Mazdoor Congress and ors. Vs. N.L. Bhalchandra and ors.

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Court : Mumbai

Decided On : Sep-03-1993

Reported in : 1994(2)BomCR369; [1994(68)FLR122]; (1994)IILLJ692Bom

Judge : A.V. Savant, J.

Acts : Industrial Disputes Act, 1947 - Sections 2, 10 and 25; MRTU and PULP Act, 1971 - Sections 24(2), 25F and 25S

Appeal No. : W.P. No. 467/1985

Appellant : Mazdoor Congress and ors.

Respondent : N.L. Bhalchandra and ors.

Advocate for Def. : R.K. Rele and ;S.K. Talsania, Advs. i/b and ;Talsania for Respondent No. 2

Advocate for Pet/Ap. : N.D. Buch and ;H.D. Buch, advs.

Disposition : Petition dismissed

Judgement :

A.V. Savant, J.

1. This is a Petition by the Mazdoor Congress, which is a Trade Union registered under the Trade Unions Act, 1926, and by two other workmen of the 2nd

Respondent company viz. Acme Manufacturing Company Limited, seeking to challenge the Award dated August 31, 1984 passed by the Industrial Tribunal, Bombay, in a reference made by the Government of Maharashtra under Section 10(1)(d) of the Industrial Disputes Act, 1947. The said reference was made for adjudication of the dispute set out in the Schedule to the order of reference, which Schedule reads as under:

'i) Whether the services of the workmenb1 of Wadala Unit of Acme ., Bombay, who were in the employment of the company on or about April 3, 1977 were terminated by notice dated May 4, 1977, which is effective from August 3, 1977 or any other date?

ii) If the services of the workmen are not legally terminated, what should be the quantum of compensation and/or benefits payable to them?'

The reference arose in the following facts:

2. The 2nd Respondent Company employed about 500 workmen. It was engaged in the business of manufacture of automobiles spare parts and accessories such as Valves, Push Rods, etc. An incident occurred in the morning of April 3, 1977 in which the Chairman of the Company Shri J.V. Patel and its Chief Executive Shri Ramanathan were assaulted by certain workmen. Initially, when the Chairman and the Chief Executive were in the chambers of Personnel Manager Shri Gujarati, the workers came there and wanted to raise the issue regarding the suspension of a workman name Kate. The Chairman suggested that the discussion, if any, should be held during the lunch recess or after the working hours and not during the working hours. This suggestion was not liked by the workmen, who were infuriated. They waited for the Chairman and the Chief Executive, who were taking a round in the Factory. The workmen then assaulted the Chairman Shri Patel and the Chief Executive Shri Ramanathan, both of whom suffered some injuries. On April 3, 1977 itself a notice was displayed by the Company temporarily discontinuing the operations of the Factory and unilaterally declared a lock-out on April 4, 1977. The notice graphically sets out the incident which occurred at about 09.15 A.M. on April 3, 1977 in which there was a physical assault on the Chairman and the Chief Executive, who had suffered injuries requiring medical attention. An

F.I.R. was also lodged with the Antop Hill Police Station against the two workmen viz., Kalambe and Raut.

3. On April 3, 1977 itself the first petitioner Union wrote to the Managing Director of the 2nd Respondent Company demanding withdrawal of the illegal lock-out. This was followed by another Notice dated April 8, 1977 issued by the Union to the Company. The Union alleged that the Company was indulging in unfair labour practices and, therefore, should unconditionally withdraw the illegal lock-out declared by it on April 4, 1977 and to pay to all the workmen their full back wages for the period of the lock- out. On April 14, 1977 the Company made an application purporting to be under Section 25-O of the Industrial Disputes Act praying for permission of the State Government for closure of the factory with immediate effect and also for the waiver of the time-limit of 10 days. On 22nd April, 1977 the Union filed a complaint, being Complaint (ULP) No. 87 of 1977, before the Industrial Court, Bombay praying that the lock-out declared by the Company was illegal and for a direction that the Company be ordered to lift the same forthwith. On 2nd Mav 1977. the company under Section 25-O of the Industrial Disputes Act stating that they had closed down their Wadala stating that they had closed down their Wadala Unit with effect from April 4, 1977. On May 4, 1977 the Company gave notice under Section 24(2) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, the 'said 1971 Act') of the lock-out to be effected from May 19, 1977. On May 4, 1977 itself the Company gave another notice to the State Government under Section 25-O of the Industrial disputes Act and served notices on the workmen ideally stating, inter alia, that their services would stand terminated with effect from August 3, 1977 or with effect from such date as would depend upon the order that may be passed by the State government on their application dated April 14, 1977 under Section 25-O of the Industrial disputes Act.

4. On May 12, 1977 an interim order was passed by the Industrial Court in Complaint (ULP) No. 87 of 1977 directing the Company to lift the lock-out and start the working of the factory forthwith. However, the Industrial Court stayed the operation of the order for a week to enable the Company to approach this Court. When the Company approached this Court by way of Writ Petition No. 634 of

1977, the learned Vacation Judge granted conditional stay, pending admission, on payment of wages by the Company. However, when the petition came up for admission on June 6, 1977, the writ petition was admitted, but the hearing on interim relief was adjourned to June 14, 1977. Interim relief was, however, refused on June 14, 1977, but one day's time was given to the Company. Consequent upon this, the Company put up a notice on June 15, 1977 in compliance with the order of fhe Industrial Court lifting the lock-out. On June 16, the workmen reported for work, but they were not given any work. Since there was no work to be assigned to the workmen, they were asked by the Company to report for work in the first shift only.

