of right, it is purely left with the discretion of the government under section 10 of the Act. How and on what considerations, the power of the appropriate government should be exercised, the Indian judiciary has delivered a number of pronouncements to ensure a just and reasonable exercise of this power. Can courts ensure prevention of misuse of the reference power by laying down the broad rules of its exercise? The answer to this question requires an insight into the actual exercise of this power we are totally in dark about the dynamics of actual reference and the role of the conciliation officer in it. So is the position of time involved in reference, the dynamics of delay and its impact on industrial justice¹⁸.

Ramaswamy, an eminent scholar of Indian labour, rightly remarks that: The reference of disputes for adjudication is shrouded in mystery. It is a matter of conjecture whether the recommendations of the conciliator carry any weight with the government. While it is impossible to gather hard evidence on the abuse of adjudication. The fact remains that the allegations of its abuse have never been vigorously and convincingly countered¹⁹.

This paper attempts to answer the above mentioned questions. It seeks to articulate the role of Appropriate Government in Industrial disputes Adjudication and reference as envisaged under the Industrial Disputes Act, 1947, the time taken in reference, the actual exercise of the reference power and the considerations influencing it, the dynamics of the reference syndrome and the impact of all these on the industrial justice dispensation.

II. Compulsory Adjudication Vis-a-Vis Collective Bargaining – A dichotomy

In the quest for industrial peace & harmony, by obviating the struggle and strife of the working classes, to ameliorate and improve their working conditions against entrepreneurial exploitation, which may often lead to headlong clashes, hamper production and disturb the social life of the community, collective bargaining by voluntary agreement has been adopted as the standard system in the United States of America. But in India, the tradition of free collective bargaining has always been weak. Consequently, there is a more continuous and systematized surveillance over industrial disputes on the part of the Government, by resorting to compulsory adjudication. But neither system is free from its snags and snares, which arise due to the sharp clashes of interests and the stormy quality of human nature²⁰.

The advocates of collective bargaining point out that under this system –

- 1) In the process of resolving a dispute, no interference from any third party.

¹⁸ Debi Saini., “Reference power of State in Industrial Disputes Adjudication: A study reference to Industrial Dispute in Faridabad”, JILI, Vol.35, The Indian Law Institute ,New Delhi, 1993, P.233.

¹⁹ E.A. Ramaswamy., ‘Power and justice; the State in industrial relations, Oxford University Press,Dehli,1984., P.166

²⁰O.P. Malhotra., Supra note 12, P. 11.

- 2) It will lead to a healthy development of the trade union movement.
- 3) There is no substitute for collective bargaining fight-to-a-finish form of resolution is hardly feasible in India`s context.
- 4) Compulsory adjudication which is costly, dilatory and time consuming has immensely hindered the growth²¹.

According to V.V. Giri., compulsory adjudication has, “cut at the roots of the trade union organization” he wanted trade unions to “become strong and self reliant and learn to get on without the assistance of a third party imposing its will, be it a government or the courts”²².

In spite of this, it has been averred that the government, was inclined to retain the provisions relating to compulsory adjudication under the Act²³. If the disputants are not able to resolve their difference either through collective bargaining, conciliation or arbitration the appropriate government “may, at any time”, refer the unresolved dispute to adjudication²⁴. The provisions relating to compulsory adjudication found their way into the Defence of India Regulations as an emergency measure during the Second World War. When the Act was enacted, these provisions were retained. Since, the government felt, inter alia, that in a developing economy with planned targets, it was imperative that the wheels of industry should not grind to a halt because of the confrontational attitudes of either the militant trade unions or unscrupulous employers. Further, the legitimate concern of the independent state to achieve a reasonable growth rate for the economy, public convenience, its anxiety to establish just and human conditions of work, eradicate exploitation of the poor, gullible and the disadvantaged, its obligation to ensure orderly social conduct²⁵, which might be disrupted owing to violent strikes and vindictive lockouts, might be some of the factors that prompted the government to bank upon the process of compulsory adjudication.

