

(2018) 07 DEL CK 0249
In the Delhi High Court
Case No : W.P.(C) 4179 OF 2011

Dal Singar And Ors

APPELLANT

Vs

Material Movement Pvt Ltd

RESPONDENT

Date of Decision : 17-07-2018

Acts Referred:

Industrial Disputes Act, 1947 — Section 25FFA, 25FFA(2), 25FFF, 25FFF(1), 25F, 25G, 25H, 30A

Citation : (2018) 07 DEL CK 0249

Hon'ble Judges : C. HARI SHANKAR, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

C. HARI SHANKAR, J.Â Â

1. Section 25 FFA, and sub-section (1) of Section 25 FFF, of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act"), read

thus:

â??25 FFA. Sixty daysâ?? notice to be given of intention to close down any undertaking (1) An employer who intends to close down an undertaking

shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the

appropriate government stating clearly the reasons for the intended closure of the undertaking:

Provided that nothing in this section shall apply to â?

(a)Â an undertaking in which â?

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the

preceding twelve months.

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

(2) Notwithstanding anything contained in subsection (1), the appropriate government may, if it is satisfied that owing to such exceptional

circumstances as accident in the undertaking or death of the employer or the like, it is necessary so to do, by order, direct that provisions of sub-

section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.â??

25 FFF. Compensation to workmen in case of closing down of undertakings

(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in

that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in

accordance with the provisions of section 25 F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to

be paid to the workman under clause (b) of section 25 F, shall not exceed his average pay for three months:

Explanation: An undertaking which is closed down by reason merely of-

(i) financial difficulties (including financial losses); or

(ii) accumulation of undisputed off stocks; or (iii) the expiry of the period of the lease or license granted to it; or

(iv) in case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which operations are carried on, shall not

be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this

sub-section.â??

2. Within, and around, these statutory provisions, revolves the present dispute.

3. The petitioners are workmen, who were employed with the respondent-Company on various dates between 1st November, 1986 and 1st January,

1996. The respondent was engaged in manufacture of conveyors, crushers, rubber belts, and associated items, used in construction and building

works.

4. The petitioners contend that they were regularly working with the respondent when, suddenly, they were prevented from entering the premises of

the respondent's factory, located near Oriental Structural Plant, Village Tughlakabad Mehrauli-Badarpur Road, New Delhi-110044 (hereinafter

referred to as 'the Badarpur factory') on 13th October, 1998, and were informed that the factory had closed down. This resulted in a notice

being issued, by five of the petitioners, to the respondent, protesting against the closure of its factory and demanding their reinstatement with

consequential benefits. The respondent replied, vide letter dated 2nd December, 1998, that the closure of its factory was in accordance with the

provisions of Section 25 FFA of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the ID Act') supra. ^ ^ ^ ^ ^ ^ ^ ^ ^ ^

5. According to the respondent, it had issued the requisite notice, contemplated by Section 25-FFA of the ID Act (supra), in Form-Q, on 13th August,

1998, to the Secretary (Labour), Delhi Administration, informing that the respondent had decided to close down its Badarpur factory w.e.f. 13th

October, 1998. Annexed, to the said notice, was the 'Statement of Reasons', justifying the said closure which deserves to be reproduced, in

extenso, as under: ^

^ ^ ^ ^ ^ A N N E X U R E

Statement of Reasons

1. The present management purchase shares of M/s. Material Movement Pvt. Ltd. Near Oriental Structural Plant, Village Tughlakabad,

Badarpur-Mehrauli Road, New Delhi-110044, in June 98 and took over control of the aforesaid factory w.e.f. 18.06.1998 in the hope of running a

successful and profitable business. Due to depression in the market and shrinkage of fresh orders, as a measure of reorganization we retrenched six

workers junior in their category w.e.f. 08.07.1998 and these workers were personally offered notice of retrenchment alongwith legal dues by demand

drafts drawn on State Bank of India, Badarpur, New Delhi vide our letters dated 07.07.1998 but the workers did not receive the same. The notices

and amounts demand drafts were thereafter sent by Registered A.D. post at their residential addresses but the workers deliberately did not take

delivery of the letters and continued forcefully entering the factory even after

notice of retrenchment for about four days. Repeated requests to the Police authorities and The Asst. Labour Commissioner (south), Giri Nagar, Kalkaji, New Delhi proved futile and the aforesaid authorities did not intervene. Several communications in writing to the authorities concerned were sent but to no avail.

The Asst. Labour Commissioner (South) was informed that the six workers have deliberately refused and avoided to take retrenchment notices as and when offered and was requested to advise the workers to receive their legal dues, but till date the workers have not collected the same from us.

2. In the meantime, the workers resorted to go-slow strike and total non-cooperation and also started mis-behaving with their superiors and started disobeying their superior's legitimate orders as detailed in our various letters sent to the concerned Asst. Labour Commissioner (South) with copies to The Labour Commissioner, 15, Rajpur Road, Delhi.

3. On 05.08.1998 vide our letter of even date one of the workers Sh. Dal Singar was suspended on charges of misconduct but he continued not to receive letter of suspension and forced his entry in the factory with the help of other workers. The Police authorities were requested vide our letters of 7th, 10th and 11th August, 1998 to intervene and advise the worker to leave the factory premises since he has been suspended and his entry in the factory is illegal. Similar requests were made to the Asst. Labour Commissioner (South) also vide copies of our aforesaid letters but all in vain.

On 12.08.1998 after arguments he received the notice of suspension but after receiving the notice he assaulted Shri Kishore Kumar Sethi, Chief

Executive of the factory. The other workers at his instance also rushed with iron rods etc. to assault him. A report to this effect was lodged with the

S.H.O. Okhla Police Station, Okhla Phase-I, New Delhi 110020 on 12.08.1998.

In view of the surcharged atmosphere and total noncooperation and indifferent attitude of the workers, Shri Kishore Kumar Sethi, Chief

Executive who is looking after the working of the factory has expressed his inability to work any longer and has tendered his resignation.

In view of inter-alia the total non-cooperation, indifferent and violent attitude of the workers, we have decided, for reasons beyond our control, to

permanently close the factory w.e.f. 13.10.1998. The workers will be paid all legal dues as provided under Industrial Disputes Act, 1947.

For Material Movement Pvt. Ltd.

(Director)â??

6. The respondent further contends that, on 12th September, 1998, it put up a notice, on its notice board, informing â??the workmen on the rolls of the

undertakings/industrial establishment of M/s Material Movement Pvt., situated at near Oriental Structural Plant, Village Tughlakabad, Mehrauli-

Badarpur Roadâ?, that, in consequence of the aforementioned notice, issued under Section 25-FFA of the ID Act, the services of the said workmen

would stand terminated from 13th October, 1998. The notice purported to be in the nature of a onemonth advance notice to the workmen, and further

stated that, consequent on termination of services of workmen, they would be paid â??due compensation and other dues as admissible in lawâ??.Â

7. The above two notices were followed by a communication, dated 7th October, 1998, from the respondent to the Chief Inspector of Factories,

enclosing a copy of the Form-Q notice dated 13th August, 1998 (supra).Â On 12th October, 1998, the respondent contends that it had put up a hand-

written notice, in Hindi, purportedly affixed on the notice board of the Badarpur factory, again intimating all workmen working in the unit that the unit

would stand closed w.e.f. 13th October, 1998, and requiring them to collect, before they left that day, all pending wages and other payments, due to

them.Â

8. The petitioners, on the other hand, assert that they were completely unaware of these developments and that they became aware of the closure of

the Badarpur unit of the respondent only when, on 13th October, 1998, they were prevented from entering the factory.Â

9. The writ petition also makes reference to subsequent communications, purportedly issued by the respondent on 13th October, 1998, 22nd October,

1998, 28th October, 1998 and 10th November, 1998; however, as these communications were posterior to the closure of the respondentâ??s factory,

they do not impact adjudication of the present writ petition.Â The necessity to refer thereto is, consequently, obviated.

10. To cut a long story short, on the petitionersâ?? finding the respondent adamant, regarding its factory having been closed down w.e.f. 13th

October, 1998, they served a demand notice dated 20th October, 1998, seeking reinstatement, continuity of service and full back wages, on the

Managing Director of the Respondent, and followed it up, through their Union, by a Statement of Claim, submitted to the Chief Conciliation Officer of

the respondent on 27th November, 1998.

