

(1996) 07 BOM CK 0054

In the Bombay High Court

Case No : O.O.C.J. Writ Petition No. 878 of 1996

Maharashtra General Kamgar Union

APPELLANT

Vs

Vazir Glass Works Ltd. and Others

RESPONDENT

Date of Decision : 18-07-1996

Acts Referred:

Industrial Disputes Act, 1947 — Section 15, 23, 25(N), 25(O), 25(O)(5)

Citation : (1997) 75 FLR 180 : (1998) 3 LLJ 231

Hon'ble Judges : V.P. Tipnis, J;F.I. Rebello, J

Bench : Division Bench

Judgement

Rebello, J.—This petition filed under Article 226 of the Constitution of India was argued for a considerable length of time at the stage of admission. After going through the records and seeing the nature of the matter, on a query from the court to the counsel for the parties, whether the matter could be disposed of finally, the learned counsel agreed and hence this petition is being disposed of finally at the stage of admission itself.

Rule. Shri Nerlekar waives notice on behalf of respondent No. 1 company and Mr. Dixit on behalf of respondent No. 2. By consent of parties Rule heard forthwith.

2. The petitioner is a union representing the employees of the 1st respondent Company. The petitioners have filed this petition challenging the award dated 20.4.1995 in IT No. 25 of 1994 passed by the Industrial Tribunal Maharashtra, Mumbai on a reference made by the State Government u/s 25(O)(5) of Industrial Disputes Act, 1947. The respondent No. 2 State of Maharashtra had made the said reference on the application dated 23.2.1993 by the Company for review of the Government's order dated 12.10.1992 on the Company's application dated 14.9.1992. Government had refused permission to the respondent company to close down its industrial establishment at Andheri, Bombay.

The respondent company was incorporated in the year 1947 and it manufactures glassware for the pharmaceutical industry at its factory located at Andheri,

situated on an 11 acre plot of land. Wheaton Industries USA are its technical collaborators and have a 20% equity holding in the company as per the affidavit in reply filed by the company by application dated 14.8.1992 had moved the Secretary to the Government of Maharashtra who was the competent authority to allow its application to close down the factory for the reasons set out in the annexure to the application for closure. Apart from the factory at Andheri, the respondent company has no other business.

4. The Petitioner has averred in the petition that before the said application for closure was moved by the company, the petitioner union was in correspondence with the respondent company. By letters dated 3.12.1991 and 22.1.1992 the president of the petitioner union informed the respondent company that of the three furnaces, only one furnace was running and two others had been closed since September 1991. It was further pointed out that it appeared that the company did not want to repair the furnaces and if the only remaining furnace went out of order, the whole factory would stop functioning. The petitioner union in the correspondence pointed out that this was brought to the attention of the company earlier, however, the respondent company or its management was not paying any heed to the complaints but instead was diverting their funds to another unit in Gujarat set up by the respondent company. It was further pointed out that the new factory in Kosamba in Gujarat was earning huge profits and it seemed that it was the intention of the management to close down the factory of the respondent company at Andheri, Bombay and that too inspite of the co-operation given by the union to the management in reducing the strength of the employees at Andheri, Bombay factory. By letter dated 27.1.1992 the Personnel Manager of the respondent company wrote to the president of the petitioner union wherein he pointed out that the factory at Kosamba has no connection with the working of the factory at Andheri and that the respondent company had endeavoured to run the against all odds and that respondent company had paid handsome amount by way of voluntary retirement scheme (VRS), that the union had recognised this by allowing to reduce the number of employees. In the letter the Personnel Manager informed the union that there need not be any apprehension or fear regarding the condition of the furnace, which was being well maintained from time to time and was at that time in good running condition.

Thereafter the company i.e. respondent herein by its notice dated 30th January 1992 informed the workmen at large that the management wants to clarify that it had no intention to stop its manufacturing activities and the company would conduct its business as usual whether the third scheme of voluntary retirement scheme prepared by the company was successful or not. The company further pointed out that it was not contemplating any closure and nor did it intend to create fear or psychosis in the minds of the workmen. Apprehending closure the petitioner filed a complaint no. (ULP) 220 of 1992 of 3.1.1992 and also sought a direction to the Company to repair two furnaces which were out of order. The respondent No. 1 filed its reply Exh. C-13 before the Industrial Court, denying that it had any intention to discontinue production of the Andheri factory. The

company further averred that the operative furnace is very well maintained and was sufficient to keep the entire existing complement of workmen working. The reply was filed on 28.2.1992.

8. The petitioner states that inspite of all these assurances the respondent company moved an application dated 14.8.1992 addressed to the Secretary to the Government of Maharashtra seeking permission to close down the factory. The respondent company submitted the relevant information and reasons as to why it was not possible to operate the company economically and that there was no other alternative, but to close down the factory. In schedule VII to the said application the financial position of the company has been set out, item (f) thereof states that the company's share capital and reserves and surplus as per the audited reserves and surplus as per the audited balance sheet as on 31.3.1992 stood at Rs. 554 lacs which would be completely wiped out at the end of the current financial year i.e. 31.3.1993, if the company continues its operations. It was further set out that the liability had been incurred on account of the amount of Rs. 400 lacs having been paid on account of three voluntary retirement schemes and recurring loss of Rs. 180 lacs in the year as explained in item (d) of the schedule VII. It was further pointed out that the company's plant and machinery had become technologically obsolete as the original plant and related infrastructure has been built 25 years back, based on the then technology available. The said plant and machinery which are in depleted condition and its inventories comprising of glass moulds, spares etc. are such that it will be difficult to dispose them in short time, there will be complete financial chaos and the company will not be able to pay any of its current expenses including the worker's wages and in order to save the company from this dangerous situation there is no other alternative but to close down the company's operation at the earliest. It was further stated that the present furnace has outlived its life, though at present it functions normally and it would cost at least Rs. 2 crores to replace and that the company had no funds to replace the machinery and rebuild the furnaces.

