

Union of India Vs. Stumpp, Scheule and Somappa Ltd.

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Court : Karnataka

Decided On : Feb-21-1989

Reported in : [1989(59)FLR38]; ILR1989KAR861; 1989(1)KarLJ233; (1989)IILLJ4Kant

Judge : K. Shivashankar Bhat and ;Prem Chand Jain, JJ.

Acts : [Industrial Disputes Act, 1947](#) - Sections 25N, 25-O, 25-O(1), 25-O(2), 25-O(7), 25-O(8) and 25R

Appeal No. : Writ Appeal Nos. 2149 and 2150/85

Appellant : Union of India

Respondent : Stumpp, Scheule and Somappa Ltd.

Judgement :

Shivashankar Bhat, J.

1. These Appeals arise out of an order of the learned single Judge of this Court (1985-II-LLJ-543) allowing the writ petitions filed - one by the Company and another by a shareholder of the Company. Two of the appeals are by the workmen, two by the State Government and two by the Union of India. The learned single Judge declared that Section 25O of the Industrial Disputes Act (hereinafter called 'the Act') offended Article 19(1)(g) of the Constitution of India

and directed respondents 1 and 2 in the writ petitions not to enforce the provisions of Section 25O of the Act against the petitioners therein.

2. The facts need not be narrated in detail. The Company sought permission of the State Government under Section 25O of the Act to close one of its units, as it was found to be uneconomical, and the situation reached a point that it had to be closed down. But the State Government rejected the application. In the writ petitions the validity of the order as well as the constitutional validity of Section 25O were challenged.

3. In the year 1976, while inserting Chapter VB in the Act, Section 25O was incorporated in it. This provision required an employer to obtain a prior permission of the appropriate Government for closure of the undertaking. Section 25O as it then stood was held to be violative of Article 19(1)(g) of the Constitution, by the Supreme Court in *Excel Wear v. Union of India* (1978-II-LLJ-527) - (hereinafter referred to as 'the Excel Wear case'). Thereafter, Section 25O in its present form was enacted by the Parliament in the year 1982 and the provision came into force in the year 1984.

4. The essence of the contentions of the writ petitioners is that, the impugned provisions of Section 25O reimposed the unreasonable restriction on the fundamental right of an employer guaranteed under Article 19(1)(g) of the Constitution, whereby he can choose to close his undertaking as and when circumstances require him to close it down; since the requirement of a prior permission of the appropriate Government implies a refusal of the permission also, such a requirement of a permission results in the very negation of the right.

5. The writ petitions were allowed and Section 25O was declared unconstitutional. The decision of the learned single Judge is reported in (1985-II-LLJ-543) - (for the sake of convenience, we refer to the said Report hereinafter). After stating the rival contentions, and the Excel Wear case, his Lordship observed (1985-II-LLJ-543 at 553) at para-7, that the answer to the main question

'entirely depends upon the ratio of that Judgment, in that, if the new Section 25O suffers from the same basic infirmities with which the old Section 25O suffered,

which brought the Section into conflict with Article 19(1)(g), then applying the law laid down by the Supreme Court in that case, the provision has to be struck down. If on the other hand those basic infirmities have been cured, the validity of the Section has to be upheld.'

On an analysis of the decision in Excel Wear case (supra) the gist of the ratio of the Judgment of the Supreme Court was stated as follows in para-11 (at pp. 556-557) :

'Before proceeding to consider the rival contentions, I shall set out the gist of the ratio of the Judgment of the Supreme Court in Excel Wear case (supra), which is as follows :

(i) Right to close down a business is part and parcel of the fundamental right to carry on business under Article 19(1)(g) of the Constitution, though it cannot be put as high as the right not to be compelled to do business.

(ii) Just as there can be reasonable restrictions on the exercise of fundamental right to carry on business within the limits permitted under clause (6) of Article 19 there could also be reasonable restrictions on the exercise of fundamental right to close down the business, but the exercise of the right cannot be made impossible by providing the securing of permission of the Government, which may be granted or refused, a condition precedent for the exercise of the right.

(iii) The exercise of the right to close a business cannot be prevented on the ground that the closure results in unemployment of workers in the industry or affects production.

(iv) The difficulties to the workmen arising out of unemployment consequent on closure of an industry can be remedied by awarding different slabs of compensation in different situations but to refuse permission to close down a business for preventing unemployment is not valid.

(v) In order to prevent unemployment as also to maintain production, the State, if it so chooses, may provide for the taking over of the industry by the State but an employer cannot be forced to continue the business for achieving those objects.

(vi) The law can impose such conditions or restrictions on the exercise of the right which would deter an unfair, whimsical, unjust or mala fide closures, but cannot prevent the exercise of the right.

(vii) Old Section 25O was violative of Article 19(1)(g) as that Section prescribed the securing of the permission of the Government for closing an industry, while leaving it to the discretion of the Government either to grant or reject permission and thereby made the exercise of the right impossible in cases in which permission was refused, which could be done notwithstanding the real difficulties and real intention of the owner to close the industry.'

