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— EDITOR

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THE RESIDENCE OF COMPANIES—A COMPARATIVE STUDY OF THE PROVISIONS OF THE INDIAN AND AMERICAN INCOME TAX LAWS

By

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The residence or non-residence of a company[1] is the only factor which determines the kind of income that is liable to be taxed under the income tax law of any country. In the context of the dependence of the developing countries on the economically developed ones for their economic growth through aids and government loans and private investments, especially those through investments by private foreign companies, the criteria for determining the residence of a company under the income tax laws of the developing countries, have assumed great importance. These criteria make a significant impact on those foreign companies that want to invest in the developing countries. This article attempts to evaluate those provisions of the income tax laws of India[2] and the United States[3], which determine the residence of companies.

The Indian Income-tax Act of 1961, along with the Rules, and the Internal Revenue Code of 1954, with the Regulations and Rulings, govern the taxation of companies in India and the United States respectively. The companies have been classified into resident and non-resident categories both under the Indian[4] as well as the American[5] tax laws, though the criteria for their classification are different.

The residence of a company under the Indian Law is based on the following grounds : (1) it being an Indian company[6] or (2) during the finan-

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1 In this article wherever the term "company" is used, it signifies not only a "company" under the Indian Law, but also a "corporation" under the American law.

2 A developing country.

3 An economically developed country.

4 Sec. 6 (3).

5 Regulations 1.881-1(a).

6 Sec. 2(26) defines : "Indian company" means a company formed or registered under the Companies Act 1956, (I) of 1956 and includes :

(i) a company formed or registered under any law relating to companies formerly in any part of India (other than the State of Jammu and Kashmir) ;

(ii) in the case of the State of Jammu and Kashmir, a company formed or registered under any law for the time being in force in that State ;

Provided that the registered office of the company in all cases is in India"

Thus every Indian company is deemed to be resident in India even though its management and control is situated partly or wholly without India.

cial year the control and management of its affairs being situated wholly in India[1]. In the Internal Revenue Code the deciding factor is whether the company is "engaged in trade or business" in the United States during the taxable year, if so engaged it is a "resident" company, otherwise not.[2]

The phrase "control and management.....situated wholly in India" has led to as much litigation, if not more, as the expression "engaged in trade or business within the United States." There is no statutory definition of either of these phrases, and the clarification of their meaning has been left to judicial interpretation.

Under the Indian law the "residence" of a company determines the mode of its taxation ; for a resident company is taxed on its world-wide income, while a non-resident company is taxed mainly on income derived from Indian sources[3].

It is clear from the definition of "resident" company in the Indian Law [Sec. 6(3) (iii),] that the place of incorporation, though important, is not the only decisive factor. Though a company incorporated in India is no doubt a "resident" in India, a company that is incorporated without India will also be deemed to be a "resident" if its "control and management" is located in India.

The control and management of a company is normally located at the place where the "head and brain of the trading adventure"[4] is situated, namely, where the meetings of the directors are held and important decisions are taken[5]. This fact is unaffected by various other circumstances such as the residence of the directors[6], or the place where the manager performs his duties[7], or where the meetings of the shareholders are held[8], or where

1 These provisions of the Indian law regarding the residence of companies are quite similar to those in the Australian Income Tax law. Sec. 6(1) of the Australian "Income Tax and Social Services Contribution Assessment Act", 1936, lays down that a company is resident in Australia if :

(*a*) it is incorporated in Australia.

(*b*) although not incorporated in Australia it carries on business in Australia and has either—

(i) its central management and control in Australia, or

(ii) its voting power is controlled by shareholders who are residents of Australia.

2 Supra, Note. 5. p. 1.

3 Sec. 5(1) and (2).

4 *San Paulo (Brazilian) Rly. Co. Ltd. V. Carter*, 3 T.C. 407 ; (1861) A.C. 31.

5 *Narottam and Pereira Ltd. V. C.I.T.* (1952), 23 I.T.R. 454.

6 *Calcutta Jute Mills V. Nicholson*, 1 Ex. D. 428 ; I.T.C. 83 .

7 Supra Note. 5.

8 *Stanley V. Gramophone and Typewriter Ltd.* (1908) 5 T.C. 358.

the dividends are declared and paid[1]. The following cases[2] illustrate effectively that the central control and management is located where the business and policy decisions are taken.

In *Narottam and Pereira Ltd. V. C. I. T.*[3] the company, which was a subsidiary of a steamship company whose business was stevedoring in Ceylon, was registered in Bombay. Its registered office was also located in Bombay. The meetings of the board of directors and of the shareholders of the company were held in Bombay during the relevant year of account. The affairs of the company in Ceylon were administered by two managers who had wide powers. The minutes of the meetings of the board of directors dealt with matters delegated to the managers. The directors gave directions to the managers from time to time. It was contended by the company that the control and management of its affairs was not situated "wholly" in British India, since its managers in Ceylon had wide powers and thus some part of the control and management was located in Ceylon, or without British India.

The Court rejected this contention and held that the control and management of the company was situated wholly in British India, as the central control was in fact exercised by the directors in Bombay, and not by the managers in Ceylon who were just employees. In the course of the judgement it was observed :

1 *Egyptian Hotels Ltd. V. Mitchell*, (1951) 6 T.C. 542 (H.L.)

2 An Indian and two British cases have been selected for this purpose. The British cases are relevant in the context because the Indian law closely follows the British law on this point, and the British cases are cited by the Indian courts.

The test of central control was laid down by the Exchequer Division in *Cesena Sulphur Co. V. Nicholson* (1876) 1 Ex. D. 428, and this decision has been repeatedly approved and followed. (See *San Paulo Rly. Co. Supra, American Thread Co. V. Joyce* (1913) 108 L.T. 353). The facts were as follows :

The Cesena Company was incorporated in England under the Companies Act for the purpose of taking over and working sulphur mines at Cesena in Italy. The manufacturing and selling of the sulphur was administered by an Italian delegation, including a managing director who was permanently resident at Cesena. No products were ever sent to England. The books of account were kept in Italy, the company was registered in Italy and two thirds of the shareholders were Italian residents. These facts *prima facie* indicated that the centre of business was in Italy. As against them, however, the memorandum of association set up a Board of Directors in London which controlled the sale order, direction, and management of the working of the company's mines, the mode of the disposal thereof and the general business of the company. The meetings of the shareholders were held and dividends declared in London. On these facts it was held that since almost every act of the company connected with its business management was done in London, the main place of business was in London, and therefore the company was resident in England.

3 Supra Note 5. p. 2.

"In construing the expression "control and management" it is necessary to bear in mind the distinction between doing of business and the control and management of business. Business and the whole of it may be done outside India yet the control and management of that business may be wholly within India.....It is entirely irrelevant where the business is done or where the income earned. What is relevant is from which place has that business been controlled and managed..... What has got to be determined is where is the seat of power, or the head and brain ? ...It is at the place where the central authority functions that the company resides"[1].

The mere allotment of certain important functions of the business to the managers in Ceylon failed to convince the Court that the control and management was divided and was thus not "wholly" situated in British India. Strict literal interpretation of the word "wholly" might have achieved this objective but the Court gave a broad and liberal interpretation, which was necessary to give effect to the true intention of the legislature.

In *John Hood & Co. Ltd. V. Magee*[2], a company registered both in the United States and Ireland used to purchase raw linen in Scotland and Ireland. The manufacture of the linen garments was entrusted to other companies, but the folding was done by John Hood Co. itself. Further it used to sell these garments chiefly in the United States. The Company had its registered office in Belfast where the general meetings were held, the minute book was kept, the accounts were audited and dividends were declared. The sole director who exercised exclusive and supreme control resided in the United States.

The Court held that for income tax purposes the company was resident[3] in Belfast, because the central control and management of the

1 Ibid pp. 459-60.

2 7 T.C. 327.

3 In the British Tax Law 'residence' in relation to a company has not been defined but the decided cases lay down that the residence of a company is located at the place where the central control and management abides thus making the criterion the same as laid down in the Indian Income Tax Act. In the famous case of *De Beers Consolidated Mines v Howe* (1906), A.C. 455, Lord Loveburn observed; "A company cannot eat or sleep but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. The decisions of C. Baron Kelly and Baron Huddleston in the *Calcutta Jute Mills V. Nicholson* (1 Tax Cas. 83), and the *Cesena Sulphur Company V. Nicholson* (1 Tax Cas. 88), involved the principle that a company resides for purposes of income-tax where its real business is carried on. These decisions have been acted on ever since. I regard that as a true rule, that the real business is, carried on where the central management or control actually resides".

company in effect abided with the general meeting of the shareholders in Belfast, where the registered office was also situated. The residence of the sole director in the United States was not considered to be the determining factor in deciding the residence of the company[1].

In *The American Thread Co. V. Joyce*[2], an English Company registered and carrying on its business in the United Kingdom, promoted a corporation to own certain mills in the United States ; but none of the products of these mills was sold in England. The entire stock of the American corporation was owned by the English company, either directly or through trustees. The bye-laws of the American corporation provided for seven directors, three of whom had to reside in the United States. The current business of the corporation was directed by the three directors resident in America, who formed an executive committee for this purpose. The regular meetings of the Board were held in the United States, though the extraordinary meetings were held at the company's office in England. The important powers, like those dealing with the purchase and lease of any business or plant, the sale and lease of real property, the borrowing of money, the appointment of auditors, the making of agreements for a period exceeding one year and the appointment of higher officials, could be exercised only by the extraordinary meetings of the directors in England. The dividends were also declared in these extraordinary meetings. Under these circumstances the Commissioner of Internal Revenue in England held the American corporation to be resident in the United Kingdom.

The Court upheld this contention on the ground that the control and management of the affairs of the American corporation rested with and was constantly exercised by the directors resident in England in the extraordinary meetings, even though some functions were performed by the directors resident in the United States.

The ascertainment of the centre of control and management in the above cases has been based on different factors. The Court does not necessarily rely upon a single factor, however, weighty it might be. In a parti-

1 Lord Madden J. observed :

"John Hood in whom the powers of the directorate are vested, is at the present moment resident in New York, but his residence there does not result from anything in the constitution of the Company or necessarily follow from the nature of the business carried on by it..... In my opinion the residence of the sole director, John Hood, in New York is not the kind of residence of a directorate which can be relied on as determining the residence of the company for the purpose of taxation....."

2 6 T.C. 1 and 163 (H.L.).

cular case the company might be registered in one country, the products being manufactured in a second and the finished goods being sold in the third In such a case the court has to take into account all the relevant factors connected with the concern in order to fix the centre of control. The place of incorporation in one case, the residence of the directors in another and the place of the meetings of the directors in the third, may be the determining factor. Thus the determination of the centre of control and management is a question of fact varying from case to case.

A company may have more than one residence[1] ; if a company is resident elsewhere that would not necessarily displace its residence in India under the Act[2]. The resident status of a company may change from time to time, and the burden of proving that a company is resident in India in a particular year is on the Revenue Department.

The Courts have held that "control" as envisaged by Section 6(3) should be the effective control, i.e. the "de facto" and not the "de jure" control. *B. R. Naik V. C. I. T.*[3] a case relating to a partnership concern illustrates this principle[4]. In this case, a citizen of India, Mr. Naik, who was personally carrying on business iu South Africa, returned to India in 1912, leaving the business in the hands of three managers. In 1937 he executed a deed styled as a partnership deed, by which he admitted the three managers as partners having a share in the profits and losses, but retained the full control of business, including even the right to dismiss any of the three partners. In his affidavit Mr. Naik stated that after 1937 he had never tried to control or manage the business in South Africa. This statement was corroborated by another affidavit filed by two of the partners, who stated that they had been carrying on the business without receiving any instructions from Mr. Naik. The correspondence between Mr. Naik and his partners revealed that the former had entrusted the control and management of the business entirely to his partners and except for a word

1 *Swedish Central Rly. Co. Ltd. V. Thompson*, 9 T.C. 342, 372-73 (H.L.) ; *Todd V. Egyptian Delta etc. Co. Ltd.* 14 T.C. 119, 114 (H.L.) *Narottam and Periera Ltd. V. C.I.T.*, Supra note 5. p. 2.

2 Supra 9 T.C. 342, 386-87, Supra 14 T.C. 119, 144.

3 1946. I.T.R. 334.

4 The criterion for "residence" for a partnership is the converse of that laid down for companies, i.e., a partnership would be resident in India, unless the control and management of its affairs is situated "wholly without India". The Bombay High Court has said that in the case of a firm the problem of control ought to be approached from the same angle as in the case of companies ; and so the decision in Naik's case would apply to companies as well with regard to the "effective" or "de facto" control principle.

of caution administered now and then he had not given any instruction to them.

The Commissioner of Income-tax contended that the partnership was "resident" in India, since Mr. Naik who "de jure" controlled and managed the affairs of the partnership resided in India, and the Appellate Tribunal upheld this contention. The Bombay High Court, however, reversed this decision on the ground that at no time after 1937 did Mr. Naik exercise any effective control over the affairs of the partnership. All decisions were taken by the partners in South Africa, and a word of caution given by Mr. Naik now and then was not sufficient to attribute the control and management of the partnership to him. Their Lordships were of the view that a simple "de jure" control was not sufficient, it was the "de facto" control that mattered. They further held that the Appellate Tribunal had no facts before it to support the argument that the affairs of the firm were controlled and managed by Mr. Naik from India, except the clause of "control" in the partnership deed, which indeed, was a dead letter in fact[1].

The word "wholly" as used in section 6(3) is definitely misleading. All it really conveys is that the control and management be "principally" located in India. If the literal meaning of the word is given effect to by the Courts it will result in numerous companies being classified as non-residents ; for a company can simply avoid being classified under the 'resident' category by having a few of the meetings of the directors abroad, as then its control and management would not be "wholly" within India. Why the legislature has chosen to use the word "wholly" instead of "principally" which would have been more appropriate, is enigmatical. Nevertheless the Courts have given a broad and liberal interpretation of the word "wholly" without adhering to its literal meaning. It appears that the desire to get more revenue has been the decisive factor underlying this broad interpretation. Thus the term "wholly" has been attributed such a fictitious meaning, that it conveys part of its whole meaning !

In America, a domestic corporation under the Internal Revenue Code, is one which is organised or created in the United States, and the District of Columbia, or under the law of the United States or of any State

1 An American case, *Helvering V. Clifford* (309 U.S. 331) can be compared to this case. There, the Supreme Court, on the facts of the case held that although on paper a person was a mere trustee having few powers, looking to other factors it became apparent that he exercised effective control over the trust property beyond the powers conferred on him by the trust instrument and thus he was the real owner of the property. Thus control meant "de facto" and not "de jure" control.

or Territory. A "foreign" corporation is one which is not domestic[1]. The criterion for determining the residence of a foreign corporation is whether it is "engaged in trade or business within the United States" in the taxable year[2]; if so engaged it becomes a "resident" otherwise it remains a non-resident foreign corporation.

The meaning of the expression "engaged in trade or business within the United States is as elusive as the phrase "the control and management... situated wholly in India". The Internal Revenue Service in the United States and the Central Board of Direct Taxes in India, have tried to enlarge the scope of these phrases in order to bring as many foreign corporations as possible within the "resident " category,, though instances of foreign corporations, especially in the United States, trying to get themselves classified as "residents" are not rare[3]. The two important terms "trade" and "business"' have not been defined by the Internal Revenue Code thereby leading to a spate of litigation. The Courts have through a catena of cases laid down definite principles to ascertain what activities constitute "trade or business".

"Business" is a very comprehensive term and embraces any thing about which a person can be employed[4]. It is that activity which occupies the time, attention and labour of man for the purpose of livelihood or profit[5]. An activity which shows progression or continuity, has usually been classified as "business" by the Courts[6]. This means conducting, prosecuting and continuing business by performing acts normally incidental thereto[7]. Single, isolated and unrelated transactions will not usually constitute being "engaged in trade or business."

Thus in *Linen Thread Co. Ltd. V. Commissioner*[8], a foreign corporation was incorporated under the laws of Scotland, with its principal office and place of business at Glasgow. It was engaged in the manufacture and sale of linen thread and knitting twines. It did not manufacture these

1 Sec. 7701 I.R.C.

2 Sec. 881.

3 Resident Corporations are entitled to certain tax advantages such as the deduction for the dividends received from a domestic corporation under section 243 of the Code.

4 *Flint V. Stone Tracy Co.* 204 U.S. 107 (1911).

5 Ibid.

6 *Levellyn V. Pittsburg B & L.E.R. Co.*, 322 F. 177, *Linen Thread Co.* 14 T.C. 725 (1950) ; "For a taxpayer to be engaged in business threre must be a fair degree of activity, scope and continuity in the transactions undertaken." *Continental Trading Inc. V. Comm.* 265 F 2d 40 (9th Cir.) Cert. den. 361 U.S. 821 (1959).

7 *European Naval Stores Co. V. Comm.* 11 T.C. 127 (1948).

8 14 T.C. 725 (1950).

products itself, but had them manufactured through seven wholly owned subsidiaries in the United Kingdom. The Linen Thread Company owned all the authorized and capital stock of a Delaware corporation of the same name which sold the linen thread in the United States.

On March, 1943, a sale of thread costing $ 129.54 was made directly to a lady in America by the parent corporation, and a second sale worth $655,87 was made to the Linen Thread Co. of Delaware during 1943. These sales were not effected by the resident agent. The Scottish Company contended that by effecting these sales, and by its intention to do business in the United States, which was thwarted by the war, it became a resident foreign corporation engaged in trade or business within the United States[1].

The Court held that the two isolated sales effected by the company did not constitute "engaging in trade or business within the United States." It further observed that in neither of the sales did the corporation's resident agent solicit the order, and "to hold that the (corporation) was engaged in trade or business on the strength of these two sales..., merely because title to the goods was, for no business reason, made to pass in this country would be to "exalt artifice above reality", in the language of *Gregory V. Helvering* [2]." Moreover, the income from these two isolated sales formed a fractional part of the total income of the corporation and that by itself indicated that the corporation was not very particular about engaging in business in the United States. As the Court observed, the test to be applied is both "a quantitative and a qualitative one."

In another case[3], a foreign corporation, the European Naval Stores Co. was organised under the laws of Belgium, its principal office and place of business being located in Antwerp. It handled the import and sale of naval stores in non-producing countries of Europe. In December, 1936, the Peninsular-Lurton Company of Florida was formed by the merger of two American Corporations, which were owned and controlled by the same interest, which also owned the European Naval Company. The new American Company was organised to continue the factorage business previously operated by the merged corporations, and it commenced the export of naval stores in 1939.

1 The Scottish Company had considerable investments in the United States and by being classified as a resident foreign corporation it could get the 85% dividend received deduction, and hence its desire to become a "resident".

2 293 U.S. 465.

3 *European Naval Stores Co. V. Comm.* 11 T.C. 127 (1948).

In 1939 due to the outbreak of the world war, a large consignment of turpentine barrels and packages of resins was held up in America, despite the best efforts of the Peninsular Company to ship it to Belgium. The goods lay in storage till 1942. Apprehending deterioration of the goods the Company bought the cargo itself, without the knowledge and permission of the European Naval Co. and credited the profits amounting to $ 19, 517.07 to the European Company's account. The Commissioner levied an income tax on this amount on the ground that this sale, resulted in the European Company being "engaged in trade or business within the United States."

The Court held that the European Company was not engaged in trade or business within the United States. It found that the Company had no showrooms, factories, officers, employees or salesmen in the United States and had never sold anything in America (except this sale, of which they were not even informed). Their Lordships observed ".....this isolated sale in 1942,.....cannot be considered as an example of engaging in trade or business in the United States ; and it could hardly be contended that this isolated sale was of a type for which the Corporation was organised, or that, as far as the European Company was concerned, the purpose was to realize a profit". The Court was of the opinion that to constitute a business, an activity should be pursued continuously. An isolated transaction, unless qualified by exceptional circumstances, can seldom be considered as making a corporation "resident" within the meaning of section 882.

As mentioned earlier a corporation may try to get itself classified as a "resident" corporation on account of certain tax advantages it may derive. Thus a Panamanian Corporation, claiming that it was engaged in trade or business within United States," filed income tax returns listing substantial dividend received credits for a three year period. Its principal activities consisted of securing loans from United States banks, investing the proceeds in foreign countries or using it to repay loans, receiving dividends from and selling stocks to domestic corporations, maintaining bank accounts and engaging in the following isolated transactions : a single purchase of equipment in the United States to accommodate a Mexican company. ; the purchase and resale of a carload of milk fat ; and various purchases and resales of tin cans. The corporation having qualified to do business in Nevada, had its United States address as that of its resident agent residing in that State. The President of the corporation, an American citizen, had an office in California with the corporation's name displayed on its door ; but this address was never used by the corporation nor any rent was paid.

The Tax Court held that the corporation was not engaged in trade or business within the United States, and this decision was affirmed by the United States Court of Appeals for the 9th circuit. The Appellate Court reasoned that the miscellaneous purchases of equipment, milk fat and tin cans lacked sufficient continuity to constitute "trade or business." It also stated that transactions which are not entered into for profit, and which do not and in all probability cannot result in profit, particularly where such transactions are of an isolated and non-continuous nature, will not dictate the conclusion that one is engaged in trade or business[1].

The making of investments by a foreign corporation in the United States does not thereby qualify it to be "engaged in trade or business." In *The Scottish American Investment Co. V. Comm.*[2] the Scottish Corporation, which had an office in the United States, was declared a foreign investment corporation during the years 1942 and 1943. All decisions as to the purchase and sale of securities and investment policies were made by the home office in Scotland. The United States office maintained records, collected dividends, sent certain reports to the home office, or otherwise performed extensive clerical and routine services for the foreign corporation. The Scottish Corporation claimed that it was a resident corporation on account of the large number of activities performed by its office in the United States, and that this office was absolutely necessary for its investment business.

This contention was rejected by the Court, which held that the corporation was not "engaged in trade or business." The Court noted that all decisions as to investments and policy matters were made outside the United States. Further all orders for the purchase and sale of securities were executed by the foreign corporation directly through resident banks in the United States and the activities of the American office were simply confined to routine and clerical functions. These activities were not of the nature for which the foreign corporation was organised, namely the making of investments. On the basis of these facts it could not be said that the corporation was engaged in trade or business through its American office, The Court further observed :

> "Such activities as the establishment of an office, performance of incidental transactions, the doing of acts relating solely to internal management, the appointment of an agent and the acquiring and holding of stock in domestic corporations have generally been held

1 *Continental Trading Inc. V. Comm.* 265 F 2d. 40 (9th Cir.) cert. den. 361 U.S. 827 (1959).
2 12 T.C. 49.

not to be sufficient to hold that the corporation is doing or engaging in business in the State."

Generally the maintenance of a permanent establishment in the United States, such as a factory, warehouse, a branch, an office or a workshop to help the purchasing, selling or producing activities of a foreign corporation constitutes engaging in trade or business by that foreign corporation.[1] If the above criterion is applied, the corporation in *The Scottish American Company's* case[2], will have to be classified in the resident category, for it was conducting its business of investment in the United States through an office located there. But surprisingly the Court decided it the other way on the ground that the office did not perform functions for which the foreign corporation was organised. It is difficult to accept this reasoning of the Court because the office in the United States did help in various ways, even though indirectly, in furthering the business of the foreign corporation[3].

The aforesaid cases present a paradox. In some the Commissioner has contended that the corporation was "engaged in trade or business within the United States," while in others the corporations themselves wanted to be classified as resident corporations to get certain tax credits and deductions. The Courts in deciding such cases have kept in view all the factors and laid down certain criteria to determine whether a corporation is "engaged in trade or business" within the United States or not.

The sale of merchandise through a resident agent by a foreign corporation in the United States will invest it with the character of a resident corporation[4]. However, selling to a United States customer directly from

1 This definition has been incorporated in many income tax treaties for the avoidance of double taxation, which the United States has concluded with other countires, e.g., United States-Japan Treaty, Art. II (1) (c), United States-Denmark Treaty, Art. II (1) (c) and United States-German Treaty, Art. II (1) (c).

2 Supra Note 2 p. 11.

3 Prior to 1942, a foreign corporation was deemed to be resident either if it engaged in trade or business within the United States or if it had an office or place of business in the United States (Sec. 231 (b), 1936 Code). In 1942 the latter portion was omitted to plug a loop hole, for as the Committee Report on the amendment pointed out that many foreign corporations which were substantial holders of the stock of domestic corporations, attempted to establish that they had an office or place of business within the United States and thus secure the very different tax treatment accorded to "resident" corporations, and since such corporations engaged in no other economic activities in the United States they could not be said to be engaged in United States trade or business. (House Ways and Means Committee, Ref. No. 2333, 77th Cong. 2nd Sess. p. 103; Senate Finance Committee, Ref. No. 1931, 77th Cong. 2nd Sess. p. 135).

4 G.C.M. 21219, 1939-ICB 201.

abroad, without the help of agents, employees, or an office of the foreign corporation in the United States, will not constitute "engaging in trade or business[1]."

While the mere ownership of real property in the United States does not amount to engaging in trade or business ;[2] *the owning and renting out* (*Emphasis added*) of real property by a foreign corporation will constitute it a resident corporation[3].

When a foreign corporation is a member of a syndicate carrying on business in the United States, it is also considered to be engaged in trade or business[4].

The Internal Revenue Service has made the broad observation that "generally any activity beyond the mere receipt of income from property and the payment of organization and administration expenses incidental to the receipt thereof constitute...engaging in trade or business[5]." This ruling goes beyond the limits set by the Courts in the cases we have reviewed. It is broad enough to cover any incidental business activity of the corporation. Under the scope of this ruling most of the foreign cor-

1 *Linen Thread Co. V. Comm. Supra Note* 8. p. 8.

2 G.C.M. 18835, 1937-2 CB 141-144.

3 *The Investors Mortgage Security Co. Ltd.*, CCH Dec. 14.33 (M) 4 T.C.M. 5 (1945).

