

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

RESERVED ON: 20.02.2023
DELIVERED ON: 15.03.2023

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT NO.378 OF 2020

(I.A. NO. CAN 01 OF 2020)

(OLD I.A. NO. CAN 2615 OF 2020)

THE PEERLESS INN

VERSUS

FIRST LABOUR COURT, GOVERNMENT OF WEST BENGAL & OTHERS

Appearance:-

Mr. Arunava Ghosh, Advocate.

Mr. Ranjay De, Advocate.

Mr. Basabjit Banerjee, Advocate.

.....For the Appellants

Mr. Bikash Ranjan Bhattacharya, Learned Senior Advocate

Mr. Rananeesh Guha Thakurta, Advocate

Ms. Senjuti Sengupta, Advocate

Ms. Dipa Roy, Advocate.

.....For the Respondent No. 3

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This intra court appeal by the writ petitioner is directed against the order dated 10.02.2020 in WP No. 3329(W) of 2018. The said writ petition was filed by the appellant challenging the award of the First Labour Court, Kolkata dated 06.12.2017 under Section 36A of the Industrial Disputes Act, 1947 (the Act). The appellant challenged the order of reference passed by the first respondent under Section 36A of the Act as well as the award passed by the labour court. The learned single bench by the impugned order has dismissed the writ petition and aggrieved by the same the present appeal has been preferred. The challenge in this appeal is not only to the award passed by the labour court but also to the order of reference passed by the first respondent referring their disputes under Section 36A of the Act.
2. Mr. Arunava Ghosh and Mr. Ranjay De, learned advocates appearing for the appellant would content that under Section 36A of the Act formation of opinion by the appropriate Government regarding doubt in respect of any clause of a settlement or award is a *sine qua non* before referring such a question to the adjudicatory forum created under the Act. The use of the expression “may” in the statute signifies that the jurisdiction of the appropriate Government is discretionary in nature. It is thus, submitted that referring a matter under Section 36A of the Act is not a matter of course rather application of mind on the part of the appropriate Government is an essential ingredient regarding formation of an opinion. Earlier the respondent trade union had filed a writ petition before this court in W.P No. 23862 (W) of 2014 in which the question was whether a suspended

employee is entitled to a percentage of service charge collected by the employer company from its customers. The Joint Commissioner by order dated 10.08.2012 held that the matter may be taken up with the authority under the West Bengal Payment of Subsistence Allowance Act, 1969. The respondent trade union contended that the said Act has no application and that the order by the Joint Commissioner of Labour was liable to be set aside. The learned writ court by order dated 04.12.2015 disposed of the writ petition while agreeing with the submissions made by the trade union that the Payment of Subsistence Allowance Act will have no application, the court held that the subject issue is within the domain of the labour court under Section 36A of the Act. In that view of the matter, the dispute between the parties was referred to the Secretary, Ministry of Labour, Government of West Bengal or any other senior officer authorised by him to go into the question whether the said dispute should be referred to the labour court under Section 36A of the Act. The parties were directed to be given an opportunity to make submission and the authority was required to pass a reasoned order. Pursuant to such direction, the Additional Chief Secretary, Labour Department, Government of West Bengal passed an order under Section 36A of the Act dated 06.03.2017 referring the dispute to the labour court. Pursuant to such direction, the parties appeared before the labour court, written statements were filed, documents were marked as exhibits though no oral evidence was adduced by both the sides and by award dated 06.12.2017, the dispute was disposed of in favour of the respondent trade union holding that the service charges collected by the appellant management from its customers should also be disbursed to the suspended

employee who is being given subsistence allowance. It is submitted that the writ court while issuing direction has specifically ordered the appropriate authority to go into the question whether the said dispute should be referred to the labour court under Section 36A of the Act. Therefore, it is submitted that due application of mind was required on the part of the appropriate authority while forming an opinion that the dispute has to be referred under Section 36A of the Act. It is submitted that the Clause 5 of the Memorandum of Settlement entered into between the appellant management and the trade union in the year 1994 provided that service charge collected on food and beverages sales will be disbursed amongst all employees including managerial personnel connected with the hotel functioning. It is submitted that the said clause does not create any doubt whatsoever about entitlement to those employees including managerial personnel connected with hotel functioning and there was no requirement of any interpretation under Section 36A of the Act. It is submitted that the word “including” occurring in clause 5 of the settlement, as explained in the Advance Law Lexicon, Fourth Edition, is a word generally used to enlarge the meaning of the preceding words. Further it is submitted on reading of the order of reference dated 16.03.2017, nothing could be deciphered that the appropriate Government is of the opinion that while interpreting clause 5 of the settlement any doubt or difficulty has ever been created in the mind of the said authority without which Section 36A of the Act could not have any manner of applicability. It is submitted that in the written statements filed by the management before the labour court, they have specifically challenged the maintainability of the order of reference dated 16.03.2017. It

