

(1988) 08 CAL CK 0039
In the Calcutta High Court
Case No : Matter No. 1706 of 1987

Annapurna Mistanna Bhandar

APPELLANT

Vs

Industrial Tribunal (VIII) and Others

RESPONDENT

Date of Decision : 12-08-1988

Acts Referred:

Industrial Disputes Act, 1947 — Section 10

Citation : (1990) 60 FLR 198 : (1990) 2 LLJ 162

Hon'ble Judges : S.K. Sen, J

Bench : Single Bench

Advocate : Monotosh Mukherjee and Deepak Bosu, for the Appellant; Partha Sarathi Sengupta, Amicus Curiae, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Sen, J.—The facts and circumstances leading to this writ petition as alleged in the petition are inter alia that prior to the dissolution of the partnership firm of M/s. Annapurna Mistanna Bhandar and closure of the said business, an industrial dispute arose between the partners of the said firm and the respondent No. 4 representing the workmen of the said firm on the issue of "lock-out" under the notice of then management dated 16th August, 1973. The said dispute was settled with the intervention of the conciliation officer on 24th October, 1973 and a tripartite settlement was entered into by the parties. After the said tripartite settlement dated 24th October, 1973 the business of the said firm was being carried on by the partners of the said firm at the said place. Thereafter dispute and differences arose amongst the partners of the said business with regard to their joint properties including the sweet-meat business and the said firm was dissolved and "closure" was declared of the said business at No. 22, Rabindra Sarani, Calcutta. It has been alleged in the petition that since the partners were no longer interested to carry on the said business of manufacturing and selling sweet-meat in copartnership, accordingly by a notice dated 19th November, 1973, the ex-partners closed down their said business with immediate effect and

the service of all the 19 workmen were duly terminated from the said date and the workmen who had been in continuous service in the said business for not less than one year immediately before the said "closure" were duly paid the notice pay and compensation in accordance with the provisions of the Industrial Dispute Act, 1947 and the workmen had duly accepted the said notice and compensation and all other legal dues against receipts duly granted by them in full and final settlement of all their claims and dues against the said firm since dissolved. The said notice of "closure" was served on all concerned, namely, the Secretary in the Department of Labour, West Bengal; The Labour Commissioner, West Bengal; The Conciliation Officer; The Chief Inspector of Shops and Establishments, West Bengal and the respondent No. 4, the union. By letter dated 19th November, 1973 addressed to the Conciliation Officer, the respondent No. 5, the respondent No. 4 the union alleged that the management of M/s. Annapurna Mistanna Bhandar had declared lockout with effect from 19th November, 1973. Thereafter the respondent No. 5 convened a number of joint conferences on the issue of "lockout" but none on behalf of the management of the said firm attended the conference held by the respondent No. 5 on the issue of lock-out as it was contended by the Management that no lock-out was declared by them but in fact they had closed the business and the declaration was a closure and not "lock-out". On 18th August, 1975 the respondent No. 2 made an order of reference being No. 3414-IR, the issue being "Whether the closure of the undertaking with effect from 19th November, 1973 is real? To what relief, if any, are the workmen entitled?" Both the union and the management represented by ex-partners filed their respective written statements. It was contended on behalf of the management that the said Order of Reference is not maintainable being bad in law and that the tribunal had no jurisdiction to adjudicate upon the said order of reference on the ground that no "industrial dispute" as to the issue of closure of the business was at all raised by the workmen or their union with the employer and as such there is no industrial dispute existing with regard to the issue of closure and that the respondent No. 4 having raised an industrial dispute on the issue of lock-out in the letter dated 19th November, 1973, the instant order of reference is incompetent and as such the tribunal has no jurisdiction to adjudicate upon the said order of reference. At the time of hearing, the preliminary objection was raised on behalf of the ex-partners as to the maintainability of the order of reference as well as the jurisdiction of the tribunal to adjudicate upon such inconsistent order of reference. The said preliminary objection was heard by the learned Eighth Industrial Tribunal and by an order No. 45 dated 8th December, 1981 the said tribunal over-ruled the preliminary objection raised by the ex-employers. In this writ petition the petitioner has challenged the said order overruling the preliminary objection raised by the ex-employers.

