**(1963) 06 MAD CK 0001**

**In the Madras High Court**

**Case No :** O.S. App. No''s. 4 to 7 of 1962

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| Sri Jayajothi and Co. | APPELLANT |
| Vs | |
| The Official Liquidator and Another | RESPONDENT |

**Date of Decision :** 28-06-1963

**Acts Referred:**

Companies Act, 1956 — Section 445(3)
Industrial Disputes Act, 1947 — Section 25FFF

**Citation :** AIR 1964 Mad 158 : (1963) 7 FLR 389 : (1963) 2 LLJ 739

**Hon'ble Judges :** Ramachandra Iyer, C.J;Venkataraman, J

**Bench :** Division Bench

**Advocate :** Govt. Pleader and G. Ramanujam, for the Appellant; The Official Liquidator and K.V. Sankaran, for S. Ramaswami, for the Respondent

**Final Decision :** Allowed

## Judgement

S. Ramachandra Iyer, C.J.—These appeals arise out of the judgment of Kunhamed Kutti, J. declining to set aside the order of the Official

Liquidator admitting certain claims made for closure compensation and leave allowances to the workers of Sri Shanmughar Mills Ltd.,

Rajapalayam (to be referred to hereafter as the company) now under liquidation.

2. The object of the company was to carry on business as cotton growers in; ginning yarn and as spinners and weavers of cotton and silk yarn etc.

The company owns textile mills at Rajapalayam and at the time when liquidation proceedings commenced it employed about 357 workers. The

year 1957 was an unfortunate one for the company in that its financial position deteriorated and its own workers added to its difficulties by staging

what is called, ""illegal strikes"". There were seven such strikes In the year. That was not the only difficulty created by them. The company''s mode of business was to purchase cotton from merchants on credit, convert them into yarn and sell the same in most cases to those who sold cotton in full

or partial liquidation of the liability incurred in the purchase of raw material. The workers obstructed delivery of the manufactured yarn by putting

forward certain grievances real or imaginary with the result that there were few who were willing to supply cotton to the mills. On 23rd September

1957 the company gave notice of a temporary closure of the mills on account of non-availability of raw material. Five days later that notice was

converted into one of an indefinite closure of the mills. The mill was actually closed down on 29th October 1957. But It was stated even then that

the management was hoping for better times. There was nothing to indicate that the management was closing down the business permanently and

discharging its workers.

3. While matters stood thus, on 15th November 1957, a creditor of the company presented a petition to this Court, O. P. No. 297 of 1957, for

the winding up of the company on the ground that it was unable to pay its debts. while this petition was pending the workers raised a dispute as to

the justification of the closure of the business, and the Government by their order dated 3rd December 1957 referred the dispute u/s 10 of the

Industrial Disputes Act for adjudication by the Industrial Tribunal at Madras. The reference Itself proceeded on the assumption at If there had been

a closure and the only matter left for adjudication was as to the justification for it and for the assessment of monetary benefit on the basis of any

finding that the Tribunal may come to. Efforts, were however being made to rehabilitate the company The management filed a counter statement

before the Tribunal stating the circumstances under which they were obliged to close down the mills and also complaining about the obstructive

attitude of the workers which in the. main according to them was responsible for the deadlock.

Initiation of liquidation proceedings appears to have cooled down the enthusiasm of the management and no. one on their behalf took interest in the

proceedings before the Industrial Tribunal. No provisional Liquidator had been appointed at the time when the dispute was pending adjudication.

The Industrial Tribunal was not prepared to wait till something was known about the fate of the winding up petition. But it is evident that it was apprised of the attempts made in the matter of finding a satisfactory solution to resolve the deadlock in the working of the company to enable it to

resume its business. On 11th August 1958, the Tribunal passed the following order:

None has entered appearance in this reference for the management during the last few hearings. The union is represented by counsel Mr.

