CALCUTTA HIGH COURT

Bhattacharyya Rubber Works Private Ltd

Vs.

Bhattacharjee Rubber Works

Matter No. 104 of 1959

(D.N. Sinha, J.)

15.01.1960

ORDER

D.N. Sinha, J.

1. The facts in this case are shortly as follows : The petitioner is a company incorporated under the Indian Companies Act as a private limited company and had been carrying on business as manufacturer of rubber products and/or rubber goods of diverse descriptions. The company had its factory at 174, Jessore Road, Dum Dum. Actually, the business was started by Sri Deven Bhattacharjee the Chairman of the Board of Directors, who belongs to Faridpur and some of the officers of the company are his relations. Originally, in 1956 there was only a Committee of Workers who used to represent the workmen, but since 1956 there have been two Unions functioning within the company, being the respondent No. 1 known as the "Bhattacharjee Rubber Works Workers' Union" and the respondent No. 2 known as the "Bhattecharjee Rubber Silpa Karmi Sangha". These Unions appear to be rivals and there was continuous friction with each other. It is stated on behalf of the workmen belonging to the respondent No. 1, that the "Karmi Sangha" was started by the Bhattacharjees, composed of their own men, in order to split the ranks of the workmen. Be that as it may, the two Unions were seriously in conflict. There were lock-outs, strikes and slow-down methods indulged by the workmen. It is in evidence that after the lock-out was lifted there was peace inside the factory only for a short time and thereafter disturbances commenced with greater vigour. Work was slowed clown and a worker, B. Thakur, was assaulted inside the factory. One Bidyut Babu, a prominent member of the workers Union declared in front of the factory gate, over a loud-speaker, that there was going to be bloodshed. A bomb was thrown into the canteen and there were several cases of stabbing. In April, 1957 some machinery was being removed for repairs. Some of the workmen obstructed the transfer of the machinery which they stated, were being taken away to Durgapur for opening another factory. In July, 1957 the President of the Workers' Union wrote to the Manager of the company to say that he was writing with the utmost urgency and did not know whether the manager appreciated the fast deteriorating situation. One Suresh Das workman, was alleged to have been stabbed by B. Bose and a gang of 50 other workmen on 5th November, 1956. There was a criminal case over this occurrence, but after a protracted trial, the accused persons were acquitted. On 7th May, 1957 one Upadhaya was assaulted by Sitaram and four others and he was stabbed by Dhanai

Singh. All these five persons were criminally prosecuted and were convicted on a charge under section 147 I.P.C. On 10th and 16th November, 1956 hand-bombs were thrown and one of them hit the factory premises. There were reports made to the police, of explosion of crackers outside the factory wall on 5th August, 1957, but no prosecution was, however, launched. A machine was broken, but no charge-sheet could be served, presumably because the miscreant could not be traced.

2. There were attempts to settle the dispute and conciliation proceedings were started. Ultimately however the founder-director and the other directors of the company found it impossible to carry on the business and were forced to close it down on or about 24th September, 1957. Letters were written to the Labour Commissioner and the District Magistrate 24 Parganas about the closure. On the 27 September, 1957 the management of the company wrote a letter to the Registrar, Joint Stock Companies, stating that the business was closed with effect from September, 1957. On or about 21st April, 1959 an alleged industrial dispute between Bhattacharjee Rubber Woks Private Ltd. and their workers, represented by Bhattacharjee Rubber Work Workers' Union and Bhattacharjee Rubber Silpa Karmi Sangha, was referred to the 4th Industrial Tribunal, Calcutta. The two issues that were referred, were as follows :