11. Conciliation proceedings failing to bear fruit, the matter was referred, by the Secretary (Labour) of the Govt. of NCT of Delhi, to the Labour

Court, for adjudication, vide notification dated 14th September, 1999, containing the following single term of reference:

“Whether the services of S/Sh. Ram Saran Yadav, Mani Ram, Harinder Chauhan, Hasan Imam, Nebi Lal, Sudama Giri, Gobind Tiwari, Dal Singar,

Chari Sharma, Virender Kumar Rao, Swami Nath, Anil Kumar Gautam, Surender Prasad, Ashok Kumar Sharma, Parmeshwar Singh, Ramashrey

Prasad, Vijay Kumar Singh, Murari Singh, Dinesh Sahni, Udai Kant Jha, Balkeshwar Chauhan, Subhash Yadav, Kamleshwar Singh, Shri Kant, Kishan

Pal, Arjun Sharma, Gian Chand Jha, Umesh Chand, Ranjeet Sharma, Pitamber Shah and Prem Narain have been terminated illegally and/or

unjustifiably and if so, to what relief are they entitled and what directions are necessary in this respect?”

(Emphasis supplied)

12. Subsequently, one more workman petitioned the respondent, resulting in his being added in the industrial dispute referred to the Labour Court, vide

the following corrigendum, as communicated by the Secretary (Labour) Govt. of NCT of Delhi, vide letter dated 29th May, 2000, to the Labour Court:

“Whether the services of Sh. Ram Avtar Yadav have been terminated illegally and/or unjustifiably by the management and if so, to what relief is

he entitled and what directions are necessary in the respect?”

13. Thirty one workmen, therefore, ultimately petitioned the Labour Court.

14. A joint Statement of Claim was filed by the aforementioned thirty one workmen, contending as under:

(i) The workmen had been employed at the establishments of the respondent at B-107, Okhla Industrial Area, Phase-I, New Delhi-110020 and the

Badarpur factory (which had been closed down on 13th October, 1998).

(ii) They had discharged their duties sincerely and with dedication and never gave any chance for any complaint. (iii) Initially, the establishment of

the respondent functioned solely from the premises at B-107, Okhla Phase-I; however, it had gradually expanded to include, apart from the factory at

Mehrauli-Badarpur Road, two sister concerns, namely, M/s. Subhash Engineering Works and M/s. International Engineering Company.

The workmen interchangeably worked in these establishments, with continuity of service.

(iv) After 11th February, 1999, almost all the machinery located in the Badarpur premises was shifted back to the establishment at B-107, Okhla

Phase-I, and the premises of M/s. Subhash Engineering Works.

(v) The respondent initially suspended the petitioner workmen, thereafter brought "goondas" to terrorize them and, when these measures failed to

yield results, resorted to a sham closure of its unit w.e.f. 13th October, 1998. This amounted to arbitrary and unjustified refusal of duties to the

petitioner workmen, without any prior notice, and, consequently, to illegal and unjustified termination of their service. As a result, the workmen had

been retrenched in violation of Sections 25-F, 25-G and 25-H of the ID Act.

In the circumstances, the petitioners prayed that they be reinstated in service with continuity of service and back wages.

15. Per contra, the respondent, in its written statement filed before the Labour Court, submitted as under:

(i) The Badarpur factory stood permanently closed w.e.f. 13th October, 1998. Prior thereto, the requisite sixty days' notice, under Section 25-

FFA of the ID Act, had been issued to the workmen.

(ii) The respondent had no factory at B-107, Okhla Industrial Area, Phase-I, New Delhi.

(iii) The factories at M/s. Subhash Engineering Works and M/s. International Engineering Company were separate units, with separate legal existence,

separate constitution and separate registration under the Factories Registration Act and the Employees' Provident Fund Act. They were also

separately licenced.

(iv) These factories, too, were, sealed by the government on 18th November, 2000, following orders passed by the Supreme Court, and were still lying

closed.

(v) A copy of the notice under Section 25-FFA of the ID Act was also displaced on the notice-board of the factory on 13th October, 1998.

(vi) As such, the termination of the services of the petitioner workmen could not be treated as retrenchment, being relatable to permanent closure of

the factory in which they were employed, after fulfilling the legal formalities contemplated by the ID Act.

In the circumstances, the respondent prayed that the petitioners' claim be dismissed.

16. Consequent on filing of the aforementioned Statement of Claim, by the petitioners, and written statement by the respondent, the following issues were framed, by the Labour Court, on 30th August, 1999.

1. Whether the management has been closed permanently w.e.f. 13.10.1998 as per preliminary objection no. 1 of WS?

2. Whether the services of S/Sh. Ram Saran Yadav, Mani Ram, Harinder Chauhan, Hasan Imam, Nebi Lal, Sudama Giri, Gobind Tiwari, Dal Singar,

Chari Sharma, Virender Kumar Rao, Swami Nath, Anil Kumar Gautam, Surender Prasad, Ashok Kumar Sharma, Parmeshwar Singh, Ramashrey

Prasad, Vijay Kumar Singh, Murari Singh, Dinesh Sahni, Udai Kant Jha, Balkeshwar Chauhan, Subhash Yadav, Kamleshwar Singh, Shri Kant, Kishan

Pal, Arjun Sharma, Gian Chand Jha, Umesh Chand, Ranjeet Sharma, Pitamber Shah and Prem Narain have been terminated illegally and/or

unjustifiably by the management?

3. Relief.

17. Twenty-nine, of the thirty-one workmen, who had petitioned the Labour Court, led evidence, on their own behalf, as WW-1 to WW-29, by filing

separate affidavits-in-evidence. The respondent led the evidence of Mr. Subhash Arora and Mr. K.L. Arora as MW-1 and MW-2 respectively. The

said management witnesses, too, filed their respective affidavits-in-evidence. The witnesses were cross examined, on their affidavits in evidence, by

the respective opposite parties.

18. The affidavits-in-evidence of the various WWs, being identical, reference need be made only to one such affidavit, i.e. the affidavit of petitioner

No. 1 Dal Singar, deposing as WW-13. Petitioner No. 1 contended, in his affidavit-in-evidence, that the business of the respondent was initially

located only at B-107, Okhla Phase-I, but gradually expanded to include the Badarpur unit as well as the establishments of M/s. Subhash Engineering

Works and M/s. International Engineering Company, and that the workmen had interchangeably been working in these establishments, from time to

time, with continuity of service. The allegation of closure of the other poor

factory being a ruse of the respondent, intended to break their Union was reiterated, and it was also submitted that, after their removal from service by the respondent, the workmen had been unable to secure any gainful employment.Â

19. The petitioner, deposing as WW-13, was examined in chief and cross examined, on 10th September, 2002 and 10th July, 2003 respectively. In his examination-in-chief, the petitioner merely tendered his affidavit-in-evidence, and relied on the documents annexed thereto. In his cross examination, the petitioner denied knowing English, and disclaimed familiarity with the contents of his own affidavit. He denied the fact that the factory of the respondent was closed and, in the very next breath, asserted that he was unaware whether the factory, which was closed on 13th October, 1998, was still working, stating that â??it may be working somewhereâ?.Â He asserted that, after its alleged closure, the factory was reported to have worked at B-107, Okhla Industrial Area, though he admitted that he had no documentary proof in support thereof. He also admitted that he had no documentary evidence to prove his allegation that he had been made to work in the factories at M/s. Subhash Engineering Works andÂ M/s. International Engineering Company. He re-asserted that he had been unable to secure any service after he was suspended by the respondent from service.Â Â

20. MW-1 Subhash Arora, in his affidavit in evidence, categorically denied the allegation, of the petitioners, that their services had been wrongfully terminated.Â He asserted that the Badarpur factory of the respondent was permanently closed with effect from 13th October, 1998, prior whereto the requisite two monthsâ?? notice stipulated under Section 25-FFA of the ID Act stood issued on 13th August, 1998. He also pointed out that, in the Annexure to the said notice, the detailed reasons for closure of the factory had been set out.Â He referred, further, to the subsequent correspondences/communications, of the respondent, to various authorities, regarding the closure of its Badarpur factory.Â He denied the allegation that the factory at Badarpur had subsequently been functioning from B-107, Okhla Industrial Area, Phase-I, or that the workersâ?? services were interchangeable with the premises of M/s. Subhash Engineering Works and M/s. International Engineering Company, which, he asserted, were

separate entities with separate constitutions, separate factory licences, ESI numbers, PF numbers and other authorisations. He again pointed out

that the said factories, too, were sealed as a consequence to orders passed by the Supreme Court, whereafter all workers of both the factories had

settled their claims with the management. He denied the allegation that the petitioners had remained unemployed after the termination of their services

consequent to closure of the Badarpur factory.

