SUPREME COURT OF INDIA

Kalinga Tubes Ltd.

Vs.

Workmen

C.A.No.26 of 1968

(J. M. Shelat, K. S. Hegde and A. N. Grover, JJ.)

03.05.1968

JUDGEMENT

GROVER, J.:

1. This is an appeal by special leave against the award of the Special Industrial Tribunal, Orissa, in which the principal question which has to be determine is whether there was a closure of its undertaking by the appellant Company pursuant to a notice issued on October 3, 1967, to its workmen on account of the Gherao, if it is permissible to use that expression, of the staff and Officers of the Company in its Administrative Office building from about 2 P. M., of October 1, 1967 till 5 A. M. of the morning of October 2, 1967, and if it was not a closure whether there was a refusal by the management of the Company to employ its workmen amounting to a lock out.

2. The material facts may be succinctly stated. The appellant is a public Company having its registered office at Choudwar in the district of Cuttack. It maintains some branch offices at Calcutta and Madras. It carried on the business primarily of manufacturing and selling iron pipes and poles and has been employing a large number of workmen, their number being 922 on the relevant date.

According to findings of the Tribunal, which have not been questioned it is a prosperous concern an between the years 1959 and 1964 the appellant paid its employees bonus equivalent to four months wages every year except in 1961-62. For the subsequent three years bonus was paid at the rate of four per cent under the Payment of Bonus Act, 1965 (Act XXI of1965). The workmen were not satisfied with the payment at the rate of four per cent an raised a dispute. On August 22, 1965, they made a demand for bonus at the rate of 20 per cent of their annual salary or wages for the accounting year 1966-67. Certain correspondence started between the Assistant Labour Commissioner, the Management and the General Secretary of the Union (Kalinga Tubes Mazdoor Sangh). On September 21, 1967, the Manager (Administration) notified that bonus at the rate of 4 per cent for the year 1966-67 had been sanctioned by the Management. The General Secretary of the Union asked the Manager to review the above notice and to send a copy of the balance sheet for the accounting year in question. On September 25, 1967, the District Labour Officer informed the Manager that he had fixed October 2, 1967, (11 A. M.) for discussion in the matter of the payment of bonus. The Manager sent a copy of the balance sheet to the General Secretary of the Union on October 1, 1967. On that day the General Secretary asked the Assistant Labour Commissioner to examine the profit and loss account for the year 1966-67 and to apply the requisite formula under the Payment of Bonus Act. On October 1, 1967 about 150 workmen assessmbled after 2 P. M. at the gates of the Administrative Building in which about 40-47 members of the staff were present. They were not allowed to leave the Building till 5 A. M. next day. Meanwhile the Officer-in-charge Choudwar Police Station, Executive Officer, Notified Area Council, Choudwar (a First Class Magistrate), the Additional Superintendent of police, Cuttack, the Sub-Divisional Officer Sadar Cuttack and the Assistant Labour Commissioner went to the place where all this was happening. The factory remained closed on October 2, 1967 on account of Gandhi Jayanti. On the morning of October 3, 1967 the Management issued a notice declaring a closure of the factory. It is common ground that uptill now the factory has remained closed. The Management offered to pay wages for one month in lieu of notice and reduced compensation under the proviso to sub-section (1) of Sec. 25-FFF of the Industrial Disputes Act, 1947 (hereinafter called the Act). It has not been disputed that out of 922 workers, 613 workers accepted compensation under the aforesaid provision. The remaining workmen, however, neither agreed to nor accepted any compensation. The reference under the Act was made on November 3, 1967 by the Government of Orissa primarily for adjudicating whether the appellant had declared a lock out by means of the notice dated October 3, 1967 or whether it was a closure.

3. The notice which was issued by the Management on the morning of October 3, 1967 may be reproduced :

"The Management hereby notified that as a direct consequence of the continued and sustained illegal activities of the workmen and their pre-concerted and pre-meditated acts since 1st October 1967 by illegally keeping confined and forcibly resisting the exit of the staff and some of the officers of the Company in the Administrative Office building from about 2 P. M. of the 1st October 1967 till they were forcibly rescued by the Police authorities at about 5 A. M. on the morning of 2nd October 1967 and thereafter continuing with their illegal trespass into the premises of the Company in the aforesaid Administrative Office, and refusal to allow entry of any of the staff and officers of the Company into the said building; and the consequent refusal by the officers and supervisory staff of the Company to carry on their normal work and discharge their functions being

reasonably apprehensive of their safety, it has become impossible to continue to run the factory and its subsidiary Sections and Departments any further. The Company hereby notifies that there will be a complete closure of the Factory on and with effect from 6 A. M. of the 3rd October 1967."

