Form No. J(1)

IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

Present :

The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Ajay Kumar Gupta

F.M.A No. 75 of 2020
The Hindustan Cables Worker's Union & Ors.
Versus
The Union of India & Ors.

MAT 254 of 2020
M/s . Hindustan Cables Limited & Anr.
Vs.
M/s. Hindustan Cables Worker's Union & Ors.

For the Appellant :Mr. L.K. Gupta, Ld. Sr. Adv.
Mr. Arjun Ray Mukherjee, Adv.
Mr. Apurba Ghosh, Adv.

For the Union of India :Mr. Indrajeet Dasgupta,
Ms. Puspita Bhowmick, Adv.

For the Respondent nos. 4, 5, & 6 :Mr. ParthaSarathi Sengupta, Ld. Sr. Adv.
Mr. Soumya Majumdar, Ld. Sr. Adv.
Mr. Rohit Das, Adv.
Ms. Kishwar Rahman, Adv.

Heard on : 21st February, 2025.

Judgment on : 28th February, 2025.

Rajasekhar Mantha, J.:

1. The present appeal MAT 254 of 2020 has been carried from a judgment and order dated 13th September 2019 passed by a Single Bench of this Court in W.P. No. 3303 of 2015.
2. By the impugned judgment, the Learned Single Bench has held that the change of the retirement age from 60 to 58 years of the workmen of the Rupnarayanpur Unit of the appellant is vitiated by applying the principle of procedural ultra vires, since the notice impugned dated 24th December 2013, was not issued by the management in Form E prescribed under Rule 34 of the Industrial Disputes Rules, 1957 (Rules of 1957), and hence violated Section 9A of the Industrial Disputes Act, 1947 (Act of 1947).
3. Yet another appeal FMA 75 of 2020 has been preferred against the selfsame judgment impugned, by the workmen's union prior thereto. The workmen contended that the learned Single Judge, having recognized that the change in terms and conditions of service of the workmen was illegal, has erroneously declined consequential benefits to the workmen i.e. additional closure and or other benefits.

The Facts of the Case

4. The facts relevant to the case are that on 6th July 1964 certified industrial standing orders were published by the management M/s. Hindustan Cables Limited (HCL) where it was specified that the age of superannuation of the workmen would be 58 years. It was further specified that the service of the

workmen could be extended, at the discretion of the management, by 1 year each, for a maximum period of period of 2 years.

5. On the 7th June 1974, a Tri-Partite agreement was signed between the management and the workmen unions in the presence of the Additional Labour Commissioner and Conciliation Officer, which provided that, subject to the approval of the Directors, the superannuation age of the workmen would be 60 years instead of 58 years. The validity of the agreement was to be for a period of 3 years and 2 months.
6. Sometime in January, 1977 further certified standing orders were published in respect of the workmen and the HCL, which did not specify the age of superannuation.
7. The Department of Public Enterprise, Government of India on 19th May 1998 instructed all public sector organizations like the appellant herein that the retirement age of all employees would have to be increased to 60 years from the age of 58 years. The same was reiterated by the Ministry of Heavy Industries and Public Enterprises vide communication dated 21st August 1998 to all Central Government Public Enterprises like the appellant.
8. The Rupnarayanpur Unit of the HCL sank into financial doldrums for various reasons and was incurring huge losses. A communication dated 18th April 2001 issued by the Ministry of Heavy Industries and Public Enterprises, directed the Chairman of the Rupnarayanpur unit of M/s. HCL for reduction of the retirement age from 60 to 58 years. Consequently, a

decision to that effect was taken on 9th April, 2001 at the 276th Meeting of the Board of Directors of HCL. It was further directed that the standing orders WB Unit of the HCL must be amended in consultation with the Labour Department.

9. However, by a memorandum of Settlement between the management and the workmen of HCL dated 28th August 2001, the retirement age of the workmen was reduced to what it was before the office memorandum dated 19th May 1998.

10. By a further communication dated 1st April 2005 the Department of Public Enterprises (DPE) issued a guideline indicating the retirement age of workmen of HCL, WB to be reduced from 60 to 58 years. The workmen did not act on the same. The dispute continued until 2010 during which a large number of employees of HCL were allowed to continue up to 60 years from time to time.

11. Sometime in January and March, 2011, management of HCL referred the issue of retirement age between the employees and employer to the Assistant Labour Commissioner (Central), Asansol for conciliation. The said conciliation failed and such failure was duly recorded on the 24th May, 2011 and communicated to the Central Government. The Labour Ministry however did not find and dispute to refer to the CGIT under section 10 of the Act of 1947.

12. M/s. HCL was thereafter taken over by the "Ordinance Factory Board" sometime in February 2013.

13. By a further communication dated 22nd September, 2014, under the Secretary to the Ministry of Heavy Industries and Public Enterprises issued an office order enquiring about the HCL, of its implementation of the roll back. Sometime on 22nd September, 2014 the Under Secretary to the Government of India addressed a communication to the Rupnarayanpur Unit of the M/s. HCL, directing the retirement age of all employees to be rolled back from 60 to 58 years, at par with all other workmen of the company. While holding that the dispute as regards retirement age cannot be construed as an industrial dispute, he refused to refer the matter to the appropriate Tribunal for adjudication.

14. Curiously, however, the said Under Secretary also directed the CMD of HCL that for the purpose of the rolled back of retirement age as aforesaid from 60 to 58 years, due notices under the Industrial Disputes Act, 1947 and the Industrial Disputes Rules, 1957 are made therein for making necessary changes in the condition of service for the concerned employees and the said Rupnarayanpur Unit of M/s. HCL.

15. The company thereafter sought to obtain an undertaking from its workmen that they were liable for all India transfers. On the 20th September 2014, the Deputy Manager of the HCL issued 60 days notice to the workmen to the Unit, fixing the age of retirement at 58 years.