21. MW-1 Subhash Arora was cross examined, on the aforementioned affidavit-in-chief submitted by him, on 18th April, 2007, 6th February, 2009 and

5th May, 2009. He asserted, in cross-examination, that when the Badarpur factory was closed, the machinery located therein was sold off. He further

stated that he was unaware whether the respondent was functioning from B-107, Okhla Phase-I also. He produced fourteen original vouchers,

purporting to reflect sale of the machinery at the Badarpur factory, after closure thereof. The said vouchers were exhibited as Ex. MW-1/X-3.

22. MW-2 K.L. Arora, the ex-Managing Director of the respondent, deposed, in his affidavit-in-evidence, that, vide agreement dated 18th June, 1998,

Punish Khanna and Subhash Arora had taken over, as directors of the respondent-Company, in place of the earlier directors, i.e. himself, his wife and

his son. He further deposed that this fact, as also the fact of the consequent closure of the current account of the respondent-Company, which was

being operated by himself, his wife and his son, were intimated to the Labour Commissioner, after sale of shares of the Company to the new directors,

who took over the assets and liabilities of the respondent, whereafter he ceased to have any control in the affairs thereof.

23. In his cross-examination on 8th April, 2010, MW-2 deposed that, till 1994-1995, the factory of the respondent was located at B107, Okhla Phase-I,

New Delhi, whereafter, it was shifted to the Badarpur unit. Even after such shifting, he admitted that the registered office of the management of the

respondent continued to remain at B107, Okhla Phase-I. He also admitted that, in addition to the said establishment, he was running the units at M/s.

International Engineering Co. and M/s. Subhash Engineering Works. He stated that his wife and Subhash Chand Arora, who was his brother, were

initially partners in M/s. Subhash Engineering Works but that, thereafter, Subhash Arora withdrew from partnership in the said firm. He further

admitted that it (was) that the workers had union in both the establishment i.e. Material Movement Private limited and International Engineering

Works. He further deposed that he was running M/s. International Engineering Works after sale of the shares in the respondent-company. He also

admitted that, even after sale of his shares in the respondent's factory, the new directors, who had purchased the shares, were taking his advice in

running the company. He confirmed the fact that M/s. International Engineering Works was closed in 2000, consequent to the directions of the

Supreme Court and that, after closure of the said enterprise, he was running the company by the name, M/s. CCS Projects and Equipment Pvt. Ltd.

He further deposed that the items manufactured by the Badarpur Company and M/s. International Engineering Company were quite different.

24. After recording of evidence had been completed, the Labour Court proceeded to hear the arguments on behalf of the petitioner and the

respondent, whereafter the impugned award, dated 8th July, 2010, was passed, deciding the reference in favour of the respondent and against the

petitioner. The issue-wise findings, of the Labour Court, were as under:

(i) Regarding Issue No. 1, viz. whether the respondent's unit stood closed permanently w.e.f. 13th October, 1998, the Labour Court identified the

burden of proof as being on the respondent, i.e. the management. MW-1 had deposed that the Badarpur factory stood closed w.e.f. 13th October,

1998 and that, prior thereto, two months' notice, as stipulated under Section 25-FFA of the ID Act, had been given on 13th August, 1998, the

Annexure where to set out, in detail, the reasons for closing the factory. He further reiterated that notice regarding closure of the factory had been

put on the notice board, and the fact of closure had also been intimated to the Chief Inspector of factory, Regional Provident Fund Commissioner,

Regional Director Commissioner, ESIC, Assistant Labour Commissioner and the individual workers, and that the license of the factory was also

surrendered in the office of Chief Inspector of the factory. These assertions, by MW-1, had not been rebutted by the workmen, i.e. the present

petitioners. The respondent had, therefore, been successful in establishing the fact of its permanent closure w.e.f. 13th October, 1998. Issue No. 1

was, therefore, decided in favour of the management and against the workmen.

(ii) The burden of proof in respect of Issue No. 2 i.e. whether the services of the

workmen had been terminated illegally/unjustifiably, by the management, was on the workmen, for which, too, reliance was placed on the decisions in UCO Bank (supra) and Canara Bank (supra). The said workmen had, in cross-examination, deposed that they did not know English and were unaware of the contents of their affidavit, and did not produce any cogent evidence to show that the factory located at Badarpur was, in fact, running elsewhere after its closure on 13th October, 1998. They also admitted that they did not have any proof to show that the machinery located at the Badarpur factory had been shifted elsewhere.Â In view of these averments, as well as the fact that the documents, relied upon by the petitioners and exhibited as Ex.WW-1/1 to WW1/16, did not make out a case of their illegal termination by the respondent, the Labour Court held that the petitioners-workmen had failed to prove that their services had really been terminated illegally and unjustifiably by the management.Â As such, Issue No. 2 was decided against the workmen and in favour of the management. Resultantly, the Labour Court decided the reference in favour of the management and against the workmen, holding that the workmen were not entitled to claim any relief against the management, and passed the impugned award in the said terms.

25. Aggrieved thereby, the workmen are before this Court, by means of the present writ petition.Â

26. Detailed submissions have been advanced, before me, by Mr. Ashraf Yusuf Khan, learned counsel for the petitioners and Mr. Harvinder Singh, learned counsel for the respondent. Written submissions have also been filed by both learned counsel.Â

27. Learned counsel for the petitioners has contended thatÂ

(a) in order for a case of closure to be covered by SectionÂ Â Â Â 25-FFF of the ID Act, it was necessary that the closure was due to unavoidable

circumstances, beyond the control of the employer,Â

(b) if, on the other hand, the closure was merely with a view to get rid of the employees working in the unit/factory, it would be malafide in nature and

would not be entitled to the benefits of the proviso to Section 25-FFF(1) of the ID Act,

(c) the illustrations contained in the explanation below Section 25-FFF(1) were sufficiently indicative of the legislative intent inherent in the said

provision,

(d) it was only where the circumstances cited as justification for the decision to close the factory/unit were similar to those envisaged in the said

illustrations, that the closure could be said to have been attributable to â?? unavoidable circumstancesâ??.Â (e) the burden to prove that the closure of

the undertaking satisfied the above tests, was on the employer,

(f) closure due to unavoidable circumstances, which were not relatable to the functioning of the undertaking, would not attract the proviso to Section

25 FFF(1),

(g) the Labour Court had left the above issue unexamined and unanswered,

(h) no witness had been produced, by the respondent, to indicate that the closure of its Badarpur factory was owing to unavoidable circumstances

beyond its control; neither did of the MWs depose to the said effect,Â

(i) as against this, the petitioners had placed, by way of additional documents before this Court, an Audit Report prepared by the Chartered

Accountant of the respondent, which indicated that, from 1995 till 2002, the respondent was submitting its Income Tax Returns regularly, showing its

address as Badarpur-Mehrauli Road, New Delhi.

(j) without returning a finding to the effect that the closure of the Badarpur factory was owing to unavoidable circumstances beyond the control of the

respondent, the benefits of the provisoÂ to Section 25 FFF(1) of the ID Act could not be extended to the respondent.Â

For all these reasons, the petitioners pray that their writ petition be allowed, in terms of the prayers contained therein, setting aside, in the process, the

impugned Award passed by the Labour Court.Â

28. The respondent contends, per contra, that Â

(i) the Badarpur factory was permanently closed w.e.f. 13th October, 1998, after fulfilling all formalities prescribed in that regard by the ID Act,Â

(ii) no question of reinstatement, against the closed unit, could arise, andÂ

(iii) the requisite sixty daysâ?? notice of closure, contemplated by Section 25-FFA of the ID Act, had been served on the appropriate government on

13th August, 1998.Â

As such, contends the respondent, the termination of the petitionersworkmen being attributable to the closure of the Badarpur factory w.e.f. 13th

October, 1998, it could not be said that they had been retrenched.Â Section 25-F of the ID Act, therefore, did not apply.