Before the Tribunal the main controversy centered on the question whether there was a closure of its undertaking by the appellant or whether there was a refuse to employ the workmen which would fall within the expression 'Lock out' as defined by Section 2 (1) of the Act. The Tribunal found;-

(i) Since the morning of October 3, 1967 there had been no production by the factory of the appellant and the operatives had not been employed;

(ii) By September 30, 1967 there was absolutely no idea to close down the undertaking or business as the Annual General Meeting of the Company had taken place on that date and there was no evidence that there was any meeting of the Board of Directors or of the share-holders between the Annual General Meeting and the issue of notice of October 3, 1967 to workmen which would show that any decision had been taken to close down the undertaking.

(iii) The trade results of the business carried on by the Company during the year 1966-67 would never have induced any business man to close down the undertaking. The Company had earned a net profit of 2.27 lacs o rupees after making payment of 20 lacs of rupees of loan to the Industrial Financial Corporation of India and incurring a loss of Rs. 63, 720 in the disposal of certain loan bonds. Orders for manufacturing pipes had been received till October 2, 1967 for more quantities than were in stock. Similarly orders had been received for manufacturing poles. Therefore the Management could not have intended the closing down of the undertaking till the notice was issued.

(iv) The closure of the factory or place of work was a direct consequence of the alleged illegal activities of the work-men and of the refusal by the officers and supervisory staff to carry on their normal work and net due to shortage of raw materials, fuel or power.

The Tribunal concluded at the action taken by the Management in issuing the notice on the morning of October 3, 1967 and in suspending the work in the factory amounted to a lock-out and was not a closure. The Tribunal proceeded, however, to state the other steps which were taken by the Management. A notice was given to the workers that they should hand over vacant possession of the quarters which had been allotted to them. A letter was written to the Chief Minister of Orissa on October 2, 1967 that the Management had no other alternative but to close down the factory. Information was similarly sent to the Superintendent of Police Cuttack in which a request was also made for posting a platoon of police force in the factory premises at the Company's cost. A copy of the notice of closure dated October 3, 1967 was sent to the Chief Inspector of Factories. It was

pointed out to the Tribunal that the employees in the Branch Offices at Calcutta and Madras had already been discharged and the members of the staff at Choudwar had been notified that their services would be terminated within a period of three months after the closure by January 3, 1968. The Tribunal considered that all such action which had been mentioned was taken consistently with the notice of closure. It was held that the Management had in fact declared a lock-out in the guise of a closure. The Tribunal was considerably influenced by the absence of any evidence that the business of the Company was going to be wound up or the Company was going to be dissolved.

4. The Tribunal next proceeded to decide whether the declaration of a lock-out was legal. It was found that two cases relating to gratuity and retrenchment between the same periods were pending adjudication before the Tribunal and therefore a declaration of lock-out contravened the provisions of Section 23 of the Act; such contravention being illegal under Section 24. It was note that the assertion of the Union that the workmen went to work in the factory on the early morning of October 3, 1967 had not been challenged on behalf of the Management. According to the Tribunal the declaration of a lock-out had been made only because a portion of a large number of workmen had assembled at the Administrative building of the Company and demanded bonus at a higher rate during their off time.

Further the Standing Orders of the Company made ample provision for taking disciplinary action for misconduct of the workmen. It was, therefore, improper on the part of the Management, so says the Tribunal, to remove all the operatives of the mill; even most of them were admittedly not present at the scene of occurrence. The following portion of the order of the Tribunal however, deserves to be reproduced:

"But the immediate cause for declaration of the 3rd October 1967 though couched in exaggerated language in Ex. 44 was undoubtedly the action taken by some of the workmen at the Administrative building from about 2 P. M, of the 1st October 1967 till 5 A. M. of the 2nd October 1967. There cannot be any manner of doubt that about 40 members of the staff working in that building had at some stage been prevented from going out. Officers from the Labour Directorate, Police Officers and Magistrates admittedly went there. It was not a pleasure with them to keep vigil over the building for that entire night for nothing. The Secretary of the Mazdoor Sangh remained present there. It does not appear from the evidence that he requested the assembled workmen to leave the premises of the Administrative building when the chance of N. K. Mahapatra, the Manager (Administration) or any other Senior Officer going there became absolutely remote. Such a conduct on the part of the Secretary of the Union and some of the workmen can hardly be appreciated."

