
(2018) 12 P&H CK 0099

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. No.22351 Of 2018 (O&M)

M/s Endurance Technologies Ltd

APPELLANT

Vs

State Of Haryana And Others

RESPONDENT

Date of Decision : 18-12-2018

Acts Referred:

Industrial Disputes Act, 1947 — Section 25K, 25K(2), 25L, 25M, 25N, 25O(2), 25O, 25P, 25Q, 25R, 25S, 25U, 25B, 25D, 25FF, 25FFA, 245FFF, 25G, 25H, 25J
Factories Act, 1948 — Section 2(m)
Companies Act, 2013 — Section 18
Constitution of India, 1950 — Article 19(1)(g), 31C

Citation : (2018) 12 P&H CK 0099

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Gurminder Singh, Ashwani Talwar, Harpriya Khaneka, G.S. Wasu, O.P. Sharma, Vishal Sharma

Final Decision : Disposed off

Judgement

1. Chapter VB containing Sections 25-K to 25-S of the Industrial Disputes Act, 1947 was added by Parliament Act 32 of 1976 w.e.f. March 05, 1976. The Chapter deals with special provisions relating to lay off, retrenchment and closure in certain establishments. Section 25 K reads as follows:-

"25K. Application of Chapter V-B.- (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.

2. The words "one hundred" were substituted by Act 46 of 1982 for "three

hundred" w.e.f. August 21, 1984. Section 25-L contains definitions for the purposes of Chapter VB of the Industrial Disputes Act, 1947 (for short the "1947 Act"). An 'industrial establishment' means a factory as defined in Clause (m) of Section 2 of the Factories Act, 1948. The petitioner is a factory and industrial establishment. The relevant provisions of Chapter VB for the purposes of decision in this case are to start with Section 25 N which prescribes conditions precedent to retrenchment of workmen. The provision is enacted as follows:-

"25N. Conditions precedent to retrenchment of workmen.- (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

(2) An application for permission under sub-section

(1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen 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.

(4) Where an application for permission has been made under sub- section (1) and the appropriate Government or the specified authority 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.

(5) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of subsection (6), be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(6) The appropriate Government or the specified authority 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 (3) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

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

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

(8) 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 establishment 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 establishment for such period as may be specified in the order.

(9) Where permission for retrenchment has been granted under sub-section (3) or where permission for retrenchment is deemed to be granted under subsection

(4), every workman who is employed in that establishment immediately before the date of application for permission under this section shall be entitled to receive, at the time of retrenchment, 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."

3. Section 25-O deals with procedure for closing down an undertaking. The word 'undertaking' would include an industrial establishment which is a factory, mine or plantation. Section 25-O reads:-

"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 Government, 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 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 sub-section, 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."

4. Sections 25-Q and 25-R are charging sections which deal with penalty for illegal lay off and retrenchment without previous permission and penalty for closure respectively. Section 25-R prescribes that any employer, who closes down an undertaking without complying with the provision of Sub-Section (1) of Section 25-O shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs.5,000/- or with both. The provision prescribes enhanced punishment of one year for any employer who contravenes an order refusing to grant permission to close down an undertaking under Sub Section (2) of Section 25-O or a direction given under Section 25-P.

5. Section 25-S makes certain provisions of Chapter VA to apply to an industrial establishment to which Chapter VB applies. Thus are attracted the provisions of Section 25-B, 25-D, 25-FF, 25-G, 25-H and 25-J falling in Chapter VA.

6. The Haryana Government, Law & Legislative Department issued notification dated November 03, 2016 enforcing law passed by the State Legislature called the Haryana Act No.31 of 2016 titled "The Industrial Disputes (Haryana Amendment) Act, 2016" further to amend the 1947 Act in its application to the State of Haryana. To become law, the State Act had to receive the assent of the President of India which approval was given on September 10, 2016. By this amendment, for the words "one hundred" the words "three hundred" were substituted in Sub-Section (1) of Section 25-K of the 1947 Act. A new proviso was inserted:-

"Provided that the State Government may, if satisfied that maintenance of industrial peace or prevention of victimization of workmen so requires, by notification in the official Gazette, apply the provisions of this Chapter to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which less than three hundred workmen, but not less than one hundred, as may be specified in the notification, were employed on an average per working day or during the preceding twelve months.

