Supreme Court. It was held that the Law Department of Government could not be considered as an industry. Labour Court and the High Court have not indicated as to how the Law Department is an industry. They merely stated that in some cases certain departments have been held to be covered by the expression industry in some decisions. It was also pointed out that a decision is a precedent on its own facts. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.

Whether Club is an industry:

Clubs or self-service institutions or non-proprietary member's club will be industry provided they fulfill the triple test laid down in Bangalore 'Water Supply v, A. Rajappa.1 The Cricket Club of India case and Madras Gymkhana Club case (discussed below) which were the two leading cases, on- the point so far have been overruled by Bangalore Water Supply case.

In Cricket Club of India v. Bombay Labour Union the question was whether the Cricket Club of India, Bombay which was a member's club and not a proprietary club, although it was incorporated as a company under the Companies Act was an industry or not. The club had membership of about 4800 and was employing 397 employees. It was held that the club was a self service institution and not an industry and it was wrong to equate the catering facilities provided by the club to its members or their guests (members paying for that), with a hotel. The catering facility also was in the nature of self service by the club to its members. This case has now been overruled.

Madras Gymkhana Club Employees' Union v. Management; is another case on this point. This was a member's club and not a proprietary club with a membership of about 1200. Its object was to provide a venue for sports and games and facilities for recreation and entertainment. It was running a catering department which provided food and refreshment not only generally but also on special occasion. It was held that the club was a member's self-serving institution and not an industry. No doubt the material needs or wants of a section of the community were catered but that was not enough as it was not done as part of trade or business or as an undertaking analogous to trade or business. This case has also been overruled. Now it is not necessary that the activity should be a trade or business or analogous to trade or business It may,

therefore, be submitted that both Cricket Club of India and Madras Gymkhana Club would now be an industry because they fulfill the triple test laid down in Bangalore Water Supply case. Both are systematically organized with the co-operation of employer and employee for distribution of service to satisfy human wishes.

Whether Agricultural Operation is an industry:

The carrying on of agricultural operations by the company for the purposes of making profits, employing workmen who contribute to the production of the agricultural commodities bringing profits to the company was held to be an industry within the meaning of this clause. Where a Sugar Mill owned a cane farm and used its produce for its own consumption and there was evidence that the farm section of the mill was run only to feed the mill, it was held that the agricultural activity being an integral part of industrial activity, the farm section was an industry.

Whether Solicitor's Firm or Lawyer's Office are industries:

In N.N.U.C. Employees v. Industrial Tribunal31; the question was whether a solicitor's firm is an industry or not. It was held that a solicitor's firm carrying on work of an attorney is not an industry, although specifically considered it is organized as an industrial concern. There are different categories of servants employed by a firm, each category being assigned by separate duties and functions. But the service rendered by a firm, each category being assigned separate duties or functions. But the service rendered by a solicitor functioning either individually or working together with parties is service which is essentially individual; it depends upon the professional equipments, knowledge and efficiency of the solicitor concerned. Subsidiary work which is purely incidental type and which is intended to assist the solicitor in doing his job has no direct relation to the professional service ultimately rendered by the solicitor. The work of his staff has no direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client. There is, no doubt, a kind of cooperation between the solicitor and his employees, but that cooperation has no direct or immediate relation to the professional service which the solicitor renders to his client. This case has been overruled again in Bangalore Water Supply case and now a solicitor's firm employing persons to help in catering to the needs of his client is an industry.

Amended definition of 'industry' under the Industrial Disputes (Amendment) Act, 1982

2(j) "Industry" means any systematic activity carried on by co-operation between an employer and his workmen (Whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not:

i. any capital has been invested for the purpose of carrying on such activity; or
ii. such activity is carried on with a motive to make any gain or profit, and includes:

(a) any activity of the Dock Labour Board established under Section 5A of the Dock Workers (Regulations of Employment) Act, 1948, (9 of 1948);

(b) Any activity relating to the promotion of sales or business or both carried on by an establishment, but does not include:

1. Any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one. Explanation: For the purpose of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act, 1951; or
2. hospitals or dispensaries; or
3. educational, scientific, research to training institutions; or
4. institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or
5. khadi or village industries; or
6. any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research atomic energy and space; or
7. any domestic service; or

8. any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by the individuals or body of individuals in relation to such profession is less than ten; or
9. any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten.

Definition of Workman:

Under sec 2(s) of the Act "Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be expressed or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes:

a) any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or
b) any person whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person:
    i. who is subject to the Army Act, 1950, or the Air Force Act, 1950 or the Navy Act, 1957; or
    ii. who is employed in the police service or as an officer or other employee of a prison; or
    iii. who is employed mainly in a managerial or administrative capacity; or
    iv. who is employed in a supervisory capacity drawing more than Rs. 1,600 per month as wages; or
    v. who is exercising either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

Some of the expressions used in the definition of "workman" have been the subject of judicial interpretation and hence they have been discussed below: (a) Employed in "any industry" To be a workman, a person must have been employed in an activity which is an "industry" as per Section 2(j). Even those employed in

operation incidental to such industry are also covered under the definition of workman.

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In the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. L.A.T., AIR 1964 S.C. 737, the Supreme Court held that 'malis' looking after the garden attached to bungalows provided by the company to its officers and directors, are engaged in operations incidentally connected with the main industry carried on by the employer. It observed that in this connection it is hardly necessary to emphasise that in the modern world, industrial operations have become complex and complicated and for the efficient and successful functioning of any industry, several incidental operations are called in aid and it is the totality of all these operations that ultimately constitutes the industry as a whole. Wherever it is shown that the industry has employed an employee to assist one or the other operation incidental to the main industrial operation, it would be unreasonable to deny such an employee the status of a workman on the ground that his work is not directly concerned with the main work or operation of the industry.

(b) Person employed

A person cannot be a workman unless he is employed by the employer in any industry. The relationship of employer and workman is usually supported by a contract of employment which may be expressed or implied. This is also a must for regarding an apprentice as a worker (Achutan v. Babar, 1996-LLR-824 Ker.). But such a question cannot be derived merely on the basis of apprenticeship contract (R.D. Paswan v. L.C., 1999 LAB 1C Pat 1026). The employee agrees to work under the supervision and control of his employer. Here one must distinguish between contract for employment or service and contract of employment or service. In the former, the employer can require what is to be done but in the latter, he can not only order what is to be done, but also how it shall be done. In the case of contract for employment, the person will not be held as a 'workman' but only an 'independent

contractor'. There should be due control and supervision by the employer for a master and servant relationship (Dharangadhara Chemical Works Ltd. v. State of Saurashtra). Payment on piece rate by itself does not disprove the relationship of master and servant. Even a part time employee is a worker (P.N. Gulati v. Labour Commissioner). Since he is under an obligation to work for fixed hours every day, jural relationship of master and servant would exist. A casual worker is nonetheless a workman.

(c) Employed to do skilled or unskilled etc.

Only those persons who are engaged in the following types of work are covered by the definition of "workman":

(i) Skilled or unskilled manual work;
(ii) Supervisory work;
(iii) Technical work;
(iv) Clerical work.

Where a person is doing more than one work, he must be held to be employed to do the work which is the main work he is required to do (Burma Shell Oil Storage & Distributing Co. of India v. Burma Shell Management Staff Association, Manual work referred in the definition includes work which involves physical exertion as distinguished from mental or intellectual exertion. A person engaged in supervisory work will be a workman only if he is drawing more than Rs. 1,600 per month as wages. The designation of a person is not of great importance, it is the nature of his duties which is the essence of the issue. If a person is mainly doing supervisory work, but incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and conversely, if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally, will not convert his employment as a clerk into one in supervisory capacity. In other words, the dominant purpose of employment must be taken into account at first and the gloss of additional duties to be rejected, while determining status and character of the job. The work of labour officer in jute mill involving exercise of initiative, tact and independence is a supervisory work. But the work of a teller in a bank does not show any element of supervisory character.

Whether teachers are workmen or not

After amendment of Section 2(s) of the Act, the issue whether "teachers are workmen or not" was decided in many cases but all the cases were decided on the basis of definition of workman prior to amendment. The Supreme Court in Sunderambal v. Government of Goa held that the teachers employed by the educational institution cannot be considered as workmen within the meaning of Section 2(s) of the Act, as imparting of education which is the main function of the teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. The Court in this case also said that manual work comprises of work involving physical exertion as distinct from mental and intellectual exertion. The teacher necessarily performs intellectual duties and the work is mental and intellectual as distinct from manual.

A person doing technical work is also held as a workman. A work which depends upon the special training or scientific or technical knowledge of a person is a technical work. Once a person is employed for his technical qualifications, he will be held to be employed in technical work irrespective of the fact that he does not devote his entire time for technical work. Thus, the person doing technical work such as engineers, foreman, technologist, medical officer, draughtsman, etc., will fall within the definition of "workman". A medical representative whose main and substantial work is to do convassing for promotion of sales is not a workman within the meaning of this Section (1990 Lab IC 24 Bom. DB). However, a salesman, whose duties included manual as well as clerical work such as to attend to the customer, prepare cash memos, to assist manager in daily routine is a workman (Carona Sahu Co. Ltd. v. Labour Court 1993 I LLN 300). A temple priest is not a workman (1990 1 LLJ 192 Ker.).

Person employed mainly in managerial and administrative capacity:

Persons employed mainly in the managerial or administrative capacity have been excluded from the definition of "workman". Development officer in LIC is a workman (1983 4 SCC 214). In Standard Vacuum Oil Co. v. Commissioner of Labour, it was observed that if an individual has officers subordinate to him whose work he is required to oversee, if he has to take decision and also he is responsible for ensuring that the matters entrusted to his charge are efficiently conducted, and an

ascertainable area or section of work is assigned to him, an inference of a position of management would be justifiable. Occasional entrustment of supervisory, managerial or administrative work, will not take a person mainly discharging clerical duties, out of purview of Section 2(s).