The Tribunal directed that the workmen should be given by the Management at least half of the wages respectively due to them normally for the period between October 3 1967 and such subsequent date when they would be reinstated in their respective posts and allowed to work in the factory. It declined to determine what compensation would be payable to the workmen under the provisions of Section 25FFF of the Act if it was a case of closure.

5. Mr. Sachin Chaudhury for the appellant Company has contended that the approach of the Tribunal to the determination of the dispute referred has not been altogether correct. According to him the essential and basic question was whether the undertaking of the appellant Company had been closed down on October 3, 1967. The question of a lock-out could only arise if the first question was answered in the negative. According to Mr. Chaudhury even if it were to be found that the undertaking had not been closed down it did not necessarily follow that there had been a lock-out. At any rate, the matter of closure had to be decided without mixing it with considerations relevant for a lock-out.

6. Now in the Act Section 25-FFF alone contains provisions which relate to closing down of an undertaking. The expression "closure" which has been frequently used by the Tribunal as also by us is nowhere defined and this expression can only be used for the sake of convenience. In Industrial law, apart from closure, the workers can be put out of action by lay off (defined by Sec. 2 kkk), lock-out [defined by Section 2 (1)] and retrenchment [defined by Sec. 2 (oo)].

7. Section 25-FFF so far as it is material for our purposes reads:-

"(i) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure, shall, subject to the provisions of sub-section (2) be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoid able circumstances beyond the control of the employer, the compensation to be paid to the workman under Cl. (b) of section 25F shall not exceed his average pay for three months.

Explanation.-An undertaking which is dose down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed of stocks (or the expiry of the period of the lease or the licence granted to it where the period of the lease or the licence expires on or after the first day of April 1967) shall not be deemed to have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.

(2) . . . ."

It is obvious that if the appellant Company had closed down its undertaking on the morning of October 3, 1967, no other question will arise except in the matter of relief involving payment of compensation which has to be on different basis according as the case falls with in the first sub-section or the proviso thereto.

8. The case of the Management itself was that the events which took place between the after-noon of October 1, 1967 and the early moring of October 2, which may compendiousy be called a Gherao were solely responsible for the decision to close and the actual closure of the factory as also the undertaking with the exception of the continued working of the waterworks which was meant for supply of water to the colony which had developed around the factory. It was never claimed nor has it been claimed before us on behalf of the Management that it was due to any financial or economic reasons or other compelling circumstances of a similar nature that the closure was effected. So far as the present case is concerned the Tribunal travelled into an extraneous and irrelevant field when it took into account the profitable business which the company was doing and the profits which it was making or was expected to make. The Tribunal was apparently labouring under the impression at according to certain judicial decisions there can be a closure of an undertaking only when there are financial difficulties and the undertaking becomes a losing concern. It is difficult and indeed no such principle entrenched in Industrial law has been brought to our notice, to accept that the closure of an undertaking can be limited or restricted only to financial, economic or other considerations of a like nature. All that has been laid down is that in case of a closure the employer does not merely close down the place of business but he closes the business itself finally and irrevocably vide Express Newspapers Ltd. v. Their Workers and Staff, (1962) 2 Lab LJ 227 at p. 232 = (AIR 1963 SC 569 at p. 574). The closure has to be genuine and bona fide in the sense that it should be a closure in fact and not a mere pretence of closure. Tea Districts Labour Association, Calcutta v. Ex-Employees of Tea District Labour Association, (1960) 3 SCR 207 at p. 213 = (AIR 1960 SC 815 at p. 817). The motive behind the closure is immaterial and what has to be seen is whether it was an effective one. Vide Andhra Prabha Ltd. v. Secy., Madras Union of Journalists, AIR 1967 SC 1869 at p. 1876. In Andhra Prabha's case the Board of Directors of the Company had passed a resolution to sell items of printing machinery and equipment to one private limited company followed by an agreement in writing on April 22, 1959 between the two companies. On April 23, the workers were informed that the company had sold the right of editing and publishing in regard to the publications. On the next day the workers adopted a resolution to go on strike. Some acts of sabotage and gross indiscipline were committed but the strike of the workers started on April 27, 1957. The publication of all the papers was consequently stopped. On April 29, 1959, a closure notice was published. It would seem that the closure was found, apart from other facts, on the evidence of Ram Nath Goenka, the Chairman of the Board of Directors that after the demonstration of the labourers before his office on April 28, 1959 and the prevention of ingress and egress of the members of the staff to and from the office building he decided to close down his undertaking at Madras. In Indian Hume Pipe Co. Ltd. v. Their Workmen, Civil Appeal No. 1829 of 1967, D/- 8-2-1968 = (reported in AIR 1968 SC 1002) decided on February 8, 1968, the question was whether the closure of the factory at Barakar in West Bengal by the appellant which was a big engineering concern having factories and establishments spread all over India and Ceylon, was illegal and unjustified. The whole area of the factory and its surroundings including the Grand Trunk Road was coal bearing land from which coal had been extracted from a very long time. There had been a subsidence of the earth on two occasions. As a result the approach road to the appellant's factory had been badly damaged, apart from the damage to a portion of the manager's quarters. The Chief Inspector of Mines wrote to the appellant that its factory was situated in a place which was dangerous for habitation. In December 1964, notice was

