

(1992) 06 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 1151 of 1987

Association of Engineering Workers" Trade Union

APPELLANT

Vs

Sewree Iron and Steel Co. and Others

RESPONDENT

Date of Decision : 19-06-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2, 25C, 25J

Citation : (1992) 65 FLR 1022 : (1993) 3 LLJ 396

Hon'ble Judges : S.H. Kapadia, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; C.U. Singh and S.P. Singh, instructed by K. Underkant and Co., for R-1 and R-2, for the Respondent

Final Decision : Partly Allowed

Judgement

S.H. Kapadia, J.

By this petition under Article 226 of the Constitution of India the petitioner Union seeks to challenge the judgment of Industrial Court in Complaint (ULP) Nos. 136 and 137 of 1985 filed by the Union alleging unfair labour practice under Item 9 - Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 which have been dismissed by the Industrial Court, Bombay.

2. The facts giving rise to this petition briefly are as follows:-

(a) The petitioner is a Trade Union registered under the Trade Unions Act, 1926. It has registered office at 252, Janta Colony, Ram Narayan Narkar Marg, Ghatkopar (E), Bombay - 400 077. Respondent Nos. 1 and 2 are partnership firms having their principal place of business at 6, Sewree Cross Road, Sewree, Bombay - 400 015. The said principal place of business is common to both respondents No. 1 and 2.

(b) According to the petitioner, the first respondent i.e. Sewree Iron & Steel

Company (hereinafter referred to for the sake of brevity as "Sewree Company") came to be formed as partnership firm sometime in the year 1947. It is not in dispute that the Sewree Company carries on business of manufacture of rods of special steel. The second respondent came to be formed some time in the year 1957. It is known by the name "Amar Wire and Rolling Mills". The main business of respondent No. 2 was to manufacture copper wires.

(c) During the period December 1984 upto 28th February 1985 at different points of time, lay-off were declared in the Sewree Company without giving any prior notice as contemplated under Standing Order 20 of the Model Standing Orders framed under the provisions of Industrial Employment Standing Orders Act, 1946 (hereinafter referred to for the sake of brevity as the said Act of 1946) read with Bombay Industrial Employment (Standing Orders) Rules, 1959.

(d) The above facts are not in dispute and therefore, it would not be necessary to deal with the chronology of events at great length. It would suffice to state that in February 1985 complaint (ULP) No. 136 of 1985 came to be instituted in the Industrial Court at Bombay by the Union alleging unfair labour practice on the part of the first respondent Sewree Iron and Steel Company under Item 9 of the Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to for the sake of brevity as the said Act of 1971). By the said complaint it was alleged that the abovementioned first respondent Sewree company, employed 55 workmen in the manufacture of steel products. It was further alleged inter alia that the first respondent company, namely, Sewree company had entered into a settlement on 5th December, 1984. By the said settlement it was agreed that the workmen and the employer shall co-operate with each other in respect of day-to-day production. The ground with which we are concerned in the present petition and which is raised in the above complaints by the petitioner association was whether the lay-off resorted to by the company during the abovementioned period was an illegal lay-off inasmuch as no notice under Model Standing Order 20 was given by the employer before resorting to lay-off and in the circumstances it was alleged that the unfair labour practice has been committed by the respondent company under Item 9 of Schedule IV to the said Act of 1971. Accordingly, it was submitted that the company was liable to pay full wages to the workmen on the ground that the lay-off declared during the above period was illegal as the same was resorted to without notice under Standing Order.

(e) On the same day an identical complaint (ULP) 137 of 1985 was also filed by the petitioner association against respondent No. 2 M/s. Amar Wire Rolling Mills (hereinafter referred to for the sake of brevity as the Amar Wire Company). In the said complaint, it was alleged that the second respondent company had 60 workers in the manufacture of steel products. It was alleged that the said Amar Wire Company - second respondent had illegally laid-off the said Workers for 15 days in December, 1984 and for 20 days in January 1985. It was further alleged that even in the month of February 1985 the second respondent continued the

illegal lay-offs. As regards the legal contention, the same ground was submitted, namely, that the lay-offs were resorted to without compliance with Standing Order 20 referred to above.