6. Thereafter, the learned single Judge proceeded to consider the new provisions and concluded that there was no substantial improvements in them and the impugned provisions of Section 25O also imposed an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution; for this, the reasons given were :

(i) The old Section required the Government to examine whether the reasons for the intended closure were adequate and sufficient and whether closure was prejudicial to public interest. Except containing a few more words, the new provision are substantially the same and these provisions 'require the Government to examine the adequacy and sufficiency of the reasons for closure having due regard to public interest;'

(ii) The requirement of an inquiry by the Government before taking its decision in no way is different from the earlier Section, because, even under the earlier Section 25O the requisite 'satisfaction could be arrived at only after collection of necessary details and enquiry;'

(iii) The requirement to give reasonable opportunity of being heard to both the employer and the workmen which is specifically provided now, though was absent in the old Section, such a requirement could be read into the earlier provision to be in compliance with the principles of natural justice;

(iv) Earlier Section was not struck down solely on the basis that the said provision did not require the Government to record its reasons and that it did not provide for any appeal or review. The learned single Judge on this aspect observed at page 558 :

'A reading of the Judgment in Excel Wear's case (supra) would show that the substantial basis for striking down the old Section 25O was that under the Section, even if the reasons for closing down an industry were good and genuine, still the permission to close down could be rejected. In other words, an unreasonable order could be made well within the scope of the power conferred under the Section because the Section itself was unreasonable. The Supreme Court, no doubt, pointed out that there was also no provision for recording reasons as also for review or revision. But the real ground for striking down Section 25O was that the exercise of the right was made dependent on the permission of the Government, which could be refused even if the reasons for closure were good.' The learned single Judge opined that the earlier Section was unreasonable and therefore an unreasonable order could be made well within its scope. Secondly, the Section enabled the refusal of permission, even when reasons for the intended closure were adequate and sufficient.

(v) The Section does not specify the grounds which, if made out, entitled the employer to secure the permission and a mere provision for recording reasons does not save it from the vice of unconstitutionality (vide paras 17 to 22). The relevant observations are :

'Therefore, if in the impugned provision the specific grounds which, if made out, entitled the employer to secure the permission were set out and the Section made it obligatory for the Government to accord permission, if one or more grounds so specified were made out, with a further provision that reasons must be recorded in the event of refusing permission, such a provision might perhaps be regarded as a reasonable restriction on the exercise of the right, for, the aggrieved employer could even in the absence of any appeal to a specified authority enforce his right and secure the relief through a petition under Article 32 or 226, if he is able to prove that he had made good one or more of the grounds which entitled him to

secure the permission, but had been refused by recording reasons which were perverse.

But without specifying the grounds which if made out, entitles the owner of an industry to secure permission to close down, a mere provision for recording reasons does not save it from the vice of unconstitutionality, for, even if such an order is struck down on the ground the permission had been rejected arbitrarily, it is of no use to the owner as it does not have the effect of according permission, and the position of the owner remains the same, i.e., he cannot close down the business without permission. Even if there were to be a direction to the Government to reconsider the matter, again the permission can be rejected.'

(vi) As the right to close down a business is part of the fundamental right, any opposition to the exercise of such a right cannot be countenanced 'when the employer decides to close down the industry.'

(vii) The law could provide for payment of substantial minimum amount as closure compensation and still higher compensation if the assets of the Company justifies such higher compensation; this aspect has been ignored in Section 25O(8) - (vide paras 27 and 28).

(viii) 'employer could not be forced to continue an industry against his willingness; a provision for payment of substantial amount as compensation to prevent whimsical or mala fide closures could be made by law' - (para-28). Then at para-31 - 'I fail to see how any one can be forced to continue an industry when one considers it impracticable or impossible to carry on the industry on account of (i) continued financial loss (ii) his own incapacity to properly manage the industry; (iii) his unwillingness to continue the industry for reasons such as his own failing health or want of proper successor or on account of his desire to lead a retired life and devote his time for social service or for any reasons whatsoever' - Such a law compelling an unwilling employer to carry on the industry and making the refusal by him to carry on it, punishable, is not only unreasonable, but in some cases will be 'tyrannical'.

(ix) The law could have provided for the State to take over the industry if its closure was impermissible but it cannot compel the employer to carry on with the industry, against his will (para 31).

(x) The impugned provision has been enacted in the teeth of the decision of the Supreme Court in Excel Wear Case (para 32).

7. The contentions urged on behalf of the appellants before us may be summarised as follows :

Section 25O imposes a reasonable restriction on the exercise of the fundamental right of the employer to close his industry. If the permission sought by the employer is refused contrary to the principles inherent in the said provision, such an order can always be challenged before the Court; in the exercise of its power by the Government while considering an application for permission to close down an industry, Government has to consider various relevant facts and circumstances. In the exercise of its power, and while considering the reasons set forth by the applicant - employer - the appropriate Government has to be guided by the observations of the Supreme Court in Excel Wear case; the earlier Section 25O was struck down by Supreme Court because of its procedural unreasonableness which enabled the Government to make an arbitrary order; the writ petition out of which these appeals have arisen was filed by the employer which is a Company, and a Company being a non-citizen, is not entitled to invoke Article 19(1)(g) of the Constitution; the concept underlying the words, 'the interests of general public and other relevant factors' referred in Section 25O(2) include the interests of the labour, the interest of the Nation's economy, etc.' Section 25O as it is enacted does not bar the closure of the industry; it provides for a machinery, by entrusting the power in the appropriate Government, to consider the circumstances of each case having regard to the factors stated in Section 25O(2), whether closure should be permitted; Industrial Disputes Act itself is a restriction on the exercise of several rights by an employer, as in the case of retrenchment, lock-outs, dismissals etc. No employer has a fundamental right to close down an industry unreasonably, or for reasons which are mala fide; closure has to be just and inevitable, as it affects a large number of employees, members of the general