16. The Workmen's Union filed Writ Petition under article 226 of the Constitution, seeking mandamus to quash the notice dated 20th December, 2014. A subsequent development occurred thereafter when the management of M/s. HCL ordered closure of the Rupnarayanpur Unit of West Bengal with effect from 31st May 2017.

17. As already stated hereinabove, the Single Bench held the impugned notice dated 20th December 2014 issued by the Deputy Manager of HCL, fixing the age of retirement of the employees of M/s. HCL at 58 years of age to be illegal and bad in law for non-compliance of the procedure fixed for issuance of notice of change under Rule 34 as it did not conform to the text of Form E of the said Rules.

18. Mr. Parathi Sarathi Sengupta, learned Senior Counsel for the appellant HCL has made several arguments assailing the impugned judgment. He has also relied upon several authorities. Mr. L.K. Gupta learned Senior Counsel appearing for the workmen's union has countered the arguments of the appellants and has also relied upon several decisions of the Supreme Court.

19. Based on the arguments advanced by learned Counsel for the parties this Court is of the view that the following questions arise for consideration and answer to address the instant appeal:

    (a) Whether a notice of change dated 20th December 2013, was in substance complied with Section 9A of the Act of 1947 read with Rule 34 of the Rules of 1959

(b) Whether the impugned notice dated 20th December 2014, admittedly in partial deviation from Form E under Rule 34 of the 1957 Rules, but giving 60 days, i.e. 30 days more than prescribed, has caused prejudice to the workmen in the instant case?

(c) Whether the refusal on the part of the Central government, to refer to the long pending dispute with regard to the roll back of the age of superannuation of the workmen, under Section 10 of the Act of 1947, is justified in law?

(d) Whether given the fact that even the workmen are unhappy with the absence of consequential benefits being awarded by the Single Bench and given the fact that the learned Single Judge has recorded that there are disputed questions of fact involved, the High Court ought to have referred the moot dispute by reference under Section 10 of the Act of 1947, for adjudication to the CGIT, in view of the availability of effective alternative remedy under the provisions of the Industrial Disputes Act, 1947.

(e) Whether given the financial and other issues that prompted the company to roll back the retirement age of the workmen of Rupnarayanpur Unit of M/s. HCL in West Bengal which are admittedly disputed question of fact, could have been decided in a writ petition under Article 226 of the Constitution of India?

(f) Is the accepted principle that the availability of effective alternative remedy not being a bar but a self-imposed discipline, applicable in the facts of the instant case, to the exercise of jurisdiction under Article 226 of the Constitution of India?

20. Insofar as the issue no. 1 is concerned, without much ado, this Court is inclined to refer to the decision cited by Mr. L.K. Gupta, learned Counsel for the respondent in the case of ***Paradeep Phosphates Limited v. State of Orissa and Ors.*** reported in ***(2018) 6 SCC 195***. While setting out Section 9A of the Act of 1947 and Clause 8 of the 4th Schedule thereof, it has been clearly laid down in paragraphs 22, 24, 25 and 27 that the roll back of retirement age of the workmen construes a privilege within the meaning of 8th Clause of the 4th Schedule of the Act of 1947. Para 27 of the said decision is set out herein below:

> "**27**. To sum up, we are of the view that at the very moment when the order of enhancement of superannuation of the employees came into force though temporary in nature, it would amount to privilege to employees since it is a special right granted to them. Hence, any unilateral withdrawal of such privilege amounts to contravention of Section 9-A of the Act and such act of the employer is bad in the eye of the law."

21. The facts ***Paradeep Phosphates case (Supra)*** also bear a striking resemblance to the instant case, except that, the Government of Orissa in the said case made a reference under Section 12 read with Section 10 of the Industrial Disputes Act, 1947 on the said issue, of roll back of superannuation age of the workmen. The Supreme Court has however while

approving the award of the Tribunal and the High Court has held that the roll back of the age of superannuation by the employee therein without compliance of the provisions of Section 9A of the Act of 1947 was illegal. The reason why this Court is of the view, that it should go a step further in this case, would be evident from the discussions hereafter.

22. The argument of learned Counsel for the appellants that the matter of roll back of retirement age is outside the scope of Section 9A read with the Schedule to the Act is, therefore, cannot be acceptable to this Court.

23. It would appear from the facts of the case that the issue with regard to roll back of the retirement age has been continuing since the year 2005 where a dispute with regard to the clarification of Clause 17 of the bi-partite agreement between the management and the workmen dated 20th August, 2001 came to be questioned by both sides. The Central Government as well as the Unit of the HCL have been repeatedly asking the management of the West Bengal Unit to roll back the retirement age of workmen from 60 to 58 during the said period.

24. Admittedly the financial condition of M/s. HCL has been negative for a substantial period of time since 2005 if not before. It is essentially for this reason that the entire business of the company was taken over by the Ordinance Factory Board in February 2013. The HCL continued to remain as a shell company until the appropriate authority issued permission for the closure of Rupnarayanpur Unit of the said company on 31st May 2017.

25. On the issue of the legality of the notice of change dated 20th December 2013, this Court has noticed the decision of the Supreme Court in the case of ***Harmohinder Singh v. Kharga Canteen, Ambala Cantt.*** reported in ***(2001) 5 SCC 540*** para 12 cited by Mr. L.K. Gupta.

> "**12.** Section 9-A of the Act relied upon by the appellant only provides that an employer proposing to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to the Act cannot affect such change without giving to the workmen notice in the prescribed manner. The provisions of the section are no doubt mandatory. But the preconditions to their applicability are:
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> (*i*) there must be a change in the conditions of service;
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> (*ii*) the change must be such that it adversely affects the workmen; see *Hindustan Lever Ltd.* v. *Ram Mohan Ray* [(1973) 4 SCC 141 : 1973 SCC (L&S) 309 : (1973) 1 LLJ 427] ; and
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> (*iii*) the change must be in respect of any matter provided in the Fourth Schedule to the Act."