While reviewing the exercise of discretionary powers in the process of compulsory adjudication observed that, wherever there is a “*discretion it creates room for arbitrariness*”²⁶. But, it is impossible and imprudent to advocate total elimination of discretionary powers. What should be denounced is not the conferment of discretion but ‘unnecessary discretion’. Davis advocates that,

²¹ S. S. Visweswaraiah., Supra note 4, P.1.

²² V.V. Giri., supra note 15, P.91.

²³ The industrial Disputes Act, 1947.

²⁴ Section 10, Industrial Disputes Act, 1947.

²⁵ Memoria and Memoria., *Dynamics of Industrial Relations in India*, 1st ed., Himalaya Publishing house, Mumbai., 1985, P.528-532.

²⁶ Dicey`s concept of Rule of law quoted by Kailashroy in his Book on *Administrative Law*, 4thed, Asia printers, Faridabad., 2004, P.31.

“unnecessary discretion should be eliminated and necessary discretionary powers should be confined, structured and checked”,²⁷ it is possible for the legislature to “qualify” the discretionary powers it grants to impose restraints on its exercise. But this requires a clear perspective and hard work. The degree to which it succeeds in controlling the scope of necessary discretion demonstrates the degree of legislative competence.

Ultimately, the awareness on the part of the discretionary authority as to the import of the statutory policy, purpose & objects, the public interest that is sought to be promoted by its discretionary action, the realization that the discretionary power is a “sacred trust” to be exercised with the best of intent and conscience of the authority to promote the policy and objects of the statute, that such power cannot be used for ulterior purposes and more importantly the vigilance of public interest groups and the dexterity of judicial review would, probably, go a long way in minimizing arbitrariness on the part of the depositors of discretion²⁸.

III. DISCRETION: Concept and analysis

Due to the adoption of the philosophy of welfare state, there has been tremendous increase in the state activities and has become necessary to confer discretionary powers on the administrative authorities so that they may be able to meet the emergent situations in the public interest promptly and efficiently. The discretionary power if not controlled properly may be misused and may affect the right of the people adversely.²⁹ According to Dicey, discretion was the source of inequality and discriminatory, it was therefore the negation of the rule of law³⁰.

The Supreme Court has made it clear that there has to be room for discretionary authority within the operation of the rule of law, it should be exercised under proper guidelines or norms which excludes any arbitrary exercise of discretionary authority³¹.

Under the Industrial Disputes Act, 1947 also the government under section 10 is vested with discretion to refer an Industrial dispute for adjudication. The grant of discretion by legislature is its indication of reposing faith, trust and confidence in the repository of discretion, it is armed with such, so that it can effectuate the

²⁷ Davis, *Discretionary Justice; A preliminary Inaccuracy*, 4th ed. University of Illinois Press, Washington., 1969.P.68.

²⁸ S. S. Visweswaraiyah., Supra note 4, P.11.

²⁹ Kailashroy., Supra note 26, P.31.

³⁰ Ibid.

³¹ S.C. Advocates-on-Record Assam v/s. U.O.I 1993 (4) SCC 441

legislative intent, policy and objectives³². That is why it is said that such power cannot be “prostituted for ulterior purposes”³³.

Another aspect of “discretion” is that it implies “choice”. It is submitted that even here choice of the discretionary authority is not unlimited, but guided by statutory policy and objects. The choice is among alternative courses of action as circumscribed by the statute itself. Discretionary authority should be properly regulated, the realization that the discretionary power is a “sacred trust” to be exercised with the best of intent and conscience of the authority, to promote the object of the statute, that such power cannot be used for ulterior purposes and more importantly, the vigilance of public interest groups and dexterity of judicial review would probably go a long way in minimizing arbitrariness on the part of the depositors of discretion³⁴.

➤ **Scope of Discretion of Appropriate Government under Section 10**

Originally, the government did not possess the power of referring Industrial Dispute for Adjudication³⁵. During the World War II this power was conferred on the central government. Rule 81 A of the Defence of India rules as was time measure, its object was to ensure unstinted industrial production and check unwarranted industrial unrest during war period. This measure succeeded laudably in its mission. So it was kept intact, for some more time by Emergency Power (Continuance) Ordinance, 1946. Ultimately, it was embodied in the Industrial Disputes Act, 1947 and the government has retained its power of reference permanently with it³⁶.