2. It has been contended on behalf of the petitioner that the respondent No. 1 had committed an error of law apparent on the face of the records by not taking into consideration that no "industrial dispute" at all was raised by the workmen

or union with the ex-employer on the issue of "closure" in spite of due service of notice of "closure" dated 19th November, 1973 on the union, the respondent No. 4, and that by letter dated 19th November, 1973 being Annexure "B" to the petition addressed to the Asst. Labour Commissioner, West Bengal the respondent No. 4 had sent a request to the Government without raising any "industrial dispute" with the ex-employer which would be a mere demand by them on the issue of lock-out and not an "industrial dispute" on the issue of closure between the employees of the union and the ex-employer. It has been submitted that there was no scope for making a reference on the issue of closure when no industrial dispute had been raised at all by the union, the respondent No. 4 or the employees as such on the question of closure and as such the order of reference made by the respondent No. 2 u/s 10 in respect of closure is not competent. It has also been urged that the order of reference mentions that an "industrial "dispute" "exists" but there was no material before the Government to form an opinion as to the existence of "industrial dispute" on the issue of closure and in the instant case there is no such material with regard to the dispute on the issue of "closure" and as such the order of reference is incompetent and bad in law. It was submitted that the tribunal could not go into the question as to whether the closure was real as it did not form part of the "industrial dispute". The learned Advocate for the petitioner also referred, to provisions in the Industrial Disputes Act and submitted that the question of closure really could not be the subject matter of an industrial dispute as defined under the Industrial Disputes Act. The learned Advocate also submitted that the issue with regard to the closure as made out in the order of reference could not form part of the subject matter of a reference under the Industrial Disputes Act and that the tribunal committed an error of law in rejecting the preliminary" objection as to the maintainability of the reference.

3. None appeared for the respondent union. I appointed Mr. Partha Sarathi Sengupta, the learned Advocate as amicus curiae. Mr. Sengupta, submitted whether the closure is real or not can be the subject matter of reference and such an issue can form part of industrial dispute. In support of his contention he relied upon a judgment in the case of Walford Transport v. State of West Bengal and Ors. (1978IILU110). He also showed the distinction between lock-out and closure and referred to the Supreme Court judgment in the case of The Management of Express Newspapers Ltd. Vs. Workers and Staff Employed under it and Others, . Mr. Sengupta also referred to the factual aspect of the question as to whether such a dispute relating to closure was raised by the workmen union or not. He submitted that the union in its written statement before the tribunal specifically referred to the said fact. Mr. Sengupta referred to paragraph 13 of the said written statement of the union which is set out hereinbelow:

"That after receiving the alleged closure notice dated 19th November, 19/3 the workmen of M/s. Annapurna Mistanna Bhandar, No. 2, Rabindra Sarani, Calcutta-1, sent their protest to the management through the Union's letter dated 19th November, 1973. The management of the said sweet-meat shop has

duly received the said letter sent Under Certificate of Posting, but they have refused the another copy of the said letter which was sent under registered with A/D."

He submitted that the statement of facts as made out by the union in paragraph 13 had not been specifically denied by the management in its reply. Under such circumstances it cannot be said that such a question relating to closure was not raised by the union and it is not correct according to Mr. Sengupta that factually industrial dispute was not raised on the question of closure by the union. In support of his contention Mr. Sengupta also referred to the following decisions:

(i) Western India Match Co. Ltd. Vs. The Western India Match Co. Workers Union and Others,

(ii) Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others,

(iii) Sadhu Ram v. Delhi Transport Corporation (1983 I LLJ 383)

4. I have considered the respective submissions of the parties. It appears to me to be necessary to consider the following material facts which are relevant for this writ petition, On 16th August, 1973 the management of M/s. Annapurna Mistanna Bhandar declared lock-out in their shop situate at Nos. 2 and 22, Rabindra Sarani, Calcutta-1 and the said lock-out continued till 28th October, 1973. After imposition of the lock-out the workmen have recorded their protest through the union's letter dated 16th August, 1973 and thereafter the union moved the matter before the Assistant Labour Commissioner, Government of West Bengal vide their letter dated 20th August, 1973 and the matter was taken up in conciliation by the Conciliation Officer. On 24th October, 1973 a tripartite settlement took place at the instance of the Conciliation Officer and at the time of the said settlement the management approached the Conciliation Officer that they have set up a new ownership by dissolving the existing partnership business and that they will run the said shop situate at Nos. 2 and 22, Rabindra Sarani, Calcutta as different establishments. After reopening of the shops in terms of the said tripartite settlement dated 24th October, 1973, it is the case of the union that the management of M/s. Annapurna Mistanna Bhandar situate at 22, Rabindra Sarani Calcutta did not implement the terms of settlement arrived at between the parties on 24th October, 1973. So the workmen represented by the union sent a protest letter to the management of the said shop regarding the non-payment of the dues to the workmen covered under the said settlement dated 24th October, 1973. Thereafter the management of the said shop issued a closure notice on 19th November, 1973 though the said closure notice was actually posted on 18th November, 1973. It is the case of the union that after closing the said shop the management again started the shop in the same name by recruiting new hands throwing out all its permanent workmen from their respective employment. So the union sent a letter dated 19th November, 1973 to the management of the shop and also referred the matter to the Assistant

