

Court No. 2  
**17.12.2024**  
(Item No. 26)  
(AB)

**IN THE HIGH COURT AT CALCUTTA**  
**Constitutional Writ Jurisdiction**  
**Appellate Side**

**W.P.A. 27005 of 2024**

M/S. Hoya Medical India Private Limited  
VS  
The State of West Bengal & Ors.

Mr. Biswaroop Bhattacharya  
Mr. Victor Chatterjee  
Ms. Neelanjana Ghorui  
.... For the petitioner

Mr. Jaharlal De  
Ms. Tanwishree Mukherjee  
.... For the State

Ms. Manika Roy  
Ms. Ankita Chowdhury  
Mr. Atanu Sur  
.... For respondent No. 2/applicant

Affidavit-of-service, filed in Court today, is  
taken on record.

Mr. Biswaroop Bhattacharya, learned counsel  
appears for the petitioner.

Mr. Jaharlal De, learned Additional  
Government Pleader appears for respondent No. 1.

Ms. Manika Roy, learned counsel appears for  
respondent No. 2.

Through this writ petition the petitioner has  
challenged the impugned order dated **January 31,**  
**2024** passed by the learned Judge, 7<sup>th</sup> Industrial  
Tribunal, Kolkata in **case No. 09/2021/10(1B)(d)** at  
**page 35** to the writ petition.

The facts in nutshell are petitioner is the  
employer and respondent No. 2 is the employee. The

respondent No. 2 has been terminated from his employment by the employer. The respondent No. 2 has challenged the termination proceeding before the learned Tribunal. In the said proceeding the employer filed an application, **annexure P-3** at **page 64** to the writ petition, inter alia, praying for the following:

*“The afore said circumstances it is humbly prayed that Your Honour may graciously be pleased to decide the preliminary issued as to “whether the instant dispute is an industrial dispute or a private dispute?” and “whether the applicant is a workmen or not under the provisions of the Industrial Disputes Act, 1947?”, before entertaining the instant application filed under section 10(1B)(d) of the Industrial Disputes Act, 1947, being numbered as CASE NO. 09 of 2021/10(1B)(d), on merit and pass such order or further order or orders as may deem fit and proper.”*

The petitioner has also filed its written objection against the complaint filed by the employee. The respondent No. 2 has filed its objection to the application filed by the petitioner, as referred to above, at **page 102** to the writ petition. The sole contention of the petitioner before the learned Tribunal was that the employee is not **Workman** within the meaning of the **Industrial Disputes Act, 1947** as the employee is employed mainly in a managerial or administrative capacity. Therefore, the learned Tribunal established under the said **Act of**

**1947** has no jurisdiction to receive the complaint from the employee.

The objection raised by the petitioner/employer was heard in detail in presence of the parties by the learned Tribunal and the impugned order was passed. While passing the impugned order the learned Tribunal has come to a specific finding that:

*“On perusal of the petition dated 12.04.2023 along with its written objection and the materials on record, I find that the whole of contention/issue whether the applicant is a workman or not under Section 2(s) of the Industrial Disputes Act, 1947 is a mixed question of fact and law in the instant case which can be adjudicated only after evidences thereof. I further find that there is enough substance in the submissions of the Ld. Advocate for the applicant that the nature of job performed by the applicant is also to be looked into, which is possible only when all the issues are tried together i.e. issues of fact and law.”*

On the basis of the above finding the learned Tribunal came to the following conclusion:

*O r d e r e d*

*That the petition dated 12.04.2023 filed by the O.P. is rejected on contest at this stage without any order as to cost.*

*Fix 23.04.2024 for framing of issues, suggestive issues, if any, by the parties.”*

Mr. Biswaroop Bhattacharya, learned counsel appearing for the petitioner employer submits that, the record would unequivocally depict that, the

employee concerned was working in a managerial capacity and hence he never falls within the meaning of **“workmen”** as defined under **sub-Section (s) to Section 2 of the 1947 Act**. In course of his submissions Mr. Bhattacharya has cited several examples about the nature of working of the employee in support of his contention. He has also referred to the annexures to the writ petition and pleadings made therein

Mr. Bhattacharya, learned counsel further submits that, under the impugned order the Tribunal held the issue raised by the petitioner shall be tried as a preliminary issue but the same being a mixed question of law and fact can be adjudicated only upon evidences thereof and all the issues both on maintainability and merit can be decided together. Learned counsel submits the Tribunal had erred in law. Tribunal ought to have decided the application taken out by the petitioner on the preliminary point of maintainability first independently and then if it holds that the Tribunal has jurisdiction then the Tribunal may proceed with the merits of the case and decide the issue on the merits of the case independently at a later stage. He submits that, when both the point of maintainability and the merits will be heard together the petitioner would have to disclose its defence both on maintainability and on merit and if ultimately the

Tribunal holds that it has no jurisdiction to try the complaint of the employee then unnecessarily the defence of the employer would be disclosed and exposed. This is not the law, according to Mr. Bhattacharya.

In support of his contention Mr. Bhattacharya has referred to the following two decisions:

- (i) ***In the matter of: Express Newspapers Ltd. Vs. Their Workers and Staff & Ors. reported at 1962 (5) F.L.R. 205 and***
- (ii) ***Unreported decision of the Hon'ble Division Bench In the matter of: M/S. Marathon Electric Motors India Ltd. Vs. The State of West Bengal & Ors. dated January 27, 2020 rendered in MAT 760 of 2019.***

The respondents are not called upon.