public, production in the country, etc. Most of the industries were started by availing of several concessions and benefits from the Governments and Governmental instrumentalities and, therefore, their closures are to be the subject of proper inquiry by the Government; an employer has an option to start an industry; having started it and having taken advantage of several concessions, or incentives and facilities offered by the State, and having invited a large number of persons to join the industry as employees, the employer cannot choose his own time and terms to close the industry. Qualitatively the fundamental right to close an industry, is not as high as the right not to start an industry. Section 25O(2) has vested a quasi-judicial power in the appropriate Government, and the exercise of the right to close an industry by an employer depends on an order, objectively made, by the Government while exercising this quasi-judicial power; no judicial power and its exercise can be held to be unreasonable. Even prior to the introduction of the earlier Section 25O, the employer had no right to close his industry, as he liked; and the workmen could have raised an industrial dispute and the closure could have been challenged; the present provision is only an extension of the earlier law governing the closure under the Act. In Excel Wear case, Supreme Court has not stated that the law regulating the right of closure by itself is an unreasonable restriction and therefore, said question has to be decided independently of the said decision, though many of the observations made in the said case may have to be followed as guiding principles. The nature of the application to be made for permission under the prescribed form requires furnishing of the entire material by the employer including his reasons for the closure, the attempt made by him to avoid closure etc., and this statutory rule has to be read with Section 25O; thus the basis for the enquiry by the Government under Section 25O(2) is statutorily provided for. All the learned Counsel appearing for the appellants fairly stated that, if the circumstances justify closure, appropriate Government was bound to grant the permission, as otherwise, in a given situation, the employer may face complete fiscal ruination etc., as observed by the Supreme Court in Excel Wear case. According to these learned Counsel, the earlier rigour of Section 25O has been fully mellowed in the present form and it cannot be termed unreasonable. The principles stated in Excel Wear case can be read into the present provisions. The circumstances of each case would vary. In one case

the industry may be owned by an individual; in other cases, the employer may be a firm, a private limited Company or a public limited Company. The number of workmen, the region where the industry is located, possibility of getting alternative employment to the workmen in case the undertaking is closed, the benefits obtained by the employer in starting and continuing the industry from the Government, the nature of the product, the number and nature of persons involved as depositors, creditors, share-holders and dealers etc., cannot be identified in advance and therefore the conclusion to be arrived at in individual cases cannot be stated in precise form - these and other several relevant factors are matters for the Government to consider before making an appropriate order and hence Section 25O cannot be held to have entrusted an unguided or arbitrary power in the appropriate Government. The inferences drawn by the learned single Judge as to the ratio of the decision in Excel Wear case are not correct.

8. Mr. Narayanaswamy, the learned Senior Counsel appearing for the employer, contended that there is no scope for any debate as to the nature of the fundamental right of the employer to close his industry and the exercise of such a right cannot be nullified by a provision like Section 25O, in the light of the decision of the Supreme Court in Excel Wear case (supra). In Excel Wear case (supra), Supreme Court struck down the earlier Section 25O, not only because of the procedural unreasonableness, but also because of the very restriction on the right being unreasonable. Assuming that procedural defects were the basis for striking down the earlier Section 25O, the present provision is in no way an improvement; the present provision is a re-incarnation of the earlier provision with the same unreasonable characteristic; plea as to the maintainability of writ petition on the ground that the employer being a Company cannot invoke Article 19(1)(g), was never raised anywhere in the pleadings nor argued before the learned single Judge; even otherwise, a similar contention was negatived in Excel Wear case (supra), Section 25O(2) does not enumerate the norms for the exercise of the power and nowhere it indicates as to when and how the reasons furnished by the employer can be accepted as genuine or adequate. While examining the adequacy of the reasons, the appropriate Government may apply its own subjective standards and such a subjective approach is inevitable while gauging the 'interest of general public and all other relevant factors.' The scope of the

enquiry is governed by so many factors, which are numerous, diverse and unidentifiable; Section 25O vests an arbitrary and unguided power in the Government; vesting of such an unguided and arbitrary power in the executive, itself is an unreasonable restriction on the fundamental rights guaranteed by Article 19(1)(g) of the Constitution. The scheme and object of the Act is regulatory and are to provide for the investigation and settlement of industrial disputes; therefore the provision in the Act cannot impose any restriction on the employer's fundamental rights.