Kuldip Jain, Secretary to Government, Haryana Law and Legislative Department"
(emphasis added)

7. Before we come to the discussion on the controversy involving closure of the undertaking by the petitioner, the provisions of Section 25-FFA falling in Chapter VA under which notice for closure was given requires attention and those are reproduced below"-

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

undertaking:

Provided that nothing in this section shall apply to-

(a) an undertaking in which -

(i) less than fifty workmen are employed, or

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

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

(2) Notwithstanding anything contained in sub-section

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

8. It is within the above statutory framework that the case has to be considered in challenge to the notification dated August 27, 2018 refusing permission to the petitioner to close down its Plant/Unit situated in Manesar, District Gurugram, Haryana. The authorities have applied the provisions of Chapter VB of the 1947 Act on the petitioner as its industrial establishment employs less than 300 workmen but not less than 100 workmen during the preceding 12 months. The application filed by the petitioner under Section 25-FFA of the 1947 Act in Form-Q read with Rule 75-A of the Rules framed under the 1947 Act for closure disclose the number of persons whose services would be terminated on account of such closure of the undertaking, if sustained, is 168 workers. The workers' union is present in Court at the hearing on caveat opposing the petition.

9. The brief facts of the case leading to the notice of closure application under Section 25FFA are as follows:-

10. The petitioner-Company was incorporated as a private limited company on December 27, 1999. The unit in dispute at Manesar was set up in 2005. A fresh Certificate of Incorporation was issued consequent upon conversion to public limited company by the Ministry of Corporate Affairs, Government of India. The name and style was changed to Endurance Technologies Limited (CN). The certificate issued by the Registrar of Companies, Mumbai under Section 18 of the Companies Act, 2013 is on record. Together with the statement of reasons, the application in Form-Q filed under Section 25 FFA was served on the Labour Commissioner, Haryana, the Labour-cum-Conciliation Officer, Gurugram, the Employment Exchange, Sector 32, Gurugram and to the Endurance Employees' Union (Registered) addressed to Sh. Rajbir Singh the Union President on June 30, 2018 although the Union President refused to receive it. The application with the statement of reasons for closure annexed with the application was to close

down the Plant/Unit at Manesar.

11. To briefly say, the statement of reasons elaborates that the Company is engaged in manufacturing and selling of aluminium die casting products, suspensions, transmissions and breaking systems. The Company has generally followed footprints of major automotive manufacturers (OEM) to set up its manufacturing plants. The company started its first plant in 1985 at Aurangabad in Maharashtra. The company supplied automotive components predominantly in the two and three wheeler industry. The company decided to set up an independent manufacturing plant for aluminium die casting, machining and painting products on plot No.400, Sector 8, IMT, Manesar, Gurugram in the year 2005. The company states that this investment was based on getting orders from renowned OEM customer located in Manesar viz. Honda Motorcycles and Scooters India Private Limited. It was considered that Manesar will have large potential of supply to automotive manufacturers to support its business venture. The management expected that the plant would have significant work orders for its profitable growth over a period of time.

12. To meet demands, the management opted to buy an adjacent industrial Plot No.401 expecting future business expansion from OEM customers in that region. They assert that the plant with reference to the application for closure was an independent entity. It has separate license including excise and sales tax registrations which changed with the advent of GST and new registration certificates were obtained from the authorities concerned. The first invoice from this plant was issued in May 2005. The management continued to be an exclusive supplier to HMST company till the year 2009. Company asserts that from 2009 to 2012 the region underwent massive disturbances from labour activities and OEM's like HMSI, Hero Motor Corporation, Maruti Suzuki India etc. were affected. Those activities led to the birth of the Union and its registration in the Companies' unit/plant as well. They say that the management tasted the heat of labour unrest and disturbance. Business was affected by labour activities with workers resorting to lower duty period which very frequently disrupted the companies' customer schedules. The company repeatedly failed to meet the demands of its OEM customer requirements with regard to quantity, quality and delivery schedules. Since the entire region became a hub of unionized restrictive activities the OEM customers of the company started allocating work orders to different geographical locations. The OEMs created alternative suppliers of die casting exchanging products in view of union activities resulting in erratic supply of goods. The plant witnessed continuous de-growth from FY 2013-14 to FY 2017-18. The plant did not have cash liquidity and was not able to make profits and on the other hand was making huge losses during this period. The existing business did not show growth on expected lines and the future of the unit had negative trend.

13. In these circumstances, the company was constrained to sell the adjacent industrial Plot No.401 in the year 2015-16 to make revival efforts and to