Under Section 10(1), Industrial Disputes Act, 1947 the government is vested with wide and sweeping discretionary power in respect of referring or refusing to refer an industrial dispute for adjudication³⁷. The important words in the provision “may” and “at any time”, before the appropriate government decides to make a reference in its discretion, it has to form an “honest” opinion as to the existence or apprehension of the industrial dispute, which is a sine qua non³⁸. Further, it is given the choice to choose between a Labour court, Industrial tribunal or National tribunal while making such reference³⁹.

³² S. S. Visweswaraiah., Supra note 4, P.8.

³³ H.W.K. Wade., *Administrative Law*, 10thed, Oxford University Press, New York, 2009, P.259.

³⁴ S. S. Visweswaraiah., Supra note 4, P.10.

³⁵ See Trade Disputes Act, 1929.

³⁶ Santosh Ram.,” A Note on Governments Discretion to outter industrial disputes for adjudication”, JILI, Vol.22, The Indian Law Institute ,New Delhi, 1980, P.569.

³⁷ State of Bombay v/s. K.P. Krishnan, 1960(II) L.L.J.592

³⁸ Barium Chemical Ltd. v/s. Company Law Board, 1967 S.C.296

³⁹ See Section 10 of the Act.

The words used in the provision prima facie gives an impression that, discretion vested in government is unfettered but there is no unfettered discretion because the courts have woven a network of restrictive principles, which requires statutory powers to be exercised reasonable and in good faith for proper purposes only and in accordance with the spirit as well as the letter of the empowering statute⁴⁰.

However, the discretion of the government under section 10(1) regarding the reference of dispute for adjudication is somewhat restricted by the second proviso to that section, in respect of disputes relating to public utility services. Thus, if a dispute concerns to a public utility service and notice Under Section 22 has been given in that connection, the appropriate government is duty bound to refer the dispute for adjudication. A dispute relating to public utility service may not be referred by the government for adjudication, if such notice is frivolous or vexatious or expediency prevents the making of such reference⁴¹. It is well established that, the discretion is neither unfettered nor arbitrary because Section 10(1) clearly provides that there must 'exist' an industrial dispute as defined by the Act or such a dispute must be 'apprehended' before the government decides to refer it for adjudication⁴².

The discretion vested in the government under section 10(1) implies that it has to reach a conclusion subjectively about whether an industrial dispute exists or is apprehended⁴³. Even after the decision of the government regarding the existence of an industrial dispute, it has to consider the expediency of a reference of the case for adjudication⁴⁴. While deciding the question, whether an industrial dispute is to be referred for adjudication the government has to examine prima facie the merits of the dispute. It may also take into account other relevant considerations to decide the expediency of making such reference⁴⁵. Further, if in exercise of this discretion the government either decides to or refuses to make it, they cannot question the propriety or satisfactory character of the reasons given for such decision⁴⁶.

Although the government enjoys a considerable amount of discretion in respect of referring industrial disputes for adjudication, it is not arbitrary or unfettered⁴⁷. If the government abuses such discretion or if the

⁴⁰ Baldev Raj v/s India, 1981 SC 70

⁴¹ Western India Match Co. v/s. Western India Match Co. Workers Union, 1970(2) L.L.J. 256 (S.C.)

⁴² Sec 10, Proviso 2 of the Act.

⁴³ K.P. Krishnan., Supra Note 37,p.594

⁴⁴ Bombay Union Journalist v/s. State of Bombay, 1964 SC 1617.

⁴⁵ Ibid.

⁴⁶ State of Madras v/s. C.P. Sarathy, 1953 SC 53.

⁴⁷ Supra note 41, 1970 SC 1205.

government does not record and communicate to the parties its reasons for not making a reference, it will be competent for the aggrieved party to approach the court for the issue of mandamus⁴⁸.