Analysis

29. Closure of undertakings, in which workmen are employed, is, in industrial law, a concept which is jurisprudentially sui generis.Â Significantly,

there is no proscription, to be found anywhere in the ID Act, against closing down of an undertaking.Â Indeed, the right to close one's business is

regarded as the inevitable alter ego to the right to carry on one's business, guaranteed by Article 19(1)(g) of the Constitution of India.Â Section

25 FFA of the ID Act merely requires the employer, who intends to close down an undertaking, to serve 60 days' notice, in advance of the

proposed closure, on the appropriate Government, clearly stating the reasons for the intended closure of the undertaking.Â The proviso to the said

sub-section excepts certain categories of undertakings from the rigour of the said requirement; however, as the Badarpur factory of the respondent

would not fall into any of the said categories, reference is not required to be made thereto.Â Similarly, sub-section (2) of Section 25 FFA also excepts

the applicability of sub-section (1), in cases where temporary closure is necessitated owing to unavoidable and unforeseeable exigencies.Â Â

30. Section 25 FFF deals with compensation, payable to workmen, in the case of closure of undertakings.Â Sub-section (1), thereof, stipulates that,

where an undertaking is closed down for any reason whatsoever, every workman, who has been in continuous service of one year, or more, in the

said undertaking, immediately preceding the closure, shall be entitled to (i) notice and (ii) compensation, in accordance with the provisions of Section

25 F, as if he had been retrenched.Â The proviso to the said sub-section, however, excepts the applicability of the sub-section to cases where the

closure of the undertaking is attributable to 'unavoidable circumstances beyond the control of the employer'.Â In such cases, the proviso ordains

that the compensation, payable to the workmen, would not exceed his average pay for 3 months.Â The explanation, following the said proviso, deems

closure of an undertaking, merely for the following reasons, not to amount to closure 'on account of unavoidable circumstances beyond the control

of the employer':

(i) financial difficulties (including financial losses),

(ii) accumulation of undisclosed stocks,

(iii) expiry of the period of lease or license granted to it and

(iv) where the undertaking is engaged in mining operations, expulsion of minerals in the area in which the operations are carried on.

31. The expression "undertaking" has not been defined in the ID Act. However, noting this fact, the Supreme Court has, in *S. M. Nilajkar v.*

Telecom District Manager, (2003) 4 SCC 27, held that the expression "undertaking" is more restricted than "industry" or "business", and

that an "undertaking" may be a part of the whole industry. It is not necessary to further discuss this aspect of the matter, as there is no dispute,

by either party before me, that the Badarpur factory would qualify as an "undertaking", for the purposes of Section 25 FFF.

32. Closure of an undertaking, per se, therefore, is not susceptible to challenge, the ID Act. Per corollary, it would ordinarily be impermissible for a

workman, who has lost his employment consequent on closure of the undertaking in which he was employed, to seek reinstatement, as there can be no

reinstatement against a closed industrial undertaking (unless the closure is not "genuine or real" - an aspect which I shall address presently).

The rights of workmen, who had been "cast out in the cold", as it were, consequent to closure of the undertaking in which they were employed

and working has, therefore, necessarily to be circumscribed by Section 25 FFF of the ID Act, and the various sub-sections and clauses thereof.

Sub-section (1) of Section 25 FFF, read with the proviso thereto, merely ordains that, where an undertaking is closed down on account of unavoidable

circumstances beyond the control of the employer, the workmen working in the undertaking would be entitled only to compensation not in excess of

their average pay for 3 months, whereas, in all other cases of closure of the undertaking, the workmen working therein, who have been in continuous

service for not less than one year in the undertaking immediately prior to the closure, would be entitled to notice and compensation in accordance with

the provisions of Section 25 F of the ID Act, as if they had been retrenched. The ID Act, therefore, does not contemplate reinstatement against a

closed undertaking, or issuance of mandamus, to an undertaking which stands closed, to reopen its doors and take back its workmen, irrespective of

the reason for closure.

33. Notice may also be taken, at this juncture, of section 30A of the ID Act, inserted with effect from 14th June, 1972, which deals with "penalty for closure without notice", and stipulates that "any employer who closes down any undertaking without complying with the provisions of section 25 FFA shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both." As such, the consequence of closure in violation of Section 25 FFA being specifically provided in the form of Section 30A of the ID Act, it is doubtful whether closure, in violation of Section 25 FFA would be rendered non est, solely for that reason. It is not necessary for me to dwell further on this aspect of the matter, on which there is cleavage of judicial opinion, as, in my view "adverted to, in greater detail, hereinafter" there is been no infraction, in the present case, by the respondent, of Section 25 FFA of the ID Act, 60 days' advance notice having been issued, by it, as required by the said provision. A A

34. While Section 25 FFA was introduced, in the ID Act, only with effect from 14th June, 1972 (by Section 2 of Act 32 of 1972), Section 25 FFF was enacted prior in point of time, with effect from 28th November, 1956, by Section 3 of Act 18 of 1957. A Consequent on its enactment, the vires of Section 25 FFF(1) of the ID Act was challenged by the management of various industrial undertakings, and was examined, by the Constitution Bench of the Supreme Court, in *Hathising Manufacturing Co Ltd v. U.O.I.*, AIR 1960 SC 923. A It was sought to be contended, by the managements of the various companies who petitioned the Supreme Court, that Section 25 FFF(1) imposed unreasonable restrictions on the fundamental freedom to close down an undertaking, as liability to pay compensation was statutorily made a condition precedent to closure of the undertaking, even where the closure was bona fide and attributable to unavoidable circumstances. A The Supreme Court, at the very outset, clarified that the ID Act did not make the closure of the undertaking dependent, or effective, upon payment of compensation, or upon service of notice of payment of wages in lieu of notice. A Though this aspect of the matter is not of particular significance, so far as the dispute in the present case is concerned, in the interests of completion of the recital, the findings, thereon, as contained in the report, may be reproduced thus:

By the plain intendment of Section 25-FFF(1), the right to notice and compensation for termination of employment flows from closure of the undertaking; the clause does not seek to make closure effective upon payment of compensation and upon service of notice or payment of wages in lieu of notice. An employer proposing to close his undertaking may serve notice of termination of employment and if he fails to do so, he becomes liable to pay wages for the period of notice. On closure of an undertaking, the workmen are undoubtedly entitled to notice and compensation in accordance with Section 25-F as if they had been retrenched, i.e. the workmen are entitled beside compensation to a month's notice or wages in lieu of such notice, but by the use of the words 'as if the workman had been retrenched' the legislature has not sought to place closure of an undertaking on same footing as retrenchment under Section 25-F. By Section 25-F, a prohibition against, retrenchment until the conditions prescribed by that section are fulfilled is imposed; by Section 25-FFF(1), termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice, is, not prohibited. Payment of compensation and payment of wages for the period of notice are not therefore conditions precedent to closure.

35. The Supreme Court, thereafter, went on to notice that, while Article 19(1)(g) of the Constitution of India guaranteed freedom, to every citizen, to carry on trade or business, such freedom was not absolute, but would, by virtue of clause (6) of Article 19, be subject to any law, which could impose, in the interest of the general public, reasonable restrictions on the exercise of the said right.Â Therefore, held the Supreme Court, 'in the interest of the general public, the law may impose restrictions on the freedom of the citizens to start, carry on or close their undertakings.'Â The Supreme Court, thereafter, traced the history of, and the purpose behind, enactment of Section 25 FFF, which need not burden the present decision.Â Consequent on the said discussion, it was held, in paras 12 and 13 of the judgement, thus:

2. Closure of an industrial undertaking involves termination of employment of many employees, and throws them into the ranks of the unemployed, and it is in the interest of the general public that misery resulting from unemployment should be redressed. In *Indian Hume Pipe Co. Ltd. v. Workmen*

[Civil Appeal No. 169 of 1958 decided on October 16, 1959] this Court considered the reasons for awarding compensation under Section 25-F

(though not its constitutionality). It was observed that retrenchment compensation was intended to give the workmen some relief and to soften the

rigour of hardship which retrenchment brings in its wake when the retrenched workman is suddenly and without his fault thrown on the streets, to face

the grim problem of unemployment. It was also observed that the workman naturally expects and looks forward to security of service spread over a

long period, but retrenchment destroys his expectations. The object of retrenchment compensation is therefore to give partial protection to the

retrenched employee to enable him to tide over the period of unemployment. Loss of service due to closure stands on the same footing as loss of

service due to retrenchment, for in both cases, the employee is thrown out of employment suddenly and for no fault of his and the hardships which he

has to face are, whether unemployment is the result of retrenchment or closure of business, the same. If the true basis of the impugned provision is

the achievement of social justice, it is immaterial to consider the motives of the employer or to decide whether the closure is bona fide or otherwise.

13. Wages in lieu of notice are normally inadequate compensation for loss of employment in an industrial undertaking. Having regard to the prevailing

conditions in the employment market, it would be difficult for the workman thrown out of employment to secure employment similar to the one

terminated within one month, and therefore the Parliament has thought it proper to provide for payment of additional compensation besides wages in

lieu of notice. The provision for payment of such compensation in addition to wages in lieu of notice cannot therefore be characterised as

unreasonable.â??

(Emphasis and underlining supplied)

36. Paras 17 to 23 of the report, thereafter, proceed to hold as under:

â??17. The impugned section providing for payment of compensation is evidently related to the object sought to be achieved by the Parliament viz.:

securing social justice. The right to receive compensation arises because the workman is exposed to undeserved want and the reasons for closure

may have no direct bearing thereon. Payment of compensation which is directed to be made at the rate of 15 days' wages for every completed year

of service cannot again be characterised as was sought to be done by one of the learned counsel for the petitioners as â??drastic in its scope and contentâ??.