5. On July 29, 1977 the State Government refused to grant permission for closure under Section 25-O of the Industrial Disputes Act. A writ petition was filed to this Court challenging the constitutional validity of Section 25-O of the Industrial Disputes Act. The petitioner also approached the Supreme Court under Article 32 of the Constitution by way of Writ Petition No. 917 of 1977. The Constitution Bench of the Supreme Court took the view that Section 25-O of the Industrial Disputes Act as a whole and Section 25-R, in so far as it related to awarding of punishment for infraction of the provisions of Section 25-O, were constitutionally bad and invalid for violation of Article 19(1)(g) of the Constitution. It was held that no provision of Chapter V-B of the Industrial Disputes Act suggested that the object of carrying on the production can be achieved by their refusal to grant permission, although in the Objects and Reasons of the Amending Act, such an object seems to be there and secondly, it was highly unreasonable to achieve the object by compelling the employer not to close down in public interest for maintaining production. It was further observed that in 1972 by insertion of Section 25-FFA in Chapter V-A of the Act, an employer was enjoined to give notice to the Government of an intended closure. But gradually the net was cast too wide and the freedom of the employer was tightened to such an extent by introduction of Sections 25-O and 25-R that it has come to a breaking point from the point of view of the employers. This decision is reported in : (1978)IILLJ527SC . It was rendered on 29th September, 1978.

6. On 2nd October, 1978 the 2nd Respondent Company entered into an Agreement of Lease with New Standard Engineering Company under which compensation of Rs. 70,000/- per month was payable to the 2nd respondent towards the lease of its machinery. Though the Lease Company is a distinct legal entity, Shri Suman Patel, its Chairman, is the son of Shri J.V. Patel, Chairman of the 2nd Respondent. On October 13, 1978 the 2nd Respondent company informed the petitioner Union of the Supreme Court decision striking down Section 25-O and part of Section 25-R of the Industrial Disputes Act and the Union was informed inter alia that the Wadala Unit of the 2nd respondent was closed with effect from August 3, 1977 and that the services of all the workmen in the said Unit stood terminated with effect from August 3, 1977. Pursuant to the dispute raised by the workmen, the State Government made the reference, as stated at the beginning of this Judgment, as per the terms set out earlier.

7. When the reference was heard by the learned Member of the Tribunal, he framed certain issues and recorded his findings thereon as under:

'i) Is it proved that the Wadala Unit of the Company has ceased w.e.f. August 3, 1977 and the legal relationship of the company and the workmen employed by the company in its Wadala Unit has come to an end w.e.f. August 3, 1977.

Yes

ii) If so, whether the State Government was competent to make the present reference and whether this Tribunal has jurisdiction to entertain and adjudicate the same?

Yes

iii) Is it proved that no manufacturing activity of any nature whatsoever was carried out in the Wadala Unit of the Company on and from April 4, 1977 onwards?

Yes

iv) Whether the notice dated May 4, 1977 is bad in law, ineffective and does not in any way affect (he subsisting relationship of employer and employee between the

company and workmen?

No

v) Whether the workmen who were in employment before April 3, 1977 are entitled to wages, D.A., etc., on the basis that their services were not terminated at any time and as such they continued in employment?

No

vi) What is the legal effect of the order of the Industrial Court dated May 12, 1977 coupled with the notice dated May 4, 1977 and June 15, 1977 put up by the Company?

No effect

vii) Whether after the lock-out was lifted w.e.f. June 16, 1977, the workers reported for duty daily but the company did not provide work to them?

Yes

viii) Whether notice dated May 4, 1977 was only a cloak to deprive the workmen of their legitimate claim and get rid of them under some cause or other and in fact company wanted to continue the operation even thereafter and is continuing in a clandestine manner?

No

ix) What is the effect of the agreement dated October 2, 1977 entered into by the company with the New Standard Engineering Co. in Law

No effect

x) What reliefs, if any, are the workmen entitled to?

xi) What order?

My findings on these issues are as follows:

i) Yes.

ii) Reference maintainable. This Court has jurisdiction.

iii) Yes

iv) Not bad in law. It serves employer employee relations.

v) No

vi) No effect on the legality or validity of closure.

vii) Yes viii) No ix) No effect on closure

x) As given on the Award, benefits as per Section 25-(N) of the Act

xi) As per order below'.

8. The Tribunal has held that the factum of closure was the very basic premise on which the reference proceeded and the said factum could not be disputed in the proceedings pursuant to the reference. The factum of closure could not be termed as an 'incidental matter' since the scope of the powers of the Industrial Tribunal was limited by the terms of reference. The Industrial Tribunal could not go into any issue which did not form the part of the terms of reference. However, since a contention was raised and since Issue No. 3 was framed, apparently erroneously, the learned Member recorded a finding, on appreciation of evidence, that there was in fact a closure with effect from April 4, 1977 onwards. The circumstances leading to the closure were discussed. The financial condition of the Company, which was under serious threats, and the labour unrest was also considered as grounds justifying the closure effected from April 4, 1977. The Tribunal also considered the question of the effect of the lease executed by the 2nd respondent Company in favour of the New Standard Engineering Company and came to the conclusion that executing the said lease in the facts and circumstances of the present case cannot amount to the starting of the manufacturing activity. The closure effected earlier was complete. There was nothing to doubt the genuineness of the said closure. On the question of the lock-out, the Tribunal came to the conclusion that the lock-out was legal. Relying upon a Division Bench