generate additional funds which declined in production opportunities of business which substantially dropped and the aggressive union activities internally and externally were gaining ground with constant demand for increase in wages. Frequent threats were resorted to by the workers/Union to strike/go slow and the company unable to meet the customer schedules and deadlines in order to fulfill the workers' demands that compelled management to agree to huge abnormal wage increase beyond its capacity. Copies of three wage settlements signed by the Union during the years 2009-2015 were enclosed as Annexures 4 to 6 with the application. The graphic reflection of wage hike versus drop in sales and market demands during each of the three settlements was appended as Annexure 7 to the statement of reasons. The management says that with mounting losses and loss of business and no future prospects to run the plant became a challenge. They assert with the OEMs migrating to other geographical locations to source products significantly reduced the order book of the plant at Manesar. Companies like Bosch stopped placing orders on the company in the year 2016-17 owing to quality, productivity and timely delivery issues. The company has lost hope for the future from the plant in dispute. It has been continuously running in losses and there appears to be no hope of becoming profitable in future. For eight years they have tried to make the plant viable but failed with no choice other than to reconcile with the fact that operations in the plant would never be profitable. It had become economically unviable. The company manufactures products for OEM customers based on their dies etc. provided to the company, which cannot be sold in the open market or to other customers. They pay wages more than four times of the minimum wages notified in the State of Haryana. The Union has lodged additional wage hike demand notice dated May 19, 2018 knowing well about the state of affairs of the company. This is adding fuel to fire and the future of the unit is doomed. The plant employs 168 workmen. The company has also 59 employees in both managerial and supervisory categories. In these circumstances, they applied for permission premised on the provisions of Chapter VA of the 1947 Act in view of the notification effective from November 03, 2016.

14. Accordingly, the management asserts that it is not required to comply with the provisions of Chapter VB of the 1947 Act. In view of the statement of reasons, the company intends to close down the operation of the Manesar unit on the expiry of 60 days from the date of notice in compliance with the provisions of Section 25 FFA of the 1947 Act. They assert that the decision to close down manufacturing operations in the disputed unit/plant is genuine and adequate. If the unit/plant is generating losses, employer is not expected to continue business. Even if the financial situation of the company is good, it need not run the unit to continue to suffer losses. The management cannot "Rob Peter to pay Paul".

15. In refutation of the reasons of closure by the management the Endurance Employees' Union has lodged its protest in writing dated July 11, 2018 against closure in their statement addressed to the Labour Commissioner, Haryana. They

have assigned reasons in their objections why permission should be refused.

16. The Union was put to notice by the appropriate Government to respond to the application and statement of reasons presented by the company. The workers assert that the 1947 Act is a social welfare legislation crafted to save workmen from exploitation and victimization at the hands of employers. The very essence of the 1947 Act is to secure social and economic security to workmen toiling in factories. They criticize the Government notification amending law by changing ceiling limits. They reveal that the petitioner company is a multidisciplinary solution provider of advanced automotive components including proprietary products to leading OEMs across India and Europe with approximately 18 plants in India and 8 plants in Europe and as per balance sheet there is a total income growth of 11.3% to Rs.65,670 MN in Financial Year-2018 with share prices which started from Rs.400 at a time when this plant had started its operation in 2005-06 and presently commands share price of Rs.1480 per share approximately. Moreover, as per their knowledge 48 patent applications are pending in all 4 product divisions and even the company has acquired 29 acres of land in Aurangabad to develop a test track which will be ready in 2018. Further, the company is planning to increase its after-market business from 4% of domestic sale to 10% of domestic business and as per knowledge the revenue sale of after-market of the company is increasing year by year and all this data and information was shared with the workmen

at the time of open house sessions in the plant held from time to time, so mere statement by the petitioner company that there are facing financial difficulties and unavoidable circumstances which compel them to close this plant is absolutely absurd and "totally a mere cooked up story just to devoid the actual fact and to put into starvation and on roads the workmen who are working in the said plant from ages" by triggering section 25 FFA in consonance with the amendment made by virtue of notification dated 16.03.2016 issued by the State Government, Haryana without applying their mind and by doing favouritism to industries and by doing active victimization of workmen employed in various plants of Haryana which is very much evident from the fact that petitioner company had taken a factory license in the year 2018 duly approved by the Government of Haryana to engage 750 workmen and which also include piece-rate workers in the factory, so the reasons stated in the said notice is a "totally blatant story" created by the petitioner company to take the benefits of amended section 25 which is itself ultra virus and palpably illegal. Copy of the balance sheet and a photocopy of the detail of profit earned by the petitioner company and other financial details were enclosed as Annexure-2 (Colly) with their objections.

17. They have denied as totally wrong and false the statement of reasons assigned by the management to justify closure. They refer to certificate of appreciation dated June 04, 2018 and February 21, 2018 of company's performance in 2013, 2014, 2017 and 2018 from their OEM suppliers (Honda)

confirming quality management system, daily delivery compliance and capacity expansion, process of innovation and loss deduction as "A Grade". Therefore, the management's assertion that plant/unit is economically bad is wrong and liable to be rejected. Union states that action of management is not an intended closure but is a strategically well planned move to shift various machineries/ mouldings to their Pant Nagar plant making the same components which were primarily being produced by the workmen at the Manesar plant. They say that the management had assured the Union that nothing would happen to the plant and new automatic machines in phase-wise automation shall be set up in the plant and will be continued in production. The management had set up a warehouse in FY 2018 and from June 2018, Pant Nagar plant directly supplies products from plant to warehouse and supplies those to the OEMs. The arrangement which was direct in the plant is being made indirectly to show that the plant is financially unviable. The management should be directed to supply copies of Sales Tax/VAT/GST/Input Credit return and also copies of bills/purchase orders/ demand-supply documents for the last three years which clearly demonstrate the real picture of the management and their malafide intent to close down the unit/plant while the company thrives pan India and abroad. They challenge the notice of closure being in complete violation of Sections 25-FFA and 25-O and the Management liable to punishment under Sections 25-R and 25-U of the 1947 Act. A factory license of 750 workers has been issued to the management which speaks for itself of continued hope. They assert that till March 2018 more than 300 workmen including piece rate workers have been engaged. This fact can be proven from ESI records in case directions are issued to the management and the department concerned to submit evidence in this regard. They have also pleaded that the workers likely to be dislodged should be given alternative employment till they are not taken back in service.