18. Does the impugned provision impose an unreasonable restriction because it imposes liability to pay compensation which is not related to the capacity of the employer? Before the impugned section was enacted, the industrial tribunals undoubtedly decided the individual claims for compensation for termination of employment submitted to them on their merits and sometimes refused compensation if it was found that the closure was bona fide and was in part due to irresponsible conduct of the workmen concerned. The decisions of the industrial tribunals before the impugned section was enacted again show that even where compensation was allowed, there was no fixed standard or principle on which the compensation was awarded. Where the business is continuing its capacity to meet the obligation to pay dearness allowance, gratuity and provident fund etc. may have to be taken into account; the reason being that if the capacity to pay is not taken into account, the business itself may come to an end and the very purpose of industrial adjudication in the matter of fixation of wages, payment of dearness allowance and the schemes of gratuity and provident fund which are intended for the amelioration of the conditions of labour may be frustrated. But where a business is closed, the capacity to pay is not a relevant consideration. Normally, if the business is capable of meeting the obligation to pay the wages of the workmen and to meet the other expenses necessary for its continuance, would not be closed down. Capacity to pay has therefore to be taken into account in the case of a running business in assessing liability to fix wages or gratuity or dearness allowance. Once the undertaking is closed and liability to pay compensation under the impugned section is not made a condition precedent, the amount which the workmen may be able to recover must depend upon the assets of the employer which may be available to meet the obligation. The workmen would be entitled to recover compensation only if the employer is able to meet the obligation otherwise they would have to rank pro rata with the other ordinary creditors of the employer.

19. The legislature has imposed restricted liability in cases where closure is due to circumstances beyond the control of the employer. By the proviso

to sub-section 1 of Section 25FFF, where the undertaking is closed down on account of circumstances beyond the control of the employer, the

compensation to be paid to the workman is not to exceed his average pay for three months. If the principal provision is not unconstitutional as imposing

an unreasonable restriction, it is not suggested that the proviso is on any independent ground unconstitutional.

20. However, the explanation to Section 25-FFF proviso is, it is submitted, unreasonable. The explanation provides:

“An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed of stocks

shall not be deemed to have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the

proviso to this sub-section.”

21. The effect of the impugned section along with the proviso is to classify the undertakings into two classes viz. (1) those which are closed down on

account of unavoidable circumstances beyond the control of the employer, and (2) the remaining. When the closure of an undertaking is due to

circumstances beyond the control of the employer, the maximum limit of compensation is average pay for three months, irrespective of the length of

service of the workmen; in the residuary class, the liability is unrestricted. The explanation is in substance, a definition clause which sets out what shall

not be deemed to be closures on account of circumstances beyond the control of the employer. By this explanation, employers who had to close down

their industrial undertakings merely because of financial difficulties including financial losses or accumulation of indisposed of stocks are excluded

from the benefit of the proviso to Section 25-FFF(1). The proviso restricts the liability of employers who are compelled to close down their

undertakings on account of unavoidable circumstances beyond their control, but in the view of the Parliament, in that category are not to be included

employers compelled to close down their undertakings merely because of financial difficulties or accumulation of undisposed of stocks. Closure of an

undertaking attributable merely to financial difficulties or accumulation of undisposed of stocks, is by the explanation, excluded from the benefit of

restricted liability; but coupled with other circumstances, financial difficulties or accumulation of undisposed of stocks may justify the view that the

closure is due to unavoidable circumstances beyond the control of the employer, and attract the application of the proviso notwithstanding the explanation.

22. Where an undertaking is closed down on account of persistent losses due to no fault of the employer or due to accumulation of stocks having regard to persistent unfavorable market conditions, the closure may normally be regarded as due to unavoidable circumstances beyond the control of the employer. By the explanation, the jurisdiction of the Tribunal which may be called upon to ascertain whether in a given case, the closure was on account of circumstances beyond the control of the employer and whether on that account the employer was entitled to the benefit of the proviso may be restricted. But it is not provided that in no case of financial difficulty or accumulation of stocks coupled with other circumstances, the closure is to be regarded as due to unavoidable circumstances beyond the control of the employer. It is only where the closure is â??merelyâ? on account of financial difficulties or accumulation of undisposed of stocks that the closure is not to be deemed due to circumstances beyond the control of the employer.

23. A state of financial difficulties or accumulation of undisposed of stocks may be temporary, it may be brought about by past mismanagement directly attributable to the employer or may even be deliberately brought about. The closure on account of financial difficulties or accumulation of undisposed of stocks is accordingly not necessarily the result of unavoidable circumstances beyond the control of the employer. That, in certain events, a statute may impose restrictions which will be irksome and may be so regarded by certain citizens as unreasonable, is not decisive of the question whether it imposes a reasonable restriction. As observed in Mohd. Hanif Quareshi v. State of Bihar [(1959) SCR 629] by Das, C.J.:

â??In determining that question (the reasonableness of the restriction) the court we conceive, cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-clause (g) is expressed in general language and if there had been no qualifying provision like clause (6), the right so conferred would have been an absolute one. To the person who has this

right, any restriction will be irksome and may well be regarded by him as unreasonable. But the question cannot be decided on that basis. What the court has to do is to consider whether the restrictions imposed are reasonable in the interest of the general public.â?? Again, as observed in *Bijay Cotton Mill Ltd. v. State of Ajmer* [(1955) 1 SCR 752 at 755] :

â??Individual employers might find it difficult to carry on the business on the basis of the minimum wages fixed under the Act but this must be due entirely to the economic conditions of these particular employers. That cannot be a reason for the striking down the law itself as unreasonable.â??

By the explanation, certain persons may, because of persistent losses or accumulation of stocks find themselves unable to carry on the business, and may still not be entitled to the benefit of the proviso, but that will not be a ground for holding that the explanation is unreasonable. The tribunal called upon to decide whether the case of an employer is covered by the proviso will certainly be entitled to look into the causes which led to the financial losses or the accumulation of stocks and ascertain whether the closure was merely on account of financial losses or accumulation of stocks or was on account of circumstances beyond the control of the employer, and in assessing whether the circumstances were beyond the control of the employer, the fact that the employer has suffered financial losses or there is accumulation of stocks is not required by the legislature to be excluded from consideration.â??

(Emphasis and underlining supplied)Â

37. It is clear, from the above decision, that the motive, or provocation, behind the decision of the employer to close down the undertaking, is irrelevant, insofar as the right of the employees/workmen, employed therein, to compensation, or the quantum of such compensation, are concerned.Â Section 25 FFF (1) makes the quantum of compensation dependent solely on the issue of whether the closure was attributable to â??unavoidable circumstances beyond the control of the employerâ?.Â The Supreme Court has, in the aforementioned decision, also clarified that undertakings suffering financial difficulties or accumulation of undisposed stocks, would stand insulated from the main part of Section 25 FFF(1) only where the closure was merely because of the said factors.Â In other words, where the closure of the undertaking was attributable merely to financial difficulties

or accumulation of undisposed stocks, the benefit of the proviso to Section 25 FFF(1) stood excepted by the Explanation to the said sub-section, but not otherwise.Â Where the closure was attributable, not merely to financial difficulties or accumulation of undisposed stocks, but to the said factors coupled with others, the benefit of the proviso would continue to be applicable.Â By way of illustration, the Supreme Court clarified that a case where the undertaking was suffering persistent losses, due to no fault of the employer or due to accumulation of stocks having regard to persistently unfavourable market conditions, may normally be regarded as due to unavoidable circumstances beyond the control of the employer.Â This, however, was a matter to be examined and decided by the Labour Court or Industrial Tribunal.Â In any event, the Supreme Court clarified that the existence of financial difficulty or accumulation of stocks did not conclude the issue of whether the case came within the main part of, or the proviso to, Section 25 FFF(1) of the ID Act; it had to be examined, further, whether the closure was merely because of the said factors, or attributable, in addition, to other exacerbating circumstances.

38. A bench of three learned Judges of the Supreme Court, in *Workmen of the Indian Leaf Tobacco Development Co. Ltd v. Management of*

Indian Leaf Tobacco Development Co Ltd, AIR 1970 SC 860 examined Section 25 FFF in some detail.Â In the said case, notice had been issued, by

the Indian Leaf Tobacco Development Co Ltd (hereinafter referred to as 'ILT'), intimating that it would be closed down with effect from 30th

September, 1963.Â This resulted in the raising of an industrial dispute, by the workmen of the said undertaking.Â The first issue, referred for

adjudication, by the State Government, consequent to the raising of the said industrial dispute, read thus:

'How far the demands of the union viz. (i) that only which worked during 1962 season should be closed, and (ii) that no workmen who worked in

1962 season should be retrenched, are justified?'

