
(2000) 06 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 4527 of 1995

Maharashtra General Kamgar Union

APPELLANT

Vs

Indian Gum Industrial Ltd. and another

RESPONDENT

Date of Decision : 01-06-2000

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 25

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 24(2), 28

Citation : (2000) 4 ALLMR 782 : (2000) 4 BomCR 818 : (2000) 86 FLR 533 : (2000) 4 MhLj 4

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; P.K. Rele and S.K. Talsania, for the Respondent

Judgement

R.J. Kochar, J.—The petitioner Union has challenged the Order dated 9-5-1995 of the Industrial Court, Maharashtra at Bombay on not less than 60 grounds in the present writ petition. The Industrial Court was pleased to dismiss the complaint filed by the petitioner Union u/s 28 read with Items 6 of Schedule II and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short MRTU & PULP Act) alleging that the respondent company had engaged in an unfair labour practice by initially issuing a lock-out notice and finally declaring closure of the undertaking at Mumbai in contravention of section 25-O of the Industrial Disputes Act, 1947. The nub of the petitioner's complaint was violation of section 25-O of the Industrial Disputes Act, that is, the respondent company had not taken permission from the State Government before closing down of its unit at Mumbai as required under the said provision of Chapter V-B of the Act.

2. The undisputed facts/events from the record are as follows :---

It was the allegation of the petitioner Union that in June 1994 the workmen employed by the respondent company at Mumbai joined the petitioner Union as they were not satisfied with the existing service conditions. By a notice of lockout dated 30-8-1994 the respondent company declared suspension of operation of its factory and lock-out after expiry of 14 days from the date of the notice. According to the petitioner Union the impugned lock-out notice was illegal and it amounted an unfair labour practice under items referred hereinabove.

By its letter dated 1-9-1994 the petitioner protested against the illegal and unjustified lock-out declared by the company. It also appears from the record that on 2-9-1994 the respondent company appears to have filed a complaint of unfair labour practice before the Industrial Court and obtained certain interim orders with which I am not concerned in the present litigation. It appears that instead of effecting to lockout the respondent company declared closure with effect from 16-9-1994. The petitioner Union once again protested against the said decision of the company by its letter dated 20-9-1994. It called the action of the company as illegal, mala fide and in contravention of section 25-O of the Industrial Disputes Act. It therefore rushed to the Industrial Court for relief against the respondent company by filing the above mentioned complaint. It further appears that initially an ad interim order was passed which came to be vacated at the stage of interim orders wherein the petitioner Union succeeded in getting a direction against the company to deposit in the Court the earned wages of the workmen and also a restraining order against the company from removing the plant and machinery.

The respondent company filed an affidavit in reply dated 12-5-1995 of its Manager Personnel which was treated to be its written statement and resisted the complaint filed by the petitioner Union denying all the allegations of unfair labour practice levelled by the petitioner Union. It specifically denied the plea of the petitioner Union that Chapter V-B of the Industrial Disputes Act was applicable to the respondent company Mumbai Unit and that section 25-O under the said Chapter was therefore not applicable to them and therefore there was no question of getting permission from the State Government before closing down the Unit. It was the specific case of the company that it had employed far less than 100 workmen at Mumbai and it had never employed 100 or more than 100 workmen in the last preceding 12 months to attract the mandatory provisions of section 25-O of the Act. The respondent company however admitted the fact that it owned two other Units at Jodhpur (Rajasthan) and Ahmedabad (Gujarat) employing at both the places certain number of workmen. It also admitted that at its Head Office at Mumbai about 16 persons in the category of workmen were employed. In its affidavit in reply the respondent company had set out its case in detail before the Industrial Court. It was specifically averred that the total number of employees working in the factory at Mumbai was less than 50 and therefore it was not necessary for the company to have issued notice u/s 25 FFA of the Industrial Disputes Act. The respondent company has given figure of 35 workmen in the factory and about 10 employees