9. The various angles of attack and defence ultimately result in two question, which overlap each other; they are :

(i) Whether Section 25O of the Act in its present form imposes an unreasonable restriction on the fundamental right of an employer, guaranteed under Article 19(1)(g) of the Constitution

(ii) Whether Section 25O of the Act suffers substantially from the same defects and unreasonableness, as the earlier one, struck down by the Supreme Court in Excel wear case (supra)

10. The other question as to the maintainability of the writ petition by invoking Article 19(1)(g) of the Constitution by a Company need not be considered, since. -

(a) the plea is raised for the first time during the course of arguments in these appeals; and

(b) In Excel Wear case (supra) a similar contention was not accepted by the Supreme Court.

Since the two questions arising for consideration are closely interlinked, having regard to the background of the impugned provision, they are to be considered together.

11. There has been much debate before us also, as to the ratio of the decision in Excel Wear case (supra). While the Counsel for the employer contended that, according to Excel Wear decision, any restriction, such as the requirement of a

prior permission of the Government for closure, is an unreasonable restriction on the fundamental right of the employer under Article 19(1)(g) of the Constitution, the learned Counsel for the respondents in the writ petition (i.e., appellants herein) contended that, the procedural aspect in the matter of granting or refusing permission was found to be unreasonable by the Supreme Court. Since this procedural unreasonableness permeated the entire provision, the earlier Section 25O was struck down in its entirety.

Having regard to the rival contentions, we proceed to consider the scope of the decision in *Excel Wear* (supra) :

12.1 Earlier Section 25O also required the employer to seek permission of the appropriate Government for closure. Application is to be filed as per Section 25O(1). As per its Clause (2), Government may direct the employer not to close down the undertaking if it is satisfied, (i) that the reasons for the intended closure are not adequate and sufficient or (ii) such closure is prejudicial to the public interest. No procedure as to enquiry and hearing by the Government was prescribed, before the Government has to arrive at its satisfaction. Section did not compel the Government to state its reasons for the refusal of the permission. Further, even in a case where the employer establishes that the reasons for the intended closure are adequate and sufficient, Government may refuse permission on the ground that such closure would be prejudicial to the public interest.

12.2. The language of earlier Section 25O was couched in such a manner that it empowered the Government to refuse permission on any one of the grounds i.e., either because the reasons for the intended closure were not sufficient and adequate or the closure would be prejudicial to the public interest. Thus even when the reasons for the intended closure were sufficient and adequate, permission could be refused on the ground of public interest.

12.3. Further, the said provision nowhere compelled the Government to dispose of the employer's application within a particular time, failing which, permission was to be deemed to have been granted. Thus, the application of the employer may be kept pending without consideration for any length of time.

13.1. Three different undertakings were involved in the Excel Wear case (supra) and there were four writ petitions. The three different employers had sought permission under the earlier Section 25O of the Act to close their respective undertaking. By different orders, the State Government rejected the applications and refused permission in two cases by observing that reasons for the intended closure were prejudicial to public interest and in the third case, the permission was rejected on the ground that the reasons for the intended closure were not adequate and sufficient and the intended closure was prejudicial to the public interest.

13.2. In paras 7 and 8 of the Decision (as reported in (1978-II-LLJ-527) the respective contentions of the learned Counsel for the parties were summarized; paras 10 to 16 trace the history of the development of this branch of the law, i.e., the various amendments to the Act, provision governing retrenchment of employees and the relevant decisions of the Supreme Court on those question; at para-17 provision of Section 25O were quoted and in para-18, the said provisions were analysed; para-19 refers to Section 25-R and its inapplicability under a particular situation. At para 20, Supreme Court considered two extreme contentions put forward on either side as to the alleged right to close down an undertaking. The two extreme propositions were not accepted. Supreme Court observed (p. 536) :

'The extreme proposition urged on behalf of the employers by equating the two rights and placing them at par is not quite apposite and sound. Equally so, or rather, more emphatically we do reject the extreme contention put forward on behalf of the Labour Unions that right to close down a business is not an integral part of the right to carry on a business, but it is a right appurtenant to the ownership of the property or that it is not fundamental right at all.'

13.3. The inference that can be drawn from the entire para-20 is quite clear. There is no absolute fundamental right vested in the employer to close his business. The right to close a business is not the same qualitatively, as the right not to start a business altogether. It is a fundamental right falling within Article 19(1)(g) of the Constitution. Since the right to close down a business is a fundamental right

embedded in Article 19(1)(g), it is subject to Article 19(6), as observed in para-21. Therefore, Supreme Court observed in para-21 that, -

'It can certainly be restrained, regulated or controlled by law in the interest of general public.'

13.4. In para-22, fifteen reasons given by the employers to hold Section 25O as unreasonable are stated; para-23 states the manner in which these points pleaded by the petitioners were met by the respondents.

13.5. In para-24, Supreme Court proceeds to make 'some general observations'; one such observation is, that, -

'But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, is it possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interests of another section of the public, namely the private owners of the undertakings ?'

Having posed this question, Supreme Court observes that the share-holders, creditors, depositors and those who deal with the employer - all form part of the public. It is further indicated that under compulsion of circumstances, an undertaking may have to be closed down, in the interest of this section of the public. Hence a further question suggestive of the answers, was posed as, -

'Does it stand to reason that by such rigorous provisions like those contained in the impugned Section all these interests should be completely or substantially ignored ?'

