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**(2001) 10 JH CK 0033**

**In the Jharkhand High Court**

**Case No : LPA No's. 107 and 108 of 2000**

Management of BASF India Ltd.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

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**Date of Decision : 16-10-2001**

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 2, 25A, 25C, 25D, 25E

**Citation :** (2001) 3 CLR 1034 : (2002) LLJ 1 389 : (2002) FLR 93 1019

**Hon'ble Judges :** V.K. Gupta, C.J.;D.N. Prasad, J

**Bench :** Division Bench

**Advocate :** J.P. Cama, K.B. Sinha, Sanjay Piprewal, R.M. Singh, Amitabh and Nitu Sinha, for the Appellant; Binod Poddar, A.K. Sinha and Sumir Prasad, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

V.K. Gupta, C.J.—By this common judgment we propose to dispose of both the L.P.As. together.

2. Vide judgment dated 16th March, 2001, passed in Civil Appeal No. 2100 of 2001 arising out of SLP (C) No. 11892 of 2000, their Lordships of the Supreme Court by setting aside the Division Bench judgments of Patna High Court in two Writ Petitions being CWJC No. 3253 of 1999(R) and CWJC No. 3254 of 1999(R) remitted to the Division Bench of this Court the aforesaid two Appeals for fresh disposal in accordance with law. Both the Writ applications related to two References made by the State Government under Industrial Disputes Act, 1947 (Act for short). The appellant-Management of BASF India Ltd. had challenged the legality, validity and correctness of these two References in the aforesaid two writ applications which came to be dismissed by a learned Single Judge of Patna High Court. Appeals under Clause 10 of the Letters Patent having been filed by the appellant also meeting the same fate, the appellant had moved the Supreme Court and, as noticed above, their Lordships of the Supreme Court while setting aside the impugned orders of the Division Bench remitted the appeals for fresh

disposal. The two References made in the two writ applications may be reproduced verbatim. These read thus:--

"Reference No. 1:

"Whether the closure of M/s. BASF India Limited, Bokaro Steel City, declared by the management is justified? If not, what relief the workmen of the said factory are entitled to?"

Reference No. 2:

"Whether not to introduce the reconstruction works of the plant under the defined purpose of voluntary Retirement service (VRS) Scheme and to enforce its closure by BASF India Ltd. Bokaro is justified? If not, what relief under this Scheme the workmen are entitled to?"

3. The ground on which the High Court of Patna had dismissed the Writ applications and L.P.As. was that the Industrial Tribunal itself was competent to decide the question of the legality or validity of the References. The Supreme Court in the aforesaid judgment did not agree with the aforesaid view of the High Court. We quote hereinbelow the observations of their Lordships on this point. These read thus:--

"In our opinion, it is not open to the Industrial Tribunal to determine whether a Reference made to it is justified or otherwise legally valid. It is also not open to the Industrial Tribunal to decide the question whether closure of the establishment is justified, in a Reference made by the State Government under the Industrial Disputes Act. The issues involved in the References were required to be decided by the High Court after taking into consideration all relevant facts, The High Court could not relegate the parties to the Industrial Tribunal for determination of those questions. Under these circumstances, the impugned orders of the Division Bench of the High Court cannot be sustained.

The appeals are, thus, allowed and the impugned orders of the Division Bench of the High Court are set aside. The matters are remitted to the Division Bench of the Jharkhand High Court for their fresh disposal in accordance with law."

4. Chapters VA & VB of the Act deal with the questions and issues relating to lay off and retrenchment, including the closure of Industrial Undertakings under certain fact situations and in some circumstances. Section 25FFA requires an employer to serve at least sixty days notice of its intention to close down an Undertaking if the Undertaking is intended to be closed. The proviso to this Section suggests that this requirement of serving the notice of 60 days would not be relevant if less than 50 workmen are employed in the Undertaking. Section 25FFA is a part of Chapter VA of the Act. Chapter VB of the Act relating to special provisions for lay off, retrenchment and closure in certain Establishments, starts with Section 25K which specifically lays down that the provisions of this Chapter shall apply to an Industrial Establishment in which not less than 100 workmen were employed on an average per working day in the preceding 12 months.