(f) By written statement dated 25th March 1985 filed on behalf of the first respondent Sewree company in Complaint (ULP) No. 136 of 1985, the company submitted that the lay-offs were not illegal, inasmuch as the said Sewree company had complied with the provisions of Section 2(kkk) read with Section 25-C in Chapter V-A of the Industrial Disputes Act, 1947. It was further submitted by way of written-statement that the workmen were not laid-off under Standing Order 20 of the Standing Orders and therefore, it was not obligatory on the part of the first respondent Sewree company to give 7 day's notice under Standing Order 20. It may be stated at this stage that the arguments advanced by the learned counsel appearing on behalf of respondents however herein proceeded on the basis that the company had purported to lay-off the workmen under Standing Order 18. This submission although permissible in law was never placed reliance upon in the written-statements filed by respondents No. 1 and 2 in the above two complaints. In the said written-statements, it was alleged that the first respondents company's work was rolling of steel into bright bar sections, hexagons, hexagons and other special sections for numerous customers. In the said written-statement it was further alleged that the work of the first respondent company was that of special type and since the first respondent company manufactures special category of steels, they were required to use special type of raw materials, namely, special steel billets of specified quality, which are only available from the Steel Authority of India Ltd. (Government Undertaking) and Tata Iron and Steel Co. Ltd. It is further alleged in the written statement that the first respondent had approached both the above Steel Authority of India Ltd. and Tata Iron and Steel Co. Ltd. for raw materials, but the availability and supply of these types of steel was very uncertain and erratic. At this stage it may be mentioned that no particulars as to when the first respondent company approached the said two companies have been given in the said written statement. A bald statement has been made as indicated above regarding their approaching the above two companies and no particulars have been given in that regard. It is further alleged in the written statement that whenever the said steel billets were available with the Steel Authority of India Ltd. and Tata Iron and Steel Co. Ltd., they supplied the same to the first respondent company. It was further alleged again that the availability of the said raw materials was very often adversely affected by the Government policy particularly as the prices of the said steel billets were strictly controlled by the Government. In view of uncertainty of the supply of the said special steel billets and in view of the price fluctuations from time to time of the said raw materials, the said lay-off was imposed as alleged by the first respondent company. In the circumstances, it was submitted that the first respondent had duly complied with the provisions of Section 2(kkk) of the Act read with Section 25-C of the Industrial Disputes Act, 1947 and in the circumstances, according to

the first respondent company, the said lay-off was legal and valid. According to the said written-statement, the first respondent had duly complied with the provisions of Section 25-C of the said Act by paying compensation and in the circumstances it was submitted by the first respondent company that they had complied with the provisions of the said Act by paying compensation as contemplated u/s 25-C of the Act of 1947.

(g) Coming to the written statement filed in Complaint (ULP) No. 137 of 1985 by the second respondent Amar Wire Company, the said respondent alleged 2 that the said Amar Wire Company did the work on labour job basis only; that the said Amar Wire Company did not purchase or sell any goods but they did the work on job work basis by converting 2 electrolytic copper wire bars into wire rods, strips and flats only after they received the requisite raw materials from numerous clients. It was further alleged in the written statement by the second A respondent company that in the year 1980 the said Amar Wire Company had rolled over 25,000 M.T. on job work basis when the said second respondent received around 12,000 M.T. per annum from respective clients to do the job. In short, shortage of orders was the ground for laying-off the workers. It was further alleged by the second respondent that the copper was produced by the Government through the Minerals and Metals Trading Corporation of India Ltd. being sole canalising agent from overseas markets at the London Market Exchange rates and the said London Market Exchange rates were susceptible of violent fluctuations and changes in the prices which made the financial position of the company uncertain, regarding supply of the raw material. The second respondent further alleged that there was a change in the Government policy as a result of which the supply of raw materials was affected and in the circumstances the customers of the second respondent could not place orders with the second respondent. Again in the said written-statement by way of paragraph 6(e) in order to show that the second respondent had complied with the provisions of Section 25-C of the Industrial Disputes Act, the break up of the compensation amount paid by the second respondent to its workmen has also been given. Since the similar legal submission were advanced both by the petitioner association and respondents 1 and 2, the Industrial Court decided both the complaints together.

(h) Accordingly, evidence was recorded in both the above complaints being Complaint (ULP) Nos. 136 and 137 of 1985. According to the evidence of one Mr. S.P. Katare, there were about 110 workmen in the two companies; that iron bars and copper wires were manufactured in both the companies; that till 1981-82 the workers were getting normal work. Layoff started from 1984. In his cross-examination Mr. Katare stated that he could not say from where the raw materials were provided to the companies. Mr. Katare was not able to give any details of work done on job work basis by respondent No. 2. On the other hand, the evidence led on behalf of the companies show that one company did the work of the other company. The evidence further shows that the said second respondent company was working during day time and the first respondent

company was working in the night time. It was further stated that the second respondent company was working from 7 A.M. to 3.30 P.M and the first respondent company was working from 3.30 P.M. till 11 P.M.