is submitted that the labour court all though on one hand accepted the submissions of the management on the other hand committed serious error of law by observing that the order of reference dated 16.03.2017 indicates the difficulties or doubt created in clause 5 of the 1994 settlement when admittedly the appropriate Government failed to indicate its opinion about existence of any doubt or difficulty in interpreting the said clause in the settlement. The learned single bench has not dealt with the issue as regards the validity of the order of reference in the impugned order. It is submitted that the labour court has recorded that the appellant has challenged the maintainability of the reference but a peculiar stand has been taken by the learned writ court that the appellant did not challenge the legality of the order of reference in the writ proceedings. Thus, the labour court did not apply its mind to the basic fact that the appropriate Government has acted mechanically in utter derogation to the statutory requirements as indicated in Section 36 of the Act. It is further submitted that a suspended employee is not entitled to receive wages but allowance in the name and style as subsistence allowance. The definition of wages under Section 2(rr) of the Act denotes all earning within its hold, provided of course those are dependent on fulfillment of terms of employment and not otherwise. Clause 5 of the settlement also stipulates enjoyment of service charge is dependent on connected with the hotel functioning. Therefore clause 5 has to be interpreted in co-relation with the statutory provisions as well as concept of suspension as propounded by the Hon'ble Supreme Court. It is further submitted that the labour court on one hand has held that it did not take the venture in interpreting the settlement but on the other hand it has

declared that the phrase “connected with hotel functioning” seems redundant in the relevant context. This contradictory stand taken by the labour court has made the award liable to be set aside.

3. It is submitted that the learned single bench did not deal with the challenge made by the appellant to the maintainability of the reference under Section 36A of the Act. The learned writ court wrongly interpreted the definition of wages as defined under Section 2(rr) of the Act. It ought to have been noted that the suspended employee is debarred from entering into the place of employment and cannot be expected to fulfill the terms of employment in any manner whatsoever and as such being paid lesser amounts than that of his salary in the name and style as subsistence allowance. The settlement could not have been interpreted in a proceeding under Article 226 of the Constitution of India. The learned writ court came to the incorrect conclusion that the settlement does not deal with suspended employee without noting that settlement was entered into considering the ideal situation prevailing at the relevant time when the settlement was signed and the management cannot anticipate a trouble to take place in future. In support of the above arguments, the learned advocates referred to the following decisions:-

B.1a) Legal Proposition:

i) Section 36A – preconditions to be fulfilled:

*a) 1961 – II – LLJ – 310 at para 8(Cal) = 1960 SCC
online Cal 205*

b) 1961 – II – LLJ – 675 at para 4(SC)

ii) Statute speaks about path to be followed – other ways are forbidden:

a) 2011 (13) SCALE 460 at para 35= 2011 15 SCC 1

- b) 2015 LLR 337 (SC) at para 33 and 34 = 2015 4 SCC 544
- c) 2021 (14) SCALE 540 at para 7 = 2021 SCC 1228
- d) 2022 (9) SCALE 370 at para 31 = 2022 8 SCC 713

iii) *Reference – Scope of Judicial Review:*

- a) 2015 (10) SCALE 114 at para 13 = 2015 15 SCC 1

B.2.a) Legal Proposition:

(i) *Concept of suspension:*

- a) 2013 (9) SCALE 671 at paragraph 13 = 2014 13 SCC 622

(ii) *West Bengal Payment of Subsistence Allowance Act, 1969:*

[Ref: Section 2(f) and Section 2(g)]

(iii) *Limitation of interpreting a settlement:*

- (a) 2005 (2) CHN 616 at paragraph 5.6 (DB) = 2005 SCC online Cal 134

B.3.a) Legal Proposition:

(i) *Socio economic legislation – principles of interpretation:*

- (a) 2010 ASCW 2310 at paragraph 15 = 2010 4 SCC 378

(ii) *Award is amenable to judicial review when suffers from perversity:*

- (a) 2022 LLR 836 at paragraph 8 (Cal. DB) = 2022 SCC online Cal 804

4. Mr. Bikash Ranjan Bhattacharya, learned senior advocate assisted by Mr. Rananeesh Guha Thakurta submitted that the case on hand is not a reference under Section 10 of the Act for resolving any dispute but a reference under Section 36A for resolving a doubt or difficulty in connection with the settlement. Further service charge is being collected by the management from the guests and nothing has been paid by the appellant company that the management never disputed order of reference passed

under Section 36A of the Act. Admittedly a suspended employee cannot get into his place of employment but the employer/employee relationship subsists and therefore financial benefit cannot be denied to them. Further it is submitted that the order of reference is a speaking order clearly showing due application of mind by the appropriate authority thereafter the parties filed their respective pleadings before the labour court and the labour court by a well-reasoned award has interpreted the said clause in the settlement in favour of the suspended employees and the correctness of the award was tested by the learned writ court on the permitted parameters and the award was upheld and in this appeal this court will not convert itself as appellate court over the award of the labour court and in the absence of any perversity in the award, this court of interference is very narrow and prayed for upholding the award passed by the labour court.

5. In reply Mr. Ranjay De would contend that the orders passed by this court in W.P. No. 23862(W) of 2014 dated 04.12.2015 did not confer any blanket power on the appropriate Government to be exercised without application of mind. Further, it is submitted that when the 1994 settlement was entered service charges was being disbursed from the amount collected from the guests and the methodology was decided after consensus was reached between the parties to the settlement. After the notification issued by the Government of India, the service charges is not collected from the guests however the management did not stop paying the extra benefit for these employees who are connected with the hotel functioning. It is reiterated that a suspended employee is an employee who is debarred from entering into the work place pending disciplinary proceedings or in

contemplation of disciplinary proceedings and/or domestic enquiry and he is entitled to subsistence allowance. The quantum of subsistence allowance is calculated based on the wages receivable by the suspended employee. The concept of wages indicated in the Payment of Subsistence Allowance Act, 1969 has got the same meaning as defined in Section 2 (rr) of the Act. Therefore, the quantum receivable is dependent on fulfillment of service conditions is primary consideration which is absent so far as the suspended employee is concerned. Thus, it is submitted that the reference made by the appropriate Government is unsustainable, as nothing is evident from the order that there was any doubt or difficulty in interpreting clause 5 of the settlement. The employees involved in the case are suspended workmen and are only entitled to subsistence allowance and not entitled to enjoy any service benefit or privilege nor he can work at his work place. It is further submitted that the conjoint reading of the definition of wages as provided under the Subsistence Allowance Act and the Industrial Disputes Act make it abundantly clear that a person is entitled to wages only when the conditions of service/terms of employment, whether implied or expressed are fulfilled and not otherwise. It is further submitted that the award of the labour court is bad in law as the labour court failed to consider that allowing service charges to the suspended employees who did not serve the guests would do injustice to those employees who had actually served the guests and received service charges. With the above submissions, the learned advocate prayed for allowing this appeal.

6. We have elaborately heard leaned advocates for the parties and carefully perused the materials placed on record.

7. As pointed out earlier, the order which was impugned before the learned writ court was an award passed by the First Labour Court, Kolkata dated 06.03.2017 in pursuant to the order of reference made by the appropriate Government under Section 36A of the Act. Section 36A of the Act deals with the power to remove difficulties. In terms of Sub Section (1) of Section 36A, if in the opinion of the appropriate Government any difficulty or doubt arises as to the interpretation of any provision of an award or settlement, it may refer the question to such Labour Court, Tribunal or National Tribunal as it may think fit. Sub Section (2) of Section 36A provides that the Labour Court, Tribunal, National Tribunal to which such question is referred shall after giving the parties an opportunity of being heard, decide such question and its decision shall be final and binding on all such parties.
8. The Memorandum of Settlement under Section 2(pp) and 18(1) of the Act read with Rule 68 of the West Bengal Industrial Disputes Rules, 1958 was entered into between the appellant and its employees for effective performance towards achieving business results, peace and harmony. Clause 5 of the settlement which is the subject matter of interpretation is as follows:-