in the Staff category. It was admitted by the company that it had engaged a contractor to do certain work through the contract labour engaged by the said contractor. It was denied that the work done by the contract labour was permanent, perennial and regular nature. It was admitted that there were certain Mathadi workers who were covered under the provisions of Maharashtra Mathadi Hamal and other Manual Workers Regulations of Employment and Welfare Act, 1969. All such Mathadi workers were provided by the Mathadi Board which fully controlled the Mathadi workers. It was therefore specifically denied by the respondent company that the contract labour and the Mathadi workers could be added to the total of its own employees to sum up the figure of 100 workmen to attract the provision of Chapter V-B of the Act. It was further specifically averred by the respondent company in its affidavit that there were 30 employees working in the head office. It was further asserted that not all the 30 employees fell in the category of workmen under the Act. Out of 30 employees seven employees were said to be not falling in the category of workmen but were said to be holding the Managerial or Administrative Posts. Further it was pointed out that the head office staff was required to perform the activities relating to other than manufacturing activities of the three Units owned by the company at Mumbai, Jodhpur and Ahmedabad. It also pointed out that the employees of the head office were not transferable to the factories and that their service conditions were distinct and separate from that of the employees working in the factories. It was also specifically averred by the affiant for the respondent company that all the three units were independently functioning having their own separate and distinct establishments and activities and there was no interdependence amongst them. All the three units were independently, separately and distinctly functioning and none of them was dependent on the other. It was positively stressed that there was no functional integrality between the three Units of the respondent company. It was therefore, clearly asserted that the employees/workmen working in the two other units cannot be included to count the total number of employees/workmen employed by the respondent company so that Chapter V-B of the Industrial Disputes Act could be made applicable to the respondent company. After giving all the details and particulars and denying the various factual and erroneous statements made by the petitioner Union the respondent company prayed for dismissal of the complaint.

3. The learned member of the Industrial Court framed the following issues on the basis of the pleadings and decided the same after recording evidence, oral and documentary adduced by both the parties :

1. Whether the complainant proves that the respondent company has committed an unfair labour practice under Item 6 of Sch. II and Item 10 at Sch. IV of the M.R.T.U. & P.U.L.P. Act, 1971 ?
2. Whether the complainant proves that the lock out effected by the respondent company w.e.f. 31-8-94 is deemed to be illegal under Item 6 of Sch. II of the M.R.T.U. & P.U.L.P. Act, 1971 ?

3. Whether the complainant proves that the closure effected by the respondent company w.e.f 16-11-94 vide notice dt. 16-9-94 is illegal and unfair ?
4. Whether the respondent company proves that the closure effected is legal, proper and in accordance with the provisions of law ?
5. Whether the complainant is entitled to get any relief ?
6. What order ?

He answered the issue Nos. 1, 2 and 3 in negative and issue No. 4 in the affirmative. He held that the petitioner Union was not entitled to get any relief. He has recorded reasons for his aforesaid order extensively. I have also heard both the learned Advocates for their respective parties at length. I have myself gone through the whole proceedings and considered the case law cited before me by the learned advocates.

4. The fate of the petition/complaint hinges wholly on the number of workmen employed by the respondent company. Answer to this question would depend on the other very crucial question and answer to the said question whether the number of employees employed by the respondent company in all the three units is to be totalled up to find out the total employment by the respondent company in its three units in the preceding 12 months. For that purpose I am to find out whether there is any functional integrality and interdependence amongst the three Units of the respondent company. It would be convenient to deal with the question of functional integrality amongst the three units of the respondent company first. It is an admitted position that the respondent company has owned three units/ factories at Mumbai, Jodhpur and Ahmedabad respectively. It is also an admitted fact that the respondent company have its own head office at Mumbai. There is no evidence produced by the petitioner Union to show the total number of employees at the two other Units/factories of the respondent company at Jodhpur and Ahmedabad. The petitioner Union has given the number of employment in its complaint.

1. Mumbai factory 44 workmen

Contract Labour 24

Mathadi Workers 20

Head Office 30

2. Ahmedabad Factory 35 workmen

3. Jodhpur Factory 35 workmen

A sum total of the aforesaid figures comes to 188. The petitioner Union has given a figure of 196 as the total employment of the respondent company. Even ignoring the difference in the figure of employment and even accepting the figures given by the petitioner Union I am not satisfied that the total number of workmen employed by the respondent company at its Mumbai factory would