given of closure and termination of service to all the workmen individually. The Tribunal while holding that the factory had been actually closed down with effect from January 1, 1965 went into the question as to whether the closure of the factory was bona fide and justified. The reason for closure was attributed to certain disputes which had been taking place between the appellant and its workers from 1957 onwards. This is what Mitter J., speaking for the Court said, "In our opinion it was not open to the Tribunal to go into the question as to the motive of the appellant in closing down its factory at Barakar and to enquire whether it was bona fide or mala fide with some oblique purpose, namely to punish the workmen for the Union activities in fighting the appellant." It was emphasised at the expression 'bona fide' used in certain decisions of this Court did not refer to the motive behind the closure but to the fact of the Closure. The decision in the Workers of the Pudukottah Textile Mills v. The Management, Civil Appeal No. 1005 of 1963 (SC) is quite apposite for the purposes of the present case. The Pudukottah Textile Mills had been working since 1948. By 1959 the financial position of the Mills was in a bad way. The Management had changed hands and the relations between the Union to which the workers belonged and the new Management were not very cordial. The new Management tried to bolster up the rival union which would be amenable to its control. In 1960 a fire broke out in the godown of the Mills which resulted in the destruction of a very large part of the cotton stored in the godown. The new Management gave notice on May 26, 1960 stating that the work would remain suspended until further notice because of the fire. On June 7, 1960, the new Management notified that the Directors had decided to close down the Mills with effect from June 8, 1960. Thereafter the Mills closed down and a dispute arose about closure. The reasons given by the Management for closing the Mills were (i) unsatisfactory financial position; (ii) difficulty in procuring cotton at reasonable prices; and (iii) the possible risk involved in storing cotton. Only a month later on August 11, 1960 the Directors decided to reopen the Mills. It was stated that this was done on account of the representations received from the workmen who had been thrown out of employment etc. A large number of old workmen were re-employed but a substantial number of them were not re-employed. This Court expressed the view that the past history of disputes between the new Management and the Union of the appellant would not be sufficient to draw the conclusion that the closure which took place on June 8, 1960 was not a bona fide closure. It was held that the closure was genuine and there were three clinching circumstances. The first was that the closure was necessitated by the fact that a very large quantity of stock of cotton was burnt (by fire) which broke out in May 1960 and which resulted in a loss of cotton worth rupees five lacs to the Mills which were already in a difficult financial position. The second circumstance was that a large amount of money was paid as retrenchment compensation by the Mills. The third circumstance was, which was considered to be conclusive, that the new Management felt that the Union of the appellant might have been behind the fire. Moreover in a letter by the new Management to the Commissioner of Labour a suspicion was expressed about sabotage in the matter of fire. The Court felt that if the Management had closed down the Mills because of a suspicion that the fire was the result of sabotage and not mere accident and that it would not be safe to reopen the factory in the near future, it could not be said that the closure was not bona fide and was resorted to merely for smashing the Union.