SERVICE CHARGE:

It is agreed between the parties that effective 1st October, 94, 70% of Service Charge collected on Food and Beverages sales will be disbursed amongst all employees including managerial personnel connected with the hotel functioning. The Industrial Trainees and the hotel operation trainees coming for on the job training from different Institutes sources will not get share of service charge. The tipping zone employees will

get 50% less service charge than the amount payable to the non-tipping zone employees from 1st October, 1996, disbursement of service charge will be 75%.

9. A section of employees had indulged in certain misconduct which resulted in issuance of charge sheet to those employees and they were also placed under suspension. We are informed by the learned advocate for the appellant that 14 such employees were suspended from the service and as on date the dispute has been settled between the management and those employees in respect of nine such employees and the five such employees are stated to contest the matter whose case is being pursued by the respondent trade union. The respondent trade union by letter dated 15.07.2009 requested for payment of service charges to the suspended employees in terms of clause 5 of the settlement. By letter addressed to the Deputy Labour Commissioner, West Bengal. By reply dated 10.08.2012, The Joint Labour Commissioner, West Bengal informed the respondent trade union that the issue regarding the denial of payment of service charges to the suspended employee may be taken up with the appropriate authority in accordance with the West Bengal Payment of Subsistence Allowance Act, 1969. This order necessitated the respondent trade union to approach this court by filing W.P. No. 23862 (W) of 2014. The learned writ court accepted the case of the respondent union that the provisions of the Payment of Subsistence Allowance Act is of no relevance to the issue on hand and was of the opinion that the issue/dispute is within the domain of labour courts under Section 36A of the Act. Accordingly, the dispute was referred to the appropriate authority of the Government of West Bengal with the directions

to the said authority to go into the question whether the said dispute should be referred to the labour court under Section 36A of the Act. The appellant management submitted their response/representation to the labour department. In sum and substance contending that there is no ambiguity in clause 5 of the Settlement warranting any reference under Section 36A of the Act. The Secretary, Labour Department, Government of West Bengal passed the order dated 16.03.2017 holding that the words “connected with hotel functioning” in clause 5 of the agreement assumes importance or relevance in deciding the admissibility of service charge to a suspended employee and it needs to be interpreted in a lawful manner to decide the case. Accordingly, the matter was referred to the First Labour Court for proper interpretation of clause 5 of the settlement and decision. The said order dated 16.03.2017 was not separately challenged by the management but before the labour court in their written statement have questioned the correctness of the order of reference on stated grounds and also notes of arguments were filed before the labour court. The labour court holds that the order of reference clearly points out the difficulty or doubt is created in clause 5 of the settlement as to whether any employee under suspension is entitled to get a share of service charge along with the subsistence allowance during the period of his suspension and whether the phrase “connected with hotel functioning” exists in clause 5 of the settlement would include suspended workmen or not. The labour court has considered the challenge made by the management to the order of reference. After noting the above, the labour court points out that the Secretary of the Labour Department has heard submissions of both the parties and has held that the words

“connected with the hotel functioning” in clause 5 of the agreement assumes immense importance or relevance in deciding the admissibility of service charges to a suspended employee. The labour court came to the conclusion that the point on which the doubt has been raised has been explicitly mentioned in the order dated 16.03.2017 and in such circumstances, held that the appropriate Government has acted within the scope of the statute in referring the matter in doubt to the labour court under Section 36A of the Act. After holding so, the labour court proceeds to consider the interpretation of clause 5 of the settlement.

