2023:BHC-AS:37570

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.1164 OF 2022

Global Health Care Products ...Petitioner
vs.
Krantikari Kamgar Union ...Respondent

Mr. Sudhir Talsania, Senior Advocate i/b. Mr. Rahul Herlekar, for the Petitioner.
Mr. Sanjay Singhvi, Senior Advocate i/b. Ms. Rohini Thyagarajan, for the Respondent.

CORAM : N. J. JAMADAR, J.
RESERVED ON : JULY 4, 2023
PRONOUNCED ON : DECEMBER 13, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the stage of admission.

2. This petition under Article 226 and 227 of the Constitution of India assails the legality, propriety and correctness of an award dated 30th November, 2019 passed by the Presiding Officer, Industrial Tribunal, Dadara and Nagar Haveli at Silvassa in I.D.R. No. 1 of 2010 whereby the learned Presiding Officer, Industrial Tribunal was persuaded to declare that action of the petitioner in closing down its industrial establishment/ factory at Dapada was illegal, direct the petitioner to give re-employment to all the

retrenched workmen employed at the time of illegal closure of the industrial establishment, except 14 employees who had settled their claims with the petitioner and were shown circled in red ink in Annexure A to the order of Reference, and to give all the benefits admissible under the law for the time being in force including backwages till re-employment to all the employees (except aforesaid 14 employees) to which they would have been entitled to as if the undertaking had not been closed down, and future wages regularly from the date they were actually allowed to resume the work in terms of the said award.

3. Shorn of unnecessary details, the background facts leading to this petition can be stated as under:-

3.1 The petitioner is a registered partnership firm. It was engaged in the activity of manufacturing of toothpaste in its factory at Dapada, Union Territory of Dadra and Nagar Haveli. The respondent is a trade union representing the workmen employed at the petitioner's factory. In the month of August, 2009 the petitioner was allegedly constrained to suspend the manufacturing activity for lack of work orders from Hindustan Unilever. The petitioner thus issued a notice of closure dated 12th September, 2009, pursuant to which the services of all workmen in the petitioner's industrial

establishment were to terminate from 12th October, 2009.

3.2 The petitioner claims workmen were offered closure compensation at the time of termination of their services. Since the petitioner had then engaged less than 100 workmen on an average per working day in the preceding 12 months, the provisions of Chapter V-B of the Industrial Disputes Act, 1947 (ID Act, 1947) were not attracted. Appreciating the genuine constraints, the petitioner's claims, most of the workmen settled their claims with the petitioner. However, 34 employees raised an industrial dispute vide application dated 5th October, 2009 complaining that the petitioner had effected closure of its industrial establishment w.e.f. 12th October, 2009 in breach of statutory provisions and without payment of their legal dues.

3.3 The Labour Enforcement Officer entered into a conciliation proceeding. As the conciliation proceeding did not succeed, the Labour Commissioner, Dadra and Nagar Haveli, Silvassa in exercise of the powers conferred by section 10(1)(d) of the ID Act, 1947 referred the following industrial dispute to the Industrial Tribunal at Silvassa for adjudication.

DISPUTE

Whether the action of the Management of M/s. Global Health Care, Dapada in allegedly closing down its undertaking without observing the provisions of the Industrial Disputes Act, 1947 and subsequently refusing to concede the demands of workers, who have

> not accepted dues in full, or reinstatement with full backwages and dues of Rs. 2 lakhs each for every completed year of service in lieu of reinstatement as per details contained in Annexure A is legal and justified ?
>
> If not, to what relief the workmen are entitled ?
>
> Encl: Annexure 'A'.

3.4 It would be contextually relevant to note that Annexure A contained a list of 34 employees i.e. 25 workmen, 8 supervisors and 1 office boy.

3.5 The respondent/union filed its statement of claim on 14th September, 2011. The petitioner resisted the claim of the respondent by filing its written statement. In the meanwhile, while the Reference awaited adjudication, somewhere in the 2013, the petitioner re-commenced its manufacturing activities. The petitioner claimed that it had sent letters to the terminated employees offering them fresh employment in its industrial establishment.

3.6 In the wake of the aforesaid development, the respondent made a representation on 28th June, 2017 to the Labour Commissioner to the effect that the petitioner had started the manufacturing activity at the industrial establishment by employing a fresh set of workmen. The respondent thus sought issuance of Corrigendum to the earlier Reference dated 3rd July, 2010. Eventually, pursuant to an order dated 5th September, 2019

passed by this Court in Writ Petition No. 1570 of 2018, the Labour Commissioner vide Corrigendum dated 9th October, 2019 added the following dispute for adjudication.