Judgment of this Court, it was held that assuming that the lock-out which had commenced on April 4, 1977 was not legal, the lock-out became legal and effective from May 19,, 1977 by virtue of the intervening notice under Section 24(2) of the said 1971 Act, which was given on May 4, 1977. This finding was recorded when the ULP Complaint was pending before the Industrial Court. On February 24, 1986 the Industrial Court disposed of the complaint of the petitioner Union finally holding that the lock-out was legal with effect from May 19, 1977 to August 3, 1977 on which day the services of the workers stood terminated and there was nothing illegal about the said lock-out which was effected after giving due notice on May 4, 1977. The complaint of the petitioner Union alleging unfair labour practice was, therefore, dismissed by the Industrial Court on February 24, 1986. It must be mentioned at this stage itself that the petitioners had approached this Court in Writ Petition No. 3061 of 1986. My learned brother A.C. Agarwal, J. by his Judgment and Order dated January 24, 1992, which is reported in 1992(1) CLR 408, dismissed the writ petition. A finding, therefore, has been recorded by this Court that the lock-out effected from May 19, 1977 till August 3, 1977 was a legal lock-out effected after giving due notice under the said 1971 Act and there was no question of the 2nd respondent having indulged in any unfair labour practice with regard to the said period. This position is not disputed before me by Miss Buch appearing for the petitioner.

9. However, as stated above, even before this Court recorded the finding as above in Writ Petition No. 3061 of 1986, the Industrial Tribunal in the impugned Award recorded a finding that the lock-out effected from May 19, 1977 was legal. This is clear from the finding in para 16 of the impugned Award. Finally, the Industrial Tribunal came to the conclusion that in view of the provisions of Section 25-S of the Industrial Disputes Act, Section 25-FFA of the said Act was not applicable to the 2nd Respondent Company, which was governed by Chapter V-B of the Industrial Disputes Act Chapter V-B contains special provisions relating to establishments which employ not less than 100 workmen on an average per working day. This is clear from the provisions of Section 25-K dealing with the application of Chapter V-B. Section 25-S, which is the last section in Chapter V-B, makes certain provisions of Chapter V-A applicable to the industrial establishments to which the provisions of Chapter V-B apply. In the sections

enumerated in Section 25-S, Section 25-FFA does not find a mention. Chapter V-A applies to industrial establishments in which less than 50 workmen on an average working day are employed. In the result the reference was answered in the following terms :

'The services of all the workmen of Wadala Unit of Acme ., Bombay, who were in employment of the company on or about April 3, 1977 barring those who retired before August 3, 1977 or who were terminated prior to that date, were terminated by the notice dated May 4, 1977 with effect from August 3, 1977.

The workmen, whose services came to beterminated on the basis of the closure noticedated May 4, 1977 effective from August 3,1977 are entitled to closure compensation atthe rate as provided under Section 25-N ofthe Industrial Disputes, Act :

Parties to bear their own costs'.

It is this Award which has been challenged before me by the petitioners.

10. I have heard both the learned Counsel, Miss Buch for the petitioners, and Mr. Rele for the 2nd respondent, at length. The first respondent is the learned Member of the Industrial Tribunal, who is a formal party. Miss Buch has raised five contentions before me. Her first contention is that in fact there was no closure of the establishment and the question of the factum of closure can be gone into and could have been gone into in the reference. According to her, at any rate, looking at the terms of reference, the factum of closure was an 'incidental matter' and ought to have been considered as such. On the other hand Mr. Rele contended that the factum of closure is the very basis on which the terms of reference have been framed. Nothing prevented the petitioners from approaching the Government and having the terms of reference amended as is done in many cases. He contended that the factum of closure cannot be termed as an 'incidental matter'. It is not incidental to the decision on the issues referred. It is the basic premise, on the basis of which terms of reference have been framed and issues have been raised. The jurisdiction of the Industrial Tribunal is limited by the terms of reference and there is no scope for the Industrial Tribunal to consider anything which does

not form part of the terms of reference. In support of his contentions, Mr. Rele has invited my attention to the following three decisions of the Supreme Court:

(i) Hochtlef Gammon v. Industrial Tribunal Bhubaneshwar, Orissa and Ors. : (1964)IILLJ460SC . Chief Justice Gajendragadkar has observed in the said decision as under(p 466):

'The next contention raised by Sri. Chatterji is that Hindustan Steel Ltd., is a necessary party because it is the said concern which is the employer of the respondents and not the appellant. In other words, this contention is that though in form the appellant engaged the workmen whom the respondent-Union represents, the appellant was acting as the agent of its principal and for adjudicating upon the industrial dispute referred to the Tribunal by the State of Orissa, it is necessary that the principal, viz., Hindustan Steel Ltd., ought to be added as a party. In dealing with this argument, it is necessary to bear in mind the fact that the appellant does not dispute the respondent union's case that the workmen were employed by the appellant. It would have been open to the State Government to ask the Tribunal to consider who was the employer of these workmen and in that case, the terms of reference might have been suitably framed. Where the appropriate Government desires that the question as to who the employer is should be determined, it generally makes a reference in wide enough terms and includes as parties to the reference different persons who are alleged to be the employers. Such a course has not been adopted in the present proceedings, and so it would not be possible to hold that the question as to who is the employer as between the appellant and Hindustan Steel Ltd., is a question incidental to the industrial dispute which has been referred under Section 10(1)(d). This dispute is a substantial dispute between the appellant and Hindustan Steel Ltd., and cannot be regarded as incidental in any sense and so, we think that even this ground is not sufficient to justify the contention that Hindustan Steel Ltd., is a necessary party which can be added and summoned under the implied powers of the Tribunal under Section 18(3)(b)'.