Section 25O prescribes the procedure for closing down an Undertaking of an Industrial Establishment to which Chapter VB applies and it stipulates that no such Undertaking of an Industrial Establishment can be closed unless prior permission of the appropriate Govt. is obtained at least 90 days before the date on which the intended closure is to become effective. Sections 25FFA, 25K and 25O are re-produced hereunder for ready reference:--

"25FFA.Sixty days"s notice to be given of intention to close down any undertaking--(1) An employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the State Government stating clearly the reasons for the intended closure of the undertaking:--

Provided that nothing in this section shall apply to:

(a) an undertaking in which not more than fifty workmen are employed or were employed on any day of the preceding twelve months;

(b) a branch establishment, in the State of West Bengal, of-

(i) an establishment, being a company, registered under the companies Act, 1956, having registered office outside the said State, or

(ii) any other establishment, having head office outside the said State,

Where the closure of such branch establishment has become necessary consequent on the closure of the registered office or the head office, as the case may be, of that establishment or that other establishment.

(2) Notwithstanding anything contained in Sub-section (1), the State Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like, it is necessary so to do, by order, direct that provisions of Sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order."

"25K. Application of Chapter VR--(1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.

(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final."

"25 "O". Procedure for closing down an undertaking.--(1) An employer who intends to close down an undertaking of an Industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become

effective, to the appropriate Government stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner:

Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under Sub-section (1), the appropriate Govt. after making such enquiry as It thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under Sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of Sub-section (5) be final and binding on all the parties and shall remain In force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman review its order granting or refusing to grant permission under Sub-section (2) or refer the matter to a Tribunal for adjudication.

Provided that where a reference has been made to a Tribunal under this subsection, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under Sub-section (1) is made within the period specified therein or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that the provisions of Sub-section (1) shall not apply in relation to such undertaking for such period

as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under Sub-section (2) or where permission for closure is deemed to be granted under Sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months."

5. "Industrial dispute" has been defined in Section 2(k) of the Act as meaning any dispute or difference between employers and employees or between employers and workmen etc. Section 2(k) reads thus:--

"Industrial dispute" means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person".

6. A very short point is involved for consideration in this case.

7. In both the impugned References, as made by the State Government, what has been referred for adjudication to the Industrial Tribunal is as to whether the closure of the appellant Undertaking/Establishment was justified or not. Even though in Reference No. 2 apparently the issue is about the non-introduction of the reconstruction works of the plant under the defined purpose of Voluntary Retirement Service Scheme, the pith and substance of Reference No. 2 is the closure of the Establishment itself and since the only issue in Reference No. 1 is the closure of the Establishment, both the References in effect and substance relate to and directly are linked with the issue of closure of the Undertaking/Establishment.

8. In the present case, from the material on record and unimpeachable documentary evidence that has been produced before us by the appellant and not controverted by the respondents, undoubtedly the Establishment of the appellant was at the relevant time being undoubtedly and apparently referable to the requirements as projected in Section 25FFA of the Act, the Establishment of the appellant was not employing more than 100 workmen. It is only if an Industrial Establishment where more than 100 workmen were employed on an average per working day for the preceding 12 months that the requirements contained in Section 25O would be attracted. Section 25K of the Act clearly and unequivocally lays down that the provisions of chapter VB shall be applicable only to an Industrial Establishment if 100 or more workmen were employed on an average per working day for the preceding 12 months. If in an Industrial Establishment this was not the case and if the number of workmen employed was less than 100, Section 25O of the Act would not be at all attracted. We are saying so with repeated emphasis only to highlight the fact that non-applicability of Section 25O clearly means that the prior permission of the appropriate Govt.