> "Whether M/s.Global Health Care Products has restarted manufacturing activities in the undertaking in which the workmen concerned with the Reference was employed ?
>
> If so, whether the workmen concerned with the Reference should have been given an opportunity to the workmen whose services were terminated on the closure to offer themselves for re-employment have preference over other persons ?
>
> If so, to what reliefs are the workmen entitled ? "

3.7 The learned Presiding Officer, Industrial Tribunal recorded the evidence of the respondent/second party and the petitioner /first party. After appraisal of the pleadings, the evidence adduced, documents tendered for its perusal and the submissions canvassed on behalf of the parties, the learned Presiding Officer, Industrial Tribunal was persuaded to pass the award as indicated above.

3.8 The learned Presiding Officer, Industrial Tribunal held, inter alia, that the closure of the petitioner's establishment was not in conformity with the provisions of law. The petitioner/first party had employed 100 or more workers on an average during 12 months preceding its closure. Closure was thus in breach of the provisions under section 25-O of the ID Act, 1947 and even otherwise the said closure was in breach of the provisions under

section 25-FFA of the ID Act, 1947.

3.9 As regards the additional question referred for adjudication, vide Corrigendum dated 9th October, 2019, the learned Presiding Officer, Industrial Tribunal was of the view that indisputably the petitioner had started manufacturing activities in the industrial establishment in which the workmen concerned in the Reference were employed and that it was incumbent upon the petitioner to give an opportunity for re-employment to them in preference and no such opportunity was given. Resultantly, the Tribunal passed the impugned award.

4. Being aggrieved by and dissatisfied with the impugned award the petitioner/employer has invoked the writ jurisdiction.

5. The principal grounds of challenge are that the Tribunal exceeded its jurisdiction in travelling beyond the terms of Reference and granting relief to those workmen who had already settled their claims with the petitioner and in respect of whom no Reference was made. In the face of the Reference of the dispute, restricted to 34 employees, named in Annexure A, the impugned award directing the petitioner to re-employ all the retrenched workmen (except 14 employees) and allow them backwages and

other benefits, is without jurisdiction. The Tribunal could not have *suo moto* and unilaterally expanded the scope of the industrial Reference. It was further contended that the provisions contained in section 25-O, 25-FFA and 25-H of the ID Act, 1947 were not at all attracted in the facts of the case.

6. At this juncture, it may be necessary to note that in an order dated 7th February, 2022 passed by this Court, it was recorded that the petitioner was willing to employ 20 workmen named in the order of Reference. In that context the petitioner filed additional affidavit asserting that 14 of those 20 workmen joined the duty and after working for few days all of them either resigned or stopped attending the work without intimation. The respondent filed an affidavit in reply controverting the averments in the additional affidavit. I will advert to the controversy on this aspect after evaluating the legality, propriety and correctness of the impugned award.

7. I have heard Mr. Sudhir Talsania, learned senior Advocate, for the petitioner and Mr. Sanjay Singhvi, learned senior Advocate for the respondent at some length. With the assistance of the learned counsel for the parties, I have perused the pleadings,

evidence and material on record.

8. Mr. Talsania assailed the impugned award primarily on two grounds. First, the Tribunal clearly exceeded its jurisdiction in granting relief to the workmen, beyond the 34 workmen. Neither those workmen had raised any industrial dispute, nor was it the case of the respondent/ union that it was espousing the cause of those workmen as well. Mr. Talsania, strenuously submitted that the Tribunal being a creature of the statute was required to adjudicate the Reference within the bounds of its terms. The adjudication by the Tribunal of the matters which were not at all referred to the Tribunal, rendered the impugned award without jurisdiction. To bolster up this submission Mr. Talsania placed a very strong reliance on the decision of the Supreme Court in the case of **Tata Iron and Steel Company Ltd. vs. State of Jharkhand and Ors.**[1].

9. Mr. Talsania further urged that the learned Presiding Officer, Industrial Tribunal also erred in awarding full backwages to all the workmen. Mr. Talsania would urge, it is well recognized that the onus lay on the workmen to plead and prove that they were not gainfully employed. In the absence of any pleading or evidence to

1 (2014) 1 Supreme Court Cases 536.

the effect that the workmen were not gainfully employed, the learned Presiding Officer was not at all justified in awarding full backwages. It was urged that the provisions contained in section 25-O and 25-FFA were completely misconstrued by the Tribunal.

