Excel Wear

Vs

Union of India and Others

Acme Manufacturing Co. Ltd.

Vs

Union of India and Another

Apar Pvt. Ltd. and Another

Vs

Union of India and Another

Writ Petition Nos. 644

(CJI Y. V. Chandrachud, R. S. Sarkaria, A. P. Sen, N. L. Untwalia, A. D. Koshal JJ)

29.09.1978.

JUDGMENT

UNTWALIA, J. -

1. By these four writ petitions the employers challenge the constitutional validity of Sections 25-O and 25-R of The Industrial Disputes Act, 1947 (hereinafter to be referred to as the Act). The facts of the different cases are of a similar nature. It is not necessary to state them in any detail for the purposes of deciding the constitutional question. We may, however, just refer to a few in order to indicate the nature of the dispute between the parties.

Writ Petition No. 644 of 1977

2. The petitioner in this case is Excel Wear, a Registered partnership firm, the partners of which are citizens of India. The petitioner has a factory at Bombay where it manufactures garments for exports. About 400 workmen were employed in the petitioner's factory. According to its case the relation between the petitioner management and its employees started deteriorating from the year 1974 and had become very much worse from 1976. From August, 1976 the workmen become very militant, aggressive violent, indulged in unjustifiable or illegal strikes and the labour trouble in the factory became of an unprecedented nature. Various incidents have been mentioned in the writ petition in support of the above allegations. But since the facts are seriously challenged and disputed on behalf of the Labour Union, which was subsequently added as a party respondent in the writ petition, we do not propose to refer to them in any detail and express our views in regard to them one way or the other. The various facts alleged in the petition may be correct - may not be correct. We do not think it necessary to adjudicate upon them for the purpose of deciding the constitutional question. Suffice it to say that it is legitimate to take notice of the fact that various kinds of situation, such as, labour trouble of an unprecedented nature, a factory running in a recurring loss,

paucity of adequate number of competent and suitable persons in the family of the partners, shareholders or the proprietors of a particular factory, or even outsiders, for the purpose of management, non-availability of raw materials, insurmountable difficulty in the replacement of damaged or worn-out machineries and so on and so forth, may arise and are said to have arisen in one form or the other in the cases before us. Although the facts pleaded in all the writ petitions are instances of one or more of such difficulties, we shall advert to the consideration of the constitutional question on the justifiable assumption that in a given case they may exist. Nobody could deny the possibility or probability of the existence of such facts in a particular industry.

3. Excel Wear, according to its case, finding it difficult, almost impossible, to carry on the business of the factory any longer served a notice dated May 2, 1977 on the State Government of Maharashtra, respondent 2 for previous approval of the intended closure of the undertaking in accordance with Section 25-O(1) of the Act. The State Government refused to accord the approval and communicated their decision in their letter dated August 1, 1977. It would be appropriate to quote here the relevant portion of this letter :-

And whereas the Government of Maharashtra, after considering the aforesaid notice is satisfied that the reasons for the intended closure are prejudicial to public interest.

Now, therefore, in exercise of the powers conferred by sub-section (2) of section 25-O of the Industrial Disputes Act, 1947 the Government of Maharashtra hereby directs the Excel Wear, Bombay - 400025 not to close down the said undertaking.

The petitioner challenges the validity of the order aforesaid.

4. Mr. F. S. Nariman appeared for the petitioner in this case. The Union of India, respondent 1, was represented by Mr. U. R. Lalit and Mr. M. C. Bhandare appeared for respondent no. 2. The case of the Labour Union, the third respondent, was presented by Mr. S. J. Deshmukh. In the petitions under consideration Mr. Nadkarni appeared for an intervener Labour Union and Mr. M. K. Ramamurthi for two intervener States of West Bengal and Kerala.

Writ Petition No. 917 of 1977.

5. In this case the first petitioner is Acme Manufacturing Co. Ltd. and the second petitioner, a citizen of India, is one of its shareholders. Mr. Damania, learned counsel for the petitioners briefly drew our attention to the facts of this case which were of a nature adverted to above. The Wadale unit of the petitioner company is engaged in the business of manufacturing and selling Diesel Oil Engines, Mechanical Lubricators, Engine Valves and Push Rods etc. The petitioners were obliged to decide to close down the undertaking due to huge losses incurred by them on account of low productivity, serious labour unrest and indiscipline resulting in various incidents of assaults or the like. The Company, therefore, applied to the State Government of Maharashtra on May 2, 1977 under Section 25-O(1) of the Act for approval of the intended closure. The State Government communicated their refusal in their letter dated July 29, 1977 enclosing therewith a copy of their order couched in identical terms as those in the case of Excel Wear.

Writ Petitions No. 959 and 960 of 1977

6. Mr. K. K. Singhvi, appearing for the petitioners in this case apart from supporting the argument of Mr. Nariman drew our attention to the facts of this case which were more or less of a similar nature as in the case of Acme Manufacturing Co. Ltd., Petitioner 2 is a citizen of India and is a

shareholder of Apar Private Ltd., petitioner 1. The Company owns a factory at Vithalwadi, Kalyan (Bombay) which manufactures aluminium rods, AAC and ACSR conductors, P.V.C. cables and welding electrodes. Feeling compelled to take a decision to close down the factory, the Company served a notice on the State Government under Section 25-O(1) of the Act on September 16, 1976. The Order of the State Government refusing permission to the petitioner company to close down the undertaking is dated December 23, 1976. The reasons for refusal given in this Order are slightly different. They are as follows :

And whereas the Government of Maharashtra after considering the aforesaid notice is satisfied that the reasons for the intended closure of the said undertaking are not adequate and sufficient and the intended closure is prejudicial to the public interest :

7. Broadly speaking the contention on behalf of the employers in all these cases is that a right to close down the business is an integral part of the right to carry on the business guaranteed under article 19(1)(g) of the Constitution of India. The impugned law imposes a restriction on the said fundamental right which is highly unreasonable, excessive and arbitrary. It is not a restriction but almost amounts to the destruction or negation of that right. The restriction imposed is manifestly beyond the permissible bounds of clause (6) of Article 19 of the Constitution. The proposition canvassed for our consideration was sometimes too bald and wide. It was submitted that a right to carry on the business includes a right not to carry on the business, just like any other right mentioned in clause (1) of Article 19, such as, the right to freedom of speech includes a right not to speak and the right not to form an association is inherent in the right to form associations. Similarly a right to acquire and hold property embraces within it a right not to acquire or hold property. The submission was that nobody can be compelled to speak or to form an association, to acquire or hold property and similarly nobody can be compelled to carry on any business.