26. Indeed, a notice in the prescribed manner is essential for the purpose of compliance of the provisions of Section 9A of the Act of 1947. The issue that however comes for consideration is as to whether the letter dated 20th December, 2014 is invalid simply because it does not follow in letter and word of the prescribed Form E under Rule 34 of the Rules of 1957.

27. This Court notices that the impugned notice dated 20th December 2014 was addressed to all the workmen's union. The notice of proposed change ie roll back of retirement age of the workmen was admittedly to the knowledge of the workmen, was to the knowledge of the workman, if not much prior to the said notice. While Section 9A prescribes a 30 days notice period, the impugned notice specified 60 days. This Court is therefore of the view that

there has been substantial compliance of the requirements of notice under Form E in the prescribed manner. The absence of certain clerical parts in the format specified under Form E, could not have constituted a non-compliance of Section 9A of the Act of 1947.

28. Reference in this regard is made to the decision of ***Manu Saxena v. Union of India & Anr.*** reported in ***(2019) 2 SCC 628*** where the substance of a notice and not its form was discussed in a case under Section 25F of the Industrial Disputes Act. Para 6.7, 6.8 and 6.9 are set out herein below:

> "**6.7.** Section 25-F of the ID Act, 1947 is extracted hereinbelow:
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> "**25-F. *Conditions precedent to retrenchment of workmen***.—No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—
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> (*a*) The workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
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> (*b*) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
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> (*c*) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."
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> **6.8.** In the present case, R-2 Bank has paid the appellant a sum of Rs 8,17,071, which included 6 months' pay in lieu of notice under Section 25-F(*a*) and an additional amount calculated on the basis of 15 days' salary multiplied by the number of years of service, in compliance with Section 25-F(*b*).
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> **6.9.** However, no notice was sent to the appropriate Government or authority notified, in compliance with Section 25-F(*c*) of the ID Act. A three-Judge Bench of this Court in *Gurmail Singh* v. *State of Punjab* [*Gurmail Singh* v. *State of Punjab*, (1991) 1 SCC 189 : 1991 SCC (L&S) 147] held that the requirement of clause (*c*) of Section 25-F can be treated only as directory and not mandatory. This was followed in *Pramod Jha* v. *State of Bihar* [*Pramod Jha* v. *State of Bihar*, (2003) 4 SCC 619 : 2003 SCC (L&S)

> 545] wherein it was held that compliance with Section 25-F(*c*) is not mandatory."

29. Indeed it is true that the law mandates that, "when a statute requires something to be done in a particular manner, it must be done only in such manner and not otherwise". The said principle must however be addressed in the light of the prejudice theory evolved by the Supreme Court in the case of ***State Bank of Patiala v. S.K. Sharma*** reported in ***(1996) 3 SCC 364.*** The principle evolved is whether non-compliance of any statutory provision has caused any prejudice to the affected party. Paragraphs 10, 11, 12, 28, 29, 31 of the said decision are setout hereinbelow.

> "**10.** Sub-clause (*iii*) aforesaid is indisputably part of a regulation made in exercise of statutory authority. The sub-clause incorporates a facet of the principle of natural justice. It is designed to provide an adequate opportunity to the delinquent officer to cross-examine the witnesses effectively and thereby defend himself properly. It is relevant to note in this behalf that neither the enquiry officers' report nor the judgment of the trial court, appellate court or High Court say that the respondent had protested at the relevant time that he was denied an adequate opportunity to cross-examine the witnesses effectively or to defend himself properly on account of non-supply of the statements of witnesses. The appellate court, on the contrary, has recorded that when he was advised to peruse, examine and take notes from the documents including the statements of witnesses (Kaur Singh and Balwant Singh), the only objection raised by the respondent was that "the documents marked Exhs. P-6, P-10 and P-11 were only photostat copies and not originals and should not be considered or marked exhibits". (Exhs. P-6, P-10 and P-11 are documents other than the statements of witnesses, i.e., of Kaur Singh and Balwant Singh.) Moreover, as pointed out above, the examination of witnesses began long after the expiry of three days from the day on which the respondent was advised to and he did peruse the documents and statements of witnesses. In the circumstances, it is possible to say that there has been a substantial compliance with the aforesaid sub-clause (*iii*) in the facts and circumstances of this case, though not a full compliance. This, in turn, raises the question whether each and every violation of rules or regulations governing the enquiry automatically vitiates the enquiry and the punishment awarded *or* whether the test of substantial compliance can be invoked in

cases of such violation and whether the issue has to be examined from the point of view of prejudice. So far as the position obtaining under the Code of Civil Procedure and the Code of Criminal Procedure is concerned, there are specific provisions thereunder providing for such situation. There is Section 99 of the Code of Civil Procedure and Chapter 35 of the Code of Criminal Procedure. Section 99 CPC says:

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action *or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.*"

Section 465(1) of the Criminal Procedure Code, which occurs in Chapter 35 similarly provides that:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment *or other proceedings before or during trial or in any inquiry or other proceedings under this Code*, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby."