13.6. In para-24, the Supreme Court emphasised the fact that the concept of public interest includes the interest of another section of the public who belong to the class of employers, share-holders, creditors etc., and the need to protect the interest of this section of the public. The last two sentences in para-24 suggest that the provisions of the impugned Section, which are rigorous in nature, completely or substantially ignore the interests of this section of the public. Then, Supreme Court proceeds to consider the provisions of Section 25O(2) of the Act.

Here, we may pause to observe that, Supreme Court has not made any observation on the scope, or effect of Section 25-O(1).

13.7. Para-25 opens with the sentence stating that 'Section 25O(2) does not require the giving of reasons in the order.' Thereafter, two of the impugned orders were referred wherein permissions sought by the employers were rejected by the Government stating that reasons for the intended closure were prejudicial to public interest. From this the Supreme Court inferred that the State Government accepted the reasons given by the employers therein for closure as correct, adequate and sufficient, but, refused permission on the ground of public interest. The implied reasoning of the State Government in its order to attract the ground of public interest, was analysed thereafter. In making those two orders State Government failed to take note of the interests of so many persons interested and connected with the management apart from the employers' - an obvious reference to those referred in para-24. The 'tremendous difficulties' faced by the employer was emphasised in subsequent sentences and all these factors were obviously ignored by the State Government while rejecting the permission sought in those two cases. How this approach of the Government, if accepted as valid would break down the employer's fundamental right, was emphasised, in the background of other provisions of the Act. Thereafter the Supreme Court proceeded to consider the nature of the order made in the third case, namely of Apar Private Limited and pointed out that the reason assigned by the Government was not a reason at all, by calling one of the reasons as 'universal in all cases of closure.' Another reason was found to be too vague. Since the reasons put forward by the employer were correct, 'it was preposterous to say they are not adequate and sufficient for closure.' This demonstrated 'to what extent the order can be unreasonable.' The conclusion drawn was (p. 539) :-

'If the reasons given by the petitioner in great detail are correct, as the impugned order suggests they are, it is preposterous to say that they are not adequate and sufficient for a closure. Such an unreasonable order was possible to be passed because of the unreasonableness of the law. Whimsically and capriciously the authority can refuse permission to close down. Cases may be there, and those in hand seem to be of that nature, where if the employer acts according to the

direction given in the order he will have no other alternative but to face ruination in the matter of personal safety and on the economic front.'

13.8. Therefore, the ratio of para-25 is that, provision of Section 25-O(2) by not providing for giving of the reasons by the Government, enabled it to make an unreasonable, whimsical or capricious order. To meet this argument, respondents tried to persuade the Supreme Court to read into Section 25-O(2) the requirement to give reasons therein. This was rejected in para-26, because of lack of any provision, compelling the Government to pass an order within a stipulated period. The former Section 25-O(2) was couched in a language which enabled the Government to 'direct' the employer not to close down. To compel an employer not to close down in public interest for maintaining production, was held to be highly unreasonable; further, even if the Government fails to consider the application and the employer closes the establishment on the expiry of the notice period (90 days) employer incurs the civil liability. These factors cumulatively weighed in para-26, to reject the request to read into Section 25-O(2), a duty to assign reasons for the order. The last sentence in para 26 was emphasised by Sri Narayanaswamy, the learned Counsel for the employer before us, in support of his contention that the provisions of Section 25-O was held to be unreasonable, because its object was to maintain production. We are of the view that this sentence has to be read in the context of the entire paras 25 and 26, and the Supreme Court was pointing out the unreasonableness of the order, and if maintaining production was the basis to apply the test of public interest. The entrustment of the power to make an order of refusal of permission without assigning any reason and the power to reject the employer's application on the ground of public interest as understood by the Government, even when the reasons put forward by the employer were actually found to be adequate and sufficient, was the basis of these paragraphs. If paras 24, 25 and 26 are read together, it is clear that, in para-24, the Supreme Court pointed out that the concept of public interest includes the consideration of the interests of several persons connected with the employer and the undertaking, and, how these considerations were ignored by the State Government, by an erroneous view of the concept of public interest; this erroneous approach was possible because of the language of Section 25-O(2) providing for alternative grounds to reject the application, without assigning any reason in the order.

13.9. In para-27, the failure to provide for an appeal or review against the order is referred, to hold the scheme of Section 25-O as unreasonable.

13.10. The impracticability of complying with the provisions of Section 25-N, which is attracted by the then Section 25-O(7) was the subject of para-28. In view of the present Section 25-O(7), which does not refer to Section 25-N at all, the reasoning in this para need not be referred and, in fact, no argument was advanced with reference to this reasoning before us.

13.11. Para-29 points out the difficulty in harmonising the conflicting parallel interests.

13.12. Para-29 has to be read with para-30. The relevant passage in para-30 is (p. 541) :

'The law may provide to deter the reckless, unfair, unjust or mala fide closures. But it is not for us to suggest in this Judgment what should be a just and reasonable method to do so. What we are concerned with at the present juncture is to see whether the law as enacted suffers from any vice of excessive and unreasonable restriction. In our opinion it does suffer.'

