Mackinon Mackenzie Ltd vs Mackinnon Employees Union on 25 February, 2015

Equivalent citations: AIR 2015 SUPREME COURT 1373, 2015 AIR SCW 1607, 2016 (1) AJR 175, 2015 LAB IC 1645, 2015 (3) AIR BOM R 98, (2015) 145 FACLR 184, (2015) 2 LAB LN 279, (2015) 2 SCALE 707, AIR 2015 SC (CIV) 1058, 2015 (4) SCC 544, (2015) 2 CURLR 109, (2015) 3 SCT 49, (2015) 5 SERVLR 358, 2015 (3) KCCR SN 221 (SC)

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Bench: C. Nagappan, V.Gopala Gowda

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5319 OF 2008

MACKINON MACKENZIE & COMPANY LTD. ....APPELLANT

VERSUS

MACKINNON EMPLOYEES UNION ...RESPONDENT

J U D G M E N T

V. GOPALA GOWDA, J.

The appellant-Company has questioned the correctness of the judgment and order dated 5.05.2006 passed in L.P.A. No. 141 of 1996 in Writ Petition No. 2733 of 1996 by the Division Bench of the High Court of Judicature at Bombay, affirming the Award dated 08.03.1996 of the Industrial Court, Mumbai in Complaint (ULP) No. 1081 of 1992 raising certain questions of law and urging various grounds in support of the same and prayed to set aside the impugned judgment, order and award of the Industrial Court.

The relevant facts are briefly stated to appreciate the rival legal contentions urged on behalf of the parties in this appeal.

The appellant-Company was engaged in shipping business from its premises at Mackinnon Building, Ballard Estate, Mumbai. The activities were divided into ship agency, shipping management, ship owning and operating, travel and tourism, clearing and forwarding, overseas recruitment and property owning and development. It had approximately 150 employees who were all workmen and members of the respondent-Union. The respondent-Union is registered under the provisions of the Trade Union Act, 1926. A letter dated 27.07.1992, purportedly a notice of retrenchment together with the statement of reasons enclosed therewith was served upon approximately 98 workmen by the appellant-Company stating that the same will be effective from closing of business on 04.08.1992. In the statement of reasons, it was stated that the appellant-Company was accumulating losses and the proprietors had taken a decision to rationalise its activities apart from the property owning and development department, a portion of the clearing and development business relating to contracts with the Government of India, Institutions such as, Central Railway and Lubrizol India Ltd. The respondent-Union who are the concerned workmen filed the complaint before the Industrial Court. Since there was a deviation from the seniority list of some workers in the clearing and forwarding departments and some of the remaining workers from the alleged closed departments of the appellant- Company were to be transferred to the aforesaid retained departments of the appellant-Company, a seniority list of all the workmen in the establishment was also allegedly put up on the notice board. However, the finding of fact recorded by the Industrial Court while answering the relevant contentious issues is that this plea taken by the appellant-Company was not proved.

Aggrieved by the said action of the appellant-Company, the concerned workmen of the respondent-Union filed a complaint before the Industrial Court at Mumbai alleging the unfair labour practices on the part of the appellant-Company in not complying with certain statutory provisions under item No. 9 of the Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the "MRTU & PULP Act"), in proposing to retrench the concerned workmen. It has assailed the legality and validity of the notice of retrenchment served upon the concerned workmen by the appellant-Company. The legal contentions urged by the workmen in the complaint were as follows:

> (i) That the notice was defective in as such though one month's salary in lieu of notice was offered, current month's salary was not offered to be paid and was not included in the cheques which had been given to the workmen. Thus, the condition precedent under Section 25F of the Industrial Disputes Act (for short the I.D. Act) is not complied with. Further the said notice did not indicate that notice in the prescribed form has been sent to the State Government or the authorities specified under Section 25F.
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> (ii)That no list of seniority of workmen in different categories from which retrenchment was contemplated had been put up on the notice board as mandatorily required under Rule 81 of the Industrial Disputes (Bombay) Rules, 1957 (for short

'the Bombay Rules').

(iii)That in the statement of reasons, assuming without admitting the same, that the activities of the appellant-Company had to be rationalised, this directly led to the retrenchment of workmen. However, there is an admitted decrease in the number of employees to be employed in different department which are under the control of the appellant-Company. This directly attracts items Nos. 9 and 10 of Schedule IV of the I.D. Act. Thus a notice under Section 9A of the I.D. Act was bound to be given. This has not been done.

(iv)That the appellant-Company was bound to give notice at least 60 days before the intended closure to the State Government, this has not been done. Therefore, Section 25FFA of the I.D. Act has not been complied with by the appellant-Company.

(v)That in the seniority list prepared and relied on by the appellant-

Company large number of employees who are not junior must have been retrenched. Therefore this is in violation of the provision under Section 25G of the I.D. Act.