6. In schedule XI annual sales figure of the last 3 years were set out which are as follows :

This was explained in schedule VII that even though the turnover of the company in 1988-89 was Rs. 18.29 crores, the same had been reduced to Rs. 14.81 crores inspite of 40% increase in price of the product. In schedule VIII the company gave reasons for the proposed closure. Some of the reasons highlighted were that the company was facing severe competition from other companies who were manufacturing the same product at a much lesser cost, as the factories of the said companies were situated in backward area and they have all got concessions and subsidies from the Government of Gujarat. The competitors were in an advantageous position because of availability of natural gas at a cheaper rate and availability of labour at a substantially lesser wage. The company's manufacturing activities had become uneconomical on account of high cost of

labour, comparatively higher expenses to the extent of 140% on account of fuel and power as compared to its competitors, high administrative expenses, increased transport and other expenses, which had resulted in high cost of production. It was pointed out that the competitors are in a position to supply some products at competitive rate with considerable profit margin and have bigger production capacity. It was specifically set out that the competitors have a cost advantage of about 35% of manufacturing cost as compared with the respondent company. It was pointed out that if the manufacturing process was continued the entire resources and surplus of Rs. 5 crores accumulated over a period of 27 years would be completely wiped out in a period of some months. In schedule XVIII the respondent company has given the cost as of percentage of production. The figures as disclosed show the cost as percentage of production as under :-

7. The Secretary Industries, thereafter issued notice to the petitioner union. Pursuant to the said notice the petitioner union filed its reply. The record also shows that various other replies and/or clarifications were sought for and given by the company as also the union. On consideration of all the material the Secretary Industries, by his order dated 12.10.1992 was pleased to refuse permission to the company to close its establishment. While rejecting the application for closure the Secretary Industries, in para 8 of the order held that the company had not taken any steps to make an offer to atleast some of the very skilled balance workmen to take up some assignment in the new unit, nor any steps for the purpose of rehabilitation of some of the workmen. In the same paragraph it was also observed that the company could have sat down with the union and the remaining workmen and explored the possibility of further improving the production efficiency at Andheri Factory by conducting detailed studies, which, the company had not done. The Secretary also held that the company had not exhausted all opportunities in this regard. The Secretary further held that after the sister unit was established in Gujarat orders to Vazir Glass had been coming down and therefore though the company had not said so it was apparent that the intention of the company was to close down the Andheri factory and this conclusion could be supported by the action of the company in closing down two furnaces and non replacement of the existing furnaces and non replacement of the existing furnace. The contention of the company that the announcement of VRS scheme of 30.1.1992 wherein they had set out that they had no intention to close the company was in order not to create a panic among the workers, was not justified, for if the entire issue was considered it was apparent that the company had more or less taken a decision to close down the unit much earlier. The Secretary therefore hold that at that juncture the management had not exhausted all possible options in regard to the future of the workmen and as such permission to close the factory was refused. This order was communicated to the respondent company.

8. On 3.11.1992 the Company closed down its 3rd furnace which was the only furnace and consequently all production come to halt in the factory. According to

the company they acted on an inspection report dated 2nd November 1992 given by one Mr. K.H. Parikh, Glass Technologist who in his report stated that he had inspected the A-tank furnace and had found that the normal metal line thickness of 12 inches had been badly corroded, leaving a skeleton thickness to the tune of 1" to 2", that the state of the furnace was such that the glass could leak through the metal line any moment, resulting into major accidents due to the leakage of molten glass causing fire or loss of life. The area near the furnace had become more hazardous because of the gas pipeline going near the furnace. Shri Parikh in his report has also reported that the dog house had completely gone and the "batch" was being charged by making temporary arrangements with refractory blocks. Shri Parikh in his report further mentioned that any leakage of glass from the dog house will be disastrous involving the risk of fire and loss of life. The report also showed that the throat of the furnace had practically disappeared. The Backwall had also completely gone. Port Arch Blocks had fallen down creating a situation that the crown would start falling part by part or as a whole. Shri Parikh therefore opined that no risk can be taken by operating the furnace any longer and as such the same should be closed down immediately. The factory thus came to be closed from 3.11.1992.

9. On the reference being made as set out in paragraph 2 the petitioner union challenged the same by filing a writ petition bearing no. 1446 of 1994. It was the contention of the petitioner union in the said writ petition that the Government acted without jurisdiction in making the reference as the application for closure was rejected on 12.10.1992 and that no reference could have been made after the expiry of one year from the said date i.e. after 12.10.1993. The said writ petition came to be dismissed by order dated 22.6.1994. A Letters Patent Appeal was preferred by the Union being Letters Patent Appeal No. 460 of 1994. A division bench of this court by its order dated 9.8.1994 set aside the order of the learned Single Judge. The division bench held that an application for reference, if made within the said period of the one year, had to be disposed of before the expiry of one year from the date of the order as the life of the order as the life of the order was for a period of one year. The company aggrieved by the said judgment preferred a SLP before the Apex Court being Civil Appeal No. 267 of 1996. The said Civil Appeal was disposed of on 4.1.1996. It may be relevant to point out that during the pendency of the Civil Appeal the Apex Court by interim order dated 17.10.1994 permitted proceedings before the Tribunal to be continued. By order dated 7.4.1995 the Apex Court directed that as it was informed that the hearing before the tribunal had concluded the Tribunal not to pronounce the award and keep it in a sealed cover and forward the same to the Apex Court. The award was made on 20.4.1995 during the pendency of the Civil Appeal before the Apex Court. While disposing of the Civil Appeal on 4.1.1996 the Apex Court gave certain directions to the effect that the application for review which was pending after the expiry of the said time frame of one year be treated fresh application for permission for closure deemed to have been made on March 9, 1994 and to treat the order of reference to Industrial Tribunal by the

State Government as order of reference on such fresh application so that the entire exercise made before the Tribunal by both parties and the award made by the tribunal are not rendered redundant .

It may be mentioned that on behalf of the company, before the Industrial Tribunal, Shri Merchant has been examined as their only witness and on behalf of the union Shri Vora and another witness were examined. Certain documents were also produced through some witnesses by the Union. The matter was argued at length. Apart from oral arguments both respondent company and also the petitioner union filed their respective written arguments including replies to each others arguments. The said written arguments of the company is dated 9.3.1995, of the Union is dated 16.3.1995 replies of the company and of the union dated 28.3.1995 are on record. The evidence was recorded between the period. The tribunal thereafter made the award on 20.4.1995.

The Tribunal in its award had upheld the contention of respondent company that the factory in Gujarat and the one at Andheri, Bombay were two different and distinct companies. The Tribunal further held that the company had established that it was not economically viable to run the factory at Andheri as the costs of production vis-a-vis its competitors was very high and if the company continued its operation or production it would have to incur heavy losses. The Tribunal also further noted that in fact the company had closed its operation from 3.11.1992. The petitioner union aggrieved by the said award has impugned the same by the present petition.