is not the requirement of law in such a case for an intended closure to become effective. The only provision, therefore, which is held applicable in respect of such an Industrial Establishment or an Undertaking is Section 25FFA which merely lays down the requirement of the Employer serving at least 60 days notice in the prescribed manner on the appropriate Govt. stating its intention of closing down its Undertaking and the reasons for such intended closure. In this case we are not called upon to decide any issue arising out of the proviso to Sub-section (1) of Section 25FFA because the learned counsel for the appellant has himself suggested to us that we may presume that the number of the workmen employed was more than 50 at the relevant time (of course, it was less than 100). If, therefore, only Section 25FFA is attracted and held applicable in the case of the appellant, it was not open to the State Govt. to make a Reference to the Industrial Tribunal questioning the justifiability of the closure or subjecting the justifiability to judicial adjudication by the Industrial Tribunal. The justifiability of an action taken or contemplated to be taken u/s 25FFA is not open to judicial scrutiny in normal circumstances. What is open to judicial scrutiny, or what may form the subject matter of a Reference under the Act is the legality of the action taken or purported to be taken or contemplated to be taken u/s 25FFA of the Act. Justification of the closure or the intended closure cannot be made the subject matter of Reference if the closure is u/s 25FFA of the Act. Undoubtedly, of course, justifiability of a closure can be made the subject matter of a Reference if the closure is ordered or resorted u/s 250 of the Act. Scheme of Section 250 of the Act clearly suggests that once the employer seeks the permission of the appropriate Govt. in terms of Sub-section (1) for closing the Industrial Establishment, in terms of Sub-section (2), the appropriate Govt. after making enquiry and after giving a reasonable opportunity to all concerned of being heard and having regard to the genuineness and adequacy of the reasons, the interest of the general public and other relevant factors by order and for reasons to be recorded in writing grant or refuse to grant permission asked for. Sub-section (5) of Section 250 clearly lays down that appropriate Govt. may either review its order granting or refusing to grant the permission for closure or it may refer the matter to a Tribunal for adjudication. It means that even if permission for closure has been granted by the appropriate Govt. such permission is always liable to be reviewed by the Govt. itself on its own motion, or on the application by either of the parties. The dispute regarding the grant of such permission (or its refusal) can be referred for adjudication to a Tribunal. When, therefore, such a Reference is made and the Tribunal starts the process of adjudication, undoubtedly the justifiability of the closure or the intended closure would be a relevant and important issue coming up in the process of such adjudication. What would be adjudicated upon by the Tribunal in such a situation would be the order of the appropriate Govt. granting permission to close. (or refusing to grant such permission). Justifiability of the closure would, therefore, be the most important and relevant issue. We are saying so at the risk of repetition because justifiability of the closure would be flowing from the order of the Govt. granting permission to close and this order being referred for

adjudication to the Tribunal, the justifiability part of it cannot escape the adjudicatory process. Such is not the case with respect to an Undertaking or an Establishment if the closure happens u/s 25FFA of the Act. We are saying so because no permission of the Govt. is required for effecting such a closure. All that is required is the serving of a notice in the prescribed manner. The only requirement, therefore, of Section 25 FFA is whether a notice has been served upon? Whether the closure is justified or not is not the requirement of Section 25FFA of the Act. Therefore, if an Industrial Establishment or an Undertaking is covered by Section 25FFA (and not covered by Chapter VB), the only requirement which an employer is to fulfil and follow is the serving of a notice in the prescribed manner. The employer does not need any permission from the appropriate Govt. Therefore, the employer is not called upon to show to anyone whether the closure is justified or not. Because correspondingly no-one has any jurisdiction, authority or power to call upon an Employer to justify the closure. If, therefore, the law does not require the justification part to be established, demonstrated, shown or proved, the same cannot be made the subject matter or a Reference for attacking the closure of the undertaking or the Establishment. If the justifiability, therefore, cannot be brought into issue, any Reference to the Tribunal asking the Tribunal to examine the justifiability of the closure undoubtedly is invalid, illegal and de hors Section 25FFA and other provisions of the Act.

9. Mr. A.K. Sinha, learned Sr. Counsel appearing for the respondents referred to Section 25A of the Act to argue that the definition of "Industrial Establishment" as occurring in that Section is relatable to the definition of a "factory" as defined in the Factories Act, 1948. This argument is of no help to Mr. Sinha because Section 25 has a limited operation since it applies only to three Sections, namely. Sections 25C, 25D and 25E. Since Section 25A (even if any definition of Industrial Establishment" qua Factories Act is taken into consideration and with whatever result) has no application or applicability to Section 25FFA, the reliance placed upon it is totally out of context.

10. In view of the aforesaid discussion, therefore, we have no doubt that it was not open for the Industrial Tribunal to examine the legality or validity of the Reference itself. The learned Single Judge by directing, therefore, that the questions raised in the writ application about the legality and validity of the Reference should be raised before the Industrial Tribunal has committed an error of law. Since the Reference was not legal or valid at its very threshold, there was no question of sending the parties to a Tribunal.

11. In the case of Indian Hume Pipe Co. Ltd. Vs. Their Workmen, , their Lordships of the Supreme Court while dealing with the question basically relating to the Justification or the motive or the reason for closing down an Industrial Undertaking observed as under:--

"In our opinion, it was not open to the Tribunal to go into the question as to the motive of the appellant in closing down its factory at Barakar and to enquire

whether it was bona fide or mala fide with some oblique purpose, namely, to punish the workmen for the union activities in fighting the appellant. It has been laid down by this Court in a series of decisions that it is not for Industrial Tribunals to enquire into the motive to find out whether the closure is justified or not.

The use of the expression "bona fide" in the above quotation does not refer to the motive behind the closure but to the fact of the closure. The question about the bona fide of the closure had to be examined in the case of Tea Districts Labour Association, Calcutta Vs. Ex-employees of Tea Districts Labour Association and Another, . There two agencies of the appellant at Korapat and Berhampur were closed by the appellant and that was the finding of the Tribunal. This Court held that once it was established that the agencies had in fact been closed, the finding about the mala fide of the closure would not "justify the conclusion that the said two agencies should be deemed to continue" and allow the Tribunal to make an award on that basis."

