The undue influence of Industrial Disputes Act's power of reference

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Deep Dive

By Sriram Gireeshan

The Industrial Disputes Act 1947 (IDA) conferred the power of reference in the realm of industrial dispute resolution to any relevant adjudicatory body, namely, to the Board of Conciliation, the court of inquiry, the labour court and the tribunal. The power of reference inscribed in Section 10 of the Act entailed that the appropriate Government upon coming to an opinion that an industrial dispute exists, or upon apprehending such dispute, is entitled to refer the dispute or any matter appearing to be connected thereto to the relevant adjudicatory forum.[1]

Furthermore, Section 12(4)[2] read with 12(5)[3] of the IDA provides that upon failure of conciliation proceedings, the conciliation officer is required to send a full report to the appropriate government, and the latter if satisfied as to there being a case for reference will make such reference to the appropriate forum.[4] If the government does not make such reference, it is obligated to record and communicate reasons for such refusal to the parties.[5]

The government's power under Section 10 is wide and exclusive, i.e., only upon it referring the industrial dispute to the relevant forum could the adjudicatory machinery be conferred with the jurisdiction to entertain such dispute.[6]

The only statutory constraint to the power of reference pertains to disputes relating to public utility services. In such cases, the second proviso to Section 10(1) mandates reference by the appropriate government except in circumstances where it considers that the notice relating to such dispute served under Section 22 of the IDA is frivolous or vexatious, and thus considers such reference to be inexpedient.[7]

The historical background of state intervention in industrial disputes under the IDA can be traced to World War II when the British Indian government gained powers to compel mediation and arbitration in labour matters.[8] After Independence, there was a debate between two opposite approaches, with one position favouring collective bargaining free from compulsory adjudication and state-influence, and with the other advocating for state intervention.[9] Ultimately, the dominant opinion among workers supported state involvement to protect their interests.[10]

This led to the inscription of the state's role as a guardian of justice in industrial relations within the IDA. The history leading up to the IDA reveals that the rationale underpinning the espousal of state-intervention consisted of a paternalistic approach that sought to secure the interests of parties involved in disputes, and enhancing industrial growth.[11] A key justification posited for this paternalistic approach was that state regulation would be more beneficial for the workers.[12] The power of reference is a key component of this paternalistic framework. With this insight, it would be worthwhile to set out key verdicts that have shaped the power of reference and are relevant for this discussion.

In *CP Sarathy*[13]*,* it was observed that power of reference is an administrative power and thus there was limited to no scope for judicial review, and the court could not delve into the material before the government to assess whether it supported its conclusion.[14]

In *KP Krishnan*[15] the Supreme Court fortified the position on limited judicial review.[16] It was observed that the power of reference connotes "wide and even absolute discretion" to grant or refuse reference of a dispute, although Courts were not barred from inquiring into the reasons.[17]

The court observed that the writ of mandamus would lie if the reasons furnished by the government are extraneous to the dispute.[18] In *Bombay Union of Journalists*[19]*,* it was held that the government may refuse referral on grounds of "expediency", with the caveat that refusal to make reference stemming from malafides or on the basis of irrelevant reasons would entitle the party to move for a writ of mandamus.[20]

Infirmities inherent in the power of reference

As discussed in the preceding section, the power of reference vested in the government is marked by a statutory silence in terms of strict guidelines that would prevent exploitation of the power. An inherent consequence of the exercise of reference-making power by the government is that adjudication is delayed in many cases.[21] A second connected but even more problematic ramification of the virtually untrammeled power is its possible discriminatory use stemming from outside influence.