10. Attention of the Court was invited to the additional affidavit to show that the employer had furnished details of the entities where the workmen were working. To this end, Mr. Talsania placed a strong reliance on the decisions of the Supreme Court in the cases of **Allahabad Jal Sansthan vs. Daya Shankar Rai and Anr.**[2] and **U.P. State Brassware Corpn. Ltd. And Anr. vs. Uday Narain Pandey**[3].

11. As against this, Mr. Singhvi, would urge that the impugned award is perfectly legal and justified. The submission that the award exceeds the mandate of the Reference is wholly misconceived. The dispute, as referred by the appropriate Government, according to Mr. Singhvi, was in two parts. First, whether the action of closure was in breach of the provisions of ID Act, 1947 and, second, the relief to which the workers were entitled to, in the event of declaration that the closure was illegal. Laying emphasis on the provisions contained in section 18(3) of the ID Act, 1947, Mr.

2 (2000) 5 Supreme Court Cases 124.
3 (2006) 1 Supreme Court Cases, 479.

Singhvi urged with tenacity that the award made by the Tribunal is binding on all the parties to the industrial dispute and since the workmen were a party to the dispute it binds all the persons who were employed in the establishment at the time of closure.

12. Mr. Singhvi, further submitted that though the respondent-union represents 34 workmen, yet the award must bind all the employees of the petitioner establishment as the crucial question was whether the closure of the industrial establishment was in conformity with law. Once, the said question is answered in the affirmative, the consequential benefits must be made available to all the workmen. Inviting the attention of the Court to the provisions contained in section 25-O(6) and 25-N(7), Mr. Singhvi would urge that all the workmen would be entitled to all the benefits once the closure is declared to be illegal.

13. Amplifying the submission, Mr. Singhvi would urge that the closure of industrial establishment in breach of the mandate of law has consequences in law as envisaged in section 25-O(6) and 25-N(7). Therefore, according to Mr. Singhvi, it was not incumbent upon the workmen to plead and prove that they were gainfully employed. An illegal closure must be followed by reinstatement with

all consequential benefits as mandated by law.

14. Mr. Singhvi further urged that the claim of the petitioner that it had arrived at settlement with the workmen is of no avail where the closure was found to be illegal. It was submitted that any settlement has to be in conformity with the provisions of law. Since the closure was found to be illegal, it was not open for the employer to settle the dispute with the workmen in derogation of statutory mandate under section 25-N and 25O of the ID Act, 1947. A strong reliance was placed on the decision of the Supreme Court in the case of **Oswal Agro Furane Limited and Anr. vs. Oswal Agro Furane Workers Union and Ors.**[4]

15. In the said case, it was enunciated that a settlement can be arrived at between the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regards the validity of a retrenchment or closure or otherwise. Such settlement, however, as regards the retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law.

16. Mr. Talsania joined the issue by canvassing a submission

4 (2005) 3 Supreme Court Cases 224.

that for applicability of provisions contained in section 18(3) of the ID Act, 1947, an industrial dispute has to be raised. A person who was not party to industrial dispute can not be granted the benefit of the award. Mr. Talsania further submitted that the principles which govern the award of backwages in case of illegal termination or retrenchment, with regard to the gainful employment of the employee in the intervening period, apply with equal force to a case of closure.

17. To begin with, it may be noted that there is not much controversy over the fact that the petitioner gave a notice of closure on 12th September, 2009 to inform all the employees that the manufacturing activity was stopped on account of no work order / future business commitment and, therefore, all employees on roll would get retrenched after the expiry of the notice i.e. from 12th October, 2009. Nor there is much dispute over the fact that somewhere in the year 2013 the petitioner re-started the manufacturing activity at the very same industrial establishment. The moot question that crops up for consideration is, whether the closure of the industrial establishment was in conformity with the provisions of law ?

18. Chapter V-A of the ID Act, 1947 makes a fasciculus of provisions under the caption “Lay-Off and Retrenchment”. Chapter V-B provides for “Special Provisions Relating to Lay-Off, Retrenchment and Closure in Certain Establishments”. Chapter V-B, as envisaged by section 25-K, applies to an industrial establishment in which not less than 100 workmen were employed on an average per work day for the preceding 12 months.