Industrial Dispute:

Industrial Dispute "Industrial Dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. [Section 2(k)]

The above definition can be analyzed and discussed under the following heads:

1. There should exist a dispute or difference;
2. he dispute or difference should be between:
   (a) Employer and employer;
   (b) Employer and workmen; or
   (c) Workmen and workmen.
3. The dispute or difference should be connected with (a) the employment or non-employment, or (b) terms of employment, or (c) the conditions of labour of any person;
4. The dispute should relate to an industry as defined in Section 2(j).

1. Existence of a dispute or difference

The existence of a dispute or difference between the parties is central to the definition of industrial dispute. Ordinarily a dispute or difference exists when workmen make demand and the same is rejected by the employer. However, the demand should be such which the employer is in a position to fulfill. The dispute or difference should be fairly defined and of real substance and not a mere personal quarrel or a grumbling or an agitation. The term "industrial dispute" connotes a real and substantial difference having some element of persistency, and likely, and if not adjusted, to endanger the industrial peace of the community. An industrial dispute exists only when the same has been raised by the workmen with the employer. A mere

demand to the appropriate Government without a dispute being raised by the workmen with their employer regarding such demand, cannot become an industrial dispute.

However, in Bombay Union of Journalists v. The Hindu, the Supreme Court observed that for making reference under Section 10, it is enough if industrial dispute exists or is apprehended on the date of reference. Therefore, even when no formal demands have been made by the employer, industrial dispute exists if the demands were raised during the conciliation proceedings. When an industrial dispute is referred for adjudication the presumption is that, there is an industrial dispute.

Unless there is a demand by the workmen and that demand is not complied with by the management, there cannot be any industrial dispute within the meaning of Section 2(k). Mere participation by the employer in the conciliation proceedings will not be sufficient.

2. Parties to the dispute

Most of the industrial disputes exist between the employer and the workmen and the remaining combination of persons who can raise the dispute, has been added to widen the scope of the term “industrial dispute”. So the question is who can raise the dispute? The term “industrial dispute” conveys the meaning that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides. The disputes can be raised by workmen themselves or their union or federation on their behalf. This is based on the fact that workmen have right of collective bargaining. Thus, there should be community of interest in the dispute.

It is not mandatory that the dispute should be raised by a registered Trade Union. Once it is shown that a body of workmen either acting through their union or otherwise had sponsored a workmen’s case, it becomes an industrial dispute. The dispute can be raised by minority union also. Even a sectional union or a substantial number of members of the union can raise an industrial dispute. However, the members of a union who are not workmen of the employer against whom the dispute is sought to be raised, cannot by their support convert an individual dispute into an industrial dispute. In other words, persons who seek to support the cause must themselves be directly and substantially interested in the dispute and persons who are

not the employees of the same employer cannot be regarded as so interested. But industrial dispute can be raised in respect of non-workmen. Industrial dispute can be initiated and continued by legal heirs even after the death of a workman;

Individual dispute whether industrial dispute?

Till the provisions of Section 2-A were inserted in the Act, it has been held by the Supreme Court that an individual dispute per se is not industrial dispute. But it can develop into an industrial dispute when it is taken up by the union or substantial number of workmen. This ruling was confirmed later on in the case of Newspaper Ltd. v. Industrial Tribunal. In the case of Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate, the Supreme Court held that it is not that dispute relating to "any person" can become an industrial dispute. There should be community of interest. A dispute may initially be an individual dispute, but the workmen may make that dispute as their own, they may espouse it on the ground that they have a community of interest and are directly and substantially interested in the employment, non-employment, or conditions of work of the concerned workmen. All workmen need not to join the dispute. Any dispute which affects workmen as a class is an industrial dispute, even though, it might have been raised by a minority group. It may be that at the date of dismissal of the workman there was no union. But that does not mean that the dispute cannot become an industrial dispute because there was no such union in existence on that date. If it is insisted that the concerned workman must be a member of the union on the date of his dismissal, or there was no union in that particular industry, then the dismissal of such a workman can never be an industrial dispute although the other workmen have a community of interest in the matter of his dismissal and the cause for which on the manner in which his dismissal was brought about directly and substantially affects the other workmen.

The only condition for an individual dispute turning into an industrial dispute, as laid down in the case of Dimakuchi Tea Estate is the necessity of a community of interest and not whether the concerned workman was or was not a member of the union at the time of his dismissal. Further, the community of interest does not depend on whether the concerned workman was a member or not at the date when the cause occurred, for, without his being a member the dispute may be such that other workmen by having a common interest therein would be justified in taking up the

dispute as their own and espousing it. Whether the individual dispute has been espoused by a substantial number of workmen depends upon the facts of each case.

If after supporting the individual dispute by a trade union or substantial number of workmen, the support is withdrawn subsequently, the jurisdiction of the adjudicating authority is not affected. However, at the time of making reference for adjudication, individual dispute must have been espoused, otherwise it will not become an industrial dispute and reference of such dispute will be invalid.

DISMISSAL ETC. OF AN INDIVIDUAL WORKMAN TO BE DEEMED TO BE AN INDUSTRIAL DISPUTE

According to Section 2-A, where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between the workman and his employer connected with or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

The ambit of Section 2-A is not limited to bare discharge, dismissal, retrenchment or termination of service of an individual workman, but any dispute or difference between the workman and the employer connected with or arising out of discharge, dismissal, retrenchment or termination is to be deemed industrial dispute. It has to be considered whether the claim for gratuity is connected with or arises out of discharge, dismissal, retrenchment or termination of service. The meaning of the phrase “arising out” of is explained in Mackinnon Mackenzie & Co. Ltd. v. I.M. Isaak. A thing is said to arise out of another when there is a close nexus between the two and one thing flows out of another as a consequence. The workman had claimed gratuity and that right flowed out of the termination of the services. Whether he is entitled to gratuity is a matter for the Tribunal to decide. It cannot be accepted that the claim of gratuity does not arise out of termination.

3. **Subject matter of dispute**

The dispute should relate to employment or non-employment or terms of employment or conditions of labour of any person. The meaning of the term “employment or non-employment” was explained by Federal Court in the case of

Western India Automobile Association v. Industrial Tribunal. If an employer refuses to employ a workman dismissed by him, the dispute relates to non-employment of workman. But the union insists that a particular person should not be employed by the employer, the dispute relates to employment of workman. Thus, the "employment or non-employment" is concerned with the employer's failure or refusal to employ a workman. The expression "terms of employment" refers to all terms and conditions stated in the contract of employment. The expression terms of employment would also include those terms which are understood and applied by parties in practice or, habitually or by common consent without ever being incorporated in the Contract.

The expression "condition of labour" is much wider in its scope and usually it was reference to the amenities to be provided to the workmen and the conditions under which they will be required to work. The matters like safety, health and welfare of workers are also included within this expression. It was held that the definition of industrial dispute in Section 2(k) is wide enough to embrace within its sweep any dispute or difference between an employer and his workmen connected with the terms of their employment. A settlement between the employer and his workmen affects the terms of their employment. Therefore prima facie, the definition of Industrial dispute in Section 2(k) will embrace within its sweep any fraudulent and involuntary character of settlement. Even a demand can be made through the President of Trade Union (1988 1 LLN 202). Dispute between workmen and employer regarding confirmation of workman officiating in a higher grade is an industrial dispute.

Employer's failure to keep his verbal assurance, claim for compensation for loss of business; dispute of workmen who are not employees of the Purchaser who purchased the estate and who were not yet the workmen of the Purchaser's Estate, although directly interested in their employment, etc. were held to be not the industrial disputes. Payment of pension can be a subject matter of an industrial dispute.

4. Dispute in an "Industry"

Lastly, to be an "industrial dispute", the dispute or difference must relate to an industry. Thus, the existence of an "industry" is a condition precedent to an industrial dispute. No industrial dispute can exist without an industry. The word "industry" has been fully discussed elsewhere. However, in Pipraich Sugar Mills Ltd. v. P.S.M.

Mazdoor Union, it was held that an "industrial dispute" can arise only in an "existing industry" and not in one which is closed altogether. The mere fact that the dispute comes under the definition of Section 2(k) does not automatically mean that the right sought to be enforced is one created or recognised and enforceable only under the Act. Where the right of the employees is not one which is recognised and enforceable under the Industrial Disputes Act, the jurisdiction of the Civil Court is not ousted.

"Definition of Appropriate Government"

According to Section 2 (a) of the Act, the term 'Appropriate Government' to include both the Central and State Government and lays down their respective dominions in relation to industrial disputes. The Constitution of India also envisages jurisdiction of both the Central and State Government on all matters of labour and industrial disputes in respect of both legislative and executive powers.

The definition of Appropriate Government under Section 2(a), the Act is exhaustive. To facilitate the meaning it may be divided in following six headings.

(i) Industrial disputes concerning any industry carried on by or under authority of the Central Government, the Central Government is an Appropriate Government. For example, Defense Factories, Central Government printing press, mint houses and press for currency notes, opium factory etc.

(ii) Industrial disputes concerning any industry carried on by Railway Company, the Central Government is an Appropriate Government; and

(iii) Industrial disputes concerning any industry which is a controlled industry, the Central Government is an Appropriate Government. It has two ingredients i.e. the industry must be a controlled industry and the same must be specified that the Appropriate Government under Section 2(a) would be the Central Government.

The provision has been clarified by Hon'ble Apex Court in *Bijay Cotton Mills Ltd. v. Its workman*, and in *Management of Vishnu Sugar Mills Ltd. v. Workmen*, and held that "it is not enough that the industry is controlled industry, but it must be specified also under Section 2 (a) of the Act that the Appropriate Government for such controlled industry would be the Central Government".