(i) In the evidence of one Mr. Kantilal Doshi on behalf of the respondents companies, it was stated that the partners of both the companies are different but the office staff is common. It was further stated that in the first respondent company, the company was manufacturing special type of steel which requires steel billets and despite their approach to the Tata Iron and Steel Co. and Steel Authority of India time and again, they were not able to get the raw materials and therefore, they were required to impose lay-offs. Again in this evidence on behalf of the companies, there are no details with regard to the particulars when they approached the said authorities. There are no details as to the orders placed by them. There are no details with regard to quantification of the raw materials as ordered by the companies and there are no details with regard to non-availability of the said raw materials. Similarly, in the case of the second respondent Amar Wire Company, the only statement made by one Mr. Doshi on behalf of the respondent No. 2 was that they did not have sufficient work for converting copper wire bars into wire copper wire rods, strips and other sections, particularly because the copper wire bars were issued by the Government of India only to the actual users such as cable industries, enamel wire factories, etc. It was further disposed on behalf of the company by Mr. Doshi that the canalising agency was M.M.T.C. and that they got job work whenever orders were placed. The above evidence has been discussed by me in detail in view of the fact that according to the learned counsel appearing on behalf of the respondents, Standing Order 18 was applicable and not Standing Order 20 and for that purpose he heavily relied upon both the written-statements referred to above as well the evidence which has been discussed hereinabove.

(j) On 30th January, 1987 the Industrial Court at Bombay by a common order decided both Complaints (ULP) Nos. 136 and 137 of 1985 in favour of the company and accordingly dismissed the above two complaints. By the impugned order dated 30th January 1987, the Industrial Court came to the conclusion that the respondents No. 1 and 2 have complied with the provisions of Section 25-C of the Industrial Disputes Act, 1947. The Industrial Court further came to the conclusion that each of the respondents is employing more than 50 employees and less than 100. It also came to the conclusion that each of the respondent company is employing more than 50 workers and the provisions of Model Standing Orders are applicable. The Industrial Court came to the conclusion further that since the companies had complied with the provisions of Section 25-C of the Industrial Disputes Act, the requirement of law was fulfilled. The Industrial Court further came to the conclusion that in view of Clause 21 of the Model Standing Orders, the rights and liabilities of the employers and workmen regarding layoff shall be decided in accordance with the provisions of Chapter V-A of the Industrial Disputes Act, 1947 and unless the petitioner Union proves that the respondent companies had acted in violation of the provisions of Chapter V-A

of the Act, it cannot succeed. The Industrial Court further observed that the petitioner Union cannot succeed merely because the respondents have not given 7 days" prior notice under Clause 20 of the Model Standing Orders. Before the Industrial Court one of the arguments advanced on behalf of the petitioner Union was that respondents No. 1 and 2 were functionally connected and in the circumstances the first and second respondents must be taken as one and the same company. This argument was advanced by the petitioner Union in view of the fact that if the combined strength of the employees of the first and second respondents companies is taken into account, then the provisions of Section 25-M in Chapter V-B of the Industrial Disputes Act which requires the prior permission of the State Government would be attracted. This argument was also rejected by the Industrial Court on the basis that the functional integrality between respondents No. 1 and 2 has not been shown and in the circumstances the provisions of Chapter V-B of the Industrial Disputes Act did not apply.

(k) Against the impugned order dated 30th January, 1987 the present writ petition has been filed by the petitioner Union.

3. Mr. Ganguli, the learned counsel appearing on behalf of the petitioner submitted that Section 25-C of the Industrial Disputes Act read with Section 2(kkk) of the said Act, does not give power to the employer to lay-off the workmen. He further submitted that Section 25-C only provides for the mode of implementing lay-off. He further submitted that Section 25-C of the Industrial Disputes Act only deals with the payment of compensation in the event of lay-off.

Mr. Ganguli submitted that the power to lay-off the Workmen must flow from either Standing Orders applicable to the company or it must flow from the contract or the employment. Mr. Ganguli further submitted that in the present case the right of the employer to lay-off the workmen was referable only to Standing Order 20 and not to Section 25-C of the Industrial Disputes Act read with Section 2(kkk) of the said Act of 1947. He further submitted that the proposition mentioned above is well established proposition as laid down by the Supreme Court in the case of *The Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd. v. The Firestone Tyre & Rubber Co.* 1976 I LLLJ 493. Mr. Ganguli drew my attention to paragraphs 11 and 12 of the said judgment in support of the said contention that the power to lay-off flows from the Standing Orders or from the contract of the employment and not from Section 25-C of the Industrial Disputes Act. The Supreme Court after considering the various provisions of Sections 25-C, 25-D, 25-E, 25-J falling under Chapter V-A of the Industrial Disputes Act of 1947 came to the conclusion that the right to lay-off is not found in any provision of the Industrial Disputes Act. In fact, the similar argument of the company in the said case was categorically rejected. The Supreme Court in the said judgment observed that "we do not find any words in the definition clause to indicate the conferment of any power on the employer to lay-off a workman". The Supreme Court further observed that the power to layoff for the failure or inability to give employment has to be searched somewhere else. The