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

9. Before we enter into the focus of the discussion of the main points and their important aspects and facets it would be advantageous to refer to the relevant history of the development of this branch of the law.

10. The Act being Central Act 14 of 1947 was passed in the year 1947. In 1953, an Ordinance was promulgated followed by Amending Act 43 of 1953 inserting Chapter VA containing Sections 25-A to 25-D. New definitions of "Lay-off" and "Retrenchment" were furnished in the Act in clauses

(kkk) and (oo) of Section 2. The heading of Chapter VA is "Lay-off and Retrenchment". The relevant provisions of this Chapter were not meant to cover the small industrial establishments in which less than 50 workmen were employed or establishments of a seasonal character. Section 25-C made a provision for certain amounts of compensation for workmen in case they are laid-off. Section 25F imposes certain conditions on the employers which are conditions precedent to retrenchment of workmen, such as, the giving of one month's notice or wages in lieu thereof. Provision has also been made for payment of retrenchment compensation. Section 25FF dealt with compensation to workmen in case of transfer of undertakings. In Hariprasad Shivshankar Shukla v. A. D. Divekar (1957 SCR 121 : AIR 1957 SC 121 : (1957) 1 LLJ 243 : 11 FJR 317) this Court had occasion to consider the meaning of the term "retrenchment". It was opined that the word "retrenchment" means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action and does not include termination of services of all workmen on a bona fide closure of an industry. The question posed at page 134 by S. K. Das, J., who delivered the judgment on behalf of the Constitution Bench of this Court was whether the definition clause of the word "retrenchment" covers cases of closure of business when the closure is real and bona fide ? The answer given at page 137 was in the negative. Discharge of workmen on bona fide closure of business was held to be not retrenchment. On the view that Section 25F of the Act had no application to a closed or dead industry, no pronouncement was made in regard to the constitutional validity of the section if it were to take within its ambit a case of closure also.

11. After the decision of this Court in the case of Hariprasad Shivshankar (supra) was handed down the law was amended by an Ordinance followed by Amending Act 18 of 1957 with retrospective effect from November 28, 1956. Section 25-FF was amended to make a provision for payment of compensation to workmen in case of transfer of undertaking and a provision was made in Section 25-FFF for payment of compensation to workmen in case of closing down of an undertaking. It will be of use to read here sub-section (1) of Section 25-FFF for the purpose of deciding some of the contentious questions in this case. It reads as follows :

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 bean retrenched :

> Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F, shall not exceed his average pay for three months.
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> Explanation - An undertaking which is closed down by reason merely of-
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> (i) financial difficulties (including financial losses); or
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> (ii) accumulation of undisposed of stocks; or
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> (iii) the expiry of the period of the lease or licence granted to it; or
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> (iv) in a case where the undertaking is engaged in mining operations, exhaustions of the minerals in the area in which operations are carried on;

shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-sections.

It would be noticed from the provision extracted above that normally it became necessary for an employer in a case of closure for any reason whatsoever to give notice and compensation to the workman in accordance with the provisions of Section 25F as if the workman had been retrenched. But the proviso clearly postulated that an undertaking may have to be closed down on account of unavoidable circumstances beyond the control of the employer. In that event a ceiling was put in the proviso on the amount of normal compensation payable. The explanation added by Amending Act 45 of 1971 merely indicates that the reasons enumerated in clauses (i) to (iv) of the Explanation will not be deemed to be a closure brought about on account of unavoidable reasons beyond the control of the employer within the meaning of the proviso. Factually and really the said reasons may be said to fall within the expression "unavoidable circumstances beyond the control of the employer." But the said reasons will not be deemed to be such that a workman should be made to get only a limited compensation and not the full normal compensation provided in Section 25F.

12. The constitutional validity of Section 25-FFF(1) came to be considered by this Court in M/s. Hatisingh Mfg. Co. Ltd. v. Union of India ((1960) 3 SCR 528 : AIR 1960 SC 923 : (1960) 2 LLJ 1 : 18 FJR 181). The provision was construed in a manner which saved it from the attack on its vires. Since we are on this case, at this very stage we may refer to some very important views expressed therein which are decisive of some of the points raised in this case and of great help in deciding some others. Shah, J., as he then was, speaking for the Court pointed out at page 535 : "By Article 19(1)(g) of the Constitution freedom to carry on any trade or business is guaranteed to every citizen, but this freedom is not absolute". "In the interest of the general public", says the learned Judge, "the law may impose restrictions on the freedom of the citizens to start, carry on or close their undertakings". This clearly indicates, and the whole ratio of the case is based upon this footing, that the right to carry on any business includes a right to start, carry on or close down any undertaking. It has further been pointed out on the same page that "by Section 25-FFF(1), termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice, is, not prohibited. Payment of compensation and payment of wages for the period of notice are not therefore conditions precedent to closure". This is one of the main reasons given in the judgment to repel the attack on the constitutional validity of the provision. We, however, must hasten to add that it does not necessarily follow therefrom that if such payments are made conditions precedent to closure the provision will necessarily be bad. While judging the question as to whether the restrictions imposed by Sections 25-O and 25-R are reasonable or not within the meaning of clause (6) of Article 19, we will have to keep in mind the principles enunciated in Hatisingh's case at page 535 thus :

Whether an impugned provision imposing a fetter on the exercise of the fundamental right guaranteed by Article 19(1)(g) amounts to a reasonable restriction imposed in the interest of the general public must be adjudged not in the background of any theoretical standards or pre-determinate patterns, but in the light of the nature and incidents of the right the interest of the general public sought to be secured by imposing the restriction and the reasonableness of the quality and extent of the fetter upon the right.