(ii) Delhi Cloth and General Mills Company Ltd. v. Their Workmen and Ors. : (1967)ILLJ423SC .

Reliance has been placed on the observations at page 425 where the terms of reference are reproduced and the observations at page 427 are as under

'From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary:

'Happening or likely to happen as a result of or in connection with something mere important; being an incident; casual; hence, secondary or minor, but usually associated'.

Something 'incidental to a dispute' must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct In the light of the above, it would appear that issue (3) was framed on the basis that there was a strike and there was a lock-out and it was for the Industrial Tribunal to examine the facts and circumstances leading to the strike and the lock-out and to come to a decision as to whether one or the other or both were justified. On the issue as framed it would not be open to the workmen to question the existence of the strike, or, to the management to deny the declaration of a lock-out. The parties were to be allowed to lead evidence to show that the strike was not justified or that the lock-out was improper. Issue (3) has also a sub-issue, namely, if the lock-out was not legal, whether the workmen were entitled to wages for the period of the lock-out'.

(iii) Pottery Mazdoor Panchayat v. The Perfect Pottery Company Ltd. and Anr. : (1983)ILLJ232SC .

Reliance has been placed on the following observations in Paras 10 and 11 of the Judgment appearing at Pages 234 and 235 of the Report :

'10. Two questions were argued before the High Court : Firstly, whether the Tribunals had jurisdiction to question the propriety or justification of the closure and secondly, whether they had jurisdiction to go into the question of retrenchment compensation. The High Court had held on the first question that the jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters incidental thereto and that the Tribunal cannot go beyond the terms of the reference made to it On the second question the High Court has accepted the respondent's contention that the question of retrenchment compensation had to be decided under S. 33-C(2) of the Central Act.

11. Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its view on the first question. The very terms of the reference show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of me business was proper and justified In other words, by the references the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management The references being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management'.

11. Having considered the above observations of the Supreme Court, I am in agreement with the contentions of Mr. Rele. The factum of closure cannot be gone into the present reference. As I stated earlier, Issue No. 3 has really been erroneously framed and since an issue was framed, the learned Member of the Industrial Tribunal has considered the same on merits. He has considered the incident which occurred on the April 3, 1977 in which the Chairman and the Chief Executive were both assaulted. Soon after the incident, Ramanathan, the Chief Executive, resigned the job. The evidence of Chairman Patel and Chief Executive Ramanathan is supported by the evidence of the Personnel Manager Gujarati. The

evidence of these three witnesses, as also the evidence led by the petitioner Union has been considered and on appreciation of the evidence, a finding of fact has been recorded that there was a closure with effect from April 4, 1977. In view of the Supreme Court decisions, in the first place, I do not think that it is open for me to consider the question of factum of closure in the facts and circumstances of the present reference. Assuming that it was open to consider this issue, the answer is clearly in favour of the 2nd Respondent company. The first contention of Miss Buch has, therefore, no merit

12. The second contention of Miss Buch is that the lease of October 2, 1978 was really a camouflage for carrying on the operations clandestinely. She relied upon the fact that the Chairman of New Standard Engineering Company Shri Suman Patel is the son of the Chairman of the 2nd Respondent Company, Shri J.V. Patel. In fact, her contention is that the fact of the execution of the lease on October 2, 1978 immediately after the Supreme Court decision on September 29, 1978 itself casts a doubt on the claim of the 2nd respondent that there was a genuine and bona fide closure with effect from April 4, 1977. As against this, Mr. Rele contends that the lease was a separate transaction and merely because the 2nd Respondent has entered into a lease with New Standard Engineering Company, It cannot be said that the 2nd Respondent Company has started its operations in a clandestine manner, much less can the factum of closure effected as far back as on April 4, 1977 be doubted on this ground. Mr, Rele has invited my attention to the following decisions of the Supreme Court:

(i) Andhra Prabha Ltd. and Ors. v. Madras Union of Journalists (by Secretary), and Ors. reported in 1968 I LLJ 15 relied upon the observations appearing at page 24 which read as under:

'From all this the Tribunal inferred that the suspension of the business was a lock-out at the inception and became a genuine closure only in October-November 1959. Before us, reliance was placed by Sri Mohan Kumaramangalam on some of the above factors and the main plank of his argument was that in fact the parent company launched and financially helped the other companies which were really benamidars for the parent company. We do not think that even in industrial law a

new company which is an independent legal entity can be chatted a benamidar for another older organisation because there was in both companies a person or family of persons who could guide the destinies of the two companies. The Express Newspapers (Private) Ltd., was later transformed into a public company and it would not be proper to describe the relationship of the Vijay-awada and the Madurai companies as daughter companies or as benamidars of the Company. We have to bear in mind that the company i.e, Express Newspapers (Private) Ltd., did not come to an end in April, 1959. It only closed its undertaking of publishing several newspapers and weeklies. It had very valuable property on its hands after April, 1959 and some persons had to be retained in service to look after the property. The fact that one of them was a Reporter cannot lead to the inference that the company did not close down its business but could take it up whenever it wanted to'.