19. Section 25-O, in Chapter V-B, delineates a procedure for closing down an undertaking. It, inter alia, provides that the employer who intends to close down an undertaking shall apply for prior permission, at least 90 days before the date of intended closure, to the appropriate government. In the context of the controversy at hand, it may not be necessary to deal with other provisions of section 25-O except sub section (6). Sub section (6) of section 25-O declares that where no application for permission under sub-section (1) or sub-section (2) is made within the period specified therein, or where the permission for closure has been refused, the closure of undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

20. It would be contextually relevant to note that section 25-N, under Chapter V-B, incorporates conditions precedent to retrenchment of workmen in an industrial establishment to which the said Chapter applies. It proscribes retrenchment of a workmen without following the mandate contained therein. For valid retrenchment, the workman has to be given three months notice in writing, indicating the reasons for retrenchment and either the period of notice expire or the workman has been paid wages for the period of notice, and the prior permission of the appropriate Government or specified authority has to be obtained on an application made in this behalf. Sub section (7) of Section 25-N, in turn, provides where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

21. In the instant case, it would be sufficient to note, it was not the case of the petitioner/employer that it had applied for, much less obtained, permission of the appropriate government for

closure, as envisaged by section 25-O, or for that matter of the appropriate government or specified authorities, under section 25-N for retrenchment of the workmen.

22. A dispute was, however, sought to be raised before the Industrial Tribunal that the provisions of Chapter V-B had no application as there were less than 100 employees. The learned Presiding Officer, Industrial Tribunal on an analysis of the evidence and, in my view rightly, repelled the said contention. In any event, the said controversy need not detain the Court as, even if the petitioner's establishment was assumed to be covered by Chapter V-A of the ID Act, 1947, as it indisputably had more than 50 workmen employed at the time of the closure, there was a clear non-compliance of the mandate contained in section 25-FFA of the ID Act, 1947 which enjoins that an employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking. Section 25-FFF further provides that where an undertaking is closed down for any reason whatsoever, every workmen 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 25-F, as if the workman had been retrenched.

23. The learned Presiding Officer, Industrial Court has recorded a finding of fact, which cannot be said to be perverse, by any stretch of imagination. Even if it is assumed that the provisions of Chapter V-B did not govern the case at hand yet, there is a clear non-compliance of the mandate of section 25-FFA and 25-FFF. I am, therefore, not inclined to delve more into the legality of the closure, which has been firmly and conclusively decided against the petitioner.

24. It would be suffice to refer to the judgment of the Supreme Court in the case of **Oswal Agro Furane Limited** (supra) where the imperativeness of strict compliance of the procedure and mandate contained in section 25-O and 25-N was underscored. In the said case, the Supreme Court was confronted with the question as to whether in a case of closure of an industrial undertaking, prior permission of the appropriate Government is imperative and whether a settlement arrived at by and between the employer and the workmen would prevail over the statutory requirements as

contained in section 25-N and section 25-O of the Industrial Disputes Act, 1947.

25. Answering the question in the negative the Supreme Court enunciated the law as under:-

> 14] A bare perusal of the provisions contained in Sections 25-N and 25-O of the Act leaves no manner of doubt that the employer who intends to close down the undertaking and/or effect retrenchment of workmen working in such industrial establishment, is bound to apply for prior permission at least ninety days before the date on which the intended closure is to take place. They constitute conditions precedent for effecting a valid closure, whereas the provisions of Section 25-N of the Act provides for conditions precedent to retrenchment; Section 25-O speaks of procedure for closing down an undertaking. Obtaining a prior permission from the appropriate Government, thus, must be held to be imperative in character.
>
> 15] A settlement within the meaning of Section 2(p) read with sub-section (3) of Section 18 of the Act undoubtedly binds the workmen but the question which would arise is, would it mean that thereby the provisions contained in Sections 25-N and 25-O are not required to be complied with? The answer to the said question must be rendered in the negative. A settlement can be arrived at between the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regard the validity of a retrenchment or a closure or otherwise. Such a settlement, however, as regard retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. Requirements of issuance of a notice in terms of Sections 25-N and 25-O, as the case may, and/or a decision thereupon by the appropriate Government are clearly suggestive of the fact that thereby a public policy has been laid down. The State Government before granting or refusing such permission is not only required to comply with the principles of natural justice by giving an opportunity of hearing both to the

employer and the workmen but also is required to assign reasons in support thereof and is also required to pass an order having regard to the several factors laid down therein. One of the factors besides others which is required to be taken into consideration by the appropriate Government before grant or refusal of such permission is the interest of the workmen. The aforementioned provisions being imperative in character would prevail over the right of the parties to arrive at a settlement. Such a settlement must conform to the statutory conditions laying down a public policy. A contract which may otherwise be valid, however, must satisfy the tests of public policy not only in terms of the aforementioned provisions but also in terms of Section 23 of the Indian Contract Act.