The next question to be answered is: *what would be the effect of the pendency of conciliation proceedings upon the Appropriate Governments Discretionary power under section 10(1) of the Act?* This leads us to ask: would not the exercise of discretionary powers by the appropriate government under section 10(1), in making a reference to an adjudicatory body bring about a clash with the conciliation process contemplated under the Act? Or does the Act permit the use of two different kinds of machineries namely, conciliation and adjudication, geared to employ wholly different approaches simultaneously, for bringing about the resolution of the same industrial disputes. The problem can be solved when we compare and contrast the provision under section 10(1) with that of section 12(1). Under the former, the appropriate government may in its discretion refer an industrial disputes to an adjudicatory body. Under the latter, the conciliation officer may in his discretion, commence conciliation proceedings in case a dispute exists or is apprehended. But if it relates to a public utility service and notice under section 22 has been given he “shall hold the conciliation proceedings in the prescribed manner”⁴⁹.

The decisions of the Supreme Court establish that in view of section 10(1), which enables the appropriate government to make reference to, inter alia, an adjudicatory body “at any time”, the pendency of conciliation proceedings is no bar. Thus, in *Western Indian Match Co. Ltd. v/s Western India Match company union*⁵⁰ the Supreme Court ruled that, [the appropriate government] can ‘at any time’ i.e. even when such [conciliation] proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression ‘at any time’ thus takes in such cases as where the government decides to make a reference without waiting for conciliation proceedings to begin or to be completed⁵¹.

According to the court, there is no statutory requirement that the appropriate government should wait for the failure report from the conciliation authority although, it is endeavoring to promote a fair and amicable settlement⁵². Again in *Avon services production Agencies (P) Ltd. v/s Industrial Tribunal Haryana*⁵³, the Supreme court has ruled that the conciliation process provided under the Act for promoting a settlement of

⁴⁸ R.C. Cooper v/s. U.O.I., 1970 SC 564.

⁴⁹ Section 12(c), Industrial Disputes Act, 1947.

⁵⁰ (1970)2 LL.J. 256.

⁵¹ Ibid. p.262.

⁵² Ibid. p.261.

⁵³ (1979)I, LL.J. P.1.

the dispute “cannot come in the way of appropriate government, making a reference even before such a (failure) report is received”⁵⁴.

The answer to the above question conclusively answered in the Act itself. Since, section 20(2) confirms categorically that the appropriate government’s discretion under section 10(1) stand unimpaired despite such commencement or pendency.

Section. 20(2) reads:

A conciliation proceeding shall be deemed to have concluded

a) ...;

b) ...;

c) When a reference is made to (an adjudicatory body) under section 10 during the pendency of conciliation proceedings.

The other relative question is, *whether the failure report submitted by the conciliation officer or the Board of conciliation impinges upon the discretionary powers of the appropriate government under section 10(1) or does reference to an adjudicatory body become imperative, consequent upon the submission of the failure report?*

Section 12(5) and section 13(4) of the Act declare that the appropriate government may, on receipt of such report make a reference, that is, such reference is not imperative or obligatory. Again both sub-sections, require that in case it decides not to make a reference even after the receipt of a failure report it would only, “have to record and communicate to the parties concerned its reasons therefor”. There is however, a suitable difference between section 12(5) and section 13(4). Thus, under the former, if the appropriate government after the receipt of the failure report considers it unnecessary to make a reference to a labour Court, Industrial Tribunal or National Tribunal, it is bound to record and communicate reasons to the concerned disputants whether or not the dispute relates to the public utility service. But under the latter, the appropriate government’s obligation to record and communicate reasons for not making a reference arises only “in respect of a dispute relating to a public utility services”⁵⁵ and if it fails to do so mandamus may issue⁵⁶. The reasons to be furnished under sections 12(5) and Sec. 13(4) cannot be ‘extraneous’ but should be ‘germane’⁵⁷.

⁵⁴ Ibid. p.4.

⁵⁵ S. S. Visweswaraiyah., Supra note 4, P.16.

⁵⁶ K.P.Krishnan., supra note 37, P.502.

⁵⁷ Ibid. p. 503.

Lastly, *what is the effect of the pendency proceedings under section 33(2) (b)*⁵⁸, upon the appropriate government's discretionary powers to make a reference under section 10 of the Act. On this point a decision of the Division Bench of Karnataka in, *ITC Ltd. v/s Government of Karnataka*⁵⁹ Rama Jois J. held that, any proceedings under section 33 is not final and therefore, cannot yield to a limited or semi final remedy provided under section 33(2)(b) proceedings. Therefore, notwithstanding that a proceeding under section 33 is pending, a dispute can be validly referred to adjudication under section 10(1) and the proceedings under section 33(2)(b) stand concluded immediately on a reference being made under section 10(1) of the Act⁶⁰.