Sankaran and suggests that the closure may for the present be accepted as a fact and the workers awarded compensation u/s 25-FFF. In the

circumstances of this case, I agree that it is the only possible and also the proper course to be adopted and so subject to any settlement that might

take place in the winding up proceedings, the closure will be accepted as a fact and the workers paid compensation u/s 25-FFF, the proviso to the

section not applying to this case. If as a result of any such settlement, the Mills should reopen and carry on its business as before,; the present

workers will be entertained in preference to* new comers. There will be an award accordingly.

4. Before continuing the narrative, "" we wish to confess our inability to understand as to what exactly the tribunal meant by saying that the closure

may for the present be accepted as a fact"". It must be remembered that the Industrial Tribunal was called upon to decide whether the closure of

the mills was justified or not. There had been no attempt on its part to advert to and consider the reasons which led to the closure. No evidence on

the side of the workers was even recorded; yet the Tribunal found that the proviso to Section 25-FFF would not apply. Even more difficult to

understand is the conclusion that the closure should be accepted ""as a fact"".

5. As an essential preliminary to the adjudication of the reference, it was the duty of the Tribunal to find out Whether there was a closure in law.

Again if really the closure was held to be true, there would be no question of its being accepted only for the present. ""Closure Implies complete

stoppage of business and discharge of the workers thereby. It is different from a lay off occasioned by the employer''s inability to give work to his

employees on account of non-availability of raw materials, or other cause. The fact that the Tribunal contemplated the possibility of the Mills being

reopened and the business being carried on as before, would show that there was no closure. There was the contingency of a scheme being evolved and sanctioned by Court for the working of the mills. It is, however, unnecessary to pursue the matter further as we are not concerned

with the validity of the award of the Industrial Tribunal in these proceedings. The award purports only to be a contingent or conditional one and it is

made expressly subject to any settlement that may be arrived at in the course of the, winding up proceedings pending before the High Court.

Such a settlement as we shall show presently had taken place. The award itself directs that if as a result of the settlement, the mills reopen, the

workers will have to be re-entertained in preference to new comers. The learned Judge has regarded this direction as a mere recommendation by

the Industrial Tribunal. We are with respect unable to agree. In our opinion a fair reading of the award shows that the Tribunal was not inclined to

regard the stoppage of work in the mills after the presentation of the winding up petition as a closure involving discharge of the workers in the event

of an ultimate settlement. If there was to be a settlement which enabled the mills to resume its work, the direction was to re-employ the old

workers. The direction to re-employ the old workers will therefore be an inevitable consequence of the resumption of business by the company

and should be regarded under the circumstances, as part of the award or at any rate as indicating that the award as to closure compensation would

cease to have effect if there were to be a resumption of the business.

6. To resume the narrative the workers did nothing to enforce the award. On the other hand, having learnt a bitter lesson from the consequences of

their own obstructive tactics, they appear to have been anxious to cooperate in the matter of rehabilitation of the mills and securing for themselves

employment Efforts in that direction of staying the winding up proceedings however proved futile. When the petition came up for final hearing on

30th April 1959 one of the members of the present Bench passed an order directing the winding up of the company. At the same time having

regard to an earnest request made on behalf of the workers a further direction was given in the following terms:

As a number of persons are employed in the company, I consider that attempts should be made in the first instance to dispose of the mills

belonging to the company as a going concern if it can be done to the advantage of the company.

 

There is thus a clear indication that the attitude of the workers even then was that everything essential for the restarting of the mills should be made

as they were keen to secure their daily bread. Indeed a few weeks before the order directing the winding up of the company was passed, a

provisional liquidator who had by then been appointed (for the restarting of the mills) restarted the mills and the workers were taken in and mills

began to function till the provisional liquidator P. L. Ataulla handed over charge of the same on 8th May 1959 to the Official Liquidator. Under the

later orders of Court in Appln. No. 983 of 1959, the mills were leased! out to Attaullah himself to run the same on the same lines as before. The

mills continued to work thereafter, though there had been a change in the lessee.