Supreme Court further observed that there is no section in the Industrial Disputes Act which confers such a power on the employer to lay-off. In the said decision the Supreme Court also referred to its earlier judgments and observed in paragraph 16 of the said judgment that the power to lay-off could only be referred to the Standing Orders or contract of the employment not to the provisions of Section 25-C or any other provisions falling under Chapter V-A of the Act. Chapter V-A of the Act deals with only the method of implementing the lay-off. It is true that the case before the Supreme Court in Firestone Tyre Company (supra) was a case where the Standing Orders were not applicable because a number of employees were less than 50. It is also true that in the case of Firestone Tyre Company (supra) even the provisions of Chapter V-A of the Industrial Disputes Act were not applicable. Nonetheless the Apex Court considered the entire scheme of the Industrial Disputes Act and came to the conclusion that the power to lay-off cannot be found in any of the provisions of the Industrial Disputes Act which only lay down procedure to implement the lay-off. Mr. Ganguli is, therefore, right in the aforesaid submissions and once it is appreciated that the power to lay-off is distinct from methodology for implementing the lay-off which is contemplated by the Industrial Disputes Act, then I do not see any difficulty in deciding the points which arise in the present petition.

4. Mr. Ganguli submitted as mentioned hereinabove, that in the facts and circumstances of the present case it is the Standing Order 20 and not Standing Order 18 which is applicable and since a prior notice as contemplated by Standing Order 20 has not been given, the lay-offs implemented from time to time by the company were illegal. He further submitted that the petitioner Union had filed the above two complaints for declaration that respondents No. 1 and 2 are guilty of unfair labour practice under Item 9 of Schedule IV to the said Act or 1971. Mr. Ganguli submitted that in view of the breach of the Standing Order 20. Item 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 is attracted and in the circumstances the said complaints ought to have been allowed. Mr. Ganguli submitted that condition of notice of 7 days as also the number of lay-offs per month which the employer is empowered to impose are preconditions to be fulfilled before the employer gets the right to lay-off. If these preconditions are not fulfilled, then the employer does not get the power to lay-off under Standing Order 20.

Mr. Ganguli submitted that even test of: functional integrality of two companies was satisfied as the office staff was common in both the above companies. He further submitted that the employees were transferable from one company to the other and in the circumstances, according to Mr. Ganguli, taking into account the evidence on record the test of functional integrality was fulfilled and in the circumstances the provisions of Section 25-M of the Industrial Disputes Act were attracted. He also relied upon the judgment of the Supreme Court in the case of The Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar v. The

Associated Rubber Industry Ltd. Bhavnagar reported in 1986 LIC 37. According to Mr. Ganguli, the various tests of functional integrality laid down by the Supreme Court in the above judgment of Associated Rubber (supra) are applicable to the facts of the present case and in the circumstances the Industrial Court ought to have treated the respondents 1 and 2 - companies as one common unit and ought to have applied the provisions of Chapter V-B of the Industrial Disputes Act to the facts of the present case.

5. Mr. Singh, the learned counsel appearing on behalf of the respondents 1 and 2 submitted at the very threshold that with regard to the applicability of Chapter V-B of the Industrial Disputes Act, the petitioner Union had not pleaded functional integrality of the two companies in the said two complaints filed before the Industrial Court. He further submitted that if one goes through the evidence on record it is not clearly established as to whether the evidence led by the petitioner was with regard to justifiability of lay-offs or the functional integrality or applicability of the Model Standing Orders and in the circumstances it was not open to Industrial Court to have entertained the arguments advanced on behalf of the petitioner Union regarding applicability of Chapter V-B of the Industrial Disputes Act. Mr. Singh further submitted that even in industrial jurisprudence where the allegations have not been made by the Union and evidence is recorded, the Industrial Court should not entertain the arguments, contentions and submissions which have not been pleaded in the complaints filed by the Union. Mr. Singh placed reliance on the judgment of the Supreme Court in the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, in that regard. Mr. Singh further submitted that even if one goes through the evidence on record the functional integrality of the company in question has not been established. In fact, the evidence on record indicates that what was sought to be proved was switching over the employees from one company to the other company to avoid lay-off as provided under Chapter V-A of the Industrial Disputes Act.

6. As regards the contention with regard to power to lay-off, Mr. Singh submitted that the judgment of the Supreme Court in Firestone case (supra) does draw a distinction between the power to lay-off and the methodology or the procedure to be implemented by the employer pursuant to that right. Mr. Singh however submitted that the judgment of the Supreme Court in Firestone case (supra) was on the basis that number of employees did not exceed 50 and therefore, the provisions of Chapter V-A of the Act were not attracted and so also the provisions of Standing Orders of 1946 were not applicable and therefore the ratio of the judgment of the Supreme Court will not apply to the facts of the present case. Mr. Singh further submitted that the above evidence and written statements filed on behalf of the respondents companies in effect and in substance indicate that on account of shortage of raw material a situation arose under which the Standing Order 18 stood attracted and since the company has complied with the provisions of Standing Order 18 of the Standing Orders Act, 1946 as also the provision of Chapter V-A of the Industrial Disputes Act, the companies have