4 *Cantrell and Cochrane Ltd.*, CCH Dec. 5863, 19 BTA. The facts were as follows:

Cantrell and Cochrane Ltd. (hereinafter referred to as C Company) was a British corporation having its registered office in Dublin, and a place of business in Belfast, Ireland. For many years it had engaged in the manufacture and sale of certain beverages in Ireland including its own brand of ginger ale. Edward and John Burke Ltd., also a British corporation, had for many years acted as the sole intermediary in the United States for the distribution and sale of the former company's products, which it purchased in Ireland. At that time C Company had no other representatives or office in the United States.

In 1917 the two companies came to the conclusion that due to the War, the manufacture abroad and the shipment of C companys' products to the United States was impossible. Consequently, they entered into an agreement on Nov. 27, 1917, by which the two companies constituted a syndicate "for the purpose of carrying on business as manufacturers of aerated, mineral or other waters elsewhere in the United States and the business of selling and distributing the same in the United States, Mexico, Cuba and Puerto Rico." The C company as a member of the syndicate was, according to the court engaged in trade or business in the United States, as it was using and protecting its secret formula, dividing the profits of the business, retaining some control over such rights in the management of the business as it desired, retaining also an undivided one half interest in certain property used in and contributing to the efficient management of the business and was also entitled to share of the profits of the business as such, not as something to be received from or through Edwards and John Burke Ltd.

5 Supra Note 2.

porations in the foregoing cases would be considered to be "engaged in trade or business." We doubt if the Courts will give effect to such a sweeping proposition.

The Internal Revenue Code excludes from the meaning of the term "engaged in trade or business" the effecting through a resident broker, commission agent or custodian, of transactions in the United States of stocks and securities or in commodities of the kind customarily dealt in on an organised commodity exchange, (such as grain futures or cotton futures markets), if the transaction is of the kind customarily consummated at such place and if the corporation has no office or place of business in the United States, at any time during the taxable year through which or by the direction of which such transactions in commodities are effected[1]. This exception will not apply to the transactions in commodities or securities even if effected through resident brokers or agents, if they have the power to give directions and make the policy decisions[2]. The key factor for determining whether an activity constitutes a trade or business within the United States, is the exercise of trade discretion and the taking of business decisions in the United States, other than through a resident broker, commission agent or a custodian.

Once a foreign corporation is deemed to be a "resident" corporation it is taxed in the same manner as a domestic corporation, with the important exception that it is taxable only on gross income derived from United States sources.[3] A non-resident foreign corporation, one which is not engaged in trade or business within the United States, is taxed at a flat rate on its "fixed or determinable, annual or periodical," income from United States sources[4].

A point of similarity that can be perceived while comparing the American and the Indian tax laws regarding the residence of a company, is that the maintenance of an office, with its incidental activities, together with the exercise of effective control, such as making of policy decisions, will bring the foreign corporation within the resident category.

The absence of statutory definition of the phrase "engaged in trade or business" has thus made the Courts the final arbiter as to whether a

1 See. 871(2); Regs. 1.871-8(b); *Chang Hsiao Liang*, 23 T.C. 1040 (acq).

2 *Compare Fernand C. A. Adda*, 10 T. C 273 (1948), aff'd 4th Cir., 171F 2d. 427, cert. den. 336 U.S. 952.

3 See. 882(b); contrast this with the provisions of the Indian law where a resident company is taxed on its worldwide income.

4 See. 881.

company is resident or non-resident. But the Courts have not drawn a clear line of demarcation between the resident and non-resident categories, as a result of which a greater degree of subjectivity is infused into their decisions. Consequently a corporation which clearly comes under a particular category may be shifted over to the other, merely because the Court deems a factor to be the material one in deciding the status of that corporation.

The criteria for determining the residence of a corporation in India and the United States are so vague that they deter foreign investors from participating in the industrial development of these countries. Such a reaction on the part of the foreign investors will adversely affect the industrial economy of India more than that of the United States, which leads other countires of the world in the industrial arena. Hence it is necessary that the Indian Income-tax Act should be amended suitably, with a view to eliminate the uncertainty created by the vague and ambiguous phraseology, by redefining in precise language the criterion of classification. Or the Courts should be judicious in classifying a foreign corporation as a resident one, especially when the corporation has no such intentions.

RETRENCHMENT : RETRENCHED AND REINSTATED*

By

S. PARASURAMAN†

I

The Indian Parliament's attempt, in 1953, to define the term "retrenchment" though well intended, was clumsy. Nevertheless, the Legislative appreciation of the facts of industrial life in India and the assessment of the needs of the situation as reflected from the prescription of remedies, showed the most imaginative comprehension in the history of legislative activity in the field of labour management relations. But, unfortunately where the Legislature succeeded, the Judiciary failed. Emphasis on the "economic concept" of the word "retrenchment" and the innovation of the doctrine of "the existing, running industry" severely circumscribed the benefits granted by the Parliament. Neither the judicial innovation of the countervailing concepts of "temporary, malafide closure" and "pre-existing right" nor subsequent legislative attempts to iterate its original policy have succeeded in resurrecting the benefits secured by the 1953 Legislative scheme.

This paper attempts to delineate the 1953 Legislative scheme of "retrenchment", critically examine decisions which retrenched the scope of the application of those provisions and assess judicial as well as legislative attempts to reinstate the initial provisions relating to "retrenchment".

II

RETRENCHMENT

A. An Explosive Situation

1. Decline of Indian Handicrafts :

When "the west of Europe" was inhabited by uncivilised tribes, India was famous for her industrial products and the artistic skill of her

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craftsmen.[1] Today, however, India depends upon the western products, means of production and technical know-how for her sustenance. Moreover, the national endeavour is directed not only towards rehabilitating Indian handicraftsmen, finding a market for their products and otherwise encouraging handicrafts industries, but also to overcome the acute shortage of skilled workers in the technologically advanced modern processess of production. The Industrial Revolution, no less than the Colonial Rule, is responsible for this swing of the pendulum.

Basically, India is, and has always been an agricultural community. Her industries developed around village communes and catered to the needs of the vast majority of her population. More sophisticated requirements of the rulers, feudal lords, affluent sections of the community and foreign markets, were met by highly skilled workers who prospered under the patronage of select customers.

The Industrial Revolution led to the increased production of better goods of uniform standards at lower costs and the improvement in the means of transportation made such goods available in far off corners of the world. The fact that British industrialists were at the top of this unparalleled technological progress, British commercial houses had virtual monopoly of international trade, British shipping facilities were par excellence and India being a part of the British Empire during its "golden-era" hastened the downfall of Indian handicraftsmen.

Long before Industrial Revolution reached the shores of India, the British factory-made goods had replaced indigenous products. Moreover, India did not undergo gradual, technological development. The Industrial Revolution hit her like a cyclone with well developed textile, steel and other technologies. Indian handicraftsmen, on the one hand, had not the financial resources to become modern industrialists and, on the other hand, the market which they commanded was sharply circumscribed by the governmental policy which while permitting the inflow of inexpensive foreign manufactured goods, prohibited the export of handicrafts. Establishment of modern factories in India by capitalists worsened the position of handicraftsmen and led to the rise of local financier-*cum*-supplier of raw materials-*cum*-purchaser of finished products.

The economic decline of Indian handicraftsmen was further hastened by the social values which put independent status above monetary gains resulting from dependent status, a factor which, incidentally, was also

1 See, Report of the Industrial Commission (1918).

responsible for the unwillingness of the handicraftsmen to join modern factories as "servants" thereby resulting in the shortage of skilled workmen for factory employment.

2. *The Starving Millions :*

(*a*) *Unemployment :*

The decline of the Indian handicrafts had a far-reaching and catastrophic effect on the tottering economy of India. Millions of people were thrown out of gainful employment. In the words of the late Prime Minister Nehru :

> "The liquidation of the artisan class led to unemployment on a prodigious scale. What were, all these scores of millions, who had so far been engaged in industry and manufacture, to do now ? Their old profession was no longer open to them, the way to a new one was barred. They could die, of course, that way of escape from an intolerable situation is always open. They did die in tens of millions. The English Governor General of India Lord Bentick, reported, in 1834, that the misery hardly finds a parallel in the history of commerce. The bones of the cotton weavers are bleaching the plains of India[1]."

This led to an unprecedented shift of population from industry to agriculture :

> "But still vast numbers of them remained and these increased from year to year as British Policy affected remoter areas of the country and created more unemployment. All these hordes of artisans and craftsmen had no job, no work and all their ancient skill was useless. They drifted to the land, for the land was still there. But the land was fully occupied and could not possibly absorb them profitably. So they became a burden on the land. And the burden grew and with it grew the poverty of the country..... India became progressively ruralised. In every progressive country there has been during the past century, a shift of population from agriculture to industry, from village to town, in India this process was reversed, as a result of British policy."[2]

These skilled workers, thus, created problems of unemployment and underemployment both in the industrial as well as in the subsistence sector of economy. The Third Five Year Plan estimated that about 9 million people

1 "The Discovery of India"—Jawahar Lal Nehru, page 247

2 *Id.*—page 248

were unemployed in 1961. In addition 70 million job opportunities had to be created by 1976 to absorb the increasing working force in the country. They further estimated that even if the entire plan projects were successfully implemented, 12 million would represent the backlog of unemployed persons in 1966.[1]

(*b*) *Underemployed :*

Staggering as these figures of unemployment are, they pale into insignificance when we consider the problem of underemployment. Malenbaum, for instance, estimated that, in 1955, 2.8 million urban workers worked 25 per cent or less of the time in which they were available for employment.[2] Similarly, 1950-51 Agricultural Labour Enquiry revealed that approximately 21 million agricultural men workers were employed on wages, on an average, for 189 days in agricultural employment and for 29 days in non-agricultural employment. During the remaining period, either they were totally unemployed or employed on their own lands, if any, or on other non-wage earning occupations. It was further estimated that the period of their total unemployment was about 100 days and that of self-employment nearly 50 days. Women workers, who numbered approximately 14 millions, worked for only 120 days in agricultural employment and for 14 days in non-agricultural employment.[3] Dandekar calculated that if agricultural workers were to be assured full employment, additional job-opportunities of the order of 36.5 per cent over 1950-51 level of employment, would have to be created.[4]

3. *The Imbalance :*

(*a*) *Bargaining Power :*

India has, and in the foreseeable future will continue to have, a surplus labour market. The impact of termination of employer-workman relationship is, therefore, to be considered in the context of the prevailing conditions of unemployment and underemployment.

It is significant that managements have shown least concern over labour welfare policies aimed at counteracting the "push" from towns and the "pull" of the villages, with a view to retain their workers and have

1 See, Third Five Year Plan (Govt. of India) pp. 74, 156.

2 Urban unemployment in India—W. Malenbaum (June 1957) (Pacific series) Table, I, page 140.

3 Indian Labour Gazette (Vol. 12) 1954-55, pp. 440, 441

4 Dandekar, V. M. "Use of food surpluses for economic development"—Publication No. 33 of Gokhle Institute of Politics and Economics, Poona (1956), page 52.

a committed labour force. Obviously, since employers can get all their labour force at the factory gate, they consider it futile to spend money on labour welfare activities. Likewise, while the "pull" from the villages is strong enough to make industrial workers desirous of visiting their villages for prolonged periods, it is not sufficiently strong to counteract the "push" from the village and the "pull" of the town. Indeed, lest they join the ranks of unemployed starving millions, workmen try to keep on to their factory jobs at all costs.[1]

Surplus labour market naturally weakens the bargaining power of an individual worker, particularly of an illiterate, unskilled, ordinary, common worker. Instances are not unknown where "assertive" striking workmen are discharged *enmasse*. Their only hope is a strong trade union. However, the Government have refrained[2] from taking concrete steps to strengthen trade union movement. Indeed, even the provisions[3] of the 1947 Trade Unions (Amendment) Act have not yet been enforced. On the other hand, legislative intervention to implement labour welfare policies, maintain minimum standards of work, and ensure social security as well as tribunal awards improving terms and conditions of service, have had the cumulative effect of taking the wind out of the sails of the protest movement. Further, if the decision in *Dharangdhra Chemical Works Limited*[4] reduced the potential strength of trade union membership, the decision in *Newspapers Limited*[5] permitted managements to nip the organisational activities in the bud itself and made it difficult for trade unions to organise themselves. Justice Shah's observation in "*The Hindu*"[6] raises a doubt even as to the strength of the bond between the worker and the trade union. The fact is

1 See, "Industrial Relations in India"—Charles A. Myres, p. 78

2 There are several reasons for this, the more important ones being two: *First*, the communists had assumed full control of the All India Trade Union Congress, the only national federation of labour then existing, and were fully exploiting their leadership to harass the Congress Government. The formation of the Indian National Trade Union Congress is indicative of the Government's concern over labour movement. Obviously, the ruling congress-party sponsored the association to forestall possible difficulties that might arise from a labour movement antagonistic to its policies. *Second*, the government of Independent India put the task of economic reconstruction in the forefront and it could neither afford loss of production due to the use of economic instruments of coercion in collective bargaining nor endure binding divergent terms and conditions of service in different sectors of national economy. The scope for free collective bargaining is extremely limited in a planned and regulated economy.

3 Provisions regarding recognition of trade unions and prohibiting unfair labour practices.

4 (1957) 1 LLJ 477 (S.C.)

5 (1957) 2 LLJ 1 (S.C.)

6 (1961) 2 LLJ 436 (S.C.)

that in a country where labour force comprises of 48.37 million people,[1] there are only 2.241 million trade unionists (divided into 4653 units with an average membership of 520.3 and an income of Rs. 3,311.9/- per union[2]) who are hardly in a position to bargain with employers.

(*b*) *Termination of Service :*

The Royal commission on Labour was appalled by the prevalent insecurity of service of workmen.[3] More than a decade later the Labour Investigation Committee iterated :

> "Labour delegates to the (1943 : Fifth Labour) Conference suggested that standing orders should cover, among other things, question of security of service. In view of the facile manner in which workers can be dismissed or employed at the sweet-will of the employers this seemed a legitimate demand. The Bombay Textile Labour Investigation Committee (1938-1948) have commented upon this question of security of employment as follows :
>
> > "There is no fear which haunts an industrial worker more constantly than the fear of loosing his job as there is nothing which he prizes more than economic security. The fear of being summarily dismissed for even slight breach of rules of discipline or for interesting himself in trade union activity disturbs his peace of mind. It is a notorious fact that dismissals of workers have been the originating cause of not a few industrial disputes and strikes. The provision of effective safeguard against unjust and wrong dismissal is, therefore, in the interest as much of industry as of workers."
>
> The evil of unfair dismissals or indefinite suspension unfortunately appears to be common in many industries."[4]

The Committee again referred to this problem towards the end of their Report :

> "The next important need of the worker is security of tenure and freedom from fear of victimization...(He) is liable to be discharged at short notice at the sweet-will of the employer or his subordinate officers. This militates equally against the worker's efficiency

1 See, Industrial Relations Statistical Series-II (1965)-p. 7, (Shri Ram Centre for Industrial Relations, New Delhi).

2 See, Industrial Relations Statistical series IV (1965) pp. 2, 9, (Shri Ram Centre for Industrial Relations, New Delhi).

3 See, Royal Commission on Labour Report (1931), page 334.

4 Report of the Labour Investigation Committee (1946) page 115.

and his self-respect.....(one) of the very first things to be done in our labour programme is to regularize the system of...discharge and dismissal, and of ventilation and redress of grievances... The proposed Central Government Bill on the subject of standing orders is, we feel, in the right direction.

Apart from the legal protection which may be made available to the worker for ensuring security, the bulwark against unjustified dismissal or victimization is trade union organization. Unfortunately, however, since the date of the publication of the Royal Commission's Report, there has been little advance in this respect..."[1]

Reported decsions are full of instances where workmen have been discharged for their union activities.[2] Instances of other unfair labour practices are not infrequent.[3] Further, it is not a problem of the past. Nothing disturbs a union more than the termination of service of its members. "It is a notorious fact that the dismissals of workers have been the originating cause of not a few industrial disputes and strikes".[4]

B. The Post World War II Crisis

End of hostilities in World War II marked the beginning of industrial strife in India. Labour (as we have already indicated) was highly discontented. They had worked hard during the war to keep the production at its peak. The allies had won the war and the employers had made unprecedented profits, but the condition of the labour, instead of improving, had deteriorated. To make the situation worse, military employments and employments connected therewith ceased to exist and several wartime industries were wound up, throwing hitherto employed workmen out of employment. The participation of top government leaders with the INTUC in 1946, on the one hand, encouraged trade union movement and was on the other hand, the warning-bell to employers who not unnaturally terminated the services of workmen on the least suspicion of their having trade union sympathies. Workmen genuinely felt that they were insecure in their jobs and were extremely restive.

But, this was not the end of the story. Machines had outlived their life, though in the absence of transport facilities for importing replacements during the war period, they were kept in operation. With the availability

1 Report of the Labour Investigation Committee, page 371.

2 See, Report of the Labour Investigation Committee (1946) pp. 113-115, 122-123 and 371-372.

3 *Ibid.*

4 *Ibid*, p. 115 (citing from the Report of the Bombay Textile Labour Enquiry Committee).

of the shipping facilities and finances in the post-war period, employers embarked on large scale schemes of modernisation of plants and rationalisation of production techniques thereby posing a new threat to job-security of workmen.

Moreover, the immediate post World War II period also marked the emergence of independent India. Foreign concerns were feeling insecure. Governmental attempts to reform land-tenure system by abolishing the proprietary interest of middle-men on payment of more or less nominal compensation, nationalization of Banking and Insurance Industries, and large scale increase in state enterprise, added to their apprehensions. Quite a few foreign entrepreneurs transferred their interests to Indians. Besides in the rapidly expanding economy, transfer of business interests among Indians themselves was commonplace. These naturally, affected the security of tenure of workmen particularly because "transfer" and "closures" were utilised by employers to get rid of such workmen as were considered to be "undesirable".

India, thus, faced a crisis in labour management relations. Workmen wanted improvement in their terms and conditions of service and, above all job security. Employers, on the other hand, claimed unfettered right to determine terms and conditions of employment, discipline erring workmen, modernise plants, rationalise production techniques and assess labour strength for their undertakings. In view, however, of the task of economic reconstruction, the Government could hardly permit economic warfare between labour and management : indeed, it severely regulated the use of economic instruments of coercion and made detailed provisions for the resolution of the industrial disputes through negotiation, conciliation and adjudication processes.

Problems relating to rationalisation were somewhat more complicated and formed subject matter of several high level parleys. The Government of India,[1] in their "Memorandum of retrenchment and how to minimise its severity" stated :

> "The employers held that it is the employers right to terminate the services of his employees. Normally this right may be conceded but because of the prevailing economic crisis in the country and the danger which large scale retrenchment can bring to law and order, there is justification for State interference in the unrestricted exercise of this right."

1 Labour Ministers Conference of December 1949.

"The Central Advisory Council of Industries at its second meeting held in July 1949 recognised in a resolution that where such proposals (rationalisation etc.) involve large displacement of labour, intervention of government may become necessary. It appears, necessary therefore, that the process of retrenchment should be hedged in with safeguards".[1]

and began to intervene, directly through the Ministry of Labour and Employment or indirectly through industrial tribunals, in disputes relating to rationalisation and retrenchment.

C. Government's Response

Rule 81-A of the Defence of India Rules, 1942, empowered the Government (1) to require employers to observe such terms and conditions of employment in their establishments as may be specified; (2) to refer any dispute to conciliation or adjudication; (3) to enforce the decisions of the adjudicators; and (4) to make general or special order to prohibit strikes or lock-outs in connection with any trade dispute unless reasonable notice had been given. These provisions, thus, permitted the Government to use coercive processes for the settlement of "trade-disputes" and to place further restrictions on the right to use economic instruments of coercion. The Industrial Disputes Act, 1947 put the war-time emergency provisions in a permanent peace-time legislation. The statement of Objects and Resasons reads thus:

"Experience of the working of Trade Disputes Act, 1929, has revealed that its main defect is that while restraints have been imposed on the rights of strikes and lock-outs in public utility services, no provisions have been made to render the proceedings institutable under the Act for the settlement of an industrial dispute, either by reference to a Board of Conciliation or to a Court of Enquiry, conclusive and binding on the parties to the dispute. This defect was overcome during the war by empowering under Rule 81-A of the Defence of India Rules, the Central Government to refer industrial disputes to adjudicators and to enforce their awards. Rule 81-A which was to lapse on the 1st of October, 1946, is being kept in force by the Emergency Powers (Continuance) Ordinance, 1946, for a further period of six months, and as industrial unrest, in checking which this rule has proved useful, is gaining momentum

1 "Industrial Awards in India-An Analysis"—page 126 quoted in *Jute Mills*, (1952) 1 LLJ 264, 274 (I.T.)

due to stress of post-war industrial adjustment, the need of permanent legislation in replacement of this Rule, is self-evident. This Bill embodies the essential principles of Rule 81-A, which have proved generally acceptable to both employers and workmen, retaining intact for the most part, the provisions of the Trade Disputes Act, 1929".[1]

However, adjudication proceedings under the Industrial Disputes Act, 1947, were not confined to "public utility services"[2] or to such employment as were essential for securing the Defence of (British) India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies or services necesssary to the life of the community.[3] They could be invoked in any "industrial dispute" and in any "industry".[4]

Section 2(k) of the Industrial Disputes Act, 1947, defines an "industrial dispute" to mean:

"Any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;"

and sections 7, 7A and 7B empower the designated Governments to constitute one or more Labour Courts, Industrial Tribunals and National Industrial Tribunals with limited jurisdictions,[5] for the adjudication of "industrial disputes".

1 Gazette of India, Part-V, pp. 239-240 (1946)

2 *Ibid.*

3 Essential Supplies (Maintenance) Ordinance, 1941, Section 3.

4 Section 2(j) of the Industrial Disputes Act defines "industry" to mean:

"any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;"

and, as is apparent, has a very wide coverage.

5 Until 1956, there was only one type of Tribunal. However, the 1956-Industrial Disputes (Miscellaneous Provisions and Amendment) Act introduced the aforesaid three types of Tribunals. Under section 6 read with schedule two, the jurisdiction of Labour Courts is confined to "adjudication of industrial disputes relating to":

"(1) The propriety or legality of an order passed by an employer under the Standing Orders.

(2) The application and interpretation of Standing Orders.

(3) Discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed.

(4) Withdrawal of any customary concession or privilege.

(5) Illegality or otherwise of a strike or lock-out; &

(6) All matters other than those specified in the Third Schedule".

Generally speaking, the Government has full discretion[1] to decide whether or not to refer a dispute to an authority for adjudication. Thus, section 10, *inter alia*, provides :

"(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended it may at any time, by order in writing,—

(*c*) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication ; or

(*d*) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication :

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c) :

and "for performing such other functions as may be assigned to them" under the Act. Section 7A declares the jurisdiction of an Industrial Tribunal to be "adjudication of industrial disputes relating to" to the aforesaid matters as also matters specified in Schedule Three, namely, :

"(1) Wages, including the period and mode of payment.
(2) Compensatory and other allowances.
(3) Hours of work and rest intervals.
(4) Leave with wages and holidays.
(5) Bonus, profit sharing, provident fund and gratuity.
(6) Shift working otherwise than in accordance with Standing Orders.
(7) Classification by grades.
(8) Rules of discipline.
(9) Rationalisation.
(10) Retrenchment of workmen and closure of establishment ; and
(11) Any other matter that may be prescribed".

National Industrial Tribunals are constituted by the Central Government, under sec. 7B "for the adjudication of industrial disputes, which, in the opinion of the Central Government, involve question of national importance or are of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such disputes". For further qualification on jurisdiction, see, the first proviso to sec. 10(1) ; sub-sections (4), (5) and (6) of sec. 10 ; proviso to sub-section (1) of sec. 33(b) ; and sub-section (2) of sec. 33(b).

1 For exceptions ; see, the second proviso to section 10(1), sections 10(2), 12(5), 13(4) and 33A of the Industrial Disputes Act.

(1A) Where the Central Government is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such dispute and that the dispute should be adjudicated by a National Tribunal, then the Central Government may, whether or not it is the appropriate Government in relation to that dispute, at any time, by order in writing, refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a National Tribunal for adjudication".

Section 15 directs adjudicating authorities to hold their proceedings expeditiously and submit their awards to the appropriate Government, which is under an obligation to publish them within a period of 30 days from the date of their receipt.[1] Unless the concerned Government is of the opinion :

"that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award".[2]

awards become enforceable on the expiry of 30 days from the date of their publication. Section 18 enumerates the persons on whom awards are binding and section 19 defines the period of the operation of the award. The enforcement of the award is sought to be ensured by imposing penal liability on those who commit a breach thereof.[3]

The Act seeks to preserve community interests and maintain continuity of production by regulating the use of economic instruments of coercion in labour management relations.[4]

D. Tribunals' Response

We may now broadly indicate the emerging pattern of the response of Tribunals to problems connected with termination of employer-workman relationship :

1 See, section 17 of Industrial Disputes Act .
2 See, section 17A of Industrial Disputes Act : the Government have wide powers to reject or modify an award.
3 See, section 29 of Industrial Disputes Act.
4 See, sections : 19(3), 22, 23, 24, 25, 26, 27 and 28 of Industrial Disputes Act.

