HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE
DIVISION BENCH : HON'BLE SHRI JUSTICE S. C. SHARMA &
HON'BLE SHIR JUSTICE VIRENDER SINGH

Miscellaneous Petition No.6311/2019

Avtec Limited

v/s

The State of Madhya Pradesh & One Another

Counsel for the Parties	**:**	Shri J.P. Cama, learned senior counsel along with Ms. Kirti Patwardhan, learned counsel for the petitioner. Shri Piyush Mathur, learned senior counsel along with Shri Shashank Sharma, learned counsel for the respondents.
Whether approved for reporting	**:**	Yes
Law laid down	**:**	1. Employer has a right to retrench the workers by taking shelter of Section 25-N of the ID Act, 1947, in case, does not have financial resources to run the Industry. (Para – 41 to 43) 2. On account of notification dated 26.09.2019, the provisions of MPIR Act have been made applicable to Engineering Industries, and therefore, an application filed after 26.09.2019 under Section 33-A, in respect of proceedings initiated by employer under Section 25-N of the ID Act, is not maintainable. (Para – 44)
Significant paragraph numbers	**:**	36 to 50

O R D E R

(Delivered on this **9th of January, 2020**)

(S.C SHARMA)
J U D G E

(SHAILENDRA SHUKAL)
J U D G E

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Shri Piyush Mathur, learned senior counsel along with Shri Shashank Sharma, learned counsel for the respondent(s).

O R D E R
(Delivered on this 9th day of January, 2020)

Per : S.C. Sharma, J:

The petitioner before this Court is a company registered under the Companies Act, 1956 and has filed this present petition under Article 227 of the Constitution of India being aggrieved by the order dated 22.11.2019 passed by the Industrial Tribunal, Indore in Case No.3/ID/19.

02. The facts of the case reveal that the petitioner / Company has submitted an application under Section 25-N of the Industrial Disputes Act, 1947 (hereinafter after referred as the ID Act) seeking permission from the competent authority for retrenchment of 217 employees and the respondent No.2 / Union submitted an application under Section 33-A of the ID Act alleging that the application preferred by the petitioner / Company amounts to change in

the service conditions and the Industrial Tribunal has passed an order on the stay application staying the proceedings in respect of the application preferred by the petitioner / Company under Section 25-N of the ID Act.

03. The facts, as stated in the miscellaneous petition, further reveal that the respondent / Union raised an industrial dispute regarding fixation of number of employees in a particular department and workload for each machine and as the conciliation proceedings failed, the appropriate Government has forwarded the reference to the Industrial Tribunal.

04. The following reference has been forwarded for adjudication to the Industrial Tribunal vide order dated 12.06.2019 :-

> "क्या आवेदक अध्यक्ष/महामंत्री, एवटेक एवं हिन्दुस्तान मोटर्स श्रमिक संघ, पीथमपुर द्वारा अनावेदक एवटेक लिमिटेड, पीथमपुर स्थित कारखाने में प्रत्येक विभाग की श्रमिक संख्या एवं प्रत्येक मशीन पर कार्यभार एवं श्रमिक संख्या का निर्धारण किये जाने की मांग उचित एवं वैध है? यदि हां तो उसकी क्या योजना होना चाहिए? तथा इस संबंध में अनावेदक एवटेक लिमिटेड पीथमपुर को क्या निर्देश दिये जाने चाहिए?"

05. It has been stated that the respondent / Union submitted the statement of claim, and thereafter, the petitioner / Company raised an objection contending *inter-alia* that fixation of number of employees does not fall under any of the items mentioned in Schedule III of the ID Act.

06. It has also been stated that the petitioner / Company is running under heavy loss and by no stretch of imagination, the Tribunal can decide the number of employees to be kept in the industry or number of

employees to be deployed on a particular machine.

