

(1963) 07 CAL CK 0017

In the Calcutta High Court

Case No : Company Petition 229 of 1962, C.A. 159/63 to C.A. 164/63

In Re: Bank of China

Date of Decision : 09-07-1963

Acts Referred:

Companies Act, 1956 — Section 2, 445(3), 454, 530
Industrial Disputes Act, 1947 — Section 2(00), 25F, 25FFF

Citation : 67 CWN 1037

Hon'ble Judges : B.C. Mitra, J

Bench : Single Bench

Advocate : R.C. Kar in C.A. 159/63 and Anindya Mitra, P.K. Das and Chandan Banerjee in C.A. 160/63 to 164/63, for the Appellant; Ranadeb Chaudhuri and R.N. Pyne for the Court Liquidator, for the Respondent

Judgement

B.C. Mitra, J.—These are five appeals under Rule 164 of The Companies (Court) Rules, 1959, against the decision of the Official Liquidator rejecting the claims of the appellants to various sums of money to which they claim to be entitled by reason of termination of their services under the Bank of China (in liquidation). The appellants were employees of the Bank of China now in liquidation, the winding up order having been made on December 10, 1962. They claimed before the Official Liquidator that the Bank of China (hereinafter called the Bank) was indebted to them in respect of annual allowance, leave pay, notice pay, gratuity and compensation for discharge and/or retrenchment and special gratuity.

2. The Liquidator has admitted and allowed one item of the claim advanced on behalf of the appellants, viz., annual allowance for 1962. The Liquidator has also admitted the amount of Staff Provident Fund but has declined to entertain individual claims in respect of the same. The Liquidator has also rejected the claims for payment of retrenchment compensation, salary in lieu of the notice for retrenchment, special gratuity and approved holiday remuneration. The claim for annual allowance for 1962 has been admitted by the Liquidator as a preferential claim under sec. 530 of the Companies Act, 1956 and the appellants have been adjudged to be preferential creditor in respect of the said claim.

3. Mr. R.C. Kar, Solicitor for one group of appellants submitted that the appellants did not claim to be preferential creditors in respect of the other claims rejected by the Liquidator and would be content only if their claims were admitted as an ordinary creditor.

4. Mr. Kar argued that the appellant's claims were based on an oral contract between the Bank and its employees. According to him, the Bank was competent to enter into oral contracts of employment and the Calcutta Manager of the Bank held a power of attorney by which he was authorised to bind the company to the terms of the employment.

5. It was further contended by Mr. Kar that the terms of a tripartite agreement between the Bank, its workmen represented by the president of the Employees' Union and the Conciliation Officer (Central) were binding on the liquidator. This agreement was arrived at on August 4, 1962. It related to and was occasioned by the proposal of the Bank to retrench fifteen clerical and fifteen members of the subordinate staff of the Bank. On June 14, 1962 the Company issued notices to the said employees, intimating its decision to effect retrenchment of the aforesaid staff on the ground that consequent upon revocation of its licence to do foreign exchange business in India, the volume of its business had been drastically reduced. The material terms of the settlement are as follows: -

Terms of settlement.

(1) On and from 14th August 1962, the Bank will terminate by way of retrenchment services of 15 clerks and 15 subordinate staff, the names of whom are set out in the Annexure "A" hereto.

(2) The following rates of payment for notice pay, retrenchment compensation, gratuity, special gratuity, annual allowance, leave wages will be paid on or before the 14th August 1962 to all the employees drawing a monthly total emolument up to Rs. 1000/-. (a) Notice pay equivalent to 3 months of total emoluments.

(b) Retrenchment compensation at the rate of 15 days for each completed year of past services.

(c) Gratuity at the rate of one month to total emolument for each completed year of past services subject to the maximum of 15 months.

(d) A special gratuity will be paid equivalent to 3 months' total emoluments in all.

(e) Annual allowance will be paid on pro rata basis.

(f) Leave wages will be paid whatever it is due, to the employees at the prevalent rate.