First: Tribunals were keenly aware of high handed and arbitrary action of managements in terminating services of their workmen and of the need to insure job security to workmen.[1]

Second: Tribunals assumed jurisdiction over disputes relating to termination of service, holding that such disputes were "industrial disputes" "connected with employment or non-employment" "of any person", enquired into them, and gave their awards.[2]

Third: Tribunals sought to enforce the observance of certified Standing Orders, fair labour practices and rules of Natural Justice in determining the legality or otherwise of orders terminating services.[3]

Fourth: Where the Tribunals held the order terminating services to be illegal, they generally directed reinstatement of workmen with or without wages[4]: the quantum of back wages and compensation were matters of case to case determination.[5]

1 *Pudukottai Textile Mills* (1951) 2 LLJ 107(S) (I.T.); *Banaras Light & Power Company Ltd.* (1952) 1 LLJ 6 (L.A.T.); *Motor Transport* (1952) 1 LLJ 705 (I.T.); *Punjab National Bank* (1952) 2 LLJ 648 (L.A.T.); *Upper India Sugar Mills* (1953) 1 LLJ 254 (L.A.T.); *Nellimarla Jute Mills* (1953) 1 LLJ 667; *Advertising Corporation of India Ltd.* (1954) 1 LLJ 365 (I.T.); *Madras Press Labour Union* (1954) 1 LLJ 752 (I.T.); *Vijai Kumar Mills* (1955)1 LLJ 483 (I.T.); *Mawana Sugar Works* (1955) 2 LLJ 462 (L.A.T.); *Spencer Ltd.* (1956) 1 LLJ 714 (L.A.T.); *Janata Pictures Ltd.* (1956) 2 LLJ 67 (L.A.T.); *B.I.C. Ltd.* (1957) 1 LLJ 422 (L.A.T.); *Indian Iron and Steel Co.* (1958) 1 LLJ 260 (S.C.); *Model Mills* (1958) 1 LLJ 539 (S.C.); *Tika Ram & Sons* (1960) 1 LLJ 514 (S.C.): *Assam Oil Co. Ltd.* (1960) 1 LLJ 587 (S.C.) *Swadeshi Industrial Ltd.* (1960) 2 LLJ 78 (S.C.); *Chartered Bank, Bombay* (1960) 2 LLJ 222 (S.C.); *Bata Shoe Co.* (1961) 1 LLJ 305 (S.C.); *Anglo American Direct Tea Trading Co.* (1961) 2 LLJ 625 (S.C.); *U.B.Dutta & Co. (P) Ltd.* (1962) 1 LLJ 374 (S.C.).

2 *Western India Automobiles Association* (1949) F.C. 111; *Indian Paper Pulp Co.* A.I.R. (1949) F.C. 148; *Shamnagar Jute Factory* A.I.R. (1949) F.C. 150; *United Commercial Bank Ltd.* (1952) 1 LLJ 782 (L.A.T); *N. K. Sen & others Vs. L.A.T.* (1953) 1 LLJ 6; *Workmen of Dimakuchi Tea Estate* (1958) 1 LLJ 500 (S.C.).

3 *Buckingham Carnatic Mills* (1951) 2 LLJ 314 (L.A.T.); *Kanpur Cotton Mills Co. Ltd.* (1951) 2 LLJ 475 (L.A.T.); *Banaras Light Power Company* (1952) 1 LLJ 6 (L.A.T.); *Smith Stainstreet Co. Ltd.* (1953) 1 LLJ 67 (L.A.T.); *Swamy Oil Mills* (1953) 2 LLJ 785 (I.T.); *Caltex India Ltd.* (1955) 2 LLJ 693 (L.A.T.); *Road Transport Department* (1956) 1 LLJ 430 (L.A.T.); *Luxmi Devi Sugar Mills* (1957) 1 LLJ 17 (S.C.); *Model Mills* (1958) 1 LLJ 539 (S.C.); *Punjab National Bank* (1959) 2 LLJ 666 (S.C.); *Andhra Scientific Co. Ltd.* (1961) 2 LLJ 119 (S.C.); *Sur Enamel & Stamping Works* (1963) 2 LLJ 367 (S.C.); *Associated Cement Co.* (1963) 2 LLJ 396 (S.C.).

4 *Western India Automobile Association* (1949) F.C. 111; *Buckingham and Carnatic Mills* (1951) 2 LLJ 314(L.A.T.); *E. Hill & Co. Ltd.* (1953) 2 LLJ 128 (I.T.); *St. Francis Sales Press* (1954) 1 LLJ 94 (I.T.); *Madras Electric Tramways (1904) Ltd.* (1954) 1 LLJ 327 (L.A.T.); *Odeon Cinema* (1954) 2 LLJ 314 (H.C. Madras); *Spencer & Co. Ltd.* (1954) 2 LLJ 310 (H.C. Madras;) *Andhra Patrika Madras* (1957) 1 LLJ 154 (I.T.); *Chopra Motors* (1957) 2 LLJ 163 (L.A.T.); *M/s Tulsi Das Paul* (1964) 1 LLJ 516.

5 *Kannan Devan Hill Produce Ltd.* (1954) 1 LLJ 98 (I.T.); *Port Trust, Bombay* (1954) 1 LLJ 193 (I.T.); *L. H. Ayurvedic College Pharmacy* (1954) 1 LLJ 417 (C.O.); *Kohinoor Saw Mills* (1954) 1 LLJ 429 (I.T.); *J K. Jute Mills Co. Ltd.* (1954) 1 LLJ 597 (Adjudicator;) *Surat Bus Co. Ltd.* (1954) 2 LLJ 75 (I.T.); *Diwan Sugar and General Mills Ltd.* (1954) 2 LLJ 394 (I.T.); *J. K. Cotton Manufacturers Ltd.* (1954) 2 LLJ 526 (Adjudicator); *Indian Standard Wagon Co. Ltd.* Burnpur (1959) 1 LLJ 351 (L.C.).

Fifth: Where Tribunals held the termination of service to be legal, their response depended on a consideration of two independent factors: (a) whether the termination of service was justified on the facts of the case, or unjustified (this generally tended to be a subjective evaluation although Tribunals tried to be objective); and, (2) whether the termination of service was involuntary viz., by operation of law or by act of parties. (A statement of clear-cut division between these types of termination of service is not available, but, a perusal of the awards, leaves the impression that the aforesaid division was subconsciously present in the minds of the adjudicators).[1]

Sixth: Generally speaking justification affected the quantum of relief and not the liability itself.[2]

Seventh: There is no reported case dealing directly with the question of relief to be granted in the case of termination of service by operation of law. Of course, by their very nature, cases dealing with involuntary termination of service or by an act of workman are not likely to come up for adjudication. Almost all the cases with which Tribunals have been concerned deal with the termination of service by an act of the employer. While declining to award any compensation in cases of dismissal, Tribunals always granted "severance-pay" in cases of retrenchment[3] and were, more often than not, inclined to grant "severance-pay" in cases of discharge,[4] irrespective of the fact whether it was for economic reasons or otherwise.

1 *J.K. Iron Steel Co. Ltd.* (1956) 1 LLJ 227 (S.C.); *Osmanshahi Mills Ltd.* (1959) 1 LLJ 187 (I.T.) *Indian General Navigation and Railway Co. Ltd.* (1960) 1 LLJ 13 (S.C.); *Assam Oil Company Ltd.* (1960) 1 LLJ 587 (S.C.); *Anglo-American Direct Tea Trading Co.* (1961) 2 LLJ 625 (S.C.).

2 See, for instance, *Victoria Cotton Mills* (1951) 1 LLJ 502 (I.T.).

3 *Madura Co.* (1950) 2 LLJ 164 (Adjudicator); *Aluminium Corporation of India* (1950) 2 LLJ 1140 (I.T.); *Vizianagaram Sugar & Refinery Ltd.* (1951) 2 LLJ 129 (S) (I.T.); *Kashi Iron Foundry* (1952) 1 LLJ 199 (L.A.T.); *Kanpur Tannery Ltd.* 1953) 1 LLJ 483 (L.A.T.); *Grand Hotel* (1963) 2 LLJ 25 (L.A.T.); *P.C. Dwadesh Sreni & Co.* (1954) 2 LLJ 830 (S.C.); *Apollo Mills* (1960) 2 LLJ 263 (S.C.); *May & Baker (I) Ltd.* (1961) 2 LLJ 95 (S.C.).

4 *Smith Stainstreet & Co. Ltd.* (1953) 1 LLJ 67 (L.A.T.); *St. Francis Sales Press* (1954) 1 LLJ (I.T.); *Rajnagar Spinning, Weaving and Manufacturing Co. Ltd.* (1955) 1 LLJ 237 (I.T.).

Eighth: Tribunals' determination of the quantum of "severance-pay" left much to be desired. There was no agreement either with regard to the factors that were to be taken into consideration in determining "severance-pay" or with regard to the relative importance of those factors.[1]

Ninth: Tribunals further sought to insure job security, in cases of retrenchment and discharge for economic reasons, by ordering termination of service in the reverse order of employment and directing re-employment when the need for increasing labour force arose.[2] We confine our study to the seventh and the eighth of the aforesaid nine observations.

The respective arguments of employers and workmen vis-a-vis award of "severance-pay" were best summarised in *Jute Mills*:[3]

> "It has been generally argued on behalf of the employers that in cases where a retrenchment is legal and fully justified, the employer should not be saddled with the liability of paying compensation to the employees retrenched, as in effecting the retrenchment, the employers are only exercising their legitimate management functions and they are not responsible for doing anything by way of mitigating the effects of conditions of unemployment which retrenchment may bring about, and the problem of unemployment is really a matter to be solved by the State and not by the employers. On behalf of the unions generally it has been argued that while the employer's right of retrenchment for legitimate reasons may be conceded, the question of security of service from the employee's point of view is of far reaching importance and the employer's right to retrench even for legitimate reasons should be hedged in with safeguards."[4]

The Tribunals, however, considered that "in the interest of the security of service of the employees, industrial peace and tranquility in the country as a whole", it was:

1 *Hyderabad Vegetable Oil Products* (1950) 2 LLJ 1281 (I.T.); *Cochin Potteries* (1950) 2 LLJ 718 (Adjudicator); *Victoria Cotton Mills* (1951) 1 LLJ 502 (I.T.); *Swastik Oil Mills* (1953) 1 LLJ 468 (L.A.T.); *Gasilitton Colliery* (1954) 1 LLJ 144 (L.A.T.); *Gotanga Sansua Tea Estate* (1957) 1 LLJ 432 (L.A.T.).

2 *Vishuddhanand Saraswati Hospital* (1949) 1 LLJ 111 (I.T.); *Kilburn & Co.* (1950) 2 LLJ 125 (I.T.); *Madura & Co.* (1950) 2 LLJ 164 (Adjudicator); *Bird & Co.* (1950) 2 LLJ 808 (I.T.); *Annapurna Mills* (1953) 1 LLJ 43 (L.A.T.); *J. K. Hosiery Factory* (1953) 1 LLJ 652 (Adjudicator); *Thacker Spink & Co.* (1953) 2 LLJ 697 (I.T.).

3 (1952) 1 LLJ 264 (I.T.).

4 (1952) 1 LLJ 264 (I.T.) p. 273.

> "quite consistent with the principles of justice and fairness, to saddle the employers with liability of paying some compensation to the discharged employees even in case of legal and fully justified retrenchment".[1]

Earlier in *Messrs. Alcock Ashdown & Co.*,[2] the Industrial Tribunal declared:

> "In a proper case, the Industrial Tribunal has jurisdiction to award compensation for unemployment resulting from even a rightful discharge and *a fortiori* in a case of wrongful discharge the tribunal has jurisdiction to award compensation".

and asserted:

> "The fairness of granting compensation as unemployment benefit to such men has been recognised in several adjudications hitherto".[3]

The case was followed in *Madura & Co.*,[4] where the management discharged a workman for want of sufficient work. The adjudicator declined to order reinstatement of the retrenched workman but nevertheless directed payment of compensation:

> "... upon good consideration of (workman's) service and plight on the one hand and the Company's position and stress of circumstances on the other, it appears to me to be quite fair and reasonable that the company should compensate him by a payment in the the nature of unemployment benefit. It may be contended that there is no law here to make the above direction. The answer to this contention is that there is no law for awarding an unemployment benefit even in places where there are fully developed labour laws and that Industrial Tribunals there had been awarding such benefit as the one in question on principles of fairness, equity and labour welfare honoured throughout the world."[5]

The *Bombay Gas Co.*,[6] reiterated:

> "It has now been well settled by a series of awards..... and other tribunals that in the absence of any social security scheme such as unemployment insurance, it is quite fair and reasonable that workers who are retrenched for reasons personal to the Company

1 *Ibid*, p. 274.

2 (1948) I.C.R. Bombay 722 (I.T.).

3 *Ibid.*

4 (1950) 2 LLJ 164 (Adjudicator).

5 *Ibid.*

6 (1950) 2 LLJ 150 (I.T.).

should be compensated for their involuntary unemployment and other suffering consequent on their retrenchment by the Company."

and indicated that :

> "varying amounts by way of relief have been awarded in appropriate cases with due regard to the benefit derived by the employer from the employee's services in the past, the conditions of the industry or undertaking, the reasons for which the employer had to retrench, the period for which the resultant unemployment had lasted and the resources of the employee at the time of his discharge and other factors".[1]

There was thus no uniformity in the rates of compensation.

In some cases[2] 15 days wages were given for each completed year of service and in others[3] one month's wages. If *Presidency Jute Mills*[4] laid down different rates of compensation depending upon the length of service,[5] *The National Industrial Works*,[6] took into consideration the period of resulting unemployment :

> "In the absence of any evidence to show as to whether all or any of the retrenched workmen remained unemployed and for what period it would, in our opinion, be not just and equitable to award compensation to all of them."[7]

1 *Ibid.* p. 154—See, also *The Ford Motor Company of India Ltd.* (1959) I.C.R. Bombay 811 ; *Messrs. Gramaphone Company Ltd.* (1950) LLJ 493 (I.T.) ; *Cochin Potteries* (1950) 2 LLJ 718 (Adjudicator) ; *Habib Insurance Co. Ltd.* (1951) 1 LLJ 650 (I.T.); *V.S.R. Ltd.* (1951) 2 LLJ 129 (S) (I.T.) ; *Kashi Iron Foundry* (1952) 1 LLJ 199 (L.A.T.) ; *Presidency Jute Mills* (1952) 1 LLJ 796 (L.A.T.) ; *General Motors* (1952) 1 LLJ 865 (I.T.) ; *I.K. Sugar Mills* (1952) 2 LLJ 492 (L.A.T.) ; *Standard Oil Mills* (1953) 2 LLJ 135 (I.T.).

2 See, for instance, *Vishakhapatnam Sugar Refinery Ltd.* (1952) 1 LLJ 638 (L.A.T.) ; *Cawnpore Tannery* (1952) 2 LLJ 423 (L.A.T.) ; *Crompton Ltd.* (1952) 2 LLJ (I.T.) ; *Grand Hotel* (1953) 2 LLJ 25 (L.A.T.).

3 See, for instance, *Bangalore Woollen and Cotton & Silk Mills* (1952) 1 LLJ 654 (L.A.T.) ; *I. K. Sugar Mills* (1952) 2 LLJ 492 (L.A.T.) ; *Coir Floor Furnishing Co.* (1953) 1 LLJ 787 (I.T.) ; Tata Oil Mills (1953) 1 LLJ 45 (L.A.T.).

4 (1952) 1 LLJ 796 (L.A.T.).

5 *Presidency Jute Mills* (1952) 1 LLJ 796 (L.A.T.):

Length of service	Amount of compensation
Less than 3 months	No compensation
Between 3 mths & 6 mths.	15 days of wages
Between 6 mths. & 1 year	1 month of total emolument
Between 1 year & 2 Years	2 months of total emolument
Between 2 Years—3 Years	2½ months of total emolument
More than 3 years	3 months of total emolument

6 (1951) 1 LLJ 24 (L.A.T.).

7 *Ibid.*

Indeed, the Labour Appellate Tribunal declined to grant any compensation in the latter case because "the grounds for retrenchment were sufficient."

On the other hand, instances are not unknown where tribunals have awarded compensation even in cases where workmen were discharged on the ground that the company was incurring losses. In *The Aluminium Corporation of India Ltd.*,[1] the management proposed to close down a particular section of the undertaking due to losses, and discharge the employees of that section. Considering the justifiability of the closure and the eligibility of compensation to such employees, the Industrial Tribunal observed :

> "..... in a case like this there is no alternative and I come to the conclusion that the... department of this company should be allowed to be closed down as proposed by the management."[2]

but directed "that compensation be paid to the employees". *Sri Lakshmi Satyanarayan Groundnut Oil Mill*[3] went a step further. The management (lessees) terminated the services of certain workmen who had been working with the lessor. The Industrial Tribunal observed :

> "On a consideration of the whole matter the action of the lessees can be justified if adequate compensastion is paid to the petitioners, as they have been thrown out of employment for no fault on their part."[4]

and upheld the lessees' right to terminate the services of lessor's workmen subject, of course, to payment of compensation.

The termination of the service by the employer may, as we have already seen, take the form of discharge for non-economic reasons. Even in such cases tribunals awarded compensation. In *New Victoria Mills Co. Ltd.*[5] the management terminated the services of a temporary workman, while he was on leave. Considering the question of the validity of discharge and the compensation to be paid to such a workman, the Labour Appellate Tribunal held :

> "..... that an employee discharged during leave period ought to be compensated as it affects his right....."[6]

1 (1950) 2 LLJ 1140 (I.T.) ; See, also *Messrs. Indo Pharma Pharmaceutical Works* (1953) 1 LLJ 63 (I.T.).

2 *Ibid.*

3 (1951) 1 LLJ 354 (I.T.).

4 *Ibid.*

5 (1952) 1 LLJ 179 (L.A.T.).

6 *Ibid.*

In *Allenbury & Co. Ltd.*,[1] the management discharged all workers for joining a strike and closed the workshop. The Tribunal observed:

> "that... the company should be left free to decide upon closure or continuance of the workshop in the light of all factors, commercial, financial, organisational, psychological or otherwise.[2]

but being of the view that:

> "In the pursuit of this unjustified policy, an unfortunate state of unemployment has been created and adequate compensation is called for."[3]

directed that in addition to the regular emoluments, the company should pay compensation to the aggrieved employees.

However, the Tribunals set their face against awarding any compensation to dismissed workmen. In *Diwan Sugar Mills*,[4] the management dismissed a workman on the plea of insubordination. The regional conciliation board awarded compensation to the workman. Setting aside the award of the board, the Labour Appellate Tribunal observed:

> "In our opinion, the board went wrong in this respect. No question of social justice or compensation arises when a workman is rightfully dismissed".[5]

The reasons for not awarding any compensation under such circumstances was further clarified by the *Punjab National Bank Ltd*.,[6] The management dismissed certain workmen for taking part in an illegal strike. The Tribunal, though concluded that the dismissals were justified, ordered the management to pay all benefits including some compensation due to the workmen. The decision was, however, reversed by the Labour Appellate Tribunal:

> "..... if the tribunal's conclusions that the dismissals were justified be right, there would be no scope for granting to any of these persons any compensation whatsoever as has been done by the tribunal. The award in this respect suffers from double infirmity, for, it has the effect of putting a premium on misconduct which

1 (1950) 2 LLJ 580 (I.T.).
2 *Ibid.*
3 *Ibid.*
4 (1952) 1 LLJ 805 (L.A.T.).
5 *Ibid.*
6 (1952) 2 LLJ 648 (L.A.T.); See, also *Kanpur Cotton Mills* Co. Ltd. (1950) 2 LLJ 43 (I.C.).

> would, according to the tribunal, merit dismissal, and at the same time penalising an employer for an action which he was justified in taking."[1]

Further, the Labour Appellate Tribunal cautioned the Tribunals that in determining liability and amount of compensation, they should not be led by "mere sympathy" or make awards which savours of penalty.

E. Legislative Response

1. *The Statutory Provisions:*

In 1953, a grave situation arose in the textile industry: accumulation of stocks threatened closure of one or more shifts in almost all textile mills and lay-off or retrenchment of a large number of workers. This led the Government to issue the Industrial Disputes (Amendment) Ordinance, No. 5 of 1953:

> "While government is taking all possilbe steps to remove the basic causes leading to the present situation and while they are hopeful that the situation will substantially improve in the next few months, they consider that emergent steps are necessary to provide for compensation for lay-off or retrenchment, should those unfortunately prove inevitable. They are, therefore, promulgating an ordinance providing for such compensation. They earnestly hope that in the event of employers being forced to curtail production they will explore all possibilities of temporarily laying off workers in preference to retrenching them. Government are aware (that) the provisions embodied in the Ordinance are not new and that all progressive employers are already paying compensation on those lines to their employees. However, in view of the situation, that has arisen, government feel that a common standard should be set for all employers.....[2]

The Ordinance was subsequently re-enacted substantially by the Industrial Disputes (Amendment) Act, 43 of 1953 and provisions relating to lay-off and retrenchment were incorporated in the Industrial Disputes Act, 1947.

Section 2(oo) defines retrenchment to mean:

> ".....the termination by the employer of the service of a workman *for any reason whatsoever* otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

1 *Ibid.*
2 Gazette of India Extra-ordinary, dated 24-10-1953, Part II, Section 1—page 365.

(a) voluntary retirement of the workman ; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf ; or

(c) termination of the service of a workman on the ground of continued ill-health" ;

and, while section 25 F ensures payment of retrenchment compensation :

"No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice :

Provided that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service :

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen day's average pay for every completed year of service or any part thereof in excess of six months ; and

(c) notice in the prescribed manner is served on the appropriate Government.

Section 25H secures re-employment :

"Where any workmen are retrenched and the employer proposes to take into his employ any person, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen to offer themselves for re-eomployment and the retrenched workmen who offer themselves for re-employment shall have preference over other persons."

to put the Government 's scheme into action.

2. *The Confusing Aspects of the Definition :*

The Legislative definition of the word "retrenchment" presents several conundrums. *First*, why did the Legislature emphasise the obvious, namely, "retrenchment means the *termination by the employer* of the services of a workman" ? *Second*, if "retrenchment" meant, "termination by the employer of the service of a workman", why was it necessary to say that it did not include either "*voluntary retirement of the workman*", (which is an act of the workman and not of the employer), or "*retirement* of the workman *on reaching the age of superannuation* if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf" (which is an instance of termination of service by operation of law) ? *Third*, the ordinary meaning of the word "retrenchment" is "termination by the employer of the service of a workman" *for economic reasons*. However, the Legislature used the phrase "termination by the employer of the service of a workman *for any reason whatsoever*" and specifically excluded, on the one hand, termination of service *as a punishment inflicted by way of disciplinary action*" (which is a typical case of "dismissal"), and on the other hand, "termination of the service of a workman *on the ground* of continued ill-health" (which is a typical case of "discharge"). What did the Legislature specifically want to convey by the phrase "*for any reason whatsoever*" ?

3. *The Legislative Intent :*

The Legislature, while appreciating the necessity of recognising management prerogative to terminate employer-workman relationship, was not happy at the facile and even vindictive manner in which that prerogative was being exercised. If labour unrest resulting from apprehended or actual termination of employer-workman relationship compelled the Legislature to think in terms of regulating the management prerogative, Tribunal awards spot-lighted not only the complicated nature of the problems but also the dangers inherent in Tribunals' regulation of that prerogative : the case-to-case method of developing, testing and perfecting the regulatory norms was, on the one hand, too slow to meet the pressing requirements of a rapidly deteriorating situation and, on the other hand, the detailed inquiry into the bonafides of management action stifled entrepreneurial initiative, hampered rationalisation of production processes and encouraged labour to challenge business decisions.

Under these circumstances, the Legislature, instead of relying on detailed enquiry by Tribunals thought it fit to frame statutory provisions so as to make it futile, if not impossible, for managements to terminate employer-workman relationship in a facile or vindictive manner, but, at the same time, leaving them a free hand to terminate that relationship in cases of genuine need. To the extent to which the Industrial Disputes (Amendment) Act 1953 implemented the judicial decisions, it marked the best piece of Indian Legislative reforms in the field of labour-law and was

certainly unparalleled in the foresight that it brought to bear on the problems connected with the termination of employer-workman relationship.

The basic materials for this epoch-making legislation were supplied by Tribunals themselves. We have already seen that they had recognised management's right to terminate the employer-workman relationship.[1] However, where the termination of service was illegal they directed reinstatement with[2] or without wages.[3] Even where the termination of employment was legal, Tribunals were prone to direct payment of "severance-pay"[4] and, in cases of retrenchment, also re-employment in the reverse order of termination of service,[5] (which was, itself, governed by the principle of "last come, first go") Of course, there was no question of payment of compensation to, or re-employment of, workman, who had been justifiably dismissed.[6]

The 1953—Legislative prescription was built upon three basic assumptions: *First*, management had the right to terminate the employer-workman relationship; *Second*, workmen, whose employment had been terminated, were entitled to receive, under appropriate circumstances, "severance pay"; and, *Third*, workmen, whose employment had been terminated, were entitled to the right, under appropriate circumstances, to be re-employed.

The delineation of the circumstances under which workmen would be entitled to "severance-pay" and re-employment was not an easy task. The Legislature guided by the decisions of the Industrial Tribunals and a strong commonsense, adopted a negative approach. It ruled that a workman who had:

(*a*) been dismissed as a measure of punishment inflicted by way of disciplinary action, or

(*b*) voluntarily retired, or

(*c*) retired on reaching the age of superannuation, or

(*d*) been discharged on the ground of continued ill-health,

1 See, for instance, *Vishwamitra Press* (1952) 1 LLJ 181 (L.A.T.)

2 See cases cited in foot-note 4. p. 28.

3 See, *Varisai Marakaya Tannery* (1953) 1 LLJ 424 (I.T.); *Colaba Land & Mills Co. Ltd.* (1955) 1 LLJ 318 (L.A.T.); *Bally Municipality* (1954) 2 LLJ 500 (I.T.).