Labour Commissioner for his intervention and the Conciliation Officer arranged a joint conference over the issue of lock-out on 1st December, 1973, 18th January, 1974 and other dates also but the attempts of the Conciliation Officer and also of the union failed due to non-compromising attitude of the petitioner. During pendency of the said dispute before the Conciliation Officer the management reopened the shop in the month of April 1974. The union brought the fact to the knowledge of the Conciliation Officer that although the management had reopened the shop but the employees working therein were not absorbed and as such requested the Conciliation Officer to ask the management to allow all the employees whose services were terminated in terms of the company's fake closure notice issued on 18th/19th November, 1973 but the management did not reinstate any of such workmen. It was urged before the tribunal on behalf of the union that the suspension of the shop worker from 19th November, 1973 to 24th April, 1974 cannot be deemed as closure. On the contrary the said suspension of workers must be deemed as illegal and un-justified lock-out and the management of the said shop had brought the situation only to deceive the workmen. The workmen represented by the union apprised the said fact to the Conciliation Officer but all the efforts of the Conciliation Officer and of the union failed. The Conciliation Officer submitted his report u/s 12(4) of the Industrial Disputes Act, 1947 to the State Government and the State Government after considering the said report referred the dispute, viz., if the closure was real, to the tribunal. On the basis of the aforesaid facts it does not appear to me that the contention of the petitioner that no dispute as such was raised by the union on the issue, viz., if the closure was real, is correct. I am also unable to, accept the contention of the petitioner that the union raised an "industrial dispute" on the issue of lock-out only and not on the issue of closure as mentioned in the order of reference and that conciliation proceedings took place at the instance of the union(?) had taken place on the issue of "lock-out" only. It cannot also be said that an industrial dispute was raised by the union only on the issue of lock-out and that no dispute was raised on the question of closure. Considering the facts on record it does not appear to me that the reference on the issue of closure is without jurisdiction. It appears that the union specifically by its letter dated 18th/19th November, 1973 addressed to the Conciliation Officer alleged that the said closure was fake closure and the members who were previously working should be absorbed. The said fact was recorded in paragraph 13 of the written statement submitted before the tribunal but the said fact was not controverted in the written statement submitted on behalf of the management. Under such circumstances the contention of the learned Advocate for the petitioner to the effect that no such issue was raised on closure on facts does not appear to be correct. In the case of *The Sindhu Resettlement Corporation Ltd. Vs. The Industrial Tribunal of Gujarat and Others*, relied upon by the learned advocate for the petitioner it was held by the Supreme Court that if no dispute is at all raised by the employees with the management, any request made by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a

dispute between employers and employees, employers and workmen and workmen and workmen. The Government in that case came to an opinion that industrial dispute existed but that opinion could not be formed on the basis that there is a dispute between employee and employer. In the said case the retrenched employee and the union had communicated their demand to the management to retrenchment compensation only and did not make any demand for reinstatement, and as such it was held that the reference made by the Government u/s 10 in respect of the reinstatement was not competent. In this case, however, the union challenged the said alleged closure notice and duly sent their protest letter dated 19th November, 1973 to the management. The said letter was sent to the management under certificate of posting as also by registered post with A/D but the management refused to accept the said letter sent under registered post with A/D. Union thereafter referred the matter to the Assistant Labour Commissioner, Government of West Bengal for his intervention. Under such circumstances it cannot be said that the union did not raise any industrial dispute with regard to the closure. The case of Kalinga Tubes Limited v. Their Workmen (1979 I LLJ 557) was relied upon by the petitioner's Advocate. This was an appeal by Special Leave against the award of the Special Industrial Tribunal, Orissa in which the principal question for determination before the Supreme Court was whether there was a closure of its undertaking by the appellant company pursuant to a notice issued on 3rd October, 1967 to its workmen on account of the gherao, and if it was not a closure, whether there was refusal by the management of the company to employ its workmen amounting to lock-out. It was held that where a large number of workers virtually staged a gherao in the Administrative Office of the Company during the several hours preceding the declaration of closure by the management but there had been no incidents involving physical violence, nor a series of incidents of any kind for any length of period preceding the gherao and no speech had been delivered by any of the representatives of the workers threatening or inciting bodily injury, with the exception of the gherao, there was nothing to furnish jurisdiction for the management for thinking that the working of the factory would involve unusual exertion or expense. Moreover when neither any Director nor other principal officer of the company was produced by the management before the tribunal to give any other facts and circumstances from which it could be inferred that it appeared to the management that it was not possible to carry on the business by acting in a businesslike way and without unusual exertion it could not be said that the closure of the undertaking was due to unavoidable circumstances beyond the control of the management and hence compensation would be payable as if the undertaking was closed down "for any reason whatsoever" within Section 25FFF(1) of the Act. The petitioner also cited the decision in the case of Indian Metal and Metallurgical Corporation Vs. Industrial Tribunal, Madras and Another, . In that case it was held that the question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act. It was also held that the closing down a business even temporarily is distinct and different