fulfilled the requirement of law. He further submitted that Standing Order 20 is not attracted to the facts of the case because the contingencies contemplated under Standing Order 18 are quite different from the contingencies provided under Standing Order 20. If Standing Order 18, is applicable then giving prior notice before imposing lay-offs did not arise. Mr. Singh in that context drew my attention to various paragraphs of the evidence and written statements which I have already discussed above. He further submitted that if one looks to the provisions of Sections 25-C, 25-D and 25-E read with Section 25-J(2) of the said Act, it is clear that in the matter of lay-off, the rights and liabilities, both of the employer and employees, shall be determined in accordance with Chapter V-A of the Industrial Disputes Act. According to Mr. Singh, the giving of notice under Standing Order 20 is also an aspect of the procedure and if it is a procedural law, the same is taken care of by the provisions of Chapter V-A of the Industrial Disputes Act and to that extent the respondents 1 and 2 have fulfilled the requirements of the Industrial Disputes Act. He further submitted that if the provision with regard to notice under Standing Order 20 is a matter of procedure, then the provisions of Industrial Disputes Act, namely, Chapter V-A read with Section 2(kkk) of the Industrial Disputes Act will supersede the provisions of Standing Order 20 framed under the Bombay Industrial Employment (Standing Orders) Rules, 1959 particularly in view of the conflict between the provisions of Industrial Disputes Act, 1947 and the Standing Orders being the State enactment and to that extent Industrial Disputes Act being Central Act will hold the field and not the Standing Orders. He further drew my attention to Standing Order 32 and submitted that the said Standing Order is saving clause which is required to be looked at for the purposes of ascertaining the true scope of Standing Order 20 of the Act of 1946. According to Mr. Singh, Standing Order 32 clearly indicates that in the event there being a conflict between the Industrial Disputes Act and Standing Orders, the Industrial Disputes Act will prevail.

7. Before coming to the various submissions advanced on behalf of the parties, it would be relevant to consider various provisions of the Industrial Disputes Act. The Industrial Disputes Act is an enactment made to make provision for investigation and settlement of industrial disputes and for certain other purposes. Section 2(kkk) defines the word "lay-off as follows:

"lay-off (with its grammatical variations and cognate expression) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or natural calamity or for any other connected reason to give employment to a workman whose name is borne on the muster-rolls of his industrial establishment and who has not been retrenched"

A bare reading of the said definition shows that the lay-off means failure, refusal or inability of an employer on account of shortage of coal, power or the break down of machinery or natural calamity or for any other connected reasons, to

give employment to the workmen whose names are on the muster-rolls of the Industrial establishment. Section 25-C of the Industrial Disputes Act deals with the rights of the workmen laid-off for compensation. Section 25-D lays down the duty of an employer to maintain muster-roll. Section 25-E deals with the right of the employer not to pay compensation in certain cases. It lays down that no compensation shall be paid to the workman who has been laid-off if he refuses to accept any alternative employment in the same establishment from which he has been laid-off, or in any other establishment belonging to the same employer situate in the same town or village within a radius of five miles from the establishment being the place of employment. Section 25-E(iii) inter alia lays down that if such lay-off is due to a strike or slow down of production on the part of the workmen in another part of the establishment, the workmen will not be entitled to the compensation. Section 25-J deals with effect of laws inconsistent with the provisions of Chapter V-A of the Industrial Disputes Act. Section 25-J(2) lays down, that for the removal of doubts, it has been declared that nothing contained in Chapter: V-A shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of Chapter V-A of the Industrial Disputes Act.

8. At this stage, it is necessary to deal with Standing Orders 18, 19, 20 and 21 of the Standing Orders Act, 1946. Standing Order 18(1) lays down that in the event of fire, catastrophe, breakdown of machinery, stoppage of power supply, epidemic, civil commotion or other cause beyond the control of the r, the r may, at any time without notice or compensation in lieu off notice, stop any machine or department: wholly or partially or the whole or part of the establishment for a reasonable period. Standing Order 18(2) lays down that in the event of stoppage under Clause (i) during the working hours the workmen affected shall be notified as soon as practicable, when work will be resumed and whether they are to remain or leave the establishment. The period of detention in the establishment shall not exceed one hour after the commencement of the stoppage. It further lays down that if the said period does not exceed one hour, the workmen so detained shall not be paid for such period. It further lays down that if the period of detention in the establishment exceeds one hour, the workmen so detained shall be entitled to receive wages for the whole of the time during which the workmen are detained as a result of the stoppage of the work. Under Standing Order 18(3), it is laid down that wherever practicable, reasonable notice shall be given of the resumption of normal work, and all such workmen laid-off under Standing Order 18(1) who present themselves for work, when work is resumed, shall be given preference for employment. Standing Order 18(4) provides for notices required to be given under the Standing Order to be displayed on the notice board at the timekeeper's office and at the main entrance to the establishment. Standing Order 19, inter alia, lays down that in cases where workmen were laid off under Standing Order 18, the workmen shall be