18. With both views in hand, the dispute was taken up by the Deputy Labour Commissioner who held meetings with the parties to find solutions, the last of which was held on August 01, 2018. The office bearers of the Union including the President, Rajbir Singh were present in the discussions. The management proposed to pay Rs.4 lac as incentive amount in addition to the workmens present legal dues on closure to all regular workers likely to be affected by any decision. The workers suggested that as the business of Manesar plant is shifted to another plant, the workers can be transferred to another plant but no consent on this could be arrived at between the parties.

19. When the matter was remitted to be placed before the Assistant Labour Commissioner, Gurugram he made a report on the ground situation noticing the two sides of the contentions of the employer and employees. After noticing the contentions, the ALC framed the following issues which read as follows:-

"(i) Whether the closure being done by the Industry is a closure transfer/ relocation of business or is closure of its business?

(ii) Whether in the provisions of Section 25K of the I.D. Act, the contract

workeres are to be included in the number of workers or not?

(iii) Whether the closure being done by the Management is a real closure or merely a ploy to get rid of the workers?"

20. On the above issues the following conclusions were made by the ALC:-

"Conclusion:

In as far as issue No. 1 is concerned, it is submitted that the above transfer or relocation of business does not come in the definition of closure of business.

In as far as issue No.2 is concerned, the Hon'ble Supreme Court in the case of Maharashtra General Kamgar Union Vs. Indian gum Industries Ltd., 2008-II LLJ 827 (2008) 3 SCC 127), this issue has been kept open as to whether as per the provisions of the Industrial Disputes Act, while computing the number of workmen, the contract labour is to be included or not.

In as far as, issue No. 3 is concerned, as to whether the closure resorted to by the Management is real or not, can only be decided by the Labour Court and thus this dispute can be sent to the Labour Court by way of appropriate Reference. A Division Bench of Calcutta High Court in the case titled Walford Transport Ltd. Vs. State of West Bengal, 1979 Lab. IC, 70-72, it has been held that prior to the expiry of the notice period or thereafter, there is no bar on the powers of the Government to refer the issue as to whether the closure is real or not and to adjudicate the same, this matter can be referred to Industrial Tribunal for adjudication.

The Orissa High Court also in the case The Management of M/s Town Bidi Factory Cuttuc Vs. presiding officer, Labour and others 1990, LLJ, 55 has also decided on the same line.

The disputes regarding closure fall in Schedule-

III item No. 10 of the I.D. Act and thus the same can be referred to the Industrial Tribunal for adjudication."

21. The ALC, Circle-6, Gurugram made the following suggestions:-

"Suggestions/recommendations:

Keeping the above said factual position in view it is debtable as to whether the closure being done by the Industry is actual or not and as to whether the Management is indulging in unfair labour practice by way of business transfer/relocation on the pretext of business closure.

Therefore, taking it to be a deemed dispute between the two parties, the following is proposed to be referred.

1. Whether the closure of the Industry being done by the Industrial Unit is closure transfer/relocation of business or closure of business?

2. Whether while counting the number of workers as per provisions of Section 25K of the I.D. Act, the number of contract labour is also to be counted in the number of workmen or not?

3. Whether the closure being effected by the management is real or only a ploy to get rid of the workers?

4. Relief to which the workers are entitled. The above reference may be made to the Industrial Tribunal-cum-Labour Court, Gurugram. The report is sent for further necessary action. It is further submitted that in case on the basis of the submissions made on behalf of both the parties, the Government reaches to a conclusion that on account of the closure, there may be unrest of workers and taking the present case as a base, the other Organizations may also do the same as a result of which there is apprehension of the exploitation of the workers then the Government may as per the proviso to sub-section (1) or 25K (Haryana Amendment), apply the provisions of Chapter V-B on this Industrial Unit."