07. It has further been stated that the Industrial Tribunal vide order dated 20.08.2019 has directed the petitioner / Company to file a reply to the reference and while the reference was pending, as the petitioner / Company was facing financial crunch, was not having adequate orders to carry on production activities and the major customers of the petitioner / Company have already stopped from lifting finished goods from the petitioner / Company, the petitioner / Company in the year 2017 had to seek permission for lay off for almost six months in different durations. Copy of one such order in respect of the lay off is also on record dated 11.08.2017.

08. The petitioner / Company has also filed a chart showing sales in respect of last three financial years i.e. 2016 to 2019 and the order in respect of next 12 months also and their contention is that they don't have work in the plant and will require approximately 356 workman only.

09. It has been further contented that the petitioner / Company has, thereafter, hired services of specialized agency M/s Corp Busniess Solutions to find out ways and means to overcome the situation which is resulting in the financial losses to the petitioner / Company and a report was submitted by M/s Corp – Biz Solutions. As per the report, the petitioner / Company does not have any other choice except to reduce the workforce.

10. It has been stated that the petitioner / Company left with no other choice, has submitted an application for retrenchment, keeping in view Section 25-N of the ID Act,

to the Labour Commissioner and the Labour Commissioner has fixed the date of hearing on 26.11.2019.

11. It has been further stated that during the pendency of the application before the Labour Commissioner, the respondent / Union submitted an application / complaint under Section 33-A of the ID Act before the Industrial Tribunal contending *inter-alia* that the application for grant of permission to retrench the workmen is in fact going to change service conditions and no such application can be filed without seeking permission of the Industrial Tribunal. A stay application was also preferred along with the application preferred under Section 33-A of the ID Act. The petitioner / Company immediately submitted an objection in the matter and the Industrial Tribunal by an order dated 22.11.2019 decided the stay application and rejected the objection raised by the petitioner / Company. The Industrial Tribunal has stayed the proceedings before the Labour Commissioner, meaning thereby, the Government has been restrained from passing any order in respect of the application preferred by the petitioner / Company under Section 25-A of the ID Act.

12. Shri J.P. Cama, learned senior counsel along with Ms. Kirti Patwardhan, learned counsel for the petitioner has vehemently argued before this Court that by no stretch of imagination, an Industrial Unit, which is running under heavy financial loss, can be forced to continue with the production activities. He has argued that the it is the employer who has to decide the number of employees to be kept in a Unit and in case, retrenchment has to be done, the

same has to be done keeping in view the statutory provisions as contained under the ID Act. He has also argued that the termination of an employee and retrenchment of an employee, by no stretch of imagination, amounts to change in the service conditions as interpreted by the Tribunal and impugned order of the Tribunal is *per se* illegal and arbitrary.

13. The petitioner has raised various grounds before this Court and it has been contended that the provisions of Madhya Pradesh Industrial Relations Act, 1960 (hereinafter referred as the MPIR Act), which is a State Act, will prevail over the provisions of the ID Act, and therefore, so long as an industrial dispute is pending, the provisions of the MPIR Act will not apply, hence, the observations made by the Industrial Court are illegal, improper and against the settled proposition of law.

14. It has been contended that Chapter V-A, V-B and V-C of the ID Act have been specifically mentioned in Section 110 of the MPIR Act and Section 110 of the MPIR Act provides that except Chapter V-A, V-B and V-C and other provisions with respect of lay off, retrenchment compensation special provisions relating to lay off, retrenchment and closure in certain establishments and unfair labour practices nothing in the ID Act shall apply to any industry to which MPIR Act is applicable.

15. It has been further argued that in light of the aforesaid, as vide notification dated 31.12.1960, the MPIR Act was made applicable to the Engineering Industries and later on vide notification dated 10.10.2005 and vide

notification dated 14.08.2007 in exercise of power conferred under Section 1 (4) of the MPIR Act, it was denotified and again vide notification dated 26.09.2019, the provisions of the MPIR Act were made applicable, and therefore, the view taken by the Tribunal is erroneous.

16. The petitioner's contention is that once the MPIR Act is made applicable, by no stretch of imagination, such an application was maintainable before the Tribunal preferred by workmen under Section 33-A of the ID Act.