In *Naval Bhai Karsanbhai Chauhan v/s. Shri Dig Vijay Woolen Mills Ltd.*⁶¹, a Division Bench of Gujarat High Court has held that, an order of reference with respect to dismissal of a workman can validly be made for adjudication during the pendency of an application for approval under section 33(2)(b) of the Act.

➤ Delay and belated reference – Power of Industrial Courts and the Judiciary

Needless to say that the powers of the Government to make a reference to the Labour courts and Industrial Tribunals are administrative in character. No time limit is prescribed and the power to make a reference can be exercised by it at any time. All that matters is that there should be an industrial dispute existing or even apprehended⁶².

It is a settled law even in cases where the government have earlier declined to make a reference for adjudication. There is no controversy that the powers of the appropriate Government to make a reference are not justiciable under Art 226 of the constitution⁶³.

However a labour court, Industrial Tribunal can strike down a reference if it is vague and ambiguous. The government becomes functus officio only when a reference has been made to a labour court or Industrial Tribunal etc. however, the situation becomes fussy when the appropriate government makes a belated and delayed reference. For a juristic view let us refer to some judgments of the courts of records. In the case, *Shalimar works Ltd. v/s. Their workmen*⁶⁴ it was held: It is true that there is no limitation prescribed for reference of disputes to an Industrial Tribunal, even so it is only reasonable that disputes should be referred

⁵⁸ The Industrial Disputes Act, 1947.

⁵⁹ (1985)2 LL.J., 430 (Kar)

⁶⁰ Ibid. p.440

⁶¹ (1988)2 LL.J. 101,108, (Guj)

⁶² M.M. Ahuja, "On delayed & belated references: powers of Industrial Courts", Lab.I.C., Vol.1, All India Reporter Private Ltd. Nagpur, 1996, P.113

⁶³ Andrew Yule Co. Ltd. v/s. Calcutta Region Clerical Staff Union 1995 1 Lab.I.C. 1216(Cal).

⁶⁴ AIR 1959 SC 1217

as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale.

In the case, *Inder Singh & Sons Ltd. v/s. Their workmen*⁶⁵, the Supreme Court has inter alia held that Stale claims should not generally be encouraged or allowed unless there is a satisfactory explanation for the delay. Apart from the obvious risk to industrial peace from the entertainment of claims after a long lapse of time, it is necessary also to take into account the unsettling effect that is likely to have on the employers financial arrangements. Whether a claim has become too stale or not will depend on the circumstances of each case.

In *Bhoop Singh v/s. Union of India*⁶⁶, it was held that, inordinate and unexplained delay or laches is by itself a ground to refuse relief to the petitioner irrespective of the merit of his claim. If a person is entitled to relief chooses to remain silent for long, he thereby gives rise to a reasonable belief in the mind of others that, he is not interested in claiming that right. Others are then justified in acting on that. This is more so in service matters where vacancies are required to be filled promptly.

From the foregoing excerpts, it stands to reason that even when no period of limitation is prescribed for making a reference, the appropriate government should discourage taking up stale and belated claims unless there are very strong and cogent reasons and satisfactory explanation for the delay. In spite of all these, to say something with certainty about the powers of the appropriate government under section 10(1) invariably refer a dispute for adjudication is like '*skating on the thin ice*'.

This all has been there inspite of the fact that our Supreme Court is strongest in the world and usually delivers the verdicts which are full of rare jurisprudential vision. It does not mean that there are no black spots and sometimes various decisions of the Supreme Court on the very same subject rather obscures a propositions conceptually, notionally and imaginatively. This is an account of the fact that the Apex court has not become an absolute viable instrument. The views of the Supreme Court are changed with the change in the composition of its various benches⁶⁷.