10. Before setting out the submission of the respondent company certain facts as on record before the Tribunal, the petition and the affidavit in reply which are relevant for disposal of this petition, need to be set out.

11. Financial position and production : In so far as the financial position of the company is concerned it is on record that the company is concerned it is on record that the company had made profits upto the financial year 1990-91. For the financial years 1988-89, 1989-90, and 1990-91, the company has paid dividend at the rate of 20% on its equity holding to the share holders. The reserves and surplus of the company for the financial year 1990-91 were 5.17 crores. The company for the first time showed a loss in 1991-92 which included as amount of Rs. 1 crore and 16 lacs paid towards VRS scheme. The loss for the year was 29.01 lacs. The production was 5615 tonnes. The reserves came down to 3.88 crores. For the financial year 1992-93 the company has shown a loss of Rs. 443.39 lacs. This also includes payment towards VRS scheme in an amount of Rs. 348.26 lacs. The production between 1.4.1992 and 2.11.1992 was 2568 tonnes. The net loss was Rs. 95.12 lacs. It must also be borne in mind that the production of the company completely stopped on 3.11.1992. Under the VRS scheme the company has paid the following amounts to their workers :

This payment towards scheme of VRS has been adjusted against the reserves and surplus of the company. The figures of production and sales for the following

financial years are as below.

In its application before the appropriate Government in so far as the production and costs are concerned the company had set out as under : The cost of production of the Respondent company and its competitors Neutral Glass and Allied Works are as set out in paragraph 6. The difference in cost of production between the respondent No. 1 and its competitors was as under :

Fuel : 3.99% Power : 2.44% and Wages : 26.56%

It has also come on record that in so far as the electric power charges are concerned, for the year 1993-94 rates in Gujarat were Rs. 2.40 per unit whereas in Bombay it was Rs. 3/- per unit. For the year 1991-92 the company has shown that it has invested Rs. 96 lacs towards cost of modernisation and upgradation of plant and equipments.

In its annual report for the year 1990-91 the company has set out that the sales during the year stood at Rs. 19.91 crores as against 23.26 crores for the preceding year and that for the said financial year there was lower percentage of profits through sales from 4.5% to 2.4%. In the said report on technology absorption on page 9 the company has further stated as under :-

"The above developments are at our collaborators" end and since we have technical collaboration with them the same can be imported from them. Out of the total equipments some of them have to be imported and the balance can be procured locally.

With increase in speed the quality and clarity of the glass containers definitely improve with which we are quite hopeful to compete the international market in exports".

It has also come on record that the company stopped production of amber glass in its factory at Andheri which was more profitable. Similarly product of borosilicate vial of installed capacity of 30 crores have also been stopped at Andheri, Bombay.

12. Furnaces and Machinery : The state of furnaces in the factory. The factory had 3 furnaces, all of which were rebuilt between the years 1985 and 1987. D-tank furnace was rebuilt in August 1985, E-tank furnace in July 1986 and A-tank furnace in September 1987 (Exh. A to petition). The life time to a furnace as per the witness of the company was 2 to 5 years. Two of the furnaces were closed on 25.9.1991 and 22.9.1991 respectively, and the third furnaces were closed on 3.11.1992. This furnace as per the evidence of Merchant was in excellent condition upto 16.8.1992. In so far as the rebuilding of the furnace is concerned as the rebuilding of the furnace is concerned various figures have been given. In oral evidence of Merchant it has been stated that the costs of rebuilding the furnace would be between Rs. 1 to 1.25 crores. In annexure C-18 i.e. reply in the complaint filed by the Union, it is shown that the cost would be between Rs. 1.25 to 1.60 crores and Annexure XIII to the closure application shows the cost as Rs.

2 crores. It has come on record that all the furnaces had electric connections. The Union had been complaining right from 1991 that the company was neglecting to repair the furnaces. The company in its application for closure had informed the appropriate Government in July 1992 that one working furnace was in good order. In February 1992 in reply to the complaint under the MRTU and PULP Act, it had set out that the furnace was in good condition. In its report for the year 1990-91 the company spoke of upgradation of technology and in fact Shri Merchant in his evidence has set out that the Company spent Rs. 96 lacs in the said year for modernisation and upgradation of machinery. For the year 1991-92 an investment allowance of Rs. 76 lacs has been shown.

13. Fuel and Raw Material : Upto the financial year 1991-92, it was the case of the company that in so far as its competitors were concerned fuel was 3.99% and power was 2.44%. For the financial year 1992-93 there is a marginal increase in fuel except for LPG for which the company has produced one bill issued by Bharat Petroleum which shows that the price of LPG has gone up from Rs. 4296.04 ps to Rs. 12,13,342/- in October 1992. The electricity charges per unit in Bombay was Rs. 3/- and in Gujarat was Rs. 2.40. In so far as raw material is concerned, what is brought on record is the consumption of raw material. The comparative cost of raw material in Bombay and Gujarat has not been brought on record.

14. Neutral Glass & Allied Works : An additional fact which has come on record, is that another company by name Neutral Glass and Allied Works has been incorporated and has set up a factory in Gujarat where production commenced in June 1989. Most of the Directors of the said company as averred in paragraph 5 of the petition are related to the Directors of the Respondent Company. It has an installed capacity of 30 crores of borosilicate vials and also equipped to produce amber glass. The entire range of products which the respondent company produces, the Neutral Glass and Allied Works was also equipped to produce. The respondent company stopped production of amber glass and borosilicate vials, much before the application for closure. The record shows that the office of the Neutral Glass and Allied Industries was functioning in the establishment of respondent company at Andheri. Personnel of the respondent company were working at the same time with Neutral Glass and Allied Works. The respondent company had introduced an advertisement for recruiting the company secretary for Neutral Glass and Allied Works. Neutral Glass and Allied works has further given an interest free loan of Rs. 2 crores to respondent company and in so far as its office premises are concerned, it was paying Rs. 60,000 p.m. towards the office expenses apart from payment towards telephone and telex charges. The minutes of meetings with the union office bearers show that the Directors of the Neutral Glass and Allied Works were participating in the discussions and meetings of the management of Respondent Company. The respondent company also gave short term loans to the Neutral Glass & Allied Works. The correspondence on record shows that the respondent company has transferred orders it was receiving to Neutral Glass & Allied Works not only for domestic consumption but

also in the international market. The respondent company right from 1990 has been asking its customers to place future orders with Neutral Glass & Allied Works.