10. Mr. De referred to the decision in the ***Britannia Engineering Company*** and ***Kirloskar Oil Engines Limited*** in support of his contention as to what are the pre-requisites/pre-conditions to be fulfilled under Section 36A of the Act. As held in both the decisions that the scope of enquiry under Section 36A is limited to the decision of the difficulties or doubt arising as to the interpretation of any provision in the award or settlement. It has been held that if the words used in any provision of an award are ambiguous or obscure and it is not reasonably possible to interpret them the difficulty arising from the use of such ambiguous or obscure words may be resolved by moving the appropriate Government to make a reference under Section 36A of the Act. It has been pointed out that any question about the propriety, correctness or validity of any provision of the award would be outside of the power of enquiry contemplated by Section 36A of the Act. Therefore, the appropriate Government has to state on what point of interpretation it had any doubt or difficulty and those should be evident in the order of reference. Reliance was placed on the decision in the case of

Chief Information Commissioner and Another for the proposition that if a statutory provision prescribes a particular procedure to be followed by the authority to do an act, it should be done in that particular manner only and if such procedure is not followed in that prescribed manner as provided under the statute, then such act of the authority has to be held to be null and void ab initio in law.

11. Bearing the above legal principles in mind, if we examine the order of the reference dated 16.03.2017 we find that before passing such an order the authority has heard the parties, discussed the background of the case in brief took note of the clause 5 of the settlement and framed the question for consideration namely as to whether an employee under suspension is entitled to get the share of service charges along with the subsistence allowance during the period of his suspension. Thereafter the authority took note of the directions issued by this court in its order dated 04.12.2017 directing the authority to go into the question whether the dispute should be referred to the labour court under Section 36A of the Act. After noting submissions made on either sides, the appropriate authority records that in its understanding the words “connected with the hotel functioning” in clause 5 of the settlement assumes immense importance or relevance in deciding the admissibility of service charge to a suspended employee and it needs to be interpreted in a lawful manner to decide the case and accordingly the order of reference has been made. The appellant management would contend that the order of reference is devoid of application of mind and the pre-requisites which are to be fulfilled for invoking the powers under Section 36A of the Act are not existing and the order is an illegal order. To be noted

that the power under Section 36A is limited as the said provision gives power to remove difficulties. In terms of Sub-Section 1 of Section 36 if in the opinion of the appropriate authority any difficulties or doubt arises as to the interpretation of any provision of award or settlement, it may refer the question to such Labour Court, Tribunal or National Tribunal as it may think fit. It is no doubt true that the word “may” has been used gives discretion to the appropriate Government. To invoke the power under Section 36A (1) an opinion should be formed by the appropriate Government as to whether any difficulty or doubt arises as to the interpretation of any provision of an award or settlement. While forming such opinion, the appropriate Government cannot take a decision by itself if done, the order of reference itself will be an empty formality and as it is not for the appropriate Government to interpret the terms of settlement. On a reading of the order dated 16.03.2017 passed by the appropriate Government, it is evidently clear that the doubt has arisen as to whether the suspended employee would be entitled to get a share of the service charges along with the subsistence allowance and in the opinion of the appropriate Government certain words and phrases occurring in clause 5 of the settlement has to be interpreted in a lawful manner so as to decide the issue. In our considered view, the order of reference is a speaking order and clearly shows as to what is the doubt which has arisen in the mind of the appropriate Government warranting the reference under Section 36A of the Act. Thus, it cannot be stated that the order of reference dated 16.03.2017 is either a non-speaking order or an order which is vitiated on account of non-application of minds.

Thus, we agree with the findings of the labour court upholding the order of reference.

12. Having steered clear of this issue, we next proceed to as to whether the learned writ court was right in refusing the challenge to the award passed by the labour court. It is well settled legal principle that the scope of interference with the award passed by the labour court on a limited and specific ground. The underline legal principle is that the learned writ court will not convert itself as an appellate court to that of the labour court and substitute the factual findings rendered by the labour court on appreciation of the evidence before it. Thus, the scope of interference with an award of the labour court is limited to grounds of perversity, non application of mind ignoring the vital documents and evidence placed before it, thorough misrepresentation of the evidence available before it and others ground related to this ground.