17. It has also been stated that as per Schedule 4 appended to ID Act, retrenchment does not fall under the term, change and conditions of service, and therefore, the application preferred under Section 33-A of the ID Act was not tenable. It has also been argued that the Industrial Court does not have the power to stay the proceedings in respect of Section 25-N of the ID Act and the Presiding Officer has transgressed his jurisdiction by staying proceedings in respect of the application preferred by the petitioner under Section 25-N of the ID Act.

18. It has also been argued by the learned senior counsel that the action of the Industrial Tribunal is contrary to the statutory provisions governing the field and the Industrial Tribunal with an oblique and ulterior motive has only decided the stay application. The Industrial Tribunal could have decided the application preferred under Section 33-A of the ID Act finally and no such application was maintainable in a reference which was altogether on a different subject.

19. Learned senior counsel for the petitioner has placed

reliance upon several judgments delivered in the cases of ***Alarsin & Alarsin Marketing Employee Union v/s Alarsin Pharmaceuticals & Alarsin Marketing Private Limited*** *reported in* ***2004 (104) FLR 1069***, ***Robert D'Souza v/s Executive Engineer Sithern Railways & Others*** *reported in* ***1981 (1) SCC 645***, ***Parry & Company Limited v/s P.C. Pal*** *reported in* ***1970 (II) LLJ 492***, ***Workmen of Subong Tea Estate v/s The Outging Management of Subong Tea Estate & Others*** *reported in* ***1964 (I) LLJ 333 SC***, ***Director, Food and Supplie, Punjab & Others v/s Gurmit Singh*** *reported in* ***2007 (5) SCC 727***, ***Rehman Industries Private Limited v/s The State of Uttar Pradesh & Others*** *reported in* ***2016 (12) SCC 420***, ***Tata Iron and Steel Company Limited v/s the State of Jharkhand & Others*** *reported in* ***2014 (1) SCC 536*** and ***Dena Nath & Others v/s National Fertilizers & Others*** *reported in* ***1992 (1) SCC 695*** and a prayer has been made for quashment of the order passed by the Industrial Tribunal dated 22.11.2019 (Annexure-P/11).

20. A reply has been filed on behalf of respondent No.2 / Avtec Evam Hindustan Motors Shramik Sangh and it has been stated that the respondent No.2 / Union has raised a 'Charter of Demand' dated 29.08.2017 demanding fixation of department wise and machine wise strength before the Conciliation Officer, Pithampur, District – Dhar and the conciliation proceeding resulted in failure. The appropriate Government, in exercise of power conferred under Section 10 of the ID Act, has forwarded the reference to the Madhya Pradesh Industrial Tribunal, Indore vide order dated

12.06.2018 and the same has been registered as Case No.09 of 2018 ID Reference.

21. The respondent / Union has further stated that a statement of claim was filed in the matter and the petitioner / Company, as a counter blast, applied for retrenchment of 217 workers before the competent authority taking shelter of Section 25-N of the ID Act.

22. It has further been stated that the respondent No.2, as the permission was being sought to retrench the workers, preferred an application under Section 33-A of the ID Act as the retrenchment amounts to change in service conditions.

23. It has also been stated that object of Section 33 of the ID Act provides the continuance and termination of the pending proceedings in a peaceful atmosphere undisturbed by any cause of friction between the employer and his employees. It has been stated that Section 33 provides for maintenance of *status quo* pending the disposal of the Industrial Dispute between the parties and any action by the employer has to be with prior permission in writing of the Tribunal.

24. It has been further contended that the employer cannot change service conditions and the ban is imposed in terms which are mandatory and Section 31 (1) makes the contravention of the provisions of the statute as offence punishable as prescribed therein. Reliance has also been placed upon the judgments delivered in the cases of ***Punjab National Bank Limited v/s All India Punjab National Bank Employees' Federation & Another*** *reported in* ***AIR 1960 SC 160*** and ***Rajasthan State Road Transport***

Corporation & Another v/s Satya Prakash *reported in* ***2014 (1) MPLJ 530***. The respondent / Union has placed heavy reliance upon Section 33-A of the ID Act.