In the application before the appropriate Government the respondent company has shown Neutral Glass and Allied Works as its competitors. In the advertisement issued for recruitments of personnel for the Neutral Glass & Allied Works the respondent company has described the Neutral Glass and Allied Works as its sister concern. In correspondence exchanged with its various customers, it has described Neutral Glass & Allied Works as an associate Company.

Considering the above material which is on record, it will be worthwhile now to consider the challenge to the award by the petitioner union as well as arguments in support of the award by the respondent company.

15. The grounds of attack on behalf of petitioner-union as argued by their learned counsel Shri Kochar may be summarised as under :

a) The Tribunal has ignored relevant considerations which it had to consider while deciding an application u/s 25(O) of the I.D. Act and as such the award is liable to be set aside.

b) The Tribunal has relied upon the Charts produced by the Company after the evidence had been recorded, replies given by the union in answer to the said charts have been totally ignored and/or atleast no mention of the arguments are found in the award. Even the material contained in the documents before the Tribunal like audited balance sheet have been ignored while considering the charts produced by the respondent company.

c) The inference drawn by the Tribunal from the documents on record which on the face, could not have been drawn and has arrived at the conclusion which could not have been arrived at.

d) The closure was not genuine as the financial losses which the company claims it had incurred were on account of the situation created by the company itself by floating another company i.e. Neutral Glass and Allied Works and transferring business to it whilst at the same time neglecting furnaces and other infrastructure of the respondent company as also directing orders to Neutral Glass and Allied Works.

e) The Tribunal failed to consider that not only had the reasons for closure to be genuine but they had also to be adequate and even thereafter the Tribunal had to consider public interest and other relevant reasons before granting permission.

f) The impugned Award is contrary to the material on record and hence same is required to be quashed and set aside.

g) In addition it is argued on behalf of the union that the tribunal while permitting the company to close down its factory at Andheri has observed that the workers can run the factory if they wanted to do so by forming a cooperative

society, that the workers pursuant to the said Award by their application dated 19th March 1996 has informed the company of their intention to form a cooperative society and run the factory in terms of the directions of the Tribunal. In support of their submission petitioner - union has placed reliance on the following decisions :

Kalinga Tubes Ltd. v. Their Workmen 1969 L I.C. 90, Ahmedabad Mill Owners' Association Etc. Vs. The Textile Labour Association, , Rashtriya Mill Mazdoor Sangh and others Vs. R.N. Gawande, Industrial Tribunal and President Industrial Court, ,Straw Products Ltd. Bhopal and Ors. v. Union of India & Ors. 1986 L.I.C. 1831. Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar Vs. Associated Rubber Industry Ltd., Bhavnagar and Another, , Union of India v. Stump Schedle & Somappa Ltd. & Ors. 1989 1 CLR 683 and Laxmi Starch and Ors. v. Kundara Factory Workers Union and Ors. 1993 1 CLR 189.

16. While supporting to Award of the Tribunal the learned Counsel for the respondent-company has made the following submissions.

a) That the court in exercising its jurisdiction under Article 226 of the Constitution of India is not sitting in appeal. The Tribunal having arrived at a conclusion based on the material before it, which conclusion cannot be said to be one which could not have been arrived at, this court should refuse to exercise its extra ordinary jurisdiction.

b) The respondent company had throughout contended and it is still its contention that the company had to close down its factory as it was not in a position to face the competition from its competitors on account of high cost of production and losses arising from increase in prices of fuel, power, wages and raw material.

c) The words "genuine and adequate" have to be read ejusdem-generis and if so read, once the company has proved that the reasons are genuine consequently it must follow that the reasons are adequate.

d) While interpreting the words "reasonable, adequate, public interest and other adequate reasons, the court should not give an interpretation which will affect the employers fundamental right to carry on trade and business. If any other interpretation is given, it will have the effect of making Section 25(O) violative of the respondents fundamental right to carry on the trade and business and Section 25(O) would be required to be struck down;

e) That in fact, the factory was closed down as far back as 3.11.1992 and it is not possible even if an order is passed by this court, to restart the factory.

f) That the respondent company and the neutral Glass and Allied Works are two different corporate entitles which are different and distinct from each other and there is no functional integrity between the two;

g) In so far as the observations of the Tribunal regarding the formation of a

cooperative society of workers to run the factory, the said observations are merely an "obiter" as parties were not given any opportunity nor was any evidence led before the Tribunal on that point.

In support of his submissions Shri Cama learned counsel for the respondent company has relied on the following decisions :-

Kalinga Tubes Ltd. v. Their Workmen 1969 L IC 90, Excel Wear and Others Vs. Union of India (UOI) and Others, , Isha Steel Treatment, Bombay Vs. Association of Engineering Workers, Bombay and Another, , Associated Cement Company Ltd. & Ors. v. Union of India & Ors. 1988 2 CLR 263, and Hindustan Steel Works Construction Ltd. etc. v. Hindustan Steel Works Construction Ltd. Employees Union Hyderabad & Anr. J.T. 1985 (2) SC 410.

17. The above propositions canvassed on behalf of the employers and employees will have to be tested on the touchstone of Section 25(O) of the Industrial Disputes Act which requires the company if it wishes to close its establishment to apply to the appropriate Government and to satisfy the appropriate Government that the reasons given by it are genuine and adequate, that the appropriate Government while considering the genuineness and adequacy of the reasons, must also consider public interest and other relevant factors before granting the permission; no doubt bearing in mind the argument of the company that the findings given by the tribunal are findings of fact based on the material on record and should not be interfered with by this court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India and further that an order refusing an application for closure is valid for a period of one year only from the date of the order.

18. The Tribunal while granting the applications of the respondent company vis-a-vis its competitor - industries in the State of Gujarat was cheaper on account of availability of gas at cheap rates as also other fuels, apart from various facilities, which make the industry profitable including tax exemption etc., the financial position of the company was such that the company had no resources to rebuilt the furnace at an enormous cost of Rs. 2 crores, the cost of wages was very high in Bombay as compared to labour available in the state of Gujarat and that the respondent company and Neutral Glass and Allied Works are two distinct entitles.