22. In short, he suggested that the factual position was debatable whether the closure is real-'actual or not'. Whether the management is indulging in unfair labour practice by way of business transfer/relocation on the pretext of business closure and the issues required to be referred for adjudication by the Industrial Tribunal-cum-Labour Court, Gurgaon. He left it to the appropriate Government opining that if it reaches to a conclusion that on account of the closure, there may be unrest of workers and by taking the present case as a base, the other organizations may also do the same as a result of which there is apprehension of exploitation of workers, then the Government may apply the provisions of Chapter VB on the industrial unit of the Establishment. The report is dated August 09, 2018. The Field Officers' report by ALC-6 keeping in view the representations submitted by the Trade Union Council, a Joint Council of All Trade Unions of Gurugram consisting of AITUC, INTUC, HMS, CITU, AIUTUC, Maruti Suzuki Sangh and some independent Trade Unions regarding the misuse of Section 25-FFA by the employer, the Deputy Labour Commissioner submitted his report to the Government advising that in the present case, there is a great fear and apprehension that a huge labour unrest can occur if the management of the petitioner-Company is not covered under Chapter VB of the 1947 Act. Therefore, it was recommended on August 09, 2018 by the Deputy Labour Commissioner that the present application may be denied and a notification may be issued to cover the said unit under Chapter VB of the 1947 Act. This has been approved by the Principal Secretary to Government, Department of Labour on August 09, 2018. The approval of the Minister-in-charge was obtained on August 24, 2018 and that is how the impugned notification dated August 27, 2018 was born declining the request of the petitioner of intended closure which, if granted, is most likely to disturb the industrial peace and harmony in the region. This result was achieved by invoking the provisions of Chapter VB of the 1947 Act against the management as it employed less than 300 workers but not less than 100 during the preceding 12 months. A short order under challenge is reproduced

below:-

"NOTIFICATION

The 27th August, 2018 No. 29020 Whereas, M/s. Endurance Technologies Limited, Plot No.400, Sector-8, IMT Manesar, Gurugram, has submitted an application dated 29.6.2018 under section 25-FFA of the Industrial Disputes Act, 1947 informing the appropriate Government about its intention to close down its industrial establishment w.e.f. 31.8.2018.

Whereas, on receipt of said application, an enquiry was got conducted and on perusal of reports thereto shows that intended closure of M/s Endurance Technologies Limited, Plot No. 400, Sector-8, IMT, Manesar, Gurugram, is most likely to disturb the industrial peace and harmony in the region.

And whereas on the basis of said reports, the Governor of Haryana is prima-facie satisfied that intended closure by M/s Endurance Technologies Limited, Plot No. 400, Sector-8, IMT, Manesar, Gurugram is likely to disturb the industrial peace and harmony in the region.

Now, therefore, in exercise of the powers conferred by the proviso added by the Government of Haryana in section 25K of the Industrial Disputes Act, 1947 (Haryana Amending Act No.31 of 2016), the Governor of Haryana hereby applies the provisions of Chapter V-B of the industrial Disputes Act, 1947 to M/s. Endurance Technologies Limited, Plot No. 400, Sector-8, IMT Manesar, Gurugram as the industrial establishment is employing less than 300 workmen but not less than 100 workmen during preceding 12 months.

Dr. Mahavir Singh,

Principal Secretary to Government of Haryana,

Labour Department."

(emphasis supplied)

23. Mr. Gurminder Singh, learned Senior counsel appeared for the petitioner-Company has argued extensively that the impugned notification is legally and factually bad and deserves to be set aside for which he seeks a writ of Certiorari as it brings the management within the purview of Chapter VB of the 1947 Act by resorting to proviso added to Section 25-K of the 1947 Act by the State of Haryana.

24. Contends that there exist two provisions for closure of the unit i.e. Section 25-FFA falling in Chapter VA and applicable to units employing less than one hundred workers wherein the pre-requisite for closing a unit is service of notice upon the appropriate Government at least 60 days prior to the effective date of closure; the other provision is Section 25-O in Chapter VB of the ID Act which is applicable to larger establishments employing over one hundred workers. The provision lays down stringent requirements initiated by way of an application for

permission from the appropriate Government prior to closure. The State of Haryana took a conscious decision by way of amendment dated November 03, 2016 to Section 25-K relevant to application of Chapter VB substituting the numerical strength from "one hundred" to "three hundred" in order to be covered under Chapter VB, and further added a proviso, whereby the State Government, may, if it records its satisfaction that maintenance of industrial peace or prevention of victimization of workmen so requires, by notification, apply the provisions of Chapter VB to establishments employing less than three hundred, but not less than one hundred workers. On the strength of the amendment to substantive provision of Section 25-K with increase of number from one hundred to three hundred, the petitioner employing 168 workers became amenable to the provisions of Section 25-A and thus was required to serve only notice upon the appropriate Government prior to closure which was done on June 29, 2018 along with a detailed statement of reasons therein attaching necessary audited accounts and documents showing the abysmal financial situation prevalent at the unit and giving bona fide reasons for its closure which right of closure is a fundamental right protected by Article 19 (1) (g) of the Constitution as explained by the Supreme Court in the leading judgment in *Excel Wear v. Union of India and others*, (1978) 4 SCC 224. The learned Senior counsel refers to paragraph 8 of the judgment to strengthen his case, which reads as follows:-