4 See cases cited in foot-note 3. p. 29.

5 See, *Kundan Textiles* (1949) 1 LLJ 875; See also cases cited in foot-note 2. p. 30.

6 See for instance, *Kanpur Cotton Mill Co.* (1950) 2 LLJ 43 (I.C.) *Punjab Naitional Bank* (1952) 1 LLJ 531 (I.T.); *Equitable Coal Ltd.* (1958) 1 LLJ 793 (S.C.); *Titaghur Paper Mills* (1957) 2 LLJ 550 (L.A.T.).

would not be entitled either to "severance-pay" or to re-employment. One cannot but agree with the Parliament that it would be absurd to give the right of re-employment to a workman under the first two circumstances though one may doubt the wisdom of the Legislature in debarring the claim of a workman, who had retired on reaching the age of superannuation or those whose services were terminated on grounds of ill-health, from receiving "severance pay". Perhaps, the Parliament was influenced by the fact that schemes relating to provident fund, gratuity and pension were being increasingly incorporated by industrial establishments. Moreover, the Employees State Insurance Act, had already been put on the statute book to take care of the old and infirm. Be that as it may, the Parliament, by necessary implication, was of the view that in all other cases of termination of employer-workman relationship, affected workmen should receive" severance-pay" and have the right of re-employment.

These decisions, we emphasise, were exceedingly well-conceived. While preserving the right of the employer to terminate employer-workman relationship, workmen's right to receive "severance-pay" and re-employment were injected as a check on the capricious misuse of the management prerogative. Who would be so unwise as to terminate the services of a workman, pay him "severance-pay" at the rate of 15 days average wages for every completed year of service and yet re-employ him in the very next vacancy ? Even if management indulged in the unpracticable scheme of terminating the services of every workman before the conclusion of a continuous year of service, it must not be forgotten that they thereby could avoid only payment of "severance-pay" : the unemployed workmen would always be standing at the gate of the establishment to get re-employment at the very next vacancy.

The scheme had another facet of great importance. Fearful of Tribunals' insistence on the application of the vague but alluring concept of natural justice, there was a perceptible trend on the part of the management to "discharge" workmen instead of dismissing them for acts of indiscipline, and thereby avoid Tribunals' scrutiny. The legislative scheme rendered such subterfuge inoperative and compelled the management to dismiss workmen in accordance with rules of natural justice if they wanted to get rid of the workmen.

Moreover, we have already referred to the problem of large scale unemployment which workmen faced on not infrequent termination of service on transfer or closure of an undertaking in the post World-War II period.

By defining "retrenchment "in such terms as to include termination of service of these workmen and granting to them the right to retrenchment compensation and re-employment, the Legislature solved a labour problem of stupendous magnitude without unduly affecting management prerogative to transfer or close the undertakings.

It would be apparent that these decisions could have been implemented by either of the two methods: (1) delineating the circumstances under which workmen (whose employment relationship had been terminated) would not be entitled to "severance-pay" and re-employment; or (ii) appropriately defining termination of service and providing that on such termination of service workmen would be entitled to "severance-pay" and re-employment. The former method would have involved repetition of circumstances under which workmen lost the right to "severance-pay" and re-employment, though it would have undoubtedly been more specific and tailor-made. The latter would have been general and would have avoided repetition, though lacking in precision. The Parliament adopted the latter course of action and chose the word "retrenchment" to describe the cases of termination of employer-workman relationship where workmen would be entitled to "severance-pay".

It would thus appear that the Parliament did not define the term "retrenchment" in the normally accepted meaning of the word: their attempt was to give such meaning to the word "retrenchment" as would enable them to confer the right to retrenchment compensation and re-employment of the retrenched workmen. Conversely, they wanted to exclude all such cases of termination of employer-workman relationship from the coverage of the definition of "retrenchment" as were deemed to be not fit to receive either the benefit of retrenchment compensation or the right of re-employment or both, We are supported in this view by the fact that until 1956, the definition of the word "retrenchment" was relevant only for the purposes of Chapter V-A of Industrial Disputes Act.

If this rendering of the legislative intent is correct it would appear that the word "retrenchment" was chosen by the Parliament, not because of any particular meaning which it had already acquired but, because it was the best available word to clothe it with a new meaning untramelled by preconceived notions.

Thus understood, the question of "retrenchment" itself suggesting termination of the employment relationship at the instance of the employer does not a rise. Consequently the Legislature said:

"retrenchment" means the termination by the employer of the service of a workman."[1]

implying, thereby, the formal act of striking off the name of the workman from the rolls and not that the employer was the person at whose instance the services were terminated. Indeed, those words did not refer to the qualitative factor at all, because the very next words used by the Legislature were "*for any reason whatsoever.*" Obviously these words were wide enough to include each and every case of termination of service, whatever be the reason for it. The Legislature was aware of it and it specifically excluded dismissals for acts of indiscipline, voluntary retirement, retirement on reaching the age of superannuation and termination of the service on grounds of continued ill-health from the coverage of the definition.

Our reading of the Legislative intent postulates, as we have already indicated, that the word "retrenchment" was not used in the traditional sense. That, indeed, is clear from the fact that dismissals for acts of indiscipline, voluntary retirement, retirement on reaching the age of superannuation and termination of service on grounds of continued ill-health, which by no stretch of imagination, come within the traditional meaning of retrenchment, were specifically excluded from the artificially assigned meaning.

We have further assumed that the expression "termination by the employer of the service of a workman" was colourless as to the causative fact and merely referred to the formal act of the removal of the name from the rolls. That, it was so, is beyond cavil because voluntary retirement which can never be at the instance of the employer was specifically excluded from the coverage of the meaning assigned to the word "retrenchment".

It would, therefore, appear that the confusing aspects of the definition, to which we adverted earlier, are really non-existent. They bother us not because of any ill-draftsmanship but because of our inability to keep aside our own pre-dispositions in the understanding of the word "retrenchment" and our desire to seek logical precision rather than to look at the words through the binoculars of the Legislature.

4. *Re-affirmation of the Legislative intent:*

The original 1953—statutory provisions, particuarly because of the wide coverage of the expression "for any reason whatsoever", created several problems. It was, for instance, asked:

1 See, section 2(oo) of Industrial Disputes Act.

"If an employer dies and his heirs carry on the business or there is compulsory winding up of a company and the company is reconstructed or a business is converted into a limited company, or a new partner is taken into the business, there is in law a termination of service by a particular employer and a new employer appears on the scene; will the workmen in such circumstances be entitled to retrenchment compensation though they continue in service as before?"[1]

After the Bombay High Court decisions in the *Barsi Light Railway Co. Ltd.*,[2] and *Shree Dinesh Mills*[3] giving unrestricted meaning to the words "for any reason whatsoever", these questions were no more hypothetical: they presented real hardships to employers and affected entrepreneurial dealings.

Legislative response was firm. "To make the intention" underlying 1953—provisions "clear",[4] it declared:

"Notwithstanding anything contained in section 25F no workman shall be entitled to compensation under that section by reason merely of the fact that there has been a change of employers in any case whether the ownership or management of the undertaking in which he is employed is transferred whether by agreement or by operation of law, from one employer to another:—

Provided that—

(*a*) the service of the workman has not been interrupted by reason of the transfer;

(*b*) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(*c*) the employer to whom the ownership or management of the undertaking is so transferred, is under the terms

1 *Barsi Light Railway Co. Ltd.*, (1957) 1 LLJ 243, 249 (S.C.)

2 (1955) 1 LLJ 371 (H.C. Bombay).

3 (1955) 2 LLJ 501 (H.C. Bombay).

4 The statement of Objects and Reasons for the amendment reads; "Doubt has been raised whether retrenchment compensation under the Industrial Disputes Act, 1947, becomes payable by reason merely of the fact that there has been a change of employers even if the service of the workman is continued without interruption and the terms and conditions of his service remain unaltered. This has created difficulty in the transfer, reconstitution and amalgamation of companies and it is proposed to make the intention clear by amending section 25F of the Act". (The doubt arose from the decision of the Supreme Court in *Pipraich Sugar* Mills Ltd., (1957) 1 LLJ 235, that discharge of labour on closure of business is not "retrenchment").

of the transfer or otherwise, legally liable to pay to workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer".[1]

This, we submit, is a further reaffirmation of our reading of the Legislative intent. It is significant that, notwithstanding the aforesaid decisions of the Bombay High Court and problems they posed, the Legislature did not take any step to restrict the coverage of the statutory definition of "retrenchment". On the contrary, it accepted that statutory definition of "retrenchment" included termination of service of a workman on transfer of an undertaking but proceeded only to demarcate the specific circumstances under which retrenchment compensation would be payable to workmen whose services were terminated on transfer of an undertaking, from those to whom it would not be payable, thereby merely plugging the loopholes that existed in the original 1953—provisions without in any way affecting the Legislative Scheme.

III

"RETRENCHMENT" RETRENCHED

A. Judicial Delimitation of Legislative concept

1. *The Controlling Decision:*

In the *Barsi Light Railway Company Ltd.*,[2] the company informed its workmen that, because of the decision of the Government of India to take over the undertaking, their services would be terminated with effect from the afternoon of 31st December, 1953 and that the Government of India would re-employ such of them as were willing to serve under the Government on slightly different terms and conditions with continuity of service for certain specified purposes only. Eventually, the company terminated the services of all workmen and 77 per cent of them were re-employed by the Government: 24 workmen did not accept re-employment. On these facts, the Barsi Light Railwaymen's Union, on behalf of 61 erstwhile employees[3] of the company, claimed retrenchment compensation under clause (b) of Section 25F of the Industrial Disputes Act, 1947.

1 Section 25FF, inserted by sec. 3 of the Industrial Disputes (Amendment) Act, 1956 (Act 41 of 1956).

2 (1957) 1 LLJ 243 (S.C.).

3 Obviously 37 of these were those who had accepted re-employment, Whether any of the remaining 24 were from amongst those that had not accepted re-employment is not clear from the report.

The Civil Judge,[1] Madha, held that the concerned workmen had been "retrenched" and were entitled to statutory compensation: but, being of the opinion that the Authority under the Payment of Wages Act[2] had no jurisdiction to direct payment of such compensation, rejected the petition. The workmen moved the Bombay High Court, under Articles 226 and 227 of the Constitution, for appropriate relief against the order of the Civil Judge.

With a view to avoid several rounds of litigation and consequent delay in the effective disposal of the workmen's claim, the company waived its objection regarding the jurisdiction of the aforesaid Authority to direct payment of "retrenchment compensation" and agreed, (subject to the right to prefer an appeal, if necessary, to the Supreme Court) to make necessary payments to the concerned workmen if it was held, on merits, that the concerned workmen had been "retrenched" and were entitled to compensation under the relevant provisions of the Industrial Disputes Act.

Accordingly, with the concurrence of the parties, Chief Justice Chagla and Justice Dixit heard the petition on merits.[3] They held, in an exceedingly well-informed and reasoned judgement, that the expression "for any reason whatsoever" was one of wide amplitude and covered cases of termination of service on transfer of an undertaking. Their Lordships further held that the concerned workmen were retrenched within the meaning of section 2(oo) of the Industrial Disputes Act and, that, they were entitled to retrenchment compensation under section 25F (b) of the Act.

The company, thereupon, preferred an appeal to the Supreme Court.

We may, here, conveniently refer to the facts of *Shree Dinesh Mills.*[4] The management of the mills, with a view to close the mill, which was running in two shifts, gave notice to the workers intimating that the second shift would be closed with effect from 20th December, 1953 and the first shift with effect from 8th January, 1954. The notice further stated that, consequent on such closure, the services of the concerned workmen shall stand terminated. Eventually, the mill was closed and its workmen, thereafter, filed a petition with the Authority under the Payment of Wages Act

1 An application for retrenchment compensation was made under the Payment of Wages Act.

2 Act No IV of 1936.

3 *Barsi Light Railway Co. Ltd.* (1955) 1 LLJ 371 (H.C. Bombay).

4 (1955) 2 LLJ 501 (H.C. Bombay).

for the recovery of compensation under section 25F(b) of the Industrial Disputes Act. The Authority held that the discharge of workmen, consequent to closure, did not come within the meaning of the word "retrenchment', (as defined in section 2(oo) of the Industrial Disputes Act) and, consequently, the application for the recovery of the compensation was misconceived. The aggrieved workmen moved the Bombay High Court for appropriate relief. Bavedkar and Shah JJ., following Chagla, C.J., and Dixit J., in the *Barsi Light Railway Company Ltd.*[1] held that discharge, consequent on closure of business, was "termination by the employer of the service of a workman for any reason whatsoever," and, accordingly, decided in favour of the workmen. The management, thereupon, preferred an appeal to the Supreme Court.

The two appeals, viz., those relating to(i) the *Barsi Light Railway Co. Ltd.*,[2] and (ii) *Shree Dinesh Mills*,[3] were heard together by the Supreme Court and were disposed of by a single judgement. The Supreme Court reversed the decisions of the Bombay High Court, being of the opinion that the statutory definition of the word "retrenchment" merely spelled out the economic concept of the terms in "apt and readily intelligible words", and that the expression "for any reason whatsoever", in fact, meant "for any *economic* reason whatsoever", and that it covered only termination of service of surplus labour in a "continuing or running industry". Observed Justice S. K. Das:

> ".....retrenchment as defined in S. 2(oo) and as used in S. 25F has no wider meaning than the ordinary, accepted connotation of the word: it 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 it has no application where the services of all workmen have been terminated by the employer on a real and bonafide closure of business as in the case of *Shri Dinesh Mills, Ltd.*, or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the *Railway Company* ..... On our interpretation in no case is there any retrenchment, unless there is discharge of surplus labour or staff in a continuing or running industry."[4]

1 (1955) 1 LLJ 371 (H.C. Bombay).

2 (1957) 1 LLJ 243 (S.C.).

3 (1957) 1 LLJ 243 (S.C.)

4 *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243, 252 (S.C.).

We demur. The decision, as in the cases of *Newspapers Ltd.*,[1] and *Dharangdhara Chemical Works, Ltd.*,[2] is a triumph of pre-dispositions and preconceived notions, not of logic and experience. It is, as we have already seen, against the trend of developing case law and throws out of gear the the legislative scheme. Moreover, it opens the door to Tribunal enquiry into the bonafides of management decisions regarding "transfer" and "closure" of business, deprives workmen of "severance-pay" and denies to them right to claim re-employment. (Lest we be misunderstood, we hasten to add that the legislative provisions were not prefect: indeed, they needed refinement and admitted further innovations).

2. *The Requirement of "Economic Reason"* :

(*a*) *Judicial rationalisation of decision-makers' pre-disposition.*

(*i*) *The decision in Pipraich Sugar Mills Ltd.*[3]

The management in *Pipraich Sugar Mills Ltd.*, were continuously incurring losses. Moreover, there was no immediate prospect of improvement in the supply position of sugarcane. They, therefore, sold the plant and, in due course, terminated the services of their workmen. Quite apart from consequent loss of employment, the transaction involved permanent loss of job-opportunity at the site of the factory because, under the terms of the contract, the factory was to be dismantled at Pipraich and re-erected in the state of Madras. Workmen, accordingly, created all kinds of obstacles in the smooth execution of the transaction. They even did not help the management in dismantling the factory, thereby depriving themselves of Rs. 45,000/- (in addition to emoluments which they would have earned in the dismantling work), and the management a profit of Rs. 2,00,000/-, though, at a later stage, they entered into a contract directly with the purchaser and helped him in the dismantling process. Subsequently, the workmen claimed the aforesaid sum of Rs. 45,000/- from the management (which the management had offered to them for dismantling the plant), despite the management not having undertaken the dismantling work because of the action of the workers themselves. The Government of Uttar Pradesh referred the ensuing dispute :

> "Whether the services of workmen, if so how many, were terminated by the concern known as Pipraich Sugar Mills Ltd., Pipraich,

1 (1957) 2 LLJ 1 (S.C.).

2 (1957) 1 LLJ 477 (S.C.); See, Anandjee : "Community Regulation of Labour Management Relations in India" (1947-57), a dissertation submitted in partial fulfilment of the requirement for the degree of J.S.D. at Yale University (U.S.A.) (unpublished).

3 (1957) 1 LLJ 235 (S.C.).

> district Gorakhpur, without settlement of their due claims and improperly, and if so, to what relief are the workmen concerned entitled ?"[1]

to adjudication. The tribunal denounced the conduct of the workmen but, being of the opinion that there was a concluded contract between the management and the workmen to pay the said sum of Rs. 45,000/-, directed management to pay the same. The Labour Appellate Tribunal upheld the award.

The management, thereafter, successfully preferred an appeal to the Supreme Court under Article 136 of the Constitution. Mr. Justice Venkatarama Ayyar, speaking for the Court, agreed with the management that there was not any concluded agreement between the parties and therefore there was no question of any liablity to pay the said sum of Rs. 45,000/- to the workmen.

Mr. Umrigar, who (in the absence of any counsel representing the workmen) assisted the court in evaluating the workmen's point of view, sought to sustain the award of the aforesaid sum of Rs. 45,000/- on the footing of retrenchment compensation. However, the Court rejected the contention. Observed Justice Ayyar :

> "retrenchment connotes in its ordinary acceptance that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage",[2]

and, while agreeing that there is discharge of workmen both when there is retrenchment and closure of business, His Lordship asserted that :

> "the compensation is to be awarded under the law not for discharge as such but for discharge on retrenchment."[3]

There is no attempt in the judgement either to substantiate these observations or to examine the not insubstantial case-law that had developed on the subject or to appraise the factual problems affecting labour-management relations. Moreover, the only cases referred in the judgement, namely, those of *Employees of India Reconstruction Corporation Ltd., Calcutta*[4] and *Bennet Coleman & Co. Ltd.*,[5] were disapproved, not on grounds of logic and experience but, on the ground of the "common accepted connotation"

1 (1957) 1 LLJ 235 p 238. (S.C.)

2 *Ibid.* p. 241.

3 *Ibid*, p. 241.

4 (1953) L.A.T. 563.

5 (1954) 1 LLJ 341 (L.A.T.).

of the term retrenchment, in the formulation of which connotation Mr. Umrigar himself concurred.[1]

(*ii*) *The decision in the Barsi Light Railway Co. Ltd.*[2]:

A Part is equal to the whole:

The Supreme Court frankly conceded in the *Barsi Light Railway Co. Ltd.*,[3] that:

> "When the Act itself provides a dictionary for the words used, we must look into that dictionary first for the interpretation of the words used in the statute".[4]

and that, the decision in the *Pipraich Sugar Mills Ltd.*[5]

> "left open the question of the correct interpretation of the definition of "retrenchment" in S. 2(oo) of the Act."[6]

Nevertheless, while asserting:

> "We are not concerned with any presumed intention of the Legislature; our task is to get at the intention as expressed in the statute,"[7]

and,

> "the definition is in very wide terms,"[8]

the Supreme Court, apparently erred in laying down its framework of enquiry when it said:

> "We propose first to examine the language of the definition and see if the ordinary, accepted notion of retrenchment fits in squarely and fairly with the language used."[9]

The question before their Lordships, we submit, was, not whether the ordinary meaning of the term "retrenchment" fitted the statutory definition but, whether termination of service consequent on transfer or closure was covered by the expression "termination of service of workmen by the employer for any reason whatsoever".

1 Cf. "and if, as is conceded, retrenchment means in ordinary parlance discharge of the surplus" (*Pipraich Sugar Mills Ltd.* (1957) 1 LLJ 235, 242 (S.C.).
2 (1957) 1 LLJ 243 (S.C.).
3 *Ibid.*
4 *Ibid.* p. 247.
5 (1957) 1 LLJ 235 (S.C.).
6 *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243, 247 (S.C.).
7 *Ibid.* p. 247.
8 *Ibid.* p. 247.
9 *Ibid.* p. 247.

Moreover, the erroneous framework of enquiry was further complicated when the Supreme Court restricted its enquiry only to the first of the aforesaid two issues:

> "Let us now see how far the ordinary, accepted notion of retrenchment (as spelled out in Pipraich Sugar Mills Ltd., namely, that the business itself is being continued but that a portion of the staff or labour force is discharged as suplusage) fits in with the language used in the definition of "retrenchment" in section 2(oo) of the Act,"[1]

and, merely because the ordinary, accepted notion of retrenchment fulfilled the four essential requirements of the definition, held:

> "that retrenchment as defined in S. 2(oo) and as used in S. 25F has no wider meaning than the ordinary, accepted connotation of the word; it means the *discharge of surplus labour or staff* by the employer for any reason whatsoever (in a continuing or running industry)."[2]

It is surprising that although the Supreme Court analysed the statutory definition of "retrenchment" into the following four parts:

"(*a*) termination of the service of a workman;
(*b*) by the employer;
(*c*) for any reason whatsoever; and
(*d*) otherwise than as a punishment inflicted by way of a disciplinary action,"[1]

it made no attempt to delineate the contours of each of the aforesaid parts, independently of the ordinary, accepted notion of retrenchment, to ascertain the coverage of the statutory definition.

It apparently never occured to their Lordships that they were not required to choose one meaning from out of two or more irreconcilable meanings. The question here was whether, on a true interpretation of the statutory provisions, the definition of "retrenchment" covered "ordinary connotation of the expression retrenchment" *plus* "termination of service consequent on closure or transfer", or merely the "ordinary connotation of the expression retrenchment". Since the "ordinary connotation of the expression retrenchment" was a common factor, the proper thing for the Court to do was to examine whether or not "termination of service consequent on closure or transfer" was included within the meaning

1 *Ibid.* p. 247.
2 *Id.* p. 252.

of the definition : Indeed, workmen did not, and on the facts of the case could not, dispute the proposition that the statutory definition of "retrenchment" included within itself the "ordinary connotation of the expression retrenchment". Be that as it may, after a detailed enquiry, the Court came to the obvious conclusion, namely, that the "ordinary connotation of the expression retrenchment" was included in the statutory definition. And, from this self-evident conclusion, astonishingly deduced that the "ordinary connotation of the expression retrenchment", in fact, exhaustively covered the entire amplitude of the words used in the statutory definition.

Arguments in concentrics :

The expression "for any reason whatsoever" presented a formidable obstacle. However, the Supreme Court made a short work of it by again adopting the inverted order of reasoning. It, first, assumed that which it was called upon to prove, namely, that the meaning of the statutory term "retrenchment" was no wider than its common, ordinary meaning :

> "the observations in (*Pipraich Sugar Mills Ltd.,*) do explain the meaning of retrenchment in its ordinary acceptation. Let us now see how far that meaning fits in with the language used. We have referred earlier to the four essential requirements of the definition, and the question is, does the ordinary meaning of retrenchment fulfil those requirements ? In our opinion, it does. When a portion of the staff or labour force is discharged as surplusage in a continuing business, there are (a) termination of the service of a workman ; (b) by the employer ; (c) for any reason whatsoever and (d) otherwise than as a punishment inflicted by way of disciplinary action."[1]

Then, it proceeded to expound the meaning of the expression "for any reason whatsoever" within the framework of that assumption :

> "What after all is the meaning of the expression "for any reason whatsoever ?" *When a portion of the staff or labour force is discharged as surplusage in a running or continuing business,* the termination of service which follows may be due to a variety of reasons, e.g., for economy, rationalisation in industry, installation of a new labour-saving machinery, etc,. The Legislature in using the expression "any reason whatsoever" says in effect :

1 *Barsi Light Railway Co. Ltd. (1957) LLJ 243, 247 (S.C.)*

> "It does not matter why you are discharging the surplus ; if the other requirements of the definition are fulfilled then it is retrenchment."
>
> "In the absence of any compelling words to indicate that the intention was even to include a bonafide closure of the whole business, it would, we think, be divorcing the expression altogether from its context to give it such a wide meaning as is contended for by the learned counsel for the respondents. *What is being defined is retrenchment, and that is the context of the definition*"[1]. (Emphasis added)

Since the expression "for any reason whatsoever" did include at least the reasons mentioned by their Lordships, we are not at all surprised at the facile manner in which their Lordships' interpretation fitted into the whole. However, because the expression "for any reason whatsoever" included the "ordinary connotation of the word retrenchment", the Court considered that as proved which it had to prove :

> "Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined."[2]

We submit that this process of inverted reasoning prevented the Court from tackling the real problem in issue, viz., whether the expression "for any reason whatsoever" included reasons contended for by the workmen.

(b) *The Industrial concept of retrenchment wider than the Economic concept :*

(i) *The concept of "severance-pay" as an instrument of controlling management action and ameliorating labour hardships :*

We have already referred to the problem of job security of workmen in the post World War II period. We have also referred to the valiant efforts which tribunals were making to insure job-security against high-handed actions of employers. Broadly speaking this was sought to be achieved by a two-pronged approach : (i) where termination of service of a workman was for a misconduct, tribunals insisted on the observance of certified Standing Orders, fair labour practices and rules of natural justice ; (ii) where termination of service was for any other reason, tribunals insisted on due notice of termination of service or payment of wages in lieu thereof, granting

1 Ibid, p. 248.
2 *Ibid*, p. 248.

of adequate "severance-pay" to ameliorate hardships caused by forced unemployment, and securing to workman right of re-employment. Further, the grant of "severance-pay" variously called unemployment compensation or retrenchment compensation, was not limited to termination of service for economic reasons: indeed, it was granted even where workmen were discharged instead of being dismissed for alleged misconduct[1] or were discharged on "closure"[2] or "transfer"[3] of business. We have already commented on the ingenuity of these decisions and the 1953—Legislative provisions in insuring job-security while leaving ample scope for the bonafide exercise of management prerogative. Under the circumstances, we cannot but feel that the Supreme Court decisions upset the developing case-law and the Legislative Scheme.