1. Is the closure of the factory justified?
2. To what reliefs are the workers entitled? The Tribunal heard the parties and made its award dated 7th April, 1959. A copy of the award is annexed to the petition and marked as Ext. 'A'. With regard to the first issue, it was contended on behalf of the respondent No. 1 that the closure was not real but a pretended one and was, in reality, a lock-out and not a closure at all. The Tribunal held against this contention. The Tribunal pointed out that the management informed the employees that the factory had been closed down on account of unavoidable circumstances beyond the control of the employer. The Registrar of Companies was intimated about the closure from September 1957. Excise licenses of the factory had been surrendered and pending adjudication proceedings the shareholders in a general meeting adopted a resolution to wound up the company and in fact a liquidator was appointed and it was the Liquidator who defended the case before the Tribunal. In view of these facts, the Tribunal held that the closure was a real and not a pretended one. In view of this finding, the question arose as to what reliefs the workers were entitled to. The Tribunal rightly pointed out that we must turn for this purpose to two sections of the Industrial Disputes Act, 1947 (hereinafter called the Act). The first section is 25F, which lays down the conditions precedent to the retrenchment of workmen. It has been provided therein that no workman employed in any industry who has been in continuous service for not less than one year shall be retrenched without one month's notice in writing or wages for the period of notice, together with retrenchment compensation equal to 15 days' average pay for every completed year of service or any part thereof in excess of six months. I need not refer to the other provisions. The next section to be considered is Section 25 FFF. The matter in this case comes directly under this section, the relevant part whereof runs as follows :

"25 FFF (1) 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 subsection (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 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.

Explanation. - An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed of stocks 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....."

3. In this case, it is said that the employers closed down the business on account of unavoidable circumstances beyond their control. The workmen represented by the respondent No. 1 say that there has been no closure at all, but if there has been a closure, retrenchment compensation should be calculated in terms of Section 25F and not in terms of Section 25FFF. It is easy to see that if the matter comes under Section 25FFF, compensation will be very much less than if the matter is governed by Section 25F. In fact, that is now the entire dispute in the case. The Tribunal realized that this point is a crucial Point. He tried to discover what was the meaning of the words 'unavoidable circumstances beyond the control of the employer" in section 25FFF. In doing so, he held that in such a case the management will have to prove that the undertaking was closed due to some circumstances which could not have been avoided and/or brought under check or control. The role of the management in such a case, should be more than that of a mere spectator. It was expected that the management should adopt measures to prevent such an eventuality, which a prudent man of business would do, before he could claim protection of Section 25FFF. He further pointed out that a decision on this issue must depend on the facts of each case and not on the caprice of an individual employer, because that would introduce a thousand shades of 'unavoidable circumstances'. The whole question resolves itself to this viz., whether this company acted in a businesslike-way, as a prudent man of business in similar situation would do, or did it stand apart and adopt a negative attitude before closing down the undertaking. The Tribunal appreciated that the employer was not expected to perform an apparently impossible task before he could come under the protection of Section 25FFF.

4. Up to this point the Tribunal was entirely correct in its appreciation of the law. Having held the above, the Tribunal however proceeded to enunciate a strange and curious doctrine, which does not represent correctly the law on the subject and accounts for the erroneous conclusion which he reached upon this issue. He said as follows:

"The Industrial Disputes Act makes it sufficiently clear that 'unavoidable circumstances beyond the control of the employer' was something more than mere financial difficulties including financial losses or accumulation of undisposed financial stocks. To my mind, it suggests that a situation, analogous to that created by (i) vis major, i.e. an act of God, calamities, e.g., earthquakes, floods, cyclones, etc. (ii) enemy action as in times of War,

(iii) civil commotion, e.g. riots etc. (iv) action of the State, viz., expropriation, restraint on trade, e.g., drastic cut in import and control of supplies of raw materials, etc. (v) acts of utter lawlessness, to which the employer is not a party."