On 28.01.1993, on the basis of the pleadings, the Industrial Court framed the following issues:-

"1.Whether any seniority list was displayed as provided in Rule 81 of the Industrial Disputes (Bombay) Rules, 1957?

2.Whether a Complaint for an alleged breach of the provisions of the Industrial Disputes (Bombay) Rules, 1947 is maintainable under item no. 9 of Schedule IV of the MRTU & PULP Act, 1971?

3.Whether a Complaint for an alleged breach of Rule 81 of the Industrial Disputes (Bombay) Rules, viz., displaying the seniority list, is maintainable under item no.9 of the Schedule IV of the MRTU & PULP Act?

4.Whether the respondent has committed breach of Section 25F(b) of the I.D.Act 1947?

5.Has it been proved that the respondent has committed unfair labour practice, as pleaded, by not sending notice to the Government under Section 25F(c) of the I.D. Act, 1947?

6.Whether the provisions of Section 25FFA of the I.D. Act are applicable and whether any unfair labour practice on the court is proved to have been committed.

7.Whether the respondent has committed unfair labour practice as contemplated by Section 25G of the I.D. Act 1947, by not following the principle of last come first go,

as pleaded by the respondents?

8.Whether any custom, practice or usage has become an agreement, settlement or award, and breach thereof, if any amounts to unfair labour practices?

9. Whether the facts of the case require notices under section 9-A of the I.D. Act, 1947?"

Before the Industrial Court the appellant-Company has filed its counter statement denying the averments made on the alleged contraventions made by the appellant-Company under the I.D. Act, and MRTU PULP Act in issuing retrenchment notice to the concerned workmen. It has further denied the various averments made in the complaint filed by the respondent-trade Union against the appellant-Company in justification of its retrenchment of the concerned workmen on the alleged closure of the department/unit of the appellant-Company. Nine witnesses on behalf of the concerned workmen and two witnesses on behalf of the appellant-Company were examined before the Industrial Court to justify their respective claims and counter claims.

On appreciation of facts, points of dispute, evidence on record, issues raised and decisions relied upon by both the parties, the Industrial Court held by answering the contentious issue no. 3 that the appellant-Company has committed an unfair labour practice by committing breach of Rule 81 of the Industrial Disputes (Bombay) Rules, 1957, (for short 'the Bombay Rules') by not displaying the seniority list of the workmen of the concerned department/unit of the appellant-Company on the notice board prior to the date of issuance of retrenchment notice to the concerned 98 workmen as contemplated by the MRTU & PULP Act, 1971 and the Bombay Rules. It was further held that the appellant-Company had committed an unfair labour practice by committing breach of Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules by not following the principle of 'last come first go'. Therefore, the Industrial Court held that breach of statutory rules and provisions of the I.D. Act and the Bombay Rules amounted to unfair labour practices as contemplated by item No.9 of the Schedule IV of the MRTU & PULP Act. The breach of the mandatory provisions of Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules was held to have been committed by the appellant-Company. Thus, the Industrial Court answered the points of dispute and relevant contentious issues framed by it in favour of the concerned workmen and set aside the notice of retrenchment served upon them. The Industrial Court held that the rest of the unfair labour practices alleged in the complaint were not proved. The Industrial Court passed an interim order directing the appellant-Company to cease and desist from enjoining the said unfair labour practice and continue the employment of retrenched workmen in service and pay them full wages every month. The appellant-Company was further directed by the Industrial Court after adjudicating the industrial dispute between the parties to pay arrears of all such wages to the retrenched workmen from the date of alleged retrenchment till the date of the said award and also directed the appellant-Company to pay them future wages regularly from the date they are actually allowed or continued to work as per the award of the Industrial Court.

The correctness of the said award passed by the Industrial Court was challenged by the appellant-Company before the High Court by filing Writ Petition No. 2733 of 1996, urging various

grounds and prayed to quash the award passed by the Industrial Court. The High Court dismissed the same and passed the judgment and order by recording its reasons and affirmed the findings of fact recorded by the Industrial Court on the points of dispute and the contentious issues.

Aggrieved by the same, L.P.A. No. 141 of 1996 was filed by the appellant- Company before the Division Bench of the Bombay High Court. The Division Bench of the High Court after adverting to each one of the rival legal contentions urged on behalf of the parties has observed that in the instant case there is a clear cut breach of Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules on the part of the appellant-Company and held that cumulative effect of the same was that the action of retrenchment taken by the appellant-Company on the concerned workmen was totally illegal and amounted to an unfair labour practice. The Division Bench reaffirmed the findings of fact and reasons recorded in favour of the concerned workmen and affirmed the award of the Industrial Court in its judgment. The correctness of the same is challenged in this appeal by the appellant-Company urging various grounds and prayed for setting aside the impugned judgment and order and to quash the award of the Industrial Court.