25. It has been argued that provision in respect of change of service conditions was brought into force by Amending Act of 1956 and prior to the amendment, there was no substantive right available to the workmen for redressal of their grievance against the change in service conditions during the pendency of the Industrial Dispute.

26. It has further been argued that the aforesaid right has been created with a definite object and it is a substantive right created by the statute available to an aggrieved party.

27. It has also been argued that substantive rights, which are available to a party under the statute, will be remained available to him, which were available to him on the date of the suit.

28. Learned counsel has further argued that provisions of MPIR Act are brought into force by the State of Madhya Pradesh w.e.f. 26.09.2019 and the same has got nothing to do with the present case.

29. It has been further argued that under the MPIR Act, Section 110 provides that the provisions of Chapter V-A, V-B and V-C in regard to lay off, retrenchment and closure and special provisions of lay off, retrenchment and closure shall be applicable to the industry governed under the Act.

30. It has been argued that Section 25 (S) provides that certain provisions of Chapter V-A like Sections 25-B, 25-D, 25-FF, 25-G, 25-H and 25-J shall also apply to the industry

governed under Chapter V-B. It has been stated that Section 25 (J) provides overriding effects to the chapter on other inconsistent provisions in any other law and in this way the applicability of MPIR Act in any way does effect the present case at all.

31. It has further been argued that the petitioner / Company has filed the application under Section 25-N of the ID Act with an oblique and ulterior motive to defeat the very basis of Industrial Dispute and pending reference, which has been noticed by the Tribunal while passing the impugned order directing the parties to maintain *status quo* enabling the Tribunal to decide the dispute in peaceful and healthy atmosphere as required under the very voice of the ID Act.

32. It has also been argued that the petitioner / Company has moved an application for grant of permission of retrenchment with an ulterior motive to get immunity from the provisions of Chapter V-B, which are applicable on it for lay off, retrenchment and closure. The provisions of Chapter V-B also mandate involvement of appropriate Government for all such actions.

33. It has also been argued that the Tribunal does have the power for grant of interim relief in appropriate case as held by Hon'ble Supreme Court in the case of Hotel Imperial. It has been argued that the Tribunal has considered all aspects of the case for *prima facie* foundation of the facts and passed a reasonable and balanced order in the facts and circumstances of the present case, which does not require any interference by this Court under the special

writ jurisdiction.

34. It has been further argued that that the Tribunal was well within its jurisdiction in passing the impugned order and there is no case of lack of jurisdiction, exceed of jurisdiction or perversity in the matter. Thus, there is no scope of making out any case under Article 227 of the Constitution of India.

35. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of with the consent of the parties at admission stage itself.

36. The petitioner before this Court, Avtec Limited, is a company registered under the Companies Act, 1956 is aggrieved by the order dated 22.11.2019 passed by the Madhya Pradesh Industrial Tribunal, Indore in Case No.3/ID-19.

37. The undisputed facts of the case reveal that the respondent / Union has raised an industrial dispute regarding fixation of number of employees in a particular department and workload for each machine and as the conciliation proceedings resulted in failure, the appropriate Government, in exercise of power conferred under Section 10 of the ID Act, has forwarded the reference to the Tribunal, which has already been quoted above.

38. During the pendency of the reference, as the petitioner / Company was running in great losses and it does not have work orders, the petitioner / Company has submitted an application under Section 25-N of the ID Act before the competent authority and the respondent No.2 / Union submitted an application under Section 33-A of the

ID Act in the pending reference, alleging that the application preferred by the employer under Section 25-MN of the ID Act amounts to change in conditions of service of the workmen and an application for stay was also preferred before the Industrial Tribunal.