This is what had happened as regards the powers of the appropriate government in matters of reference of disputes. If we go by letters of the provision, it does not prescribe any period of limitation for making the reference of an industrial dispute by the appropriate government. However, it was casually held that a reference should not be made of "belated and stale claims" without prescribing any period of limitation⁶⁸. The

⁶⁵ (1961)2 FLR 583

⁶⁶ AIR 1992 SC 1414

⁶⁷ Shantimal Jain, "OF References-Hits and Misses", F.L.R., Law Publishing House, Allahabad, 2001(91), P.35.

⁶⁸ Ibid.

full bench of the Punjab and Haryana High Court in the case of *Ram Chandra Morya v/s. State of Haryana*⁶⁹, for the first time inducted a five years limitation for making a reference or refusing the same. This epoch-making judgment was mercilessly upset by the Hon`ble Supreme Court in the case of *Ajaib Singh v/s. Sarhind Co-operative marketing-cum-processing services society Ltd*⁷⁰.

The Supreme Court in this case came to the conclusion that the provisions of limitation Act do not apply to proceedings, applications or appeals before the bodies other than courts such as quasi-judicial, tribunals or executive authorities. The Hon`ble court also held that provisions of the Article 137 of the schedule of the limitations Act, 1963 are not applicable to the proceedings under the Industrial disputes Act 1947 and the relief under it cannot be denied on the ground of delay.

It is most unfortunate that in *Ajaib Singh`s* case, the other Supreme Court cases on the point namely, *Shalimar works Ltd. v/s. Its workmen*⁷¹, *Jharkhand collieries (P) Ltd v/s. Central Government Industrial Tribunal*⁷², *United collieries Ltd. v/s. Its workmen*⁷³, *Inder Singh & sons v/s their workmen*⁷⁴, *Union of Journalists v/s. State of Bombay*⁷⁵ were not referred. Some of these cases were decided by the larger benches of Hon`ble Supreme Court. The theme of the ratio decidendi of these cases is that, although, there is no limitation prescribed for making a reference of disputes under section 10(1) of the industrial disputes Act, 1947. Yet, it is only reasonable that very stale and belated claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. It was also held that if the claim made is patently frivolous or is clearly belated it should not be referred. In the case of *western India watch company V/S. Western India watch company workers union*⁷⁶ the court even went a step forward and held that while considering the expediency to refer or not to refer an industrial dispute, the government would consider the question of delay etc. properly and will not allow itself to be tempted into making references in cases of old or stale disputes or refer such disputes on the pressure of union.

We are in a precedent bound judicial system and therefore, in the instant case, the ratio decidendi is at variance with the earlier ones and there is a paradigm in approach giving an aura of judicial romanticism⁷⁷.

⁶⁹ 1999(1) SC (P&H) 141.

⁷⁰ 1999(82) FLR 137(SC)

⁷¹ AIR 1959 SC 1217

⁷² (1960)2 LLJ 71

⁷³ 1961(2) FLR 581(SC)

⁷⁴ 1961(2) FLR 583(SC)

⁷⁵ AIR 1964 SC 1617

⁷⁶ 1970(2) FLR 297(SC)

⁷⁷ Shantimal Jain., Supra note 67, P.86.

It is the felt need of our times that the judicial “views” must not be only “over views” and Hon`ble Supreme Court must come to our rescue in this regard.

The concept of making a reference or refusing to make a reference as envisaged in Section 10(1) and 12(5) of the Industrial Disputes Act, 1947 has thus become subdued by dissensions. However lately the Supreme Court in the case of *Sapan Kumar Pandit v/s. U.P .State Electricity Board and others*⁷⁸, propounded a concept which looks all logical and convincing, on the crucial question of limitation is co-extensive with the existence of dispute and the opinion as to the existence of dispute has to be formed by government and none else. The Supreme Court has opined that words “where the government is of opinion that any industrial dispute exists or is apprehended” in section 10(1), have to be read in conjunction with the word “at any time”. They are in a way, complimentary to each other. The government’s power to refer a dispute for adjudication has thus one limitation of time and i.e. it can be done only so long as the dispute exists. In other words, the period envisaged by the enduring expression “at any time” terminates with the eclipse of the industrial dispute. It, therefore, means that if the dispute existed on the day when the reference was made by the government, it is idle to ascertain the number of years which elapsed. Since, the commencement of the disputes to determine whether the delay would have extinguished the power of the government to make the reference.