The First National Commission on Labour, cognizant of this perception, recommended that a regulatory procedure be developed to obviate charges of political intervention.[22]

Thus, despite the positive decisions by the Supreme Court that have placed fetters on the exercise of the power of reference, in practice, the power nevertheless continued to be exercised in an arbitrary and discriminatory manner. This is evidenced by the trend wherein trade unions affiliated to the ruling political party sponsored disputes, they received favourable treatment in respect of reference.[23] A study of industrial adjudication conducted by Debi S. Saini, revealed that despite parties to reference decisions being under the impression that the conciliation officer's failure report was the vital factor in determining whether a dispute was referred for adjudication, in actuality, only around 30 percent of disputes did the conciliation officer's recommendations play the determining role.[24] The study revealed that party-affiliated trade unions were at a considerable advantage with regard to both the expediency and the probability of referral of disputes.[25]

Significantly, disputes that were initially not recommended for reference by the conciliation officer in their failure report nevertheless came to be referred for adjudication in cases where the disputes in question were espoused by unions affiliated to the party in power upon exercise of political influence.[26]

Furthermore, changes in the party in power and even changes in the leadership of the ruling party came to influence and change the government's decision as to the appropriateness of reference of disputes which were earlier denied referral.[27] The vagaries of the government's exercise of reference have proved to be detrimental to the sustenance of trade unions in instances where such unions failed to secure reference, since the legitimacy of unions is predicated upon, *inter alia,* its ability to represent workers and succeed in securing decisions in their favour.[28] As Ramaswamy observes, the government was in substance conferred the power to either build up or destroy unions by systematically granting or denying reference.[29]

The foregoing discussion demonstrates that the absence of strict safeguards applicable to the power of reference made it vulnerable to capture by influential parties and external actors. Despite the normative underpinnings of the power of reference being the government

acting with the objective to preserve industrial peace, and secure the interests of the workers, the wide discretion and absence of procedural strictures such as a fixed duration for deciding the question of reference, renders it prone to abuse and adversely affects workers.

Furthermore, as long as the government retains the discretion as to reference of disputes, despite the courts decisions mandating absence of bias and malafides, it is arguably very much possible for governments to render decisions denying reference which, though actuated by covert bias and/or malafides, can be couched in ostensibly justifiable reasons that convincingly support the denial of reference in certain cases, and in actuality, perpetuate discriminatory treatment. The scope for such discrimination is widened by the position established in *Niemla Textile Finishing Mills*[30]*,* wherein the Supreme Court observed that since no two cases are alike in nature, their eligibility for reference would be contingent upon the situation prevailing in such disputes. While the Court is not wrong for taking this position given the multiplicity of factors that shape the situation surrounding a particular dispute, this wide scope, in my opinion, gives the government considerable leeway to refuse reference for ostensibly sound reasons in certain cases, while granting reference in other similar cases where the material factors are substantially the same on undisclosed extraneous considerations stemming perhaps from outside influence, thereby leaving considerable scope for *de facto* discriminatory use of the power.

Furthermore, refusal and even grant of reference invites petitions to the High Courts, which has burdened the judiciary, and more significantly, strained the resources of the workers who struggle to sustain themselves during the already protracted adjudication process which is further lengthened by refusal to grant reference.[31] Additionally, the factor of “expediency” that the courts in *Sarathy**[32]**, Krishnan**[33]***, and *Bombay Journalists*[34] posited as a valid consideration is vague in its import, and consequently, widens the discretion of the government even further. Such untrammeled discretion to stall industrial disputes is likely to add to the delay of resolution of industrial disputes and spur unnecessary litigation.

The problems pertaining to the practical difficulties surrounding reference can possibly be resolved by constraining the scope of reference solely to the question whether the dispute in question is an industrial dispute. However, this would render the power of reference superfluous.

In my opinion, state oversight of industrial disputes does not ipso facto ensure fairness or industrial peace;[35] rather, these goals are contingent upon the efficacy of the dispute resolution mechanism, which encompasses, *inter alia,* the speed of resolution of disputes and capability to handle large volumes of disputes. Arguably, buttressing the dispute resolution by steps such as (i) ensuring that officers involved in adjudication possess high qualification, (ii) resolving redundancy in the dispute resolution process to increase expediency of dispute resolution would obviate the need for the power of reference. State

oversight in the form of the power of reference is arguably a superfluous procedural formality at its best, and a sizeable obstacle to expedient dispute resolution that is malleable to extraneous pressures at its worst.