considered as temporarily unemployed and the period of such unemployment shall be treated as leave with pay to the extent such leave is admissible and leave without pay for the balance of the period. Standing Order further lays down that when the workmen have to be laid off for an indefinite period exceeding two months, their services may be terminated after giving due notice or pay in lieu thereof. Standing Order 20, inter alia, lays down that the workmen may be laid off due to shortage of orders, temporary curtailment of production or similar reasons and consequent stoppage of any machine or department, for a period not exceeding six days in the aggregate in any month provided that seven days' notice is given. Standing Order 21 begins with non-obstante clause. It lays down that notwithstanding anything contained in Standing Orders 18, 19 and 20, the rights and liabilities of employers and workmen in so far as they relate to lay-off shall be decided in accordance with the provisions of Chapter V-A of the Industrial Disputes Act, 1947.

9. As mentioned hereinabove, in the case of Firestone (*supra*) the Apex Court took the view that Section 2(kkk) of the Act as also the provisions of Chapter V-A do not confer power to lay-off and what is contemplated by the provisions of the Industrial Disputes Act. In the present case the respondents' power to lay-off the workmen could only be found in the Standing Orders or the contract of the employment and not u/s 2(kkk) of the Act read with Section 25-C of the Industrial Disputes Act. It may also be mentioned at this stage that the expression "rights and liabilities of employers and workmen in so far as they relate to lay-off u/s 25-J of the Industrial Disputes Act is distinct from the power to lay-off under Standing Order 20. Taking into account the above distinction between power to lay-off and mode of implementing we will have to refer to the provisions of Standing Orders 18, 20 and 21 to ascertain the true scope of the said Standing Orders. Standing Order 18(1) deals with contingencies like fire, catastrophe, breakdown of machinery, stoppage of power supply, an epidemic, civil commotion or other causes beyond the control of the r. On the other hand, Standing Order 20 deals with contingency like shortage of orders, temporary curtailment of production or similar reasons and consequent stoppage of any machine or department for a period not exceeding six days in the aggregate in any month. Standing Order 20 further lays down that even in cases of contingencies like shortage of orders, temporary curtailment of production or similar reasons, seven days' notice which is prior notice is required to be given. The object of Standing Order 20 in making a prior notice requirement a condition precedent is required to be understood. The object of Standing Order 20 appears to be that certain contingencies like shortage of orders, temporary curtailment of production or such similar reasons could be anticipated by the employer sufficiently in advance; whereas the contingencies mentioned in Standing Order 18 like fire, catastrophe, breakdown of machinery, stoppage of power supply, breakdown of power supply, an epidemic, civil commotion or such other cause cannot be foreseen, by the employer in close proximity of time. Secondly, contingencies in Standing Order 18 like fire, catastrophe, breakdown of

machinery, stoppage of power supply, an epidemic, civil commotion does not occur from time to time; whereas Standing Order 20 deals with the contingencies like shortage of orders, temporary curtailment of production, etc. which may rise from time to time dependent on financial and economic factors. For example, change of certain policies by the Government may result in certain shortage of raw materials. But such contingencies cannot be equated to contingencies mentioned in Standing Order 18. Standing Order 18, therefore, proceeds on the basis of the contingencies which warrant immediate action by the employer and it is for this reason that Standing Order 18(2) and Standing Order 18(3) meticulously lays down the period for which the lay-off will be implemented. In the circumstances, it is clear that notice of seven days prior to lay-off under Standing Order 20 is a condition precedent before imposing lay-off. The said condition is in nature of a proviso which also reinforces the view, I have taken that it is condition precedent to the power being assumed by the employer to lay-off the workmen. Further Section 2(kkk) of the Industrial Disputes Act defines the word "lay-off to mean failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or natural calamity or for any other connected reason to give employment to the workman whose name is on the muster-roll of the industrial establishment. The bare reading of Section 2(kkk) shows that before implementing the lay-off the employer, who is not in a position to give employment to the workmen should give notice to the workman so that the workman gets an opportunity to know the true state of affairs. The workman is entitled to know as to whether the failure, refusal or inability of employer is on account of shortage of raw materials, coal, power, etc. as stated by the employer. If no such notice is given under Standing Order 20, it would not be possible for the workman to appreciate as to whether the said lay-off is warranted or not. After all the industrial adjudication can be resolved if such notices are given and the workers are made aware of the true state of affairs of the company. On the other hand in emergency cases as mentioned in Standing Order 18(1) of the Model Standing Orders like fire, catastrophe, breakdown of machinery, it would not be possible for the employer to give 7 days" notice each time. Reading Standing Order 18 as distinct from Standing Order 20, it is clear that the prior notice of seven days under Standing Order 20 is a statutory provision.