16] It is trite that having regard to the maxim "ex turpi causa non oritur actio", an agreement which opposes public policy as laid down in terms of Sections 25-N and 25-O of the Act would be void and of no effect. The Parliament has acknowledged the governing factors of such public policy. Furthermore, the imperative character of the statutory requirements would also be borne out from the fact that in terms of sub-section (7) of Section 25- N and sub-section (6) of Section 25-O, a legal fiction has been created. The effect of such a legal fiction is now well-known. [See East End Dwellings Co. Ltd. V. Finsbury Borough Council [(1951) 2 All ER 587, Om Hemrajani vs. State of U.P. and Another (2005) 1 SCC 617 and M/s Maruti Udyog Ltd. vs. Ram Lal & Ors. 2005 (1) Scale 585].

17] The consequences flowing from such a mandatory requirements as contained in Sections 25-N and 25-O must, therefore, be given full effect. The decision of this Court in P. Virudhachalam (supra) relied upon by Mr. Puri does not advance the case of the Appellant herein. In that case, this Court was concerned with a settlement arrived at in terms of Section 25-C of the Act. The validity of such a settlement was upheld in view of the first proviso to Section 25-C of the Act. Having regard to the provisions contained in the first proviso appended to Section 25-C of the Act, this Court observed that Section 25-J thereof would not come in the way of giving effect to such settlement. However, the provisions contained in Sections 25- N

> and 25-O do not contain any such provision in terms whereof the employer and employees can arrive at a settlement.

26. This takes me to the main plank of challenge to the impugned award. Plainly, the submission of the petitioner was that the industrial dispute referred for adjudication to the Tribunal should have been confined to 34 workmen. The Tribunal could not have granted relief to workmen beyond those named in the Reference.

27. Undoubtedly, the industrial Tribunal is a creature of the statute. Section 10(1) empowers the appropriate government to refer the industrial dispute for adjudication where it is of opinion that any industrial dispute exists or is apprehended. The existence of an industrial dispute is thus a *sine qua non* for reference and the consequent adjudication. The Court or Tribunal to which the dispute is referred thus derives its authority under the provisions of the ID Act, 1947 to adjudicate the specific dispute referred to it. Ordinarily, it is not open to the Court or Tribunal to travel beyond the terms of the Reference.

28. In the case of **Tata Iron and Steel Company Ltd.** (supra), on which reliance was placed by Mr. Talsania, the Supreme Court enunciated the law as under :-

> 16] The Industrial Tribunal/ Labour Court constituted under the Industrial Disputes Act is a creature of that statute. It acquires jurisdiction on the basis of reference made to it. The Tribunal has to confine itself within the scope of the subject matter of reference and cannot travel beyond the same. This is the view taken by this Court in number of cases including in the case of National Engineering Industries Limited v. State of Rajasthan & Ors. 2000 (1) SCC 371. It is for this reason that it becomes the bounden duty of the appropriate Government to make the reference appropriately which is reflective of the real/ exact nature of "dispute" between the parties.

29. It would be contextually relevant to note that, under section 10(4) of the ID Act, 1947 there is a statutory mandate that where the industrial dispute is referred to the Court or Tribunal and the appropriate government has specified the points of dispute for adjudication, the Court or Tribunal shall confine its adjudication to those points and matters incidental thereto.

30. In the case of **Delhi Cloth and General Mills Co. Ltd. vs. The Workmen and Others**[5], the Supreme Court after adverting to the provisions contained in section 10(1)(d) and section 10(4), enunciated the law as under:-

> 20] From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute

5 AIR 1967 SC 469

> referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary:
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> "happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated:"
>
> 21] "Something incidental to a dispute" must therefore mean something happening as a result of or; in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct.