(i) Industrial disputes concerning any industry which are established under the provisions of any Central legislation, the Central Government is an Appropriate Government.

(ii) Industrial disputes concerning some other industries which are specified by the Central Government not covered under above categories under its wisdom and authority which are, the Industrial Finance Corporation of India Ltd. formed and registered under the Companies Act, an Air Transport Service or a Banking or an Insurance Company, Mine, an oil field, a Cantonment Board or a major port, the Appropriate Government would be the Central Government; and

(iii) In relation to any other industrial disputes, Appropriate Government would be the State Government.

If the Government refers a dispute for adjudication is not the Appropriate Government within the meaning of this definition, the Tribunal to which the dispute is referred would not acquire jurisdiction to adjudicate upon the dispute and even if an award is rendered, it would be invalid. Therefore, the parties in certain cases exploited this legal position by challenging the awards on the ground that the Government that referred the dispute for adjudication was not the Appropriate Government.

A controversy arose on the phrase "under the authority of Central Government". In construing the phrase 'carried on by or under the authority of the Central Government,' the word authority must be construed according to its ordinary meaning and, therefore must mean a legal power given by one person to another to do an act. The words 'under the authority of' mean pursuant to the authority, such as where an agent or servant acts under such authority of his principal. These words mean much the same as 'on behalf of'. This phrase must, therefore, mean and is intended to apply to industries carried on directly under the authority of the Central Government.

The expression 'carried on by or under the authority of the Central Government' involves a direct nexus with the industry, through servants or agents of the Central Government. In *Bharat Glass Works Pvt. Ltd. v. State of West Bengal*, the appellant carried on an industry in the manufacture of glass and ceramics. Their contention was that it was a 'controlled industry' and as such the Central Government being the Appropriate Government the reference made by the Government of West

Bengal was bad. It was held that "an industry mentioned in the first schedule of the Industries (Development and Regulation) Act, 1951 is a 'Controlled Industry', but it is not necessarily an industry carried on by or under the authority of the Central Government. For an industry to be carried on under the authority of the Central Government it must be an industry belonging to the Central Government i.e. its own undertaking".

In *Shri Sankara Allom Ltd.v. The State of Travancore, Cochin*, it was held that, "merely because the manufacture of salt was carried on by the company under a license from Government, it cannot become a Government business or one carried on under authority of the Government".

The Kerala High Court in *India Naval Canteen Control v. Industrial Tribunals*, held that, "the question as to whether an industry is carried on by or under the authority of the Central Government, is essentially a question of fact depending on the circumstances of each case". As such a business carried on by a Naval Canteen Control Board was held not to be carried on by or under the authority of Central Government even if the trust was constituted by the Central Government.

In the light of the above two cases, simply because an industry is a controlled industry or the license is granted by the Central Government, industry is not necessarily one carried on by or under the authority of the Central Government. The Act requires that, not only the industry should be a controlled industry but also that Central Government must specify in this behalf that the industry concerned is a controlled industry. In other words, the specification must be taken by the Central Government by reference to and for the purpose of this Act, in order that the Central Government may itself become the Appropriate Government in such industry under this provision.

In *Administrative officer Central Electro Chemical Research Institute Karaikudi v. State of Tamilnadu*, the question was whether the Central or State Government was the Appropriate Government in respect of the National Laboratory setup by its parent body i.e. Council of Scientific and Industrial Research (CSIR). It was held that the Central Electro Chemical Research Institute as well as the CSIR was functioning under the authority of the Central Government notwithstanding the fact that CSIR was held not an authority of the Central Government within the meaning of Article 12 of the Constitution. The Court's conclusion was supported by the

notification of the Central Government wherein it has been stated that CSIR is a Society owned and controlled by the Central Government. The award was quashed because the reference was made by the State Government.

According to the interpretation of this provision, no industry carried on by a private person or a limited company can be a business carried on by or under the authority of the Government. ikewise, industries which are carried on by incorporated commercial corporations, which are governed by their own constitutions for their own purposes cannot be described as carried on by or under the authority of the Central Government as these corporations are independent legal entities and run the industries for their own purposes.

The Second part of the Section 2(a) which declares that the State Government is the Appropriate Government in relation to all other industrial disputes, also gave scope for much of litigation in case of concerns having establishments in more than one State. All industrial disputes which are outside the industrial purview of sub-clause (i) are the concerns of the State Government under sub-clause (ii). Thus, the employee would be referred for adjudication by the State Government, except in the cases falling under Section 2 (a) (i) of the Act.

While interpreting the provision, the Courts have generally relied upon the principles governing the jurisdiction of Civil Courts to entertain actions or proceedings. In *Lalbhai Tricumlal Mills Ltd. v. D.M. Vin*, Chagla C.J. observed that "Applying the well known principles of jurisdiction, a court or tribunal would have jurisdiction if the parties reside within its jurisdiction or if the subject matter of the dispute substantially arises within its jurisdiction. And, therefore, the correct approach to the question is to ask ourselves – where did the dispute substantially arise?"

In *Indian Cable Company Ltd. v. Its Workmen*, the Supreme Court echoing the voice of the Chagla C.J. observed that, "As the Act contained no provision bearing on the question, it must consequently be decided on the principles governing the jurisdiction of courts to entertain actions or proceedings. The court extracted the above quoted passage from *Lalbhai Tricumlal Mills* case and held that "these principles are applicable for deciding which of the states has jurisdiction to make a reference under Section 10 of the Act."

The principle established in the above two cases was followed by the Supreme Court in workmen of *Sri Rangavilas Motors (P) Ltd. v. Sri Rangavilas Motors (P) Ltd*., and later in *Hindustan Aeronautics Ltd. v. their workmen*, In *Sri Rangavilas*

Motors case the Court laid down a test "where did the dispute arise?. Ordinarily, if there is a separate establishment and the workman is working in that establishment, the dispute would arise at that place, there would clearly be some nexus between the dispute and the territory of the State and not necessarily between the territory of the State and the industry concerning which the dispute arose".

But ambiguity still persist on the question, whether the existence of a separate branch or establishment in State other than the State in which the head quarters of the industry is situate, is necessary to consider the former as the Appropriate Government with respect to disputes concerning the workmen employed in that State. In other words, for the application of the above principle, whether "the existence of a separate branch" is part of the ratio of the above mentioned Supreme Court decisions.

In *Association of Medical Representatives v. Industrial Tribunal*, the M.P. High Court held that, "in respect of a dispute relating to a workman employed in the State of M.P., where there is no separate establishment of the company, the Appropriate Government was the State of Maharashtra in which the head quarters are situated". But in *Paritosh Kumar pal v. State of Bihar*, a full Bench of the Patna High Court considered that, "the existence of a separate establishment is not a necessary part of the ratio and therefore, in respect of dispute relating to a workman employed in Bihar, where there was no separate establishment of the company, the Appropriate Government was the State of Bihar and not the State of West Bengal in whose territories the head quarters of the company situated".

This ambiguity is further confounded by a new principle enunciated by some of the High Courts, according to which there can be two Appropriate Governments for the same dispute and a reference by either of them can be valid. Although most of them are obiter dictums, Delhi High Court in *Gesterner Duplicators (P) Ltd. v. D.P. Gupta*, had specifically taken this view and applied this principle to the facts in this case by validating reference made by the Delhi Administration, where the Appropriate Government was, as per the principle enunciated earlier by the Supreme Court, the Karnataka State Government. The pragmatic approach of these courts deserves to be appreciated. But a separate line of cases exist where some other High Courts had entirely rejected this theory of two Appropriate Government on purely technical and legalistic considerations.

In *J and J Dechane Distributors v. State of Kerala*, Golanan Nambiya J. observed that: "It seems reasonable and fairly clear that there can be only one

Government which can be regarded as the Appropriate Government for the purpose of making a reference of industrial dispute. The consequences of holding that more than one Government can refer the same industrial dispute for adjudication appear to us to be startling."

In spite of various decisions of High Courts, it is really painful that after a lapse of sufficient time spent on adjudication of dispute and the award was rendered, the courts quash the award on jurisdictional grounds because the Government which initially referred the dispute for adjudication was not the Appropriate Government in the opinion of those courts. Until the definition is suitably amended to provide for such situations, it is better that the principle of simultaneous jurisdiction of two Appropriate Governments is recognized, so that awards made by the tribunals shall be quashed on such technical grounds.

Dispute Resolution Machineries:

The Act provides for following Authorities for Investigation and settlement of industrial disputes:

1. Works Committee.
2. Conciliation Officers.
3. Boards of Conciliation.
4. Court of Inquiry.

1. Works Committee

Section 3 of the Act provides that the appropriate Government may by general or special order require the employer to constitute in the prescribed manner a Works Committee in industrial establishments, where 100 or more workmen are employed or have been employed on any working day in the preceding 12 months. The Works Committee will be comprised of the representatives of employers and workmen engaged in the establishment.

It shall be the duty of the Works Committee to promote measures for securing and preserving amity and good relations between the employer and workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters [Section 3(2)].

2. Conciliation Officers

With the duty of mediating in and promoting the settlement of industrial disputes, the appropriate Government may, by notification in the Official Gazette, appoint such number of Conciliation Officers as it thinks fit under Sec 4 of the Act. The Conciliation Officer may be appointed for a specified area or for specified industries in a specified area appointing the Conciliation Officers, by the appropriate Government, is to create congenial atmosphere within the establishment where workers and employers can reconcile on their disputes through the mediation of the Conciliation Officers. Thus, they help in promoting the settlement of the disputes.

Sec 12 provides that where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under Section 22 has been given, shall, hold conciliation proceedings in the prescribed manner.

The Conciliation Officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government 5[or an officer authorized in this behalf by the appropriate Government] together with a memorandum of the settlement signed by the parties to the dispute.