exceed 100 as required under the Chapter V-B of the Act to attract section 25-O. Even assuming the figure of 44 employees in the factory at Mumbai obviously the figure cannot be stretched to 100, as I am not inclined to include the contract labour and the Mathadi workers. I am further not inclined to include the head office staff. As far as the contract labour is concerned the respondent company is not the direct employer of such contract labour which is employed by an independent entity that is the contractor. The arrangement between the principal employer and the contractor obviously is that the principal employer engaged the contractor to get certain work to be done by such contractor within four corners of the law. The contractor in turn employs his own labourers and gets the work done for remuneration which is paid to them by the contractor, who in turn receives the agreed amount for the completion of the work. Broadly and distinctly the contractor is a separate legal entity and he employs his own labourers and they are not directly or indirectly employed by the principal employer and therefore, they do not become the employees of the principal employer. There is no privity of contract between the principal employer and the contract labourers employed by their contractor, there is no master and servant or employer and employee relationship between them. In these circumstances it cannot be said that the contract labourers are the workmen employed by the respondent company. Where such contract labour is legal, valid and where such contract labour is to be treated as the permanent and regular employees of the principal employer are the distinct and separate issues which will require separate adjudication and they cannot be decided as incidental question in such proceedings. As held by the Supreme Court in the case of *The Workmen of the Food Corporation of India v. M/s. food Corporation of India*, reported in 1985(2) L.L.J. (S.C.)⁴ the contract labourers cannot be held to be the workmen employed by the principal employer. It would be useful to quote paragraph 12 from the said judgment.

"12. Briefly stated, when Corporation engaged a contractor for handling foodgrains at Siliguri Depot, the Corporation had nothing to do with the manner of handling work done by the contractor, the labour force employed by him, payments made by him etc. In such a fact situation, there was no privity of contract of employer and workmen between the Corporation and the workmen. "Workmen" has been defined (omitting the words not necessary) in the Industrial Disputes Act to mean any person (including an apprentice) employed in any industry to do The expression employed has at least two known connotations but as used in the definition, the context would indicate that it is used in the sense of a relationship brought about by express or implied contract of service in which the employee renders service for which he is engaged by the employer and the latter agrees to pay him in cash or kind as agreed between them or statutorily prescribed. It discloses a relationship of command and obedience. The essential condition of a person being a workman within terms of the definition is that he should be employed to do the work in that industry and that there should be, in other words, an employment of his by

the employer and that there should be a relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the term as contained in the Act. *Dharangadhara Chemical works Ltd. v. State of Saurashtra*, 1957(1) L.L.J. 477. Now where a contractor employs a workman to do the work which he contracted with a third person to accomplish on the definition as it stands, the workman of the contractor would not without something more become the workman of that third person. Therefore, when the contract system was in vogue, the workman employed by the contractor were certainly not the workmen of the Corporation and no claim to that effect has been made by the Union."

5. The next group of persons claimed to be included in the total number of workmen employed by the respondent company is that of Mathadi workers. They are 20 in number and they are allotted by the Mathadi Board to the respondent company under the provisions of the Maharashtra Mathadi Hamal and other Manual Workers Regulations of Employment and Welfare Act, 1969 (for short the Mathadi Act). To protect such unorganised class of Mathadi workers the State of Maharashtra has enacted the aforesaid Act in order to ensure that such scattered class of workers are not exploited and are sufficiently protected in the larger interest of the society. The Act has established a Board which is empowered to enroll such persons called Mathadi/Hamal who do the work of loading and unloading etc. Any employer or any establishment needing the work of loading, unloading has to request the Board to supply such labour as required by them on the terms and conditions which are statutorily prescribed. The Board would send its own Bill for the work done by such Mathadi workers and the employer requiring such Mathadi workers would pay the stipulated amount to the Board for the services rendered by such Mathadi workers. Considering all the provisions of the Mathadi Act and the Rules made thereunder it is crystal clear that the Mathadi workers are enrolled as candidates available for Mathadi work and they are supplied by the Board in accordance with the provisions of the Act. It is the Board which supplies the Mathadi labour on its own terms and conditions statutorily determined. It is the Board which pays remuneration to the Mathadi workers for the work done by them with a particular employer or establishment. It is the Board which provides for the welfare scheme such as ESI, PF, Leave, Gratuity etc. It is the Board which alone is empowered to initiate disciplinary proceedings against such Mathadi workers, who misconduct themselves. The employer's duty is only to pay the required sum claimed by the Board. To be precise there is no privity of contract between the Mathadi workers and the principal employer or the establishment. The employer does not issue any appointment order and does not pay any remuneration directly to such workers. In a way he is not directly concerned with them except that they do the work which is required to be done by them for him. In the aforesaid broad circumstances and provisions of the Mathadi Act according to me, the test laid down by the Supreme Court in the case of *Food Corporation of India* (supra)

would also be aptly applicable to the case of the Mathadi workers also. In the case of Contract Labour the Contractor is an agent while in the case of Mathadi workers it is the Board which acts as an Agent. There is no relationship of employer and employee or master and servant between them. I therefore hold that neither the contract labourers nor the Mathadi workers can be included in the list of the workmen employed by the respondent company for the purpose of Chapter V-B of the Industrial Disputes Act. I am further fortified in my view by a judgment of the learned Single Judge of this Court (B.U. Wahane, J.) in the case of M/s. Jayram Karsan Tank v. Deputy Regional Director, reported in 1992 L.I.C. 2404. The question before the learned Single Judge was whether the Mathadi workers were entitled to get the cover of the E.S.I. Act and whether employer was liable to pay E.S.I. contribution in respect of such Mathadi workers ? The learned Judge has observed as under :