11. It is not brought to our notice that the State Bank of Patiala (Officers') Service Regulation contains provision corresponding to Section 99 CPC or Section 465 CrPC. Does it mean that any and every violation of the regulations renders the enquiry and the punishment void *or* whether the principle underlying Section 99 CPC and Section 465 CrPC is applicable in the case of disciplinary proceedings as well. In our opinion, the test in such cases should be one of prejudice, as would be later explained in this judgment. But this statement is subject to a rider. The regulations may contain certain substantive provisions, e.g., who is the competent authority to impose a particular punishment on a particular employee/officer. Such provisions must be strictly complied with. But there may be any number of procedural provisions which stand on a different footing. We must hasten to add that even among procedural provisions, there may be some provisions which are of a fundamental nature in the case of which the theory of substantial compliance may not be applicable. For example, take a case where a rule expressly provides that the delinquent officer/employee shall be given an opportunity to produce evidence/material in support of his case after the close of evidence of the other side. If no such opportunity is given at all in spite of a request therefor, it will be difficult to say that the enquiry is not vitiated. But in respect of many procedural provisions, it would be possible to apply the theory of substantial compliance or the test of prejudice, as the case may be. The position can be stated in the following words: (1) Regulations which are of a substantive nature have to be complied with and in case of such provisions, the theory of substantial compliance would not be available. (2) Even among procedural

provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case, the theory of substantial compliance may not be available. (3) In respect of procedural provisions other than of a fundamental nature, the theory of substantial compliance would be available. In such cases, complaint/objection on this score have to be judged on the touchstone of *prejudice*, as explained later in this judgment. In other words, the test is: *all things taken together whether the delinquent officer/employee had or did not have a fair hearing*. We may clarify that which provision falls in which of the aforesaid categories is a matter to be decided in each case having regard to the nature and character of the relevant provision.

12. It would be appropriate to pause here and clarify a doubt which one may entertain with respect to the principles aforestated. The several procedural provisions governing the disciplinary enquiries (whether provided by rules made under the proviso to Article 309 of the Constitution, under regulations made by statutory bodies in exercise of the power conferred by a statute or for that matter, by way of a statute) are nothing but elaboration of the principles of natural justice and their several facets. It is a case of codification of the several facets of rule of audi alteram partem or the rule against bias. One may ask, if a decision arrived at in violation of principles of natural justice is void, how come a decision arrived at in violation of rules/regulations/statutory provisions incorporating the said rules can be said to be not void in certain situations. It is this doubt which needs a clarification — which in turn calls for a discussion of the question whether a decision arrived at in violation of any and every facet of principles of natural justice is void.

28. The decisions cited above make one thing clear, viz., principles of natural justice cannot be reduced to any hard and fast formulae. As said in *Russell* v. *Duke of Norfolk* [(1949) 1 All ER 109 : 65 TLR 225] way back in 1949, these principles cannot be put in a strait-jacket. Their applicability depends upon the context and the facts and circumstances of each case. (See *Mohinder Singh Gill* v. *Chief Election Commr.* [(1978) 1 SCC 405 : (1978) 2 SCR 272]) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. (See *A.K. Roy* v. *Union of India* [(1982) 1 SCC 271 : 1982 SCC (Cri) 152] and *Swadeshi Cotton Mills* v. *Union of India* [(1981) 1 SCC 664] .) As pointed out by this Court in *A.K. Kraipak* v. *Union of India* [(1969) 2 SCC 262] , the dividing line between quasi-judicial function and administrative function (affecting the rights of a party) has become quite thin and almost indistinguishable — a fact also emphasised by House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service* [(1984) 3 All ER 935 : (1984) 3 WLR 1174 : 1985 AC 374, HL] where the principles of natural justice and a fair hearing were treated as synonymous. Whichever the case, it is from the standpoint of fair hearing — applying the test of prejudice, as it may be called — that any and every complaint of violation of the rule of audi alteram partem should be examined. Indeed, there may be situations where observance of the

requirement of prior notice/hearing may defeat the very proceeding — which may result in grave prejudice to public interest. It is for this reason that the rule of post-decisional hearing as a sufficient compliance with natural justice was evolved in some of the cases, e.g., *Liberty Oil Mills* v. *Union of India* [(1984) 3 SCC 465] . There may also be cases where the public interest or the interests of the security of State or other similar considerations may make it inadvisable to observe the rule of audi alteram partem altogether [as in the case of situations contemplated by clauses (*b*) and (*c*) of the proviso to Article 311(2)] or to disclose the material on which a particular action is being taken. There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such *and* violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no *adequate* hearing" or to put it in different words, "no opportunity" and "no *adequate* opportunity". To illustrate — take a case where the person is dismissed from service without hearing him altogether (as in *Ridge* v. *Baldwin* [1964 AC 40 : (1963) 2 All ER 66 : (1963) 2 WLR 935]). It would be a case falling under the first category and the order of dismissal would be *invalid* — or void, if one chooses to use that expression (*Calvin* v. *Carr* [1980 AC 574 : (1979) 2 All ER 440 : (1979) 2 WLR 755, PC]). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report (*Managing Director, ECIL* v. *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704]) or without affording him a due opportunity of cross-examining a witness (*K.L. Tripathi* [(1984) 1 SCC 43 : 1984 SCC (L&S) 62]) it would be a case falling in the latter category — violation of a facet of the said rule of natural justice — in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct — in the light of the above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a *proper hearing* (i.e., adequate or a full hearing) *or* of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice as aforesaid.