(g) Additional gratuity will be paid at the rate of an additional half month of total emoluments for each completed year of service beyond 30 years. To that extent the maximum limit of 15 months as in item (c) above will be waived.

(3) For the purpose of above payments "monthly emoluments" shall mean basic

wages, clearness allowance, house rent allowance, temporary allowance, adjustment allowance, special allowance and officiating allowance, if any.

(4) For the purpose of payment of retrenchment compensation and gratuity as provided under item No. 2(b) and (c) above, proportionate payment will be made for the broken period of the year if it is less than 6 months.

(5) The balance of the Staff Welfare Fund amounting to a total of Rs. 29,500/- will be divided into as many equal parts as the total number of subordinate staff in the employment of the Bank of China at Calcutta and Bombay; this is taken together at the time of the services of retrenchment notices and one part thereto shall be paid to each member of the subordinate staff to be retrenched by the Bank.

(6) The above payments satisfy all the claims of the Bank of China Employees Union made on behalf of the above 30 staff to be retrenched on and from 14th August 1962.

6. After the aforesaid tripartite agreement, the Bank gave notice of retrenchment to a further batch of employees. Thereupon on September 3, 1962 the president of the Employees Union wrote to the Manager of the Bank that it was presumed that the retrenchment benefits to be given to the further batch of employees proposed to be retrenched would be the same as provided in the aforesaid tripartite agreement. In answer to the said letter from the president of the Employees' Union, the Acting Manager of the Bank by his letter dated September 5, 1962 confirmed that the retrenchment benefits as provided in the aforesaid tripartite agreement would be given by the company to its employees in all stages of retrenchment.

7. It is on the basis of the aforesaid tripartite agreement and the said two letters dated September 3, 1962 and September 5, 1962 that Mr. Kar contends that the terms of the agreement had become terms of the contract of employment by the company, of all its employees including the appellants, who, therefore, were entitled to the benefits conferred upon employees under the said tripartite agreement.

8. It is, therefore, necessary to scrutinise the tripartite agreement and its effect on the contract of employment having regard to the letter from the president of the Union dated September 3, 1962 and the Bank's answer to the same dated September 5, 1962.

9. The agreement recites that the Bank intended to retrench some of its employees having regard to the revocation of the licence by the Reserve Bank of India to carry on foreign exchange business. It is stated that by reason of such revocation the volume of the Bank's business as an exchange bank was drastically reduced. In consequence of such reduction in business, it became necessary for the Bank to retrench fifteen clerical and fifteen subordinate staff. It is in this background that the said tripartite agreement was arrived at for the

purpose of conferring some benefit upon the thirty individuals who were sought to be retrenched.

10. By the letter of September 3, 1962 the president of the Employees' Union wanted that the benefits of the agreement should be given to the second batch of the employees to whom notices of retrenchment had been served on August 31, 1962. The second paragraph of the letter also makes it plain that what was wanted was that the terms of the agreement should be applied to all employees who were sought to be retrenched. On September 5, 1962 the letter in answer to the letter of September 3, 1962 confirmed that the retrenchment benefits provided in the said agreement would be given by the Bank to its employees in all stages of retrenchment.

11. It is thus clear that what was intended was that those employees of the Bank whose services were terminated by the Bank should get the benefit of the tripartite agreement. It follows therefore, that those employees who were not retrenched, but whose services were continued, could not claim the benefit of the tripartite agreement and indeed no such claim was at any time advanced on behalf of the employees. There can be no doubt that only when the Bank chose to exercise the option of terminating the services of its employees by retrenchment that the benefits under the tripartite agreement were to be given to such retrenched employees. Unless therefore, an employee was retrenched and his services were terminated by the Bank at its option, he could not claim to be entitled to the benefits of the tripartite agreement.

12. Mr. Kar contended that all the employees of the Bank were entitled to the benefits of the said tripartite agreement and that the terms of the agreement became, either expressly or by implication, part of the terms of contract of service of all the employees of the company. He argued that it is true that the terms of the agreement were not in existence at the time when the employees were appointed, but the said letters of September 3, 1962 and September 5, 1962 made it quite clear that the employees should have the benefits of the agreement, if and when, they were retrenched. He next argued that discharge of the employees or termination of their services u/s 445(3) of the Company's Act, 1956 is equivalent to retrenchment as contemplated by the tripartite agreement and the said letters of September 3, 1962 and September 5, 1962.