"Where the employee was deputed by the Mathadi Board to work with the employer and he was neither on the muster roll of the said employer nor any fixed hours were prescribed for his work and during the working period he was doing work in other factories also, the employer was not liable to pay E.S.I. contribution in respect of such employee. Such employees who are engaged in building of raw timber are not permanently attached to any factory or establishment and their working hours are not fixed like the factory workers because they are called upon to perform their duty as and when there is a work, otherwise they do not go to factory or establishment days together. Their wages are also not paid by any one employer like factory workers, because they go round the factories and establishments, and collect wages to the extent they had done the work on piece rated basis. Their employers change every week. Thus, the nature of their work is such that they are neither employed nor work incidentally in the manufacturers process of the factory. Besides, the intermittent and irregular payment of wages involved in respect of these workers, makes the deduction of contribution, if any, practically impossible. Also, the E.S.I. scheme can be made applicable to those workers who are regular and borne on the muster roll of the establishment."

In view of the aforesaid legal position the claim of the petitioner Union to include the contract labour and the Mathadi workers as the workmen employed by the respondent company cannot be accepted for the purposes of Chapter VB of the Industrial Disputes Act.

6. The third group of the employees prayed to be included in the category of the workmen employed by the respondent company for the purposes of Chapter VB is the Head Office staff numbering 30. Shri Ganguli, the learned advocate for the petitioner Union has given the figure of the head office workmen as 30, while Shri Rele, the learned Counsel for the respondent company has disputed the same. According to him the number is 23 as seven were holding the posts of Managers. The Head Office of the respondent company is also a separate and distinct establishment set up for managing and administering the three factories

of the respondent company. It is also the case of the respondent company that in addition to the administration of the three factories the Head Office is also looking after certain other activities unrelated to the factories. There is no evidence on record brought by the Union to specify the number of the head office workmen related to respective individual units. The entire office is functioning for all the three units. There is no dispute that the head office is common, the accounts might be pooled together and further there is no dispute that there is common management and common ownership of the three units. The Head Office cannot be said to entirely depend on any one unit and in the case of closure of one unit the head office will not stop functioning though its work would be reduced to that extent. According to me, the number of workmen employed in the head office also cannot be included in the list of the workmen employed by the respondent company for the work of the Mumbai factory for want of specific bifurcation of the number attached to the Mumbai Unit. Even assuming that all of them can be included the total number would not become 100 to attract the provisions of Chapter V-B of the Act.

7. I may further mention here that equally important ingredient to apply the provisions of Chapter V-B is totally missing in the present case. There is no evidence on record to prove that the said workmen were employed on an average per working day for the preceding 12 months. Both the parties have proceeded without any pleading on that point and therefore I leave this point at that end only. For the purpose of Chapter V-B and section 25K it is for the petitioner Union or the workmen who claim the protection under this Chapter to prove the two crucial factors (1) employment of not less than 100 workmen and (2) such employment should be on an average per working day for the preceding 12 months. It was for the Union to have pleaded and proved this fact and according to me, the whole burden to prove both these foundational facts was on the petitioner Union. The respondent company could not be expected to prove the negative. It is not possible to accept the submissions of Shri Ganguli for the Union that it was for the respondent company to have discharged its burden as the whole record was with them. It is elementary that it is for the party to prove a fact positively pleaded and asserted by it. In the present case the petitioner Union has pleaded and asserted that the respondent company had employed not less than 100 workmen on an average per working day for the preceding 12 months and it was for the Union to have discharged its obligation. Shri Rele has cited a judgment of our Division Bench on the very same point between Arvind Anand Gaikwad v. Uni Abex Alloy Products Ltd. & others, reported in 1988(1) C.L.R.