"8. M/s. Lalit and Bhandare did not dispute the proposition that the right to close down the business is an integral part of the right to carry on the business. They, however, strenuously urged that the restrictions imposed by the impugned law are quite reasonable and justified to put a stop to the unfair labour practice and for the welfare of the workmen. It is a progressive legislation for the protection of a weaker section of the society. Mr. Deshmukh, however, did not accept that a right to close down a business is an integral part of the right to carry on any business. He submitted that a right to closure is appurtenant to the ownership of the property, namely, the undertaking. The total prohibition of closure only affects a part of the right to carry on the business and not a total annihilation of this. The restriction imposed was in public interest and there is a presumption of reasonableness in its favour. Mr. Nadkarni endeavored to submit with reference to the high philosophies of Jurisprudence in relation to the social and welfare legislations, as expounded by renowned jurists and judges abroad, that the action of closing down a business is no right at all in any sense of the term. Mr. Ramamurthi while supporting the main arguments put forward on behalf of others led great stress in the point that the law is protected by Article 31-C of the Constitution, a point which was merely touched by them but was seriously taken over by Mr. Ramamurthi."

25. He draws attention to the representation of the Workers' Union against the impending closure, stressing on victimization of workers and alleging that the petitioner under the garb of closure of unit was in fact transferring business to another plant. It is further an admitted fact, that the workers have refused an additional compensation of Rs.4 lac per worker, being offered by the petitioner,

over and above the statutory compensation available under Section 25 FFF.

26. In view of the above facts and circumstances, the Assistant Labour Commissioner, Circle-6, Gurgaon had submitted a report dated August 09, 2018 to the Labour Commissioner, Haryana recommending therein that in case the Government reaches the conclusion that on account of closure, there may be unrest of workers then taking the present case as a base, other organizations may also do the same and if that happens, and there is apprehension of exploitation of the workers, then the Government may as per proviso to Section 25FFA apply the provisions of Chapter VB to the petitioner's unit.

27. On the basis of the above report of the labour department the Commissioner-cum Principal Secretary to Government, Labour Department has by ipsi dixit and without due application of mind passed the impugned Notification dated 27/28.08.2018, which suffers from the following infirmities as addressed by the learned senior counsel:-

1. The impugned Notification has been passed without any independent application of mind, and by placing reliance on report of ALC, which is purely a recommendation and not a fact finding report. The ALC is not the Appropriate Government and therefore in the suggestion/recommendations made had duly forwarded the report for the State Government to record its independent satisfaction for applying Chapter V-B of the ID Act.

2. In accordance with the proviso, a Notification to bring an otherwise exempted establishment under the purview of Chapter VB, has to be issued by the State Government, only if satisfied with either of the conditions provided. Therefore, such satisfaction has to be subjective in nature, and has to be supported by reasons recorded in writing after giving due opportunity to the affected parties, which is conspicuously missing. In fact there is absolutely no application of mind by the State Government upon the recommendations made by the ALC.

3. The notings on the file clearly depict that the Labour Commissioner for whom the report of ALC dated August 09, 2018 was in fact intended is shown as "away", and the order by way of notification has been issued by the Principal Secretary in a capricious manner, in a mechanical manner by a cryptic order, without adverting to the statement of reasons which has been given by the Petitioner unit for closing an unviable unit, which is its fundamental right.

4. The order bringing an establishment under purview of Chapter V-B, can be made in only either of the given two conditions entailed in the proviso to Section 25-K i.e. maintenance of industrial peace or victimization of workmen. In this regard, it is noteworthy to point out that it is the admission of the workers union that no strike, unrest, lockout has been resorted to, which rules out the question of any apprehension of adverse effect on industrial peace. The workers have alleged victimization by alleging that the petitioner under the garb of closure is actually transferring the business to another unit, while at the same time admitting refusal to accept additional compensation offered by the petitioner. In

fact in the facts of the present case the State Government has issued the said Notification solely on the ground of apprehension of breach of industrial peace thus ruling out the ground of victimization. Considering the said facts, the Principal Secretary has not commented on the actual issues raised by the petitioner or the workers union, and merely issued impugned Notification on the basis of an apprehension that the intended closure is likely to disturb industrial peace and harmony in the region.

5. The Principal Secretary has erred in whimsically applying the proviso to Section 25 K to the petitioner for bringing the unit under the purview of Chapter V-B, on a mere apprehension and likelihood of disturbance of industrial peace, without even recording a shred of evidence to justify such apprehension. In fact in a completely callous manner the reliance has been placed upon the report of the ALC/DLC wherein instead of making out any tangible grounds for recording the finding of disturbance of industrial peace arising from the closure of the petitioners establishment, reliance has been placed under conjectures that the closure would lead to other units following the same path. This vague apprehension would not be a reason for the State Government to deny the legal fundamental right of the petitioner to close down its establishment in accordance with law.