13.13. The need to deter an employer from resorting to closure under certain circumstances, is thus accepted and in our view, this observation pertains to the substantive aspect of the right under Article 19(1)(g) read with Article 19(6). The last sentence in this para once again shows that, the Supreme Court in Excel Wear case, was concerned with the language of the earlier Section 25-O as it then stood.

13.14. After stating in para-31 that reasonableness of law has to be tested both from the procedural and substantive aspect, the conclusion is drawn in para-32 that the provisions of Section 25-O permitted 'the authority to pass a cryptic, capricious, whimsical and one-sided order'; therefore, it was meaningless to provide for furnishing of detailed particulars by the employer while seeking the permission.

13.15. Paras 33 and 34 go together. In para 34. the following sentences were relied to contend that, Section 25-O was struck down, on the basis of the unreasonableness in its substantive aspect :

'The owner cannot be asked to part with them or destroy them by not permitting him to close down the undertaking. In a given case for his mismanagement of the undertaking resulting in bad relationship with the labour or incurring recurring losses the undertaking may be taken over by the State. That will be affecting the property right with which we are not concerned in this case. It will also be consistent with the object of making India a Socialist State. But not to permit the employer to close down is essentially an interference with his fundamental right to carry on the business.'

These observations were made in the context of the larger question, as to whether right to close down a business is a right appurtenant to the ownership of the property and not an integral part of the right to carry on the business. The first sentence extracted above actually pertains to the order of refusal, the emphasis is to be on the words 'the owner cannot be asked' and 'by not permitting him.'

13.16. Asking the owner or not permitting him, could be only by an order. It is while making the order under Section 25-O if the Government ignores the various relevant factors stated in several passages of this decision, the said order would interfere with the fundamental right to carry on the business.

13.17. The next relevant paragraph is para 42, wherein Supreme Court 'declared that Section 25-O of the Act as a whole and Section 25-R in so far as it relates to the awarding of punishment for infraction of the provisions of Section 25-O are constitutionally bad and invalid for violation of Article 19(1)(g) of the Constitution.'

13.18. Having already observed in para-26, that, by reading the requirement of giving reasons for the order under Section 25-O, would not make it reasonable, in the absence of other safeguards, Supreme Court had to declare the entire section invalid. From this declaration, again, it is not possible to infer that the Supreme Court struck down Section 25-O because the restriction imposed by the said provision was unreasonable in its substantive aspects.

14. The nature of the provision was such that it enabled the Government to ignore several relevant factors. But the real factors which weighed with the Government while rejecting the employer's application for permission cannot be deciphered, since, reasons need not be given; thus, the fundamental right of the employer can be annihilated by an order of the State Government based on its subjective satisfaction and there was no statutory remedy to have this order re-examined. Supreme Court recognises the power of the legislature to impose reasonable restrictions on the right of the employer to close the establishment and in fact indicated the need to have a deterrent law to prevent closure under certain circumstances. Necessity of permission from an independent authority like the Government was not held as destroying the fundamental right of the employer, anywhere in Excel Wear case (supra).

15. If the requirement of a prior permission for the closure, by itself is an unreasonable restriction, sub-section (1) of Section 25-O would have been independently struck down by the Supreme Court in Excel Wear case (supra). Earlier Section 25-O(1) was as follows :-

'An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall serve, for previous approval atleast ninety 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 an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.'

Sub-section (1) required previous approval of the Government for closure. But, in the entire discussion in Excel Wear case (supra), Supreme Court nowhere referred to this aspect and made any observation against such a requirement.

16.1. With utmost respect, we are constrained to take a view differing with the view of the learned single Judge regarding the ratio of the decision in Excel Wear case (supra).

16.2. The several passages from the Excel Wear case (supra) referred in the Judgment of the learned single Judge, pertain to certain relevant situations and factors which should normally guide the decision-taking process on an application for permission; but these could be easily ignored by the appropriate Government while refusing permission, in view of the language of the earlier provision.

16.3. The said law (old Section 25-O) was held to be unreasonable, because the Section gave alternative grounds to reject an application. The said provision enabled the making of an unreasonable and cryptic order, and it enabled the Government to procrastinate over the application without arriving at any decision within a prescribed period; in these circumstances the provision was found to be unreasonable.

16.4. The Supreme Court has not categorically laid down as an absolute proposition, that 'it was not possible to strike a balance between the parallel and conflicting interests ...', as observed at page 555 in the order under appeal (1985-II-LLJ-543). The observation of the Supreme Court at para-29, points out that 'it is not always easy to strike a balance between the parallel conflicting interests...'. The inference to be drawn is that paras 29, 30 and 24 contemplate a reasonable law which would provide for balancing the diverse interests involved in the matter of closure of an undertaking. In fact, the Supreme Court recognises the need to have a law to deter 'the reckless, unfair, unjust or mala fide closures.' - (1978-II-LLJ-527 at 541).

16.5. The restriction against the right to close the undertaking flows out of the requirement to obtain permission. The question is, under what circumstances, the restriction will become unreasonable. 'Annihilation of the person affected (employer)' as apprehended in the Judgment under appeal, will be by an arbitrary or capricious order of refusal and not by the provision requiring the employer to obtain the permission; the observation in para 34 of the Judgment in Excel Wear case (supra), as already held by us, was in the context of negating the contention of Mr. Deshmukh, that a right to close down a business is a right appurtenant to the ownership of the property, and not a right flowing out of Article 19(1)(g). That is to say, if the State proceeds to take over the undertaking then its

assets would vest in the State and on that occasion, the question as to whether property right is also affected may have to be considered.