Dealing with the issue of fuel, the Tribunal has considered the chart produced by the company wherein the company has shown the cost of fuel, including that of natural gas, light diesel oil, liquefied petroleum gas, furnace oil and low sulphur high speed oil. In the said chart the calorific value of the various fuels and the equivalent calorific value for the fuels in comparison to LPG was given. It was the contention of the respondent company and which has been accepted by the Tribunal that the said calorific values were based on material on record before the tribunal. Our attention was invited to the documents produced by the ONGC which were produced at the instance of the union. The calorific values did not come through in evidence on behalf of the witness of the respondent company.

The inference on calorific values is sought to be drawn from the documents produced by the official of the ONGC. In reply to the said chart the union had in their written arguments disputed the claim of the company vis-a-vis calorific value. In fact it was the contention of the union that the calorific values of LPG was wrongly calculated by the respondent company and if the documents produced by the ONGC are considered it would be seen that the calorific value, gross was 27,400 and not 25,125 and not 11,850 gross and 10,950 net, as contended by the company. The case as set out by the union has not at all been considered by the tribunal in arriving at the conclusion on the calorific value. The written arguments in reply have been totally ignored. If the said documents and the contents thereof had been proved the position might have been different. More production of private documents is not proof of the contents. Even before the Tribunal, though strict rules of Evidence Act are not applicable, none the less principles of the Evidence Act have to be followed if the company sought to rely upon the said documents. The tribunal has totally lost sight of this fact while upholding the contention of the respondent company. The Apex Court in "Ahmedabad Mill Owners Association" case (supra) has held that "Single minded Statements produced by a party should not ordinarily be regarded as decisive. Therefore this finding arrived at without considering the union's contention cannot be sustained".

In respect of the cost of LPG the company has sought to prove the price based on the bills which had been produced. Apart from a bill of October 1992 which shows an increase in the price of LPG from Rs. 4900/- to Rs. 12,133.49, there is no subsequent document to show that in fact the increase in the cost of LPG continued even assuming that the said bill issued by the Bharat Petroleum could be considered as proved. At the highest what that would show is that there has been a sharp increase in the price of LPG from October 1992, and this has to be considered bearing in mind the aspect namely the case of company itself that the cost of production of the company is so far as the fuel consumption is concerned, was 9.99% and that at the relevant time the difference between its competitors in Gujarat and the respondent company was 3.99%. Therefore the only inference if at all the tribunal could have drawn would have been that there was an increase in the price of LPG. The tribunal has not at all applied its mind as to the effect of the price increase in the cost of LPG to the cost of production and has merely gone on the footing that there has been an enormous increase in the price of LPG, when in fact LPG is not the only fuel the company was using for its operations. The record shows that the company apart from the LPG has been using other fuels like, furnace oil, etc. The oral evidence shows that all the furnaces were so equipped that they could be run on electricity. The tribunal has completely ignored this aspect while considering the increase in the cost of LPG".

19. The tribunal also compared the cost of production of the respondent company and Gujarat Glass another company based in Gujarat. The company again in the chart which itself has produced after evidence had been closed has given the statement of various raw material which it claims are being used in

Gujarat Glass vis-a-vis respondent company Mr. Kochar learned counsel for the Union has invited our attention to the fact that in the chart produced by the company there is no reference to the item of culets (broken glasses). It was the contention of the counsel for the respondent company that the company used its own broken glasses and therefore the same has not been shown. In the written argument filed in reply to the contention of the company, the Union had contended that the culets to the extent of 60% were being used by the company and no reference or mention whatsoever has been made or found in the finding of the Tribunal in this respect. In working out the figures of Gujarat Glass Works culets to the extent of 40% have been considered and the value of culets has been taken into consideration. There is no evidence to show whether Gujarat Glass purchased culets or whether it was again using the broken glass which is normally a by-product of the production process. If the company wanted to reply on such figures it was incumbent upon it not merely to prepare a chart from the balance sheet but by leading evidence in fact to show that the Gujarat Glass in fact was purchasing culets from outside. "If the culets used by the company had been considered then the cost of production and the production itself is seen totally in a different aspect and the tribunal has not at all addressed itself to this question. The finding of the tribunal therefore cannot be sustained".

20. The tribunal has also come to the conclusion that the furnace cannot be rebuilt without spending Rs. 2 crores which resources the company does not have. The application of the respondent company to the Appropriate Government itself shows that the life-time of the furnaces was limited. In the evidence before the tribunal the witness on behalf of the company had pointed out that the life time of the furnaces was 2 to 5 years. It has come on record through the witness of the company that the furnaces were built between the years 1985-87. If that had been the case of the company it would be a normal action on the part of the company as a prudent management to provide for rebuilding the furnaces. For the financial year 1990-91 the management paid dividend at 20% and it had reserves of over Rs. 5 crores. It had also spent Rs. 96 lacs on infrastructure for upgradation and modernisation of the machinery of the company as per the balance sheet. It is thus inconceivable to believe that the company in the year 1990-91 was not aware that it had to rebuild the furnaces. The plea that they had no resources, which has found favour with the tribunal, is in fact not supported by the evidence on record. In fact it is the company's own case that their company has been closed on 3.11.1992 and since then it has spent nearly Rs. 5 crores for payment of wages as on date at the rate of Rs. 12 lacs p.m. "If the company can arise funds to the extent of Rs. 5 crores to pay wages one wonders as to how the tribunal could have recorded a finding that the company was not in a position to raise resources for rebuilding at least one furnace which according to the witness of the company would come to about Rs. 1.25 crores to 2 crores". As observed by the Apex Court in *Kalinga Tubes Ltd.* (supra) while considering Section 25-FFF of the Industrial Disputes Act, an employer when faced with difficulties is not expected to sit idle and not make an all out effort like

a prudent man of business in the matter of filling over difficulties in company's business. On 3.11.1992 the company acting on the report of Shri Parikh closed down the only functioning furnace. Upto September 1992 it was the case of the company that one furnace was in working and proper condition. That was also the case in its application for closure to the appropriate Government and in various other documents. Shri Parikh, it turns out, is a director of Neutral Glass and Allied Works, and also a former General Manager of the Respondent-company. Apart from this the Tribunal has sought to rely on a report in respect of which the author has not been examined nor had the union an opportunity to test the correctness of the said report. The Union had contended that the company had suppressed the fact that Shri Parikh was on the board of directors of Neutral Glass and Allied Works. "The tribunal has chosen not even to consider this aspect of the matter apart from the fact that the said report was not proved before the tribunal.