(*ii*) *Parliamentary exposition by subsequent Legislation :*

We have already referred to the provisions of section 25FF that was enacted in 1956, (i.e., after the Bombay High Court decisions in the *Barsi Light Railway Co. Ltd.*, and *Shree Dinesh Mills cases*),[4] "to make the intention (of the Parliament) clear". Attorney General Setalvad, naturally, relied on the non-obstante clause to establish that the statutory definition of "retrenchment" included termination of service consequent on transfer. However, the Supreme Court rejected the contention. It was of the view that the doctrine of "Parliamentary exposition by subsequent legislation" had no application where the action of the Legislature was based on an erroneous view of the law. Said Justice Das :

> "Legislation founded on a mistaken or erroneous assumption has not the effect of making that the law which the legislature had erroneously assumed to be so. In the cases before us, the legislature proceeded on the basis of the judicial decisions then available to it, and on that basis enacted S. 25FF. We do not think that the general principle of parliamentary exposition or subsequent

1 See, for instance, *Bangalore Silk Throwing Factory* (1957) 1 LLJ 435 (L.A.T.).
2 See, for instance, *Victoria Cotton Mills* (1951) 1 LLJ 502 (I.T.); *Indian Metal and Metallurgical Corporation* (1953) 1 LLJ 364 (H.C. Madras); *Sri Ram Mills* (1953) 1 LLJ 487 (L.A.T.); *Anil Textile Mills* (1954) 1 LLJ 34 (L.A.T.); *Kandan Textiles* (1954)2 LLJ 249 (I.T.); *New Mahaluxmi Mills* (1954) 2 LLJ 633 (L.A.T.); *Genda Lal Mills* (1957) 1 LLJ 300 (L.A.T.).
3 See, for instances, *Meenambikai Motor Service* (1955) 1 LLJ 219 (I.T.); *I.I.A.W.S. Ltd.* (1951) 2 LLJ 652 (I.T.); *Gillanders Arbuthnot & Co. Ltd.* (1956) 1 LLJ 311 (L.A.T.) *South Arcot Electric & Co.* (1963) 1 LLJ 5 (H.C. Madras).
4 (1955) 1 LLJ 371 (H.C. Bombay) and (1955) 2 LLJ 501 (H.C. Bombay).

> legislation as an aid to construction of prior Acts can be called in aid for construing the definition clause and S. 25F of the Act".[1]

Moreover, the Court refused to read the provisions of section 25FF as parliamentary exposition of the previously existing law. They felt that those provisions were enacted merely to partially supersede the evil effects flowing from the aforesaid decisions of the Bombay High Court which could not otherwise be remedied by the Parliament. Observed Justice Das :

> "The legislature could not declare the decisions to be incorrect, but could partially supersede their effect by an amendment of the law. These were the circumstances in which S. 25FF was enacted .....the aim or the object of the enactment was to supersede the effect of the.....decisions (of the Bombay High Court in the present cases), ...rather than parliamentary exposition of the pre-existing law."[2]

The court "fortified" this view by an examination of the wordings of item 10 of the Third Schedule, viz., "Retrenchment of workmen and closure of establishment," and of item 10 of the Fourth Schedule, "Rationalisation, standardisation or improvement of plant or technique which is likely to lead to retrenchment of workmen", which was enacted by the Parliament only about 7 days before the enactment of section 25FF. Declared Justice Das :

> "the wording of the (aforesaid) items..... shows that the legislature clearly envisaged a distinction between retrenchment and closure and retrenchment did not include closure of business ; item 10 of Schedule IV almost clinches the issue, because it shows how retrenchment of surplus labour may occur in a running industry"[3],

and concluded :

> "if we are to choose between the two amending Acts of 1956 on the point of Parliamentary exposition, we unhesitatingly, hold that the Industrial Disputes (Amendment and Miscellaneous Provisions) Acts, 1956 is more in the nature of Parliamentary exposition than the Industrial Disputes (Amendment) Act of 1956 which merely supersedes the effect of certain judicial decisions."[4]

We are unable to appreciate any one of these arguments.

1 *Barsi Light Failway Co. Ltd.* (1957) 1 LLJ 243, 252 (S.C.).
2 *Ibid.* p. 251.
3 *Ibid.* p. 251.
4 *Ibid* p 251

of adequate "severance-pay" to ameliorate hardships caused by forced unemployment, and securing to workman right of re-employment. Further, the grant of "severance-pay" variously called unemployment compensation or retrenchment compensation, was not limited to termination of service for economic reasons: indeed, it was granted even where workmen were discharged instead of being dismissed for alleged misconduct[1] or were discharged on "closure"[2] or "transfer"[3] of business. We have already commented on the ingenuity of these decisions and the 1953—Legislative provisions in insuring job-security while leaving ample scope for the bonafide exercise of management prerogative. Under the circumstances, we cannot but feel that the Supreme Court decisions upset the developing case-law and the Legislative Scheme.

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> "Legislation founded on a mistaken or erroneous assumption has not the effect of making that the law which the legislature had erroneously assumed to be so. In the cases before us, the legislature proceeded on the basis of the judicial decisions then available to it, and on that basis enacted S. 25FF. We do not think that the general principle of parliamentary exposition or subsequent

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> legislation as an aid to construction of prior Acts can be called in aid for construing the definition clause and S. 25F of the Act".[1]

Moreover, the Court refused to read the provisions of section 25FF as parliamentary exposition of the previously existing law. They felt that those provisions were enacted merely to partially supersede the evil effects flowing from the aforesaid decisions of the Bombay High Court which could not otherwise be remedied by the Parliament. Observed Justice Das:

> "The legislature could not declare the decisions to be incorrect, but could partially supersede their effect by an amendment of the law. These were the circumstances in which S. 25FF was enacted .....the aim or the object of the enactment was to supersede the effect of the.....decisions (of the Bombay High Court in the present cases), ...rather than parliamentary exposition of the pre-existing law."[2]

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> "the wording of the (aforesaid) items..... shows that the legislature clearly envisaged a distinction between retrenchment and closure and retrenchment did not include closure of business; item 10 of Schedule IV almost clinches the issue, because it shows how retrenchment of surplus labour may occur in a running industry"[3],

and concluded:

> "if we are to choose between the two amending Acts of 1956 on the point of Parliamentary exposition, we unhesitatingly, hold that the Industrial Disputes (Amendment and Miscellaneous Provisions) Acts, 1956 is more in the nature of Parliamentary exposition than the Industrial Disputes (Amendment) Act of 1956 which merely supersedes the effect of certain judicial decisions."[4]

We are unable to appreciate any one of these arguments.

1 *Barsi Light Failway Co. Ltd.* (1957) 1 LLJ 243, 252 (S.C.).
2 *Ibid.* p. 251.
3 *Ibid.* p. 251.
4 *Ibid* p 251

First, merely because Legislature's assessment does not measure up to the evaluation of the Court, it does not follow, (at least in the type of cases with which we are concerned), that the former's assessment is mistaken. Moreover, where, as here, issues relating to *vires* of the statute are not involved, the key question is, not whether the assumption of the Legislature is right or erroneous but, what is the assumption of the Legislature, (irrespective of the question whether the assumption is right or wrong from the point of view of the decision-maker). If this were not so, the doctrine of "parliamentary exposition by subsequent legislation" would be rendered innocuous because it would be always open to a court to get round the doctrine by merely asserting that the legislation is based on erroneous assumption of the law.

Second, we see no reason why if Parliament wanted to exclude termination of service consequent on transfer from the purview of the statutory "retrenchment", it could not add another exclusory clause to the definition of "retrenchment", instead of assuming that statutory "retrenchment" included termination of service consequent on transfer and then proceeding to remove only the evil consequences arising out of that assumption.

Third, we are not aware of any rule which prohibits Parliament from superseding the full impact of court decisions by appropriate legislative changes. Indeed, quite a few of the constitutional amendments and any number of statutory amendments have superseded judicial pronouncements.

Fourth: The reference to item 10 of the Fourth Schedule and the inferences drawn therefrom ignore the provisions of section 9A, which *inter-alia* states:

> "No employer, who proposes to effect any change in the conditions of service appplicable to any workman in respect of any matter specified in Fourth Schedule, shall effect such change" without giving prescribed notice to concerned workman. Obviously, conditions of service can only be changed in an "existing, running industry". How could item 10 of the Fourth Schedule or any other item therein include matters relating to "closure" or "dead-industry"? We fail to understand how these provisions helped the Court in coming to the conclusion to which it did.

Fifth: Of course, there is a difference between "retrenchment" and "closure": the latter is one of the business, entrepreneurial decision and the former represents termination of service of workmen within the

meaning of section 2(oo) of the Act. But, this does not mean that there cannot be retrenchment within the meaning of the definition, if the services of all the workmen are terminated on the "closure" of an undertaking. Indeed, to the extent to which disputes relating to "closure" could be referred for adjudication under item 10 of Third Schedule, the doctrine of "existing, running industry" stood exposed.

In our opinion, as we have already indicated, 1956 provisions re-affirmed the Legislative intent to include the termination of service consequent on "transfer" and "closure" within the meaning of the statutory definition of "retrenchment"' under section 2(oo) of the Industrial Disputes Act.

(*iii*) *Reappraisal of the Statutory Definition*:

Justice Das, readily conceded:

> "It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject matter of definition; but there must then be compelling words to show that such a meaning, different from or in excess of the ordinary meaning, is intended,"[1]

but was equally reticent to acknowledge the force of such "compelling reasons" as did exist. For instance, he explained away the presence of the following exclusory clauses:

> "..... otherwise than as a punishment inflicted by way of disciplinary action, but does not include—
>
> (*a*) voluntary retirement of the workman; or
>
> (*b*) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contain a stipulation in that behalf; or
>
> (*c*) termination of the service of a workman on the ground of continued ill-health;"[2]

by asserting:

> "they, no doubt, apply to a running or continuing business only but whether inserted by way of abundant caution or on account of excessive anxiety for clarity, they merely exclude certain categories of termination of service from the ambit of the definition. They do not necessarily show what is to be included within the definition."[3]

1 *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243, 248 (S.C.).
2 Section 2(oo) of the Industrial Disputes Act.
3 *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243, 247 (S.C.).

We disagree. Though, dismissals, voluntary retirements, retirements on reaching the age of superannuation, and discharge on grounds of ill-health may occur in a running and continuing business, they are certainly not for any such "reason"[1] as the Supreme Court included within the meaning of the expression "for any reason whatsoever". In our opinion they did show Legislative intent to include within the expression "for any reason whatsoever" reasons other than those which lead to "common, ordinary retrenchment." Any other interpretation would, as the Supreme Court's decision did, ignore the golden rule of interpretation of giving every word in a legislative provision its due weight, and render sixty-three words out of a total of eighty words in the definition superfluous.

Justice Das, laid emphasis on the "surprising results" flowing from the wider interpretation. But, he obviously failed to appreciate that, consequent on the decision of the Bombay High Court in the instant case, the Parliament had taken effective steps to plug the loopholes. Indeed, after the promulgation of the 1956—Ordinance and subsequent enactment of the original section 25FF, one wonders what were the "surprising results" of which the Court was apprehensive.

3. THE REQUIRMENT OF "EXISTING, RUNNING INDUSTRY"

The Supreme Court decision in the *Barsi Light Railway Co. Ltd.*,[2] as observed earlier, emphasised the requirement of "economic reason" as well as the need of an "existing, running industry". As asserted by Justice Das:

> "It would be against the entire scheme of the Act to give the definition clause relating to the retrenchment such a meaning as would include within the definition termination of service of all workmen by the employer when the business itself ceases to exist."[3]

We submit, however, that the judicial requirement of "existing, running industry" completely ignores the factual problems involved in "closure" disputes and renders one of the most potent Legislative attempts to resolve such disputes innocuous.

1 Termination of service of "a portion of the staff or labour force" "as surplusage in a running or continuing business" "for economy, rationalisation in industry, installation of a new labour saving machinery" and similar other reasons.
2 (1957) 1 LLJ 243 (S.C.)
3 *Ibid*, p. 249.

(a) THE DOCTRINE

The doctrine assumes that:

> "the industrial dispute to which the provisions of the Act apply is only (sic) one which arises out of an existing industry,"[1]

and, therefore,

> "where, the business has been closed and it is either admitted or found that the closure is real and bonafide."[2]

it asserts:

> "any dispute arising with reference thereto would.....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 quandam employer and employees."[3]

The assumption, although appearing to state the obvious, used the word "industry" in a narrow sense of an "industrial establishment". Thus, in the *Barsi Light Railway Co. Ltd.*,[4] itself, notwithstanding the fact that the industry of railway transportation was carried on by the transferee-Government of India, the Industry was deemed to be "closed", *qua* the Company. This conclusion is hardly in conformity with the definition of "industry" in the Industrial Disputes Act. Moreover, it fails to take notice of the facts of the industrial life. The evolution of the concept of "pre-existing right"[5] to provide for the solution of such problems, we submit, makes a serious inroad on the aforesaid basic assumption.

The doctrine itself is based on the equation of "industry" with "industrial establishment". It merely emphasises the physical act of "closure" and not the consequences flowing therefrom, thereby ignoring the problems arising in labour-management relations. Moreover, the concept of *mala-fide* closure which courts have propounded as much with a view to resolve these problems as to avoid entanglement with the constitutional right "to practice any profession or to carry on any occupation, trade or business," not only unduly interferes with managements' prerogatives to run the business but also weakens the assertion of the doctrine.

1 Pipraich Sugar Mills Ltd., (1957) 1 LLJ 235, 239 (S.C.)
2 *Ibid.*
3 *Ibid.*
4 (1957) 1 LLJ 243 (S.C.)
5 See infra.

(b) The Development of the Doctrine

(i) *The converging strands :*

Disputes connected with, and arising out of, "closure" have come up before tribunals in several ways :

Namely, :

(1) On an employer's application under section 33 seeking permission to close the business on the ground that such closure :
   (a) made alteration in the conditions of service,[1]
   (b) resulted in discharge,[2]
   of concerned workman.

(2) On a complaint of an aggrieved employee under section 33A, alleging that the concerned employer had closed the business thereby :
   (a) altering conditions of service[3]
   (b) terminating the service[4]
   of the complainant in contravention of section 33.

(3) On government reference of a dispute relating to :
   (a) Closure :
      (i) *bonafides* of the closure[5]
      (ii) discharge and appropriate relief to be granted to workmen on such "closure" ;[6]
   (b) matters other than closure and consequential reliefs :
      (i) where, after the date of the reference the concerned industrial establishment was closed,[7]

1 See, for instance, *Madras Electric Tramways* (1953) 2 LLJ 195 (Sp. I.T.)
2 See, for instance, *Annamalai Timber Trust Ltd.* (1950) 2 LLJ 994 (I.T.) ; *Aluminium Corporation of India Ltd.* (1950) 2 LLJ 1140.
3 See, for instance, *Banks in West Bengal* (1950) 2 LLJ 1045 (C.I.T.) ; *Victoria Cotton Mills* (1951) 1 LLJ 502 (I.T.) *Surat Rander Bus Service* (1953) 1 LLJ 525 (I.T.) *Mahalakshmi Mills* (1953) 2 LLJ 356 (L.A.T.)
4 See, for instance, *Banks in West Bengal* (1950) 2 LLJ 1045 (C.I.T.) ; *Mysore Modern Cafe* (1952) 2 LLJ 172 (I.T.)
5 *The Hyderabad Vegetable Oil Products Ltd.* (1950) 2 LLJ 1281 (I.T.) ; *Tile Factories* (1951) 2 LLJ 162 (I.T.) ; *Murugan Dress Manufacturing Co.* (1951) 2 LLJ 709 (I.T.) : *Indian Metal & Metallurgical Corporation* (1952) 2 LLJ 364 (H.C. Madras) ; *Jai Bharat Tile Works* (1952) 2 LLJ 587 (H.C. Madras) ; *Sri Ram Mills* (1953) 1 LLJ 487 (L.A.T.) ; *J. K. Woollen Manufactures* (1953) 2 LLJ 815 (L.A.T.)
6 *The Hyderabad Vegetable Oil Products Ltd.* (1950) 1 LLJ 1281 (I.T.) ; *Murugan Dress Manufacturing Co.* (1951) 2 LLJ 709 (I.T.).
7 See, for instance, *Indian Metal & Metallurgical Corporation* (1953) 1 LLJ 224 (L.A.T.).

   (ii) where, the reference was made after closure of the concerned industrial establishment.[1]

High Courts and the Supreme Court have become involved with the problem in the exercise of their powers of judicial review.

Until the decision in the *Pipraich Sugar Mills Ltd.*[2] the aforesaid situations received treatment tailored to meet their specific requirements :

First : Tribunals were near-unanimous in their view that "closure" did not make any alteration in the conditions of service within the meaning of section 33(a) of the Act. But being of the opinion that discharge consequent on "closure" came within the purview of section 33(b) of the Act, they entertained employers' applications under section 33 of the Act and granted permission, subject to payment of "severance-pay", to concerned employers to close their establishments. However, after the decisions[3] of the Supreme Court delineating the tribunal's jurisdiction under section 33 and, in particular, disapproving imposition of conditions, tribunals granted unconditional permission.

Second : Complaints under section 33A, invited stricter scrutiny. Tribunals, first enquired into the *bonafides* of the "closure". If the "closure" was *bonafide* they did not generally interfere with the action of the management except as to the extent of granting "severance-pay". However, if the "closure" was *malafide*, they often directed the re-opening of the establishment and the reinstatement of discharged workers with back-wages, though after the Supreme Court decision in *Lakshmi Devi Sugar Mills Ltd.*,[4] tribunals did not interfere in cases where "closure" amounted to lock-out.

Third : The tribunals faced a dilemma in closure disputes referred to them particularly because of the constitutional right "to practice any profession or to carry on any occupation, trade or business". However, the case-law gradually confined the constitutional right to *bonafide* "closures" on payment of "severance-pay." But where "closures" were *malafide* tribunals negatived the plea of the constitutional right, by ordering the reopening of the establishment and directing the reinstatement of discharged workmen with back-wages.

1 *Indian Metal & Metallurgical Corporation* (1952) 1 LLJ 364, *I.M.M.C.* (1953) 1 LLJ 224 (L.A.T), *K.M. Padmanabha Iyyer* (1954) 1 LLJ 469 (H.C. Madras), *Pipraich Sugar Mills Ltd.* (1957) 1 LLJ 235 (S.C.).
2 (1957) 1 LLJ 235 (S.C.).
3 See, for instance, *Atherton West & Co. Ltd.* (1953) 2 LLJ 321 (S.C.) ; *Automobile Products of India Ltd.* (1955) 1 LLJ 346 (S.C.) ; *Equitable Coal Co. Ltd.* (1958) 1 LLJ 793 (S.C.).
4 (1957) 1 LLJ 17 (S.C.).

Fourth: Generally speaking, the jurisdiction of the tribunals was not affected by the closure of the establishment either before or after the reference, so long as matters in dispute did not arise out of "closure". They gave their awards as in any other industrial dispute concerning an "existing, running industry."

It is significant that notwithstanding these broad generalisations several awards and decisions referred to the concept of "existing, running industry" in one way or the other. Indeed, they often emphasised it with a view to avoid entanglement with the constitutional right "to practice any profession or to carry on any occupation, trade or business".

(ii) *The flowering of the doctrine:*

The closing months of the year 1956 saw the doctrine of "existing, running industry" in its full bloom.

In the *Pipraich Sugar Mills Ltd.*,[1] wherein the Government of Uttar Pradesh had made a reference of a *non-closure dispute* after the closure of the mill, the management contended before the Supreme Court:

> "(It) is a condition precedent to the exercise by the State, of its power under .....the Act that there should be an industrial dispute that there could be no industrial dispute.....unless there is a relationship of employer and employee; that in the present case, as the appellant sold its mills, closed its business and discharged the workmen on 21st March 1951, paying to them in full whatever was due in accordance with the Standing Orders, there was thereafter no question of any relationship of employer and employee between them: that accordingly there was no industrial dispute at the date of the notification on 16th November, 1951: and that the reference was therefore incompetent."[2]

Justice Venkatarama Ayyar referred to the provisions of the Industrial Disputes Act and observed:

> "It cannot be doubted that the entire scheme of the Act assumes that there is in existence an industry and then proceeds on to provide for various steps being taken when a dispute arises in that industry."[3]

He then referred to the decision of the Supreme Court in *Burn & Co. Ltd.*,[4] wherein he himself had delineated the object of labour legislation to be:

1 (1957) 1 LLJ 235 (S.C.).
2 *Ibid*, pp. 238, 239.
3 *Ibid*, p. 239.
4 (1957) 1 LLJ 226 (S.C.).

> "firstly, to ensure fair terms to the workmen and, secondly, to prevent disputes between employers and employees so that production might not be adversely affected and the larger interests of the public might not suffer",

and stated that:

> "Both these objects can have their fulfilment only in an existing and not a dead industry."[1]

Thereafter, he approved the decision (to which he was a party as a puisne judge of the Madras High Court) in the *Indian Metal and Metallurgical Corporation*:[2]

> "The view.....that the industrial dispute to which the provisions of the Act apply is only one which arises out of an existing industry is clearly correct."[3]

and concluded:

> "therefore, where the business has been closed and it is either admitted or found that the closure is real and bonafide, any dispute arising with reference thereto would.....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 quandam employer and the employees."[4]

It might be emphasised that, since the dispute in the instant case related to a "pre-existing right" and not to any matter connected with "closure", these observations were merely *obiter*.

However, in the Supreme Court decision in the *Barsi Light Railway Co. Ltd.*,[5] (wherein Justice Venkatarama Ayyar was again a member of the Bench which heard the appeal), the doctrine of "existing, running industry" acquired the status of *ratio*. Justice Das referred to the aforesaid observations of Justice Ayyar and concluded:

> "In view of these observations, it would be against the entire scheme of the Act to give the definition clause relating to retrenchment such a meaning as would include within the definition termination of service of all workmen by the employer when the business itself ceases to exist."[6]

Curiously, instead of testing the validity of their conclusions with reference to the doctrine of inconsistency or repugnancy, the Court merely tried to

1 *Pipraich Sugar Mills Ltd.*, (1957) 1 LLJ 235, 239 (S.C.).
2 (1952) 1 LLJ 364 (H.C. Madras).
3 *Pipraich Sugar Mills Ltd.*, (1957) 1 LLJ 235, 239. (S.C.)
4 *Ibid.*
5 (1957) 1 LLJ 243 (S.C.).
6 (1957) 1 LLJ 243, 249 (S.C.).

show that the provisions of the Act were in conformity with the doctrine of "existing, running industry". In particular, the Court did not examine whether the provisions of the Act could be applied for the resolution of a dispute relating to "termination of service on closure of an undertaking". Indeed, it brushed aside such provisions of the Act which were inconsistent with the doctrine of "existing, running industry" but consistent with the jurisdiction of the Court to decide matters connected with "termination of service on closure".

Be that as it may, in the *Banaras Ice Factory Ltd.*,[1] (wherein Justice Venkatarama Ayyar was again a member of the Bench which heard the appeal and Justice Das delivered the judgement) the Supreme Court reaffirmed the doctrine of "existing, running industry". The management, in this case, closed the factory during the pendency of an appeal before the Labour Appellate Tribunal and discharged all the workmen without obtaining the permission of the tribunal. The aggrieved employees filed petitions under section 23 of the Industrial Disputes (Labour Appellate Tribunal) Act alleging that the management had violated the provisions of section 22 of the aforesaid Act, and claimed reinstatement with back wages. The Labour Appellate Tribunal upheld the contention of the workmen and gave its award in their favour. The management, thereafter, preferred a special appeal to the Supreme Court, which reversed the decision of the Labour Appellate Tribunal. Justice Das referred, to the decisions in the *Indian Metal and Metallurgical Corporation*,[2] *Burn & Co.*,[3] *Pipraich Sugar Mills Ltd.*,[4] and the *Barsi Light Railway Co. Ltd.*,[5] to reiterate :

"that the provisions of the Industrial Disputes Act, 1947 applied to an existing industry and not to a dead industry."[6]

He, then, analysed the provisions of section 22 of the Industrial Disputes (Labour Appellate Tribunal) Act, indicated that clause (*a*) of the section as also the word "punishment" in clause (*b*), could have application only to a "running or existing industry", and observed :

"we are then left with the word "discharge". Unqualified though the word is, it must, we think, be interpreted in harmony

1 (1957) 1 LLJ 253 (S.C.).
2 (1952) 1 LLJ 364 (H.C. Madras).
3 (1957) 1 LLJ 226 (S.C.).
4 (1957) 1 LLJ 235 (S.C.).
5 (1957) 1 LLJ 243 (S.C.).
6 *Banaras Ice Factory Ltd.* (1957) 1 LLJ 253 (S.C.).

with the general scheme and scope of the Industrial Disputes Act, 1947."[1]

He, thereafter, referred to the true scope and object of sections 22 and 23 of the said Act (as laid down in *Automobile Products of India Ltd.*,[2] and concluded :

"Those objects are capable of fulfilment in a running or continuing industry only, and not in a dead industry. There is hardly any occasion for praying for permission to lift the ban imposed by section 22, when the employer has the right to close his business and *bonafide* does so, with the result that the industry itself ceases to exist. If there is no real closure but a mere pretence of a closure or it is *malafide*, there is no closure in the eye of law and the workmen can raise an industrial dispute and may even complain under S. 23 of the Act."[3]

This was the broadest statement of the doctrine of "existing, running industry".

(c) Contemporaneous Countervailing Concepts

(i) *The concept of "temporary, malafide closure."*[4]

The Victoria Cotton Mills[5] is the first case where a distinction was drawn between temporary closure and permanent closure. During the pendency of the adjudication proceedings, the mill was closed for want of raw materials, blocking of finances and heavy losses without the permission of the tribunal. The aggrieved employees complained under section 33A of the Act. The Industrial Tribunal in the course of its award observed :

"Termination of service.....was.....the result of the closure of the Mills.....Every individual has the natural right to initiate a business or an undertaking and to close it down. This natural right has not yet been interfered with in any way by any legislation .....When the natural right of an individual to wind up a business

1 *Ibid.*
2 (1955) 1 LLJ 346 (S.C.).
3 *Banaras Ice Factory* Ltd. (1957) 1 LLJ 253, 255 (S.C.)
4 The statement of facts and criticisms of *the Victora Cotton Mills, The Indian Metal and Metallurgical Corporation and the Jai Bharat Tile Works* are drawn from Suresh Chandra Srivastava "Community Regulation of Management's Economic Instruments of Coercion", A Study of the Law Relating to Lock-out, a dissertation submitted for the Degree of Master of Laws of the Banaras Hindu University, 1963.
5 (1951) 1 LLJ 502 (I.T.)

or an undertaking has not been denied, *the consequences that follow cannot be avoided by any legislation.*"[1]

and further pointed out that the closure could either be temporary or permanent. If it was temporary it was lock-out[2] and section 33 did not apply. On the other hand:

> "If the closure was permanent, it flowed from the natural right to close down a business or an undertaking which has not hitherto been restricted in any way,'[3]—

and there was no violation of section 33.