16.6. The observations in the Judgment under appeal that there is no difference between the earlier Section and the present one, except a few more words, with respect, is also not acceptable to us. Earlier provision gave the power to the Government to direct the employer not to close down the undertaking on any one of the two grounds viz., (i) if the reasons for the intended closure are not adequate and sufficient; or (ii) such closure is prejudicial to the public interest. These alternatives vested a vast power to reject the application even when a case for closure is made out. The present provision, Section 25-O(2) requires the Government to grant or refuse permission sought by the employer 'having regard to' (i) the genuineness and adequacy of the reasons stated by the employer; (ii) the interest of the general public and (iii) all other relevant factors. The cumulative effect of the grounds falling under these three heads of factors to be regarded, is different from the earlier power (under old Section 25-O) enabling the rejection of the application solely on the ground of public interest. Further, we have to assume that the Parliament had considered the observations of the Supreme Court in Excel Wear case and accepted the various factors referred therein, as relevant factors while enacting the new Section 25-O; and therefore, while exercising its power under Section 25-O(2), the appropriate Government would consider the scope of Section 25-O(2) bearing in mind those observations.

16.7. Interest of the workmen or need to maintain production etc., each by itself will not be the basis to reject the employer's application. The observation at pages 556-557 of the Report (1985-II-LLJ-543) has been already extracted. The present impugned provisions satisfy those requirements. Another reason given in the order under appeals, is that, specific grounds on which permission could, either be granted or rejected, are not stated in Section 25-O; we cannot agree with this reasoning. Present Section 25-O read with the decision of the Supreme Court in Excel Wear, provides sufficient guidance to the appropriate Government to consider the scope and effect of the three factors to which the Government should have due regard while considering the application for permission.

16.8. As held in Maneka Gandhi's case : [1978]2SCR621 , the phrase 'in the interest of the general public' is not a vague or uncertain term; (ii) when a power is entrusted to the Government it can be assumed that the Government will exercise the power in a reasonable and responsible manner, and abuse of power, in such a circumstance cannot be lightly assumed; (iii) if there is any abuse of power arms of the Court are long enough to reach it and strike it down. These principles apply aptly to the provisions of present Section 25-O also.

16.9. Dwaraka Prasad's case : [1954]1SCR803 was referred in the order under appeals. Most apposite decision, in the circumstances of this case, seems to us, is Harishankar Bangla v. State of Maharashtra : 1954 CriLJ1322 wherein at page 468, the Supreme Court after referring to Dwaraka Prasad's case and the Control Order involved in the said decision, proceeded to say, -

'Provisions of the Control Order bear no analogy to the provisions of the present Control Order. The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample power in the Courts to undo the mischief.'

In Dwaraka Prasad's case (supra) there was a total unguided power, to be exercised by anyone to whom the power may be delegated by the Government. But here, under Section 25-O, the exercise of the power is by the highest executive authority i.e., the appropriate Government. There is a presumption that when a power is vested in the Government, the same would be exercised reasonably. A further appeal from the order of the Government, even if not provided for, will not render the law unreasonable. The judicial power of the High Courts and of the Supreme Court is always available to set at right, if any injustice results from the order of the Government. We are of the view that Section 25-O vests a guided, controlled power in the appropriate Government to be exercised reasonably and objectively and therefore its provisions cannot be nullified as

unreasonable.

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

Similarly, the statement that the employer has a fundamental right to close the undertaking as and when he desires, is again, not an acceptable proposition. It is undoubtedly true that, if permission is refused, even when the situation warrants closure, then, it will be an order of unreasonable compulsion and may become tyrannical. But, we cannot assume that the Government (Central or State) would resort to the making of an unreasonable order. Since reasons are to be recorded, and such order can be easily scrutinised by the High Court or the Supreme Court and the Court's judicial power would strike at such an unreasonable order. The High Court need not always remit the matter to Government for fresh consideration, after setting aside an unreasonable order. If the existing material is sufficient to lead to the only reasonable conclusion that permission has to be granted, Court may issue a mandamus to Government to accord permission - (vide ratio of *Gujarat Steel, Tubes Ltd. v. Gujarath Steel Tubes Mazdoor Sabha* (1980-I-LLJ-137) and *Comptroller and Auditor General of India & others v. K. S. Jagannathan & another* : [1986]2SCR17 .

18. Since the appropriate Government has to consider the application of the employer objectively and reasonably opportunity of being heard to the employer, the workmen and the persons interested in such a closure, is procedurally, a salutary one. Hearing of all these persons would assist the Government to arrive at a correct and fair decision. The contention, that none can oppose the employer's decision to close the undertaking, cuts at the very root of the principles underlying the observation in *Excel Wear* (supra) that an employer cannot close his industry recklessly, unfairly unjustly or with ulterior motive (i.e. with mala fide).