39.Â A preliminary issue was taken, by ILT, that closure of its undertaking was a managerial function, regarding which no industrial dispute could be

maintained or, consequently, referred for adjudication and that, therefore, in adjudicating on the said issue, the Industrial Tribunal was acting in excess

of its jurisdiction.Â This objection was sustained by the Industrial Tribunal, on the

ground that closure of a depot did not amount to closure of the business of ILT, which continued in thirteen other depots.Â It was noticed that only eight depots of ILT were closed.Â The Supreme Court, in appeal, held, in clear and unequivocal terms, that the closure or stoppage of part of its business was a managerial act of ILT, immune from interference by any Industrial Tribunal under the ID Act.Â It was clarified that the Industrial Tribunal could not direct a Company to continue a part of the business which the company had decided to shut down, or to reopen a closed depot or branch.Â The following words, from Paras 4 to 6 of the report, unequivocally settled this legal position:

â??4. The decision given by the Tribunal in the interim award, holding that the reference covered by Issue 1 was not competent, has been challenged

by learned counsel for the appellants on the ground that the closure of a depot does not amount to closure of business in law and, since the same

business was continued by the Company at least 13 other depots, the closure of the 8th depots in question was unjustified. For the proposition that the

closure of the depots did not amount to closure of business, learned counsel rolled on the views expressed by this Court in *Pipraich Sugar Mills Ltd. v.*

Pipraich Sugar Mills Mazdoor Union [1956 SCR 872] where the Court explained the reason for the decision given by the Labour Appellate Tribunal in

the case of *Employees of India Reconstruction Corporation Limited, Calcutta v. India Reconstruction Corporation Ltd., Calcutta* [1953 LAC 563]. It,

however, appears to us that this question raised on behalf of the appellants is totally immaterial insofar as the question of the jurisdiction of the

Tribunal to decide the first part of Issue 1 is concerned. The closure of the 8 depots by the Company, even if it is held not to amount to closure of

business of the Company, cannot be interfered with by an Industrial Tribunal if, in fact, that closure was genuine and real. The closure may be treated

as stoppage of part of the activity or business of the Company. Such stoppage of part of a business is an act of management which is entirely in the

discretion of the Company carrying on the business. No Industrial Tribunal, even in a reference under Section 10(1)(d) of the Industrial Disputes Act,

can interfere with discretion exercised in such a matter and can have any power to direct a Company to continue a part of the business which the

Company has decided to shut down. We cannot possibly accept the submission

made on behalf of the appellants that a Tribunal under the Industrial

Disputes Act has power to issue orders directing a Company to reopen a closed depot or branch, if the Company, in fact, closes it down.

5. An example may be taken of a case where a Bank with its headquarters in one place and a number of branches at different places decides to close

down one of the branches at one of those places where it is functioning. We cannot see how, in such a case, if the employees of that particular branch

raise an industrial dispute, the Bank can be directed by the Industrial Tribunal to continue to run that branch. It is for the Bank to decide whether the

business of the branch should be continued or not, and no Bank can be compelled to continue a branch which it considers undesirable to do.

6. In these circumstances, it is clear that the demand contained in the first part of Issue 1 was beyond the powers and jurisdiction of the Industrial

Tribunal and was incorrectly referred for adjudication to it by the State Government.â??

(Emphasis and underlining supplied)

40. It is interesting to note that, while clearly holding, in the above extracted passages of its decision in *Workmen of the Indian Leaf Tobacco*

Development Co Ltd (supra), that the Industrial Tribunal did not possess the jurisdiction to direct opening of a closed industrial undertaking, or

continuance of any part of the business which the management had decided to shut down, the Supreme Court qualified this pronouncement with the

caveat that the closure had to be â??genuine and realâ??.Â It was only, therefore, â??if the closure was genuine and realâ? that the Labour Court, or

the Industrial Tribunal, stood foreclosed from interfering therewith, or undoing the closure.Â Needless to say, this caveat could not be used as a

handle, for Labour Courts, or Industrial Tribunals, to undo closures of undertakings.Â It is only where the closure is a â??shamâ? â?" or, as it would

become clearer hereinafter, a ruse to lay off the workmen â?" that the undertaking could be directed to be reopened, or the workmen re-engaged.Â

In all other cases, the motive for closure, or the justification therefor, would not be open to examination by the Labour Court or the Industrial Tribunal,

and the freedom, guaranteed in law to the employer, to decide how to run his business, including the freedom to close any such part of the business,

the continuance of which, in the employers own discretion, would not be viable

or advisable, has necessarily to be respected.

41. The Supreme Court went on, in para 7 of its judgement in *Workmen of the Indian Leaf Tobacco Development Co Ltd (supra)*, to hold that, even

where a Company closed down a branch or a depot of its business, the question could always arise, as to the relief to which the workmen of that

branch or depot were entitled and that, if such a question arose and became subject matter of an industrial dispute, the Industrial Tribunal would be

fully competent to adjudicate thereon.Â Having said so, in para 8 of its judgement, the Supreme Court noticed that the legal position had undergone a

change with the enactment of Sections 25-FF and Section 25FFF.Â The following words, in para 8 and 10 of the report, are significant:

â??8. â?¡ Since then, as we have indicated above, Section 25FF and Section 25-FFF have been added in the Industrial Disputes Act, and the latter

section specifically lays down what rights a workman has when an undertaking is closed down. In a case where a dispute may arise as to whether

workmen discharged are entitled to compensation under Section 25-F or Section 25-FFF it may become necessary to decide whether the closure, as a

result of which the services have been dispensed with, amounts to a closure in law or not. In the case before us, it was admitted by learned counsel

for both parties that the workmen, who have been discharged as a result of the closure of the 8 depots of the Company, have all been paid

retrenchment compensation at the higher rate laid down in Section 25-F, so that, in this case, it is not necessary to decide the point raised on behalf of

the workmen.

10. The Tribunal examined in detail the allegations made on behalf of the workmen in this respect. In fact, the interim award mentions that, for the

purpose of deciding the preliminary issue and the first issue, evidence was recorded by the Tribunal for more than a week and arguments of

Advocates of the parties were heard for even a longer period. After examining the evidence, the Tribunal came to the conclusion that the stoppage of

the work at the depots was genuine and that the work which was being carried on at the depots had not been transferred to the buying points

established by the Company. The closure of the business at the depots was necessitated by reasons of expediency inasmuch as the Company had to

reduce its purchases in its quest for quality and its desire to run the business

economically. The principal work, which used to be done at the depots, was not that of purchasing tobacco, but of handling it and that work was not transferred at all to any buying point. The Tribunal, thus, came to the finding that the closure of these depots was real and genuine and that the suggestion of the appellants that only a device was adopted of carrying on the same business in a different manner had no force at all if the same business had been continued, though under a different guise, the claim of the workmen not to be retrenched could possibly be considered by the Tribunal; but, on the finding that there was a genuine closure of the business that used to be carried on at the depots, no question could arise of the retrenchment being set aside by the Tribunal. The Tribunal could not ask the Company to reemploy or reinstate the workmen, because there was no business for which the workmen could be required. In these circumstances all that the workmen could claim was compensation for loss of their service and in that respect, as we have indicated above, the workmen have received adequate compensation.â??

(Emphasis supplied)

42. The above judgement would, therefore, appear to settle the legal position that the closure of an undertaking, which is â??genuine and realâ?, is immune from interference, at the hands of the Labour Court or the Industrial Tribunal and that, in such cases, the only relief that would be available to the workmen of such an undertaking, would be by way of compensation, the quantum whereof would depend on whether the case would fall within the main part of Section 25 FFF(1), of the Industrial Dispute Act, or the proviso, thereto.Â No direction, for reinstating of workmen employed in an undertaking, which was closed, could be issued, where the closure was found to be â??genuine and realâ??.

43. Whenever, therefore, workmen, consequent on closure of an undertaking of an industry, raise an industrial dispute, the Labour Court, or Industrial Tribunal, would be required to address the following issues:

(i) Is the closure â??genuine and realâ??.Â If the answer is the negative, i.e. the closure is found to be a â??shamâ?, merely with the oblique intent

of laying off the workmen, it would be a fraud on the statute and ex facie unconscionable in law, in which case the Labour Court, or Industrial

Tribunal, would be well within its authority in setting aside the closure and

directing the undertaking to resume work and reinstate the workmen.