At pages 536-37 are to be found some important observations in the interest of the labour and we respectfully agree with them. They are as follows :

Closure of an industrial undertaking involves termination of employment of many employees, and

throws them into the ranks of the unemployed, and it is in the interest of the general public that misery resulting from unemployment should be redressed. In Indian Hume Pipe Co. Ltd. v. The Workmen, (1960) 2 SCR 32 this Court considered the reasons for awarding compensation under Section 25F (though not its constitutionality). It was observed that retrenchment compensation was intended to give the workman some relief and to soften the rigour of hardship which retrenchment brings in its wake when the retrenched workman is suddenly and without his fault thrown on the streets, to face the grim problem of unemployment. It was also observed that the workman naturally expects and looks forward to security of service spread over a long period, but retrenchment destroys his expectations. The object of retrenchment compensation is therefore to give partial protection to the retrenched employee to enable him to tide over the period of unemployment. Loss of service due to closure stands on the same footing as loss of service due to retrenchment, for in both cases, the employee is thrown out of employment suddenly and for no fault of his and the hardships which he has to face are, whether unemployment is the result of retrenchment or closure of business, the same.

13. In case of retrenchment only a specified number of workmen loses their employment while in closure all the workmen become unemployed.

14. By Amending Act 32 of 1972 Section 25FFA was inserted in Chapter VA of the Act providing for the giving by the employer of 60 days' prior notice to the appropriate Government of his intention to close down any undertaking. Failure to do so entailed a liability to be punished under Section 30-A inserted in the Act by the same Amending Act.

15. Chapter VB was inserted in the Act by Amending Act 32 of 1976 with effect from March 5, 1976. Under Section 25-K the provisions of this Chapter were made applicable to comparatively bigger industrial establishments in which not less than 300 workmen were employed. Only three kinds of industries were roped in for the purpose of the rigour of the law provided in Chapter VB by defining "industrial establishment" in clause (a) Section 25-L to mean :

> (i) a factory as defined in clause (m) of Section 2 of the Factories Act, 1948;
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> (ii) a mine as defined in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952; or
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> (iii) a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act, 1951.

16. Section 25-M dealt with the imposition of further restrictions in the matter of lay-off. Section 25-N provided for conditions precedent to retrenchment of workmen. In these cases the vires of neither of the two sections was attacked. Rather, a contrast was made between the said provisions with those of Section 25-O to attack the latter. The main difference pointed out was that in sub-section (3) of Section 25-M the authority while granting or refusing permission to the employer to lay-off was required to record reasons in writing and in sub-section (4) a provision was made that the permission applied for shall be deemed to have been granted on the expiration of the period of two months. The period provided in sub-section (4) enjoins the authority to pass the order one way or the other within the said period. Similarly in sub-section (2) of Section 25-N reasons are required to be recorded in writing for grant or refusal of the permission for retrenchment and the provision for deemed permission was made in sub-section (3) on the failure of the governmental authority to communicate the permission or the refusal within a period of three months.

17. We must now read Section 25-O the impugned provision in full :

> (1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall serve, for previous approval at least 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 :
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> 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.
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> (2) On receipt of a notice under sub-section (1) the appropriate Government may, if it is satisfied that the reasons for the intended closure of the undertaking are not adequate and sufficient or such closure is prejudicial to the public interest, by order, direct the employer not to close down such undertaking.
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> (3) Where a notice has been served on the appropriate Government by an employer under sub-section (1) of Section 25FFA and the period of notice has not expired at the commencement of the Industrial Disputed (Amendment) Act, 1976, such employer shall not close down the undertaking but shall, with in a period of fifteen days from such commencement, apply to the appropriate Government for permission to close down the undertaking.
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> (4) Where an application for permission has been made under sub-section (3) and the appropriate Government does not communicate the permission or the refusal to grant the permission to the employer within a period of two months from the date on which the application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of two months.
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> (5) Where no application for permission under sub-section (1) is made, or where no application for permission under sub-section (3) is made within the period specified therein or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.
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> (6) Notwithstanding anything contained in sub-section (1) and sub-section (3), the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that the provisions of sub-section (1) or sub-section (3) shall not apply in relation to such undertaking for such period as may be specified in the order.
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> (7) Where an undertaking is approved or permitted to be closed down under sub-section (1) or sub-section (4), every workman in the said undertaking who has been in continuous service for not less than one year in that undertaking immediately before the date of application for permission under this section shall be entitled to notice and compensation as specified in Section 25-N as if the said workman had

been retrenched under that section.

Special provision as to the restarting of an undertaking closed down before the commencement of the Amending Act 32 of 1976 was made in Section 25-P. Whether the said provision is constitutionally valid or invalid does not fall for determination in these cases. What is, however, of some importance to point out is that only on the existence of the four situations mentioned in clauses (a) to (d) of Section 25P the undertaking could be directed to be restarted within such time (not being less than one month from the date of the order) as may be specified in the order. Section 25-Q provides for penalty, for lay-off and retrenchment without previous permission and Section 25-R deals with the question of imposition of penalty for closure under certain circumstances. Section 25-R reads as follows :

> (1) Any employer who closes down an undertaking without complying with the provisions of sub-section (1) of Section 25-O shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.
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> (2) Any employer, who contravenes a direction given under sub-section (2) of Section 25-O or Section 25-P, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both, and where the contravention is a continuing one, with a further fine which may extend to two thousand rupees for every day during which the contravention continues after the conviction.
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> (3) Any employer who contravenes the provisions of sub-section (3) of Section 25-O shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

18. Let us now analyse the provisions of Section 25-O. Sub-section (1) requires 90 days' notice to the appropriate Government for previous approval of the intended closure. Our attention was drawn to the Bombay Industrial Rules and the form prescribed therein for the filing of an application for permission to close down an undertaking. A very comprehensive history of the undertaking and many facts and figures in relation thereto, apart from the reasons to be stated for the intended closure of the undertaking, are required to be given in the application form. Under subsection (2), if in the opinion of the appropriate Government, the reasons for the intended closure are not adequate and sufficient or if the closure is prejudicial to the public interest, permission to close down may be refused. The reasons given may be correct, yet permission can be refused if they are thought to be not adequate and sufficient by the State Government. No reason is to be given in the order granting the permission or refusing it. The appropriate Government is not enjoined to pass the order in terms of sub-section (2) within 90 days of the period of notice. Sub-section (3) is a special provision in respect of an undertaking where an employer had given a notice under Section 25-FFA(1) before the commencement of Act 32 of 1976. In that event he is required to apply within a certain period for permission to close down an undertaking. Under sub-section (4) in a case covered by sub-section (3) it is incumbent upon the Government to communicate the permission or the refusal within a period of two months, otherwise the permission applied for shall be deemed to have been granted. Sub-section (5) brings about the real object of the impugned provisions by stating that the closure of the undertaking shall be deemed to be illegal from the date of the closure if the undertaking has been closed down without applying for permission under sub-section (1) or sub-section (3) or where the permission for closure has been refused. In that event the workman shall be entitled to all the