26. The Division Bench has observed as under :

"The question as to whether the special provisions of Chapter V-B of the Act are applicable in respect of retrenchment would depend upon the question whether the company had engaged more than 300 workers in the preceding twelve months. The company claimed that at no stage in the preceding twelve months,

the company employed more than 280 workmen and in support of the claim, Mr. Gopalkirshnan, who is working as Senior Officer, from the year 1976 was examined. Mr. Gopalkrishnan deposed on oath that about 280 to 290 workmen are employed in the company at a time. The statement of Mr. Gopalkrishnan was not even challenged in the crossexamination. The appellant deposed that the company had engaged more than 300 workmen and except the oral word of the appellant, there was no material before the Labour Court to sustain the assertion. The Labour Court, on appreciation of evidence, came to the conclusion that the appellant has failed to establish that the company had engaged 300 or more workmen in the preceding twelve months. Mr. Ganguli disputes the finding but it is not possible to accede to the submission of the learned Counsel for more than one reason. In the first instance, the finding recorded by the Labour Court is a pure finding of fact on appreciation of evidence and it is not permissible to disturb the same in exercise of writ jurisdiction. Secondly, we have perused the statements made by the appellant and Gopalkrishnan, and we fail to understand how it is possible to discard the statement of Gopalkrishnan. The Labour Court very_ rightly pointed out that the burden of establishing the fact that the company employed more than 300 workmen was on the appellant and the appellant has failed to discharge that burden, Mr. Ganguli submitted by reference to the decision of Single Judge of this Court in the case of Varsha Vishwanath Kolambkar v. Ravindra Hindustan Platinum Pvt. Ltd. and others, reported in 1987(1) CLR 3 that the learned Judge had made passing observation to the effect that it is for the employer to satisfy the Industrial Court that at the relevant time more than the relevant number of workmen were not engaged. We do not read the observation of the learned Judge as concluding that the burden in such cases is on the employer. Indeed, it is not possible to conclude that the burden is on the employer because the issue was raised by the employees and when the employer disputed that fact, then the burden to establish the negative fact cannot be lead at the doorstep of the employer. Mr. Ganguli urged with reference to the decision of the Supreme Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, that the facts and material is to how many workers were engaged was within the custody of the employer, and therefore, the burden should have been cast on the shoulder of the company. We are unable to accede to the submission because the company examined Mr. Gopalkrishnan before the Labour Court and it was open for the appellant to call upon the company to produce the relevant documents to substantiate the claim. The appellant not only did not seek the documents and the record, but did not even bother to cross mine Gopalkrishnan on this aspect. It is futile in these circumstances to claim that the oral word of the appellant should be accepted as a gospel truth. The appellant, according to his own claim, was active member in the union and was fully conscious of the record maintained by the company and nothing prohibited him from demanding production of the record before the Labour Court. In our Judgement, the finding recorded by the Labour Court on this aspect is in consonance with the evidence produced and should not be disturbed in writ jurisdiction."

(Emphasis is given by me)

It is therefore crystal clear that to enforce a right under Chapter V-B of the Industrial Disputes Act, the initial burden to prove the foundational facts lies on the Union or the workmen challenging the action of the employer as violative of any of the provisions under the said chapter V-B of the Act. Merely saying that the entire record is with the employer does not satisfy the elementary principles of pleadings. A suitable application can always be made to the Court for a direction to the employer to produce such record and to take inspection of such documents to prove the fact. It is the primary duty of the union to bring on record the relevant facts and material to succeed on the law point.

8. The last desperate effort of the Union was to build up the figure of the required 100 employees was to rope in the other two factories of the respondent company. The Union has pleaded and claimed functional integrality amongst the three units admittedly owned and managed by the respondent company. What would amount to functional integrality is no more *res Integra* as the Supreme Court as well as the High Courts have laid down and prescribed various tests in that respect. The most crucial and pertinent question would be whether the other one would survive if one of the two is closed ? If there are two or three units commonly owned by one employer and if one of such units or undertakings is closed as a result of which if the others do not survive or are adversely or gravely effected in that case it can be safely said that all the units are not independent but are mutually interdependent and one cannot survive without other. On the point of functional integrality of the undertakings/units the Supreme Court has concluded the issue after considering its earlier judgments and considering various tests such as unity of ownership, supervision and control etc. in paragraphs 7, 8, 9 and 10 in the case of *Isha Steel Treatment, Bombay Vs. Association of Engineering Workers, Bombay and Another*, . I reproduce paragraphs 7, 8, 9 and 10 as under :