(ii) In case the closure is found to be, on the other hand, 'genuine and real', the motive, or justifiability, of the closure, is not open to judicial

scrutiny. It is not open to the Labour Court, or Industrial Tribunal, to examine whether the facts and circumstances necessitated the closure, or not,

or whether the closure was avoidable, irrespective of the hardship that might have resulted, to the workmen employed in the undertaking, as a result

thereof. This is because Article 19(1)(g) of the Constitution of India guarantees, to every citizen, not only the right to carry on a business of his

choice, but also the right to discontinue the business, if he so chooses.

(iii) The Legislature has not been insensitive to the prejudice, resulting to the workmen as a consequence of the closure of the undertaking; it is for this

reason that Section 25 FFF requires the management only the undertaking, which it closes down, to pay compensation, to the workmen working in the

undertaking. As a result, in case the answer the query at (i) supra is in the affirmative, i.e., if the closure of the undertaking is found to be

'genuine and real', the Labour Court/Industrial Tribunal would next have to examine whether the workers would be entitled to compensation

under sub-section (1) of Section 25 FFF, or under the proviso thereto. This, in turn, would require examining whether the closure was 'on

account of unavoidable circumstances beyond the control of the employer'. As such, this would be the next query, which the Labour Court, or

Industrial Tribunal, would have to address, and answer.

(iv) In case the closure is merely on account of any of the circumstances enumerated in the Explanation to Section 25 FFF(1), it cannot be regarded

as 'on account of unavoidable circumstances beyond the control of the employer'. If, however, these circumstances, in conjunction with other

factors, have resulted in the undertaking having to close down, then the Labour Court, or Industrial Tribunal, would have to examine, and decide, on

facts, whether the reason for closure could still be regarded as 'on account of unavoidable circumstances beyond the control of the employer', or

not.

(v) In case the closure is 'on account of unavoidable circumstances beyond the control of the employer', only reduced compensation, as per the

proviso to Section 25 FFF(1), would be payable.

(vi) If the closure, however, cannot be attributed to "unavoidable circumstances beyond the control of the employer", Section 25 F would apply, *mutatis mutandis*, i.e., the workmen would be entitled to notice, as well as compensation, as if they had been retrenched.

44. We may now revert, once again, to the exact issue referred, for adjudication, to the Labour Court, by the appropriate Government. As already noted herein above, the term of reference, as contained in the said referral order, read thus:

"Whether the services of s/Sh. Ram Saran Yadav, Mani Ram, Harinder Chauhan, Hasan Imam, Nebi Lal, Sudama Giri, Gobind Tiwari, Dal Singar,

Chari Sharma, Virender Kumar Rao, Swami Nath, Anil Kumar Gautam, Surender Prasad, Ashok Kumar Sharma, Parmeshwar Singh, Ramashrey

Prasad, Vijay Kumar Singh, Murari Singh, Dinesh Sahni, Udai Kant Jha, Balkeshwar Chauhan, Subhash Yadav, Kamleshwar Singh, Shri Kant, Kishan

Pal, Arjun Sharma, Gian Chand Jha, Umesh Chand, Ranjeet Sharma, Pitamber Shah and Prem Narain have been terminated illegally and/or

unjustifiably and if so, to what relief are they entitled and what directions are necessary in this respect?"

The term of reference, qua the 31st workman, Ram Avtar Yadav, who was subsequently added to the reference, was more or less identical.

45. Two issues, plainly, stood referred, by the above reference, to the Labour Court. The first was whether the termination of the workmen was

illegal and/or unjustifiable. The second, a sequel to the first, addressed the relief, to which the said workmen would be entitled, were the first issue

to be decided in the affirmative, i.e. in their favour and against the management, and the directions that would be required to be issued in that regard

"as is apparent from the use of the words "and if so".

46. The manner in which the issue, referred by the Government, to the Labour Court, was worded, has resulted in a certain degree of ambiguity.

How is one to understand the first, of the two issues referred? The issue is whether the termination of the services of the workmen was illegal

and/or unjustifiable. The Labour Court has understood this issue as essentially limited to examining whether the plea, of the respondent, that its

Badarpur factory stood closed, with effect from 13th October, 1998, was justified, on facts, or not. It has proceeded on the premise that, if the fact

of closure was established and proved, the termination of the petitioner-workmen, being an inevitable sequitur to such closure, was, ipso facto, legal and justified.Â In view of the fact that the second issue, i.e. the second part of the issue as worded by the Government in the referral order, arose only where the answer to the first issue, regarding the legality/justifiability of the termination of the workmen, was answered in favour of the workmen and against the management, the Labour Court, having found the issue of legality of termination of the workmen to be answerable in favour of the management and against them, has not proceeded to examine the second issue at all.Â Such examination would necessarily have involved the exercise of determining whether the closure was â??on account of unavoidable circumstances beyond the control ofâ? the respondent, or not.Â No such exercise has, however, been undertaken by the Labour Court.

47. That this is the manner in which the Labour Court interpreted the term of reference, as contained in the Referral Order dated 14th September, 1999 (supra), is apparent from the three issues framed by the Labour Court itself, as arising for consideration. A reading of the said issues, as contained in para 8 of the impugned Award, indicates that, essentially, the Labour Court has concerned itself only with the question of whether, factually, the Badarpur factory stood permanently closed w.e.f. 13th October, 1998 and, implicitly, to the issue of whether the closure was â??genuine and realâ?. The second issue framed by the Labour Court, viz. as to whether the services of the workmen had been terminated illegally and/or unjustifiably, was basically a repetition of the term of reference as contained in the Referral Order.Â

48. The manner in which the Labour Court has interpreted the term of reference, as contained in the Referral Order dated 14th September, cannot be said to be ex facie incorrect. At the same time, if the reference were to be read in this manner, it would result in completely excluding, from consideration, Section 25 FFF of the ID Act, and its applicability to the petitioner-workmen. The problem has essentially arisen because of the use of the words â??and if soâ?, in the term of reference as contained in the Referral Order. As a result of the usage of the said words, the issue of consequential relief, to the workmen, would arise for consideration, by the Labour Court, only if the first part of the term of reference, i.e., whether

the termination of the workmen was legal and/or justified, were answered in favour of the workmen and against the management. The term of reference, as contained in the referral order, indicates that, if the preliminary/first issue, regarding the legality, and/or justifiability of the termination of the petitioners-workmen, were to be decided in favour of the management and against them, the second issue, regarding the relief to which the workmen, would be entitled, would not arise for consideration at all. This is how the Labour Court has understood the term of reference, as set out in the Referral Order, and it cannot be said that, in so understanding, the Labour Court has committed any fundamental error.Â

49. The use of the words â??and if soâ?, in the referral order, cannot be said to be justified because, in law, the workmen would be entitled to relief even if the issue of legality/justifiability of their termination were to be decided against them. Even, that is, if it were to be held that Badarpur factory, indeed, stood closed w.e.f. 13th October, 1998, and that the closure was effected in accordance with Section 25-FFA of the ID Act, the workmen employed in the said factory would, nevertheless, be entitled to compensation in accordance with Section 25-FFA thereof. The right to compensation, under Section 25-FFF, is not dependent on the validity, or otherwise the closure of the factory, compensation being available to the workmen, working in the factory, under Section 25-FFF, in every case of closure. Where the closure is on account of unavoidable circumstances beyond the control of the employer, compensation would be payable as per the proviso to Section 25-FFF (1); in other cases, compensation would be payable in accordance with Section 25-F, by virtue of sub-section (1) of Section 25-FFF. Compensation, would, however, be payable in every case.Â The ID Act does not, therefore, contemplate workmen, who have lost their job because of closure of the undertaking in which they were working, returning home empty-handed.Â If the closure of the undertaking is not â??genuine and realâ?, the workmen would be entitled to reinstatement; if, on the other hand, the closure is â??genuine and realâ?, the workmen would be entitled to compensation, either in accordance with the proviso to Section 25 FFF(1) of the ID Act , or in accordance with Section 25 F, depending on whether the closure was â??on account of unavoidable circumstances beyond the control of the employerâ??, or not.

50. The Labour Court, as already noted herein above, chose to reword the issues that arose, before it, for consideration.Â The single issue, contained in the â??term of referenceâ?, as worded by the appropriate Government while referring the dispute for adjudication, was divided into three issues, already set out in para 16 supra.Â The first issue was whether the Badarpur factory had been closed permanently with effect from 13th October, 1998.Â The second issue was whether the services of the workmen had been terminated illegally and/or unjustifiably by the respondent.Â The third issue was the relief, to which the workmen would be entitled.