The Tribunal proceeds to apply these tests to the facts and circumstances of this case. What the Tribunal had in view was probably Section 66 of the Indian Contract Act, by which a contract may be avoided when it becomes impossible of performance. This however, is a very restricted view of the relevant words in Section 25FFF. That section has come into the Industrial Disputes Act by way of an amendment. The question that arose before the Industrial Tribunals was as to whether a person carrying on business was at liberty to stop it. It was urged that he could not. After various pronouncements on the subject, it was finally held by the Supreme Court that there was nothing to prevent the closure of a business and if it is either admitted or found that the closure is real and *bona fide* then any dispute arising with reference thereto will fall outside the purview of the Industrial Disputes Act. See *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union*[1] It was further held that in such a case, the workmen cannot be said to have been retrenched within the meaning of Section 25F of the Act. Thereupon, the Act was amended by introducing Section 25FFF. Under that section, if an undertaking is closed down for any reason whatsoever, then compensation will have to be paid under Section 25F, as if the workmen had been retrenched. But there is one exception, namely where the undertaking is closed down on account of 'unavoidable circumstances beyond the control of the employer'. In such a case, compensation is very much less and will not exceed the average pay of the workman for three months. The question is, what is the meaning of the words 'unavoidable circumstances beyond the control of the employer'. The idea behind the introduction of Section 25FFF appears to me to be quite clear. If an employer chooses to close his business, there is nothing in the Act preventing him from doing so. If, however, he chooses to do so arbitrarily and without any reasonable cause, then he has to pay compensation to the workmen, as if they were retrenched. But if he has to close his business due to unavoidable circumstances beyond his control, then compensation payable will be very much less. It would be observed that there are two preconditions to bring the matter within the scope of this section. The closure must be due to circumstances which could not be avoided by the employer and the circumstances which justify the closure must be such as cannot be controlled by the employer. The explanation to the section makes it clear that an undertaking which is closed down by reason of some financial difficulty, including financial losses or accumulation of undisposed stocks, shall not be deemed to have been closed down within the meaning of the proviso. Where the circumstances amount 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 does not stop there. If the closure is mala fide then of course it is not a closure at all. For example, if an employer merely closes his business for a short while, just in order to get rid of his employees and starts it over again, that would be a mala fide closure. The closure must be *bona fide*. But it must not be arbitrary. Circumstances cannot be called "unavoidable" if the employer, by acting in a business-like way, or as a prudent man of business, could avoid it. He is not expected to take a negative attitude. But at the same time, he is not called upon to make any unusual effort to avoid any particular circumstance, necessitating the closure of his business. Mr. Chowdhury appearing on behalf of the petitioner has cited the case of *Granger v. Dent*[2]

[1] AIR 1957 SC 95

[2](1829) 173 ER 1229

This case dealt with the provisions in a charter party agreement which provided that if a ship did

not arrive at her Port of loading on or before a particular date, unless prevented by stress of whether or other "unavoidable impediment," the freighter should not be obliged to ship a cargo. What happened was that the ship, which should have arrived at a particular Port, upon a particular date, could not do so because the vessel was prevented by stress of weather and other unavoidable impediments. It was argued that the reason was that the ship had taken too much time in unloading cargo at an intermediate Port and with more boats and men being hired, whereby additional expenses would be incurred, she might have completed her discharge in less time and would have arrived at the Port of destination earlier, in spite of inclement Weather. Tindel C.J. said as follows :

> "I am obliged to my learned brother for stating his view of the case : my opinion is, that the captain was bound only to use ordinary diligence and if he used those means of dispatch which are usual in such a voyage as he was engaged in, he may in the sense of this charter-party be considered as prevented by unavoidable impediment from arriving earlier, though he might by extraordinary efforts have been able to do so.

5. The learned Chief Justice directed the jury that if they were of the opinion that ordinary diligence have been used and that the arrival of the voyage had been delayed by impediments, not to be overcame without unusual exertion, they should find for the plaintiff. A similar principle should be applied to the closure of a business. All that the employer is required to do is to use ordinary diligence. He is not called upon to make any special effort to avoid the circumstances leading to the closure. Let us take the facts of this particular case. The Bhattacharyyas had started this industry and there is no suggestion that it was not running at a profit. It is in evidence that about 500 workmen were employed. Unfortunately, however, the workmen divided themselves into two camps and there was conflict. It is argued that this result was the outcome of the employer's own conduct inasmuch the company fostered a Union which was friendly to it and the rivalry between the two Unions was the direct outcome of it. Firstly, there is not sufficient evidence to justify this conclusion. Secondly, there does not appear to be any law preventing the employer from encouraging the formation of a friendly Union of workmen. What has to be considered, however, are the circumstances that led to the closure. The Tribunal has mentioned that in the notice of closure, 9 reasons have been given, as are set out in the award. It is pointed out that, of these, three reasons could not be substantiated by evidence. It is also pointed out that although it could not be denied that there were threats, intimidation, stabbing, throwing of bombs etc. the employers could not bring the charge home in some cases and in others no charge sheet could be served. It is, however, clear from the facts stated in the award itself, that there can be no doubt about the happenings. It is established by evidence that there were threats, intimidations and at least in one case a prominent official of the workers' Union publicly stated that there would be blood shed. It is not denied that bombs were thrown and there were cases of stabbing. A machine was broken but the miscreants could not be traced. There was also evidence to show that the workers indulged in go-slow tactics. I have already mentioned above that the circumstances reached a point where the president of the workers' union himself wrote a frantic letter to the Manager, pointing out the "fast deteriorating situation". The question is as to whether an employer under such circumstances is bound to carry on his business. In respect of this incident the Tribunal said as follows :