If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about settlement

3. Boards of Conciliation

For promoting the settlement of an industrial dispute, the appropriate Government may, as occasion arises, constitute by a notification in the Official

Gazette, a Board of Conciliation. A Board shall consist of a Chairman and two or four other members as the appropriate Government thinks fit.

Under sec 13 of the Act it shall be the duty of Board to endeavor to bring about a settlement of the dispute and for such purpose it shall, without delay, investigate into the dispute and all matters affecting the merits and the right settlement. The Board may also do all such things which may be considered fit by it, for including the parties to come for a fair and amicable settlement of the dispute. In case of settlement of the dispute, the Board shall send a report thereof to the appropriate Government together with a memorandum of settlement signed by all the parties to the dispute. In case no settlement is arrived at, the Board shall forward a report to appropriate Government enlisting therein the steps taken by the Board for ascertaining the facts and circumstances related to the dispute and for bringing about a settlement thereof. The Board will also enlist the reasons on account of which in its opinion a settlement could not be arrived at and its recommendations for determining the disputes. (Section 5)

4. Courts of Inquiry

According to Section 6 of the Act, the appropriate Government may as occasion arises, by notification in the Official Gazette constitute a Court of Inquiry into any matter appearing to be connected with or relevant to an industrial dispute. A Court may consist of one independent person or of such number of independent persons as the appropriate Goverment may think fit and where a Court consists of two or more members, one of them shall be appointed as the Chairman. It is the duty of such a Court to inquire into matters referred to it and submit its report to the appropriate Government ordinarily within a period of six months from the commencement of the inquiry. The period within which the report is to be submitted is not mandatory and the report may be submitted even beyond the period of six months without affecting the legality of the inquiry.

Voluntary Arbitration under Sec 10A

When Conciliation Officer or Board of Conciliation fails to resolve conflict/dispute, parties can be advised to agree to voluntary arbitration for settling their dispute. For settlement of differences or conflicts between two parties, arbitration is an age old practice in India. The Panchayat system is based on this

concept. In the industrial sphere, voluntary arbitration originated at Ahmedabad in the textile industry under the influence of Mahatma Gandhi. Provision for it was made under the Bombay Industrial Relations Act by the Bombay Government along with the provision for adjudication, since this was fairly popular in the Bombay region in the 40s and 50s. The Government of India has also been emphasizing the importance of voluntary arbitration' for settlement of disputes in the labour policy chapter in the first three plan documents, and has also been advocating this step as an essential feature of collective bargaining. This was also incorporated in the Code of Discipline in Industry adopted at the 15th Indian Labour Conference in 1958. Parties were enjoined to adopt voluntary arbitration without any reservation. The position was reviewed in 1962 at the session of the Indian Labour Conference where it was agreed that this 'step would be the normal method after conciliation effort fails, except when the employer feels that for some reason he would prefer adjudication. In the Industrial Trade Resolution also which was adopted at the time of Chinese aggression, voluntary arbitration was accepted as a must in all matters of disputes. The Government had thereafter set up a National Arbitration Board for making the measure popular in all the states, and all efforts are being made to sell this idea to management and employees and their unions.

In 1956 the Government decided to place voluntary arbitration as one of the measures for settlement of a dispute through third party intervention under the law. Sec. 10A was added to the Industrial Disputes Act, and it was enforced from 10th March, 1957.

Reference of Disputes for Arbitration

Where a dispute exists or is apprehended, it can be referred for arbitration if the parties to the dispute agree to do so by submitting a written agreement to that effect, mentioning the person acceptable to them as arbitrator and also the issues to be decided in arbitration - proceedings, to the Government and the Conciliation Officer concerned before it is referred for adjudication to Labour Court or Tribunal. The Agreement must be signed by both the parties. Both under Sec. 10A and 10(2) reference is obligatory.

Where an agreement provides for even number of arbitrators, it will provide for the appointment of another person as an Umpire who shall decide upon the

reference if the arbitrators are divided in their opinion. The award of the Umpire shall be deemed to be the arbitration award for the purposes of the Act.

The appropriate Government shall within one month from the date of the receipt of the copy of the arbitration agreement publish the same in the Official Gazette if the Government is satisfied that the parties, who have signed the agreement for arbitration, represent majority of each party; otherwise it can reject the request for arbitration.

Where any such notification has been issued, the employer and workmen who are not parties to the arbitration agreement, but are concerned in the dispute, shall be given an opportunity to present their case before the arbitrator or arbitrators.

The arbitrator shall investigate the dispute and submit to the Government the Arbitration Award signed by him. Where an industrial dispute has been referred for arbitration and notification has been issued, the Government may by order prohibit the continuance of any strike or lock-out in connection with such dispute, which may be in existence on the date of reference.

The arbitration award which is submitted to the Government and becomes enforceable, is binding on all parties to the agreement and all other parties summoned to appear in the proceedings as parties to ‘dispute. Such an award is also binding on all, employees at the time of award, or to be employed subsequently even if they are not party to the initial agreement. If the arbitration agreement is not notified in the Official Gazette under Sec. 10A, it is applicable only to the parties who have agreed to refer the dispute for arbitration. Arbitration Award is enforceable in the same manner as the adjudication award of Labour Court or Industrial Tribunal.

Arbitration is an alternative-to adjudication and the two cannot be used simultaneously. It is voluntary at the discretion of the parties to a dispute. Arbitrator is a quasi-judicial body. He is an independent person and has all the attributes of a statutory arbitrator. He has wide freedom, but he must function within the limit of his powers. He must follow due procedure of giving notice to parties, giving fair hearings, relying upon all available evidence and documents. There must be no violation of the principles of natural justice.

Acceptance of Arbitration

Voluntary arbitration has been recommended and given place in law by the Government. Experience, however, shows that although the step has been strongly

pressed by the Government for over thirty years it has yet to take roots. During the last decade not even 1% of the disputes reported were referred for arbitration. The National, Commission on Labour examined the working of arbitration as a method of settling disputes, and found that it was yet to be accepted by the parties, particularly by the 'employers, unreservedly.

The main hurdles noticed yet are, the Choice of suitable arbitrator acceptable to both parties and payment of-arbitration-fees-Unions can seldom afford to share such costs equally with management. Apart from these, it appears that arbitration under the Act is not correctly understood by the employers and trade unions. When arbitration is suggested, the impression often is that matter is to be left to the sole decision of an individual who can act in any manner he likes. The sanctity of the decision by an arbitrator is also held in doubt. The fact that law covers voluntary arbitration and places it almost parallel to adjudication, is not appreciated or known widely.

Power of Appropriate Government to refer Industrial Dispute

The State sponsored conciliation and adjudication are the hall mark of the law of industrial dispute resolution in India. The Act is the principal Central law which provides the mechanism for and conditions subject to which, the conciliation and adjudication powers are to be exercised. Under the Act, adjudication cannot be demanded by a disputant party as of right; it is the discretion of the "Appropriate Government" to refer or not to refer an industrial dispute collective or individual for adjudication by an adjudicatory body. If the disputants are not able to arrive at a "settlement" or if they are disinclined to refer their disputes to an Arbitrator, then, the ultimate legal remedy for the unresolved dispute is its reference to adjudication by the Appropriate Government.

The Act envisages the exclusive power of the Appropriate Government to refer disputes for adjudication there by rendering the adjudication conditional on its discretion except applications under Sec 33, 33-A, 33(C)(2) all other matters will have to come before the adjudicatory authorities only through an order of reference by the Appropriate Government. But, now in some States like Karnataka, Tamilnadu and Andhra Pradesh in case of individual disputes relating to discharge, dismissal, retrenchment or termination of services, a workman may directly approach a Labour

Court for the adjudication of such disputes under the relevant State amendments to the Act. This power of the Government disables the trade unions or the workmen to make use of the adjudicatory forums for the settlement of disputes and as an effective remedy for their grievances. There has been a constant demand by the trade union to provide them and to the workers direct access to these adjudicatory authorities. Further, the controversy about the Government power arises in the context of misuse of this discretionary power for partisan ends with political motives. How and on what considerations should the reference power of the Government be exercised? Delay in reference of disputes and Government's reluctance to refer disputes to which it is a party.

Scope of Section 10 - Nature of Government Power

To say something with certainty about the powers of the Appropriate Government under Section 10(1) of the Act, to invariably refer a dispute for adjudication is a risky one and the exercise is rather like *skating on the thin ice*. This all has been there in spite of the fact that our Supreme Court is probably the 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 observe a proposition conceptually, nationally and imaginatively. This is on account of the fact that 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 benches. This is what had happened as regards the powers of the Appropriate Government in matters of reference of disputes.

Section 10(1) Act states that, where the Appropriate Government is of opinion that any industrial dispute exists or is apprehended it may at anytime; by order in writing refer the dispute to a Board or Court of Inquiry or Labour Court or to an Industrial Tribunal for adjudication. From the above provision, it is evident that the Appropriate Government can only refer a dispute to any adjudicatory body provided if it is satisfied that there exists an industrial dispute or apprehension of such dispute but not otherwise.

It shows that the foremost object of the Act is to provide for economical and expeditious machinery for the decision of all industrial disputes by referring them to adjudication, and avoid industrial conflict resulting from frequent lock-outs and

strikes. It is with that object the 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.

On the construction of this Section the Supreme Court in a number of decisions explained that this power of the Appropriate Government is purely of an 'administrative nature', as the expression is understood in contradiction to quasi judicial or judicial power. This implies that it is a discretionary function of the Appropriate Government to form an opinion about the existence and apprehension of industrial dispute. This decision is based on subjective satisfaction of the Government, only the order of refusal to make a reference needs to be communicated and the order must record the reasons for refusing to make a reference. It is only an administrative order and not a quasi judicial order. There is no need to issue any notice to the employer or to hear the employer before making a reference or refusing to make a reference.