21. The tribunal was also impressed by the fact that it was not viable to run the factory. The evidence on record shows that the case of the company through the evidence of Merchant was that if an amount of Rs. 5 crores were spent the Company would be viable. Bearing in mind that in so far as the furnace is concerned, it would have cost maximum Rs. 2 crores if the figures presently shown are accepted, Shri Merchant himself was confident that if an amount of Rs. 5 crores had been spent the company would have been viable. The balance sheet of 1990-91 shows reserve and surplus of over Rs. 5 crores. Surely this reserve were available. If the company like any other prudent management wanted to rebuild the company or make it viable by using the said reserve it could have done so, but the said reserve has been used for the purpose of payment of VRS scheme. Nothing could be fault if the company wanted to reduce its work force so as to reduce the cost of production. In fact the evidence on record shows that after the work force was reduced there was an increase various savings, which can be seen from the evidence of Shri Merchant himself. Shri Merchant in his evidence stated that the company saved per month on over-time Rs. 65,000/- on contract labour Rs. 50,000 on inspection, smoking and sorting department Rs. 75,000/- p.m. as also Rs. 2 lacs on moulds. For the financial year 1992-93 company's VRS scheme had come into effect and the effect on the company's cost of production on account of lesser wage burden would then have been felt. "The Tribunal has not at all adverted to these aspects in considering the financial position or viability of the company. Considering the material and rejecting it would be one thing but ignoring and/or not considering the material, discloses total non-application of mind on the part of the tribunal in respect of vital material which it had before it and which it should have considered".

22. The tribunal have also given a finding that the respondent company and the Neutral Glass and Allied Works are two different and distinct companies. The counsel for the respondent company has sought to support the said finding and relied on the judgment of the Apex Court in Isha Steel Treatment Factory (supra)

and Hindustan Steel Works Construction Ltd. (supra). There could be no quarrel with the said finding. The contention of the Union, however, was that the management had set up a new plant at Gujarat, and created a situation whereby the factory of the respondent company was allowed to die. For this the Union has pointed out that the respondent company had transferred all its business and even its key personnel to the Neutral Glass & Allied Works. The directors of Neutral Glass and Allied Works were relatives of the directors of the respondent company and if one lifts the corporate veil or gets behind the smoke screen one would see that Neutral Glass and Allied Works was a creation of the respondent Company. The respondent went out of its way in first stopping production of Amber Glass which was thereafter done by Neutral Glass & Allied Works; stopped production of borosilicate vials, which was thereafter done by Neutral Glass and Allied Works after it became fully operational. In fact the installed capacity of both the companies was 30 crores of vials. The key personnel and management of Neutral Glass and Allied Works and respondent company were simultaneously working for the company and Neutral Glass & Allied Works. The correspondence on record shows that respondent company informed its customers that the Neutral Glass & Allied Works was its sister and/or associate company and diverted orders received for the domestic market and for the international market to Neutral Glass & Allied Works. If one looks at the said position - aspect i.e. healthy growth of the new born baby as was described the Directors of the Neutral Glass & Allied Works in its report for the year 1988-89 and the slow death of the respondent company, it is apparent that the financial problems of the respondent company have arisen on account of setting up of Neutral Glass and Allied Works. All throughout in its application to the appropriate Government the respondent company has been describing Neutral Glass & Allied Works as its competitors. "One may pose a question whether any reasonable person with these facts on record would come to a conclusion that Neutral Glass and Allied Works is a competitor of respondent company or would it come to the conclusion that the Neutral Glass & Allied Works has stepped into the shoes of the respondent company to carry on the production which the respondent company was carrying out at its Andheri factory. The tribunal has not at all adverted to these aspects of the matter. It has gone on the footing that they are two distinct and different legal entities about which as already held there is no dispute or there could have been no dispute at all. If the finding of the tribunal on this aspect is considered it is abundantly clear that the tribunal did not address itself to the correct question nor did it refer or rely on the material produced by the petitioner union or the arguments advanced. A bare perusal of the award shows total non application of mind by the tribunal in so far as arguments advanced on behalf of the petitioner union as seen from the written arguments on record".

23. However, from all the above facts, it is established that the respondent company had to face competition from the factories in Gujarat and the cost of production was higher to the extent of 35% as could be seen from the application made by it to the appropriate Government. Further it is also

reasonable to conclude that there have been increase in cost of fuel, power, electricity and raw material. However, would a mere increase in the cost of production enable the tribunal to come to the conclusion that the application of the respondent company for closure was genuine or adequate and further that no public interest or other relevant factors were involved in granting the permission to close down the factory or respondent company.

24. The first requirement of any application is that the reasons given in the application must be genuine, in other words, must be real and not sham. Shri Cama in the first instance states that it is the employers right to carry on trade or business or shift his business to any other State where it is more profitable. He further states that once a company has shown that it is suffering losses, then a company cannot be compelled to go on functioning or making production. He relies on the judgment of the Apex Court in Kalinga Tubes (supra). Kalinga Tubes was a case dealing u/s 25FFF of the Industrial Disputes Act which provides that closure has to be genuine and bonafide in a sense that it should be a closure in fact and not a mere pretense to closure and quantum of compensation that has to be paid to the workmen. In the instant case we are dealing with the issue whether closure can be permitted and as such the said authority is clearly distinguishable. Shri Cama, counsel for the respondent then relies upon the judgment in Excel Wear's case to contend that the words genuine and adequate must be read ejusdem generis, in the same manner the Apex Court interpreted the words correct, sufficient and adequate in the case of Excel Wear. The argument has to be rejected. First and foremost the observations in paragraph 21 of the judgment of Excel Wear itself shows that the Apex Court noted the separate requirement of correct on the one hand and adequate and sufficient on the other. However, the Apex Court thereafter observed that if the reason was correct it would be preposterous to say that it was not adequate and sufficient for closure. Let us take an illustration. A wrong question is posed to which a correct answer is given. The answer given does not become genuine, because the question itself was wrong. If one looks at it from this angle one sees the difference between what is correct and what is genuine. In the present case it is the case of the company that it was suffering financial losses on account of high cost of production. We have already seen that the financial position and the losses if any incurred by the company are its own creation. A division bench of the Gujarat High Court in the case of Associated Cements Co. Ltd. and Ors. v. Union of India has observed as under.