Subsequent decisions have conceded the managements the right to close their undertakings permanently. However, temporary or indefinite "closures" have been the subject matter of further investigation at two different levels: (1) to enquire whether or not such "closures" were lock-out? and, (2) where "closures" did not amount to lock-out, whether or not such closures were *bonafide*? Generally speaking, tribunals conceded the managements the right to close their undertakings for a temporary or indefinite period on *bonafide* grounds. But, the tribunals reserved to themselves the jurisdiction to intervene in cases of "temporary, *malafide* closures" and lock-outs (where the question of lock-out was raised otherwise than on an application under section 33(*a*) of the Industrial Disputes Act, 1947 or section 23 of the Industrial Disputes (Labour Appellate Tribunal) Act of 1950).

The Indian Metal and Metallurgical Corporation[4] was the first of these cases. The management, in this case, notified:

> "The factory at Mettur is closed and hence the raw materials for this factory are not coming. Owing to serious developments in foreign countries, the present condition in the local market is unfavourable to work. Further still many machineries are to be installed for economising production. So we are forced to suspend the work for an indefinite period till we are able to complete the erection and trial to get the sheets (raw materials) for our own plant. Therefore the work will be suspended from Saturday the 7th instant after the 14th (day) from to-day."[5]

1 *Ibid*, 505.
2 (1951) 1 LLJ 502, 505 (I.T.)./
3 *Ibid*, p. 506.
4 (1951) 2 LLJ 1485 (I.T.).
5 *Indian Metal & Metallurgical Corporation* (1952) 1 LLJ 364, 365 H.C. Madras).

and suspended the work with effect from February 17, 1951. On 18th April, 1951, the Government of Madras referred, *inter-alia*, the following issues:

> "1. Whether the closure of the Factory from 17-2-1951 is justified;
> 2. Whether any compensation is to be paid to the discharged workers;
> 3. Whether the discharged workers have preferential claim for re-employment at the time of re-opening of the Factory?"[1]

to the Industrial Tribunal, Madras for adjudication.

The Tribunal investigated the matter in detail and rejected the contention of the management that there was any such shortage of raw materials, requirement for installation of new machinery or loss as to compel them to close the factory. It was apparently of the view that the management had the right, under Article 19(1)(g) of the Constitution to permanently close the factory.[2] But, since the management had

> "only temporarily closed down the factory, with the idea of re-opening the same as and when they think fit to do so,"[3]

the Tribunal considered it appropriate to inquire:

> "as to whether the factory was temporarily closed down *bonafide* for proper reasons, which (may) or may not be quite adequate, or whether the factory was closed down *malafide*, principally to spite the workers and bring them to their knees, taking advantage of a few circumstances that might give colour to their action."[4]

The Tribunal concluded that the management

> "had *malafide* decided on the closure of the factory merely to break the Union and to afterwards take back in driblets such of the workers as would conform to their own ideas of subservient labour,"[5]

and held that:

1 *Ibid.*
2 "It has been argued that the fundamental right guaranteed by the Constitution under Article 19(1) (g) involves not merely the right of carrying on any occupation or business, but also the right to discontinue such business temporarily or permanently according to one's discretion. In considering this aspect of the case, however, it has to be first noted that even though the Factory was closed down in its entirety, it is not even pretended at present that there had been any intention at any time to close the Factory permanently"—(1951) 2 LLJ 148, 153 (I.T.).
3 *Indian Metal & Metallurgical Corporation* (1951) 2 LLJ 148, 153 (I.T.)
4 *Ibid.*
5 *Ibid.* 154.

"the management had not acted *bonafide* in the exercise of any legitimate rights in closing down the factory on 17th February, 1951."[1]

It, accordingly, directed the management to reinstate the discharged workmen.

The management moved the Madras High Court to get the award of the Tribunal quashed. Chief Justice Rajamannar and Justice Venkatarama Ayyar, (as he then was), disagreeing with the distinction drawn by the Tribunal between "temporary closure" that was *bonafide* and the one that was not, took the view that "closure" whether "temporary" or "permanent" and whether *bonafide* or *malafide* was not only constitutionally protected but also beyond the reach of the Industrial Disputes Act (though they distinguished "lock-out" from "closure"). The Chief Justice observed :

"(there) has been no lock-out in this case. In the case of a lock-out the industry as such is not closed down even temporarily ; only particular workers are refused work. Closing down a business even temporarily is distinct and different from a lock-out, just as the discontinuance from service of an employee is not the same thing as a strike. While, therefore, the Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not, it cannot decide the question whether an employer can close down his business temporarily, for an indefinite period or permanently. There can not be a dispute strictly so called between an employer and an employee as regards the continuance of the business itself. The question was completely outside the Industrial Disputes Act."[2]

The readiness to investigate lock-out cases, though divergent from the view expressed in the *Victoria Cotton Mills*[3] is understandable : the Court was, in fact, concerned with a reference under section 10 of the Act, and not with a complaint under section 33A of the Act.

The decision of the Madras High Court in *Jai Bharat Tile Works*[4] however, reveals greater awareness of the mischievous propensities of the doctrine of "existing, running industry" and virtual acceptance of

1 *Ibid.*
2 *Indian Metal and Metallurgical Corporation*, (1952) 1 LLJ 364, 370 (H.C. Madras).
3 (1951) 1 LLJ 502 (I.T.).
4 (1954) 1 LLJ 286 (H.C. Madras).

the Industrial Tribunal's approach in the *Indian Metal and Metallurgical Corporation*.[1]

There were four tile factories in the city of Samalkot in 1948 and disputes between the managements and workmen were referred to an Industrial Tribunal for adjudication. The Tribunal gave its award upgrading the wages which remained in force until 23rd August, 1950. During the pendency of the aforesaid proceedings, however, another tile factory, namely, the Jaya Bharat Tile Works started functioning and its management adopted the wage structure recommended by the aforesaid award. The Jaya Bharat Tile Works closed its work on 24th August 1950, and it was followed by other tile works. The government referred the ensuing dispute, namely,

"(i) whether the closure of the tile works was justified and
(ii) if so, what relief should be given to the workers,[2]

between the management of all the five tile works and their workmen, to an Industrial Tribunal for adjudication.

Managements contended that they were compelled to close the works because of high cost of production, apprehended losses, lack of raw materials and unhealthy competition in the industry. The workmen, on the other hand, contended that the closure of the mill was with a view to avoid payment of higher wages and dearness allowance as per the earlier award and to victimize them.

The Industrial Tribunal, on those contentions, framed the following issues :

"(1) Whether the closure of the Mills was *bonafide* due to loss in trade, lack of demand of tiles and exhaustion of mud as contended by the Mills or did it amount to illegal lock-out, victimisation and unfair labour practice ?
(2) Whether the workers are entitled to be reinstated or compensated and if so, for what period and at what rate ?"[3]

and, on detailed inquiry, rejected the contentions of the managements, holding :

"the closure of the five mills was not *bonafide* and that it was with a view to victimise labour."[4]

It, accordingly, directed the managements to reinstate the workmen and pay them compensation for the period of unemployment.

1 (1951) 2 LLJ 148 (I.T.).
2 *Tile Factories*, (1951) 2 LLJ 162, 163 (I.T.).
3 *Ibid.*
4 *Ibid*, p. 167.

"the management had not acted *bonafide* in the exercise of any legitimate rights in closing down the factory on 17th February, 1951."[1]

It, accordingly, directed the management to reinstate the discharged workmen.

The management moved the Madras High Court to get the award of the Tribunal quashed. Chief Justice Rajamannar and Justice Venkatarama Ayyar, (as he then was), disagreeing with the distinction drawn by the Tribunal between "temporary closure" that was *bonafide* and the one that was not, took the view that "closure" whether "temporary" or "permanent" and whether *bonafide* or *malafide* was not only constitutionally protected but also beyond the reach of the Industrial Disputes Act (though they distinguished "lock-out" from "closure"). The Chief Justice observed :

"(there) has been no lock-out in this case. In the case of a lock-out the industry as such is not closed down even temporarily ; only particular workers are refused work. Closing down a business even temporarily is distinct and different from a lock-out, just as the discontinuance from service of an employee is not the same thing as a strike. While, therefore, the Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not, it cannot decide the question whether an employer can close down his business temporarily, for an indefinite period or permanently. There can not be a dispute strictly so called between an employer and an employee as regards the continuance of the business itself. The question was completely outside the Industrial Disputes Act."[2]

The readiness to investigate lock-out cases, though divergent from the view expressed in the *Victoria Cotton Mills*[3] is understandable : the Court was, in fact, concerned with a reference under section 10 of the Act, and not with a complaint under section 33A of the Act.

The decision of the Madras High Court in *Jai Bharat Tile Works*[4] however, reveals greater awareness of the mischievous propensities of the doctrine of "existing, running industry" and virtual acceptance of

1 *Ibid.*
2 *Indian Metal and Metallurgical Corporation*, (1952) 1 LLJ 364, 370 (H.C. Madras).
3 (1951) 1 LLJ 502 (I.T.).
4 (1954) 1 LLJ 286 (H.C. Madras).

the Industrial Tribunal's approach in the *Indian Metal and Metallurgical Corporation.*[1]

There were four tile factories in the city of Samalkot in 1948 and disputes between the managements and workmen were referred to an Industrial Tribunal for adjudication. The Tribunal gave its award upgrading the wages which remained in force until 23rd August, 1950. During the pendency of the aforesaid proceedings, however, another tile factory, namely, the Jaya Bharat Tile Works started functioning and its management adopted the wage structure recommended by the aforesaid award. The Jaya Bharat Tile Works closed its work on 24th August 1950, and it was followed by other tile works. The government referred the ensuing dispute, namely,

"(i) whether the closure of the tile works was justified and

(ii) if so, what relief should be given to the workers,[2]

between the management of all the five tile works and their workmen, to an Industrial Tribunal for adjudication.

Managements contended that they were compelled to close the works because of high cost of production, apprehended losses, lack of raw materials and unhealthy competition in the industry. The workmen, on the other hand, contended that the closure of the mill was with a view to avoid payment of higher wages and dearness allowance as per the earlier award and to victimize them.

The Industrial Tribunal, on those contentions, framed the following issues :

"(1) Whether the closure of the Mills was *bonafide* due to loss in trade, lack of demand of tiles and exhaustion of mud as contended by the Mills or did it amount to illegal lock-out, victimisation and unfair labour practice ?

(2) Whether the workers are entitled to be reinstated or compensated and if so, for what period and at what rate ?"[3]

and, on detailed inquiry, rejected the contentions of the managements, holding :

"the closure of the five mills was not *bonafide* and that it was with a view to victimise labour."[4]

It, accordingly, directed the managements to reinstate the workmen and pay them compensation for the period of unemployment.

1 (1951) 2 LLJ 148 (I.T.).
2 *Tile Factories*, (1951) 2 LLJ 162, 163 (I.T.).
3 *Ibid.*
4 *Ibid.*, p. 167.

It is not at all clear how, in view of the termination of services, there could have been a lock-out. Nor, indeed, there is any finding that there was a lock-out. The Tribunal merely said that the closure was with a view "to harass the workers in order to compel them to accept their own terms as against the rates fixed in the award" or that it was an "unfair labour practice" or that it was with a view to "victimize labour."

On an appeal, preferred by the managements the Labour Appellate Tribunal felt that the reference was not happily worded. In its view, the issues were :

"(1) Whether the closure of the tile works is justified ? and

(2) If not, what relief should be given to the workers ?"[1]

The Labour Appellate Tribunal held that, since the four Tile works, which were parties to the previous adjudication proceedings, closed their works after the award ceased to be operative, there was no question of the closure of those works being illegal. Consequently, the further question of relief did not arise in their cases. *The Jaya Bharat Tile Works*, however, stood on a different footing :

> "They closed on the 24th August, 1950 and reopened on the 13th December, 1950. We are doubtful if the closure from 24th August, which was effected in order to avoid the payment of wages at a higher rate was a closure at all, when subsequently under the same circumstances the Mill has been reopened. We are of opinion that it amounted to an unfair labour practice and was effected in order to bring pressure to bear on the workers to accept lower rates."[2]

Accordingly, while allowing the appeal of other Tile works, the Labour Appellate Tribunal dismissed the appeal of the *Jai Bharat Tile Works*.[3]

Even assuming that the conduct of the Jaya Bharat Tile Works amounted to "an unfair labour practice", it is difficult to understand how it became illegal. Sections 24, 10(3), 22 and 23 of the Industrial Disputes Act did not apply as much to the other factories as to the Jaya Bharat Tile Works. It may be that Jaya Bharat Tile Works did not give notice terminating the terms imposed by the 1948 award ; but it must not be overlooked that the works was not even a party to the previous industrial dispute and, consequently there was no necessity for it to serve statutory

1 *Jaya Bharat Tile Works*. (1951) 2 LLJ 509 (L.A.T.).
2 *Ibid*, p. 510.
3 *Ibid*.

notice. Moreover, how was the reopening of the Works a relevant factor ? It is interesting to note that three of the other four factories had temporarily reopened to complete the unfinished work[1] but no notice was taken of these reopenings.

The *Jaya Bharat Tile Works*[2] sought for the issuance of a writ of certiorari to quash the order of the Labour Appellate Tribunal, which was heard by Justice Subba Rao (as he then was) of the Madras High Court. The management argued, relying on the *Indian Metal and Metallurgical Corporation case*,[3] that the Tribunal had no jurisdiction to decide the dispute in respect of the closure of the factory. However, Justice Subba Rao observed :[4]

> "the learned judges in that case were not called upon to consider or decide the question namely that if a closure is in fact illegal lock-out or unfair labour practice whether the Tribunal had jurisdiction to consider that question."[5]

and, relying on the observation of Justice Balakrishna Iyer[6] wherein His Lordship had said :

> "where an employer suspends work and the question is whether that suspension is lock-out or not, we will have to enquire, why did he shut down ?"[7]

held :

> "Whenever.....the question arises whether a closure is in fact illegal lock-out or a subterfuge adopted by employers to bring the employees down to their knees as it were, the Industrial Tribunal has to decide that question. For if it is a lock-out or an *illegal labour practice* the tribunal certainly will have jurisdiction to go into the question."[8]

These observations require careful analysis.

First : The establishment in the *Indian Metal and Metallurgical Corporation*[9] was in fact closed, *malafide* "to spite the workers and to bring

1 (1951) 2 LLJ 162, 166 (I.T.).
2 (1952) 2 LLJ 587 (H.C. Madras).
3 (1952) 1 LLJ 364 (H.C. Madras).
4 C.S. No. 448 of 1949 cited in (1952) 2 LLJ 587.
5 *Jaya Bharat Tile Works* (1952) 2 LLJ 587, 582 (H.C. Madras)i
6 C.S. No. 448 of (1949) cited in 1952 2 LLJ 587.
7 (1952) 2 LLJ 587, 589 (H.C. Madras).
8 *Ibid*.
9 (1952) 1 LLJ 364 (H.C. Madras).

them to their knees".[1] We are, therefore, unable to perceive the distinction which Justice Subba Rao sought to draw between that case and the *Jaya Bharat Tile Works.*

Second : The observations of Justice Balakrishna Iyer regarding the circumstance under which shutting down of the works may be deemed to be a "closure," and not lock-out, are only illustrative ; they cannot be deemed to be exhaustive.

Third : We do not know what Subba Rao J. meant by "illegal labour practice."

Dissatisfied, The *Jaya Bharat Tile Works*[2] preferred a Letters Patent Appeal. Chief Justice Rajamannar discussed the decision in *Indian Metal and Metallurgical Corporation*[3] to remove the "misconception as to the exact scope of that ruling". He did not refer to the finding of fact that the "closure" in that case was *malafide* "to spite the workers and to bring them to their knees". On the contrary, he observed :[4]

> "The argument in that case proceeded on the footing that there was discontinuance of business and that there was no lock-out"

and proceeded :

> "A lock-out is different from the discontinuance of a business. Occasionally some confusion is caused by the use of the word "closing". Lock-out does not mean closing down of a business. It only means closing down of the place of business. It means suspension of work, not discontinuance of the carrying on of the business. It means the refusal by an employer to continue to employ the persons employed by him and not the refusal by an employer to carry on any longer his business.....
>
> In other words, the closing down of a business is different from the closing of a place of business.....As I pointed out therein, just as a person cannot be compelled to commence a new business to provide employment for several unemployed persons, so too a person cannot be compelled to continue a business though he decides for reasons of his own to stop it. If, however, the employer does not wish to discontinue the business but only to close down

1 Per Mr. Davidar in (1951) 2 LLJ 148, 154. The Madras High Court did not aspect this finding in (1952) 1 LLJ 364.

2 (1952) 2 LLJ 587 (H.C. Madras).

3 (1952) 1 LLJ 364 (H.C. Madras).

4 *Jaya Bharat Tile Works* (1954) 1 LLJ 286 (H.C. Madras).

> the place of business temporarily, then the Tribunal can go into the question whether such closure is *bonafide* and for proper reasons or whether it was with the object of victimizing the workmen and coercing them to accept his own terms."[1]

Since, in the instant case, the Tribunal had found that Jaya Bharat Tile Works was closed "to bring pressure on the workers to accept the rates offered" by the management, the Division Bench declined to interfere with the decision of Justice Subba Rao.

It is impossible to reconcile *Indian Metal and Metallurgical Corporation*[2] with *Jaya Bharat Tile Works.*[3] Moreover, we are unable to understand how "closure" which involves termination of service can ever be equated with lock-out where the employer-workman relationship subsists.

Subsequent cases involving temporary closures, such as *J. K. Jute Mills*[4] and *Sri Ramchandra Spinning Mills,*[5] followed the decision in *Jaya Bharat Tile Works,*[6] The *Pipraich Sugar Mills*[7] and the *Barsi Light Railway Co. Ltd.,*[8] were not concerned with temporary closures. Nevertheless, the observations of the Supreme Court in these cases, to the extent to which they emphasise "permanent, *bonafide* closures" appear to adopt the view first expressed by the Industrial Tribunal in the *Indian Metal and Metallurgical Corporation*[9] and subsequently adopted, *albiet* inferentially, by the Madras High Court in the *Jai Bharat Tile Works.*[10] The result is that a *bonafide* closure, even if "temporary", is protected under the constitutional guarantee and beyond the reach of Industrial Tribunals. On the other hand, a "temporary" *malafide* "closure" is not the exercise of the right which is guaranteed by the Constitution and is therefore open to scrutiny. Indeed, the *Banaras Ice Factory Ltd.,*[11] goes a step further : "*malafide* "closure" is no closure at all in the eye of law".

We are not surprised at the ascendency of the concept of "temporary, *malafide* closure". While ostensibly preserving the sanctity of the constitutional right "to practice any profession or to carry on any occupation,

1 *Ibid.* p. 288

2 (1952) 1 LLJ 364 (H.C. Madras).

3 (1954) 1 LLJ 286 (H.C. Madras).

4 (1956) 1 LLJ 588 (L.A.T.).

5 (1957) 1 LLJ 90 (H.C. Madras).

6 (1954) 1 LLJ 286 (H.C. Madras).

7 (1957) 1 LLJ 235 (S.C.).

8 (1957) 1 LLJ 243 (S.C.).

9 (1952) 1 LLJ 364 (H.C. Madras).

10 (1954) 1 LLJ 286 (H.C. Madras).

11 (1957) 1 LLJ 253 (S.C.).

trade or business", it helped courts to intervene in deserving cases. Even so, we are not impressed by this concept. It not only rendered entrepreneurial decision dependent on Tribunal determination of *fides* but has also unduly restricted Tribunal intervention for the protection of the interests of labour. The constitutional guarantee neither depends on the duration of the closure, nor on the motive which prompts the employer to take entrepreneurial decisions. He is as much entitled to close the undertaking "temporarily" as "permanently", and for *bonafide* reasons as for *malafide* reasons. We agree with Chief Justice Rajamannar's delineation of the constitutional right when he observed :

> "(it) is not necessary to embark on an enquiry whether the petitioner had proper grounds for deciding to close down the factory temporarily. We do not think it is open to us to canvass the ground which prompted the owner to discontinue the business. The grounds may be actual loss or apprehended loss. It may equally be disinclination to run the risk of running the business."[1]

However, the constitutional guarantee "to practice any profession or to carry on any occupation, trade or business", we would like to emphasise, merely ensures the employer his right to take entrepreneurial decisions. It does not, in particular, debar the State[2] from mitigating the evil consequences flowing from the implementation of such decisions, and in labour-management relations, we are primarily concerned with such consequences of closure as affect workmen. Where closure does not result in termination of service, i.e., where there is, in the words of Chief Justice Rajamannar, "merely closing of the place of employment", there may either be" lay-off" or "lock-out", and certainly tribunals are concerned with them. On the other hand, where "closure" results in termination of service, i.e., where there is "closing of the business itself", the resulting unemployment or loss of earnings is neither lessened by a *bonafide* closure nor aggravated by a *malafide* closure. Temporary closure may reduce the period of unemployment, but it does not lessen the impact of loss of earning during that period.

It is true, as we have already indicated, that the concept of *malafide* closure helped decision makers in resolving some of the problems that came before them. However, the recent decision of the Supreme Court in *Tea District Labour Association*,[3] we submit, explodes the myth of *malafide* closure. The management, in this case, closed two of their branches and

1 *Indin Metal and Metallurgical Corporation* (1952) 2 LLJ 364, 370 (H.C. Madras).
2 *Hathising Manufacturing Co. Ltd.* (1960) 2 LLJ 1 (S.C.)....
3 (1960) 1 LLJ 802 (S.C.).

the question of the justification of the "closure" was referred for adjudication. The Tribunal, on a detailed investigation, came to the conclusion that the "closure" was *malafide* and following the decison of the Supreme Court in the *Banaras Ice Factory Ltd.*[1] wherein Justice Das had observed that a *malafide* closure was no "closure' in the eye of law, deemed the closed branches to be continuously functioning and directed reinstatement of discharged workmen with back-wages in a factually closed establishment. The management, thereupon, appealed to the Supreme Court, which reversed the decision of the Tribunal. Explained Justice Gajendragadkar (as he then was) :

> "we do not read the observations (made in the Banaras Ice Factory Ltd.) as laying down an unqualified and categorical proposition of law that wherever a closure is *malafide* it must be deemed to be unreal and non-existent."

querried :

> ".....it is difficult to see how when the branches have in fact been closed the finding about *malafides* can justify the conclusion that the branches should be deemed to continue."

and concluded :

> "In our opinion the said finding is based on mere surmises."[2]

We agree. However, the rejection of the concept of "temporary, *malafide* closure" brings us back to the decision of the Madras High Court in the *Indian Metal and Metallurgical Corporation*.[3] It would be interesting to see how the Courts would now respond to the problem presented by *Jaya Bharat Tile Works*.[4]

(ii) *The concept of "Pre-existing right" :*

In the *Pipraich Sugar Mills Ltd.*,[5] to resolve the deadlock created by workmen's resistence to the transfer of the machinery to a site in Madras on 3rd January, 1951, the management offered to pay to the workmen 25 per cent of the net profits on the sale transaction, provided the workmen withdrew their strike notice and helped the management in the dismantling work. Subsequently, the mill was closed and workmen discharged. On a still later date, the government referred the dispute between the workmen and the management regarding payment of 25 per cent of net profits

1 (1957) 1 LLJ 253 (S.C.).
2 (1960) 1 LLJ 802. (S.C.).
3 (1952) 1 LLJ 364 (H.C. Madras).
4 (1954) 1 LLJ 286 (H.C. Madras).
5 (1957) 1 LLJ 235 (S. C.).

of the sale transaction, for adjudication. The Tribunal gave an award in favour of the workmen and, on appeal, the Labour Appellate Tribunal upheld the award. Thereafter, the management appealed to the Supreme Court under Article 136 of the Constitution, impugning the award on the grounds that: (1) the Government of Uttar Pradesh had no power to make the reference in pursuance of which the award was given; and that (2) there was no concluded agreement to pay 25 per cent of the net profits on the sale transaction. The first of these grounds was based on two contentions: (a) the provisions of the Industrial Disputes Act apply, to an "industrial dispute" in an "existing running industry"; consequently, where, as in this case, the mill had been closed, there was no dispute which could be adjudicated under the provisions of the Act: and (b) the power of the State Government to refer a dispute existed only so long as there was an "existing, running industry" and therefore when the mill had been closed, the Government had no power to refer a dispute for adjudication even if it had arisen before the "closure" of the mill.

The Supreme Court agreed with the management that there was no concluded agreement between the workmen and the management. They also upheld, as we have already seen, the doctrine of "existing, running industry". However, they rejected the contention of the management that the government had no power to refer a dispute after the "closure" of the mill, even though the cause of action had arisen before the "closure". Observed Justice Venkatarama Ayyar:

> "If a workman, improperly dismissed, raises an industrial dispute, and before action is taken by the Government the industry is closed, what happens to the right which the Act gives him for appropriate relief, if the Act vanishes into thin air as soon as the industry is closed? If (this) contention is correct, what is there to prevent an employer who intends, for good and commercial reason, to close his business, from indulging in large scale unfair labour practices, in victimization and in wrongful dismissals, and escaping the consequences thereof by closing down the industry."[1]

and concluded:

> "We do not find anything in the language of.....the Act to warrant the imposition of this additional limitation on the power of the State to make a reference. That section only requires, apart from other conditions, with which we are not concerned that there should be an industrial dispute before there can be a reference, and we have held that it would be an industrial dispute if it arises out of an existing industry. If that condition is satisfied, the competence of the State for taking action under that section is complete, and the fact that the industry has since been closed can have no effect on it."[1]

1 *Pipraich Sugar Mills Ltd.* (1957) 1 LLJ 235, 238 (S.C.).)