Further, implication of holding it an administrative power is that, when the Government makes a reference of a dispute for adjudication by a Labour Court or a Tribunal it does not decide any question of fact or law. The fact that it has to formed an opinion as to the factual existence of a dispute as a preliminary step to discharge of its function does not make it any the less administrative character. The expression 'at any time' empowers the Appropriate Government to review its earlier decision and refer a dispute which was earlier refused. It can reconsider its earlier decision in the light of new facts and circumstances.

The restriction on the Government is that it should exercise the power *bonafide* after application of its mind to the matter before it. It should take all relevant matters into consideration and leave out all irrelevant consideration. In other words, the discretion must be exercised according to law as established by courts in various cases. The discretionary power should be exercised to promote statutory objects and that a discretionary decision founded upon irrelevant factors or grounds would be subject to judicial considerations.

In *State of Madras v. C.P. Sarathy*, the Apex Court held that "the Government should satisfy itself on the facts and circumstances brought to its notice in its

subjection opinion that an industrial dispute exists or is apprehended. The factual existence of the dispute or its apprehension and the expediency of making a reference are matters entirely for the Government to decide". It was further observed that "the order of reference passed by the Government cannot be closely examined by a writ under Article 226 of the Constitution to see if the Government had material before it to support the conclusion that the dispute existed or was apprehended".

But later, the Supreme Court in *Western India Match Co. v. Western India Match Co. Workers Union* and in *Shambunath Goyal v. Bank of Baroda, Jullundur* insisted that, the Appropriate Government should satisfy itself on the basis of the material available before it that an industrial dispute exists or is apprehended and it was held that such a satisfaction of the Government is a condition precedent to the order of reference. In other words, if there is no material before Government that an industrial dispute exists or is apprehended, the Government has no power to make a reference of cause, the court observed that "the adequacy or sufficiency of the material on which the opinion was formed is beyond the pale of Judicial Scrutiny. Once the Government forms an opinion with respect to the existence of an industrial dispute or its apprehension, the next question of expediency i.e. whether to refer the dispute for adjudication or not is left to the subjective satisfaction of the Government". However, where the Appropriate Government refuses to make a reference on receipt of a failure report of a conciliation officer under Section 12(4), the Government is bound to give reasons for its refusal and communicate the same to the parties concerned.

The exercise of power by the Government or refusal to do so is subject to the well recognized principles regarding the exercise of administrative discretion. The discretionary power must be exercised honestly and not for any corrupt or ulterior purposes and the Appropriate Government must apply its mind to the relevant material before it and decide the question of expediency of referring the dispute in the interests of maintaining industrial peace in the concerned industry. It will be an absurd exercise of discretion, if for example the Government forms the requisite opinion on account of pressure by any political party, within these narrow limits, the Government opinion is not conclusive and can be challenged in a court of law. The well known grounds for challenging the exercise of administrative discretion like *malafide*, irrelevant considerations, not taking relevant considerations into account, improper purpose, acting mechanically or under dictation are also available for challenging the

improper exercise of power by the Appropriate Government under Section 10(1) of the Act.

The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other.

It is well settled that the use of word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intent a mandatory force. In order, therefore, to interpret the legal import of the word 'may', the Court has to consider various factors, namely the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well-settled that where the word 'may' involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words a directory significance would defeat the very object of the Act, the word 'may' should be interpreted to convey a mandatory force.

In *D.A. Koregaonkar v. the State of Bombay*, Chagla, C.J. observed that,"One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and if it does then the Court would say that that provision must be complied with and that it is obligatory in its character".

The adjudication of industrial disputes under the Act, is based on the concept of compulsory adjudication and hence, the Appropriate Government has to refer the industrial dispute and the adjudicator is bound to adjudicate on the referred industrial dispute and thereafter to give its decision in writing in the form of an award.

Power of Courts to direct the Government to make a reference of Industrial Disputes:

In *Pratap Singh v. State of Punjab*, the Supreme Court observed that, "the Court is not an appellate forum where the correctness of the order of the Government could be canvassed. It has no jurisdiction to substitute its own view for entirely of the power, jurisdiction and discretion vested by law in Government the only question which could be considered by the Court is, whether the authority vested with the power has paid attention to or taken into account, circumstances, events or matter wholly extraneous to the purpose which the satisfying a private or personal grudge of the authority".

Power of reference under Section 10 (1) is undoubtedly an administrative function of the 'Appropriate Government' based upon its own opinion with respect to the existence or apprehension of an industrial dispute and its subjective satisfaction as to whether it would be expedient to make a reference or not. Though the earlier thinking was that such an order cannot be interfered with at all by the courts, the recent trend of judicial thinking is that though in a very limited field, the order of reference is amenable to judicial review under certain circumstances.

The question of referring a industrial dispute for adjudication arises after the Government has received the failure report from the Conciliation Officer. According to Section 12(5), if on a consideration of the failure report by a conciliation officer, the Appropriate Government is satisfied that there is a case for reference, it may make such a reference. Where the Appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefore. Similar obligation to record reasons for non reference and communicating the same to the parties concerned arises under Sec 13(4) of the Act where the failure report is submitted by a Board of Conciliation only in case of Public Utility Services.

In *State of Bombay v. K.P. Krishnan*, the Appropriate Government on consideration of the failure report refused to refer the dispute and the reason given by the Government was that the workmen resorted to go slow during the year 1952-53 for which year the workmen claimed bonus. The Supreme Court held that the Government had taken into consideration altogether an irrelevant matter in refusing to refer the dispute and therefore a writ of mandamus was issued to the Government directing it to reconsider the matter by ignoring the irrelevant consideration. While

holding so the Court observed, the order passed by the Government under Section 12(5) may be an administrative order and the reasons recorded by it may not be justifiable 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 a 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 administrative order.

The Supreme Court in *Bombay Union of Journalists v. State of Bombay*, further discussed the question. Although it is difficult somewhat to reconcile this decision with that of *K.P. Krishnan*, the Supreme Court clearly pointed out that while the Government is not precluded from considering the prima facie merits of the case before deciding as to whether a reference should be made or not, it cannot take final decisions on questions of law or disputed questions of fact which are within the jurisdiction of the Tribunal. The Supreme Court then reiterated its earlier stand that in entertaining an application for a writ of mandamus against an order made by the Appropriate Government under Section 10(1) read with Section 12(5), the Court is not sitting in an appeal over the order and is not entitled to consider the propriety, adequacy or the satisfactory character of the reasons given by the said Government.

The combined reading of the above two cases, no exhaustive or final criteria emerges as to on what grounds an administrative order is amenable to judicial review. Nor any such exhaustive or final criterion is possible in a growing branch of law like the administrative law. However, some broad heads under which an order of reference may be reviewable are as follows.

(i) When the Government does not act *bonafide*

In any enactment which creates powers, there is a condition implied that the powers shall be used *bonafide* for the purpose for which they are conferred. Exercise of power of reference is said to be *malafide* if it is made for achieving an alien purpose. No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives and any action purporting to be that of the body but proved to be committed in bad faith or from corrupt motives would certainly held to be in operative. However, such bad faith will be a matter to be established by a party propounding bad faith or *malafide*. He should affirm the set of acts and it would not

be sufficient merely to allege the facts but they will have to be proved. In *State of Bihar v. D.N. Ganguli*, while dealing with a case of cancellation of a notification of reference, the Supreme Court reiterated the same view and said that if validity of cancellation of notification making an order of reference is challenged on the ground of *malafide*, it may be relevant and material to inquire into the motive of the Government. Thus, if the Court finds that the Government was actuated by *malafide* motives in making an order of reference, the reference shall be invalid.

(ii) Improper opinion of the Government

With respect to the existence or apprehension of an industrial dispute, the Government is the sole arbitrator and its opinion is final Likewise the determination of the question whether it is expedient to make a reference or not depends upon the discretion of the Appropriate Government and this discretion should be exercised reasonably or else it is reviewable by a High Court in its writ jurisdiction under Article 226 of the Constitution. The opinion of the Government may be assailable for the following reasons:

(a) No material

In *Orient Paper Mills Sramik Congress v. State of Orissa,* the Court opined that the formation of opinion cannot import an arbitrary or irrational state of affairs; the opinion must be grounded on materials which are of rational and probative value. In forming the opinion if the Government had no material before it, the order of reference will be liable to be quashed.

(b) Omitted vital material from consideration

While exercising the power of reference under Section 10 of the Act, the Government did not take into account some vital material which is ought to have considered and refuses to refer the dispute for adjudication then the reference will be liable to be quashed.

(c) Irrelevant Consideration

If, in forming the opinion, the Appropriate Government looks into any extraneous or irrelevant consideration which had no rational connection with the question of making the reference, hence, order would be beyond the scope of the power of the Government under Section 10(1) of the Act. In such a case the order of reference will be bad even if the authority has acted *bonafide* and with the best of intention.

(d) Non-application of mind

The Appropriate Government before forming an opinion to the questions whether there is an industrial dispute existing or apprehended and whether it will be expedient to refer the dispute on the basis of material before it. If the order of reference challenged on the above ground the Government will have to satisfy the Court by filing an affidavit to show that it had material before it and the reference was made after consideration of relevant factors, the absence of such evidence may make the reference vulnerable on the lack of material or non-application of mind.

(iii)The activity carried on is not an 'Industry' and no 'Industrial Dispute'

The term 'industrial' in the definition of 'industrial dispute' relates to the dispute in an 'industry' as defined in Sec 2(j) of the Act. Unless the dispute is related to an industry it will not be an industrial dispute. Therefore, if the reference is made of a dispute which relates to any activity which is not an industry it will not be a valid reference.