10. In the present case, as mentioned hereinabove, the evidence on record, which has been discussed above at length, clearly shows that in the case of the first respondent company, the case sought to be made out was that there was shortage of raw materials, which shortage occurred due to certain policies of the Government which led to paucity of raw materials. Firstly, I do not see any reason for coming to the conclusion that such a paucity of raw materials could fall under Standing Order 18. Further, no particulars regarding orders placed with the Steel Authority of India and Tata Iron & Steel Co. Ltd. have been produced at any time by the employer. No details have been given in the written statements in that regard by the employer. The fluctuation in the market price of raw

materials cannot bring the case within the Standing Order 18(1) of Model Standing Order. On the other hand the case of respondent No. 1 company clearly falls under Standing Order 20 on account of shortage of raw materials and therefore Standing Order 20 will apply and not Standing Order 18. If that be the case then Standing Order 20 is attracted and not Standing Order 18.

11. Similarly, in the case of the second respondent company, the evidence on record indicates that the company was working on job works as and when the customers' business came to be affected there was shortage of orders received by the second respondent company. If that be the case, then Standing Order 20 is clearly attracted and not Standing Order 18. Here also it may be stated that there is no sufficient evidence on record even to show the shortage of orders. Taking into account the above facts, it is clear that Standing Order 18 is not attracted and what applies is Standing Order 20, and since the pre-condition as mentioned in Standing Order 20 has not been fulfilled of giving 7 days' prior notice, it is clear that Standing Order 20 stood violated and if that be so then the provisions of Item 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 would be applicable.

12. As regards the submission made by the learned counsel for the respondents with regard to the conflict between Standing Order 20 and the provisions of Chapter V-A of the Industrial Disputes Act, I do not find any merit in the said submission. Mr. Singh drew my attention to certain judgments of the Supreme Court regarding the test laid down in matters of repugnancy between the Central and State Laws under Article 254 of the Constitution read with concurrent list. It is not necessary to refer to the said judgments. It is not necessary to go into the said judgments particularly in view of the fact that I do not see any such conflict between Standing Orders 20 and 21 on the one hand and the provisions of Chapter V-A of the Industrial Disputes Act on the other hand. As mentioned hereinabove, the power to lay-off in Standing Order 20 cannot be confused with the procedure of implementing the lay-off under Industrial Disputes Act, 1947. In view of the judgment of the Supreme Court in Firestone case (supra) the question of conflict does not arise. Once, it is held that the power to lay-off could be located only to Standing Orders or contract of employment and the procedure to implement the lay-off is under Industrial Disputes Act, 1947 then there cannot be conflict between Standing Order 20 on the one hand and the Industrial Disputes Act, 1947, on the other hand as the two operate in different areas. Mr. Singh, however, submitted that the provisions with regard to giving 7 days' notice under Standing Order 20 is the part of the procedure and it is distinct from power of the employer to lay-off the workers. He further submitted that if the provisions with regard to 7 days' notice is read as procedure then reading the provisions of Standing Order 21 along with the provisions of Section 2(kkk) of the Industrial Disputes Act would give rise to conflict between the Central Enactment contained in Section 2(kkk) of the Act and the State Act by way of the Bombay Industrial Employment (Standing Orders) Rules, 1959. I do not find any merit in the said submission. The employer gets the power to lay-off under

Standing Order 20 only if the employer fulfills the requirement of seven days notice in cases falling under Standing Order 20 and only after the employer gets the power to lay-off that the provisions of Industrial Disputes Act will come into play and since both are distinct, as held, the question of conflict does not arise. In that connection, the reliance placed on Standing Order 21 is not correct. Standing Order 21 contains the expression "rights and liabilities of employers and workmen in so far as they relate to lay-off shall be determined in accordance with the provisions of Chapter V-A of the Industrial Disputes Act. This expression in so far as they relate to lay-off also find place u/s 25-J(2) of the Industrial Disputes Act. As stated, the judgment of the Supreme Court in Firestone case (supra) has considered the entire scheme of the Industrial Disputes Act and has held that power to lay-off is distinct from the procedure to implement the lay-off under the Industrial Disputes Act. It has further held that the power to lay-off is not found under Industrial Disputes Act but under Standing Orders or contract of employment. In the circumstances, the petitioner Union is right in submitting that the respondents No. 1 and 2 have violated the provisions of Standing Order 20 by not giving 7 days" prior notice which is a precondition to the assumption of power to lay-off. The Industrial Court was in error in holding that as there was no breach of Industrial Disputes Act, failure to give notice under Standing Order 20 will not constitute unfair labour practice. It was further held that since the companies have fulfilled the provisions of the Industrial Disputes Act, the question of fulfilling Standing Order 20 does not arise. The impugned judgment is contrary to decision of the Supreme Court in Firestone's case (supra) and is accordingly set aside.