We are in entire agreement with this part of the judgement. "Any other construction would", as pointed by the Supreme Court, "result in serious anamolies and grave injustice".

However, this concept of "pre-existing right", we submit, makes a serious inroad on the doctrine of "existing, running industry" and invites a second look at the relevant Supreme Court decisions.

A question of consequence that arises in this context is whether the right to receive compensation on termination of service on "closure" of an industrial undertaking, arises *before* or *after* the closure? We submit that it arises from the very day a workman is employed in an industrial undertaking. This is particularly so where the right is conferred by the statute or flows from the explicit terms of the contract or is linked with the period of employment in the industrial undertaking. Assume for a moment that the *Pipraich Sugar Mills Ltd.*, had closed, not on March 1, 1951 (i.e., before the enactment of sections 2(oo) and 25F of the Industrial Disputes Act) but on January 1, 1964 (i.e., after the enactment of the section 25FFF of the Act) without giving any prior notice to the concerned workmen, and that subsequent to the closure of the Mills, the management terminated the services of all its workmen without giving them any compensation under section 25FFF of the Act. Would the Supreme Court decline under such circumstances the claim of discharged workmen for compensation under section 25FFF of the Act? Does the right to receive compensation in such a case arise *before* or *after* the closure?

To suggest a negative answer is to render the statutory provisions infructuous; on the other hand, an affirmative answer completely demolishes the case of the Supreme Court for excluding compensation on termination of service on "closure" of an undertaking from the scope of the word "retrenchment" and the provisions of the Industrial Disputes Act.

If, because of section 25FFF of the Act, a claim for compensation on termination of service consequent on closure can be validly entertained under the provisions of the Industrial Disputes Act, we do not see any reason

1 (1957) 1 LLJ 235, 239 (S.C.).

why a claim for the same compensation could not have been entertained under section 25F (assuming, of course, that the definition of "retrenchment" included cases of termination of service on closure). And, if claims for compensation on termination of service on closure could be entertained under section 25F of the Act, what is so heinous about tribunals themselves giving that compensation irrespective of any statutory provision ? We respectfully submit that the Supreme Court placed undue emphasis on the doctrine of "existing, running industry" and failed to push the concept of "pre-existing right" to its logical end.

(*d*) An appraisal of the doctrine of "existing, running industry" :

(i) *A factual analysis of the problem :*

Fact situations involved in cases[1] requiring determination of the issue, whether or not there should be an "existing, running industry" for the application of the provisions of the Industrial Disputes Act, reveal the following pattern :

An employer, alleging
- falsely
- truly

that, on grounds of
- financial reasons :
  - losses[2]
  - pecuniary difficulties[3]
  - higher rates of wages :

1 Generally speaking this analysis excludes cases where decision makers were of the opinion, on the facts involved therein, that the so called closure was in fact lock-out or lay-off.

2 *Madras Engineering Works* (1950) 2 LLJ 48 (I.T.) ; *Maxwell Engineering Works* (1950) 2 LLJ 277 (I.T.) ; *Aluminium Corporation of India* (1950) 2 LLJ 1140 (I.T.) ; *Hyderabad Vegetable Oil Products Ltd.*, (1950) 2 LLJ 1281 (I.T.) ; *Tile Facctories* (1950) 2 LLJ 162 (I.T.) ; *Surat Rander Bus Service* (1953) 1 LLJ 525 (I.T.) ; *Associated Rubber and Plastic Works* (1954) 1 LLJ 57 (L.A.T.) *Jai Bharat Tile Works* (1954) 1 LLJ 286 (H.C. Madras) ; *Kandan Textiles* (1954) 2 LLJ 249 (I.T.) ; *Raja Mills* (1956) 1 LLJ 174 (L.A.T.) ; *Presidency Engineering Works* (1957) 1 LLJ 398 (I.T.) *Banaras Ice Factory Ltd.*, (1957) 1 LLJ 253 (S. C.) ; *General Produce Ltd.*, (1957) 2 LLJ 447 (H. C. Kerala) ; *Madura Mills Workers Co-operative Store* (1958) 2 LLJ 230 (H.C. Madras) *Hathising Manufacturing Co.* (1960) 2 LLJ 1 (S.C.) ; *Investa Machine* (1963) 2 LLJ 113 I.T.).

3 *Kandan Textiles* (1954) 2 LLJ 249 (I.T.) ; *Lalubhai Tricumlal Mills* (1956) 2 LLJ 526 (L.A.T.) ; *Ravi Krishna Manufacturing Mills* (1959) 2 LLJ 760 (H.C. Kerala).

  - demanded by workers[1]
  - awarded by tribunals[2]
  - claim for bonus[3]
- production reasons :
  - non-availability of raw materials[4]
  - accumulation of stock[5]
  - cut in supply of power[6]
  - lack of demand for the produce[7]
  - slackness in business[8]
  - vacation of premises[9]
- labour troubles :
  - apprehension of strike[10]
  - stoppage of work[11]
  - union activity[12]
  - strained relations[13]
  - physical violence threatening :
    - life and person of :
      - managerial staff
      - other workers
  - safety of machinery and premises
- managerial problems :
  - domestic inconvenience[14]
  - difference between partners[15]

1 See, for instanee, *Fine Hosiery Mills* (1952) 2 LLJ 1 15 (I.T.).

2 See, for instance, *Tile Factories* (1951) 2 LLJ 162 (I.T.) ; *Murugan Dress Manufacturing Co.* (1951) 2 LLJ 709 (I.T.).

3 See, for instance, *H. N. Industries* (1958) 1 LLJ 114 (I.C.).

4 *The Hyderabad Vegetable Oil Products Ltd.* (1950) 2 LLJ 1281 (I.T.) ; *Tile Factories* (1951) 2 LLJ 162 (I.T.) ; *Jaya Bharat Tile Works* (1954) 1 LLJ 286 (H.C. Madras) ; *Ramchandra Spinning Mills* (1957) 1 LLJ 90 (H.C. Madras).

5 See, for instance, *Mahalakshmi Mills* (1953) 2 LLJ 356 (L.A.T.) *Ravi Krishna Manufacturing Mills* (1959) 2 LLJ 760 (H.C. Kerala).

6 See, for instance, *Millowners Association* (1955) 1 LLJ 437 (L.A.T.).

7 See, for instance, *Jaya Bharat Tile Works* (1954) 1 LLJ 286 (H.C. Madras).

8 See, for instance, *Coir Yarn Textiles* (1960) 1 LLJ 304 (H.C. Kerala).

9 See, for instance, *Trisul Bidi Factory* (1960) 1 LLJ 140 (I.T.).

10 See, for instance, *Allenbury & Co. Ltd.*, (1950) 2 LLJ 580 (I.T.).

11 See, for instance, *Sri Ram Mills* (1953) 1 LLJ 487 (L.A.T.).

12 See, for instance, *Metal Industries* (1951) 2 LLJ 797 (I.T.) *R.S.R.G. Mills* (1953) 2 LLJ 494 (L.A.T.) ; *Bhattacharjee Rubber Works* (1960) 2 LLJ 198 (H.C. Calcutta).

13 See, for instance, *Express Beedi Factory* (1960) 2 LLJ 669 (H.C. Madras).

14 See, for instance, *Mysore Modern Cafe* (1952) 2 LLJ 172 (I.T.).

15 See, for instance ,*New India Commercial Corporatiion* (1954) 1 LLJ 773 (L.A.T.) ; *Andrade & Lobo Tile Factory* (1956) 1 LLJ 582 (L.A.T.).

dissolution of partnership[1]
entrepreneurial reasons :
transfer of geographical location of :
the entire undertaking
a part of the undertaking[2]
transfer of ownership of :
the assets of the undertaking[3]
the undertaking as a going concern[4]
compulsory winding up[5]
other reasons :
avoidable
unavoidable[6]
cannot run the business
temporarily[7]
for an indefinite period[6]
permanently[9]
closes the business
entirely[10]

1 *Rathnam & Co.* (1954) 2 LLJ 110 (I.T.) ; *Bharat Motor Transport Co.* (1958) 1 LLJ 130 (I.T.) ; *Desai Gounder & Co.* (1962) 2 LLJ 133 (H.C. Madras).

2 See, for instance, *Express Newspapers Ltd.* (1962) 2 LLJ 227 (S.C.).

3 *Bhanuvilas Theatre* (1956) 2 LLJ 176 (L.A.T.) ; *Pipraich Sugar Mills Ltd.* (1957) 1 LLJ 235 (S.C.) ; *New Gujrat Cotton Mills* (1957) 2 LLJ 194 (H.C. Bombay) ; *Arunachalam Pillai Vs. Central Government* I.T. (1957) 2 LLJ 682 (H.C. Madras) ; *Ispahani Ltd.* (1959) 2 LLJ 5 (S.C.).

4 *Asarva Mills Co.* (1952) 2 LLJ 879 (I.C.) ; *G.P. Tea Estate* (1956) 1 LLJ 311 (L.A.T.) ; *Gillanders Arbuthnot & Co. Ltd.* (1956) 1 LLJ 311 (L.A.T.) ; *Himabhai Mills Co. Ltd.* (1956) 2 LLJ 244 (L.A.T.) ; *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243 (S.C.) ; *Dahingeapar Tea Estate* (1958) 2 LLJ 498 (S.C.) ; *Anakapally Co-operative Agriculture & Industrial Society* (1962) 2 LLJ 621 (S.C.).

5 See, for instace, *Jayajyothi & Co.* (1963) 2 LLJ 739 (H.C. Madras).

6 See, for instance, *Crown Flour Mills* (1955) 2 LLJ 737 (L.A.T.).

7 *Madras Engineering Works* (1950) 2 LLJ 48 (I.T.) ; *J.K. Woollen Manufacturers* (1952) 2 LLJ 127 (I.T.) ; *Nehru Silk Mills* (1954) 2 LLJ 736 (L.A.T.) ; *Kotak & Co. Ltd.* (1956) 1 LLJ 123 (I.C.) ; *Ramchandra Spinning Mills* (1957) 1 LLJ 90 (H.C. Madras).

8 *Hindustan Bicycle Manufacturing and Industrial Corporation Ltd.* (1953) 2 LLJ 704 (I.T.) ; *J. K. Woollen Manufacturers* (1963) 2 LLJ 815 (L.A.T.) ; *Anil Textile Mills* (1954) 1 LLJ 497 (L.A.T.).

9 *Maxwell Engineering Works* (1950) 2 LLJ 277 (I.T.) ; *Aluminium Corporation of India* (1950) 2 LLJ 1140 (I.T.) ; *Hyderabad Spinning and Weaving Co. Ltd.* (1954) 1 LLJ 805 (L.A.T.).

10 See, for instance, *Banaras Ice Factory Ltd.* (1957) 1 LLJ 253 (S.C.).

partially[1]
and discharges
all[2]
some[3]
workmen.

Enlightened employers gave notice of impending termination of service or wages in lieu thereof. They also paid compensation, either on adhoc basis or at the statutory rates prescribed by section 25FFF of the Act. However, instances are not rare where employers neither gave notice nor wages in lieu thereof nor any compensation on termination of service. But none of them guaranteed re-employment in the event of the reopening of the undertaking.

Accordingly, workmen claimed, depending on the circumstances of each case, wages in lieu of notice, severance pay (i.e., compensation on termination of service) and right of re-employment.

(ii) *A survey of the Judicial Response :*

Notwithstanding the resistence of Indian Workmen to closure of an undertaking, it is important to emphasise that workmen are concerned, not with closure as such, but with the consequences of closure, namely, discharge, unemployment and loss of earnings. It is doubtful if, were an employer to continue to retain workmen in his employ and pay them remuneration even after closing his business, there would be any hue and cry over the closure. In every case of closure, the basic demand is for the payment of compensation and reinstatement. The desire of workmen to continue in employment and maintain their earnings is understandable in a surplus labour market (as it exists in India).

Initial response of decision-makers was exceedingly favourable to workmen. Indeed, where the tribunals found that "closures" were *mala fide* and resorted to victimize workmen, they went to the extent of ordering the

1 *Aluminium Corporation of India* (1950) 2 LLJ 1140 (I.T.) ; *Banks in West Bengal* (1950) 2 LLJ 1045 (I.T.) ; *J. K. Woollen Manufacturers* (1952) 2 LLJ 127 (I.T.) ; *New Mahalakshmi Silk Mills* (1954) 2 LLJ 226 (L.A.T.) ; *Berar Oil Industries* (1958) 1 LLJ 226 (H.C. Bombay) ; *Mckenzies Ltd.* (1960) 1 LLJ 334 (H.C. Madras) ; *Tea District Labour Association* (1960) 1 LLJ 802 (S.C.) *Blackwoods India* (1961) 2 LLJ 552 (H.C. Calcutta) ; *Shanker Flour Mills* (1952) 2 LLJ 16 (H.C. Allahabad).

2 See, for instance, *Banaras Ice Factory Ltd.* (1957) 1 LLJ 253 (S.C.).

3 See, for instance, *Victoria Cotton Mills* (1951) 1 LLJ 502 (I.T.) ; *Keshav Silk Mills* (1958) 1 LLJ 723 (L.A.T.).

reopening of the undertakings and directing re-employment of the workmen with back-wages.[1]

Faced with this situation, employers 'put forward the ingenious plea that government had no power to intervene in labour-management relations after the "closure" of an industry.[2] The constitutional guarantee of the freedom "to carry on any occupation, trade or business" was invoked not merely to support the doctrine of "existing, running industry" but also to prevent tribunals from ordering reopening of closed industries[3] and directing re-employment of workmen whose services had been terminated at the time of closure[4].

It is unfortunate that the provisions relating to lay-off and retrenchment compensation were incorporated in the Act only after six years of the operation of adjudication system on an all-India pattern. During this long period, several cases involving closures came up before the Industrial Tribunals.[5] The only provision of the Act which, in those days, used the word "closure" was section 2(l) of the Act. This invariably led the Tribunals to hold that "closure" came within the ambit of the definition of "lock-out" particularly because, unlike 1929 definition,[6] the 1947-definition[7] had no restrictive qualifying clause. The Labour Appellate Tribunals, the High Courts and the Supreme Court, on the other hand, (impressed by the constitutional guarantee of the right to practice any profession or to carry on any occupation, trade or business") were at pains to emphasise that lock-out was the "closing of the place of business" and not the "closing

1 See, for instonce, *Jaya Bharat Tile Works* (1954) 1 LLJ 286 (H.C. Madras).

2 See, for instance, *Indian Metal and Metallurgical Corporation* (1952) 1 LLJ 264 (H.C. Madras).

3 See, for instance, *Tile Factories* (1951) 2 LLJ 162 (I.T.).

4 *Ibid.*

5 See, for instance, *Annamalai Timber Trust Ltd.* (1950) 2 LLJ 994 (I.T.); *Victoria Cotton Mills* (1951) 1 LLJ 502 (I.T.); *Indian Metal and Metallurgical Corporation* (1951) 2 LLJ 148 (I.T.); *Tile Factories* (1951) 2 LLJ 162 (I.T.).

6 Section 2(e) of the Trade Dispute Act 1929 read as follows:

"Lock-out means the closing of a place of employment, or the suspension of work, or the refusal of an employer to continue to employ any number of persons employed by him, *where such closing, suspension or refusal occurs in consequence of a dispute and is intended for the purpose of compelling these persons or of aiding another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.*"

7 Section 2(l) of the Industrial Disputes Act, 1947 read:

"Lock-out means the closing of a place of employment or the suspension of work or the refusal by an employer to continue to employ any number of persons employed by him."

of the business itself". Because of the difficulty of maintaining this distinction in cases of temporary closures, there developed a marked tendency to enquire into the *bonafides* of management action. At the same time, the view that the provisions of the Industrial Disputes Act were applicable only to an "existing, running industry", began to assert itself and, along with it, came the realisation that, if the government had no power to refer a dispute after the closure of an undertaking, patent denial of labour's legitimate rights would ensue. Out of this dilemma, developed the concept of temporary *malafide*, closure. It was asserted that, where the closure was *malafide*, there was in fact no closure in the eye of law[1] and consequently neither was the constitutional right to "practice any profession or carry on any occupation, trade or business" violated nor was the operation of the Industrial Disputes Act precluded. The concept of "pre-existing right" further alleviated the situation. However, the emphasis on the form continued and the substance was hardly touched upon. Moreover, the decision-makers hardly appreciated that employer-workman relationship subsisted during lock-out and lay-off and when that relationship was snapped, there could neither be a "lock-out[2] nor a lay-off".

(iii) *The Basic issues in closure cases:*

The expression "closure of business" is too vague and general, It merely describes the physical act of closing down an "industrial establishment" ignoring the reason therefor and the consequences flowing therefrom. For instance, the management may decide to close down the establishment, as we have already seen, on grounds of:

financial reasons
production reasons
entrepreneurial reasons
labour troubles
managerial problems
economic pressure to be put on the workmen.

Further, consequent on such closure or in anticipation thereof, the management:

may terminate services
after or without giving any notice or
wages in lieu of notice
after or without paying any "severance-pay"

1 *Banaras Ice Factory Ltd.* (1957) 1 LLJ 253 (S.C.).

2 See, for instance, *Express Newspapers Ltd.* (1962) 2 LLJ 227 (S.C.).

guaranteeing or without guaranteeing right
of re-employment to workmen
may not terminate services and
may continue to pay
full wages
partial wages
may not pay any wages for the period of closure.

The expression "closure of business", however, does not give any clue to these situations.

Even so, either because of ignorance or designedly to avoid formulating terms of reference in such narrow words as may conceivably frustrate the enquiry, government adopted the practice of couching orders of reference by using the vague and general word "closure":

"(1) Whether the *closure* of the factory...is justified ?
(2) Whether any compensation is to be paid to the discharged workmen ?"[1]

The critical aspect in labour management relations is the impact of "closure" on the economic conditions of the workmen. In order to justly assuage the sufferings of workmen without unduly burdening the employer with financial liabilities, it is not irrelevant to inquire into the reason for the closure and the consequences flowing therefrom. A proper enquiry into these "closure" disputes, therefore, envisages investigation of a chain of interdependant issues, namely :

Is the "closure" permanent or temporary ?
if permanent :
is the management continuing to employ its workmen or has it terminated their services ?
if the employer-workman relationship has been terminated, to what relief are the workmen entitled (in addition to those, if any, already given to them by the management) ?
if temporary :
is the management continuing to employ its workmen or has it terminated their services ?
if the employer-workman relationship has not been *terminated*, is "closure" "lock-out" or "lay-off" ?

1 See, for instance, *Indian Metal and Metallurgical Corporation* (1952) 1 LLJ 364 (H.C. Madras); *Ashok Biri Factory* (1964) 2 LLJ 340 (H.C. Calcutta).

if "lock-out" :
is the "lock-out" legal or illegal ?
if illegal : to what relief are the workmen entitled ?
if legal : is the lock-out justified or unjustified ?
if unjustified : to what relief are the workmen entitled ?
if *"lay-off"* : to what relief are the workmen entitled (in addition to those, if any, already given to them by the mangement) ?
if the employer-workman relationship *has been terminated,* to what relief are the workmen entitled (in addition to those, if any, already given to them by the management) ?

Unless these questions are answered, we cannot hope to resolve various problems connected with "closure" disputes.

(iv) *Provisions of the Industrial Disputes Act comprehensive :*

We have already seen that until 1953- Amendment of the Industrial Disputes Act, tribunals assumed jurisdiction over "closure" disputes and gave their awards to meet the requirements of each case. The 1953-Amendment did not seek to restrict the jurisdiction of tribunals ; it merely consolidated the developing case-law, and sought to maintain uniformity in the grant of "severance-pay".[1]

The restrictions imposed by the Supreme Court decisions in the *Pipraich Sugar Mills Ltd.*[2], the *Barsi Light Railway Co. Ltd.*,[3] and the *Banaras Ice Factory Ltd.*[4] emanate primarily from their predispositions and attempt to rationalise them. There is nothing in the statutory definition of "retrenchment"[5] to limit it either to the requirement of "economic reasons" or to the requirement of "existing, running industry". And once these self-imposed restrictions are removed, the concept of "pre-existing right" is wide enough to admit resolution of the type of disputes with which we are here concerned. Moreover, the view that the provisions of the Industrial Disputes Act apply only to "existing, running industry" is untenable. Indeed, the Supreme Court itself observed :

1 See, for instance, *May & Baker* (I) (1964) 2 LLJ 95 (S.C.).
2 (1957) 1 LLJ 235 (S.C.).
3 (1957) 1 LLJ 243 (S.C.).
4 (1957) 1 LLJ 253 (S.C.).
5 Section 2(oo) of the Industrial Disputes Act, 1947.

"we agree that if it is conceded that the definition clause includes cases of closure of business, no difficulty is presented by Ss. 25G and 25H."[1]

We submit, that there is nothing in the Act which is inconsistent with or repugnant to the ideas of enquiring, investigating and adjudicating problems arising out of "closure" and affecting labour-management relations.

IV

RETRENCHMENT REINSTATED

A. Legislative disapproval of the judicial response :

1. *1957-Amendment :*

Be that as it may, the Supreme Court decisions not only ignored sixty three out of eighty words in the definition of the term. "retrenchment" but also rendered the original section 25FF superfluous : Justice Das observed :

"We are aware that on the narrower interpretation of the definition clause on the basis of the ordinary, accepted connotation of retrenchment, S. 25F will apply to a continuing or running business only and S. 25FF will become largely unnecessary. We do not think that consideration need cause any difficulty : the judicial decisions on the basis of which S. 25FF was enacted being held to be erroneous by us, no hardship is caused if S. 25FF is rendered superfluous, because its aim is served by the correct interpretation now of the definition clause and of the provisions of S. 25F."[2]

We disagree. The Legislative object in enacting original section 25FF was to plug the loopholes in the 1953-provisions relating to "retrenchment", and, in particular, to avoid payment of compensation to workmen on a transfer of an undertaking where such transfer preserved the continuity of employment including benefits flowing therefrom, and did not, in fact, throw workmen out of employment. In other words, the Legislative intent was not to do away entirely with the grant of compensation to workmen who were retrenched on transfer of an undertaking but to restrict the payment of such compensation to only those cases where it was needed.

To the extent to which the *Barsi Light Railway Co. Ltd.* and *Shri Dinesh Mills*[3] negatived the right of workmen to receive compensation on

1 *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243, 249 (S.C.).
2 *Ibid,* 251.
3 (1957) 1 LLJ 243 (S.C.).

transfer or closure of an undertaking even in cases where workmen were actually thrown out of employment without receiving benefits accruing from continuity of service and without any claim to future employment, judicial view was in conflict with the Legislative scheme. The "Objects and Reasons" accompanying the Bill[1] for the Amendment of the Industrial Disputes Act stated :

"In a judgement (in the case of Hari Prasad Shivashankar Shukla V. A.D. Divalkar and Barsi Light Railway Co. Ltd. V. Joglekar (K.N.)-1957 1 LLJ-243) delivered on the 27th November 1956, the Supreme Court held that no retrenchment compensation was payable under sec. 25F of the Industrial Disputes Act 1947 to workmen whose services were terminated by an employer on a real and *bonafide* closure of business or when termination occured as a result of transfer of ownership from one employer to another ; since then a number of undertakings have closed down or put up notices of closure for one reason or another. This has led and is likely to lead to a large number of workmen being rendered unemployed without any compensation. In order to meet the situation which was causing hardship to workmen, it was considered necessary to take immediate action and the Industrial Disputes (Amendment) Ordinance (4) of 1957) was promulgated with retrospective effect from 1st of December 1956. The ordinance provides that compensation would be payable to workmen whose services are terminated on account of transfer or closure of undertaking. In the case of transfer of an undertaking, however, if the workman is re-employed on terms and conditions which are not less favourable to him, he will not be entitled to any compensation. This was the position which existed prior to the decisions of the Supreme Court. In the case of closure of business on account of circumstances beyond the control of employer, the maximum compensation payable to a workman has been limited to his average pay for three months. If the undertaking is engaged in any construction work and is closed down within two years on account of the completion of its work, no compensation would be payable to workmen employed therein. The Bill seeks to replace the Ordinance by Act of Parliament."[2]

1 Bill No. 10 of 1957 which was passed as Act 18 of 1957.
2 Vide Gazette of India, Part II ,Section 2, Page 170 dated 17th May 1957 (cited in "The law of Industrial Disputes in India"—R.F. Rustamji, page 483).

The Parliament accordingly redrafted section 25FF and enacted section 25FFF for the first time :

"Compensation to workmen in case of closing down of undertakings :—

(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 sub-section (2) be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched :

Provided that where the undertaking is closed 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 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.

(2) Where any undertaking set up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up, no workman employed therein shall be entitled to any compensation under clause (b) of Section 25 F but if the construction work is not so completed within two years he shall be entitled to notice and compensation under that section for every completed year of service or any part thereof in excess of six months."[1]

This, we believe, was Legislative disapproval of the Judicial response.

2. *1957 Amendment Inadequate :*

In *Rajkumar Singh V. Authority under Payment of Wages Act,*[2] Justice Newaska observed :

"The object of the provisions contained in secs. 25F, 25FF and 25FFF is :

(i) to provide for involuntary unemployment ;

1 Section 25 FFF of the Industrial Disputes Act.

2 (1960) 2 LLJ 545 (H.C. Madhya Pradesh).