9. The discussion of the above decisions yields the result that the entire set of circumstances and facts have to be taken into account while endeavouring to find out if, in fact, there has been a closure and the Tribunal or the court is not confined to any particular fact or set of facts or circumstances. In one case the Management may deride to close down an undertaking because of financial or purely business reasons. In another case it may decide in favour of closure when faced with a situation in which it is considered either dangerous or hazardous from the point of view of

the safety of the Administrative staff or members of the Management or even the employees themselves to carry on the business. The essence of the matter therefore, is the factum of closure by whatever reasons motivated.

10. There can be no manner of doubt from what has been found by the Tribunal itself that a large number of workers about 150 of them virtually staged a gherao during the several hours preceding the declaration of closure. If their demand was purely one in respect of bonus there was no justification for keeping about 40 members of the Administrative staff virtually confined inside the building and stopping all ingress and egress as apparently was the case till the police came to the rescue. It is in the evidence of Shri Harekrishna Mahapatra who was Officer Incharge of the Police Station Choudwar and whose evidence does not appear to have been fully read by the Tribunal that he arrived at the Administrative Office at 4 or 5 p. m. on October 1, 1967. He reported the incident to the Superintendent of Police and the Sub-Divisional Officer Cuttack. The latter directed the Executive Officer Choudwar to take charge of the situation. He came to the spot. Other officers also arrived. It was on a warning by the Sub-Divisional Officer that force would be used unless the workers left that they went away and allowed the officers to leave the building. During the period he was there some canteen boys brought tiffin at about 11.30 p. m. for the staff but it was not allowed to be taken to them. Some of the workers threw the same away and some partook of it.

11. A question immediately arises whether the Management could take a quick decision to close the the undertaking of manufacturing iron pipes and poles on account of the gherao the magnitude of which was not inconsequential and which was likely to result in deterioration of relations between the Management and the workers as also the apprehension expressed by the staff of danger to personal safety. It is not possible to say in categorical terms that closure in the aforesaid background and circumstances would not be genuine or that a great deal of suspicion would attach to the action taken simply because the Company was a profitable and going concern. There are a number of supplement facts which show that the Management was faced with a situation in which it could well take a decision to close down the undertaking. The Deputy Chief Accounts Officer wrote a letter to the Manager (Administration) . on October 7, 1967 (Ex. 3) giving his version of what was experienced by him. It was pointed out that the staff had to pass through anxious hours under conditions of torture due to wrongful confinement. It was only at 5.30 a. m. on the morning of October 2, that they were rescued by the Sub-Divisional Officer with the help of a strong police cordon. The letter concluded by saying "considering the above circumstances, unless an assurance is given and adequate arrangements are made for the protection and safety of the staff in the Administrative Office Building, I regret my inability to attend office from tomorrow." An application received from the staff of the Accounts. Department on similar lines (Ex. 4) was also enclosed. As mentioned before, the Tribunal has itself noted and castigated the conduct of the workmen and the Secretary of their Union who was present during the material period and who did not make any effort to persuade the assembled workmen to leave the premises of the Administrative Building.

12. Mr. Govind Das for the respondent workmen has not seriously challenged what he calls the Management's prerogative to dose down the undertaking, but according to him the Management is

not at liberty to ignore all business reasons which must form the paramount consideration for taking such a decision. He has also emphasised that the closure should be of the entire business which means, according to him, that the Company should have been wound up. He has stressed the various matters which prevailed with the Tribunal about the absence of evidence to show that any decision was taken by the Board of Directors or the shareholders of the Company to close down the undertaking as a whole. It is maintained by him that it was only the manufacturing part of the undertaking which was stopped and this cannot possibly be equated with the closing down of the undertaking itself. It must be remembered that the notice which was served by the Management in the matter of closure contained an affirmative declaration not only about the closing down of the factory but also that compensation would be payable under the proviso to Section 25-FFF (1). It was open to the respondents to ask for production of any resolution passed the Board of Directors or other form decision taken by the Management and if any such attempt had been made and the necessary documents had not been produced adverse inferences could have been legitimately drawn against the Company. There is no evidence that the action taken by the Manager (Administration) was not ratified or accepted by the Board of Directors or any other officer who was competent to accord approval. As a matter of fact, it appears that a large number of employees at Calcutta and Madras offices as also at the Choudwar Office had been discharged from service or notices of termination of service had been served on them (vide Ex. 29 and the statement of Management witness No. 4 G. C. Rath, page 164 of the printed record). It appears from Ex. 33 that only a very small staff of officers and workers had been retained in service out of the permanent cadre. There is no indication that after the closing down of the factory, any orders were being obtained or executed in the matter of sales. It is difficult to accede to the contention of Mr. Govind Das that the Company must be wound up or that there should have been a transfer of the machinery or the factory before it could be said that the undertaking had been closed down.