from lock-out just as discontinuance of the service of an employee is not the same thing as strike. Therefore, the industrial tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not, it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently. In my opinion this case is not of any assistance to the petitioner. The issue for determination before the tribunal as referred to by the Government was not whether the closure was justified or not, but whether the closure is real. It is really the contention of the workmen that the management really declared a lock-out in the guise of the closure. Can that fact be determined viz., if the closure is real or not, by the I.T? If it appears that the closure is not real but it is in the guise of a lock-out, then that really falls under the purview of the Industrial Disputes Act, If it appears on the other hand that the closure is real and if the tribunal comes to the finding considering it as a preliminary issue, then the next stage would be not to make any finding as it would be beyond jurisdiction of the tribunal. The Supreme Court in the case of *Express Newspaper Pvt. Ltd. v. The Workmen* (supra) distinguished between a closure and a lock-out. The Supreme Court also held that "It is also true that often 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 lock-out. 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 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 jurisdiction 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".

5. Mr. Sengupta also cited the decision in the case of *Walford Transport v. State of West Bengal* and Ors. 1970 LIC.70. In that case Division Bench of this Court held where the closure of the workshop by the company raises as industrial dispute the question whether the closure of the workshop was real and what relief the workmen were entitled to relates to the matter connected with the dispute and specified in Schedule 3 Item 10 of the Industrial Disputes Act. Therefore, it was held that the reference of the question to the tribunal by the Government u/s 10(1)(d) of the Industrial Disputes Act would be valid and the Tribunal would be competent to adjudicate it. The material facts before the Division Bench inter alia were that on 11th December, 1972 the appellant company had given to the State Government 60 days notice of the intended

closure of its workshop at 22/1, Darga Road, Calcutta and joint conference of the appellant company and its workmen represented by one of their union was convened in the chamber of Additional Labour Commissioner, Government of West Bengal on 17th March, 1973 but the company did not attend the same. The Government of West Bengal thereafter u/s 10 of the Industrial Disputes Act made a reference to the 5th Industrial Tribunal in respect of the following issue: Whether the closure of the Darga Road Workshop of the company is real, what reliefs are the workmen entitled. The appellant company challenged the said reference by a writ petition and a rule was issued but rule was ultimately discharged by the learned Single Judge. Thereafter an appeal was preferred wherein the Division Bench dismissed the said appeal holding that such a reference would be valid and the Tribunal would be competent to adjudicate as the issue under reference relates to a matter connected with the dispute and specified in Schedule 3 Item 10 of the Industrial Disputes Act. While arriving at the said decision the Division Bench referred to the judgment in the case of Workmen of the Indian Leaf Tobacco Development Co, Ltd. v. Management of Indian Leaf Tobacco Development Co. Ltd (1970 I LLJ 343). Referring to the said Supreme Court decision the Division Bench observed as follows:

"The Supreme Court in the said case recognised that no Industrial Tribunal even in a reference u/s 10(1)(d) of the Industrial Disputes Act can interfere with the discretion exercised by a company in the matter of closing down some of its branches and depots and that the Tribunal has no power to issue orders directing re-opening of a closed depot or branch. But at the same time, the Supreme Court in the said case observed that the Tribunal can determine whether a closure was genuine or real. Secondly, the Industrial Tribunal would be fully competent to adjudicate upon the relief to which the workmen of a branch which had been closed down, might be entitled to. If such a question arises and becomes subject matter of an industrial dispute, the Tribunal, can go into it and decide whether the claim of the workmen that they should not be retrenched was justified. In the instant case, we have already set out the order of reference u/s 10. The Tribunal had been asked to determine whether or not the closure of the appellant company was real and what relief, if any, the workmen concerned were entitled to and the learned Advocate also cited the case of Sahu Minerals and Properties Ltd. Vs. Presiding Officer, Labour Court and Others, , which also fully supports the submission of the learned Advocate for the respondent No. 3 that the reference made to the Tribunal involved an industrial dispute and therefore the Industrial Tribunal was competent to adjudicate whether the case before it was a case of retrenchment and compensation or the proviso to Subsection (1) of Section 25-FFA was attracted on closure of the establishment. The Tribunal may determine whether a so-called closure was no closure at all".

6. Considering the facts and circumstances of the case and also of the decisions cited above it does not appear to me that the Tribunal has committed an apparent error of law or illegality in deciding the said preliminary point raised by the management and that no interference is called for in this writ proceeding.

Accordingly this writ petition is dismissed. There will be no order as to costs.