(iii) General Labour Union Red Flag, Bombay v. B.V. Chavan and Ors. reported in : : (1985)ILLJ82SC . He placed reliance on the observations appearing in Para 11 which read as under (p.84):

'11. While examining whether the employer has imposed a lock-out has closed the Industrial Establishment, it is not necessary to approach the matter from this angle that the closure has to be irrevocable, final and permanent and that lock-out is necessary temporary or for a period. The employer may close down industrial activity bona fide on such eventualities as suffering continuous loss, no possibility of revival of business or inability for various other reasons to continue the industrial activity. There may be a closure for any of these reasons though these reasons are not exhaustive but are merely illustrative. To say that the closure must always be permanent and irrevocable is to ignore the causes which may have necessitated closure. Change of circumstances may encourage an employer to revive the industrial activity which was really intended to be closed. Therefore the true test is that when it is claimed that the employer has resorted to closure of industrial activity, the Industrial Court in order to determine whether the employer is guilty of unfair labour practice must ascertain on evidence produced before it whether the closure was a device or pretence to terminate services of workmen or whether it is bona fide and for reasons beyond the control of the employer. The

duration of the closure may be a significant factor to determine the intention and bona fides of the employer at the time of closure but is not-decisive of the matter. To accept the view taken by the Industrial Court would lead to a startling result in that if an employer who has resorted to closure, bona fide wants to reopen, revive and re-start the industrial activity, he cannot do so on the pain that the closure would be adjudged a device or pretence. Therefore, the correct approach ought to be that when it is claimed that the employer is not guilty of imposing a lock-out but has closed the industrial activity, the Industrial Court before which the action of the employer is questioned must keeping in view all the relevant circumstances at the time of closure decide and determine whether the closure was a bona fide one or was a device or a pretence to determine the services of the workmen.. Answer to this question would permit the Industrial Court to come to the conclusion one way or the other'.

I am in agreement with the submission advanced by Mr. Rele since the same is supported by the above two Supreme Court decisions. Merely because the 2nd Respondent company entered into a lease with New Standard Engineering Company, it cannot be concluded that the 2nd respondent is carrying on its activity in a clandestine manner. The 2nd respondent openly advertised for giving its plant and machineries on lease. There is nothing clandestine about the lease being entered into or the operations being carried on by the lessee Company in terms of the lease. The lessee has employed its staff and no workman or staff of the 2nd Respondent Company was found at work. This is clear from the evidence on record. In view of the Supreme Court decisions, to which my attention has been invited by Mr. Rele, it is clear that even in industrial law a new Company which is an independent legal entity cannot be called a benamidar for another older organisation, just because some family members are common in both the Companies to guide the destinies of the two companies. This is clear from the observations of the Supreme Court in the Andhra Prabha Limited case. Similarly, the contention of Miss Buch that the fact of the lease being entered into militates against the claim of closure, has no substance in view of the observations of the Supreme Court in para 11 in the case of General Labour Union(supra). It is not necessary that the closure has to be irrevocable, final and permanent. The employer may close down the industrial activities bona fide on such eventualities

as suffering of continuous loss, no possibility of revival of business or inability for various other reasons to continue the industrialactivity. Change of circumstances may, however, encourage the employer to revive the industrial activity, which was really intended to beclosed. The duration of the closure may be asignificant factor to determine the intention orbona fides of the employer at the time of theclosure, but it is not a decisive factor. The secondcontention has, therefore, no merit and has to berejected.

13. The third contention of Miss Buch was that the lock-out was illegal from inception and could not be legalised by issuance of the subsequent Notice on May 4, 1977 in accordance with the provisions of Sub-section (2) of Section 24 of the said 1971 Act. The learned Member of the Industrial Tribunal has recorded a finding, on appreciation of evidence, that the lock-out was legal with effect from May 19, 1977. This finding has been recorded even prior to the decision of the Industrial Court in the pending Complaint (ULP) No. 87 of 1977 under the M.R.T.U. and P.U.L.P. Act. That complaint was decided on February 24, 1986 after the impugned award was declared. As stated earlier, the Judgment of the Industrial Court dated February 24, 1986 holding that the lock-out was legal from May 19, 1977 has been upheld by this Court (A.C. Agarwal, J.) in the decision reported in Mazdoor Congress v. S.A. Patil and Ors. 1992 (1) C.L.R.408. Suffice it to say that the learned Single Judge has relied upon some of the Supreme Court decisions and particularly, the Division Bench decision of this Court in the case of The Premier Automobiles Ltd. and Ors. v. G.R. Sapre and Ors. reported in 1981 LIC 221. The relevant observations of the Division Bench, on which the learned Single Judge has placed reliance, are to be found in Paras 23 to. 25, at page 228 of the Division Bench Judgment and Para 6, page 410 of the Judgment of the learned Single Judge. They are as under:

'In other words, resorting to 'lock-out' by the employer by itself is not illegal. It is the non-compliance with the requirements of the above Clause (a) that makes it illegal. Under the above Clause (a) a lock-out will be illegal, if it is (1) commenced without giving a notice, or (2) commenced within 14 days of the notice, even if notice is given, or (3) continued from day-to-day if commenced without notice, or (4) so continued from day-to-day during the period of 14days, even if notice is so

given. Not mere commencement of lockout without notice, but even continuance thereof without compliance with Section 24(2)(a) appears to have been deliberately rendered illegal, in an anxiety to extend intended relief to the employees and expose the employer to legal consequences for the entire period of illegality.