13. It is significant that in the case of the Workers of the Pudukottah Textile Mills, Civil Appeal No. (1005 of 1963 (SC) there had neither been winding up of the entire business nor had the machinery or the factory been disposed of and actually the Mills had been reopened only after an interval of a few months and yet it was held that there had been a closure.

14. Mr. Govind Das has sought to reinforce the view of the Tribunal that in the notice relating to closure all that was stated was that the factory would be closed. This, according to him, attracted the application of the rule laid down in the Express Newspaper Limited case, 1962-2 Lab LJ 227 = (AIR 1963 SC 569) derided in 1962, that in a case of closure the employer does not merely close down the place of business but be closes the business itself and so the closure indicates the final and irrevocable termination of the business itself. Lock-out, on the other hand, indicates the closure of the place of business and not the closure of business itself. The mere statement in the notice, however, cannot be conclusive in the present case and it is the totality of facts and circumstances on which a conclusion has to be reached whether the undertaking was closed down.

15. Ordinarily, as it is well known this Court does not interfere with findings of fact of a Tribunal, but the question whether the undertaking was closed down or not by means of the notice dated October 8, 1967 was not considered in a proper manner by the Tribunal and its approach was

erroneous and suffered from a number of infirmities of such a nature that the conclusion arrived at by it cannot, be regarded as sacrosanct or final. The entire facts and circumstances established in this case impel us to hold that the Management of the appellant closed down its principal undertaking of manufacturing and selling iron pipes and poles on October 3, 1967. It may be mentioned that it was and is not the case of the respondent that the continuation of water supply meant continuation of the undertaking of the appellant.

16. The only question which now remains to be determined is whether the undertaking was closed for "any reason whatsover" or it was "on account of unavoidable circumstances" beyond the control of the employer. The measure of compensation payable when an undertaking is closed down for any reason whatsoever is different as provided in sub-section (1) which refers to the provisions of Section 25F as if the workmen had been retrenched. In the notice served by the Management in the present case it was claimed that the undertaking had been closed down under the proviso to sub-section (1) and actually compensation has been paid to the 613 workers in accordance with the porviso.

17. Mr. Chaudhury has sumitted that the main circumstances which were both unavoidable and beyond the control of the employer were (a) the gherao and (b) the apprehension of the staff of danger to personal safety. These circumstances were not the creation of the employer but of the workmen who indulged in the gherao. According to Mr. Chaudhury a decision had to be taken preceding the issuance of the notice by the Management whether the undertaking should be closed down. The aforesaid circumstances prompted the Management to take a decision in favour of closure and therefore the notice rightly mentioned that compensation would be payable under the proviso. He has drawn attention to a decision of a learned Single Judge of the Calcutta High Court in Bhattacharya Rubber Works Private Ltd. v. Bhattacharya Rubber works workers' Union, AIR 1960 Cal356. In that case there had been lockouts, strikes etc. followed by slow down of work. A prominent member of the Workers' Union declared over a loudspeaker that there was going to be bloodshed. A bomb was thrown into the canteen and there were several cases of stabbing. When some machinery was being removed for repairs, some workmen obstructed the transfer of the machinery. There were further cases of stabbing followed by criminal prosecution. Ultimately the founder Director and the other Directors of the Company found it impossible to carry on the business and were forced to close down.Apart from the question of factum of closure it had to be decided whether the closing down of the undertaking in that case was for unavoidable circumstances beyond the control of the employer. D. N. Sinha J. (as he then was) expressed the view that where the circumstances amounted to vis major or acts of God or enemy action or an act of the State in exercise of its powers of Eminent Domain, that of course would be circumstances beyond the control of the employer. But the matter did not stop there. The closure must be bona fide and it must not be arbitrary. According to him circumstances could not be called unavoidable if the employer by acting in a business like way or as a prudent man of business could avoid it. He was not expected to take a negative attitude. But at the same time he was not called upon to make any unusual effort to avoid any particular circumstances necessitating a closure of his business. Reliance was placed on the observations of Tindal C. J., in Granger v. Dent, (1829) 173 ER 1229 in which a charter-party contained the expression "unavoidable impediment". It was found by the learned Judge that all the instances which had been mentioned showed that the matter had gone out of hand. Undoubtedly, if the Management had engaged an army of Darwans they could have restored peace but that was not