13. The next point urged by Mr. Kar was that "retrenchment" as defined by sec. 2(00) of the Industrial Disputes Act, 1947 means the termination by the employer of the services of a workman for any reason whatsoever. Termination of the services of the employees by reason of the winding up order is therefore, according to him, retrenchment of their services and the employees are, therefore, entitled to the benefits of the tripartite agreement. Mr. Kar referred to the case of Maharaj Weaving Mills, Amritsar Vs. State of Punjab and Others, . In this case it was held that sec. 25FFF of the Industrial Disputes Act, 1947 is designed to bring a workman within the term "retrenchment" where an undertaking is closed down for any reason whatsoever. It was pointed out, that

in that section the Legislature had used words of sufficient amplitude to accomplish this object, viz., to bring workmen within the term "retrenchment" where an undertaking is closed down for any reason whatsoever. It was further held that any workman discharged on closure of an undertaking must be considered to have been retrenched as defined in sec. 2 (00) of the said Act.

14. The next case referred to is *Benett Coleman & Co. Ltd. v. Their Employees*, (2) 1954 Labour Appeal Cases 25 in which it was held that whether the closure of a business or an undertaking was justified or not, the workmen who lost their jobs would in any event get compensation.

15. It is true that the definition of the term "retrenchment" in the Industrial Disputes Act, 1947 is for the purpose of that Act and such definition cannot ordinarily be applied while considering question of retrenchment or discharge under the Companies Act. But sec. 25J of the Industrial Disputes Act 1947 makes the provision contained in Chapter VA of that Act applicable notwithstanding anything inconsistent in any other law. But the meaning and effect of retrenchment has been considered by the Supreme Court and I will revert to the subject later on.

16. The next case referred to is *Thomas v. Williams* (3) (1835) 1 Ad. & EI. 689. It was held that an order adjudicating an employer a bankrupt does not operate as dissolution of the contract of service between the bankrupt and his clerk. In my view, this case is of no assistance to the appellants having regard to the provisions of sec. 445(3) of the Company's Act, 1956.

17. Mr. A. Mitter appearing for some of the appellants contended that winding up of a company is a wrongful discharge of the employees of the company and in support of this proposition he referred to a passage in *Palmer's Company Precedents*, Winding up volume, 17th Ed. page 350. He next referred to the case in *re. London & Scottish Bank Ex parte Legal* (4) (1870) 9 Eq. 149. In this case a person was appointed a Manager by the Articles of the company and it was provided that if he, at any time, is deprived or removed from his office for any cause other than gross misconduct the Directors should pay him a sum equal to three years' salary. It was held by Lord Romilly, M.R. that the employee was entitled to prove in the winding up for the sums specified by the Articles.

18. Mr. Mitter next referred to *In re. Imperial Wine Company* (5) (1872) 14 Eq. 417. In this case, by the Articles of the Company it was provided, that in case of the dismissal of the Manager he should be paid the full amount of money which he had paid upon certain shares taken by him. A resolution was passed for voluntary winding up of the company and that particular employee was appointed Liquidator. He had paid ₹2,000 on his shares and received ₹400 for remuneration as Liquidator. It was again held by Lord Romilly, M.R. that winding up of the company was equivalent to dismissal of the employee and he was entitled to prove in the winding up for ₹2,000 but the sum of ₹400 which he had received should be treated as part payment of the debt. These two cases make it

quite clear that if the contract of employment provided for certain benefits to the employee and the company was thereafter wound up, the employee would be entitled to prove his claim in the winding up. But it is to be noted that in both the cases, there was no dispute that there was a contract which provided for the benefits claimed. It is now well established that one effect of winding up order of a company is a dismissal of the employees and indeed the Companies Act itself provides for it.