13. At this juncture, it would be relevant to note the decision of the Hon'ble Supreme Court in the ***State of Haryana and Others Versus Devi Dutt and Others***¹, wherein the Hon'ble Supreme Court pointed out as follows:

5. The High Court ordinarily should not have interfered with the said finding of fact. We, although, do not mean to suggest that the findings of fact cannot be interfered with by the superior courts in exercise of their jurisdiction under Article 226 of the Constitution of India, but the same should be done upon application of the well known legal principles such as : (1) when it is perverse; (2) when wrong legal principles have been applied; (3) when wrong questions were posed; (4) when

¹ (2006) 13 SCC 32

*relevant facts have not been taken into consideration; or
(5) the findings have been arrived at on the basis of the
irrelevant facts or on extraneous consideration.*

The High Court ordinarily also ought not to have entertained an additional affidavit without assigning any sufficient or cogent reason therefore. The parties adduced their evidences before the Industrial Court. Why could they not bring on records any other evidence before the Labour Court, was not explained. The contentions raised before the High Court for the first time in the additional affidavits filed before it, were also not admitted by the appellants herein.

14. Thus, the management should be able to bring their challenge to an award of the labour court on any one of the above grounds and nothing more. The learned writ court appears to have been fully conscious of the limited scope of adjudication in a writ proceeding when the challenge is made to the award of labour court. As elaborate submissions were made on either side questioning the reasoning given by the labour court, we proceed to test the correctness of the award on the anvil of the settled parameters qua, the scope of interference in proceeding under Article 226 of the Constitution. Clause 5 of the Memorandum of Settlement dated 05.10.1994 quoted above states that with effect from 01.10.1994, 70% of service charge collected on food and beverage sales will be disbursed amongst all employees including managerial personnel connected with the hotel functioning. The service charges collected on food and beverages sales is from the customers/guests of the appellant. Out of the total amount of service charges collected, it was agreed between the appellant management and its workmen represented by that trade union that 70% of such collection

will be disbursed amongst all employees including managerial personnel connected with hotel functioning.

15. The case of the management is that the suspended employee is entitled for subsistence allowance, he is not permitted to work and he is only paid subsistence allowance which is less than the salary and therefore he is not entitled to any share in the service charges. It is there further case that clause 5 of the settlement clearly provides that the entitlement to service charges is co-related with employees connection and/or attachment with the functioning of the hotel and a suspended employee cannot claim his attachment with the functioning of the hotel as his contract of service with the management remains under suspended animation during the said period. It is the further contention of the management that a suspended employee is not permitted to work during the period of suspension and therefore there is no difficulty in interpreting clause 5 of the settlement and invoking the jurisdiction under Section 36A is unnecessary. In this earlier, part of this judgment we have held that order of reference to be valid. Therefore, the only question that remains for consideration is whether a suspended employee would be entitled to share of service charges payable together with the subsistence allowance. Clause 5 of the settlement requires interpretation which has been interpreted by the labour court and we have to see whether such an interpretation was proper in the facts and circumstances. With effect from 01.10.1994, 70% of the service charges collected on food and beverages will be disbursed amongst all employees. In the opinion of the appropriate Government, the words “connected with the hotel functioning” assumes immense importance or relevance which

requires a lawful interpretation. The terms of a settlement has to be read bearing in mind as to what was the intention of the parties when they entered into the settlement. The terms of the settlement are not be to interpreted as if it is a statute. The clause 5 clearly states that 70% of the service charges will be disbursed amongst all employees. The sentence does not culminate with a full stop but proceed further to state that including managerial personnel connected with the hotel functioning. In the case on hand, we are concerned only with the workmen who have been termed as employees in the settlement and we are not concerned with the managerial personnel. Therefore, to our mind the proper way to interpret the settlement is to state that 70% of the service charge collected will be disbursed amongst all employees. This disbursement would include managerial personnel who are connected with the hotel functioning. We are not here to interpret as to which category of managerial personnel would be entitled to this benefit and as to which of the managerial personnel who would be excluded. The settlement clearly states that 70% of the service charges collected will be disbursed amongst all employees. It is trite law that an order of suspension does not terminate the service of an employee, it contemplates that such suspended employee is not entitled to the salary but is eligible to get subsistence allowance. Thus, the suspended employee continues to be an employee of the management and the order of suspension prevents him from reporting for duty and he will be paid as subsistence allowance which is admittedly less than the salary. If such is the position, on a plain reading of clause 5 of the settlement which needs to be interpreted in favour of the employees, would mean that 70% of the service charges collected will be