7. An appeal was filed against the judgment directing the winding up of the company presumably with the object of utilising the time during which

the appeal would be pending to make fresh efforts to have a settlement effected with the creditors and to re-start the mills, in this attempt

everybody concerned met with success. A scheme was put forward before the appellate Court which provided that the Official Liquidator should

draw up a list of creditors as on 30th April 1959. The appellant came forward as the financier to provide the Official Liquidator with sufficient

funds for paying off the creditors as settled by him in full by four equal yearly instalments, the first instalment to commence within 4 months from the

date of the order sanctioning the scheme. As consideration for the monies to be advanced for paying off the debts of the company, it was agreed

that a lease of the mills was to be granted to the appellant for a period of ten years by the Official Liquidator on a monthly rental of Rs. 6000 which

was to be set off against the advances made.

The Court sanctioned the scheme by its order dated 29th April 1960. The memorandum which was filed as part of the petition praying for the

sanctioning of the scheme was duly recorded by the Court and the proposed lease was approved. The Official Liquidator was directed to grant the

lease to the appellant on the terms and conditions set out in clause 4 of the memorandum. The Official Liquidator was further directed not to sell

the mills and other properties of the company so long as the lessee honoured his obligations under the contract. The memorandum which formed

the basis of the ultimate order of this Court, proceeded on the footing that the workers would have to be re-employed by the company. The

relevant portions of it are:

11. Subject to the above provision, expenses necessary for the running of the mills including wages, salaries and other payments to the workers,

employees and staff of the mills shall be borne by Sri Jaya Jothi and Co.

12. The company is to pay the municipal property tax, insurance premia on the building, machinery and plant and Income Tax on the lease

amounts. Subject to this reservation all other taxes and public charges are to be borne by Sri Jaya Jothi and Co.

14. Sri Jaya Jothi and Co. is to hold a charge over the company''s properties and assets in respect, of the amounts due to it by the company, but

the charge shall take effect only after the payment in full to the creditors is completed.

17. The winding up order Is to be stayed permanently on (payment in full to the creditors by the Official Liquidator and on a report to that effect

being filed in this Honourable Court).

It will be apparent from; clause 11 of the memorandum, set out above and also from the other provisions of the scheme, that the workers were

treated as employees of the company and the obligation of the lessee was merely to pay the wages, salaries etc., due to them. The scheme does

not indicate that the workers were to take any fresh employment under the lessee. That this is so will be clear from the fact that possession of the

mills was handed over to the lessee as a going concern by the Official Liquidator. The Mills were being run from the date of the winding up petition

upto the date of the winding up order with almost all the workers; and even thereafter It continued to work. The only change brought about as a

result of the orders of the Court was that the Official Liquidator was running it through his lessee. The learned Judge appears to have thought that

the lessee of the Mills directly employed the workers of the company; he held that there was nothing to show that such employment constituted a

continued service under the company.

That question has to be considered in the light of all that has happened.

The scheme for the working of the mills was the result of a combined effort made by the company, its workers and its creditors, each one of accepting the position that it was only the continued working of the mills that would improve their position and that a liquidation would be

prejudicial to all. How best was that object to be achieved was the problem before them. Having regard to the shattered fortunes of the company,

a financier who could manage the company for a time was found essential. Such a financier, they found in the appellant. For the advances to be

made by him for payment in full to the creditors, the appellant was to have a charge over the assets of the company. He was granted lease of the

mills which obliged him to pay Rs. 6000 per mensem to the company after payment to the workers. In these circumstances, it is clear to our mind

that it will not be right to say that the scheme envisaged termination of the service of the workers by the company, and the reemployment of some

or all of them by the lessee afresh as workers under him. On the other hand, the lease was granted as that would be the convenient way of

managing the mills for a short period. Factually there was no discontinuity in the services of the workers. Secondly ''the effect of the scheme was to

stay the winding up of the company.

8. The appellant entered into possession of the mills on 12th June 1960, and it is stated that ail but fifteen. workers were taken in by the lessee.