7. In the above decision this Court has held that the unity of ownership, supervision and control that existed in respect of the two mills involved in that case and the fact that the conditions of the service of the workmen of the two mills were substantially identical were not by themselves sufficient in the eye of law to hold that there was functional integrality between the two mills. It held that it was a clear case of closure of an independent unit and not of a part of an establishment. The decision of the learned Single Judge of the High Court that the fact that the two units were situate at a distance of 200 metres, the fact that both the units were controlled by the same employer and that the business of heat treatment processing carried on in the two units was identical had left no room for doubt that the two units were really integral cannot be sustained. The decision in *S.G. Chemicals and Dyes Trading Employees' Union Vs. S.G. Chemicals and Dyes Trading Limited and Another*, is not of much assistance to the workmen. The management in that case was running its business in pharmaceuticals at three places. The pharmaceutical Division was at Worli, the

Laboratory and Dyes Division was at Trombay and the Marketing and Sales Division was at Churchgate. In 1984 the company which was managing the said three divisions of business was sold out. As the buyers proposed to handle the future sales of the company through their own distribution channels, they found that the services of the staff working at the Churchgate office were not longer required. Therefore, the management closed down the office at Churchgate. The question was whether there was functional integrality between the office at the Churchgate and the factory at Trombay. This Court on a consideration of the material before it in that case, held that the functions of the Churchgate division and the Trombay factory were neither separate nor independent but were so integrally connected as to constitute the Churchgate and the Trombay factory into one establishment, because the Churchgate division used to purchase the raw material required by the Trombay factory for producing or processing the goods, it used to market and sell the goods so manufactured or processed by that factory and it also used to disburse the salary and other employment benefits and maintain accounts, etc., of the workmen. These were considered to be integral parts of the manufacturing activities of the factory at Trombay, because the factory could never have functioned independently without the Churchgate division being there. It is not the case of the workmen in the present case that the II Unit could not continue to function after the closure of the I Unit. As already mentioned, the II Unit is continuing to function as usual even now notwithstanding the stoppage of the activities at the I unit. The question of application of section 25G of the Act arises only when the services of the workmen are retrenched. In *Santosh Gupta Vs. State Bank of Patiala*, it is laid down that if the termination of service of a workman in a given case falls either u/s 25FF or u/s 25FFF of the Act it would not be a termination falling u/s 25F of the Act. This Court has observed in that case that after the enactment of section 25FF and section 25FFF retrenchment included every kind of termination of service except those not expressly included in section 25F or not expressly provided for by other provisions of the Act such as section 25FF and 25FFF. Hence if the case is one of genuine closure then the question of applying section 25G of the Act which is applicable to a case of retrenchment would not arise.

8. It is not necessary that in order to effect closure of business the management should close down all the branches of its business. In *Management of Hindustan Steel Ltd. Vs. The Workmen and Others*, this Court has held that the word "undertaking" used in section 25FFF seems to have been used in its ordinary sense connoting thereby any work, enterprise, project or business undertaking. It is not intended to cover the entire industry or business of the employer. Even the closure or stoppage of a part of the business or activities of the employer would seem in law to be covered by the said provision. In deciding the above case this Court relied upon its earlier decision in *Workmen of the Indian Leaf Tobacco Development Co., Ltd., Guntur Vs. The Management of Indian Leaf Tobacco Development Co. Ltd., Guntur*, . In that case the Court observed that a genuine closure of depots or branches, even though it did not amount to closure

of the business could not be interfered with by an Industrial Tribunal. It further held that the closure was stoppage of part of the activity or business of the management and such stoppage is an act of management which is entirely in the discretion of the management. The Court further observed that no Industrial Tribunal could interfere with the discretion exercised in such a matter.

9. It was, however, argued in this case on behalf of the workmen that since the Provident Fund accounts of the employees and the Employees' State Insurance accounts of the two units had common numbers with the authorities concerned and settlements containing similar terms (copies which are not produced before us) had been entered into in 1974 between the management and the workmen of the two units, it should be held that the two units had functional integrality between them. We are of the view that even these factors are not sufficient to hold that the two units were one and the same notwithstanding the fact that the nature of the business carried on in them was the same. In *Indian Cable Co. Ltd. v. Its Workmen*, 1962(1) L.L.J. 409 this Court has held that the fact that the balance sheet was prepared incorporating the trading results of all the branches or that the employees of the various branches were treated alike for the purpose of provident fund, gratuity, bonus and for conditions of service in general could not lead to the conclusion that all the branches should be treated as one unit for purposes of section 25G of the Act.