benefits under any law for the time being in force as if no notice had been given to him. It is to be noticed that sub-section (5) does not say as to whether the closure will be illegal or legal in case a notice under sub-section (1) has been given by the employer but in absence of any communication from the Government within a period of 90 days granting or refusing permission, the employer closes down the undertaking on the expiry of the said period. Sub-section (6) postulates that there may be a sudden closure of an undertaking due to some exceptional circumstances as accident in the undertaking or death of the employer or the like. In such a situation the appropriate Government is empowered to direct that the provisions of sub-section (1) or sub-section (3) shall not apply in relation to such undertaking for such period as may be specified in the order. Under sub-section (7) where an undertaking is approved or permitted to be closed down, then the workman becomes entitled to notice and compensation as specified in Section 25-N as if the said workman had been retrenched under that section. In other words requirement of Section 25-N is to be complied with on the grant of the permission to close.

19. Section 25-R while providing for awarding of punishment to an employer who closes down an undertaking without complying with the provisions of sub-section (1) of Section 25-O or who contravenes a direction given under Section 25-O(2) is silent on the question of entailing any penal consequences in case where an employer had applied for permission under sub-section (1) of Section 25-O but the Government had failed to communicate its order to him within a period of 90 days and the undertaking is closed down on the expiry of the said period.

20. We propose first to briefly dispose of the two extreme contentions put forward on either side as to the nature of the alleged right to close down a business. If one does not start a business at all, then, perhaps, under no circumstances he can be compelled to start one. Such a negative aspect of a right to carry on a business may be equated with the negative aspects of the right embedded in the concept of the right to freedom of speech, to form an association or to acquire or hold property. Perhaps under no circumstances a person can be compelled to speak; to form an association ([See Editorial note at the end of the headnote]) or to acquire or hold a property. But by imposing reasonable restrictions he can be compelled not to speak; not to form an association or not to acquire or hold property. Similarly, as held by this Court in Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmeri (1954 SCR 873 : AIR 1954 SC 220 : 1954 SCJ 246); Narendra Kumar v. The Union of India ((1960) 2 SCR 375 : AIR 1960 SC 430 : 1960 SCJ 214), total prohibition of business is possible by putting reasonable restrictions within the meaning of Article 19(6) on the right to carry on the business. But as pointed out at page 387 in the case of Narendra Kumar (supra). "The greater the restriction, the more the need for strict scrutiny by the Court" and then it is said further :

In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public.

But then, as pointed out by this Court in Hatisingh's case (supra) the right to close down a business is an integral part of the right to carry it on. It is not quite correct to say that a right to close down a business can be equated or placed at par as high as the right not to start and carry on a business at all. 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 a fundamental right at all. It is wrong to say that an employer has no right to close down a business once he starts it. If he has such a right, as obviously he has, it cannot but be a fundamental right embedded in the right to carry on any business guaranteed under Article 19(1)(g) of the Constitution. In one sense the right does appertain to property. But such a faint overlapping of the right to property engrafted in Article 19(1)(f) or Article 31 must not be allowed to cast any shade or eclipse on the simple nature of the right as noticed above.

21. We now proceed to examine whether the restriction imposed under the impugned law are reasonable within the meaning of Article 19(6). This is undoubtedly on the footing, as held by us above, that the right to close a business is an integral part of the fundamental right to carry on a business. But as no right is absolute in its scope, so is the nature of this right. It can certainly be restricted, regulated or controlled by law in the interest of the general public.

22. On behalf of the petitioners, the restrictions imposed by the impugned law are said to be unreasonable because :

(i) Section 25-O does not require giving of reasons in the order.

(ii) No time limit is to be fixed while refusing permission to close down.

(iii) Even if the reasons are adequate and sufficient, approval can be denied in the purported public interest of security of labour. Labour is bound to suffer because of unemployment brought about in almost every case of closure.

(iv) It has been left to the caprice and whims of the authority to decide one way or the other. No guidelines have been given.

(v) Apart from the civil liability which is to be incurred under sub-section (5), the closure, however, compulsive it may be, if brought about against the direction given under sub-section (2) is visited with penal consequences as provided in Section 25-R.

(vi) There is no deemed provision as to the according of approval in sub-section (2) as in sub-section (4).

(vii) Refusal to accord approval would merely mean technically that the business continues but a factory owner cannot be compelled to carry on the business and go on with the production and thus one of the objective sought to be achieved by this provision cannot be achieved.

(viii) There is no provision of appeal, revision or review of the order even after some time.

(ix) The employer is compelled to resort to the provisions of Section 25-N only after approval of the closure.

(x) Restriction being much more excessive than is necessary for the achievement of the object is highly unreasonable.

(xi) There may be several other methods to regulate and restrict the right of closure by providing for extra compensation over and above the retrenchment compensation if the closure is found to be mala fide and unreasonable.

(xii) To direct the employer not to close down is altogether a negation of the right to close. It is not regulatory.

(xiii) If carrying on any business is prohibited in public interest, a person can do another business. But to prohibit the closure of a running business is destruction of the right to close.

(xiv) That reasons should be adequate and sufficient from whose points of view is not indicated in the statute.

(xv) The reasonableness of the impugned restrictions must be examined both from procedural and substantive aspects of the law. Sub-section (2) of Section 25-O does not make it obligatory for any higher authority of the Government to take a decision. It may be taken even by a lower officer in the hierarchy.

23. On behalf of the respondents and the intervener all the above arguments were combated and it was asserted that the restriction imposed is reasonable in the interest of the general public. The dominant interest was of labour but the other interests are also protected by the restriction, such as, interest of ancillary industry and preventing fall in production of a particular commodity which may affect the economic growth. The application form requires the employer applying for permission to close down to give such comprehensive and detailed information that it will enable the appropriate Government to take appropriate decisions in appropriate cases. It was also urged that the word "Socialist" has been added in the Preamble of the Constitution by the Forty Second Amendment and the tests of reasonableness, therefore, must change and be necessarily different from the dogmatic and stereotype tests laid down in the earlier decisions of this Court. Apart from invoking the bar of Article 31-C in terms, it was also urged that the spirit behind the said article for the progress of the law meant for social justice has got to be kept in view while judging the reasonableness of the restriction in the light of its endeavour to advance the directive principles enshrined in Part IV of the Constitution. In order to overcome the various obvious lacunae in the section, we were asked, by a rule of construction, to read down the section and save its constitutionality. It was urged that successive applications can be made on the change of a situation. No amount of compensation can be a substitute for the preventive remedy of the evil of unemployment.