39. Section 33-A of the ID Act reads as under:-

> "33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings.- Where an employer contravenes the provisions of section 33 during the pendency of proceedings [6] before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal], any employee aggrieved by such contravention may, make a camplaint in writing, in the prescribed manner,--
>
> (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in inediating in, and promoting the settlement of, such industrial dispute; and
>
> (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referr ed to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

40. The question before the Industrial Tribunal was whether the application preferred under Section 25-N of the ID Act amounts to change in service conditions or not ? The Industrial Tribunal, after holding that the application preferred by the employer under Section 25-N of the ID Act amounts to change in service conditions of the workmen, has granted interim order restraining the competent

authority from passing any order on an application preferred under Section 25-N of the ID Act.

41. The argument canvassed by Shri J.P. Cama, learned senior counsel in respect of the averment that an industrial unit cannot be forced to continue with the production activities, even though it is running under heavy financial loss, has got a meaning. An employer, who does not have funds to continue with the industry, cannot be forced to continue with an industry and does have a right to file an application under Section 25-N of the ID Act and it is for the competent authority to pass appropriate order in accordance with law. The employer does have a right to retrench the workers subject to the provisions as contained under the ID Act.

42. A Division Bench of this Court in the case of ***Factory Manager, Century Yarn / Denim Divisions of Century Textile & Industry Limited & Another v/s Textile Mazdoor Union, Khargone & Others (M.P. No.2248/2019)*** decided on 25.11.2019 has taken a similar view. Paragraphs – 15 to 19 of the aforesaid judgment reads as under:-

> "**15-** It was also stated that machines became old and they are not functional for the last two years and in spite of the aforesaid fact the Tribunal has directed the petitioners to run the Units. The petitioners have stated that in case they are closing down the Units permanently, they shall be taking action under the law and it has also been stated that they are paying wages regularly to the workmen.
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> **16-** The apex Court in the case of **Excel Wear Vs. Union of India and Others** reported in **(1978) 4 SCC 224** in paragraphs No.26, 27, 30 and 34 has held as under:-
>
> > **"26.** We were asked to read in section 25-o(2) that it will be incumbent for the authority to

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

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

30. In case of fixation of minimum wages the plea of the employer that he has not got the capacity to pay even minimum wages and, therefore, such a restriction on his right to carry on the business is unreasonable has been repeatedly rejected by this Court to wit *U. Unichoy and Ors. v. The State of Kerala* [AIR 1962 SC 12]. But the principle, rather in contrast, illustrates the unreasonableness of the present impugned law. No body has got a right to carry on the business if he cannot pay even the minimum wages to the labour. He must then retire from business. But to tell him to pay and not to retire even if he cannot pay is pushing the matter to an extreme. In some cases of this Court, to wit *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union* [AIR 1957 SC 95] it has been opined that where the industry had been closed and the closure was real and bona fide, there cannot be an industrial

dispute after closure. At page 881 Venkatarama Ayyar J., has said:-

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

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

> If the contention of the appellant is correct, what is there to prevent an employer who intends, for good and commercial reason, to close his business from indulging on a large scale in unfair labour practices, in victimisation and in wrongful dismissals, and escaping the consequences thereof by closing down the industry ? We think that on a true construction of s. 3, the power of the State to make a reference under the section must be determined with reference not to the date on which it is made but to the date on which the right which is the subject-matter of the dispute arises, and that the machinery provided under the Act would be available for working out the rights which had accrued prior to the dissolution of the business.
>
> It would thus be seen that in the matter of giving appropriate and reasonable relief to the labour even after the closure of the business the facts which were in existence prior to it can form the subject matter of an industrial dispute. Even assuming that strictly speaking all such matters cannot be covered in view of the decisions of this Court we could understand a provision of law for remedying these drawbacks. The law may provide to deter the reckless, unfair, unjust or mala fide closures. But it is not for us to suggest in this judgment what should be a just and reasonable method to do so. What we are concerned with at the present juncture is to see whether the law as enacted suffers from any vice of excessive and unreasonable restriction. In our opinion it does

> suffer.
>
> **34.** Mr. Deshmukh's argument that a right to close down a business is a right appurtenant to the ownership of the property and not an integral Art of the right to carry on the business is not correct. We have already said so. The properties are the undertaking and the business assets invested therein. The owner cannot be asked to part with them or destroy them by not permitting him to close down the undertaking. In a given case for his mismanagement of the undertaking resulting in bad relationship with the labour or incurring recurring losses the undertaking may be taken over by the State. That will be affecting the property right with which we are not concerned in this case. It will also be consistent with the object of making India a Socialist State. But not to permit the employer to close down is essentially an interference with his fundamental right to carry on the business.**"**

The apex Court in the aforesaid case has held that an employer is certainly lawfully entitled to closed down a Unit. It has been held that right to carry on any business includes the right to close it down and therefore, the Tribunal has erred in law and facts in issuing *mandamus* in light of the aforesaid judgment.