29. The matter can be looked at from the angle of justice or of natural justice also. The object of the principles of natural justice — which are now understood as synonymous with the obligation to provide a fair

hearing [See the discussion of this aspect at p. 515 of Wade: Administrative Law (7th Edn.). In particular, he refers to the speech of Lord Scarman in *CCSU* v. *Minister for the Civil Service26* [AC at 407] where he used both these concepts as signifying the same thing.] — is to ensure that justice is done, that there is no failure of justice and that every person whose rights are going to be affected by the proposed action gets a fair hearing. The said objective can be tested with reference to sub-clause (*iii*) concerned here. It says that copies of statements of witnesses should be furnished to the delinquent officer "not later than three days before the commencement of the examination of the witnesses by the inquiring authority". Now take a case — not the one before us — where the copies of statements are supplied only two days before the commencement of examination of witnesses instead of three days. The delinquent officer does not object; he does not say that two days are not sufficient for him to prepare himself for cross-examining the witnesses. The enquiry is concluded and he is punished. Is the entire enquiry and the punishment awarded to be set aside on the only ground that instead of three days before, the statements were supplied only two days before the commencement of the examination of witnesses? It is suggested by the appellate court that sub-clause (*iii*) is mandatory since it uses the expression 'shall'. Merely because the word 'shall' is used, it is not possible to agree that it is mandatory. We shall, however, assume it to be so for the purpose of this discussion. But then even a mandatory requirement can be waived by the person concerned if such mandatory provision is conceived in his interest and not in public interest, vide *Dhirendra Nath Gorai* v. *Sudhir Chandra Ghosh* [(1964) 6 SCR 1001 : AIR 1964 SC 1300] . Subba Rao, J., speaking for the Court, held:

"Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it. In the present case the executing court had inherent jurisdiction to sell the property. We have assumed that Section 35 of the Act is a mandatory provision. If so, the question is whether the said provision is conceived in the interests of the public or in the interests of the person affected by the non-observance of the provision. It is true that many provisions of the Act were conceived in the interests of the public, but the same cannot be said of Section 35 of the Act, which is really intended to protect the interests of a judgment-debtor and to see that a larger extent of his property than is necessary to discharge the debt is not sold. Many situations may be visualized when the judgment-debtor does not seek to take advantage of the benefit conferred on him under Section 35 of the Act."

31. Sub-clause (*iii*) is, without a doubt, conceived in the interest of the delinquent officer and hence, he could waive it. From his conduct, the respondent must be deemed to have waived it. This is an aspect which

> must be borne in mind while examining a complaint of non-observance of procedural rules governing such enquiries. It is trite to remember that, as a rule, all such procedural rules are designed to afford a full and proper opportunity to the delinquent officer/employee to defend himself and are, therefore, conceived in his interest. Hence, whether mandatory or directory, they would normally be conceived in his interest only."

30. Applying the aforesaid dicta in the facts of the instant case, this Court is of the clear view that the notice dated 20th December 2014 is in substantial compliance with Section 9A and Form E under Rule 34 of the Rules of 1957. The notice of change in the facts of the instant case therefore cannot be faulted.

31. It is equally now well settled that notwithstanding the prayers made in a writ petition, a writ Court is empowered to do substantial justice, by identifying an narrowing down the real issues between the parties. The moot question therefore is whether or not the Central government was justified in refusing to make a reference to the Tribunal under Section 10 of the Act of 1947 despite the failure of conciliation recorded by the Assistant Labour Commissioner dated 24th May, 2011 and the continued impasse with regard to the roll back of the age of retirement, between the management and the workmen of HCL.

32. In the case of ***A.P. Foods v. S. Samuel and Ors.*** reported in ***(2006) 5 SCC 469***, the Supreme Court held that while it is true that it is for the appropriate government whether to refer a dispute under Section 10 and 12 of the Act of 1947 as held at Para 12,13, and 14 as follows, this Court has

only complied the aforesaid decision in passing the direction of the Central Government as above.

> **"12.** A bare reading of Section 22 of the Act makes the position clear that where the dispute arises between an employer and employees with respect to the bonus payable under the Act or with respect to the application of the Act in public sector then such dispute shall be deemed to be an industrial dispute within the meaning of the ID Act.
> **13.** As disputed questions of fact were involved, and alternative remedy is available under the ID Act, the High Court should not have entertained the writ petition, and should have directed the writ petitioners to avail the statutory remedy.
> **14.** However, because of the long passage of time (the writ petition was filed in 1996), the attendant circumstances of the case in the background noted above and in view of the agreement that this is a matter which requires to be referred to the Tribunal, we direct that the appropriate Government shall refer the following questions for adjudication by the appropriate Tribunal:
> (*1*) Whether there was violation of Section 9-A of the Industrial Disputes Act, 1947 as claimed by the employees?
> (*2*) Whether the withdrawal of the construction allowance amounted to the change in the conditions of service?
> (*3*) Whether A.P. Foods was liable to pay bonus under the Act to its employees?"

33. It is equally well settled, as held by the Supreme Court in the case of Ram ***Avatar Sharma and Ors. v. State of Haryana and Anr***. reported in ***(1985) 3 SCC 189***, that a decision of the Central Government either to refer a decision or otherwise to construe and refer a dispute or otherwise is amenable to the writ jurisdiction under Article 226 of the Constitution of India. Para 7 to 9 of the said decision are set out herein below:

> **"7.** Now if the Government performs an administrative act while either making or refusing to make a reference under Section 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis. That would certainly be in excess of the power conferred by Section 10. Section 10 requires the appropriate Government to be satisfied that an industrial dispute exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial

dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace and harmony. Every administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on the irrelevant, extraneous or grounds not germane to the exercise of power it is liable to be questioned in exercise of the power of judicial review. In *State of Bombay* v.*K.P. Krishnan* [AIR 1960 SC 1223 : (1961) 1 SCR 227, 243 : (1960) 2 LLJ 592 : 19 FJR 61] it was held that a writ of mandamus would lie against the Government if the order passed by it under Section 10(1) is based or induced by reasons as given by the Government are extraneous, irrelevant and not germane to the determination. In such a situation the Court would be justified in issuing a writ of mandamus even in respect of an administrative order. Maybe, the Court may not issue writ of mandamus, directing the Government to make a reference but the Court can after examining the reasons given by the appropriate Government for refusing to make a reference come to a conclusion that they are irrelevant, extraneous or not germane to the determination and then can direct the Government to reconsider the matter. This legal position appears to be beyond the pale of controversy.