The Supreme Court’s jurisprudence on the concept of limitation for making a reference has been wayward for quite some time and there have been some somersaults in judicial thinking on this point and most of the holdings are hetrodoxial on this point. The ‘existence’ and ‘apprehension’ of an industrial dispute is a condition precedent to making a reference. Still delay and latches have not been left out scot free. The Bombay High Court, even went to the extent of holding that inordinate and un explained delay could be a proper ground for refusing to make a reference. In the mist of the controversy so persisting the Supreme Court has lately come out with a clear jurisprudence on this point in *Sapan Kumar’s* case, where it ruled that “at any time” is to be read in conjunction with the “existence” or “apprehension” of the dispute and therefore if the “existence” and “apprehension” conditions of dispute are satisfied, it could be referred at any time irrespective of anything as limitation. The period of limitation of its own has now little relevance.

IV. Process of reference making by the Government under Section 10 - defective?

The answer to above question is ‘yes’ because of the following reasons:

First, inexpensive and quick resolving of industrial conflicts and thereby providing speedy justice to the working class is the reason d`etre for the creation of special procedure for the settlement of industrial disputes under the industrial disputes Act, 1947. The reference making power has been vested in the government under the Act to ensure speedy settlement of industrial disputes⁷⁹.

⁷⁸ 2001(90) FLR 754(SC)

⁷⁹ K.P. Krishnan., Supra note 37, p.503.

It is submitted that if the objective of vesting reference making discretion in the government was to ensure and facilitate speedy resolution of labour issues, parliament has committed a stupendous error as well as miscalculation in this regard. because on an average, the time spent by the labour department in making reference of an industrial dispute after receipt of the failure report of the conciliation officer is about 9 to 12 months. While in some others, the government does not make a reference at all and the aggrieved workmen are made to continue groping in the dark to hanker after the elusive social justice as envisaged for them under the Act⁸⁰.

Secondly, the power of the government of referring industrial disputes for adjudication is prone to be exercised in a discriminatory manner. It is well known that various trade unions in the country have been affiliated with different political parties. In such circumstances, it is quite natural that a trade union affiliated to the political party in power shall get favoured treatment from the government formed by such party in respect of reference of disputes of that trade union for adjudication. On the contrary, a trade union having alliance with a political party opposed to the party in power is apt to get step-motherly treatment from the government in matters of referring disputes for adjudication. Although outwardly these apprehensions appear to be hollow and banal remarks only, these are real sometimes (if not often) in the world of reality.

Thirdly, we have adopted the concepts of mixed economy and social welfare state, for the economic development of the country as well as social uplift of the people. Under such a dispensation, the state is bound to be a major employer, as most of the development and public undertakings are to be controlled and carried on by the government. As a result, the state agencies would happen to be party to most of the industrial disputes with their employees which may be adjudicated by the labour courts and industrial tribunals. In those cases atleast where an agency of the state is a party to a dispute, the government cannot be expected to conduct itself with necessary measure of impartiality and fairness while exercising its discretion whether such dispute is to be referred for adjudication or not.

Fourthly, referring of industrial disputes by the government for adjudication tends to breed corruption and favoritism, allegations of this kind may seem to be mendacious and stale on their face value. But, in the world of reality such things cannot be entirely dismissed as untrue. Particularly there is a real danger of political influence being wielded in some cases installing the reference of even a genuine dispute for adjudication or at any rate deferring its reference.

Further, our low paid administrative staff is known for its corrupt proclivity. These persons (i.e. those belonging to the lower echelon of administration) do not hesitate as regards accepting a bribe from which ever source it may happen to come to them. A shrewd and affluent employer in contrast to the economically weak employees can easily win their sympathies by offering them a paltry sum of money. They (administrative staff

⁸⁰ Santosh Ram, "A Note on Governments Discretion to Refer Industrial Disputes for Adjudication", JILI, Vo.22. The Indian Law Institute, New Delhi, 1980 .P.572.

personnel) in their term may go the whole hog in scuttling the reference of a dispute for adjudication. If their tactics work, they can easily dupe and mislead their superiors and thereby succeed in circumventing the reference of a dispute for adjudication.

