

Form No. (J2)

ORDER SHEET  
IN THE HIGH COURT AT CALCUTTA  
Special Jurisdiction (Income Tax)  
ORIGINAL SIDE

**Present :**

The Hon'ble JUSTICE T. S. SIVAGNANAM

And

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

APOT/5/2022  
IA NO.GA/1/2022  
WPO/166/2020

THE CALCUTTA GUJARATI EDUCATION SOCIETY AND ANR.  
VS  
STATE OF WEST BENGAL & ANR.

**Appearance:**

*Mr. Soumya Majumder, Adv.*

*Ms. Noelle Banerjee, Adv.*

*Mr. Dipak Dey, Adv.*

*Ms. Swapna Mitra*

*...for the appellant.*

*Mr. Amitava Mitra, Adv.*

*for the first respondent.*

Heard on : 31.01.2022

Judgement on : 31.01.2022

**T. S. Sivagnanam, J.** : Leave in terms of prayer (a) of the  
Notice of Motion is granted.

This appeal is treated as on the day's list and taken up for  
hearing.

This intra-court appeal filed by the writ petitioner, the Calcutta Gujarati Education Society, is directed against the judgement and order dated 21<sup>st</sup> December, 2021 passed in WPO No.166 of 2020. When the appeal came up for hearing on 18<sup>th</sup> January, 2022, we noted that though the 2<sup>nd</sup> respondent had been served, he was not represented by Counsel nor he appeared in person. Therefore, we directed the learned Counsel appearing for the appellant to serve notice on the Counsel who appeared for the second respondent in the writ petition. This direction of ours has been complied with and affidavit of service has been filed which shows that notice has been served on the Counsel who had appeared for the second respondent in the writ petition and the said notice states that the matter would be taken up by this Court. Despite such opportunity being granted, the second respondent remains unrepresented. Therefore, we proceed to hear this appeal and decide the same on merits.

We have heard Mr. Soumya Majumder, learned Counsel for the appellant assisted by Ms. Noelle Banerjee, learned Counsel and Mr. Amitava Mitra, learned Counsel appearing for the first respondent, the State of West Bengal.

The writ petition was filed by the appellant challenging the orders dated 18<sup>th</sup> March, 2019 and 16<sup>th</sup> January, 2020 both passed in Case No.VIII/197/2001, on the file of the First Industrial Tribunal, West Bengal. The appellant had filed an application before the Industrial Tribunal seeking for fixing a date of hearing on the preliminary point raised before the Tribunal before examining the matter on merits. This application was dismissed by the Tribunal holding that in the earlier

order passed by the learned Single Bench of this Court in WP No.1036 of 2008 dated 7<sup>th</sup> December, 2009, there is no scope for permitting the appellant to raise any preliminary issues and they are expected to proceed with the matter on the basis of the evidence already recorded. The appellant challenged the correctness of the said order contending that the order passed by the learned Single Bench of this Court is an open remand and all questions and issues can be raised afresh by the appellant before the Tribunal. One ground which has been raised by the appellant was that though the two orders passed by the Tribunal were impugned in the writ petition, the learned Writ Court has only dealt with one of the orders dated 18<sup>th</sup> March, 2019 but has not dealt with the correctness of the order dated 16<sup>th</sup> January, 2020 in order no.166 which was challenged on several grounds including on the ground that it is a non-speaking order. The learned Single Bench dismissed the writ petition with cost of Rs.20,000/- on the ground that the appellant is precluded from raising the preliminary issue which was not permitted to be raised by the appellant in the earlier writ petition, namely, WP No.1036 of 2008 dated 7<sup>th</sup> December, 2009. Thus we require to consider as to how and in what manner the order and direction issued in WP No.1036 of 2008 has to be interpreted. The said writ petition was filed by the appellant challenging the order passed by the Tribunal dated 16<sup>th</sup> June, 2008 by questioning the award passed by the First Industrial Tribunal, Kolkata dated 22<sup>nd</sup> February, 2008 which directed the second respondent to be reinstated in service without back wages. The charge against the second respondent appears to be very serious and that on 4<sup>th</sup> June, 2000 at about noon he was in a

drunken condition, used abusive language and threatened a member of the society and the darwan of the school and tried to manhandle them. The other factual matrix may not be of much relevance to decide this appeal and, therefore, we have not spelt out the same. The learned Writ Court allowed the writ petition filed by the appellant by judgement dated 7<sup>th</sup> December, 2009. The learned Single Bench in the impugned order in this appeal has noted the penultimate paragraph of the order which reads as follows:

*"For these reasons, I allow the petition, set aside the impugned award and order as follows. Treating the case as one of open remand entitling the parties to raise all questions and issues afresh, the tribunal shall make a fresh award on the basis of the evidence already recorded, but after giving the parties fresh opportunity of hearing. During pendency of the matter before the tribunal the petitioner shall pay Binod interim relief at the rate at which he has been getting relief under s.17B. GA No.1052 of 2009 is dismissed."*

After going through the above paragraph, the learned Writ Court opined that though the Writ Court has treated the case as one of open remand entitling the parties to raise all questions and issues afresh, the appellant cannot raise the issues with regard to the aspect as to whether the appellant society was an industry or not before the Tribunal. This finding of the learned Writ Court is presumably on account of the following observation made by the Writ Court in its order dated 7<sup>th</sup> December, 2009 which reads as follows :

*"It is evident from the award that the question whether the is an industry within the meaning of s.2(j) of the Industrial*

*Disputes Act, 1947 was not pressed at the time of arguments before the tribunal. Under the circumstances, I find no reason to permit the petitioner to raise the question, essentially a question of fact, for the first time in this court. Even if there is evidence adduced by the petitioner in proof of the claim, in my opinion, it is entitled to invite the high court exercising power under art.226 to appreciate such evidence and record a finding of fact. As the point was not pressed before the tribunal, the tribunal did not express its opinion on it."*

After having considered the finding recorded by the learned Writ Court in its order of December 7, 2009 we find that the interpretation given by the learned Single Bench in the impugned order before us is incorrect. The appellant had raised the question as to whether it is an industry or not before the Tribunal in the form of an affidavit which was on record. However, it appears during the course of the argument that the issue was not pressed. It is not clear as to whether such a concession was a valid concession given by the Counsel or the representative of the appellant who appeared before the Tribunal, whether at all such a concession could have been made. Be that as it may, the Writ Court in its order of December 7, 2009 did not permit the appellant society to raise such a contention for the only reason that it is a factual matter, not raised before the Tribunal cannot be raised in a writ proceeding under Article 226 for the first time. Thus, we are of the clear view that the appellant cannot be precluded from raising such an issue and the paragraph extracted by us above from the order of December 7, 2009 cannot be read to restrict the scope of the enquiry to be done by the Industrial

Tribunal upon an order of remand after setting aside the award in its entirety. The only aspect, which the Tribunal has to take note, is that the parties cannot lead fresh evidence. The appellant society has not filed any appeal against that portion of the order restricting the parties and cannot proceed to lead further evidence. That apart, we have to read the penultimate paragraph of the judgment of December 7, 2009 in conjunction with the other observations which have been made by the learned Single Bench. In fact, the learned Writ Court had gone to the extent holding that a wrong test has been applied by the Tribunal to decide the question whether the charge against the second respondent were proved and also commented upon the jurisdiction of the Tribunal. Thus, the proper manner of understanding the scope of the judgment of December 7, 2009 in WP 1036 of 2008 is that the award passed by the Industrial Tribunal dated February 22, 2008 stands set aside in its entirety and the parties, namely, the appellant as well as the second respondent are at liberty to raise all questions and issues afresh and the Tribunal has been directed to make a fresh award on the basis of the evidence already recorded but after giving the parties fresh opportunity of hearing. The findings/observations of the learned Writ Court that "all questions and issues afresh" cannot be given a restrictive meaning as the preceding word in the sentence does qualify the case as one of open remand which would mean that all questions and issues should be permitted to be canvassed by both parties and a fresh decision should be taken by the Tribunal. That apart we also note that while allowing the writ petition the award dated February 22, 2008 has been set aside in its entirety. Thus, the

learned Single Bench committed an error in dismissing the writ petition filed by the appellant society.

In the result, the appeal is allowed. The order passed in the writ petition dated 21<sup>st</sup> December, 2021 is set aside. Consequently, WPO 166 of 2020 is allowed and the orders passed by the Industrial Tribunal dated 16<sup>th</sup> January, 2020 in order no.166 and dated 18<sup>th</sup> March, 2019 in order no.108 stand set aside and the matter stands remanded to the Tribunal to permit the parties to raise all questions and issues both legal and factual, sufficient opportunity be given to the parties and pass a fresh order on merits and in accordance with law.

We make it clear that the parties shall not be entitled to lead fresh evidence and the Tribunal shall take note of the evidence already recorded by it. We further make it clear that all questions and issues would mean as to whether the appellant is an industry or not within the meaning of section 2(j) of the Industrial Disputes Act, 1947 including all other preliminary issues raised by the appellant. Consequently, the cost imposed on the appellant also stands set aside.

With the disposal of this appeal, the stay application (GA 1 of 2022) stands closed.

**(T. S. SIVAGNANAM, J.)**

I agree.

**(HIRANMAY BHATTACHARYYA, J.)**