10. On a consideration of the entire material before it, the Tribunal had reached the conclusion that the closure of the I Unit was bona fide, that it did not have any functional integrality with the II Unit and that there was no victimisation of workmen for their trade union activities. On going through the award passed by the Tribunal we feel that it had not committed any error in recording the said findings which called for interference at the hands of the High Court under Article 226 of the Constitution. We are satisfied that this case is one of bona fide closure of an independent unit of business. The learned Single Judge and the Division Bench of the High Court were, therefore, in error in holding that the termination of service of the workmen in this case amounted to retrenchment and not closure and the case of the workmen had to be considered on remand by the Tribunal in the light of section 25G of the Act. They overlooked that it would result in a wholly unjust situation in which a corresponding number of workmen in the II Unit would be prejudicially affected even though they had nothing to do with the I Unit.

9. The question of functional integrality of six undertakings of one company arose before a Division Bench of this Court in the case of *Yeshwant G. Chikhalkar & others v. Killick Nixon Ltd. & others*, reported in 1999(2) C.L.R. 390. In that case one of the unit was closed and six other divisions which were independent, and therefore, there was no inter-dependence amongst them. The Division Bench took cognisance of the definition of the Industrial Establishment or undertaking and held that "each division or an undertaking having severable activities will have to be treated as distinct and separate unless there was mutual inter-

dependence, that one unit could not survive in the absence of the other." In our case also the respondent company is having three severable independent distinct establishments and all the three are carrying on severable activities as contemplated by the definition of the Industrial Establishment given under the Industrial Disputes Act. What is further pertinent to note in our case is that in spite of the closure of the Mumbai factory the other undertakings or factories or units of the respondent company at Jodhpur and Ahmedabad are still continuing and they were not closed or they were not adversely affected by the closure of the Mumbai factory. This factual position is fairly conceded by Shri Ganguli, the learned Advocate for the petitioner Union. In these circumstances the conclusion is inevitable and inescapable that there was absolutely no functional integrality amongst the three units owned by the respondent company. There is no mutual inter-dependence. All the three units are separate, distinct and severable. The other two still survive in spite of the closure of the Mumbai unit. It is therefore not possible for me to accept the petitioner Union's contention that the workmen employed in those two units should be included in the strength of the workmen employed by the respondent company to count the total number of workman employed by it for the purpose of the Chapter V-B. The number of employees employed by the two other units cannot be included to count the whole strength to satisfy the requirement of section 25K of Chapter V-B of the Act. Shri Rele for the respondent company has also relied on a judgment of the learned Single Judge of this Court (B.N. Srikrishna, J.) in the case of Saurashtra Trust Karmachari Sangh v. States People (P) Ltd.. & others, reported in 1995(2) C.L.R. 781, following the judgment of the Supreme Court in the case of Isha Steel Treatment, Bombay v. Association of Engineering Workers, Bombay & others (supra), the learned Judge in paragraphs 8 and 9 of the judgment has observed as under :

8. In Isha Steel Treatment, Bombay v. Association of Engineering Workers Bombay & others, 1987(1) C.L.R. 232 the employer established one factory for the purpose of carrying of metal processes with 32 workmen and, after about 12 years, the employer established another factory for carrying on the same kind of business employing about 75 workmen at a distance of about 200 yards from the first factory. The employer was maintaining separate stores, accounts and obtaining separate factory and municipal licenses. The employer maintained separate muster rolls in respect of workmen of each of the two factories. There was also no provision for inter transferability of the workmen. The first factory was closed by the employer on account of indiscipline on the part of workmen and lack of production, the services of workmen were terminated and the workmen employed therein were paid off closure compensation. The Union of the workmen raised an industrial dispute demanding reinstatement and the other benefits and the said dispute was referred for adjudication to the Industrial Tribunal. The Industrial Tribunal found that the two factories were independent of each other and that the closure of the first factory had become legally effective. It, therefore, rejected the demand of the workmen. The Award of the Tribunal

was successfully challenged before the High Court which set aside the Award of the Tribunal and remanded the matter for fresh disposal to the Tribunal after finding that the two factories were functionally integrated and consequently section 25G of the Industrial Disputes Act was applicable. In appeal, the Supreme Court again emphasised the functional integrality and functional inter-dependence test and came to the conclusion that the two factories were separate entities. Though the Provident Fund Accounts of the employees and the Employees State Insurance Account of the two factories had common numbers with the authorities concerned and the settlements containing similar terms had been entered into between the management and the workmen of the two factories, it was held that these factors were not sufficient to hold that the two factories were one and the same, even though the nature of business carried on by both was identical. The Supreme Court was of the view that unity of ownership, supervision and control that existed in respect of the two Mills involved and identity of conditions of service of the workmen of the two Mills were not by themselves sufficient to hold that there was functional integrality between the two Mills.