(ii) to create a sense of security in a worker to a reasonable extent that in case he sticks to his work, he will not be thrown out in case his employment is terminated either when the industry continues to run or when it is closed down for any reason including one due to transfer of business to new employer or due to closure on the ground of expediency,

(iii) to raise the position and status of labour and to standardize its rights in relation to industry."[1]

We agree. However, we would like to point out that the damage done to the original 1953-scheme by the Supreme Court decision[2] has not been completely repaired by the 1957-Amendment. Though the Amendment specificially provides for the payment of retrenchment compensation and notice when the employment relationship is terminated due to closure, according to section 25F of the Act, it is not quite clear whether the Amendment gives preference to the re-employment of workmen, whose employment relationship has been terminated due to "closure" on the re-opening of the undertaking by the employer according to section 25H of the Act. Even before the Amendment, the tribunal[3] granted the right of re-employment to workmen, (whose employment relationship was terminated on account of the "closure" of an undertaking) when the employer wanted to re-open the undertaking, on considerations of "fair play and justice". The same view was iterated by the Supreme Court in *Cawnpore Tannery Ltd.*[4] where Justice Gajendragadkar (as he then was) observed :

"that the principle which was applied to the case of an employer who re-opened his business which had been closed by him is substantially the same principle which requires the employer to give an opportunity to his retrenched workmen,"[5]

and thus paved the way to keep up the 1953-Legislative scheme of giving preference to those workmen for reemployment, whose employment relationship was terminated due to the "closure" of an undertaking This, we hope, will, to a very great extent, act as a check to the capricious misuse of the management prerogative and relieve, to a substantial extent, the insecurity of the workmen which in its turn will go a long way in strengthening the trade union organisations.

1 *Ibid,* Pp 549, 550

2 *Barsi Light Railway Co. Ltd.* (1957) 1 LLJ 243 (S.C.).

3 See, for instance, *Sri Annapurna Mills* (1953) 1 LLJ 43 (L.A.T.).

4 (1961) 2 LLJ 110 (S.C.).

5 *Ibid,* p. 112.

THE PROBLEM OF FUNCTUS OFFICIO UNDER S. 33 (2) (b) OF THE INDUSTRIAL DISPUTES ACT, 1947*

By

YOGENDRA SINGH†

I

INTRODUCTION

Section 33[1] of the Industrial Disputes Act, 1947, imposes restrictions on the management's prerogatives, especially its inherent right to manage

* This article was written by the author a year ago. Since then the decision of the Supreme Court (*The Tata Iron and Steel Co. Ltd., v. S. N. Modak*, 1965-2 L.L.J. 128 : (1965) 11 S.C.W.R. 516, which is in substantial agreement with the views expressed in this article, has come out. Because of the comprehensive scope of the problem discussed and its importance in future, this article, in its original form published here, may usefully serve as an anticipatory rejoinder to the views of the Supreme Court.

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1 Section 33 runs as :—

Condition of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.

(1) During the pendency of any conciliation proceeding before conciliation officer or a Board or of any proceeding before an arbitrator, or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall.....

(*a*) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding ; or

(*b*) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or where there are no standing orders, in accordance with terms of contract whether express or implied, between him and workman-

(*a*) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding ; or

(*b*) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman ;

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(5) Where an employer makes an application to a Conciliation Officer, Board, Labour Court, Tribunal, National Tribunal under the proviso under sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it thinks fit.

its affairs during the pendency[1] of the proceedings. The imposition of the statutory ban on the employer's right to "hire and fire" has two objects in view : to protect the workmen involved in the dispute against the employer, and to bring the pending proceedings before the authorities to a peaceful culmination.[2]

Section 33(1) of the Act makes it incumbent on the employer to take express prior permission in writing whenever he wants to alter the conditions of service of any employee "in regard to any matter connected with the dispute" pending before the authority concerned. He is also required to take prior permission for discharging or punishing the workman concerned if the misconduct is connected with the pending dispute.

Section 33(2) of the Act enables the management "to alter the conditions of service in regard to any matter" not connected with the pending industrial dispute. Further, the management is competent "to discharge or punish whether by dismissal or otherwise" any workman for a misconduct not connected with the pending dispute. However, the proviso to this sub-section enjoins the employer to get the approval of the action taken during the pendency of proceedings by making an application to the "authority concerned" if the action taken by him involves discharge or dismissal.

Section 33(5) of the Act directs, with a deceptive simplicity, the authority to dispose of the application made by the employer for the approval of the action taken by him "as expeditiously as possible." The aforesaid clause is silent as to whether, at the time the application for approval is disposed of by the authority, there should be "pendency of proceeding" before him. It thus raises an exceedingly important problem : whether "the authority concerned" under 33(5) of the Industrial Disputes Act, 1947, is competent to dispose of an application made to it under the proviso to S. 33(2) (*b*) of the Act for approval of the action taken, after the industrial dispute pending before it has been decided and the resulting award has become enforceable under section 17-A[3] of the Act ? The High Courts are

1 S. 20 of the Industrial Disputes Act, 1947, is determinative of commencement and conclusion of proceedings. Sub-clause (2) of S. 20 runs as :—

Proceedings before an arbitrator under section 10-A or before a Labour Court, Tribunal or National Tribunal shall be deemed to have commenced on the date of reference of the dispute for arbitration or adjudication as the case may be and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under section 17-A.

2 *Automobile Products of India Ltd. v. Rukmaji Bala*, (1955), 2 L.L.J. 346.

3 S. 17-A provides as follows :

(1) an award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under section 17.

divided in this respect: while the High Courts of Mysore, Madras and Calcutta are of the view that "the authority concerned" is not competent to decide the application after the termination of the main dispute, the High Courts of Kerala, Punjab, and Orissa have asserted that the authority is capable of dealing with the application even after the disposal of the main dispute.

The purpose of this study is to evaluate as to which of the two diametrically opposite views best serves the purpose of the Industrial Disputes Act 1947, that is, the preservation of the industrial harmony which in its turn furthers unhampered production.

II
JUDICIAL INTERPRETATION

Tribunals[1] *become dead.*

The Mysore High Court in *Shah* (T.A.) v. *State of Mysore and others*[2] has taken the view that an authority ceases to exist after the termination of the proceedings before it. The facts of the case are as follows: The petitioner, an employee in Indian Tin Industries (Pvt.) Ltd., was dismissed for misconduct during the pendency of an industrial dispute before the Labour Court. The management sought the approval of the relevant authority, the Labour Court, for the action taken by it by filing an application under the proviso to S. 33(2) (*b*) of the Industrial Disputes Act. The Labour Court did not dispose of the said application within thirty days from the date of the publication of the award. Thereafter, the application was turned down by the "authority concerned" on the ground that it was not competent to deal with the application beyond the pendency of the main dispute. The management approached the High Court under Art. 226 for an appropriate writ.

The petitioner contended before the High Court that the Labour Court had committed an error in not disposing of the said application in accordance with S. 33(5) of the Act, for that sub-section did not require the pendency of proceeding before the authority concerned at the time of the disposal of the application. Though their Lordships agreed that S. 33(5) of the Act did not expressly refer to any pending proceeding, they declared that such reference was plainly implicit in the provisions of the sub-section. Their Lordships emphasised:

1 The term "Tribunal" denotes not only Industrial Tribunal but also Labour Court and National Tribunal specified in S. 33 of the Industrial Disputes Act.

2 (1964) 1 L.L.J. 237.

> "The question is, which is the "authority concerned" referred to in that sub-section. In order to identify the "authority concerned" referred to in the sub-section, one must necessarily look into the provisions of sub-section (2), the opening words of which are "during the pendency of any such proceeding in respect of an industrial dispute". What is of greater importance is that the approval required by the proviso to S. 33(2) (b) is the approval of "the authority before which the proceeding is pending."[1]

The High Court of Mysore relied on the analogy of an interlocutory application made during the pendency of a civil suit to substantiate its conclusion. According to their Lordships, the application under S. 33(2) (b) had no higher status than that of the interlocutory application and, therefore, it should necessarily be decided before the determination of the main dispute.

The Madras High Court took the same view in *Mettur Industries Ltd.* v. *Sundara Naidu and another.*[2] The management in the above case dismissed one of its workmen during the pendency of a dispute, and thereafter made an application to the Industrial Tribunal for approval of the action taken by it. The Tribunal on a full consideration of the facts did not approve the action of the management.

Aggrieved by the decision of the Tribunal, the management approached the High Court for an appropriate writ urging, for the first time, that the Tribunal was incompetent to dispose of the application since it had become functus officio immediately after the termination of the main dispute. The High Court agreed with the contention of the management and observed that the jurisdiction under section 33(2) (b) is given to the tribunal only because of the pendency of the main dispute.[3]

The Calcutta High Court in *Alkali and Chemical Corporation of India., Ltd.*, v. *Seventh Industrial Tribunal, West Bengal and others,*[4] took the view that the application for approval must be disposed of within the time during which the authority concerned has seisin over the dispute and before it becomes functus officio.

In this case, the management dismissed Mr. Satya Narain Banerjee, one of its employees, for absenteeism. An industrial dispute having thus

1 (1964) 1 L.L.J. 237, 240.

2 (1963) 2 L.L.J. 303.

3 *Id.* at 304.

4 (1964) 2 L.L.J. 568.

arisen, the Government referred it to the Industrial Tribunal for adjudication. While the dispute was pending, the services of three other workers were terminated by the company and an application was made to the authority concerned for the approval of the action taken. The Tribunal decided the main dispute without disposing of this application and gave an award which, after publication, became final.

Thereafter, the management filed an objection before the authority that it was no longer competent to decide the matter under the proviso to S. 33(2) (b) as there was no industrial dispute pending before the authority concerned. But the Tribunal rejected this plea. Aggrieved by the order of the Tribunal, the management moved the High Court for the issuance of an appropriate writ. The High Court, after examining the "internal indications" of the relevant sub-section of S. 33 asserted that since under sub-section (2) of S. 33, an employer can not take action without approval of the authority concerned; and, since sub-section (5) directs the authority to dispose of the matter as soon as possible, the "authority concerned" can not be anyone other than the one before which the proceeding is pending. Therefore, after the award became enforceable under S. 17-A, the decision-maker had no jurisdiction to decide the application under the proviso to S. 33(2) of the Act.

Tribunals do not die.

In *K. D. Hill Produce Co. Ltd., Mannar* v. *Miss Aleyamma Varughese and another*,[1] during the pendency of an industrial dispute before the Tribunal, the respondent, a workman, was dismissed. The management filed an application before the Tribunal to get the approval of the action taken, and while the application was pending, the Tribunal gave an award which became enforceable on the expiry of thirty days from the date of publication. The management contended that since the Tribunal had become defunct, the application could not be considered. This contention was, however, rejected by the Tribunal.

The Kerala High Court upheld the decision of the Tribunal by relying on certain observations made by the Supreme Court in *Straw Board Manufacturing Company* v. *Govind*.[2] The High Court observed that if the action

1 (1962) 2 L.L.J. 158.

2 (1962) 1 L.L.J. 420. In this case, the respondent Govind was dismissed after due enquiry for the disobedience of more than one order of the management. Since certain disputes were pending, the management applied for approval of the action taken under S. 33(2)(*b*) of the Industrial Disputes Act. The Labour Court held that the action of dismissal was bad in law since the application for approval should have been made before the dismissal took place.

The Supreme Court, while dealing with the effect of non-approval of the action taken of the management, observed:

> "If the Tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and thereupon the workmen would be deemed never to have been dismissed or discharged and would remain in the service of the employer. In that sense, the order of discharge or dismissal passed by the employer does not become final and conclusive until it is approved by the tribunal under S. 33(2)".

taken by the management by way of discharge or dismissal under S. 33(2) has to take effect legally, that action has to be approved by the tribunal under S. 33(2) (b) proviso. If the tribunal does not approve of the action taken by the management, then that action would fail and the workman concerned would be deemed never to have been dismissed or discharged at all and thus it would create an anomalous situation. Therefore, to avoid such an anomaly, a reasonable interpretation has to be placed upon S. 33(2) (b) read with S. 33(5): to wit, the jurisdiction of the tribunal to deal with the application is in no manner affected by the mere fact that it has become functus officio in respect of the main dispute.

The Punjab High Court in *Om Prakash Sharma* v. *Industrial Tribunal*[1] took the same view as that of the Kerala High Court though for a different reason. In this case, Mr. Om Prakash, an employee, was dismissed by the management during the pendency of an industrial dispute before a tribunal. An application was made to the authority for approval of the action taken and, on merits, it refused to grant the approval. The aggrieved party went to the High Court for an appropriate writ. The High Court directed the tribunal to decide the matter afresh in accordance with law. By the time the matter reached the Tribunal, it had become functus officio, hence it refused to proceed with the matter. Again, the management filed a petition in the High Court against the refusal order of the Tribunal.

Justice D. K. Mahajan, after referring to S. 33(1) and S. 33(2), drew a distinction between the disputes arising out of reference and disputes which have nothing to do with the reference. He stated that, after the Tribunal had become functus officio, it had nothing to do with "any matter arising out of or connected with the reference but that will not put an end to an application under S. 33(2), because that application has no connection whatever with the dispute nor does it arise out of that dispute."[2]

1 (1962) 2. L.L.J. 272.

2 *Id.* at 274.

The Orissa High Court has, in a recent case, fallen in the line with the Kerala and Punjab High Courts. In *Bisra Stone Lime Company, Ltd* v. *Industrial Tribunal and another*[1], the management terminated the services of Mr. Das Gupta, one of its employees, for the misconduct of assault, reckless driving, and driving without permission. Since an industrial dispute was already pending before the Tribunal, the management filed an application for the approval of the action taken against Mr. Das Gupta. In the meanwhile, the Tribunal gave the award in the main dispute which became final and enforceable under the relevant provision of law. Thereafter, the Tribunal, on merits, refused to accord approval for the action taken by the management.

In a writ petition before the High Court, the management contended that the Tribunal, at the time of disposal of the approval application, had no jurisdiction to pass the order upon the interlocutory appliction as the award in the main dispute had become enforecable under S. 17-A of the Industrial Disputes Act. But their Lordships rejected the contention by observing that the analogy of interlocutory injunction cannot hold good in view of the express provision of S. 33(2) of the Act. The applicaion for the approval of the action under S. 33(2) has very little to do with the pending matter before the authority concerned. The application is "in respect of a misconduct unconnected with the direct dispute relating to a completely different subject."[2] The High Court held that the Tribunal was justified on merits in refusing to accord the approval for the action taken by the management.

III

APPRAISAL

It can be categorically declared that the views of the Kerala, the Punjab and the Orissa High Courts are more pragmatic and at the same time not totally devoid of judicial logic.

The Mysore High Court in *Shah (T.A.)* v. *State of Mysore*[3] laid emphasis upon the words "authority concerned" in S. 33(5) of the Industrial Disputes Act, who "shall without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit." Their Lordships inferred (hesitatingly) that though there is no express reference in sub-section (5) to the authority before which a proceeding is

1 (1965) 1 L.L.J. 247.

2 Id. at 250.

3 (1964) 1 L.L.J. 237.

pending, the authority concerned implied in sub-section (5) is no other than "the authority before which the proceeding is pending" and the "proceeding" referred to is again no other than the proceeding "in respect of an industrial dispute" referred to in the opening portion of sub-sec.(2).

The Mysore High Court has further reinforced its stand on the analogy of an interlocutory application made during the pendency of a civil suit. Their Lordships have opined that just as an interlocutory application has to be decided before the termination of the suit, the application under S. 33(2) (b) proviso should be disposed of before the termination of the main dispute because such an application had no higher status than that of an interlocutory application in a civil suit. But this proposition is not correct. First, the rigid application of the technical principles of civil law in the administration of labour law may not be conducive to the labour welfare.[1] Second, the proceeding arising out of an application under S. 33(2) (b) proviso is independent in its origin and is not so intimately connected with the main dispute, as the interlocutory application is to the main suit. Unless an interlocutory application is disposed of, the main suit cannot be decided. But the position is totally different in the case of the application arising out of S. 33(2) (b), because the adjudication of the main dispute is not impeded by the nondisposal of the application. Third, the theory that the interlocutory matter should be disposed of before the main dispute ends, does not fit in with other provisions of the Industrial Disputes Act, 1947. S. 33A which is complementary to S. 33 is a definite pointer in this behalf.

> "Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Labour Court Tribunal, National Tribunal, any employee aggrieved by such contravention, may make a complaint in writing in the prescribed manner to such Labour Court, Tribunal or National Tribunal and on receipt of such complaint that Labour Court, Tribunal or National Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply accordingly."

1 In *Guest. Keen, Williams (Private) Ltd. v. Sterling* (P. J.) *and others*, (1959) 2 L.L.J. 405, observed :

> "In dealing with industrial dispute, the application of technical legal principles should as for as is reasonably possible be avoided".

See,also, *Workmen of Balmer Lawrie & Co. Ltd.* v. *Balmer Lawrie & Co. Ltd.* (1964) 1 L.L.J. 380, where Justice Gajendragadakar (as he then was) did not favour the application of res judicata in case of wage determination.

It is significant to note that the complaint under S. 33A is interlocutory in nature and it is not infrequent that after the main dispute has been adjudicated upon, the authority concerned continues to have seisin of the complaint. It is evident from the bare provision itself that the authorities specified in the relevant section "shall adjudicate upon the complaint as if it were a dispute referred to or pending before it." In juxtaposition with the aforesaid provision, the relevant provision of S. 33(5) of the Act reads as follows :

> "The authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit. "

Evidently, under both set of provisions indicated above, the dispute gives rise to a new proceeding before the relevant authority. Under both the provisions, the authority is directed to dispose of the matter irrespective of the fact whether the main dispute is pending before the authority or not. Therefore, it is submitted that just as a complaint under S. 33A which is an interlocutory matter may be decided by the concerned authority even after the termination of the main dispute, so also the application under the proviso to S. 33(2) (b) may be disposed of even after the main dispute has ripened into an enforceable award under S. 17-A of the Industrial Disputes Act. S. 33(5) lacks clarity on account of the unfortunate omission of the key words "that" and "such" which precede the expression "Labour Court, Tribunal or National Tribunal" in S. 33A. There is nothing unreasonable if the above key words are read into the section 33 (5) especially when the context of the situations under both the provisions is the same. Accordingly, the observation of the Mysore High Court to the effect that the contrast between S. 33(5) and S. 33A of the Industrial Disputes Act is so manifest that it is not possible even to argue that the application under the proviso to sub-section (2) (b) of S. 33 is "some kind of independent dispute" which may be adjudicated after the disposal of the main dispute, loses much of its force.

The Madras High Court while unduly emphasising "the pendency of proceeding" failed to take notice of the fact that sub-sec (5) of S. 33 does not expressly prohibit the authority to dispose of an application even beyond the pendency of proceeding. Indeed, there is nothing in S. 33 (2) (b) proviso or S. 33(5) to indicate that there must be a pendency of proceeding when the application for approval is disposed of by the authority concerned. The Orissa High Court's observation is apposite in this context :

> "It is true that, at the time when the application under the proviso to S. 33(2) (b) is to be made, the industrial dispute must be pending. But, it does not necessarily follow that the industrial dispute must still continue to be pending before the disposal of such application."[1]

Instead it—

> "gives an indication that the legislature wanted this application to be taken up irrespective of the fact that the tribunal has become functus officio in respect of the main dispute itself."[2]

What the proviso lays down is that the application has to be made to the "authority before which the proceeding is pending." It just indicates the authority which has to decide an application, rather than impose a time restriction for the disposition of the application.

It is interesting to note that the Madras High Court in *Mettur Industrial Ltd.* v. *Sundaraa Naidu and another*[3] seems to have relied upon the observation of the Supreme Court in *Martin Burn, Ltd.* v. *Banerjee (R.N.)*[4] for arriving at the conclusion that the jurisdiction under S. 33(2) is given to the tribunal only because of the pendency of the main dispute. The relevant observation of the Supreme Court reads :

> "The fifth industrial tribunal, however, became functus officio on the expiry of thirty days from the publication of its award in the dispute which was then pending before it, with the result that the said application could not be disposed of and accordingly struck off."[5]

As rightly interpreted by Vaidialingam, J., of the Kerala High Court in *K. D. Hill Produce Co. Ltd.* v. *Miss Aleyamma Verughese and another*,[6] the above observation of the Supreme Court was made in the course of the statement of facts of the case, while considering an application under S. 33(1) of the 1950 Amendment Act.[7] But the applications for approval in

1 *Bisra Stone Lime Co. Ltd.* v. *Industrial Tribunal and another*, (1965) 1 L.L.J. 247,2 50.

2 *K. D. Hill Produce Co. Ltd., Mannar* v. *Miss Aleyamma Verughese and another*, (1962) 2 L.L.J. 158, 164.

3 (1963) 2 L.L.J. 303.

4 (1958) 1 L.L.J. 247.

5 *Id.* at 250.

6 (1962) 2 L.L.J. 158.

7 S. 33 as amended in 1950 ran as follows :

> "During the pendency of any conciliation proceedings before a Tribunal in respect of any industrial dispute, no employer shall—
> (*a*) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings, or
> (*b*) discharge or punish whether by dismissal or otherwise any workman concerned in such dispute, save with express permission in writing of the Conciliation Officer, Board or Tribunal, as the case may be".

the cases under review are made under S. 33(2) proviso of the 1956-Amendment Act. The Madras High Court seems to have missed this material distinction while reading the Supreme Court decision.

The decisions of these High Courts, in effect, mean that the tribunal would be invested with jurisdiction of frustrating the disposal of the application and thereby rendering the sub-section nugatory. Such a conclusion is untenable in view of the basic canons of interpretation. It is a fundamental rule of interpretation that words used in a statute should not be literally interpreted; the interpretation should be in tune with the intent of a statute which is nonetheless the intent of the legislature. Further, one portion of the statute should not be attributed such a meaning which would render another portion infructuous. The object as indicated by the preamble is "the investigation and settlement of industrial disputes." The Court should, in fact, prefer such a construction (when the expression used by the legislature is quite plastic) which furthers the policy of the Act and is more beneficial to the employee in whose interest the Act has been passed.[1] Indeed, the court should not interpret the section in such a way as to create an impasse in the labour-management relations that would frustrate the very object of the Act. The literal interpretation of the expression "authority concerned" as adopted by these High Courts is not in keeping with the true policy underlying the provisions of the Act.

Perhaps, it can be argued that, once the main dispute has been adjudicated and the award becomes final, logic requires that the tribunal becomes functus officio. But the logic of the pendency should not be pushed to an extent as to deny the authority jurisdiction to decide the application and thereby frustrate the very object of the provision. Though law follows logic in most cases, every rule of law cannot be tested exclusively on the basis of logic. After all, law and logic have to subserve the higher values, namely, the preservation of peace and harmony in the industrial society. Consequently, logic may have to be sacrificed sometimes in order to maintain labour-management relations with minimum friction.

Moreover, the stand taken by the Calcutta, the Mysore, and the Madras High Courts does not provide answer to certain puzzling questions. In case the authority concerned does not decide the application on the ground that it has become functus officio. what will be the fate of the action taken "during the pendency of the dispute ?" Whether the action stands or falls ? If the action stands, whether the employer is liable for the punishment

1 *Alembic Chemical Works Company, Ltd.* v. *Its Workmen*, (1961) 1 L.L.J. 328.

under S. 31[1] of the Industrial Disputes Act, for the action taken during pendency ? Further, whether a complaint under S 33Ā[2] of the Industrial Disputes Act can be filed? In view of the statement of the Supreme Court in *Straw Board Manufacturing Company* v. *Govind*[3] that in case the approval is not affirmed by the authority concerned the action taken during pendency of the proceeding is no action in the eye of law, the following questions arise : Whether the employer should start a domestic enquiry de novo ? Or is he entitled to take further action upon the same enquiry ? Will there be an automatic reinstatement of the discharged or dismissed employee ? Can the tribunal refuse to comply with an order of the High Court under Art. 227[4] or remand orders passed by the appellate tribunals ?[5] These are some of the conundrums that remain unanswered if the decisions of the above High Courts are folllowed.

It is submitted that the jurisdiction of the tribunal should be deemed to be in existance by necessary implication (a sort of suspended animation) so that the purpose of the 1956 Act be served by approving the action taken during the pendency of the dispute before the authority concerned.

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1 S. 31(1) prescribes for the punishment for the contravention of S. 33. which runs as follows :

> "Any employer who contravenes the provisions of Section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both".

2 This can be vividly presented by assuming a situation where an employee has been dismissed during the pendency of a proceeding before an authority concerned and he has been paid one month's wages. Further, the employer has made an application to the authority for approval of the action taken. In the mean time, the main dispute is disposed of and the resulting award has become final. The dismissed employee files a complaint under S. 33-A of the Act as his dismissal has taken place duing pendency of proceeding. Against this, the employer contends that he has done all that he is required to do. This illustration is sufficient to indicate the stalemate that would jeopardize the labour-management relations.

3 (1962) 1 L.L.J. 420.

4 In *Om Prakash Sharma* v. *Industrial Tribunal*, (1962) 2 L.L.J. 272, The Punjab High Court has, in fact, taken notice of this problem : whether the order under Art. 227 of the Constitution directing the authority concerned to proceed with the application under S. 33(2)(*b*) proviso be carried out by the said authority after the award had become final ? Justice Mahajan answered it in affirmative :

> "It was not therefore open to the tribunal in face of that order to say that it had no jurisdication. It was bound to carry out the order of this court passed under Art. 227 of the constitution".

5 *Obeelee, Ltd., Carpet Manufacturers, Mirzapur* v. *Their Workmen*. (1955) 2 L.L.J. 25.

RESEARCH WORK

A. Approved LL.M. Dissertations :

1.	DURGA PRASAD	Community Regulation of Management Prerogative to Terminate the Services of Workmen
2.	RAJNI KANT	Community Prescriptions for the Settlement of Bonus Disputes
3.	SURESH CHANDRA JOSHI	The Constitution is what the Judges say it is.
4.	MAHESHWAR NATH CHATURVEDI	Judicial Delineation of the word "Civil Post" under Article 311(2) of the Indian Constitution
5.	SURESH CHANDRA SRIVASTAVA	Community Regulation of Managements' Economic Instruments of Coercion
6.	N. N. VERMA	Law Relating to Strikes
7.	S. PARASURAMAN	Law Relating to Retrenchment
8.	M. KAMARAJU	Government Intervention under Industrial Disputes Act, 1947.

B. Current Ph.D. Work :

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