31. In the case of **State Bank of Bikaner and Jaipur vs. Om Prakash Sharma**[6] the Supreme Court enunciated that as the jurisdiction of the Court emanated from the order of Reference, it could not have passed the award beyond the terms of the Reference and if the Court passed the award exceeding its jurisdiction, such award must be held to be suffering from jurisdictional error. The observations in paragraphs 8 and 14 are material and hence extracted below:-

> 8] The Industrial Court, it is well settled, derives its jurisdiction from the reference. {See Mukand Ltd. vs. Mukand Staff & Officers' Association, [(2004) 10 SCC 460].} The reference made to the CGIT specifically refers to only one question, i.e., "Whether any illegality was committed by the management in giving appointment to one Vijay Kumar in place of the respondent in violation of Section 25H of ID Act, 1947?" Non-maintenance of any register in terms of Rule 77 of the ID Rules was, thus, not in issue. Before the Industrial Court, the parties adduced evidence. An

6 (2006) 5 Supreme Court Cases123.

> attempt was made by the respondent herein to show that one Vijay Singh was appointed, although the name of one Vijay Kumar appeared in the reference. An attempt was also made by the respondent to show that Vijay Kumar and Vijay Singh are one and the same person. In fact, one voucher was produced which was allegedly issued in the name of one Vijay Sharma. The said contentions of the respondent were denied and disputed by the appellant herein.
> ....
> 14] In the instant case, the Award of the Labour Court suffers from an illegality, which appears on the face of the record. The jurisdiction of the Labour Court emanated from the order of the reference. It could not have passed an order going beyond the terms of the reference. While passing the Award, if the Labour Court exceeds its jurisdiction, the Award must be held to be suffering from a jurisdictional error. It was capable of being corrected by the High Court in exercise of its power of judicial review. The High Court, therefore, clearly fell in error in refusing to exercise its jurisdiction. The Award and the judgment of the High Court, therefore, cannot be sustained. Consequently, the appeal is allowed and the judgment of the High Court is set aside. The award is set aside to the extent of order of reinstatement with backwages. The writ petition filed by the appellant in the High Court is, thus, allowed.

32. The legal position in the light of the statutory prescription under section 10 of the ID Act, 1947 has crystallized to the effect that the Court or Tribunal is a creature of the statute, it draws the authority to adjudicate an industrial dispute under section 10(1) from the Reference made by the appropriate government and is statutorily enjoined to confine its adjudication to the points of dispute specified by the appropriate government and matters incidental thereto and it is not open to the Court or Tribunal to

venture into the dispute which has not been referred to it for adjudication.

33. In the case at hand, the learned Presiding Officer, Industrial Tribunal was of the view that the Reference of the dispute by the Labour Commissioner was, in a sense, inarticulate. The Labour Commissioner had clubbed several disputes in one sentence by employing conjunction. The original dispute referred by the Labour Commissioner was sub-divided by the Tribunal as under:-

> 50] The referred dispute by the LEO for adjudication to this tribunal in the order of first reference dated 03.07.2010 in brake up will be as under:-
>
> 1} Whether the action of Management of M/s. Global Health Care Products, Dapada, in alleged closing down its undertaking without observing provisions of the Industrial Disputed Act, 1947 is legal and justified ?
>
> 2} Whether the action of Management of M/s. Global Health Care Products, Dapada, in subsequently refusing to concede the demands of workers, who have not accepted the dues in full and final settlement for reinstatement with full wages is legal and justified ?
>
> 3} Whether the action of Management of M/s. Global Health Care Products, Dapada, in refusing to concede the demand of workers who have not accepted dues of Rs. 2 lacs each for every completed year of service in lieu of reinstatement as per details contained in Annexure -A is legal and justified ?
>
> If not, to what relief the workmen are entitled ?

34. Mr. Talsania, learned senior Advocate for the petitioner urged

that the aforesaid observations and trifurcation of the dispute amounts to amending the Reference which the Industrial Tribunal is not empowered to do in law. Attention of the Court was also invited to the stand of the respondent as manifested in rejoinder before the Labour Enforcement Officer that it reckoned that the Reference IDR No.1 of 2010 and the Corrigendum application were being prosecuted only on behalf of 20 workmen who are named in the Reference and not on behalf of the workmen who had settled their claims directly with the company and whose names had already been deleted from the Reference.

35. The learned Presiding Officer, Labour Court was of the view that the consequences of the non-compliance of the mandate contained in Chapter V-B or for that matter V-A of the ID Act, 1947 were statutorily prescribed. Therefore, once a declaration was made that the closure was illegal, all the workmen who were on the roll of the employer on the date of the closure were entitled to the benefits which emanated from the statutory provisions. At the same time, where the petitioner succeeded in establishing that 14 out of 34 workmen had settled their claims with the petitioner, the learned Presiding Officer excluded those 14 persons from the benefits to which the workmen were entitled to.