13. With regard to the contention of the petitioner Union, namely, that Chapter V-B of the Act has also been violated, I do not find any merit in the submission of the petitioner. At the outset, it may be stated that it is now well settled by various judgments of this Court as well as the Supreme Court that two establishments in fact constituted one establishment, if the test of a functional integrality applies. Merely because the employees are transferable from one company to the other or merely because the partners of the two firms are common will not be sufficient to come to the conclusion that the test of functional integrality is satisfied. In the case of the Dharamsi Morarji Chemical Co. Ltd. v. R.P.F. Commissioner reported in 86 B.L.R. 458 this Court laid down the basic test of functional integrality; where the units are functionally so connected that closure of one unit would lead to closure of the other unit. This test of functional integrality is also laid down in the judgment of the Supreme Court in the case of Isha Steel Treatment, Bombay Vs. Association of Engineering Workers, Bombay and Another, . In the said judgment the Supreme Court has held the test of functional integrality to mean that the functions of the two companies are so interconnected by way of unity of ownership, supervision and the control that closure of one unit directly affects the other. In the present case the petitioner Union had filed two independent separate complaints. In each of the said complaints, there is no averment regarding functional integrality of the

two companies. It was not even alleged that the said two companies were so connected that they should be held as one establishment. Mr. Ganguli conceded that in the said two complaints, there is no allegation with regard to functional integrality of the said two establishments. However, he submitted that the evidence was led in that regard and the matter was argued on the basis before the Industrial Court. He submitted that in view of the fact that the arguments with regard to Chapter V-B were advanced before the Industrial Court, he was entitled to raise the contention herein regarding the functional integrality of the said two establishments. I do not see any merit in the contention of Mr. Ganguli. Once two independent complaints are filed by the Union without making any allegation of functional integrality, it was not open to the Industrial Court to go into the question of compliance of Chapter V-B of the Industrial Disputes Act on the ground that both the companies constituted one independent establishment. Secondly, the evidence on record also does not indicate evidence in the matter of functional integrality of the two companies. No evidence has been led on that count before the Industrial Court. Mr. Ganguli drew my attention to certain paragraphs of the evidence in support of his case that the question of functional integrality was there before the Industrial Court. He referred to those paragraphs of the evidence which deals with shifting of workmen from one company to the other and also evidence with regard to common office staff. He submitted that the partners of the said two companies were common. As stated earlier, the shifting of workmen from one company to the other was in order to avoid lay-off u/s 25-E of the Industrial Disputes Act and not in connection with the question of functional integrality. The evidence led by the Union indicates that it was in the context of the applicability of the Standing Orders and the applicability of the Chapter V-A of the Industrial Disputes Act. In the circumstances, no case was made out to prove functional integrality and consequentially applicability of Chapter V-B of the industrial Disputes Act. It is true that the argument was advanced before the Industrial Court with regard to two establishments being treated as one. However, the Industrial Court was right in coming to the conclusion that there was nothing to indicate that both the respondents companies constituted one Industrial Establishment. The Industrial Court was right in coming to the conclusion that there was no functional integrality between the two establishments and the same cannot be treated as one company. The Industrial Court was also right in coming to the conclusion that the respondents companies are separate partnerships and merely because the partners are common it would not constitute one establishment as submitted by the petitioner. The Industrial Court further came to the conclusion that both the respondent companies are separate units and both the units are engaged in different types of work and they are independent. In view of the said findings of fact recorded by the Industrial Court, it is not possible for me under Article 226 of the Constitution of India to take contrary view particularly in view of the fact that the Union filed two separate complaints and in view of the paucity of evidence regarding functional integrality as indicated above. In the circumstances, I do not find any merit in the submissions of the petitioner on

that aspect of the case.

16. In the circumstances to sum up, I hold :

(a) That respondents No. 1 and 2 have violated the provisions of Standing Order 20 of the Model Standing Orders of 1959 and as a result they have committed unfair labour practice under Item 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.

(b) In view of the above judgment, the respondents 1 and 2 are hereby directed to pay wages in accordance with law to the employees of respondents No. 1 and 2, respectively, on the basis that the lay-offs declared by the Company from time to time for a period in question were illegal and bad in law and violative of Standing Order 20 of the Model Standing Orders of 1959.

(c) It is hereby declared that the first and second respondents are two independent establishments and they do not constitute one establishment as contended by the petitioner. In the circumstances, the provisions of Chapter V-B of the Industrial Disputes Act, 1947 are not applicable.

15. In the circumstances, as mentioned hereinabove, Rule is made absolute in terms of prayers (a) and (b), with costs.

Mr. Singh on behalf of the respondents seeks stay of this order passed today for a period of four weeks. Mr. Ganguli, for the petitioner Union opposes. Since the dispute has been pending from 1986, in the circumstances, stay refused.

Certified copy, if applied for, to be furnished out of turn expeditiously.