what the employer could be compelled to do as he was entitled to run his business in a normal manner. The closure had been made bona fide and was real. The company went into liquidation and the excise licences had been surrendered. All this would not have been done unless the Management found that it was impossible to continue the work of the factory in the prevailing circumstances.

18. The circumstances which had been proved in the Calcutta case were much stronger than the present case in which there had certain been a gherao for the period mention previously but there, had been no incidents involving physical violence nor a series of incidents of any kind for any length of period preceding the gherao. No speech had been delivered by any of the representative of the workers threatening or inciting bodily injury. With the exception of the gherao, therefore, there was nothing to furnish justification for the Management for thinking that the working of the factory would involve unusual exertion or expense.

19. Mr. Chaudhury had laid a good deal of stress on the apprehension expressed in some of the letters, already noticed, of the members of the staff which was conveyed to the Management by means of Exs. 3 and 4 dated October 2. But in those letters it was clearly stated that the staff would not be able to attend the office unless arrangements were made for their protection and safety. The evidence of the Station House Officer Harekrishna Mahapatra was that the police force which had been sent at the time of the happenings on the material dates had not been withdrawn even up to the time he gave his deposition before the Tribunal and that the factory and the surrounding premises were being watched and guarded by armed police force till Bali Jatra and thereafter by the Orissa Military Police. There is nothing to indicate that the police had refused to give protection even to the individual members of the staff or the expenditure cost of securing protection for them would have been so exorbitant that the company could not have afforded it.

20. Mr. Chaudhury quite properly and fairly accepts that the burden was on the company to bring the case within the proviso and to prove that the circumstances were unavoidable and were also beyond the control of the company for closing down the undertaking. Furthermore such a determination has to be objective on such evidence as may be placed on the record. It is significant that neither N. K. Mahapatra, the Manager (Administration) who had issued the notice dated October 3, 1967 nor any Director or other principal officer of the company was produced by the Management before the Tribunal to give any other facts and circumstances from which it could be inferred that it appeared to the Management that it was not possible to carry on the business by acting in a business-like way and without unusual exertion.

21. The explanation appearing in the proviso gives some indication to the anxiety of the legislature to expressly rule out certain contingencies which ordinarily could have been pleaded by the employer as unavoidable circumstances beyond his control. In the normal working of business of a commercial undertaking financial losses or accumulation of undisposed of stocks and the expiry of the period of the lease or the licence can ordinarily go a long way in establishing that it as virtually become impossible to carry on the business. For instance, if a Company is heading towards

liquidation its business will, in normal course, have to be closed down. Similarly if the period of lease of the site on which a factory has been set up has expired and there is no provision for its renewal or extension it would ordinarily present insurmountable difficulty in the way of the working of an undertaking by a Company or a commercial concern. Notwithstanding all this the legislature provided that in spite of the aforesaid difficulties or impediments or obstacles the conditions of the proviso would not be satisfied merely by the happening or existence of the circumstances embodied in the explanation. The reason for doing so seems to be that whenever such difficulties as are mentioned in the explanation arise, the employer is not expected to sit idly and not to make an all out effort like a prudent man of business in the matter of tiding over these difficulties for saving his business. The legislature was apparently being very stringent and strict about the nature of the circumstances which would bring them within the proviso. The laying down of two preconditions therein in the language in which they are couched is significant and must be given due effect.

22. After considering the entire facts and circumstances of the present case we are not satisfied that the closure of the undertaking was due to unavoidable circumstances beyond the control of the appellant. Thus compensation would be payable as if the undertaking was closed own "for any reason whatsoever" within Section 25FFF (1) of the Act.

23. In the result the appeal is allowed and the award of the tribunal is set aside. The appellant shall be liable to pay compensation under the principal part of sub-section (1) of Section 25FFF of the Act. In view of the entire circumstances the parties are left to bear their own costs.

Appeal allowed.