In *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor union*, Justice Venkatarama Ayer opines that"The definition of industrial dispute presupposes continued existence of industry and hence the dispute should be in a live industry and not in a closed industry, because closed industry or establishment would not fall within the definition of industry. The reference of an industrial dispute which arises after the establishment becomes dead on account of closure shall therefore be invalid as the provisions of the Act will apply only to an existing or live industry".

The power of the State to make a reference is to be determined with reference not to the date on which it is made but with reference to the date on which the right, which is the subject matter of the dispute arises and the machinery provided under the Act would be available for working out the right which accrued prior to the dissolution of the business. There is thus a clear distinction between the two classes of cases namely:

(i) Those in which the cause of action arose at the time when the business had been closed; and

(ii) Those in which the cause of action arose at the time when the business was being still carried on.

There can be no 'industrial dispute' in respect of the first category of cases because the real subject matter of the dispute had ceased to exist when the dispute

arose. But in regard to the second category, where the dispute actually arises before the closure of the business, it does not cease to be an industrial dispute merely because subsequently the industry is closed. If the dispute related to a period when the industry was in existence the reference even after the closure of the industry can be validity made.

The dispute with respect to the existence or apprehension of which the Appropriate Government is to form its opinion must be an industrial dispute as defined in Section 2 (k) of the Act. According to this, "any dispute or difference between employers and employers and between employers and workmen or between workmen and workmen, connected with the employment or non employment or the terms of employment or with the conditions of labour of any person".

In *Shambhunath v. Bank of Baroda*, Supreme Court held that the term 'industrial dispute' connotes a real and substantial difference having some element of persistency and continuity till resolved and likely, if not adjusted to endanger the industrial peace of the undertaking or the community. The definition of industrial dispute expressly states that not dispute or difference of all sorts but only those which bear upon the relationship of employers and employers, employers and workmen or between workmen and workmen and if it is connected with grounds provided there under are contemplated and the Appropriate Government before exercising its power under Section 10, the industrial dispute must be in existence or apprehended on the date of reference i.e. a demand has been made by the workmen and it has been rejected by the employer before the date of reference, whether directly or through the conciliation officer, it would constitute an industrial dispute. If there is no industrial dispute in existence or apprehended the Appropriate Government lacks power to make any reference.

(iv) Reference Contrary to Law:

The order of reference should be made to the authorities in accordance with the provisions of Section 10(1). If the order is contrary to these provisions in the matter of selecting the appropriate authority, the order shall be invalid. Likewise where an order of reference covering some items of industrial disputes is pending adjudication a further order of reference covering the same subject matter would be invalid. In *Rashtriya Hair Cutting Saloon v. Maharashtra Kamgar Sabha*, held that a reference of dispute the subject matter of which is covered by the provisions of

special enactments like Contract Labour (Regulation and Abolition) Act, 1970, Payment of Gratuity Act, 1972 etc. being a self contained code, cannot be validly referred or be adjudicated upon by the adjudicatory authorities under the Act.

Disputes covered by a Settlement or a previous Award

In *Madras District Automobile and General Employees Union v. State of Madras*, held that reference of an Industrial Dispute the subject matter of which is covered by a Settlement as defined in Section 2 (p) of the Act would be invalid during the period of operation of such a Settlement because when once a dispute is resolved by a Settlement in the course of Conciliation or otherwise no dispute remains to be resolved by Arbitration or Adjudication. The Law is well settled that if there is a binding settlement which has not been terminated in accordance with the procedure laid down in the Act, no industrial dispute can be raised with regard to the items which form the subject matter of the settlement. Such matters cannot be the subject matter of conciliation proceedings under Section 12 or of reference under Section 10 of the Act.

From the analysis of above all cases the approach of the Supreme Court and High Courts in compelling the Appropriate Government to make a reference which may virtually amount to exercising appellate jurisdiction over the discretionary order of the Government is justified or not from a strict administrative law view point, the activists in these decisions is quite welcome from the point of view of labour law.

In justification of the above decision of the Supreme Court, it may be stated First, that the Supreme Court is very much concerned about abnormal delay at the stage of reference by the Government, in many of these cases the delay was more than a decade. Although the Supreme Court was satisfied that case for reference was made out, the Court stand was considered to be patently unreasonable. Secondly, the Court in these cases also took into account the fact that the Appropriate Government had decided for itself the questions of fact and law which ought to be determined by the Tribunal after adjudication. Thirdly, the Court was considering that the adjudication of industrial disputes by the Tribunals should be considered as a quasi judicial remedy provided to the industrial workmen for the resolution of their grievances and demands which lead to disputes. This is of particular importance if it is relating to discharge, dismissal, retrenchment or the termination of services of workmen and therefore the

jurisdiction of Civil Courts is impliedly barred by the Act. Although disputes strictly relating to contract of employment may be taken before the Civil Courts for enforcement of contractual rights the Civil Courts have no power to order reinstatement even in cases of illegal termination of service, not to speak of the delay or expense that go with the Civil Suits.

Under these circumstances the remedy available to workmen is only under the Act and if the Appropriate Government takes the stand that it has discretion whether to refer or not to refer such disputes the workmen who are deprived of their livelihood would be at the many of the Government for justice and this would hindrance the very object of the Act and social justice principle under the Constitution.

Analysis of the term may "at any time" refer under Section 10

Under the Act it is the Appropriate Government which has the power to make the reference for adjudication. The words "at any time" preceded by the word "may" in Section 10(1) indicate the intention of the legislature that the Government has discretion to refer dispute at any time, if it is of opinion that an industrial dispute exists or is apprehended and that it considers expedient to do so in the interests of maintaining industrial peace in the concerned industry. The interpretation of the term "at any time" under Section 10 of the Act gives rise to four questions namely,

(i) Whether the conciliation proceedings are a condition precedent in the making of the order of reference?

The Act casts a duty on Conciliation Officer to hold conciliation proceedings and try to promote settlement between the parties and the procedure for promoting settlement cannot come in the way of the Appropriate Government making reference for adjudication. The significance of the words "at any time" is that the reference can be made at any time even before or during the pendency or after the conciliation proceedings. In other words, though as a matter of practice conciliation proceedings by a conciliation officer are held before the Government decides to refer a dispute for adjudication it is not a condition precedent. In *Western India Match Co. Ltd. v. Western Match Co. Workers Union*, Shelat, J.M. JJ observed that,"Ordinarily the question of making a reference would arise after the conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent

case, it can "at any time" i.e. even when such 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 where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed".

Section 10 not suggests that the Appropriate Government has to wait for the failure report of Conciliation officer. This position is amply made clear by Section 20 of the Act which states that the conciliation proceedings shall be deemed to be concluded, among others, when a reference is made to a Court of Inquiry, Labour Court, Tribunal or National Tribunal.

(ii) Whether during the pendency of the proceedings under Section 33 a reference of the dispute can validly be made for adjudication?

In *ITC Ltd. v. Government of Karnataka*, a question raised before the High Court of Karnataka that during the pendency of proceeding under Section 33(2)(b) of the Act for 'approval' of the imposition of penalty of dismissal from service against a workman. Whether the Appropriate Government is competent to refer the dispute for adjudication relating to dismissal under Section 10(1) of the Act? It was held that any decision under Section 33 is not final and therefore cannot yield to a remedy provided under Section 33(2)(b) proceedings. Therefore, notwithstanding that a proceeding under Section 33 is pending, a dispute can be referred to adjudication under Section 10(1) of the Act.

(iii) Whether once having refused to make a reference the Appropriate Government can subsequently make a reference of the same matter?

Refusal of the Government to refer dispute for adjudication on a previous occasion does not prevent it from reconsidering the matter afresh at a later date and deciding to refer the same under Section 10(1) of the Act. The Supreme Court in *Western India Match Co. v. Western India Match Co. Workers Union* stated that the words "at any time" do not admit any period of limitation and that previous refusal is no bar for a subsequent reference. The Court explained the law on this aspect in the following words: "When the Government refuses to make reference it does not exercise its power, on the other hand it refuses to exercise its power. Consequently,

the power to refer cannot be said to have been exhausted when it has declined to make a reference at an earlier stage".

The Court further pointed out that the Government may reconsider the matter either because some new facts had come to light or because it had misunderstood the existing facts or for any other relevant consideration with regard to too old claims or the extraneous consideration like, pressure from unions etc. The Court said, "there is no reason to think that the Government would not consider the matter properly or allow itself to be stampeded into making references in cases of old or stale disputes or reviving such disputes on the pressure of unions".

Later in *Binny Ltd. v. Their workmen*, the Supreme Court upheld the validity of a reference by the Government though the Government refused to refer the same on two earlier occasions. In *Avon Services (production) Agencies Ltd. v. Industrial Tribunal, Haryana*, the Supreme Court clarified the nature of power of the Appropriate Government when it subsequently refers the dispute after initial refusal and about the need for any fresh material before the Government justifying the change on its opinion. It was observed by Desai, J. that, "Merely because the Government rejects a request for reference or declines to make a reference, it cannot be said that the industrial dispute has ceased to exist, nor could it be said to be review of any judicial or quasi judicial order or determination. The industrial dispute may nevertheless continue to remain in existence and if at a subsequent stage the Appropriate Government is satisfied that in the interest of industrial peace and for promoting industrial harmony it is desirable to make a reference the Appropriate Government does not lack power to do so under Section 10(1), nor it is precluded from making a reference on the only ground that on an earlier occasion it had declined to make a reference".

The Supreme Court also held that "A refusal of the Appropriate Government to make a reference is not indicative of an exercise of power under Section 10(1), the exercise of power would be a positive act of making a reference. Refusal to make a reference does not tantamount to saying that the dispute, if at all existed stands resolved. On the contrary, the refusal to make a reference not compelling the parties to come to dispute reasoning authorities would further accentuate the feelings and a

threat to direct action may become imminent and the Government may as well consider the decision and make the reference".