36. On a careful consideration, I find that the learned Presiding Officer, Industrial Tribunal was not justified in returning a finding that notwithstanding the industrial dispute having been referred with regard to 34 workmen, the declaration that the closure was illegal entailed the result that all the employees who were on the roll of the petitioner were entitled to the benefits under the award.

37. I am not inclined to accede to the broad submission on behalf of the petitioner that the sub-division of the dispute by the learned Presiding Officer, Industrial Tribunal, as extracted above, constitutes an amendment of the Reference. The appropriate Government is enjoined to frame the industrial dispute in clear and unambiguous terms so as to spell out the real dispute between the parties. Where the Reference is clumsy and not happily worded, if the industrial adjudicator is able to cull out the real dispute between the parties, a mere inarticulate Reference cannot be pressed into service to urge that the adjudication is beyond the terms of the Reference.

38. In the case at hand, in the context of the aforesaid trifurcation of the dispute, indisputably the third point revolving around the demand of dues of Rs. 2 lakhs each, was not pressed by the

workmen. The first point framed by the learned Member, Industrial Tribunal pertained to legality of the closure. While deciding the second point of dispute, the learned Presiding Officer seems to have lost sight of the fact that the said point was couched to the effect: whether the action of the employer in refusing to concede the demands of the workers who have not accepted dues in full and final settlement for reinstatement with full wages, was legal and justified. It was implicit in the second point, formulated by the Tribunal, that the legality of the action of the employer was to be judged qua the workmen who had not accepted the dues in full and final settlement.

39. It would be contextually relevant to note that in the conciliation proceeding also, the parties were *ad idem* that the dispute was restricted to 34 named workmen. In the Reference order the Labour Commissioner observed, inter alia, as under:-

> And whereas the list of 34 workers/ supervisors who are claimed to have not received dues in full and final settlement was shown to the workers present to verify it to ensure that none of the workmen is left out. The workmen present confirmed that 34 workers / supervisors / office boy have not accepted dues in full and final settlement.

40. To add to this, it was not the stand of the respondent- Union that it was espousing the cause of the rest of the workmen.

41. The submission of Mr. Singhvi that an award made by the Tribunal, binds all the persons who were employed in the establishment to which the dispute relates on the date of the dispute under section 18(3)(a) and (d), at the first blush, appears alluring. However, on a close scrutiny the proposition does not appear to be free from infirmities. Clause (d) of sub section (3) of section 18 has to be read with clause (a). It pre-supposes the existence of an industrial dispute. If the party chooses to settle the matter and not raise the dispute, the adjudication of the dispute cannot be in the abstract. However, where such party, who had entered into the settlement, raises a ground that the settlement is not legal and binding, different considerations come into play. In the absence of such stand, the adjudicator would be entering into an arena of resolution of a non-existent or uncertain or hypothetical dispute. In any event, such workmen may resort to the provisions contained section 33-C of the ID Act, 1947 and in that event the parties would have opportunity to assert or contest the legal entitlement of such workmen.

42. It is also a settled law that if the workman had settled their claim and derived benefit thereunder, they must bring back the benefit which they had derived under the settlement, if they intend

to challenge its legality and validity.

43. For the foregoing reasons, I am impelled to hold that the learned Presiding Officer, Industrial Court was not justified in passing the impugned award conferring benefit on the workmen beyond those included in Annexure A appended to the Reference. To this extent, the impugned order warrants interference.

44. This leads me to the second submission on behalf of the petitioner. It was urged that the workmen had not pleaded and proved that they were not gainfully employed during the intervening period since the closure. Mr. Talsania would urge that the factors which govern the award of backwages are well recognized. The initial onus to establish that the workman was not gainfully employed is on the workman. The grant of backwages is not automatic. The learned Presiding Officer has not adverted to this aspect of the matter, urged Mr. Talsania.

45. In the case of **Allahabad Jal Sansthan** (supra), the question before Supreme Court was, whether the respondent, who was appointed on a purely temporary basis and subsequently terminated by the State, was entitled to be granted full backwages,

in the facts and circumstances of the said case. A two judge Bench of Supreme Court after adverting to a number of pronouncements of the Supreme Court enunciated that, earlier reinstatement with full backwages was the norm but with passage of time a more pragmatic approach was required to be adopted in the matter of grant of backwages. Supreme Court observed, inter alia, as under :-

> 16] We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full backwages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.
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> 17] In view of the fact that the Respondent had been reinstated in service and keeping in view the fact that he had not raised any plea or adduced any evidence to the effect that he was remained unemployed throughout from 24.1.1987 to 27.2.2001, we are of the opinion that the interest of justice would be sub-served if the Respondent is directed to be paid 50% of the backwages.