"The question of the motive of the employer in closing an establishment had to be examined by this Court again in The Andhra Prabha Ltd. and Others Vs. Secretary, Madras Union of Journalists and Others, . It was pointed out there that there might be more than one motive working in the mind of the employer leading him to close his establishment and it was not for the Industrial Tribunal to examine that question meticulously and decide on the bona fides of the motive."

In the case of Kalinga Tubes Ltd. v. Their Workmen reported in 1969 Lab. I.C. 90, once again dealing with the question of justification and motive for the closure of an Undertaking, their Lordships of the Supreme Court held as under:--

"The case of the Management itself was that the events which took place between the afternoon of October 1, 1967 and the early morning of October 2, which may compendiously be called a Gherao were solely responsible for the decision to close and the actual closure of the factory as also the undertaking with the exception of the continued working of the waterworks which was meant for supply of water to the colony which had developed around the factory. It was never claimed nor has it been claimed before us on behalf of the Management that it was due to any financial or economic reasons or other compelling circumstances of a similar nature that the closure was effected. So far as the present case is concerned the Tribunal travelled into an extraneous and irrelevant field when it took into account the profitable business which the company was doing and the profits which it was making or was expected, to make. The Tribunal was apparently labouring under the impression that according to certain judicial decisions there can be a closure of an undertaking only when there are financial difficulties and the undertaking becomes a losing concern. It is difficult and indeed no such principle entrenched in Industrial law has been brought to our notice, to accept that the closure of an undertaking can be limited or restricted only to financial, economic or other considerations of a like nature. All



that has been laid down is that in case of a closure the employer does not merely close down the place of business but he closes the business itself finally and irrevocably vide *The Management of Express Newspapers Ltd. Vs. Workers and Staff Employed under it and Others*, , the closure has to be genuine and bonafide in the sense that it should be a closure in fact and not a mere pretence of closure."

At another place in the same judgment, their Lordships held as under:--

"The discussion of the above decisions yields the result that the entire set of circumstances and facts have to be taken into account while endeavouring to find out if, in fact, there has been a closure and the Tribunal or the Court is not confined to any particular fact or set of facts or circumstances. In one case the Management may decide to close down an undertaking because of financial or purely business reasons. In another case it may decide in favour of closure when faced with a situation in which it is considered either dangerous or hazardous from the point of view on the safety of the Administrative staff or members of the Management or even the employees themselves to carry on the business. The essence of the matter, therefore, is the factum of closure by whatever reasons motivated."

12. On the question of the workmen being less than 100, Mr. Sinha, learned counsel for the petitioner submitted that the contract labourers have to be included. Un- doubtedly, if the contract labour is included, only then, perhaps, the number would swell to beyond 100. But it is an established principle of law that in calculating and computing the number of workmen in terms of Section 25FFA of the Act, only regular employees are to be included and not the persons working as contract labourers. In the case of *Workmen of The Food Corporation of India Vs. Food Corporation of India*, , it has clearly been held that expression "employed" does not include a person not regularly and permanently employed but employed by the Contractor. The following observations of their Lordships in the aforesaid case are apposite:--

"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 the 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. Vs. State of Saurashtra, 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 workmen employed by the contractor were certainly not the workmen of the Corporation and no claim to that effect has been made by the Union."

13. Viewed from any angle, therefore, either from the justifiability point of view or otherwise, we have no doubt in our minds that the two References in question were framed dehors Chapter VA, particularly Section 25FFA of the Industrial Disputes Act, 1947 (undoubtedly Chapter VB, particularly Section 25O was not applicable and could not to be attracted in this case) and, therefore, the Industrial Tribunal had no jurisdiction to adjudicate upon the issues forming the subject matter of the aforesaid two References. We, therefore, find that the appellant was right in its contention urged before the learned Single Judge that the References were bad in law. The learned Single Judge in our considered view erred in holding that the Industrial Tribunal should decide upon the validity of the References or the related jurisdictional questions arising therefrom. Since the References are dehors the Act ab initio, the Industrial Tribunal had no jurisdiction to decide upon any issue relating to the References since it lacked jurisdiction inherently and patently.

14. The Appeals, accordingly, are allowed. The judgments rendered by the learned single Judge in both the writ applications, accordingly, are set aside. Consequently both the References are quashed. No order as to costs.

15. Appeals allowed.