This holding of the Court seems to confer on the Government the power to refer the dispute after a previous refusal and for such a reference the Government need not have any fresh material before it and the only paramount consideration is the maintenance of industrial peace. But such a blanket power may result in some absurd situations or may put the employer in an embarrassing situation when he had already arranged the affairs of his business on the basis of the Government's refusal to make a reference. It is also possible that such unlimited power may be abused or exercised due to some extraneous factors like, political pressure.

In *Mahavir Jute Mills Ltd. v. Shibbanlal Sexena*, the Supreme Court itself noted that between the dismissal of 800 workmen, which was the subject matter of dispute and the hearing of the appeal by special leave nearly twenty years have elapsed and an embarrassing situation had arises for the employer, as the workmen employed in the place of the dismissed workmen had already put in twenty years of service. Despite these facts, the Court upheld the order of reference following the ratio of WIMCO case. In view of such possibilities, O. P. Malhotra suggests, that: "It is therefore desirable that when the Government subsequent to its refusal to make a reference decides to refer the same dispute for adjudication, it must state reasons, showing that new facts had came to light or there was misunderstanding as to the existing facts or there was any other relevant consideration including the threat to peace in the order of reference. Alternatively these reasons may be stated in the counter affidavit in reply to the writ petition challenging the order of reference".

Further, a considerable contention is that in making a reference the Government is performing an administrative function and not a judicial or a quasi judicial function and *audi alterem partem* is not invokable has become untenable in the light of the path breaking decision of the Supreme Court in *State of Orissa v. Binapani Devi*, *kraipak v. UOI*, *Mohinder Singh Gill v. Chief Election Commissioner*. The Supreme Court has observed that, "the dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after *kraipak case* in India, In *Binapani,* the Supreme Court held that even

an administrative order, which involves civil consequences must be made consistently with the principles of natural justice".

(iv) Whether there is any limitation in making the order of reference?

The power of the Appropriate 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 apprehended. The words "at any time" do not admit any such limitation. That is the express intention of the legislature and there should be no such restrictions imposed on the Government's power. The laws of limitation which might bar any Civil Court from giving a remedy in respect of lawful rights cannot be applied by Industrial Tribunals. However, it is only reasonable that the Government shall refer disputes within a reasonable time after the fact of the existence of the dispute is brought to its notice, either through the parties directly or through the failure report of the Conciliation Officer and incase of delay there should be sufficient explanation for it.

The Appropriate Government's power to make a reference is unbridled. But any discretionary power cannot be regarded as absolute because absolute discretion is ground to breed arbitrariness and which shrikes at the roots of Article 14 of the Constitution, which forbids discriminatory actions. The discretionary authority, is therefore, is obliged to act fairly, justly and in good faith. In *Shalimar Work Ltd. v. Its workmen*, the Supreme Court pointed out that though there is no period of limitation prescribed in making a reference of dispute even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when dispute relate to discharge of workmen wholesale. In the case of *Western India Watch Company v. Western India Watch Company workers Union* the Supreme 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 case of old or stale disputes or review such disputes on the pressure of Union.

Authorities to whom Reference can be made by the Appropriate Government

Although a reference under Section 10(1) may be made to a Board of Conciliation to promote settlement or to a Court of Inquiry for inquiring into matter but as the present study is concerned with Adjudication, hence, the detailed provisions pertaining to power of reference to a Labour Court, Industrial Tribunal and National Tribunal for the purpose of investigation and settlement of Industrial disputes are discussed herewith.

(i) Labour Court

The Appropriate Government Under Section 10(1)(c) may refer a dispute, if it relates to any matter specified in the Second Schedule to the Labour Court for adjudication. The Second Schedule matters are all disputes of rights nature or also known as legal disputes when workmen raise disputes with regard to their existing legal rights, the reference of such disputes by the Government should be a matter of routine, unless the claims of workmen are found to be frivolous or vexatious.

Although, as a general rule, the matters enumerated in Third Schedule are referred to Industrial Tribunals, the first proviso to Section 10(1) (d) provides that, where the dispute relates to any matter specified in the Third schedule and is not likely to affect more than one hundred workmen, the Appropriate Government has the discretion to refer such a dispute to a Labour Court for adjudication.

(ii) Industrial Tribunal

The Appropriate Government may refer a dispute Under Section 10(1) (d), whether it relates to any matter specified in the Second or Third Schedule, to a Tribunal for adjudication. The Third schedule matters like wages, allowances, bonus, hours of work etc. are all interest disputes and they can be referred only to Industrial Tribunals. Thus the Tribunals enjoy greater Jurisdiction than the Labour Courts.

(iii) National Tribunal

Sec 10 (1A) provides that Central Government may refer the dispute to a National Tribunal for adjudication, where it is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such dispute and that the dispute should be adjudicated by a National Tribunal, then, the Central Government may, whether or

not it is the Appropriate Government in relation to that dispute, at any time, by order in writing, refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule.

The only requirement of Section 10(1) is that the order of reference should be in writing. No form is prescribed under the rules for making such order. It is sufficient if the existence of a dispute and the fact that the dispute is referred to the Tribunal are clear from the order. Since the Jurisdiction of the Tribunal is confined to the points specified in the order of reference and matters incidental there to as per Section 21 of the Act and it is necessary that the order of reference should be carefully drafted without giving room for unnecessary litigation.

In *Express News Papers Ltd. v. Their workmen*, it was observed that "order of reference hastily drawn or drawn in a casual manner often give rise to unnecessary disputes and they prolong the life of industrial litigation, which must always be availed". Therefore, it is necessary that the Government must bestow great case so as to formulate the points of dispute clearly and should be so worded as to avoid ambiguity.

Appropriate Government power to withdraw, cancel, supersede or amend the order of reference

On the question whether the power of reference under Section 10 of the Act carries with it the power to cancel or supersede the reference, the Supreme Court in *State of Bihar v. D.N. Ganguly*, ruled that the Government has no such express or implied power to either cancel or withdraw a reference after it has made the order of reference. The Court did not approve the contention of the Government that as per the provisions of the General Clauses Act a power to make order includes in it a power to cancel the order.

The Appropriate Government acting under Section 10 will have power to add or amplify or correct any clerical or typographical errors. But the Government under the guise amending or correcting cannot supersede the reference already made. The cardinal principle in determining the question, whether the amendment amounts to a mere correction of a clerical error or introduction of fresh material, whether the relief claimed by the aggrieved party in the original notification can be granted in the proceedings which are to take place in pursuance of the amended notification. If the

same relief can be granted, the mistake may be considered as clerical, which can be corrected by an amendment. But if the same relief cannot be granted, then it means that the original notification has been cancelled and another notification has been issued in its place, which the Appropriate Government is not competent to do.

Constitutional Validity of Section 10(1)

In *Nirmala Textile Finishing Mills Ltd. v. Industrial Tribunal, Punjab*, the Constitutional validity of Section 10(1) of the Act was upheld by the Supreme Court. It held that, "the provisions of Section 10 are not unconstitutional, as there is no infringement of the fundamental rights guaranteed under Articles 14, 19(1)(f) and (g) of the Constitution. It was observed that the discretion conferred on the Government was not unfettered or unguided, because the criteria for the exercise of such discretion are to be found within the terms of Act itself".

In *A. Sundarambal v. Governor of Goa, Daman and Diu*, it was held that "the refusal of the Government to refer a dispute for adjudication would not amount to infringement of Article 14 of the Constitution merely because the Appropriate Government had in an earlier case referred the case of similar employer for adjudication because of the repetition of an error, if there is one, is not needed for complying with the principles of equality before law. If in law the Government justified in refusing a reference, the applicability of Article 14 does not arise at all".

The Circumstances in which the Power of Reference is Mandatory

In order to protect the interest of public and to avoid the dislocation of services by the public utility services in case of sudden strikes or lockouts the Act contains some special provisions in which the Government imperatively has to refer the industrial disputes for adjudication i.e., under Section 20(1), second proviso to Section 10(1) and Section 10(2).

According to Section 20(1) of the Act, Conciliation proceedings shall be deemed to have commenced on the date on which the notice of strike or lockout under Section 22 is received by the Conciliation Officer.

Under second proviso to Section 10(1), "where the dispute relates to a public utility service and notice of strike or lockout under Section 22 is given, 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 Section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced".

As per the proviso it is mandatory for the Government to make a reference subject to the two exceptions specified in the proviso itself. Since conciliation proceedings are compulsory in case of public utility services on receipt of notice of strike or lockout, practically in all such disputes the Government will have to either refer the dispute or record its reasons for refusing to make a reference and communicate the same to the parties concerned under Section 12(5). Although the word used in this proviso is "shall" instead of "May" used in the main provision, the Government has still the power to consider the question of expediency of making a reference even in case of public utility services and therefore it is difficult to distinguish this proviso with the main provision of the Section. In both cases the Government has to consider the question of expediency before making a reference. But the proviso by using the term 'shall' it has controlled the wide discretion of the Government in case of public utility services as compared to other industries.

Thus, it is clear that in regard to cases falling under this proviso an responsibility 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. The 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 Section 10(1) but is limited under the second proviso to Section 10(1).

Section 10(2) of the Act provides "where the parties to an industrial disputes apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a board, Labour Court, Tribunal or National Tribunal, the Appropriate Government if satisfied that the persons applying represent the majority of such party, shall make a reference accordingly".

Where the parties apply for a reference the discretion of the Government is divested and it will be under an obligation to refer such dispute for adjudication. In such cases, the Government need not consider the question of existence of an

industrial dispute or its expediency to refer. The only requirement is that Government should satisfy itself that the parties to the application 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.