There is a further case against retaining the power of reference in light of the reforms in the 1990s that liberalised the Indian economy. In light of the fact that the power of reference is very much prone to political influence among others, there is high likelihood of the government being keen to refuse reference of industrial disputes in instances where it has close ties to business interests, or where it believes that reference of such dispute would be inimical to the prospects of inviting the sustaining private investments. Furthermore, given the vocal espousal of “ease of doing business” by the current ruling dispensation, the possibility of “expediency” being utilised to effectively deny the scope of redressal for workers in service of business interests cannot be gainsaid.

It is thus submitted that the withdrawal of the power of reference from the statute has been long overdue. In my opinion, an expedient, efficient and sizeable dispute resolution machinery, that is directly accessible to workers without the State acting as a middleman is far more preferable to the government acting as the gatekeeper of the adjudicatory process. The provision of direct access to recourse to independent adjudicatory fora bereft of executive influence and untrammeled discretion, would increase transparency, do away with apprehensions of malafides and misuse of power, and thereby foster trust in the adjudicatory process among the parties.

In conclusion, the power of reference has proven to be vulnerable to extraneous influences and potential misuse. Despite its original purpose to preserve industrial peace and protect workers’ interests, it has often been subject to political pressures and exercised in a discriminatory manner to the detriment of workers’ interests. Given the challenges posed by the power of reference, its removal was long overdue. Thus, the removal of reference powers under the Industrial Relations Code is a positive step towards streamlining and expediting the industrial dispute resolution process.

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[1] The Industrial Disputes Act 1947, s10

[2] The Industrial Disputes Act 1947, s12(4)

[3] The Industrial Disputes Act 1947, s12(5)

[4] Ibid.

[5] The Industrial Disputes Act 1947, s10

[6]Santokh Ram, ‘Government’s Discretion to Refer Industrial Disputes for Adjudication’ (1979) 15 Indian Journal of Industrial Relations 307 <https://www.jstor.org/stable/27768562> accessed 30 September 2023.

[7] The Industrial Disputes Act 1947, s 10

[8]EA Ramaswamy, *Power and Justice: The State in Industrial Relations* (Oxford University Press 1984).

[9] Ibid.

[10] Ibid.

[11]Upendra Baxi, ‘Law and State Regulated Capitalism in India: Some Preliminary Reflections’ in Ghanshyam Shah (ed), *Capitalist Development: Critical Essays : Felicitation Volume in Honour of Prof. A. R. Desai* (Sangam 1992).

[12] Supra (n 8)

[13] State of Madras v. CP Sarathy AIR 1953 SC 53

[14] Ibid.

[15] State of Bombay v. K.P. Krishnan AIR 1960 SC 1223

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Bombay Union of Journalists v. The State of Bombay 1964 AIR 1617

[20] Ibid.

[21]Santokh Ram, ‘Government’s Discretion to Refer Industrial Disputes for Adjudication’ (1979) 15 Indian Journal of Industrial Relations 307 <https://www.jstor.org/stable/27768562> accessed 30 September 2023.

[22]‘Report of the National Commission on Labour’ (National Commission on Labour 1969) 1 <https://www.vvgnli.gov.in/sites/default/files/Report%20of%20the%20National%20Commissionon%20Labour_0.pdf>.

[23] Supra (n 21)

[24]Debi S Saini, ‘Reference Power of State in Industrial Disputes Adjudication: A Study with Reference to Industrial Disputes in Faridabad’ (1993) 35 Journal of the Indian Law Institute 233 <https://www.jstor.org/stable/43953212> accessed 1 October 2023.

[25] Ibid.

[26] Ibid.

[27]TC Phadtare, ‘Government’s Power in Relation to Industrial Disputes’ (1981) 23 Journal of the Indian Law Institute 421 <https://www.jstor.org/stable/43950761> accessed 30 September 2023.

[28] Supra (n 8)

[29] Ibid.

[30] Niemla Textile Finishing Mills Ltd v Second Punjab Tribunal 1957 AIR 329

[31]V Nagaraj, ‘The Relevance of the Appropriate Government’s Power of Reference under Section 10(1) of the Industrial Disputes Act, 1947 in a Liberalised Economy’ 9.

[32] Supra (n 13)

[33] Supra (n 15)

[34] Supra (n 19)

[35] Supra (n 31)

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