19. The next case referred to is *Midland Counties District Bank Ltd. v. Attwood* (6) (1905) 1 Ch. 357. In this case it was held that a voluntary winding up of a company did not operate as a dismissal of the employees of the company. In my view, this case has no application as in the instant case sec. 445(3) of the Companies Act 1956 applies and the winding up operates as a discharge of all employees of the Bank.

20. These appeals were heard by me on June 17, 1963 and June 18, 1963. Thereafter the Official Liquidator submitted that the matter should be set down for further arguments as some further submissions would be made on his behalf. Further argument was advanced by all the parties on July 3, 1963.

21. At the further hearing Mr. R.C. Kar referred to the case of *British Movietones Ltd. v. London & District Cinemas Ltd.* (7) (1952) A.C. 166. In this case it was held that if, since the making of a contract, circumstances changed, and the parties never agreed to be bound in a totally different situation which unexpectedly emerged, the contract ceases to bind at that point because on its true construction it does not apply to the new situation.

22. In this case the whole question was whether the court can substitute its notion of what is just and reasonable for the contract as it stands, if an unexpected situation has arisen. This point is made clear from a passage in the speech of Viscount Simon at p. 185 of the report: "It is of the utmost importance that the action of a Court when it decides that in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an "uncontemplated turn of events" is enough to enable a court to substitute its notion of what is just and reasonable in the contract as it stands even though there is no "frustrating event" appears to be likely to lead to some misunderstanding. The question discussed and decided in this case has no application to the case under my consideration. In the instant case there is no question as to whether, having regard to the winding up order, fresh terms should be implied in the contract of employment of the employees of the Bank so as to make such contracts "just and reasonable". Nor is there any question of justice demands that the contract of employment should be modified, having regard to the winding up order, so as to make the terms of such contracts just and reasonable for the employees. But the question is whether the terms of the tripartite agreement became part of the terms of employment and whether the employees are entitled and the Liquidator is bound to give them the benefits contemplated by the terms of the tripartite agreement.

23. Mr. R. Chaudhuri appearing for the Liquidator submitted that the word "retrenchment" should be given its ordinary meaning. According to Mr. Chaudhuri, retrenchment means dismissal of surplus employees of a business or undertaking. It implies that the business or undertaking is in existence and is being carried on and that some employees who are considered by the employer to be surplus have been removed from service. Mr. Chaudhuri next referred to the terms of the tripartite agreement and the two letters exchanged between the Bank's Manager and the president of the Union and submitted that the agreement contemplated a phased reduction in the staff of the Bank.. Retrenchment cannot be applied to a case of closure of a business or undertaking and as contemplated by the parties to the agreement, it did not refer to a total closure of the business. Mr. Chaudhuri contended that the background of the agreement was that there was going to be a gradual and phased reduction and not wholesale discharge of the employees by a winding up order. He referred to the term "all stages" in the letter of September 5, 1962 from the Bank's Manager to the president of the Employees' Union. He submitted that this clearly showed that the parties agreed to the terms on the basis that there was going to be a gradual and phased reduction in the staff. He further submitted that the agreement implied that there was to be an option with the Bank either to retrench or to retain the services. But such option was taken away by operation of sec. 445(3) of the Companies Act, 1956. The Bank, according to him, had no option or choice in the matter of discharge of the employees by reason of the winding up order. The discharge of all the employees was not a matter over which the Bank had any control, such discharge took place by reason of the operation of law. In my view, there is a good deal of substance in this contention of Mr. Chaudhuri.

24. The agreement, on the basis of which the appellants are claiming the various sums, quite clearly contemplated a gradual and phased reduction in the staff and also it implied that the Bank had the option of terminating the services of some employees and if such option was exercised, the Bank would give the employees who had been removed from service, the benefits under the agreement. The agreement does not contemplate the discharge of all the employees by reason of a total closure of the business for any reason whatsoever. Discharge of the employees of the Bank under sec. 445 (3) of the Companies Act by reason of the winding up order excludes any possibility of a phased reduction of the staff of the Bank.