"Merely because the employer has not managed his undertaking properly, it cannot be made out a ground for refusing permission to close down his undertaking. Unless it is found as a matter of fact that the situation requiring closure has been brought about deliberately and malafide. Poor management or mismanagement of the undertaking can hardly be regarded as a good ground for refusal of permission to close down an undertaking".

Can it be said in the present case that the action of the management is totally

neglecting the respondent company as well as at the same time helping Neutral Glass and Allied Works to establish was an action of prudent management and can therefore, the application for closure be said to be genuine.

In the case of The Workmen Employed in Associated Rubber Industry Ltd. Bhavnagar, the Apex Court has observed as under :-

"It is duty of the court, in every case where ingenuity is expended to avoid taxing and welfare legislations, to get behind the smoke-screen and discover the true state of affairs. The court is not to be satisfied with form and leave well alone the substance of a transaction".

In the said judgment following observation from the case of Ramasay 1981) 1 All 865 has been approved.

"The fact that the court accepted that each step in transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results. Avoidance of welfare legislation is as common as avoidance of taxation and the approach in considering problems arising out of such avoidance has necessarily to be the same".

The provisions of Section 25(O) were first introduced by Act 32 of 1976 with effect from 5th March 1976. The said amendment was struck down by the Apex Court in the case of Excel Wear. Thereafter the Parliament enacted Act 46 of 1982 with effect from 21st August 1984 whereby Section 25(O) was introduced in its present form. The provisions of Section 25(O) are for the benefit of workmen, so that they are not left jobless. Is the present case not a closure brought about deliberately and malafidely ? If one goes behind the smoke screen or lifts the corporate veil there is no doubt whatsoever from the facts on record that the respondent company brought about the situation by not taking any steps which a prudent management had to take avoid closure of business. This was done with a malafide intent purpose of closing down the respondent company. This act was brought about, as by 1991-92 Neutral Glass & Allied Works, a sister or associate company with same or more production capacity than the respondent-company had become fully operational and it could cater to the full needs of the customers who were earlier being supplied by the respondent company with larger profit margins. Therefore the reasons for closure cannot be said to be genuine.

25. That takes us to the question - whether the reasons were adequate. Again the stand of the company was that it had faced serve competition from its competitors in Gujarat and its production costs were very high. The balance sheet and profit and loss account for the year 1990-91 shows that the company paid dividend of 20%. It had not suffered any loss. All that could be seen from the record is that the profit margins were less as already adverted to in the earlier part of the judgment. Further for the year 1991-92, and 1992-93 the VRS scheme had been introduced in lieu of which over 5 crores were spent in

payment of compensation to the workers. This is not a case where a company was unable to sell its product. In fact in the application before the appropriate Government the company itself has stated that inspite of 40% increase in price, profits had gone down. Therefore, this was a case where the company qua its competitors was getting less profits. No material has come on record to show that it could not sell the product at a price they were selling, and that on account of high price customers had withdrawn their orders and placed them with others. The company if it wanted to establish that it would not be financially viable ought to have produced that evidence to show that it could not sell its product, that its competitors had taken over its market and that even if they had produced with the existing capacity, it would not have been financially viable. This the company had failed to do so. The real high cost of production vis-a-vis its competitors were wages. The company had already reduced the workforce from 775 to 321. In any established company, the wages are bound to be higher than in a newly established industry. However, an older industry has the market and good will which the new industry does not have. As far as technology is concerned any prudent management upgrades technology over the years as and when technological innovations take place. Can therefore the reasons given by the company be said to be adequate. On this ground also we are of the view that the said reasons are not adequate. Shri Cama's assertion that once the reasons are held to be genuine it must be held to be adequate on a parity of reasoning as held in the case of Excel Wear, must also be rejected. In the first instance we have held that the reasons were not genuine and as already explained earlier the word "genuine" and the word "correct" have two different and distinct meanings. The Apex Court in the case of Excel Wear was considering the words "correct" on the one hand and "adequate" and "sufficient" on the other hand and its observations are in that context. Such an interpretation cannot be said to make section 25(O) violative of Employers fundamental rights to carry on trade and business. The Apex Court in Excel Wear had itself observed that law may provide to deter the reckless, unfair, unjust or mala fide closure.

26. Whilst granting permission for closure did the Tribunal address itself to the question of public interest and other relevant factors. Shri Kochar learned counsel for the petitioner - union has pointed out that the tribunal lost sight of these factors. He submits that public interest which is a every wide term apart from other aspects, would include the interest of workers who will be rendered jobless. He points out that an order u/s 25(O) is valid for a period of one year in the event the application for closure is refused. The said period of one year is provided so as to enable the parties to take steps to see if the company can be made financially viable. It may be true that a loss making unit cannot be forced to continue but at the same time the requirements of Section 25(O) of the Act are reasonable restrictions on that right. He drew our attention to a judgment of the division bench of the High Court of Karnataka in Union of India v. Stump, Schedule and Somappa Ltd. & Ors. wherein in para 18 it has been observed as under :

"It is said that the objection of workmen to the closure cannot be countenanced, this again is not acceptable. Workmen have great stake in the functioning of the undertaking. In a particular situation, apart from the employer, and the workmen, others also may have to be heard while considering the application for permission to close. The concept of public interest is so wide that it is not possible to define it is a formula governing all situations".

In fact the appropriate Government while rejecting the application for closure had called on the parties to negotiate and discuss ways and means of increasing productivity and some other steps. Instead of taking steps the company immediately closed down the factory. After the closure all that it did was to try to find job for about a few of the workmen out of 350 that were left. A single judge of our High Court in *Rashtriya Mill Mazdoor Sangh v. R.N. Gawande & Ors.* (supra) has observed in paragraph 24 as under :

"Those who borrow public funds must also accept public responsibility. T.C.I's public responsibility is not to take shelter under spurious grounds and create avoidable un-employment for not less than 1600 workers and bring starvation at their door-step and those dependent on them. To do so would be against public interest. It is not the cotton that you weave nor the yarn that you spin (the pun unintended) but human creatures" lives you play with where comes the question of public interest".