17- The apex Court in the case of **Naba Krishna Chakrabarty and Others Vs. The Calcutta State Transport Corporation and Others** reported in **1979 SCC OnLine Cal 343** was again dealing with Section 33 of the Industrial Disputes Act, 1947 and in light of the aforesaid judgment it can be safely gathered that the Tribunal has transgressed its jurisdiction by directing the petitioners to run the Units.

18- In the considered opinion of this Court, the Tribunal has certainly erred in law and facts by directing the petitioners to run the Units and to operate the Units. As stated in the writ petition, Units are sick and unviable, the Company has suffered a loss of more than Rs.100 Crores as informed while arguing the matter, salaries have been paid to the workmen and therefore, the order passed by the Tribunal to run the Unit would result in further accumulation of losses and no such *mandamus* could have been issued by the Tribunal keeping in view the peculiar facts and circumstances of the case, specially when the basic agreement i.e. Business Transfer Agreement dated 22/08/2017 is not in existence.

> **19-** In light of the aforesaid, this Court is of the opinion that the order passed by the Tribunal to run the plant and machinery, which is 22 years old and which is lying closed for the last two years, deserves to be quashed and is accordingly quashed. The directions given by the Tribunal in paragraphs No.29 and 39 of the impugned order dated 22/01/2019 are quashed. However, the petitioner Company shall continue to pay the workmen as per the agreement. With the aforesaid, writ petition stands allowed."

Thus, in similar circumstances, this Court has interfered in a case where the Tribunal has directed the industry to run a Unit.

43. In the case of *Alasarin & Alasarin Marketing Employee Union (supra)*, the Bombay High Court in paragraphs-15 to 19 has held as under:-

> "15. In the case of M/s Parry and Co. Ltd. (supra), the Supreme Court considered whether on reorganisation of business by an employer amounted to rationalisation or standardisation. According to the employer in that case, its business in Calcutta was two-fold : (i) as selling agents of certain companies, and (ii) of conducting an engineering workshop. Since the agency business began to decline some workmen were retrenched. Consequently, the Company decided to reorganise its business by giving impetus to its manufacturing activities and relinquishing some of the agencies held by it. As a result of this, there was surplus staff whose services were retrenched. The Apex Court while considering whether the management had the right to reorganise its business, considered that it was well established that it was within the managerial discretion of an employer to organise and arrange its business in the manner he considers best as long as it is done bona tide. If a scheme for reorganisation results in surplusage of employees, the employer cannot be expected to carry the burden of such economic dead weight and retrenchment has to be accepted as inevitable however unfortunate. The Supreme Court while considering this, reproduced the propositions laid down by it in the earlier judgment of Workmen of Subong Tea Estate v. The Outgoing Management of Subong Tea Estate, , as

follows :--

> "(1) that the management can retrench its employees only for proper reasons, which means that it must not be actuated by any motive of victimisation or any unfair labour practice;
>
> (2) that it is for the management to decide the strength of its labour force, for the number of workmen required to carry out efficiently the work in his industrial undertaking must always be left to be determined by the management in its discretion;
>
> (3) if the number of employees exceeded the reasonable and legitimate needs of the undertaking it is open to the management to retrench them;
>
> (4) workmen may become surplus on the ground of rationalisation or economy reasonably or bona tide adopted by the management or on the ground of other industrial or trade reasons, and (5) the right to effect retrenchment cannot normally be challenged but when there is a dispute about the validity of retrenchment the impugned retrenchment must be shown as justified on proper reasons, i.e., that it was not capricious or without rhyme or reason."