24. We now proceed to deal with the rival contentions. But before we do so, we may make some general observations. Concept of socialism or a socialist State has undergone changes from time to time, from country to country and from thinkers to thinkers. But some basic concept still holds the field. In the case of Akadasi Padhan v. State of Orissa (1963 Supp 2 SCR 691 : AIR 1963 SC 1047 : (1964) 2 SCJ 37) the question for consideration was whether a law creating a State monopoly is valid under the latter part of Article 19(6) which was introduced by the (First Amendment) Act, 1951. While considering that question, it was pointed out by Gajendragadkar, J., as he then was, at page 704 :

With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle

and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations as economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

The difference pointed out between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the courts to lean more and more in favour of nationalisation and State ownership of an industry after the addition of the word 'Socialist' in the Preamble of the Constitution. 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 extend the interest of another section of the public namely the private owners of the undertakings ? Most of the industries are owned by limited companies in which a number of shareholders, both big and small, holds the shares. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does socialism go to the extent of not looking to the interests of all such persons ? In a State owned undertaking the Government or the Government company is the owner. If they are compelled to close down, they, probably, may protect the labour by several other methods at their command, even, sometimes at the cost of the public exchequer. It may not be always advisable to do so but that is a different question. But in a private sector obviously the two matters involved in running it are not on the same footing. One part is the management of the business done by the owners or their representatives and the other is running the business for return to the owner not only for the purpose of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. Does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored ? The questions posed are suggestive of the answers.

25. In contrast to the other provisions. Section 25-O(2) does not require the giving of reasons in the order. In two of the impugned orders communicated to the petitioners, Excel Wear and Acme Manufacturing Co. Ltd., it is merely stated that the reasons for the intended closure are prejudicial to public interest suggesting thereby that the reasons given by the employers are correct, adequate and sufficient, yet they are prejudicial to the public interest. In cases of bona fide closures it would be generally so. Yet the interest of labour for the time being is bound to suffer because it makes a worker unemployed. Such a situation as far as reasonably possible, should be prevented. Public interest and social justice do require the protection of the labour. But is it reasonable to give them protection against all unemployment after affecting the interests of so many persons interested and connected with the management apart from the employers ? Is it possible to compel the employer to manage the undertaking even when they do not find it safe and practicable to manage the affairs ? Can they be asked to go on facing tremendous difficulties of management even at the risk of their person and property ? Can they be compelled to go on incurring losses year after year ? As we have indicated earlier, in Section 25FFF retrenchment compensation was allowed in cases of closure and if closure was occasioned on account of unavoidable circumstances beyond the control of the employer a ceiling was put on the amount of compensation under the proviso. The Explanation postulates the financial difficulties including financial losses or accumulation of undisposed stocks

etc. as the closing of an undertaking on account of unavoidable circumstances beyond the control of the employer but by a deeming provision only the ceiling in the matter of compensation is not made applicable the closure of an undertaking for such reasons. In 1972 by insertion of Section 25FFA in Chapter VA of the Act, an employer was enjoined to give notice to the Government of an intended closure. But gradually the net was cast too wide and the freedom of the employer tightened to such an extent by introduction of the impugned provisions that it has come to a breaking point from the point of view of the employers. As in the instant cases, so in many others, a situation may arise both from the point of view of law and order and the financial aspect that the employer finds it impossible to carry on the business any longer. He must not be allowed to be whimsical or capricious in the matter ignoring the interest of the labour altogether. But that can probably be remedied by awarding different slabs of compensation in different situations. It is not quite correct to say that because compensation is not a substitute for the remedy of prevention of unemployment, the latter remedy must be the only one. If it were so, then in no case closure can be or should be allowed. In the third case namely that of Apar Private Ltd. the Government has given two reasons, both of them being too vague to give any exact idea in support of the refusal of permission to close down. It says that the reasons are not adequate and sufficient (although they may be correct) and that the intended closure is prejudicial to the public interest. The latter reason will be universal in all cases of closure. The former demonstrates to what extent the order can be unreasonable. 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. If he violates it, apart from the civil liability which will be of a recurring nature, he incurs the penal liability not only under Section 25-R of the Act but under many other statutes.

26. We were asked to read in Section 25-O(2) that it will be incumbent for the authority to give reasons in his order and we were also asked to cull out a deeming provision therein. If the Government order is not communicated to the employer within 90 days, strictly speaking, the criminal liability under Section 25-R may not be attracted if on the expiry of that period the employer closes down the undertaking. But it seems the civil liability under Section 25-O(5) will come into play even after the passing of the order of refusal of permission to close down on the expiry of the period of 90 days. Intrinsically no provision in Chapter VB of the Act suggests that the object of carrying on the production can be achieved by the refusal to grant permission although in the Objects and Reasons of the Amending Act such an objects seems to be there, although remotely, and secondly it is highly unreasonable to achieve the object by compelling the employer not to close down in public interest for maintaining the production.

27. The order passed by the authority is not subject to any scrutiny by any higher authority or tribunal either in appeal or revision. The order cannot be reviewed either. We were again asked to read into the provisions that successive applications can be made either for review of the order or because of the changed circumstances. But what will the employer do even if the continuing same circumstances make it impossible for him to carry on the business any longer ? Can he ask for a review ?

28. Again, by interpretation we were asked to say that steps under Section 25-N can be taken simultaneously when a notice under Section 25-O(1) is given. Firstly, the language of sub-section (7) does not warrant this construction. The action of giving notice and compensation in accordance

with Section 25-N is to be taken when an undertaking is approved or permitted to be closed down and not before that. Secondly, it is not practicable to give three months' notice in writing or wages for the said period in lieu of notice or to pay the retrenchment compensation in advance as required by Section 25-N before the employer gets an approval from the Government.