51. While it is always open to the Labour Court, or Industrial Tribunal, to re-frame the issue, as originally framed in the referral order, so as to facilitate the adjudication thereof, it appears that, in the present case, after reframing the issues as above, the Labour Court has effectively decided only the issue of the nature of closure of the Badarpur factory, without advertng, at all, to Section 25 FFF, or the compensation which would be available to the petitioner-workmen thereunder.Â As already noted herein above, the Labour Court cannot be faulted for having adopted this approach, as the term of reference, contained in the referral order of the State Government, by using the words â??and if soâ?, required the Labour Court to enter into the issue of relief available to the petitioner-workmen only if their termination was found to be illegal and/or unjustified.Â In law, however, having decided that the termination, of the service of the petitioner-workmen was not illegal/unjustified, the Labour Court was required, nevertheless, to examine the issue of the compensation, to which the workmen would be entitled (which, needless to say, would come within the ambit of the expression â??reliefâ?), i.e., whether compensation would be payable under Section 25 FFF (1) of the ID Act, or under the proviso thereto.Â This exercise, unfortunately, has not been undertaken, by the Labour Court in the instant case. Â Â

52. The manner in which the Labour Court has proceeded to analyse the controversy is, at a plain reading, not in accordance with the procedure which, in my view, ought to have been adopted, as set out in para 43 supra.Â Issue No 1, as framed by the Labour Court , has been answered, by it, in the affirmative, relying on (a) the notice, dated 13th August, 1998, issued by the respondent to the appropriate Government, (b) the reasons for

closure, as set out in the Annexure to the said document, (c) the notice regarding closure, dated 12th September, 1998, put up on the notice board of the Badarpur factory, (d) the letter, dated 7th October, 1998, from the respondent to the Chief Inspector of Factories, (e) the communication, dated 7th April, 1999, from the respondents to the Regional Provident Fund Commissioner, (f) the communication, dated 7th April, 1999, from the respondent to the Employees State Insurance Corporation, (g) the communication, dated 13th October, 1998, from the respondent to the Assistant Labour Commissioner, (h) the individual communications, to the workers, requiring them to collect their pending wages and (i) the surrender, by the respondent, of its license, in respect of the Badarpur factory, to the Chief Inspector of Factories.Â Albeit while dealing with â??Issue No 2â?, as framed by it, the Labour Court has further observed that the petitioner-workmen had not produced any cogent evidence, to the effect that, after closure of the Badarpur factory, the activities theretofore being carried out in the said factory were being carried out elsewhere, despite alleging to the said effect, or that the machinery located at the Badarpur factory was shifted elsewhere and put to use at such new location.Â The Labour Court has held, on a conjoint examination of all these factors, that the Badarpur factory had, indeed, closed down, permanently, on 13th October, 1998, and that the activities being carried out at the said factory were not being carried out elsewhere.Â Though the Labour Court has not expressed itself in so many words, these findings would amount to a determination that the closure of the Badarpur factory was â??genuine and realâ?, and not a sham exercise, intended merely to lay off the workmen working in the said factory, as the petitioners had sought to contend.

53. I find no reason to differ with these findings of the Labour Court, which cannot be said to suffer from perversity in any manner.Â The closure of the Badarpur factory of the respondent has, in my view, to be regarded as â??genuine and realâ?, and not merely a sham closure, with the intent of laying off the workmen. The jurisdiction of this Court, while dealing with awards of Labour Courts, has necessarily to peregrinate within the peripheries set out in the following passage, from Syed Yakub v. K. S. Radhakrishnan, AIR 1964 SC 477:

â??7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by

this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction

committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of

it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal

acts illegally or in properly, as for instance, it decides a question without giving an opportunity to be heard, to the party affected by the order, or where

the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a

writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means

that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ

proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may

appear to be. In regard to finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the

Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced

the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a

writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot

be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient

or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the

said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that

the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

8.Â It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected

by a writ has to be an error of law; it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is

manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis- interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconducted or contravened.â??

(Emphasis supplied)

54. Thus viewed, it cannot be said that, in coming to a finding that the Badarpur factory stood closed w.e.f. 13th October, 1998, the Labour Court has committed any jurisdictional error or that its finding suffers from perversity on facts or in law. The attempt, of the petitioners to urge that, subsequent to its closure, the Badarpur factory was working elsewhere, is bereft of any evidentiary support.Â Equally unsupported is the petitionersâ?? contention that the factory was also working at B-107, Okhla Industrial Area, New Delhi.

55. I may note, here, that the petitioners have not even placed, on record, their letters of appointment, or any evidence to support their case that they

were interchangeably working at the Badarpur factory and at the premises of M/s. Subhash Engineering Works and M/s. International Engineering

Company, or that any work was discharged, by them, at B-107, Okhla Industrial Area, New Delhi. It appears, clearly, that the petitioners were

working at the Badarpur factory, and that the Badarpur factory actually stood closed w.e.f. 13th August, 1998.Â

56. But what of Section 25FFF(1), and the liability cast on the respondent thereby?

57. It is too late in the day, now, to reword the term of reference, as contained in the referral order dated 14th September, 1999. In order, however,

that substantial justice is done, I intend to read, into the ambit of the issue of legality and/or justifiability of the termination of the petitioners-workmen,

also the issue of compensation, if any, to which they would be entitled, as a consequence thereof. I am also of the view that it could never had been

the intention of the government, while referring the dispute for adjudication to the Labour Court to leave the question of Section 25-FFF undecided,

given that the said provision contains a statutory dispensation in favour of the workmen, whether to a greater or to a lesser degree, depending on

whether the proviso, to sub-section (1) thereof, applies, or does not apply.Â

58. Adverting, now, to this aspect of the matter, i.e. whether the closure of the Badarpur factory was â??on account of unavoidable circumstances

beyond the control of the employerâ?, it is clear that failure to decide the said issue would result in an inchoate determination of the rights of the

workmen, to compensation, consequent to closure of the Badarpur factory. While it is obvious that the said closure cannot be treated as not being

genuine or real, or as being a sham, the petitioners-workmen would, nevertheless, be entitled to compensation, under Section 25 FFF(1) of the ID Act.

In case the closure is attributable to unavoidable circumstances beyond the control of the respondent, only limited compensation, as contemplated by

the proviso to Section 25 FFF(1) of the ID Act would be available to the petitioners. On the other hand, if the closure is not attributable merely to

unavoidable circumstances beyond the control of the respondent, the petitioners-workmen would be entitled to additional compensation, in accordance

with sub-section (1) of Section 25 FFF of the ID Act.Â

59. Whether the closure of the Badarpur factory was, or was not attributable to

“unavoidable circumstances beyond the control of the employer”

is essentially an issue of fact. Though the circumstances necessitating such closure, as per the respondent, stand set out in the Annexure to the notice

in Form Q, submitted by it to the Secretary (Labour), Delhi Administration, on 13th August, 1998, it would be always open to the petitioner-workmen

to contest the same, or to urge, on facts, as well as in law, that the said exigencies, even if treated as correct, do not amount to “circumstances

beyond the control of the employer” within the meaning of the proviso to Section 25 FFF(1) of the ID Act.Â

60. I have already referred, hereinabove, to the legal position obtaining in this regard, as manifests from the judgments of the Supreme Court in

Hathising Manufacturing Co Ltd (supra) and Workmen of the Indian Leaf Tobacco Development Co. Ltd (supra). It would be necessary for the

Labour Court to examine whether, in the backdrop of the law enunciated in these decisions, and the observations made by me, in that regard,

hereinabove, it could be said that the closure of the Badarpur factory was on account of unavoidable circumstances beyond the control of the

respondent. Consequent upon and dependent on, the said determination, needless to say, would be the resultant finding regarding the compensation

which would be payable to the petitioner-workmen.Â

61. These aspects being essentially issues of fact, this Court is loath to return any finding thereon, in the absence of a first-instance examination, and

determination of the issue, by the Labour Court.Â

Conclusion

62. In view of the findings hereinabove, the present writ petition is allowed in part. The impugned Award, dated 8th July, 2010, passed by the Labour

Court, is quashed and set aside. The matter is remanded to the Labour Court, to consider the compensation payable to the petitioners-workmen in the

light of Section 25 FFF(1) of the Industrial Disputes Act, 1947, keeping in mind the observations and findings contained hereinabove.Â

63. In view of the fact that this case has remained pending for long, the Labour Court is requested to decide the reference, to the extent it stands

remanded hereinabove, expeditiously, and preferably within a period of six months from the date of receipt of a certified copy of this judgment.Â

64. There shall be no order as to costs.Â