When on both sides of the dispute there are associations or unions, the requirement of majority on both sides arises. But if the dispute is between a single employer and his workmen, the question of majority with respect to the employer does not arise and the Government will have to be satisfied only with respect to the majority of workmen. In other words the trade union which makes such an application will have to be a representative of majority of the workmen of that establishment. The Appropriate Government before making a reference under this provision may hold such inquiry as it thinks necessary to satisfy itself about the representative character of the union, which is a party to the application.

Central Government Power to refer Industrial Disputes

The following special powers have been conferred on Central Government, for settlement of industrial dispute namely:

(i) Power under third proviso to Section 10(1)

The Third proviso to Section 10(1), "where the dispute in relation to which the Central Government is the Appropriate Government, it shall be competent for that Government to refer a dispute to Labour Court or an Industrial Tribunal, as the case may be constituted by the State Government." According to this proviso, inserted by 1982 Amendment, it is not necessary that the Central Government shall refer disputes only to Labour Courts and Industrial Tribunals constituted by it, Instead, it may refer the disputes to a Labour Court or an Industrial Tribunal constituted by any State Government. This is aimed at facilitating the Central Government not to constitute separate adjudicatory authorities in areas where the dispute are not many in number, but all the same refer them to the authorities constituted by state Governments in those areas.

(ii) Power under Section 10 (1-A)

Under Section 10 (1-A), Central Government may, at any time, refer any industrial dispute, if it is of opinion that the dispute involves questions of national

importance or is of such a nature that industrial establishments situated in more than one state are likely to be interested in, or affected by such dispute and that the dispute should be adjudicated by a National Tribunal, whether or not the Central Government is the Appropriate Government in relation to such dispute and also whether the dispute relates to any matter specified in Second Schedule or Third Schedule. For adjudication of dispute of national importance or dispute in respect of interstate industrial establishments, the Central Government has been empowered to invoke this provision to refer such disputes to a National Tribunal for adjudication. To invoke this provision, the Central Government need not be the Appropriate Government in relation to such disputes.

Under Section 10(6), upon such reference being made by the Central Government no Labour Court or Industrial Tribunal shall have jurisdiction to adjudicate upon any matter contained in the reference to the National Tribunal. In any such matter referred to National Tribunal is pending in any proceedings before a Labour Court or Tribunal, such proceeding before the Labour Court or Tribunal shall be deemed to have been quashed. It shall also not be lawful for the Appropriate Government to refer any matter under adjudication before a National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of proceedings in relation to such matters before the National Tribunal.

The analysis of both Sections 10(1-A) and 10(6) reveals that the Central Government has an overriding power of reference to a National Tribunal, even with respect to disputes which are already pending adjudication by a Labour Court or Tribunal. Once the Central Government shall be divested of its functions under the Act and thereafter the Central Government shall be deemed to be the Appropriate Government in relation to that dispute for all legal purposes.

Process of reference making by the Government under Section 10-Defective?

The following defects have been found in the Act, namely,

1. **No direct access to the Authorities under the Act:**

The Policy of the Government insists, the intervention of the Government in the settlement of industrial disputes through conciliation and adjudication. The Government intervention in the adjudication is extensive because the Government

retains in its hands the ultimate control of deciding which disputes should go for adjudication through its reference under Section 10 of the Act.

Parties to the industrial dispute have no freedom to take their grievances to the adjudication directly, even in case of disputes of legal nature which includes dismissal discharge, termination or retirement of workmen. The discretion vested in the hands of Appropriate Government to refer dispute for adjudication will defeat the very purpose of peaceful settlement of disputes through adjudication there by maintaining industrial peace and harmony, which results in large scale industrial unrest. Over the years it has been experienced that adjudication system is the only effective remedy available to the aggrieved party. Therefore, it is quite objectionable as a matter of policy to deny free access to these authorities for the parties concerned.

The Government in the year 1978 proposed Industrial Relations Bill and Trade Unions and Industrial Disputes (Amendment) Bill for liberalization of Government policy which enable the industrial workmen to approach Labour Courts directly in cases of all individual disputes. But unfortunately the Bills could not be enacted into law and absolute power of the reference in the hands of Government continued. So necessary changes in law with regard to individual disputes under Section 2-A of the Act are imperative as recommended by the Ramanujan Committee, 1990 and the Second National Commission on Labour, 2002 regarding changes in law, on following lines, namely:

(i) Individual workmen should have direct access to Labour Courts in case of all individual disputes, which are by their very nature rights disputes.

(ii) A provision must be made for the recognition of a bargaining agent in each industrial establishment and such agent should be given the option of taking interests disputes directly to Tribunals for adjudication; and

(iii) Compulsory reference of industrial disputes for adjudication if there is no settlement through collective bargaining or voluntary arbitration. With some of these changes the proposed Labour Management Relations Bill was recommended by Second NCC in 2002.

2. Delay in reference results in delayed Justice

The object behind enactment of industrial law and providing separate dispute resolution mechanism is to provide speedy settlement and ensure speedy justice it is contrary to the projected goal of the Act of expeditiousness in industrial justice, the reference decision takes unduly longtime after the submission of the failure report.

Apart from prolonging the dispute resolution process, the delay in reference leads to the exertion of extraneous pressure on the political executive for prejudicial exercise of the reference power. The disputant parties perceive the conciliation officer recommendation as most instrumental in reference decisions, but the actual exercise of these decisions shows an attempt on the part of the Appropriate Government to serve its own objective through its power.

The Government reference involves in it, conciliation of the dispute first by the Conciliation Officer and the time specified under Section 12 (6) for completion of the conciliation proceedings is 14 days but in practice the conciliation proceedings are prolonged beyond a reasonable time; many times lasting up to 6 months or more. The conciliation officer does this without officially commencing the conciliation on his records. In addition to this delay, after receipt of the failure report from the Conciliation Officer, the Appropriate Government very often takes a pretty longtime before a reference is made.

An empirical study conducted in Kolhapur District of Maharastra State and the data collected through opinion survey reveals that the average time taken for reference of disputes is 10 to 12 months, another study by a labour law consultant in the State of U.P. and he found that the time taken by the Government in many cases is more than a year. He mentioned it is an irony that the Appropriate Government invariably takes more than a year in making a reference after the Conciliation Officer submits his report.

Yet in another study conducted by a Trade Union Leader at Dhanabad Coal mines he found that the delay was quite unreasonable on the basis of his empirical investigation he found on verification of 50 references randomly, which were made by the Central Government to the Industrial Tribunal at Dhanabad with respect to coal mines which is a public utility service for adjudication under Section 10 (1) of the Act, it was found that 15 months to 3 year was ordinarily taken for getting the dispute referred from the date of dispute raised by the union before the Conciliation Officer till it was referred to Industrial Tribunals. The Central Government itself took one to two years to make reference from the date of the receipt of the failure report by Conciliation Officers.

Various empirical studies conducted in different States revealed that the Government had taken 6 to 24 months for making a reference after receiving the failure report from Conciliation Officer. A study conducted by researcher in the State

of Jammu and Kashmir, reveals that the average time taken by the Appropriate Government to refer the dispute after receiving failure report from Conciliation Officer was 9 months. Four out of Twenty cases it is between 15 to 20 months and in Faridabad it reveals that out of 26 references 13 took more than 90 days, 6 references took more than 150 days and the reference of one dispute APL (9), took 452 days after the failure report.

It is already discussed in the earlier, where the Supreme Court had directed the Government to refer the dispute for adjudication of the matter which was pending before it for more than a decade.

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 was highly unreasonable and in some matters 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 Act. Hence, recommendations of Second NCL providing for direct approach of parties to the Labour Court, Conciliation, Arbitration or to Labour Relations Commissions in respect of all matters specified in Second Schedule of the I.D. Act is significant one. As such it needs serious considerations by the law making authority.

3. **Discriminatory treatment by Government in exercise of power of reference under Section 10(1) of the Act**

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

(i) Inexpensive and quick resolving of industrial conflicts and thereby providing speedy justice to the working class is the reason 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 disputes.

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 Act.

(ii) 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 favored 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.

(iii) 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 at least 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.

(iv) 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 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.

(v) It is true that final determination of an industrial dispute is made by the Labour Court or Industrial Tribunal to which the dispute is referred for adjudication. But is it to suggest that the Labour Court or Industrial Tribunal 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 power. 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.

Hence, the First National Commission on Labour observed that, "There have been complaints of political pressure and interference. And this aspect cannot be entirely ignored in framing our recommendations. To get rid against this and to do away with existing exclusive discretionary power of the Government the first NCL recommended for Independent Industrial Relations Commissions which are to be entrusted with the function of deciding to make references of interests disputes for adjudication upon the failure of bipartite negotiations. As regards legal or rights disputes, the NCL favoured the retention of Labour Court, where proceedings instituted by parties asking for the enforcement of rights under the aforesaid categories will be entertained by Labour Courts. Even the Second NCL also has recommended for direct access to parties for adjudication in respect of matters specified in second schedule of the Act and minimizes the role of Government in settlement of disputes.

4. **Lack of expatriation**

The question of reference is ultimately decided under the present system by the bureaucratic or political administration which lacks expert knowledge on labour problems. By the stretch of any imagination, bureaucrats and politicians cannot be treated as better repertories of expertise in labour matters than well trained and experienced presiding officers of Labour Courts and Tribunals. It is more so in view of the fact that top official positions in the Labour Department, as in other departments of the Government, are manned by different bureaucrats and politicians on different occasions. This process undeniably does not make for the conserving of necessary expertise in industrial and labour matters. This is in stark contrast with the devoted and constant engrossment of labour adjudicators with the study of varies case law and legal enactment in the era labour law. The IRCs consisting of experts in the area as recommended by the first NCL would be more appropriate body to exercise such power and the recommendations of second NCL i.e. aggrieved worker in case of individual disputes and by an recognized union in case of collective disputes within a period of one year from the date of the cause of action arose. These are matters of serious consideration by law making Authority.