25. Retrenchment of employees has been the subject matter of several decisions of the Supreme Court. The first case referred to by Mr. Chaudhuri is *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union*, (8) AIR 1957 S.C. 95. In this case the appellant company could not fully work its mills for short supply of sugarcane and obtained Government's permission to sell its machinery but continued crushing cane under a lease from the purchaser. The workmen gave notice of a strike. To settle the dispute the company offered to pay the workmen 25 per cent, of the profits on condition that the strike notice must be withdrawn

immediately. The workmen did not fulfil this condition and made counter proposals. The strike notice was not withdrawn and the workmen did not cooperate with the management in dismantling and delivery of the machinery to the purchaser. On expiry of the lease and closure of the industry, the services of the workmen were duly terminated. The workmen claimed the share of profits on the basis of the offer made by the Company. This dispute was referred to the Industrial Tribunal which held that the company was bound by the offer it made and awarded Rs. 45,000/- to the workmen as their share of the profits. On appeal this award was upheld by the Labour Appellate Tribunal. On these facts Venkatarama Ayyar, J. held that there can be no doubt that the entire scheme of the Act assumed that there is in existence an industry and then proceeds to provide for steps being taken if dispute arises in the industry. By industry is meant an undertaking which is running and not closed. It was argued on behalf of the workmen that even if there was no concluded agreement by the company to pay the workmen a share of profits, it would have been open to the Tribunal to have awarded compensation for termination of their services, treating it as retrenchment and the award of Rs. 45,000/- as compensation might be sustained on that footing. Referring to this argument it was held at page 103 of the report: "This contention assumes that the termination of the services of workmen, on the closure of business is retrenchment. But retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage and the termination of services of all the workmen as a result of the closure of the business cannot therefore, be properly described as retrenchment."

26. Referring to the views expressed by the Appellate Tribunal in *Employees of Messrs. India Reconstruction Corporation v. Messrs. India Reconstruction Corporation Ltd.* that retrenchment ordinarily means discharge from service of only the surplus part of the labour force and the difference between closure and normal retrenchment is one of degree, it was held at page 104 of the report: "We are unable to agree with these observations. Though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law not for discharge as such but for discharge on retrenchment, and if, as is conceded, retrenchment means in ordinary parlance, discharge of the surplus, it cannot include discharge on closure of business". This decision is an authority for the proposition that retrenchment means that the business is continuing and that a portion of the staff is discharged as surplusage and also for the proposition that termination of services of all workmen owing to closure of business cannot be described as retrenchment.

27. The next case referred to by Mr. Chaudhuri is *The Barsi Light Railway Co. Ltd. v. K.N. Joglakar & Ors.* (9) AIR 1957 S.C. 121. At page 128 of the report reference has been made to the following observations of Venkatarama Ayyar, J. in the *Pipraich Sugar Mills* case, (8) "Therefore, where the business has been closed and it is either admitted or found that the closure is real bonafide, any

dispute arising with reference thereto would, as held in *K.N. Padmanabha Ayyar v. The State of Madras*, fall outside the purview of the Industrial Disputes Act." Referring to these observations S.K. Das, J. said "In view of these observations, it would be against the entire scheme of the Act to give the definition clause relating to retrenchment such a meaning as would include within the definition termination of service of all workmen by the employer when the business itself ceases to exist." Again at page 129 of the report it was held: "We are aware that in some cases Labour Appellate Tribunals award retrenchment compensation on closure of business even when the closure was bonafide or justified. We expressed our dissent from those decisions in the *Pipraich Sugar Mills*" case. When closely examined, none of those decisions show, however, that discharge of workmen on bonafide closure of business was held to fall within the meaning of normal retrenchment". Then again at page 129 of the report it was held: "We consider it unnecessary to examine all the decisions on this point. It is enough to indicate what we consider to be the correct position in the matter. Retrenchment means discharge of surplus workmen in an existing or continuing business: it had acquired no special meaning so as to include discharge of workmen on bonafide closure of business though a number of Labour Appellate Tribunals awarded compensation to workmen on closure of business as an equitable relief for a variety of reasons". Again referring to the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1955-1956 which was passed on August 28, 1956 and which inserted new schedules to the Act, it was held at page 131 of the report: "It is true that these new schedules have not yet come into force and the wording of items mentioned therein shows that the Legislature clearly envisaged a distinction between retrenchment and closure and retrenchment did not include closure of business; item 10 of the Fourth Schedule almost clinches the issue, because it shows how retrenchment of surplus labour may occur in a running industry." Finally at page 132 of the report it was held: "For the reasons given above, we hold, contrary to the view expressed by the Bombay High Court, that retrenchment as defined in sec. 2(00) and as used in sec. 25-F has no wider meaning than the ordinary, accepted connotation of the word: it means the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of workmen have been terminated by the employer on a real and bona fide closure of business as in the case of *Shri Dinesh Mills Ltd.* or where services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the Railway Company."