disbursed to all employees. In our opinion, we need not travel further than this aspect, as we are not concerned with the managerial personnel. Thus, the interpretation to be given to clause 5 should give life to the intention of parties and not otherwise. The facts and circumstances prevailing at the time when the settlement is entered into cannot be ignored. The settlement does not in as many words excludes a suspended employee; but states that a portion of the service charges payable to all the employee and employee undoubtedly would also include a suspended employee. It may be true that a suspended employee is debarred from attending work but the employer employee relationship does not get snapped but it continues and all that the suspended employee can claim is the subsistence allowance which will be lesser than the salary payable to him and he cannot insist that he should be permitted to allow to work. Thus, the labour court rightly held that the intention of the parties must be explicit and clear and if the parties intended be exclude a section of employees, it should have done so while signing the settlement in the year 1994. This aspect becomes clearer if we examine the second limb of clause 5 which excludes certain categories namely the industrial trainees and the hotel operation trainees coming for job trainee from different institute/sources are specifically excluded to any share in the service charge. The third category are the tipping zones employees who will get 50% less service charges than the amount payable to the non-tipping zone employees. Therefore, the management had entered into the settlement in the year 1994 did not seek to exclude suspended employees. This is presumably due to the fact that the management understood the legal position that a suspended employee will also continue to be employee unless

and until his services are terminated. The decision in the case of **Allahabad Bank** referred to by the learned advocate appearing for the appellant would in fact support the above conclusion. The Hon'ble Division Bench held that when an agreement is specific and clear and agreed between the parties neither the tribunal nor the court can substitute the agreement nor can it extend the scope of the agreement. The tribunal and the court have to accept the agreement which is binding between the parties, any interpretation which amounts to re-writing of the terms of the agreement or extension of the agreement or modification of the agreement is wholly outside the jurisdiction of the tribunal or the court. This scope of interpretation of the scope of the agreement is limited to the expression used and classification made and neither the court nor the tribunal can erase the distinction or difference between different categories; nor it is within the scope of the court to undertake job evaluation and substitute its view replacing an existing agreement. Thus, if the case of the management is to be accepted then it would tantamount to creating a class amongst the employees which is not provided for in the settlement. The parties who were at ad-idem in the year 1994 had clearly spelt out as to which of the categories have to be excluded and which of the categories are to be included. The plain reading of the settlement clearly shows that all employees will be entitled to a share of the service charges collected. The inclusive clause is those who are managerial staffs who may not strictly fall within the definition of employee/workmen. The understanding of the parties appears to be that such managerial personnel involved with the hotel administration will also be paid a share of the service charges. In our

opinion such clause including a managerial personnel to be entitled to a share of the service charges may not in the strict sense be germane for finding an answer to the question referred for adjudication before the labour court. The settlement has to be read as a whole and in particular clause 5 of the settlement has to be read in its entirety, as we have seen it provides for inclusion as well as exclusion. Those included are the managerial personnel connected with the running of the hotel the exclusion are the trainees and another sections of the employees who receives tips. Therefore, the words including managerial personnel connected with the hotel function has to be read in its entirety and the words “connected with the hotel functioning” should be read in conjunction with the words “managerial personnel” and it should not be transposed to the earlier part of the sentence to state that service charges will be disbursed to all employees connected with the hotel functioning. If such interpretation is to be given, it would tantamount to re-writing the settlement which is impermissible. The observations made by the labour court in Page 13 of the award wherein the labour court held that the phrase “connected with the hotel functioning” seems redundant has been heavily commented upon by the learned advocate appearing for the appellant. In our view, what the labour court has meant to explain is that the said words “connected with the hotel functioning” seems redundant because every employee of the hotel must be connected with its functioning, for if it were otherwise, he or she would not have been employed in the first place. In addition to what the labour court has observed we would add to say that the appropriate way to read the words “connected with the hotel functioning” is to read along with the words “including managerial

personnel”. If it is read in such a manner, it clearly brings out the intention of the parties when they entered into the settlement. Thus, in the absence of any specific exclusion of a suspended employee, the appropriate manner in which the clause 5 of the settlement has to be interpreted is to hold that the 70% of the service charges shall be disbursed among all employees which would include a suspended employee as he is also an employee of the management till he is terminated.

16. Thus, for all the above reasons, we find that the challenge to the award of the labour court was rightly rejected by the learned writ court.

17. In the result, the appeals fails and is dismissed. No costs.

(T.S. SIVAGNANAM, J.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A – SACHIN)