24. But such an illegality can be brought to an end by discontinuing the lock-out, so commenced illegally and resuming the operations. The same result would follow after the expiry of 14 days of the notice, if notice is given, in compliance with Section 24(2)(a), either at the commencement of such illegal lock-out, or during the pendency thereof with a view to get rid of such illegality. There is nothing in Section 24 or any other provision militating against this.

25. We are unable to see any reason why condition as to notice of 14 days cannot be complied with, even at such commencement or during the period of the continuance of illegal strike. Any lock- out so commenced illegally without notice, would cease to be so illegal, from the day on which 14 days period expire. Illegality committed till that day may have its full effect and subsequent legality thereof may not relieve the employer of financial liabilities to which the illegality of this period exposes him such as paying compensation to workers even when they had not worked for no fault of theirs. Illegal commencement of a lock-out can take place under variety of circumstances, including the ignorance of the legal position or doubtfulness of its being a 'lock- out' and, not necessarily out of vindictiveness, obstinacy or deliberate intention to flout the law. It is never too late to be wiser and to make amends. No one can claim vested interest in compelling a man to continue the illegality even when he is keen to remove it by complying with the law'.

As has been held in the present case, the lock-out which commenced on April 4, 1977, may be without a valid notice under Section 24(2) of the 1971 Act, became legal from May 19, 1977 because of the Notice dated May 4, 1977 duly issued under Section 24(2) of the said 1971 Act. There is, therefore, no substance in the third contention.

14. The fourth contention of Miss Buch was that some subsequent events such as issuance of the charge-sheets and offering voluntary retirement benefits to some of the workmen, also indicate that there was no closure as far back as on April 4, 1977. One has to approach this submission in the light of the Supreme Court decision striking down the provisions of Section 25-O and part of Section 25-R in so far as it relates to the awarding of punishments for infraction of the provisions of Section 25-O of the Industrial Disputes Act. In the case of the 2nd Respondent company itself, the Supreme Court has clearly held that the said provisions were constitutionally bad and were violative of the provisions of Article 19(1)(g) of the Constitution of India : (1978)IILLJ527SC . If that be so, the giving of the application by the 2nd respondent to the Government under Section 25-O was really unnecessary. The 2nd Respondent could have unilaterally effected the closure. It has, however, given notice to each of the workmen on May 4, 1977 informing them unequivocally that their services would stand terminated with effect from August 3, 1977. This was on the assumption that 90 days' notice was required to be given. Since, however, the provisions of Section 25-O have been held to be unconstitutional, no importance can be attached to the subsequent events such as issuance of the charge- sheets or offering some voluntary retirement benefits to some workmen. In my view, these actions were redundant and superfluous. At any rate, this cannot affect the closure as effected from April 4, 1977. There is, thus, no merit in this contention also.

15. Miss Buch finally contended that assuming that the aid of the provisions of Section 25-O is not available to the petitioner any longer in view of the Supreme Court decision. The 2nd Respondent ought to have complied with the provisions of Section 25-FFA of the Industrial Disputes Act. Section 25-FFA provides for 60 days' notice to be given to the appropriate Government of the intention to close down the undertaking. Whereas Section 25-O contemplates an application for permission of the appropriate Government and lays down an elaborate procedure for closing down the undertaking, Section 25-FFA only deals with the giving of a notice of the intention to close down the undertaking. Such a notice has to be of 60 days under Section 25-FFA. The contention of the Counsel is that even though the 2nd Respondent has given the requisite notice under Section 25-O, the said notice is of Sections 25-C to 25-E will not apply to the industrial 90 days and, therefore,

the said 2nd Respondent has failed to comply with the provisions of Section 25-FFA requiring 60 days' notice and hence, the closure is bad in law. She places heavy reliance on the decision of a learned Single Judge of this Court in the case of Maharashtra General Kamgar Union v. Glass Containers Pvt. Ltd. and Anr., reported in 1983 1 LLJ 326. Relying upon the observations in me said case of Glass Containers Pvt. Ltd., she contends that the language of Section 25-FFA was mandatory and a closure effected without complying with the requirement of Section 25-FFA must be held to be devoid of legal effect and hence, illegal. Her contention is (hat under Section 25-A, the provisions of Sections 25-C to 25-E cannot apply to industrial establishments to which Chapter V-B applies. Whereas Chapter V-A deals with the provisions of lay-offs and retrenchment in case of industrial establishments in which less than 50 workmen have been employed, Chapter V-B deals with the special provisions relating to lay-offs, retrenchment and closure in certain establishments in which not less than 100 workmen are employed on an average working day. It is no doubt true that Section 25-A states that Sections 25-C to 25-E will not apply to the industrial establishments to which Chapter V-B applies. Relying upon this, Counsel contended that Section 25-FFA which occurs in Chapter V-A must also apply to the Industrial establishments to which Chapter V-B applies.