Fifthly, it is true that final determination of an industrial dispute is made by the Tribunal or labour Court to which the dispute is referred for adjudication. But is it to suggest that an industrial tribunal or labour court can adjudicate upon a dispute without its being referred to it? What would be the fate of the industrial disputes which are not referred by the government for adjudication? Can a labour Tribunal adjudicate upon such disputes?

On the contrary, the final adjudication of an industrial dispute is defendant on its being referred by the government for adjudication. Consequently, referring a dispute or refusal to refer it by the government for adjudication affects as much the rights and interests of the parties to the dispute as the final determination of a dispute made by the Industrial Tribunals or labour Court. This being so, the government ought to accord hearing to the aggrieved parties before it decides to exercise or not to exercise its power under sections 10(1) and 12(5) of the Act.

Again, it would be in the interest of justice and helps in controlling the absolute discretion of the government, if the government complies with the principles of natural justice while exercising its power under section 10(1) and 12(5). It would also make the exercise of this discretion consists with principles of the rule of law, one of its main objective is to control the exercise of unregulated discretionary power⁸¹. Alternately if adjudication of disputes is to be made really expeditious under the Act discretion of the government concerning referring of industrial disputes for adjudication must be ended.

V. Conclusion and suggestions.

In the foregoing discussion, various defects causing delay in settlement of disputes, danger of discriminatory use of discretion, etc. have been listed regarding exercise of reference making power by the government under section 10 of the Act. An analysis of various aspects of exercise of this discretion by the government unmistakably leads to the conclusion that discretion is unbridled, is apt to be misused by the government so long it is in the statute book.

The most ruinous and detestable negative trait of exercise of reference making discretion by the government is that it unduly prolongs the time tag for the start of adjudicatory proceedings in an industrial dispute. It manifestly runs counter to the expeditious settlement of disputes and dispensation of justice to the working class. Time expended by an appropriate government in referring a dispute for adjudication can be

⁸¹ H.W.R. Wade., Supra note 33, P.17.

profitably utilized by labour tribunals for adjudication of such a dispute if the parties are directly permitted to take disputes to them.

During the period between, the submission of failure report by the conciliation officer and making of reference by the government for adjudication there is no prohibition on strike or lockout. While an appropriate government may creep cautiously or drag its feet on reaching subjective satisfaction to refer an industrial dispute for adjudication, aggrieved and frustrated workers may resort to strike in order to let off their pent-up anger against recalcitrance of the employer and the dilatory course adopted by the government, deliberately or otherwise in the case. The result would be chaos and disruption. The law need to be changed in this regard.

In any case, control of the government over employer-employee affairs does not get weakened if it is denuded of discretionary power of referring industrial disputes for adjudication. It can be counter balanced, if need be, by effecting an amendment in the Law. Such amendment can take shape as follows: Labour courts and Tribunals should be empowered to entertain all industrial disputes directly from the parties for adjudication, after its adjudication, award must be sent to the government for its scrutiny. Besides, the government ought to be invested with the power to rescind or modify an award if it thinks it expedient in the public interests to do so. However, the statutory time limit of one month should be laid down for the government to take this decision. Again, after failure of mutual negotiations and inability of the parties to refer disputes to an arbitrator, if conciliation proceedings have also failed to resolve the dispute, it should be obligatory on the parties to take that dispute to the Labour Court or Tribunal for adjudication and during this period no strike or lockout should be permitted.

Finally, it can be said that grant of discretion is no legislative license for indulging in discriminatory practices. The grantee should realize that discretionary power is a “scared trust” meant for effectuating the statutory policy, purpose and objects and that, the “scared trust” ought not to be exercised for ulterior purpose.

In countries such as Australia and England, which have doubtlessly devised the best adjudicatory mechanism for compulsory arbitration of industrial disputes, the government does not possess discretion to refer disputes to labour adjudicating bodies for settlement. Instead, parties approach the adjudicatory forum on their own for adjudication of industrial disputes. The proceedings of these countries as regards institution of adjudicatory proceedings before Industrial Tribunals can profitably be emulated in this country for initiating adjudicatory proceedings before the Labour Tribunals.