29. It is not always easy to strike a balance between the parallel and conflicting interest. Yet it is not fair to unreasonably tilt the balance in favour of one interest by ignoring the other. Mr. Nadkarni relied upon the following passage of Frankfurter, J., while expressing his view on "Balance of Interest" :

I cannot agree in treating what is essentially a problem of striking balance between the competing interest as an exercise in absolutes.

Learned counsel also referred to a note on 'Government and Liberty' from Paradoxes of Legal Science by Banjamin Cardozo which is to the following effect :

As the social conscience is awakened, the conception of injury is widened and insight into its cause is deepened the area of restraint is therefore increased.

Nobody can have a quarrel with these basic principles however high sounding or unreasonable they may appear to be on their face. But yet no jurisprudence of any country recognizes that the concept of injury is widened and the area of restraint is broadened to an extent that it may result in the annihilation of the person affected by the restraint.

30. In case of fixation of minimum wages the plea of the employer that he has not got the capacity to pay even minimum wages, and therefore, such a restriction on his right to carry on the business is unreasonable has been repeatedly rejected by this Court to wit U. Unichoyi v. The State of Kerala ((1962) 1 SCR 946 : AIR 1962 SC 12 : (1961) 1 LLJ 631). But this principle, rather in contrast, illustrates the unreasonableness of the present impugned law. Nobody has got a right to carry on the business if he cannot pay even the minimum wages to the labour. He must then retire from business. But to tell him to pay and not to retire even if he cannot pay is pushing the matter to an extreme. In some cases of this Court, to wit Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union (1956 SCR 872 : AIR 1957 SC 95 : (1957) 1 LLJ 235 : 11 FJR 262) it has been opined that where the industry had been closed and the closure was real and bona fide, there cannot be an industrial dispute after closure. At page 881 Venkatarama Ayyar, J., has said :

Therefore, where the business has been closed and it is either admitted or found that the closure is real and bona fide, any dispute arising with reference thereto would, as held in K. N. Padmanabha Ayyar v. The State of Madras (supra), fall outside the purview of the Industrial Disputes Act. And that will a fortiori be so, if a dispute arises - if one such can be conceived - after the closure of the business between the quondam employer and employees.

But the observations at page 882 indicate that if the dispute relates to a period prior to closure it can be referred for adjudication even after closure. The very apt observations are to the following effect :

If the contention of the appellant is correct, what is there to prevent an employer who intends, for good and commercial reason, to close his business from indulging on a large scale in unfair labour practices, in victimisation and in wrongful dismissals, and escaping the consequences thereof by closing down the industry ? We think that on a true construction of Section 3, the power of the State

to make a referenced under that section must be determined with reference not to the date on which it is made but to the date on which the right which is the subject-matter of the dispute arises and that the machinery provided under the Act would be available for working out the rights which had accrued prior to the dissolution of the business.

It would thus be seen that in the matter of giving appropriate and reasonable relief to the labour even after the closure of the business the facts which were in existence prior to it can form the subject-matter of an industrial dispute. Even assuming that strictly speaking all such matters cannot be covered in view of the decisions of this Court we could understand a provision of law for remedying these drawbacks. 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.

31. The reasonableness has got to be tested both from the procedural and substantive aspects of the law. In the case of State of Bihar v. K. K. Misra ((1970) 3 SCR 181 : (1969) 3 SCC 337), it has been said at page 196 : (SCC p. 345, para 14).

As observed in Dr. Khare v. State of Delhi 1950 SGR 519 and reiterated in V. G. Row's case, 1952 SCR 597 that in considering reasonableness of law imposing restrictions on fundamental rights both substantive and procedural aspects of the law should be examined from the point of view of reasonableness and the test of reasonableness whereever 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. It is not possible to formulate an effective test which would enable the court to pronounce any particular restriction to be reasonable or unreasonable per se. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice.

32. It is no doubt true that Chapter VB deals with certain comparatively bigger undertaking and of a few types only. But with all this difference it has not made the law reasonable. It may be a reasonable classification for saving the law from violation of Article 14 but certainly it does not make the restriction reasonable within the meaning of Article 19(6). Similarly the interest of ancillary industry cannot be protected by compelling an employer to carry on the industry although he is incapacitated to do so. All the comprehensive and detailed information given in the application forms are of no avail to the employer if the law permits the authority to pass a cryptic, capricious, whimsical and one-sided order.

33. Mr. Deshmukh relying upon the decision of this Court in the case of Akadasi Padhan (supra) urged that there will be presumption of reasonableness in a legislation of this kind. But reliance upon this principle enunciated in the case of State monopoly of kendu leaves seems to be misconceived. Gajendragedkar, J., pointed out at page 704 :

The amendment made by the Legislature in Article 19(6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Article 19(6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly.

This proposition cannot be pressed into service in a case of the kind which we are dealing with.

34. Mr. Deshmukh's arguments that a 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 is not correct. We have already said so. The properties are the undertaking and the business assets invested therein. 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.

35. On the basis of the decision of this Court in State Of Gujarat v. Shri Ambica Mills Ltd. ((1974) 3 SCR 760 : (1974) 4 SCC 656 : 1974 SCC (L&S) 381), it was urged that even if there is a violation by impugned law of the fundamental right guaranteed under Article 19(1)(g) and not saved by clause (6) thereof, the said right has been conferred only on the citizens of India and not upon the corporate bodies like a company. Counsel submitted that the company cannot challenge the law by a writ petition merely by making a shareholder join it. Nothing of the kind was said by Mathew, J., who spoke for the Court in the above case. The question which was posed at page 773 was whether a law which takes away or abridges the fundamental right of citizens under Article 19(i)(f) would be void and, therefore, non-est as respects non-citizens. On a consideration of a number of authorities of this Court the principle which was culled out and applied in the case of Ambica Mills (supra) at page 780 is in these words :

For our purpose it is enough to say that if a law is otherwise good and does not contravene any of their fundamental rights, non-citizens cannot take advantage of the voidness of the law for the reason that it contravenes the fundamental right of citizen and claim that there is no law at all.

Contrary to the above submission there are numerous authorities of this Court directly on the point. A reference to the case of Bennett Coleman & Co. v. Union of India ((1973) 2 SCR 757 : (1972) 2 SCC 788) will be sufficient. Following the decision of this Court in Rustom Cavasjee Cooper v. Union of India ((1970) 3 SCR 530 : (1970) 1 SCC 248) it was held that if a shareholder's right is imparied the State cannot impair the right of the shareholders as well as of the company and the Court can strike down the law for violation of a fundamental right guaranteed only to the citizens if the challenge is by the company as well as the shareholder. Referring to the Bank Nationalisation case it is said at page 773 by Ray, J., as he then was : (SCC p. 806, para 22)

A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The Bank Nationalisation case (supra) has established the view that fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental right as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected.