28. The above decisions of the Supreme Court clearly defined the meaning of retrenchment. But after the decision of the Supreme Court in *Barsi Light Railway Co.*'s case, the Industrial Disputes Act, 1947 was amended by the Industrial Disputes (Amendment) Ordinance, 1957 which was later repealed by the Industrial Disputes (Amendment) Act, 1957. The Ordinance and the amending Act introduced the new section 25FFF in the main Act. By this section, a

workman who has been in continuous service for not less than a year in an undertaking, will be entitled to notice and compensation according to sec. 25-F, if the undertaking is closed down for any reason, subject to the condition laid down in the proviso and in sub-sec. (2) of sec. Industrial Disputes Act has nothing to do with retrenchment compensation as such. This new section 25FFF of the Act.

29. It is to be noted, however, that sec.25FFF of the Act deals with the question of compensation to workmen in case of closure of undertakings. It provides that where an undertaking is closed down for any reason, every workman would get compensation under certain conditions. The compensation, however will be calculated on the basis of sec. 25-F, as if the workman had been retrenched. It will thus be seen that this new section does not deal with the question of retrenchment compensation at all.

30. Another point urged by Mr. Chaudhuri is that retrenchment as defined in sec. 2(100) means the termination by the employer of the services of a workman for any reason whatsoever. Mr. Chaudhuri contended that retrenchment under the Industrial Disputes Act clearly means retrenchment by the employer. In this case the employer is the Bank and it is nobody's case that the Bank terminated the services of the appellants, who continued to be the employees of the Bank up to the date of making of the winding up order. It is common case that services of the employees excepting one were discharged by reason of sec. 445 (3) of the Companies Act. Having regard to the terms of sec. 25FFF of the Industrial Disputes Act, it is not necessary for me to decide for the purpose of these appeals, if the employees were retrenched as contemplated by sec. 2(100) of the Act.

31. Mr. Chaudhuri next referred to sec. 25FFF of the Industrial Disputes Act, 1947 and contended that this section was not creating any new rights in favour of workmen in cases where there has been a closure of business. But this section was really indicating the method on which compensation is to be awarded to workmen in the case of closure. This section according to Mr. Chaudhuri provides that in case of closure of business the compensation is to be awarded according to the provisions of sec.25F. I cannot accept this contention of Mr. Chaudhuri as sec. 25FFF clearly confers some rights upon employees to which they were not entitled before this section was introduced.

32. The proviso to the section, however, lays down that where the closure is due to unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workmen shall not exceed his average pay for three months.

33. Mr. Chaudhuri next conceded that the employees are entitled to the benefits under sec. 25FFF of the Industrial Disputes Act, but subject to sec.2(s) (iv) and the proviso to sec. 25FFF of the Act. He, however, pointed out that the workmen will be entitled to the benefit if they give up their claim on a contractual basis.

34. Mr. Chaudhuri next distinguished the cases of London & Scottish Bank

Exparte Legal, (4) (1870) 9 Eq. 149 and Imperial Wine Company, (1872) 14 Eq. 417 by contending that in both cases the contract of employment provided that if at any time the employee concerned was dismissed or deprived of or removed from his office, certain sums of money would be paid to the employees. He contended that in both the cases payment of compensation was part of the contract and was contemplated by the parties on removal from service. In the instant case according to Mr. Chaudhuri, there was no such contract and the decisions in the two English cases have no application. I accept Mr. Chaudhuri's contentions.