The appellant''s case is that those 15 workers did not turn up as they had secured employment elsewhere. The respondents however attribute this

to the refusal of the appellant to re-entertain them. We are not, however, concerned in this case as to which version is true. If these workers are

willing to come back and they are not given work, they can certainly seel their remedies in appropriate proceedings. That circumstance, viz., the

non-entertaining of some workers, can have no bearing on the question whether the workers now under the employ of the appellant continued to

be the workers of the company or not. It must be noticed that although the workers were fully aware of the winding up proceedings, both before

the company judge as well as in the appeal, there was no attempt on their part to put forward their claim on the basis of the award of the Industrial

Tribunal that they were entitled to be paid closure compensation from out of the assets 6f the company. Strangely enough after the lessee had

started the working of the mills and began to make payments in accordance with the terms of the scheme, they made a claim to the Official

 

Liquidator that they were entitled to be included as creditors of the company in respect of closure compensation awarded to them under the

Industrial Tribunal''s award. That application was contested by some of the shareholders of the company and also by the lessee.

9. The question as to whether the workers were entitled to closure compensation under the circumstances mentioned above cannot be said to be

an easy one. The Official Liquidator could very well, having regard to the opposition by the shareholders, have referred the workers to agitate their

claims u/s 33C(2) of the industrial Disputes Act. The Official Liquidator did not do so. He evidently thought that in view of the terms of the award

he was bound to make the payment. He accepted the claim of the workers rejecting the contention of the shareholders that there was continuity of

service of the workers and that there was no case for payment of closure compensation. He said: ""The liquidation continues whereas there is no

continuity of business. The lease is only in respect of the factory and mills and cannot be considered as continuity of business.

We are unable to understand what precisely was Intended to be conveyed by the Official Liquidator by the order extracted above. The liquidation

proceedings were, under the terms of a scheme, which was adopted by the appellate Court, stayed. The workers were regarded as the employees

of the company. There was only a change in the manner of the doing of the business by the company. That is to say, instead of directly running the

mills the management (Official Liquidator) granted a lease of the company to the appellant. It was handed over to him as a going concern. It may

be that if the lessee was unable to perform his obligations under the lease, '' liquidation proceedings had to be recommenced but so long as the

scheme was working there was undoubtedly a continuity of the business by the company. There has been, we are afraid, a certain amount of the

mixing up of the rights accruing to the workers under a retrenchment or transfer of business and rights arising on a closure of business, involving

termination of service by the employer.

10. The learned Judge has dealt with the matter thus: ""Under Section 25-FFF, as amended, a change of employer entitles the workmen to

compensation if their services had been interrupted by reason of the transfer. On the facts and circumstances of this case, I am inclined to hold that not only had the mills been closed down within the meaning of Section 25-FFF, but there was also interruption in the service of the workmen to

there prejudice. Nor in the circumstances, am I inclined to accept the contention of the applicant that there was mo liquidation of the company for

the reason that the sale of the mills had been stayed. It is true that if the scheme is fully implemented liquidation might be averted; but as matters

now stand, it cannot be said that the company is not under liquidation, or the employment under the lessee is a continuous employment under the

company.

11. We have already found with reference to the scheme that the liquidation proceedings had been stayed and that the workers continued to be

workers under the company though the management of the mills was entrusted to the lessee (appellant) for a limited period. It must: be

remembered that the claim of the workers is laid on there having been a closure of the mills and not on the footing of there having been a

retrenchment or lay off. We are, therefore, unable to appreciate how the fact that there had been an interruption of service of the workers to their

prejudice would at all entitle them to the relief that they now seek.

12. In order to ascertain whether there had been a closure of business in the circumstances of this case It is necessary to appreciate first the

distinction between retrenchment or transfer, lay off and closure. All of these involve in one sense or another a change or stoppage of service by

the worker. As has been pointed out, by the Supreme Court in Hariprasad Shivshankar Shukla Vs. A.D. Divikar, , retrenchment means discharge

of surplus labour by the employer otherwise than by way of punishment. In that case the business continues to be run toy the same employer.

In the case of a transfer of the business there is a change of employer which will ordinarily import a fresh contract of service between the workers

on the one hand and the new employer on the other. In one sense, therefore, in the case of a transfer, the old service ceases and a new one comes

into existence. The case of closure is different. There the business stops and there is a termination of service thereby. It may be that as a result of

the stoppage of business, its undertaking and goodwill are sold to a third party and that third party employs the same workers. That will be a case

of a new contract of service between the workers and the purchaser. The old employer in such a case will have no further interest in the business.