Excel Wear is a partnership concern. The partners in the name of the firm can challenge the validity of the law. In each of other two petitions, as already started, a shareholder has joined with the company to challenge the law. The contention of Mr. Ramamurthi, therefore, must be rejected.

36. Now we proceed to consider whether the law is saved by Article 31-C of the Constitution. This point, as indicated earlier, was just touched in passing by other counsel. But Mr. Ramamurthi endeavoured to advance a full-dressed arguments on this aspect of the matter. His submission was

that Article 31-C inserted in the Constitution by the (Twenty fifth Amendment) Act, 1971 as amended by the (Forty second Amendment) Act, 1976 makes the law beyond the pale of challenge on the ground of violation of Article 19.

37. Mr. Ramamurthi's arguments proceeds thus. A declaration of Emergency on the ground of external danger was made by the President in 1971. While the imposition of external Emergency was in force, internal Emergency was also imposed on June 25, 1975. The Emergency - both external and internal, was lifted on March 21, 1977. Article 31-C, as originally inserted read as follows :

Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, Article 19 or Article 31.... (We have omitted from this quotation that part of Article 31C which was declared void by majority decision in the case of Kesavananda Bharati v. State of Kerala, 1973 Supp SCR 1 : (1973) 4 SCC 225).

The Forty-second Amendment made the application of the article more comprehensive by substituting the words "all or any of the principles laid down in Part IV" in place of the words "the principles specified in clause (b) or clause (c) of Article 39". A feeble attempt in the first instance was made to show that the impugned law was covered by clause (b) or clause (c) of Article 39. But this attempt could not be pursued with any force or success. What was, however, strenuously contended was that surely the law is for giving effect to the policy of the State towards securing the principles laid down in Articles 39(1), 41 and 43 of Part IV and thus within the ambit of the amended Article 31-C. No attack on the validity of the law, therefore, could be made. In the instance, we may point out that we are not impressed with the arguments and do not accept it as correct that the impugned law is for giving effect to the policy of the State towards securing any of the principles in Articles 39(a) or 41. Clause (a) of Article 39 concerns itself with the policy towards securing "that the citizens men and women equally, have the right to an adequate means of livelihood". The impugned law obviously does not fit in with this directive principle. Article 41 deals with right to work, to education and to public assistance in certain cases. The impugned law is not concerned with this policy. The directive principle which might be brought nearest to the impugned law is to be found in the following words of Article 43 - "The State shall endeavour to secure, by suitable legislation... to all workers.... work....." Without deciding the question whether the impugned law can be said to be a law giving effect to the directive principle enshrined in Article 43 or not, we shall assume in favour of the respondents and the interveners that it is so. Yet we shall presently show that the amended Article 31-C cannot put this law beyond the pale of challenge.

38. Chapter VB was introduced by Amending Act 32 of 1976 with effect from March 5, 1976. The amendment aforesaid made in Article 31-C was with effect from January 3, 1977. Section 4 of the (Forty-second Amendment) Act, 1976 which brought about the amendment merely uses the expression "the words and figures.... shall be substituted." It did not say, and probably it could not have said so, that "they will always be deemed to have been substituted". It is, therefore, clear that the amendment was prospective in operation and was not made retrospective. To overcome this difficulty Mr. Ramamurthi advanced an ingenious argument. He submitted that Chapter VB was inserted in the Act when the Emergency was in operation. Under Article 358, the State during the period of Emergency was competent to enact the impugned law even though it violated Article 19. By the time the Emergency was lifted Article 31-C had come into operation. Thus by the continuous process the letter became immune from challenge on the ground of Article 19. Counsel relied upon

the following decision of this Court, apart from some others which are not necessary to be referred to, viz. - Keshavan Madhava Menon v. State of Bombay (1951 SCR 228 : AIR 1951 SC 128 : 1951 SCJ 182); Dhirubha Devisingh Gohil v. State of Bombay ((1955) 1 SCR 691 : AIR 1955 SC 47 : 1955 SCJ 1); M. P. V. Sundararamier & Co. v. State of Andhra Pradesh (1958 SCR 1422 : AIR 1958 SC 468 : 1958 SCJ 459); Jagannath v. Authorised Officer, Land Reforms ((1972) 1 SCR 1055 : (1971) 2 SCC 893). We shall presently point out the fallacy in the argument and show that none of the decisions supports the contention. Rather, in contrast, some of them demolish it. Article 358 says :

While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect :

39. Sometimes a distinction has been drawn between the lack of legislative competency of a State to make and enact a law on a particular topic covered by any of the Lists in the Seventh Schedule and its incompetency to make a law abridging or abolishing the fundamental rights or in violation of any other provisions of the Constitution. When there is a lack of legislative competency, the law made is void ab initio, non-est and a still born law. But Article 13(2) also says :

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Such a law is void to the extent of the contravention and in case of Article 19 the contravention is of the fundamental rights guaranteed to a citizen. It has been said in some different contexts that for non-citizens the law is not void but it is merely unenforceable. Article 358 says that a law made in contravention of Article 19 during the operation of proclamation of Emergency is not to be treated incompetently made by the State. But as the Proclamation ceases to operate the law so made ceases to have effect to the extent of the incompetency. In other words, the article clearly postulates that the law which was incompetently made and bad for violation of Article 19 will not be taken to be so during the period of Emergency. But as soon as the Emergency is lifted the law becomes bad because it was bad when it was enacted, although it could not be taken to be so during the period of Emergency. The amended Article 31-C says that if the law gave effect to the policy of the State towards securing any of the principles laid in Part IV it shall not be deemed to be void on the ground of violation of Article 19. The law which was enacted in March, 1976 could, by no stretch of imagination, be said to a law giving effect to the policy of the State towards securing any of the principles laid down in Part IV within the meaning of the amended Article 31-C which came into force in January, 1977. The Legislature could not have thought of enacting a law within the meaning of amended Article 31-C at a point of time when the Article stood unamended. It is, therefore, difficult to accept the argument of the learned counsel that the law was not bed during the operation of the Emergency because of Article 358 and the same position was continued by Article 31-C by its amendment by the (Forty-second Amendment) Act. The purport, content and the principles underlying the two Articles is so very different that it is difficult to tag the effects of the two together and make it a continuous effect like a relay-race in a game. In our view the law was bad for violation of Article 19(1)(g) when it was enacted, but it was not to be taken to be so during the period of Emergency; its invalidity sprouted out with full vigour on the lifting of the Emergency. The amended Article 31-C did not save it.