9. Finally, we come to the latest judgment of the Supreme Court in Hindustan Steel Works Constructions Ltd. etc. etc. v. Hindustan Steel Works Construction Ltd. Employees Union, Hyderabad & another etc. e(c.), 1995(1) C.L.R. 598. In this case a Government Company engaged in construction of industrial and engineering plants both within the country and abroad was contending that its Hyderabad Unit and Vizag Unit were different entities for the purpose of application of section 25-O of the Industrial Disputes Act. Even in this case the Supreme Court emphasised the functional integrality and functional interdependence test and took the view that there was no functional integrality and functional inter-dependence between the two establishments. Interestingly, in this case, even though the management has reserved to itself the liberty of transferring the employees from one unit to another, that fact was held insufficient to hold that all units of the company constituted one single establishment. This is one more instance of the Supreme Court holding that mere unity of ownership, management and control are not as significant as the test of functional integrality and interdependence. Having regard to the facts and circumstances of the case and the material on record, the Supreme Court held that the conclusion is inevitable that the units at Hyderabad and Vizag were distinct establishments and that the workmen of the one unit had no right to demand absorption in other units on completion of job and, as the company was groaning under the weight of surplus and excessive manpower, the Industrial Tribunal was entitled to mould the relief to suit the justice of the case."

10. Having considered the facts extensively and having elaborately set out the law it is not possible for me to accept the submissions of Shri Ganguli on the point of functional integrality of the three units and the head office and also on the point of counting to include the contract labour, Mathadi workers and the head office staff to satisfy the mandatory test under section, 25K in Chapter V-B

of the Act. It was therefore not required or obligatory for the respondent company to have sought permission from the State Government before closing down its Mumbai factory as required u/s 25-O of the Act. According to me, therefore the Industrial Court has rightly concluded that there was no unfair labour practice engaged in by the respondent company within the meaning of Item 9 of Schedule IV of the Act. It is needless to mention for me here that the underlying proposition is that the failure to comply with the provision of section 25-O of the Industrial Disputes Act would attract Item 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act, as per the ratio laid down by the Supreme Court in the case of *S.G. Chemicals and Dyes Trading Employees' Union v. S.G. Chemicals and Dyes Trading Ltd. & another*, 1986(1) C.L.R. 360.

11. The next passing submission of Shri Ganguli was that initially the company had given a notice of lockout and subsequently it converted it into a closure. It was a mala fide act on the part of the respondent company. According to Shri Ganguli the closure was continuation of an illegal lock out. The closure was in the guise of a continuing lockout. To attract the Item 6 of Schedule II of M.R.T.U. & P.U.L.P. Act a lock out will have to be illegal. In our case the respondent company had given 14 days notice before lockout in accordance with section 24(2) of the M.R.T.U. & P.U.L.P. Act. There was no declaration that the said lock out was illegal and that it was not withdrawn after such declaration to become the lockout to be deemed to be illegal. It is therefore not possible to accept the submission of Shri Ganguli that the lock-out was illegal or deemed to be illegal to attract Item 6 of Schedule II of the Act. It is also not possible to accept the submission of Shri Ganguli that the closure was in the guise of lockout and that it was mala fide and not in good faith. Having accepted the factual closure I need not and I cannot go into the question of mala fides or otherwise of the closure. It is an admitted position that the factory is still closed. It is no where even whispered that respondent employer intended to re-start the same. According to me the Industrial Court has rightly observed that the closure is final, permanent and irrevocable. It is therefore not possible to accept the arguments on behalf of the petitioner Union that the closure was mala fide and not in good faith and that it was in the guise of a continuing lockout. The respondent company has closed down its Mumbai factory permanently and there does not appear any intention to re-start the same. The respondent company has not engaged in any unfair labour practice as complained by the petitioner Union. There is no illegality or infirmity in the order of the Industrial Court to warrant any interference by this Court in its extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India. In the circumstances the petition fails and the same is dismissed. Rule is discharged. No order as to costs.

11 A. Issuance of certified copy of this judgment and order is expedited.

12. Petition dismissed.