13. The Industrial Disputes Act provides for compensation to the workmen for all the above cases. If he were to be retrenched, Section 25-F

provides for notice and compensation at a specified rate. Where there has been a termination of service by reason of the transfer of business

Section 25-FF will be applicable and compensation to be paid by the old employer to the workers at the same rate as in the case of retrenchment.

But there will be no right to compensation to the worker if the transferee were obliged under the terms of the transfer to continue to employ him on

the same terms and conditions of service as before. Section 25-FF provides that. if the services of the worker were not interrupted by reason of

the transfer of the business or the terms and conditions of service under the new employer were in no way less favourable to the workman than

before and where the employer under the terms of transfer is legally liable to pay the workman in the event of his retrenchment, compensation on

the basis of his previous service, there would be no liability for compensation on the transfer of the business.

14. A lease can in a limited sense be said to partake of the character of transfer; but we are not however concerned in this case whether Section

25-FF of the Industrial Disputes Act would be involved. The claim in the present case is on the basis of a closure. There, as we stated, business

will be at an end and if somebody else purchases the goodwill or the machinery and starts the business it will be a new business or undertaking of

the purchaser and it will have no nexus with the old one. In such a case, the old employer will be liable to pay the discharged worker compensation

u/s 25-FFF.

15. The question then is, whether there has been such a closure. The company has continued to have title to and owns the mills. The Mill is now

working with the same old employees who were being engaged when the company was directly managing the affairs of the mills. There has now

been only a lease of the factory or the mills as a going concern with an obligation on the part of the lessees to pay the wages of the workmen and

the existing creditors. That too is only for a limited period of time. It cannot be said that the company does not do any business at all. If the terms

of the scheme were to be fully implemented, it will mean that there has been no break In the, business of the company. The goodwill of the

company has not been parted with. There is no specific clause in the scheme empowering the lessee to employ his own workers. On the other

hand, clause 11 of the scheme puts the staff of the company as well as the workers in the mills on the footing as the employees of the company for

whom salaries were to be paid by the lessee. The case before us is unlike the one in S.K.G. Sugar Ltd. Vs. Sri Ali Hassan, Chairman, Industrial

Tribunal, Bihar and Others, where the lessees worked the mills not for and on behalf of the company, but on their own account having liberty to

take in outsiders as employees. But here no discharge on the workers has been contemplated under the scheme.

16. To sum up the present case cannot be said to be one of retrenchment either. Nor is it a case of transfer of business because the goodwill of the

company continues to be with the1 company. Nor as we said on this be said to be a closure, because the workers and the staff continue to be

employed. Only the Liability to pay their salaries and wages is cast upon the appellant who has taken the lease of the mills. Stoppage of service

under the circumstances mentioned above might perhaps be termed as a lay off. We prefer to express no final opinion on the matter

17. The Official Liquidator who appeared in person ''referred to Section 445 sub-section (3) of the Indian Companies Act, in support of his order.

That section provides that once the winding up order has been made it shall be deemed to be notice of discharge to the officers and employees of

the company, except when the business of the company is continued. The company judge be doubt"" passed an order for winding up of the

company but that order was expressly stayed by, the appellate judgment which approved of and adopted the schema, if the scheme were to be

worked out properly and fully, every creditor would have to be paid and the company will be in a position to resume its activities. Secondly, this is

a case in which it can be said that the business of the company is being continued. There is, therefore, no scope for holding that there has been a

discharge of the workers under the provisions of Section 445(3) of the Companies Act. Mr. Sankaran, who appeared on behalf of the workers

conceded that If it were to be held that there has been a stay of the winding up order by the appellate Court there would in law be no discharge of the workers. There has been such a stay in the present case. It would follow that there has keen no closure of the business of the mills ablest that

there might have been a lay off of the workers. Under the circumstances we are of opinion that the workers will not be entitled to any closure

compensation either on the terms of the award or otherwise. The admission of their claim by the Official Liquidator will therefore, have to be set

aside, and is accordingly set aside. The appeals are allowed but there will be no order as to costs.

 