The argument that once a closure was permitted workers will receive their statutory compensation was answered by the Learned Single Judge in the judgment, thus :

"The statutory compensation thus dangled is no palliative for a regular employment and a steady wage "BUT STILL THE GREAT HAVE KINDNESS IN RESERVE THEY HELPED TO BURY WHOM THEY HELPED TO STARVE".

In this case can the company look into the mirror and say that it has done everything possible to avoid the closure. The record speaks otherwise. True the company has been paying wages to the workers over all this period but that is a statutory obligation which in fact indicates that it has means to raise loans to pay wages. If it can pay wages without production, could it not attempt to rebuilt atleast one furnace and commence production. The tribunal caught up with its finding of higher cost of production, did not lend its ears to those pleas of the workmen. Would not public interest also involve the moral and social responsibility of the employer, to act like a prudent person before closing down the factory. A division bench of the Madhya Pradesh High Court in *Straw Products Ltd's.* case (supra) has observed as under :

"Social and moral responsibility of the applicant to exhaust all other avenues of improving the economic viability of the industrial undertaking before resorting to closure/retrenchment in order to prevent unemployment of a larger number of workmen is a relevant factor and not an extraneous consideration in refusing permission whether in the context of closure section 25(O) or retrenchment u/s

25(N) since it related to the factor of public interests as well as interest of the workmen as a whole".

The Mahatma expected every industrialists to act as a trustee in today's world, that is but a dream, but does that exonerate the Industrialist from his social and moral responsibility of exhausting all remedies to make the industry viable before closing it down. Is it too much to ask from those who have prospered from the return of the industry, to take such steps which any diligent man would take to prevent closure. In this case the respondent company has failed on all these counts. In fact after the Government refused permission in October 1992, without waiting further, acting on a procured report of its former General Manager who is now Director of Neutral Glass and Allied Works, closed the factory from 3.11.1992 after holding out throughout to the workers that there was no damage or problem for the functioning of the furnace nor had the company any intention whatsoever to close down its factory.

27. That takes us to the question whether the public interest and other relevant reasons would include State Interest. The State is very much concerned with the closure of industries as it has an adverse effect on employment potential in the State and the soundness of its economy. In fact the legislature itself has recognised this fact by calling on a company/undertaking to move an application u/s 25(O) of the Act to the appropriate Government. There is a purpose behind this. It is the State Govt. which can give concessions in the form of tax facilities, reduction of power tariff etc. in order to enable an industry to stand on its own feet and/or to obviate its financial and other difficulties. The State invites entrepreneurs to set up industries in backward area of the State, provides infrastructural facilities, gives subsidies, and tax concessions etc. with a view that more and more industries will be attracted which will help the State provide employment to its residents and bring in resources to meet the expenditure on its welfare schemes for the economically backward and public at large. If an employer who has set up an industry in a State has prospered therein afterwards because of the increase in cost of production arising out of higher wages and cost of raw material decides to pack off and set up the same industry in some other State where he enjoys better tax benefits or facilities, benefit of low wages and other such concessions, is allowed to close down the industry without making attempts or taking steps to overcome the difficulties the State will be faced with a situation of industries running away to States which offer more facilities as and when cost of production on account of higher wages and/or raw material goes up. In the case like the City or Mumbai where the cost of land has shot up astronomically, industrialist would prefer to close down industries and make their fortune by developing the land and go to neighbouring States to set up such industries. This would lead to a flight of industries which no State can permit. Section 25(O) has behind it this aspect also.

"Having considered all these aspects we are of the considered opinion that the tribunal should have refused permission for closure on the ground of public

interest also".

28. That takes us to the last question i.e. observations of the Tribunal that the company could be run by the workers by forming a cooperative society. This finding of the tribunal has to be set aside. The matter was not in issue before the tribunal. The parties were not given any opportunity by the tribunal which is evident from a letter dated 16th March 1996 of the petitioner union itself when it informed the respondent company its decision to run the factory as a cooperative society. This part of the observation of the Tribunal will have therefore to be obviously set aside.

29. Before parting with the judgment we have observe that when the company approached the appropriate Government had disclosed that it's reserves and surplus alongwith its shares capital of Rs. 60 lacs as on 31st March 1992 were to the tune of Rs. 5.54 crores. Its gross assets as on 31st March 1992 were Rs. 13 crores and odd which on 31st March 1993 came down to about Rs. 6 crores. Its net asset which were Rs. 5.82 crores as on 31st March 1991 came down to Rs. 1.9 crores as on 31st March 1993 and its reserves as on 31st March 1993 were Rs. 44 lacs and odd. Before the tribunal a statement of accounts was filed for the year ending 31st March 1993 showing a loss of Rs. 1.75 crores. After 1993 till 30th June 1996 the company has been paying wages at the rate of Rs. 12 lacs without any production. This will further show a loss of Rs. 1.92 crores. The net worth of the company on March 1994 the deemed date which the Apex Court had given from the figures reproduced must have disappeared. A bare perusal of the provisions of the Sick Industries (SPL Provisions) Act shows that in case of a scheduled industry the provision of the sick Industries (Special Provisions) Act, 1985 and Board For Industrial and Financial Reconstruction Regulation 1987 apply. These facts are being adverted to as the financial position of the company has been placed before us. If the provisions of the aforesaid Act are applicable then certain other consequences follow. It may be mentioned that this was not in issue before the tribunal nor was it raised either by the petitioner - union or the respondent company either before the tribunal or this court nor was the said issue dealt with or answered by the tribunal. These facts were discovered by us at the time of hearing of this petition. It may however, be pointed out that on behalf of the respondent-company, its counsel has pointed out that in fact an application u/s 23 of the Sick Undertakings Act had been made before the appropriate forum. The position since then has further deteriorated to which provisions of section 15 may be applicable. In the aforesaid circumstances, the appropriate authorities could have looked into the matter whether the company could be made financially viable or not as also the Union's plea to run the factory as a cooperative society could have been considered. On this aspect we need say nothing more.

30. As we are holding that the reasons for closure of the respondent's factory at Andheri, Mumbai were not genuine and adequate and as public interest was not considered the award of the Tribunal dated 20.4.1995 is hereby quashed and set

aside and consequently the company is refused permission to close down the factory pursuant to its application for review dated 23rd February 1993, which the Apex Court considered as deemed application dated 9th March 1994. Rule made absolute in the aforesaid terms. In the circumstances of the case there shall be no order as to cost. Certified copy expedited.