Therefore, it is an accepted proposition that workmen may become surplus either on the ground of rationalisation or economy, reasonably or bona fide on the ground of industrial or trade reasons. To accept Mr. Pai's submission that a Section 9A notice was required even in a case when a process has been discontinued would do violence to the section. It is not in every case of retrenchment that a Section 9A notice is required. Retrenchment would normally be effected either on account of reorganisation or rationalisation of the business or because the employer desires to remove the dead weight which he carries. While doing away with such dead weight, it would not necessarily mean that it was on account of rationalisation and, therefore, a Section 9A notice was required.

16. In the case of L. Robert D'Souza v. Executive Engineer, Southern Railway and Anr., 1982 (1) LLJ 330, the Apex Court considered the provisions of Section 9A read with Section 25F of the Act. The Apex Court held that an employer is precluded from effecting a change without giving to the workman

likely to be affected by such change a notice in the prescribed manner of the nature of change proposed to be effected. The Apex Court has observed thus :--

> "It was obligatory upon the employer, who wants to retrench the workmen to give notice as contemplated by Clause (a) of Section 25F. When a workman is retrenched it cannot be said that change in his conditions of service is effected. The conditions of service are set out in Fourth Schedule. No item in Fourth Schedule covers the case of retrenchment. In fact, retrenchment is specifically covered by Item 10 of the Third Schedule. Now, if retrenchment, which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, Section 9A would not be attracted. In order to attract Section 9A the employer must be desirous of effecting a change in conditions of service in respect of any matter specified in Fourth Schedule. If the change proposed does not cover any matter in Fourth Schedule, Section 9A is not attracted and no notice is necessary. (See Workmen, of Sur. Iron and Steel Co. (P) Ltd. v. Sur Iron and Steel Co. (P) Ltd., 1971-I L.L.J. 570, Tata Iron and Steel Company Ltd. v. Workmen, 1975-II L.L.J. 153, and Assam Match Co. Ltd. v. Bijoy Lal Sen, 1973-II L.L.J. 149). Thus, if Section 9A is not attracted, the question of seeking exemption from it in the case of falling under the proviso would hardly arise. Therefore, neither Section 9A nor the proviso is attracted in this case. The basic fallacy in the submission is that notice of change contemplated by Section 9A and notice for a valid retrenchment under Section 25F are two different aspects of notice, one having no co-relation with the other. It is, therefore, futile to urge that even if termination of the service of the petitioner constitutes retrenchment it would nevertheless be valid because the notice contemplated by Section 25F would be dispensed with in view of the provision contained in Section 9A, proviso (b)....."

17. In my view, the action taken by the Company of discontinuation of the Mailing section on account of the increase in printing charges, postage, etc., does not amount to rationalisation and, therefore, a notice under Section 9A was not required.

18. Mr. Pai has also submitted that under Item 11 of the Fourth Schedule, when there is a reduction in the number of persons employed in any occupation or process or department or shift not occasioned by circumstances over which the employer has no control, a Section 9A notice is mandatory. For this item to be attracted, the reduction of the employees must be in an occupation or process or department or shift which continues but the complement of workers is reduced. In the present case, admittedly the entire Mailing section has been closed down. Therefore, Item 11 of the Fourth Schedule of the Act would not be attracted.

19. Mr. Pai has also submitted that there is a breach of Section 33(1) of the Act because the services were terminated despite the continuation of the conciliation proceedings, in the Statement of Claim filed by the petitioner, it is stated that the matter was closed by the Conciliation Officer on 8th April 1987. This being so, the question is whether the action of the Company in terminating the services of the workmen on 22nd April 1987 after the closure of the conciliation proceedings would amount to a breach of Section 33(1). By placing reliance on the judgment in Lokmat (supra), Mr. Pai for the petitioner, submits that the Conciliation Officer does not become functus officio and the proceedings must be considered to be continued till such time as a failure report is submitted by the Conciliation Officer to the State Government. In the present case, there is no evidence on record to demonstrate that the failure report had not been submitted by the Conciliation Officer. In fact, the Company has disputed the contention that the demands were actually admitted in conciliation. According to the Company, the demands were not admitted in conciliation and the proceedings were at a preliminary stage before the Conciliation Officer. If the demands were not admitted in conciliation, then the provisions of Section 33(1) of the Act would not be applicable, the section is very clear that it is during the pendency of conciliation proceedings before a Conciliation Officer that an employer shall not alter to the prejudice of the workmen concerned in the dispute