6. That it is settled law that when the legislative intention of the State Government is clearly borne out from the fact that it had sought to afford larger autonomy for closure of an establishment by raising the number of minimum workers from 100 to 300, which would qualify for application of Chapter V-A the proviso which is exclusive in nature would have to be construed for strict compliance. The proviso cannot be operated to defeat the purpose of the main section and the legislative intent much less when it is kicked into operation on the basis of vague and unsubstantiated grounds.

7. As a matter of good will and a fair compensatory gesture the petitioner company has taken a decision in principle to pay the compensation to the workers at the earliest as they are entitled under section 25FFF but in addition to that they have also raised the compensation offered @ Rs.4 lakhs before the authority to 6 lakhs per worker. This has been done to close the matter in a graceful manner in the interest of the workers and also of industrial Health."

28. Learned Senior counsel further cites the law in *M/s. Avon Services Production Agencies (P) Ltd. v. Industrial Tribunal, Haryana and others*, (1979) 1 SCC 1. The principle laid down that termination upon closure is not the same as retrenchment and issue of compensation in such termination would fall under Section 25 FFF which is not a pre-requisite and thus termination as a result of closure is neither illegal nor invalid.

29. Learned Senior counsel cites the law in *Management of BASF India Ltd. v. State of Bihar and others*, SLP (C) No.11892 of 2000 and the decision of Division Bench of the Jharkhand High Court in *Management of BASF India Ltd. v. State of*

Bihar and others, 2001 (3) CLR 1034. It is not open to the Industrial Tribunal to determine whether a reference made to it is justified or legally valid. Upon receipt of notice of closure under Section 25 FFA it is not open to the State to make reference to Industrial Tribunal questioning justifiability of closure. Reference to Industrial Tribunal de hors Chapter VA and particularly Section 25 FFA is without jurisdiction. The requirements under Section 25 FFA are not mandatory.

30. The he cites the law in Azad Kamgar Union v. Metagraphs Pvt. Ltd., 2001 (2) CLR 753 urging that the only object behind Section 25 FFA is to prevent sudden closure. The requirements under it are not mandatory and failure to comply would not render closure illegal. Compensation can be paid afterward. Employers cannot be blamed for refusal of employees to accept compensation and other dues.

31. Learned Senior counsel cites the law in Valliappa Textiles and Allied Companies Workers Union, Hejjala, Bangalore v. State of Karnataka by its Secretary and another, 2006 (13) SCT 215. The Court accepted bona fide plea of management upon showing that despite best efforts and culmination of several reasons, financial as well as labour activities business could not be run leading to closure is not to be questioned in court.

32. Learned Senior counsel cites the law in Britannia Industries Ltd. v. Maharashtra General Kamagar Union, 2009 (12) SCT 517 arguing that so long as closure is shown to be genuine and bona fide, the same should not be interfered with. Right to carry on or close down a business is a fundamental right, controlled by specific reasonable restrictions. Aim of industrial law is primarily to maintain industrial harmony.

33. Learned Senior counsel places reliance on dicta in Workmen of the Food Corporation of India v. Food Corporation of India, (1985) 2 SCC 136. Contract labour is not to be considered as part of regular workers, since they are not employed directly by the management/employer. For industrial law purposes there must be direct relationship between the employer and employee. This goes for piece rate workers.

34. Learned Senior counsel also cites the law in Siemens Limited and another v. Siemens Employees Union, (2011) 9 SCC 775. Unfair labour practice must have an element of arbitrariness and unreasonableness to be established on record. Specific allegations of victimization must exist before the issue can be entered in trial arena.

35. Per Contra, Union argues that the decision to close down the unit/plant at Manesar is in colourable exercise of employers' right which the impugned order has rightly curtailed. They have supported the impugned order as legal and valid and the protections afforded by it to the 168 members of the Union and employees of the management as salutary. The statement of reasons furnished by the petitioner-Company and those of the workers in opposition to the reasons

assigned by the management are seriously disputed facts which cannot be resolved in writ jurisdiction and, therefore, no opinion should be expressed on the pleadings as the only concern of this Court is confined to judicial scrutiny of the decision-making process which led to the impugned notification dated August 27, 2018.