After considering the submissions made on behalf of the petitioner this Court, at the threshold reiterates the law relating to the judicial review in brief. This Constitutional Court in exercise of its power under **Article 226 of the Constitution of India** in judicial review never sits on appeal on the impugned order. Only if there is a glaring perversity on the face of the impugned order, and if there is a breach of natural justice or a glaring illegality on the

face of the impugned order this Constitutional Court interferes and otherwise not.

Upon reading the provisions laid down under **sub-Section (s) to Section 2 of the 1947 Act** in the light of the facts of this case, it appears to this Court also that, to decide the issue whether the respondent No. 2 employee is a '**workman**' within the meaning of the said **1947 Act** is a mixed question of law and fact. Several fact finding enquiries are required to be made and only after that the provisions of law will have to be applied to come to a definite finding whether the employee is a workman or not.

To decide the point of maintainability raised by the petitioner employer before the learned Tribunal, the Tribunal has rightly held that this mixed question of law and fact first has to be decided on the basis of a complete evidence action to come to a definite conclusive finding whether the Tribunal has jurisdiction or not to entertain the case of employee as a preliminary issue and then ultimately if the Tribunal holds that it has no jurisdiction there shall be no further proceeding before the Tribunal and there would be no question of going into the merits of the case any further but if the Tribunal holds it has jurisdiction then, of course, the Tribunal shall immediately proceed to adjudicate upon the merits of the case.

**In the matter of: Express Newspapers Ltd.**

**(Supra)** the Hon'ble Supreme Court has observed as under:

*"It is also true that even if the dispute is tried by the industrial tribunal, at the very commencement the industrial tribunal will have to examine as a preliminary issue the question as to whether the dispute referred to it is an industrial dispute or not, and the decision of this question would inevitably depend upon the view which the industrial tribunal may take as to whether the action taken by the appellant is a closure or a lockout. The finding which the industrial tribunal may record on this preliminary issue will decide whether it has jurisdiction to deal with the merits of the dispute or not. If the finding is that the action of the appellant amounts to a closure, there would be an end to the proceedings before the tribunal so far as the main dispute is concerned. If, on the other hand, the finding is that the action of the appellant amounts to a lockout which has been disguised as a closure, then the tribunal will be entitled to deal with the reference. The finding which the tribunal may make on this preliminary issue is a finding on a jurisdictional fact and it is only when the jurisdictional fact is found against the appellant that the industrial tribunal would have jurisdiction to deal with the merits of the dispute. This position is also not in dispute."*

The above observation of the Hon'ble Supreme Court speaks that the moment the Tribunal, if holds it has jurisdiction after deciding the preliminary issue it can immediately proceed to decide the issues on the merits of the case.

In the matter of: **M/S. Marathon Electric Motor India Ltd.** the Hon'ble Division Bench has observed as under:

*"The principle is this. All the issues have to be framed by the tribunal. The issues which concern the jurisdiction of the tribunal or any other jurisdictional issue going to the root of the reference should be framed as the first and preliminary issue. If the evidence which is receivable to try the preliminary as well as the other issues and the arguments are not separable, then the evidence has to be taken and arguments heard on all the issues. Thereafter, if the decision of the preliminary issue disposes of the matter and the other issues need not be gone into then that issue is to be decided first.*

*If the preliminary point fails, then the other issues are to be decided. Normally if the jurisdiction or competence of the tribunal is not the preliminary issue, all the issues are to be tried together. On the other hand, if the preliminary issue is jurisdictional, as the evidence and arguments on the issue are separable and the decision on that issue may dispose of the case, then evidence and arguments only for that issue are to be admitted. It is to be tried first. If the decision on this issue does not dispose of the case, then the other issues have to be gone into.*

*The last type of case is the one at hand. As submitted by Mr. Chowdhuri, learned senior counsel for the appellant. The evidence, i.e., receivable to try the question whether the said respondents were trainees or not are separable from the evidence to be received for the other issue. The preliminary issue is not connected with the other issues and can be separately tried. If the preliminary issue is decided in favour of*

*the appellant, it could dispose of the whole reference. The other issues need not be gone into.”*

In view of the foregoing reasons and discussions this Court is of the firm view that, the impugned order passed by the learned Tribunal calls for no interference and the same stands **affirmed**. This writ petition accordingly stands **disposed of** and this Court directs:

*‘The learned Tribunal to decide the said issue as a preliminary issue, after framing all the issues. If the issue is decided in favour of the appellant, the learned tribunal will dispose of the reference accordingly. If not, it will immediately try the other issues taking additional evidence, hearing arguments and dispose of the reference as expeditiously as possible.’*

The expression appellant quoted above should be read and understood as the employer in the facts of the instant case.

The learned Tribunal shall make all endeavour to conclude the entire proceeding in accordance with law as expeditiously as possible.

On the prayer of Mr. Biswaroop Bhattacharya, learned counsel appearing for the petitioner, the petitioner employer shall file its written statement before the learned Tribunal on or before **January 15, 2025**.

The Tribunal after receiving the said written statement shall commence and proceed with the hearing within a period of **two weeks** there from.

It is needless to mention that the point of maintainability as raised by the employer petitioner shall be decided as a preliminary issue strictly in accordance with law.

This Court has not gone into the merit of the rival contentions of the parties. All points are kept open before the Tribunal.

Since affidavits are not called for, the allegations made in this writ petition are deemed not to have been admitted by the respondents.

With the above observations and directions, this writ petition, **WPA 27005 of 2024** stands **disposed of**, without any order as to costs.

Photostat certified copy of this order, if applied for, be furnished expeditiously.

**(Aniruddha Roy, J.)**