8. Accordingly, it is necessary to examine the reasons given by the Government to ascertain whether the determination of the Government was based on relevant considerations or irrelevant, extraneous or considerations not germane to the determination.

Re: *Writ Petitions Nos. 16226-29 of 1984*

9. The reasons assigned by the Government for refusing to make a reference are to be culled out from the letter Annexure 'A' dated September 1, 1984 sent by the Joint Secretary, Haryana Government, Labour Department to the petitioners. It is stated in the letter that: "the Government does not consider your case to be fit for reference for adjudication, to the Tribunal as it has been learnt that your services were terminated only after charges against you were proved in a domestic enquiry". The assumption underlying the reasons assigned by the Government are that the enquiry was consistent with the rules and the Standing Orders, that it was fair and just and that there was unbiased determination and the punishment was commensurate with the gravity of the misconduct. The last aspect has assumed considerable importance after the introduction of Section 11-A in the Industrial Disputes Act by Industrial Disputes (Amendment) Act, 1971 with effect from December 15, 1971. It confers power on the Tribunal not only to examine the order of discharge or dismissal on merits as also to determine whether the punishment was commensurate with the gravity of the misconduct charged. In other words, Section 11-A confers power on the Tribuna1/Labour Court to examine the case of the workman whose service has been terminated either by discharge or dismissal qualitatively in the matter of nature of enquiry and quantitatively in the matter of adequacy or otherwise of punishment. The workmen questioned the legality and validity of the enquiry which aspect the Tribunal in a quasi-judicial determination was required to examine. A bare statement that a domestic enquiry was

held in which charges were held to be proved, if it is considered sufficient for not exercising power of making a reference under Section 10(1), almost all cases of termination of services cannot go before the Tribunal. And it would render Section 2-A of the Act denuded of all its content and meaning. The reasons given by the Government would show that the Government examined the relevant papers of enquiry and the Government was satisfied that it was legally valid and that there was sufficient and adequate evidence to hold the charges proved. It would further appear that the Government was satisfied that the enquiry was not biased against the workman and the punishment was commensurate with the gravity of the misconduct charged. All these relevant and vital aspects have to be examined by the Industrial Tribunal while adjudicating upon the reference made to it. In other words, the reasons given by the Government would tantamount to adjudication which is impermissible. That is the function of the Tribunal and the Government cannot arrogate to itself that function. Therefore if the grounds on which or the reasons for which the Government declined to make a reference under Section 10 are irrelevant, extraneous or not germane to the determination, it is well-settled that the party aggrieved thereby would be entitled to move the Court for a writ of mandamus. (See *Bombay Union of Journalists* v. *State of Bombay* [AIR 1964 SC 1617 : (1964) 6 SCR 22 : (1964) 1 LLJ 351 : 26 FJR 32] .) It is equally well-settled that where the Government purports to give reasons which tantamount to adjudication and refuses to make a reference, the appropriate Government could be said to have acted on extraneous, irrelevant grounds or grounds not germane to the determination and a writ of mandamus would lie calling upon the Government to reconsider its decision. In this case a clear case for grant of writ of mandamus is made out.

Writ Petition No. 16418 of 1984"

34. In ***Rahman Industries (P) Ltd. v. State of U.P.*** reported in ***(2016) 12 SCC 420,*** the Hon'ble Supreme Court held that the Court may direct the appropiate government to refer a dispute to the tribunal in exercise of the power of judicial review:-

> **"3.** We find force in the submission made by the learned counsel. In the scheme of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"), it is not as if the Government has to act as a post office by referring each and every petition received by them. The Government is well within its jurisdiction to see whether there exists a dispute worth referring for adjudication. No doubt, the Government is not entitled to enter a finding on the merits of the case and decline reference. The Government has to satisfy itself, after applying its mind to the relevant factors and satisfy itself to the existence of dispute before taking a decision to refer the same for adjudication. **Only in case, on judicial scrutiny**, the court finds that the

> refusal of the Government to make a reference of the dispute is unjustified on irrelevant factors, the court may issue a direction to the Government to make a reference.
>
> 6. In Telco Convoy Driver's Mazdoor Sangh v. State of Bihar [Telco Convoy Driver's Mazdoor Sangh v. State of Bihar, (1989) 3 SCC 271 : 1989 SCC (L&S) 465] , it has been held that on judicial review, if the court finds that the appropriate Government was not justified in not making a reference, the court may issue a ***positive*** direction to make a reference."

35. The Supreme Court in the case of ***Imperial Chemical Industries (India) (P) Ltd. v. Workmen*** reported in ***1960 SCC OnLine SC 330,*** referred to the tribunal's award, while examining the issue of age of retirement. The award was based on oral and documentary evidence. Hence, the facts of the case warrant a reference by the Central Government to the tribunal. Paragraph 10 of the said decision is setout hereinbelow:-

> 10.... In regard to Godrej and Boyce there was a dispute between the parties as to the real age of retirement fixed by the employer; similarly there was a dispute about the age of retirement in Brooke Bond (India) Private Limited. The learned Tribunal considered the evidence supplied by the two documents Ext C-1 and Ext U-1 and held that having regard to all the relevant circumstances it would not be unreasonable to fix the retiring age at 58 in the present case. It is true that in dealing with this question the Tribunal has commenced its discussion with the observation that in a number of concerns the retirement age is 60, and that there had been for sometime a trend to increase the retirement age from 55 to upwards; but the tone and trend of the discussion leave no room for doubt that the Tribunal failed to take into account the evidence supplied by the workmen in their document Ext B filed along with their claim. This evidence strongly suggests almost a uniform tendency in Bombay to fix the age of retirement at 60 and not 55. If the Tribunal had considered this evidence and given reasons why it did not justify the workmen's claim for fixing the age of retirement at 60 it would have been another matter. Since the award does not refer to this document and gives no reasons why the trend disclosed by the document should not be adopted in the present case it has become necessary for this Court to consider that question for itself
>
> emphasis applied

36. A co-ordinate bench in the case of ***M/s. Hindustan Cables Ltd. & Ors. v. Tapan Kumar Sarkar & Ors.*** reported in ***2016 SCC OnLine Cal 4385*** has held that the employer has not been making payment of salaries and wages. A Writ Petition was filed before the Single Bench of this Court which directed the appellant herein to make payment of all arrears and salaries. It had further directed that if the HCL was not able to make payment of the same, the Central Government should bear the financial burden. Referring the decision of the Single Bench, the said Co-ordinate bench held that the alternative remedy before the Act of 1947 should be availed by the employee concerned and the writ court is not the appropriate forum to decide the entitlement of wages.