36. The foremost question is as to the material available to the Principal Secretary to Government of Haryana, Labour Department as the appropriate Government on which the order rests while denying permission is that in case permission is granted it is most likely to disturb the industrial peace and harmony in the region. The fear expressed by the Deputy Labour Commissioner that other industries in the region of Gurugram may follow suit and, therefore, Chapter VB should be invoked by the Government and has rightly been. By the very terms of the order on its face, the jurisdiction to prevent victimization of workmen has not played any role in the decision making process and in the impugned notification. The satisfaction to be recorded is of maintenance of industrial peace and what might likely to disturb it. Without resort to the proviso introduced by the notification dated November 03, 2016 the case would have to fall back on Section 25 FFA for which only 60 days' notice is required to be served on the appropriate Government and on the workforce/union, if any. The Assistant Labour Commissioner in his report which formed basis of the material before the Government has himself concluded that the issue is debatable whether the closure is actual or management is indulging in unfair labour practice by way of business/transfer re-location "there may be unrest of workers". He has made the present case a "base" to suggest that other organizations may also do the same as a result of which there is apprehension of exploitation of workers and for this the Government may apply the provisions of Chapter VB. The Deputy Labour Commissioner in his noting dated August 09, 2018 submitted to Government has based his recommendation on the misuse of Section 25 FFA by the employer and because of this apprehended misuse "there is a great fear and apprehension that a huge labour unrest can occur if the management M/s Endurance Technologies Limited" if it is not covered by Chapter VB. On these premises, he has recommended denial of application and has issued the impugned notification to cover the said unit under Chapter VB of the 1947 Act.

37. The original record produced before me by Mr. Wasu has been perused at p.16 where the Principal Secretary to Government, Labour Department has recorded in his hand that the recommendation may be approved. This has led to the order on a mere apprehension.

38. On a reading of the order as I understand the impugned order can be categorized as a non-speaking order. It is vague and cryptic order which is based on a personal opinion without there being any tangible and subjective grounds available on record for recording finding on disturbance of industrial peace arising from the closure of the petitioner's establishment. If other organizations

follow the same path the petitioner cannot be disadvantaged in the realm of conjectures and fancies. In any case, the right to do business includes the right to shut it down or a part of it or a unit which is not financially integrated with any other business the management might do. The work of the authorities is like deciding to dismiss the application and then findings ways and means to support it. The easiest being resort to the proviso to Section 25-K introduced by the State of Haryana in 2016.

39. I also do not see any independent application of mind in the authority that passed and issued the impugned notification. The satisfaction recorded must be subjective in nature but based on objective criteria and data supported by reasons recorded in writing after giving due opportunity to the effected parties, which opportunity Mr. Gurminder Singh, learned Senior counsel rightly submits is conspicuously missing. There is breach of principles of natural justice and the rule of audi alteram partem that on such a grave matter, parties likely to be effected are not heard. The notification has serious repercussions not only on the fate of the petitioner-Company but also on the 168 workers.

40. The impugned notification is presumptive, arbitrary and unreasonable. The newly added Proviso to Section 25-K of the Haryana Act envisages only two situations, that is, maintenance of industrial peace or prevention of victimization of workmen and if it so requires, can notification be issued. There is no empirical data collected by the respondent authorities to exercise satisfaction to act under the proviso as to how the entire region will plunge into disturbance of peace. If a case under the Proviso to Section 25K is not made out with any clarity, the petitioner can well fall back of Section 25FFA of the Act under which provision the notice was served of closure. There is yet another reason why the impugned notification cannot be sustained. The statement of reasons presented by both sides have neither been noticed nor dealt with which was virtually the foundation of cases on merits on both sides. Pleadings have been passed over without understanding them. The conclusions drawn on the issues framed by the ALC-6 in his report are facile and flimsy.

41. I also see no reason why a ship should be sunk with its crew. The fundamental rights of the petitioner have to be guarded and balanced equitably with the industrial rights of the workers facing threat of retrenchment. Compensation packages have been offered by the management to the affected workers. The management has raised the offer of Rs.4 lac to Rs.6 lac per worker. If the workers deserve more than this, it would be open to them and the management to sit together and negotiate an increase with the spirit of 'give and take'.

42. In the facts and circumstances, this petition is allowed. The impugned notification dated August 27, 2018 is quashed as arbitrary, unreasonable and discriminatory besides being in violation of the petitioner's fundamental rights. It will be open to the State Government to pass a fresh order in accordance with law.

43. However, the following directions are issued pro tem for consideration of the disputants and the authorities:-

1. The management will renegotiate compensation packages of the 168 workers dependent on length of service which is just and adequate over and above payments fixed under the Act.
2. Management would consider offering alternative employment to these 168 workers wherever possible, for which they may ask options.
3. Assistant Labour Commissioner-6, Gurugram will oversee the negotiations of points 1 & 2 in the event they take place.
4. Assistant Labour Commissioner-6, Gurugram will visit the unit/plant where these 168 workers served and make a report to this Court at the end of six months of his findings whether closure was genuine and bonafide in the disposed of case for the perusal of the Court.
5. These directions will, however, remain subject to fresh orders as may be passed by the State Government in view of this order.
6. In case of none of the eventualities, refer the dispute for adjudication.