35. Mr. Chaudhuri also referred to Tail's case (10) (1871) 16 Solicitors' Journal 46, in which one of the terms of engagement of an officer was that ₹5000 would be paid to him if the company discontinued to employ him. It was held that as a matter of construction this term of employment meant a discontinuance when it was optional with the company either to continue or to discontinue the employment. The company was wound up and his employment was terminated by the winding up. Lord Cairns held "In my opinion, in order to bring the assets of the Company under a liability on this contract there must be a voluntary, active, intelligent discontinuance by the company of the employment of Mr. Tait as their agent at a time and under circumstances when it is optional with them either to continue or to discontinue it. That in my opinion is what is pointed at by the contract he has entered into, and that in my opinion is not what has been done in this case." It was held that the claim failed as the option which the company had, to continue or to discontinue Tait in the Company's service, ceased to exist on the order for winding up being made. In my view the principle laid down in Tait's case applies to this case. Tait's case has been noted in Buckley's Companies Act, 13th Edition.

36. Assuming therefore, that there was a contract, under which the employees were given the benefits now claimed by the appellants, the claim made by the appellants fail because upon the winding up order being made, the Bank no longer had the option either to retain or retrench the services of the appellants. In this view of the matter the appellants cannot claim the benefits which have been rejected by the Liquidator either on the basis of the tripartite agreement or on the basis of oral contracts of employment of the appellants. But they are entitled to the benefits conferred upon them by sec. 25FFF of the Industrial Disputes Act.

37. Mr. Chaudhuri next referred to the case of Messrs. Mackenzies Ltd. v. The Presiding Officer, Labour Court, Madras (11) AIR 1960 Madras 446. In this case an Engineering firm was taking steps to close its Madras Branch as it was running at a loss. The Tribunal found as a fact that losses were being incurred, so that the closure of business was bona fide. The question was whether retrenchment of eight workers was or was not justified. No new contracts were undertaken with a view to closure but some work was being carried on to complete the contracts which had already been taken on hand. It was held following the Supreme

Court's decision in *Barsi Light Railway Co. Ltd. v. K.N. Joglekar*, (9) to which reference has been made by me earlier in this judgment, that if it was a case of closure, sec. of the Industrial Disputes Act had no application. Aft25-Fer referring to certain passages in that judgment it was held that in order to be a closure of business it should be complete in the sense that there is no work remaining to be done after determination of the employment of the workmen. Mr. Chaudhuri contended that the position is now well established that termination of the services of employees in case of a closure of business is entirely different from retrenchment of some employees under sec. 25-F of the Industrial Disputes Act.

38. Mr. A. Mitter in course of his further arguments referred to the Supreme Court decision in *Brahmachari Research Institute v. Their Workmen*, (12) AIR 1960 S.C. 257. In this case, however, it was held that if by an award or contract a workman is entitled to something more as retrenchment compensation than is provided by sec. 25-F of the Industrial Disputes Act, the workmen will be entitled to such additional benefit and sec. 25-F will not derogate from that right of the workmen i.e., will not reduce the compensation proved under the award to the level provided under sec. 25-F. In my view, this case has no application to the instant case as there is no question in this case of any additional or extra benefit to the workmen under any contract other than what is provided for under sec. 25-F, of the Industrial Disputes Act. Secondly the instant case is not a case of retrenchment but of termination of services by reason of closure of the undertaking as provided in sec. 25FFF of the Act.

39. Mr. R.C. Kar in course of his further argument contended that in the alternative his clients claim under an oral contract of employment. In other words, if the appellants are not entitled to the benefits under the tripartite agreement because they are not retrenched as contemplated by the agreement, they are entitled to the benefits conferred upon employees by the terms of the agreement, under an oral contract of employment. His contention is that the statement of affairs filed under sec. 454 of the Companies Act shows that the appellants have been credited with various sums of money which can be equated to the benefits contemplated and conferred upon the retrenched employees by the tripartite agreement. He argued that independently of the tripartite agreement the appellants are entitled to the same benefits under the oral contracts of employment.