> ..... But in the annexure I, indisciplined and prejudicial activities have been listed. They

included (i) a report of formation of the Union (ii) gate meetings by Shri B. Bose, the President of the Union, (iii) wearing of black badges by some workers while on duty on 11-5-1957, (iv) Union's charter of demands asking, among others, an increase in the rates of wages and (v) the letter of the Company addressed to the Labor Commissioner threatening to close down the factory. These are some of the normal activities that were carried out in an improper way. Meetings addressed by Trade Union people are ordinarily not opposed to law but when such meetings invite the workers to take recourse to violent methods, viz.. shedding of blood, the speakers certainly exceed the limits of law. The remedy is to move the machineries of law for preventing its recurrence."

6. In my opinion, such a doctrine is insupportable. The company here was faced with threat, intimidation, violent methods like stabbing and bomb throwing and it is a counsel of perfection to suggest that the remedy was to move the machinery of the law. The Tribunal himself has stated that handbombs were thrown and one of them hit the factory premises. Thereafter, there were explosion of crackers outside the factory wall and although all these cases were reported to the police, no prosecution was launched by it. If there were one or two ordinary incidents in respect of which a complaint to the police would have been sufficient, that would be one thing. In this case however, the matter went out of hand. Undoubtedly, if the management engaged an army of Darwans they could have restored peace, but that is not what the employer can be compelled to do. An employer is entitled to run his business in a normal manner. If there are emergent situations he is called upon to apply normal remedies. But he is not called upon to take extraordinary measures or incur extra-ordinary expenses in order to run his business in peace. It is said that the managing director of the business was a man of peace and he found it impossible to carry on his business under the circumstances of lawlessness prevailing in the company's affairs and although his business was not running at a loss it was thought more prudent to close it. No business man in his senses would close a profitable business without reason. It has been specifically held by the Tribunal that the closure was *bona fide* and real. The company went into liquidation and all excise licenses were surrendered. This would not have been done unless the management found that it was impossible to continue the work of the factory under the circumstances prevailing. In my opinion, the circumstances were both unavoidable and beyond the control of the employer. Circumstances are not to be considered as avoidable simply because the employer might have restored peace by acceding to each and every demand of the workmen. Assuming that the demands of the workmen were legitimate they should have proceeded in accordance with law and be content with putting the machinery provided by the Act, in motion. If they choose to take the law in their own hands, they must be content with the natural consequence, namely the closure of the business. I must therefore, hold that on this issue the Tribunal came to an erroneous conclusion, which is patent on the face of record. He ought to have held that the business was closed due to unavoidable circumstances beyond the control of the employer and should have directed compensation to be paid in accordance with the provisions of Section 25FFF of the Act and not Section 25F. Mr. Choudhury appearing on behalf of the petitioner has taken another point, namely that the Tribunal has ordered payment of compensation within two months from the date of the publication of the award. Mr. Choudhury points put that under the Indian Companies Act, the priority of payments have been laid down. Under Section 530 of the Indian Companies Act, priority has been provided for in respect of certain payments but it does not include payment to workmen as compensation under the

Industrial Disputes Act. Mr. Choudhury points out that there are other Acts, for example the Employees' State Insurance Act, 1948 (S. 94) or the Employees' Provident Fund Act (S. 11) which specifically provide for priority of payment. There is however no provision in the Industrial Disputes Act which lays down priority of payment in respect of compensation payable to workmen, under the said Act. In my opinion, this also is a point of substance. But it is unnecessary to deal with it any further because in view of my decision on the main issue, this award cannot be supported and must be set aside.

7. The result is that this Rule must be made absolute and the award of the Tribunal dated 7-4-1959 must be set aside and/or quashed by a writ in the nature of certiorari and a writ in the nature of mandamus will be issued prohibiting the respondents from giving effect to the same. It will not, however, prevent the respondents from proceeding in accordance with law. There will be no order as to costs.
Rule made absolute.