40. In Keshavan's case (supra) Das, J., as he then was, in the majority judgment of this Court was interpreting clause (1) of Article 13 and while doing so, he said at page 234 :

In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights. Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them retrospective effect which, we have said, they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution.

This case is of no help to the respondents. In Dhirubha's case (supra) the wordings of Article 31-B were being construed. Because of the presence of the words "or ever to have become void" in the said article it was said at pages 696, 97 :

> The intention of the Constitution to protect each and every one of the Acts specified in the Ninth Schedule from any challenge on the ground of violation of any the fundamental rights secured under Part III of the Constitution, irrespective of whether they are pre-existing or new rights, is placed beyond any doubt or question by the very emphatic language of Article 31B which declares that none of the provisions of the specified Acts shall be deemed to be void or ever to have become void on the ground of the alleged violation of the rights....

In contrast to the language of Article 31-C which merely uses the phrase "shall be deemed to be void" and not the phrase "or ever to have become void" as used in Article 31-B the decision of this Court in Dhirubha's case, rather, goes against the contention of the learned counsel. In the Sundararamier's case (supra) Venkatarama Aiyar, J., summed up the result of the various authorities at page 1474 thus :

> Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the Constitutional bar is removed, and there is no need for a fresh legislation to give effect thereto.

These observations were made in connection with the removal of the constitutional bar of imposition of sales tax under Article 286. The distinction so drawn in the above case is not universal application. In the legislative field there is nothing like "void or voidable." The application of the principle has been restricted later to only a limited field, namely, in connection with the question whether the legislation requires fresh enactment or not when the bar of incompetency is removed. This Court has considered the question whether an enactment subsequently saved by Article 31B by being included in the Ninth Schedule requires a fresh legislation to make it valid. The answer given was in the negative. In the case of Ambica Mills (supra), Mathew, J., referred to some of the cases aforesaid and the principles decided therein as also the decision of this Court in Bhikaji Narayan Dhakras v. State of M.P. ((1955) 2 SCR 589 : AIR 1955 SC 781 : 1956 SCJ 48) wherein Das, Acting C.J., has said at pages 599-600 :

> All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provisions of Article 13, rendered void "to the extent of such inconsistency." Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition.

Referring to Sundararamier's case the learned Judge said at page 775 in Ambica Mills case :

> The proposition laid down by the learned Judge was that if a law is enacted by a legislature on a topic not within its competence, the law was a nullity but if the law was on a topic within its competence but if it violated some constitutional prohibition, the law was only unenforceable and not a nullity. In other words, a law if it lacks legislative competence was absolutely null and void and a subsequent cession of the legislative topic would not revive the law which was still-born and the law would have to be re-enacted; but a law within the legislative competence but violative of constitutional limitation was unenforceable but once the limitation was removed, the law became effective.

But later on he hinted at the restricted application of this principle. It may also be pointed out here that in the case of Basheshar Nath v. C.I.T. (1959 Supp 1 SCR 528 : AIR 1959 SC 149) Subba Rao, J., as he then was, held that there was no distinction between lack of legislative competence and violation of constitutional limitations. Subba Rao, J., reiterated the same view in the case of Deep Chand v. State of U.P. (1959 Supp 2 SCR 8 : AIR 1959 SC 648 : 1959 SCJ 1069) In the case of Mahendra Lal Jaini v. State of U.P. (1963 Supp 1 SCR 912 : AIR 1963 SC 1019) :

The Supreme Court again reviewed the authorities, and held (1) that the doctrine of eclipse applied only to pre-Constitution and not to post-Constitution laws; (ii) that the words "to the extent of the inconsistency" or "to the extent of the contravention" were designed to save parts of a law which did not contravene, or were not inconsistent with, fundamental rights; (iii) that the meaning of the word "void" in Article 13(1) and (2) was the same; (iv) however, pre-Constitution laws violating fundamental rights were valid when enacted and could therefore be revived under the doctrine of eclipse, whereas post-Constitution laws violating fundamental right were "still-born" and non-est and could not be revived. In dealing with the argument, based on Supreme Court decisions, that a law violating Article 19 would be void qua citizens but valid qua non-citizens, Wanchoo, J. said :

> "Theoretically the laws falling under the latter category (i.e. contravening Article 19) may be valid qua non-citizens; but that is a wholly unrealistic consideration and it seems to us that such notionally partial valid existence of the said laws on the strength of hypothetical and pedantic considerations cannot justify the application of the doctrine of eclipse to them."

(Vide Seervai's Constitutional Law of India, 2nd edition, page 180.)

Of course, in none of the three cases aforesaid the decision of this Court in Sundararamaier's case was considered. For our purpose we have merely pointed out the divergence of opinion on this aspect of the matter, although for the decision of the point at issue, even Sundararamaier's case does not make good the submission of Mr. Ramamurthi. Mr. Ramamurthi was not right in pressing this ratio in support of his contention. The content of Articles 358 and 31C is entirely different. The

former Article, rather, works in the reverse gear. It does not lift the ban in the way of the State to enact a law in violation of Article 19. It puts the ban under suspension during the period of Emergency and the suspension comes to an end on its lifting. Article 31C has no words to indicate that the ban is removed by it. It merely saves the law enacted after coming into force of the said Article. We therefore, must reject the argument of Mr. Ramamurthi with reference to Article 31C of the Constitution.

39. In the result all the petitions are allowed and it is 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 provision of Section 25-O are constitutionally bad and invalid for violation of Article 19(1)(g) of the Constitution. Consequently, the impugned orders passed under sub-section (2) of Section 25-O in all the cases are held to be void and the respondents are restrained from enforcing them. We must, however, make it clear that since the orders fall on the ground of the constitutional invalidity of the law under which they have been made, we have not thought it fit to express any view in regard to their merits otherwise. We make no order as to costs in any of the petitions.

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