37. It is now well settled that when a specific remedy is provided under a statute it is only such remedy that must be invoked. Reference in this regard is made to the decision in the case of ***A.P. Foods (supra)*** where the issue under Section 22 of the Payment of Bonus Act was admitted by the industrial dispute. The Supreme Court held that it is only the authorities under the Payment of Bonus Act, 1965 that should be availed.

38. Curiously HCL and the Central Government in the order dated 22nd September, 2014 while refusing to recognise the issue of roll back of retirement age cannot be construed as an "industrial dispute" yet required the management to comply with the provisions of the Act of 1947 and the

Rules of 1957 for making necessary change in the condition of service of the West Bengal unit of M/s. HCL.

39. Admittedly the dispute with regard to roll back was earlier referred for conciliation by the management itself. Despite receiving notice of failure of conciliation by the management itself on 14th January, 2011. The failure of conciliation was duly reported to the Central Government. Despite thereof, the Central Government was to take a stand in the impugned notice dated 20th December, 2014 that there was no need for reference of any industrial dispute was wholly incorrect and unsustainable in law.

40. The consequence of the inaction and the stubbornness of the Central Government has unfortunately prolonged the issue since 2005 and the issue is still at large. This Court is therefore of the view that the Central Government must refer the issue of alleged roll back of retirement age of the workmen of Rupnarayanpur Unit of M/s. HCL without any further delay.

41. Sadly even the workmen have not benefitted in any form by the impugned decision. They have not received any consequential benefit. The Single Bench in this regard has held that there are disputed question of fact. It ought to have either dismiss the writ petition or ought to have directed a reference to be made by the Central Government. The Single Bench ought to have applied the dicta in ***A.P. Food (supra)*** decision for the purpose of the aforesaid reference.

42. This Court is also reminded of the decision in ***Comptroller and Audit General of India, Gian Prakash, New Delhi and Anr. v. K.S. Jagannathan and Anr.*** reported in 1986 2 SCC 67 which held as follows:-

> **"18.** In Dwarkanath v. ITO this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "**to reach injustice wherever it is found**" **and** "**to mould the reliefs to meet the peculiar and complicated requirements of this country."**
>
> emphasis applied

43. This Court directs as such that both the management of the workmen would get an opportunity after trial of evidence to put forward their respective views, bring evidence on record as regards the financial condition and the benefits of the roll back to both the management and the workmen.

44. Having now ironed out and dealt with the purely legal issues that have arisen in the case which is permissible since there are no disputed questions of fact on that score, let us now proceed to deal with the decisions cited by both sides on the entertainability of the writ petitions and Article 226 of the Constitution of India.

45. Mr. Partha Sarathi Sengupta with a view to further bolster his arguments that when there are disputed questions of fact and the matter cannot be decided on the basis of affidavit evidence, it is a statutory form that must be approached by an aggrieved person.

46. However in this case, only purely legal issues have been addressed by this Court and have been pronounced upon. The propriety and merits of the

decision of the HCL to roll back the retirement age of the workmen must therefore now be left for decision by trial and evidence before the appropriate forum, i.e. the CGIT under the Act of 1947.

47. The decision of the Supreme Court relied upon by Mr. Partha Sarathi Sengupta in the case of ***Radha Krishan Industries v. State of Himachal Pradesh & Ors.*** reported in ***(2021) 6 SCC 771*** where the issue of alternative remedy and the power of the Supreme Court under Article 226 of the Constitution have been discussed and the statute must also be necessarily set out.

> **"27.** The principles of law which emerge are that:
> **27.1.** The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.
> **27.2.** The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.
> **27.3.** Exceptions to the rule of alternate remedy arise where : (*a*) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (*b*) there has been a violation of the principles of natural justice; (*c*) the order or proceedings are wholly without jurisdiction; or (*d*) the vires of a legislation is challenged.
> **27.4.** An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.
> **27.5.** When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.
> **27.6.** In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

48. The decision of ***Rohtas Industries Ltd. & Anr. v. Rohtas Industries Staff Union & Ors.*** reported in ***(1976) 2 SCC 82*** particularly Para 27 and 28 must also be noticed. It is being held in the said case at Para 27, 28 and 29 as follows:

> **"27.** The High Court has touched upon another fatal frailty in the tenability of the award of compensation for the loss of profits flowing from the illegal strike. We express our concurrence with the High Court that the sole and whole foundation of the award of compensation by the arbitrators, ignoring the casual reference to an ulterior motive of inter-union rivalry, is squarely the illegality of the strike. The workers went on strike claiming payment of bonus as crystallised by the earlier settlement (dated October 2, 1957). There thus arose an industrial dispute within Section 2(*k*) of the Act. Since conciliation proceedings were pending the strike was *ipso jure* illegal (Sections 23 and 24). The consequence, near or remote, of this combined cessation of work caused loss to the management. Therefore the strikers were liable in damages to make good the loss. Such is the logic of the award.
>
> **28.** It is common case that the demands covered by the strike and the wages during the period of the strike constitute an industrial dispute within the sense of Section 2(*k*) of the Act. Section 23, read with Section 24, it is agreed by both sides, makes the strike in question illegal. An "illegal strike" is a creation of the Act. As we have pointed out earlier, the compensation claimed and awarded is a direct reparation for the loss of profits of the employer caused by the illegal strike. If so, it is contended by the respondents, the remedy for the illegal strike and its fallout has to be sought within the statute and not *de hors* it. If this stand of the workers is right, the remedy indicated in Section 26 of the Act viz. prosecution for starting and continuing an illegal strike, is the designated statutory remedy. No other relief outside the Act can be claimed on general principles of jurisprudence. The result is that the relief of compensation by proceedings in arbitration is contrary to law and bad.
>
> **29.** The *Premier Automobiles case* [*Premier Automobiles Ltd.* v. *K.S. Wadke*, (1976) 1 SCC 496 : 1976 SCC (L&S) 70] settles the legal issue involved in the above argument. The Industrial Disputes Act is a comprehensive and self-contained code so far as it speaks and the enforcement of rights created thereby can only be through the procedure laid down therein. Neither the civil court nor any other tribunal or body can award relief. Untwalia, J., speaking for an unanimous court, has, in *Premier Automobiles* observed : SCC p. 503 : SCC (L&S) p. 77, para 8]
>
> "The object of the Act, as its preamble indicates, is to make provision for the investigation and settlement of industrial disputes, which means adjudication of such disputes also. The Act envisages collective

> bargaining, contracts between union representing the workmen and the management, a matter which is outside the realm of the common law or the Indian law of contract."
>
> After sketching the scheme of the Act, the learned Judge stated the law thus : [SCC p. 505 : SCC (L&S) p. 79, paras 9, 10]
>
> ". . . the civil court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement of certain right or liability created only under the Act.
>
> * * *
>
> In *Doe* v. *Bridges* [(1831) 1 B & Ad 847(2), 859 : 9 LJ OS KB 113 : 199 ER 1001] are the famous and of quoted words of Lord Tenterden, C.J., saying:
>
> Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."
>
> *Barraclough* v. *Brown* [1897 AC 615 : 65 LJ QB 672 : 13 TLR 527] , decided by the House of Lords is telling, particularly Lord Watson's statement of the law at p. 622:
>
> "The right and the remedy are given *uno flatu* and one cannot be dissociated from the other."
>
> In short, the enforcement of a right or obligation under the Act, must be by a remedy provided *uno flatu* in the statute. To sum up, in the language of the *Premier Automobiles Ltd.* [SCC pp. 513-514 : SCC (L&S) pp. 87-88, para 23]:
>
> "If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act."

49. The aforesaid decision further the argument of the appellants that it is only the authorities under the Act of 1947 that can adjudicate the legality and propriety of the roll back of the age of superannuation of the workmen from 60 to 58 years. This Court does not therefore wish to further the trial by evidence delay in to this before the concerned CGIT under the Act of 1947.

50. Two other decisions cited by Mr. L.K. Gupta, learned Senior Counsel appearing for the workmen namely ***Godrej Sara Lee Ltd. v. Excise and Taxation Officer-cum-Assessing Authority and Ors.*** reported in ***2023 SCC OnLine SC 95*** and in the case of ***L.K. Verma v. HMT Ltd. & Anr.***

reported in ***(2006) 2 SCC 269*** where the proposition discussed above have been reiterated.

51. This Court however sets out para 133 of the decision of ***State of Rajasthan & Ors. v. Lord Northbrook & Ors.*** reported in ***(2021) 16 SCC 400*** and the same is quoted herein below:

> **133.** The power of the High Court to issue prerogative writs is wide. The Constitution does not place any limitation on such power. However, the courts have, through judicial pronouncements, evolved self-imposed restrictions on the exercise of power by the writ court. When an efficacious alternative remedy is available, the High Court does not normally exercise jurisdiction. However, when a writ petition has been entertained and kept pending for years, it would not be appropriate to reject the writ petition only on the ground of existence of an alternative remedy.

52. In the instant case both the management and the workmen are equally responsible for failing to take steps in respect of the moot issue of propriety of roll back of the age of superannuation. The failures on the part of the workmen to challenge the refusal to refer the dispute before the High Court under Article 226 of the Constitution of India, and on the part of the Central Government to construe the same and frame reference to decision of the CGIT concerned under section 10 of the Act of 1947.

53. This Court has to the extent possible dealt with purely legal issues that have arisen in the facts of the case however a writ court under Article 226 cannot adjudicate the propriety of the decision to roll back of the age of superannuation. The same is required to be done by way of a trial and evidence before the CGIT.

54. Hence in conclusion this Court directs the Central Government within a period of 30 days from the receipt of the copies of this order and refer the following issues for adjudication under Section 10 of the Industrial Disputes Act to the CGIT at Kolkata:

(a) Whether the roll back of the retirement age by its management and workmen of the Rupnarayanpur Unit of HCL was justified given its financial condition and other issues, and whether the workmen are bound by the same.

55. The Central Government may chose to modify the text of the reference as set out hereinabove in any manner that it deems fit and necessary. With the aforesaid observation being MAT 254 of 2020 stands disposed of. Consequently, the question of any consequential benefits to the workmen of M/s. HCL being decided by the writ court also therefore cannot arise. The same may also be decided by the CGIT. MAT 254 of 2020 shall also thereupon stand disposed of on the basis of the above directions.

56. Let a copy of this judgment be sent by the registry and the parties to the Secretary, Ministry of Labour, to take steps to comply with the directions contained herein above.

57. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(*Rajasekhar Mantha, J.*)

I agree.

(*Ajay Kumar Gupta, J.*)