16. As against this, Mr. Rele for the 2nd Respondent Company contended that Section 25-K makes it clear that the provisions of Chapter V-B apply to an industrial establishment in which not less than 100 workmen are employed on an average per working day. He then invited my attention to the provisions of Section 25-S which reads as follows:

'25-S. Certain provisions of Chapter V-A to apply to an industrial establishment to which this Chapter applies

The provisions of Sections 25-B, 25-D, 25-FF, 25-G, 25-H and 25-J in Chapter V-A shall, so far as may be, apply also in relation to an industrial establishment to which the provisions of this Chapter apply'.

He contends that as far as Chapter V-B is concerned, there is already a provision in the nature of Section 25-O dealing with the procedure for closing down an

undertaking. Section 25-O contemplated obtaining of prior permission from the appropriate Government. Section 25-FFA merely talks of an intimation of notice being given to the appropriate Government There is no question of the employer obtaining the approval or permission of the appropriate Government under Section 25-FFA, which appears in Chapter V-A. However, a perusal of Section 25-S makes it clear that while certain provisions of Chapter V-A have been specifically made applicable to the industrial establishments to which the provisions of Chapter V-B apply, in the Sections enumerated, Section 25-FFA does not find a mention. Chapter V-B, being a Chapter dealing with special provisions, relating to Lay- Off, Retrenchment and Closure, in the case of establishment of the type of the 2nd respondent, there is sufficient force in the contention of Mr. Rele and I am inclined to accept the same. The learned Member of the Industrial Tribunal has taken the view that in view of Section 25-S, the provisions of Section 25-FFA cannot be made applicable to the industrial establishment to which the provisions of Chapter V-B apply.

17. Coming to the Judgment in the case of Glass Containers Pvt. Ltd. Mr. Rele has criticised the Judgment on three grounds - Firstly, Counsel contends, that the perusal of Para 7 of the Judgment of the learned Single Judge in the case of Glass Containers Pvt Ltd., clearly shows that as far as Point No. (iii) dealing with compliance with the provisions of Section 25-FFA is concerned, what was said by the Industrial Tribunal in that case was clearly an obiter and was wholly unnecessary. The learned Single Judge himself has said in para LLJ of the Judgment as under(p.328):

'7. Now for the time being I propose to reserve my view on points (i) and (ii), since what the learned member of the Industrial Court did was not to restrict his judgment only to the said two points and reject the complaint as not covered by the two items indicated in points (i) and (ii) but he went on somewhat astoundingly to hold, which was totally unnecessary, that in effecting the closure the employer had complied with all the requirements of the Industrial Disputes Act, and particularly with Section 24-FFA. In view of the extensive discussions in the impugned order dealing with this aspect, it has become necessary for me to express my views on the validity and legality of the closure although I am inclined

to concur broadly with the decision of the Industrial Court on points (i) and (ii) for reasons I will subsequently indicate. In my opinion, it was totally unnecessary for the Industrial Court to go into the other aspects of the matter'.

Having said so and having agreed with the conclusions of the Industrial Court on Points Nos. (i) and (ii), Mr. Rele contends that what follows thereafter on Point No. (iii) was wholly unnecessary and is clearly an obiter. In the case of Glass Containers Pvt. Ltd., The first point related to the threatened lock-out or closure amounting to an unfair labour practice under Item 1(b) of Schedule II of the M.R.T.U. and P.U.L.P. Act. the second point related to the failure to implement the award, settlement or agreement amounting to unfair labour practice falling under Item (9) of Schedule IV of the said 1971 Act and the third point related to the necessity of the issuance of an order of injunction restraining the Company from taking any action. This will be clear from the points framed in para 6 of the Judgment in Glass Containers' Case. The learned Single Judge also expressed his disapproval with the view taken by a Division Bench of the Calcutta High Court in the case of Walford Transport Ltd. v. State of West Bengal and Ors. reported in : (1978)IILLJ110Cal and the Division Bench decision of the Orissa High Court in the case of The Management of Town Bidi Factory Cuttack v. Presiding Officer, Labour Court and Anr. reported in : (1990)IILLJ55Ori . Thus, while coming to the conclusion on Point No. (iii) in the case of Glass Containers Pvt. Ltd. dealing with Section 25-FFA the learned Judge has expressed his disapproval with the view taken in two Division Bench decisions; one of the Calcutta High Court and the other of the Orissa High Court. However, as stated earlier, Mr. Rele's first criticism is that the observations on this point are clearly obiter.

18. The second criticism of Mr. Rele is that the attention of the learned Single Judge, who decided the Glass Containers' case, was not invited to the provisions of Section 25-S of the Industrial Disputes Act. If the establishment was one like the Respondent No. 2, to which the special provisions of Chapter V-B apply, then counsel contends that in view of the provisions of Section 25-S, the provisions of Section 25-FFA cannot at all be made applicable. In short, he contends that the Judgment of the learned Single Judge in Glass Containers' case is per incuriam in so far as Point No. (iii) therein is concerned. In support of this, he has invited my

attention to the observations of the Supreme Court in the case of State of U.P. and Anr. v. Synthetics and Chemicals Ltd. and Anr. reported in Judgments Today 1991 (3) S.C. 268. Counsel relies upon the observations appearing in Paras 40 and 41 on pages 285 and 286 which read as under:

'40. Incuriam literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered 'in ignoratium of a statute or other binding authority'. 1944 1 KB 718 Young v. Bistol Aeroplane Ltd. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey, : [1962]2SCR558 this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury Laws of England incorporating one of the exceptions when the decision of an Appellate Court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words, can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. 1941 1 KB 675, the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaurt : AIR 1989 SC38 . The Bench held that, precedents sub-silentio and without argument are of no moment The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and

consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In Shama Rao v. State of Pondicherry AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits ,is inimical to the growth of law'

19. Mr. Rele has also invited my attention to a passage from Halsbury's Law of England, 4th Edition, Vol.26, Para 578 at Page 297 which reads as under:

'578. Court of Appeal decisions. The decisions of the Court of Appeal upon question of law must be followed by Divisional Courts and Courts of first instance, and, as a general rule, are binding on the Court of Appeal until a contrary determination has been arrived at by the House of Lords. There are, however, three, and only three, exceptions to this rule; thus (1) the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) it is bound to refuse to follow a decision of its own which, although not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; and (3) the Court of Appeal is not bound to follow a decision of its own if given per incuriam. Unlike the House of Lords, the Court of Appeal does not have liberty to review its own earlier decisions.

A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force'.

20. Reliance was also placed by Mr. Rele on the dictionary meaning of the word 'per incuriam' appearing at page 298 of the Oxford Reference (A concise dictionary of law) Second Edition, which reads as under:

'Per incuriam (Latin) Through lack of care. A decision of a court is made per incuriam if it fails to apply a relevant statutory provision or ignores a binding precedent'.

21. The third and the last criticism of Mr. Rele on the Judgment in Glass Containers' case is that even on the main Point No. (ii) in the said decision dealing with the question as to whether the failure to implement award, settlement or agreement amounted to an unfair labour practice, the view of the learned Single Judge has been overruled by the Supreme Court in the case of S.G. Chemicals and Dyes Trading Employees Union v. S.G. Chemicals and Dyes Trading Ltd. and Anr. reported in : (1986)ILLJ490SC My attention has been invited to the observations of the Supreme Court in para 23, on page 505, which read as under:

'It is not possible to accept as correct the view taken in the said case. It is an implied condition of every agreement, including a settlement, that the parties thereto will act in conformity with the law. Such a provision is not required to be expressly stated in any contract. If the services of a workman are terminated in violation of any of the provisions of the Industrial Disputes Act, such termination is unlawful and ineffective and the workman would ordinarily be entitled to reinstatement'.

Mr. Rele, therefore, contends that, at any rate, in view of the above Supreme Court decision specifically overruling the view taken by the learned Single Judge, the authority of the view taken in Glass Containers' case is considerably weakened even on point No. (iii) in that case. I find much substance in the contentions of Mr. Rele. I have no doubt in my mind that on a plain construction of the provisions of Section 25-K and Section 25-S of the said Act, the provisions of Section 25-FFA would not be attracted in the facts of the present case. Unfortunately, the attention of the learned Judge was not invited to the special provisions of Section 25-S of the Act Miss Buch's grievance, therefore, that there is a failure to comply with the provisions of Section 25-FFA would not be justified in the facts of the present case. At any rate, it must be held in the facts of the present case that there is substantial compliance with the provisions of Section 25-FFA also in the light of the steps taken by the 2nd Respondent Company under Section 25-O, which has

not been declared as unconstitutional. None of the contentions of Miss Buch, therefore, deserve acceptance.

22. To sum up, in view of the terms of reference in the present case, I am of the opinion that the factum of closure could not have been gone into in the reference. Despite this, on merits, on the appreciation of the evidence led by both the side it is clear that there was a closure with effect from April 4, 1977. Secondly, it is not possible to say mat the lease entered into by the 2nd Respondent Company with the New Standard Engineering Company was a camouflage for carrying on its own operations clandestinely. The two Companies are separate legal entities. There is no question of one being a benamidar for the other. This is clear in view of the observations of the Supreme Court in the case of Andhra Prabha Ltd. Similarly, the observations of the Supreme Court in the case of General Labour Union, (supra) also support the view that a closure need not be irrevocable, final and permanent. Change of circumstances may encourage an employer to revive the industrial activity which was really intended to be closed. Thirdly, it must be held that the lock-out was legal with effect from May 19, 1977. This is clear in view of the decision of this Court in this very case reported in 1992 (1) CLR 408. A lock-out which was initially illegal can subsequently become legal pursuant to the compliance of the provisions of Section 24(2) of the M.R.T.U. and P.U.L.P. Act. Fourthly, the subsequent events such as issuance of charge-sheets and offering the benefits of voluntary retirement to some workmen were entirely redundant and superfluous in the facts of the present case in the light of the Supreme Court decision striking down the validity of Section 25-O and part of Section 25-R as reported in : (1978)IILLJ527SC . The 2nd Respondent could have unilaterally effected the closure. It has, however, given notice to each of the workmen on May 4, 1977 informing him unequivocally that his services would stand terminated with effect from August 3, 1977. Finally, I am of the view that the provisions of Section 25-FFA may have no application to the facts of the present case. In view of the provisions of Section 25-K and Section 25 of the Industrial Disputes Act, the provisions of Section 25-FFA would not be attracted in this case.

23. In view of the above, Rule in the petition is discharged. However, in the circumstances of the case, there will be no order as to costs.