40. In advancing this argument Mr. Kar overlooked the effect of the letters of September 3, 1962 from the president of the Employees' Union and the answer thereto by the Bank's Manager by his letter dated September 5, 1962. If there was any oral agreement under which the identical benefits as contemplated by the tripartite agreement, were conferred upon the employees, the president of the Employees' Union would not have written the letter of September 3, 1962 nor would the Bank have stated in its letter of September 5, 1962 that the benefits under the tripartite agreement would be given to its employees in all stages of retrenchment. It was only because the contract of employment of the

employees did not provide for the benefits given to the employees under the tripartite agreement, that the president of the Employees' Union sought to secure those benefits for the retrenched employees. If the agreement for employment already provided for the same benefits, there would have been no need for the president of the Union to write the letter of September 3, 1962. I am, therefore, unable to accept Mr. Kar's contention. But even assuming that there were oral contracts of employment, on the basis of the principles laid down in Tait's case, any claim against the Liquidator under such contracts will not be admissible.

41. I, therefore, hold that on the termination of the services of the appellants, who were employees on the date the winding up order was made, they are not entitled to the benefits under the terms of the tripartite agreement. But they are entitled to the benefits under sec. 25FFF of the Industrial Disputes Act, 1947 but subject to the conditions contained in that Act and the Companies Act, 1956. In the result, I make the following order:

(a) Upon giving up their claims on the basis of any contract of employment, the employees of the Bank other than Biswanath Das will be entitled to submit their claims for compensation under sec. 25FFF of the Industrial Disputes Act, 1947. Such claims, if any, are to be submitted, within fifteen days from the date of signing of this order.

(b) The Liquidator is directed to entertain such claims and if satisfied, to admit them, subject to the provisions contained in (i) section 530, subsection (2) of the Companies Act, 1956, (ii) in the proviso to section 25FFF and (iii) in section 2, sub-section S(iv) of the Industrial Disputes Act, 1947, such of the claims as are admitted under this clause should be treated as preferential claims u/s 530 of the Companies Act, 1956.

(c) The employees of the Bank other than Biswanath Das are not entitled to any benefits under or on the basis of the agreement dated August 4, 1962 between the Assistant Manager of the Bank and President of the Bank of China Employees' Union or under any other oral contract of employment.

(d) Regarding Staff Provident Fund S.P. Mitra, J. has already made an order, therefore, no fresh order is necessary in this matter.

(e) The delay in preferring this appeal by Mr. Chandan Banerjee's clients is condoned,

(f) Mr. P.K. Das appearing for Biswanath Das contended that the services of his client were not terminated by reason of sec. 445(3) of the Companies Act but he was retrenched before the winding up order was made. The Liquidator is directed to examine the question if Biswanath Das was retrenched before the winding up order was made. Biswanath Das is to file his claim within the time mentioned in clause (a). If the Liquidator comes to the conclusion that the retrenchment of Biswanath Das was prior to the winding up order, the Liquidator is directed to

entertain the claim of Biswanath Das and if satisfied to admit the same on the basis of the terms of the agreement dated August 4, 1962. This claim if admitted should be treated as an ordinary claim. If such claim of Biswanath Das is rejected by the Liquidator, he will be entitled to file fresh claim under clause (a) hereof within seven days of such rejection. If satisfied, the Liquidator will admit such claim as provided in clause (b) hereof.

(g) In awarding compensation under sec. 25FFF of the Industrial Disputes Act, 1947, the Liquidator is directed to treat the winding up of the Bank as a closure on account of unavoidable circumstances beyond the control of the employer, as contemplated by the proviso to sec. 25FFF of the Industrial Disputes Act, 1947.

(h) This judgment will govern and dispose of all the appeals preferred by the employees.

(i) Each party to bear its own costs. The Liquidator will retain the costs of and incidental to these appeals as between attorney and client, out of the assets in his hands. Certified for counsel.