19. One more aspect has to be stated. The order of refusal under Section 25-O will be in force only for one year. Therefore, the restriction on the right of the employer operates only temporarily. This enables the employer, the workmen, the Government or others to intervene and save the undertaking. In a particular case, an employer may make out a very good case for closure; but some one else may come forward to carry on the undertaking on reasonable terms or for a price. Giving of opportunity to various persons, enables the Government to consider this aspect and persuade the employer to sell or lease the undertaking or entrust its management to such a third party.

20. The laws governing insolvency, or dissolutions of the firms or incorporated companies cannot have any bearing on the construction Section 25-O. Those laws pertain to the civil status and organisation of certain persons, and do not directly govern the operations of the undertakings. Extreme examples cannot be stretched to interpret a legislation and to nullify the effect of a legislative measure like Section 25-O of the Act.

21. As held in Excel Wear case (supra) it is not easy to strike a balance several interests. The balancing has to be done in a particular situation. Depending upon the particular set of facts and circumstances, the appropriate Government has to strive to achieve this balance under Section 25-O. The orders of the appropriate Government in all these cases are subject to judicial review. In the very nature of things, the legislature cannot envisage the future situations and lay down a fixed formula to meet those situations. The Supreme Court in Excel Wear case (supra) held that a law to control, regulate or deter the closure of an undertaking, may be enacted as a reasonable restriction. The bar to make the law is, only when it is unreasonable under Article 19(6). the defects found in the earlier Section 25-O are now removed. Bearing in mind these principles, we are of the view that Section 25-O of the Act, cannot be declared as violative of Article 19(1)(g) of the Constitution.

22. In this regard the classic statement contained in V. G. Row's case : 1952 CriLJ966 may be recalled while considering the scope of Article 19 of the Constitution :

'..... the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature or the right alleged to have been infringed, the underlying purpose to the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative Judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions considered them to be reasonable.'

23. Arguments were addressed on the question of onus. While Sri Narayanaswamy contended that the onus is on the State to justify the reasonableness of the restrictions imposed, the appellants contended that there is a presumption in favour of the constitutionality of the law and the burden is on those who seek its invalidity, to establish the unconstitutionality. It is unnecessary for us to go into this contention, in the view we have taken of the provision, de hors the onus.

24. In conclusion, we are of the view that the present Section 25-O of the Act is denuded of the infirmities found in its predecessor. The provisions of Section 25-O of the Act as it now stands require the Government to give reasons for its orders; the factors to be considered by the appropriate Government are stated in Section 25-O(2); an objective approach in arriving at the decision by the Government, is now imperative; the factors stated in Section 25-O(2) which are to be considered, are to be understood in the light of the decision in *Excel Wear*; the appropriate

Government has to strive to strike a balance between the various interests involved, in the background of a particular situation; any unreasonable order can be corrected by judicial review; the Government itself may review its order or refer the matter for decision by a Tribunal for adjudication; the application of the employer has to be considered by the appropriate government and the order to be communicated within sixty days from the date on which the application is made, failing which the application is deemed to have been granted; there is always an assumption that the Government would exercise its power reasonably. In *Excel Wear case* (supra) the Supreme Court recognised that a law may provide to deter reckless, unjust, unfair or mala fide closures; therefore, requirement of a prior permission for closure by itself cannot be an unreasonable restriction on the fundamental right of the employer. In this view of the matter, we hold that, it is not possible to declare Section 25-O of the Act as violative of Article 19(1)(g) of the Constitution.

25. Facts of the case point out that 'time' is the best healer. We are told that the undertaking in question still continues to operate, the employer having settled the problem amicably with the workmen and that the employer has no immediate reason to close it down; in the altered circumstance, no arguments were addressed as to the correctness, propriety or reasonableness of the order of the State Government. The same set of learned Counsel are appearing for the rival set of parties in the connected writ petitions (i.e., W.P. No. 16594 of 1988 etc) wherein the validity of Section 25-O of the Act is the only point involved, and since any decision in these appeals would affect the result of those writ petitions, there was no reservation of any sort for the respective Counsel to advance their contentions in these appeals, in spite of the fact that on facts no dispute survives between the management and the workmen of the undertaking involved in these appeals.

26. We are fortified in our conclusion that Section 25-O of the Act does not suffer from any constitutional infirmity, by the views of His Lordship A. G. L. Oza, Acting C.J. (as he then was) of Madhya Pradesh High Court in *Straw Products Ltd. v. State of Maharashtra* (Misc. petitions No 2012 of 1983) and that of the Full Bench decision of the Delhi High Court in *D.C.M. Ltd. v. Union of India & other* (CWP. No

1281 of 1985).

27. In the result, for the reasons stated above, these appeals are allowed, the order under appeals is set aside and the writ petitions are dismissed. Rule in discharged.

In the circumstances of the case, there will be no order as to costs.

ORDER ON ORAL PRAYER

The learned Counsel for the Management makes an oral prayer to certify these appeals to be fit ones to appeal to Supreme Court.

2. In our view, the case is covered by the judgment of the Supreme Court and we have relied upon that Judgment. No substantial question of law of general importance which needs determination by the Supreme Court arises in these cases. Consequently, the prayer is declined.

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