46. Mr. Singhvi, learned counsel countered the submissions on behalf of the petitioner. It was urged that where the question is of award of backwages after setting aside an order of termination different consideration come into play, in contrast to a case where the undertaking has been closed in breach of the statutory

requirements. In a case of an illegal closure, the consequences are statutorily prescribed. In such eventuality it is not incumbent upon the workmen to plead and prove that they were not gainfully employed.

47. It is well recognized that where the question is of award of backwages, by setting aside the order of termination, the plea for backwages is really a motion addressed to the discretion of the Court. Indisputably, such discretion is required to be exercised in a judicious manner. A host of factors, peculiar to both the workman and the employer, enter into determination. Whether the workman was, in the intervening period, gainfully employed is a material circumstance which influences the exercise of discretion. It is true, initial onus lies on the workman to show that he was not gainfully employed. Once, the workman makes such statement, the onus shifts on the employer to prove to the contrary. Whether the aforesaid principles govern the entitlement to backwages where the employer resorts to illegal closure of the establishment ?

48. The provisions of sub section (6) of section 25-O are clear and explicit. A closure of an undertaking in breach of the mandate contained under section 25-O is deemed to be illegal from the date of

closure and the workmen are entitled to all the benefits under any law for the time being in force as if such undertaking had not been closed down. It would be contextually relevant to note that sub section (7) of section 25-N in an identical fashion declares that where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him. The decision of the Supreme Court in the case of **Oswal Agro Furane Limited** (supra) exposits in clear terms that the consequences flowing from the mandatory requirements contained in section 25-O and 25-N must, therefore, be given full effect.

49. The two situations, namely, termination of the services of an employee, by ascribing a cause, and the retrenchment brought about by an illegal closure cannot be weighed in the same scale. A special mechanism is provided for authorizing closure of the establishment. If an employer resorts to the closure of the establishment in flagrant violation of statutory provisions, in my considered view, such employer deserves to be visited with the

consequences which emanate from mandatory statutory provisions. In such a case, the employer cannot be permitted to urge that notwithstanding the illegal closure the workmen must establish that he was not gainfully employed to be entitled to claim the benefits which are available under the law.

50. In the order dated 8th February, 2022, this Court noted that considering that 14 persons, out of the list of 34 persons set out in Annexure A to the Order of Reference, had accepted their dues and management was willing to recruit around 20 persons that day, the petitioner would be at liberty to follow the law on re-employment of retrenched workmen under section 25-H of the Industrial Disputes Act, 1947 read with Rule 82 of the Industrial Disputes (Maharashtra) Rules 1957.

51. There is a serious controversy as to whether the petitioner did offer re-employment in conformity with the aforesaid provisions of law and in terms of the impugned award. An additional affidavit was filed on behalf of the petitioner to affirm that 14 workmen joined duty and after working for few days, all of them either resigned or simply stopped attending the work without intimation. The said stand was controverted by filing an affidavit on behalf of

the respondent. It was inter alia contended that the workmen who re-joined were paid meager wages, whereas similarly placed workmen were paid much higher wages and there was an invidious discrimination.

52. I am of the considered view that this controversy cannot be delved into in this petition. As noted above, re-employment of the illegally retrenched workmen has to be in conformity with law. It would be suffice to observe that, in the event of breach of the statutory provisions and obligations, the consequences, as envisaged by law, will follow.

53. The petition therefore deserves to be partly allowed by modifying the impugned award to the aforesaid extent.

Hence, the following order.

ORDER

1] The petition stands partly allowed.

2] The impugned award declaring closure of the industrial establishment illegal, is affirmed.

3] The impugned award to the extent it directs the petitioner to give re-employment to 20 workmen named in the Annexure A

(excluding 14 workmen) and to give them all the benefits under the law for the time being in force including backwages till re-employment and also future wages regularly from the date they are actually re-employed stands affirmed.

4] The direction in the impugned award to give re-employment to all the retrenched workmen, apart from the 20 workmen named in the Annexure A, and give them all the benefits, backwages and future wages upon re-employment stands quashed and set aside.

5] Rule made absolute to the aforesaid extent.

6] In the circumstances, there shall be no order as to costs.

(N. J. JAMADAR, J.)