> the conditions of service applicable to them immediately before commencement of such proceedings. While considering the submission made on behalf of the petitioner regarding Section 33(1), the Labour Court has concluded that there is no breach of Section 33(1). The Labour Court has, therefore, rightly concluded that the workmen were not entitled to any relief except for the three workmen mentioned in the Award. ”

In the aforesaid case also, the Bombay High Court has held that an industry can retrench the workmen subject to provisions as contained under Section 25-F of the ID Act. The learned Single Judge of the Bombay High Court has taken into account the judgment delivered in the case of *L. Robert D'souza (supra)*.

44. The another important aspect of the case is that vide notification dated 26.09.2019 the provisions of MPIR Act, 1960 have been made applicable in respect of the Engineering Industries and once the MPIR Act is made applicable, by no stretch of imagination, such an application preferred by the respondent / Union under Section 33-A of the ID Act in respect of the proceedings initiated by the employer under Section 25-N of the ID Act were maintainable. The Tribunal has erred in law in facts in passing the impugned order and by entertaining the application preferred under Section 33-A of the ID Act.

45. Retrenchment does not fall under the term, change and conditions of service keeping in view Schedule – IV appended to the ID Act, and therefore, the application preferred under Section 33-A of the ID Act was not at all tenable and the Industrial Tribunal has transgressed in jurisdiction by restraining the competent authority from

passing any order on the application preferred under Section 25-N of the ID Act.

46. The reference, which was pending before the Tribunal, is altogether on a different subject. It was in respect of fixation of number of workers on a particular machine and it does not mean that the employer cannot discontinue the services of an employee or cannot terminate the service of an employee subject to the provisions of the ID Act only because the reference was pending.

47. The prescribed procedure, as prescribed under Section 25-N of the ID Act was being followed by the petitioner / Company and in those circumstances, the Tribunal has erred in law and facts in granting stay in respect of the proceedings pending under Section 25-N of the ID Act.

48. This Court has carefully gone through the judgment delivered in the case of *Punjab National Bank Limited (supra)*. It is true that in the aforesaid case, the scope of Section 33, its contravention has been dealt with. In the aforesaid case, it has been held that the object of Section 33 of the ID Act is to provide for the continuance and termination of the pending proceedings in a peaceful atmosphere undisturbed by any causes of the friction between the employer and its employees. In the aforesaid case, the issue of grant of retrenchment permission, keeping in view Section 25-N of the ID Act, was not at all involved, and therefore, the judgment is distinguishable on facts.

49. In the case of *Rajasthan State Road Transport Corporation & Another (supra)*, Section 33-A (b) has been

dealt with, however, again in the aforesaid case also, the issue in respect of grant of permission to retrench the employees, keeping in view the Section 25-N of the ID Act, was again not involved, and therefore, the aforesaid case also does not help the respondent No.2 / Union in any manner.

50. In the considered opinion of this Court, the impugned order passed by the Tribunal is bad in law. The application preferred under Section 33-A, keeping in view the terms of reference, could not have been entertained in the manner and method it has been done by the Tribunal in the present case, ignoring the statutory provisions as contained under the ID Act and MPIR Act, and therefore, the impugned order dated 22.11.2019 deserves to be quashed and is accordingly, quashed.

With the aforesaid, the present Miscellaneous Petition stands allowed.

Certified copy, as per rules.

(S.C. SHARMA)
J U D G E

(SHAILENDRA SHUKLA)
J U D G E

Ravi