The learned senior counsel Mr. Jamshed Cama, appearing for the appellant- Company, sought to justify the action of the appellant-Company, inter alia, contending that due to severe recession in the dominant areas of the industry in which the concerned workmen were engaged and various other factors having a direct bearing on their business activities, it was found imperative for the appellant-Company to shut down some of their activities as detailed by them in their statement of reasons appended to the retrenchment notice. Further it has been stated that in the circumstances, the appellant-Company, according to their business needs had decided to let out a part of the premises housing their office on leave and licence basis to M/s. Urmila & Co. Pvt. Ltd that as the same would not be required for the respondent-workmen as the appellant-Company had contemplated the retrenchment of the concerned workmen. The said decision was also taken by the appellant-Company to further ensure availability of funds to pay the employees. Therefore, the concerned workmen were retrenched from employment and their legal dues were paid as contemplated under the provisions of Section 25F clause (b) of the I.D. Act. The retrenchment of the concerned workmen in fact came into force at the close of business on 04.08.1992 at 4:45 p.m. as per the retrenchment notice itself served upon them. Intimation of passing of the ex-parte ad interim order dated 04.08.1992 by the Industrial Court was allegedly communicated to the appellant-Company by the respondent-Union vide its letter dated 04.08.1992 itself at 5:30 p.m., by which time the possession of the premises of the appellant-Company where the retrenched workmen were employed was already handed over to three independent Companies, who had acquired leave and licence agreement with the premises of the appellant-Company on 28.07.1992. Their occupation of the premises alleged to have been deferred up to 04.08.1992 i.e. until the completion of the process of retrenchment of the concerned workmen of the respondent-Union, which process had started much earlier.

With respect to the violation of the principle of 'last come first go' under Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules as contended by the respondent-Union on behalf of the concerned workmen that no seniority list of the category wise workmen was put up on the notice board of the appellant-Company in accordance with Section 25G of the I.D. Act read with Rule 81 of

the Bombay Rules i.e. 'last come first go' and that the same was not done within 7 days of the proposed retrenchment notice, the said contention of the workmen is rebutted by the learned senior counsel for the appellant-Company saying that it is an admitted fact that at the very least, the workers had received the seniority list several days prior to 04.08.1992. They were thus well aware of their inter-se- seniority list displayed before the actual date of closure/retrenchment, whether it was 7 days in advance or not is not relevant for the purpose of finding out whether the action of the appellant-Company is legal and valid or not. Therefore, the concurrent finding of fact recorded by the High Court in the impugned judgment accepting the case of the respondent-Union is not tenable in law and prayed to set aside the same.

Further, it is contended by him that it is now established by the judgments of this Court that the rule of 'last come first go' as provided in Section 25G of the I.D. Act can be deviated by the appellant-Company for justifiable reasons. Reliance was placed by him in support of the above legal contention on the decision of this Court in the case of Workmen of Sudder Workshop of Jorehaut Tea Co v. The Management of Jorehaut Tea Co[1], wherein, it was observed that for the application of the provision of Section 25G of the I.D. Act with respect to the above principle, it was necessary to treat all the workmen in the category as one group and concluded that the aforesaid principle of 'last come first go' was not an inflexible rule and that there must be a valid and justifiable reason for deviation from the above said principle. Further, reliance was also placed by him on other decisions of this Court in the cases of Swadesamitran Ltd., Madras v. Their Workmen[2], Jaipur Development Authority v. Ramsahai & Anr[3] and State of Rajasthan v. Sarjeet Singh & Anr.[4] in support of the above legal proposition.

It is further contended by the learned senior counsel on behalf of the appellant-Company that in the present case, the respondent-Union had ample notice of the closure/retrenchment on their own admission from 30.07.1992 i.e. at least 5 days before their date of retrenchment, they had a copy of the seniority list. However, they have not at any time indicated to the appellant-Company that there was a deviation from the principle of 'last come first go' on the part of the appellant-Company. Further, it is urged by him that either the Industrial Court or the High Court has not been able to identify any such breach of the above mandatory provisions of the Act & Rules. However, despite the same, it is contended by him that the conclusion of the High Court on the contentious issue nos. 1-3 and 7 in holding that there is a "clear-cut breach" of Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules is not founded on any material facts and evidence on record in this regard. A copy of the seniority list of the workmen of the unit/department was exhibited by the appellant-Company on the notice board of their establishment on 22.07.1992 i.e. 14 days prior to the date of closure of the unit/department which does not constitute technical rationalisation envisaged under the item no. 10 of the IV Schedule of the I.D. Act. It is further contended by him that the respondent-Union has not led any cogent evidence in this regard to prove the said allegation before the Industrial Court and therefore, the finding recorded on this aspect is erroneous in law. Hence, the same is liable to be set aside.

The further legal contention urged further on behalf of the appellant- Company is that there is no violation of Rule 81 of the Bombay Rules and the complaint was not maintainable in law before the Industrial Court on the alleged ground of violation of statutory provisions under Rule 81 of the

Bombay Rules and Sections 25F clause (b), 25G of the I.D. Act to attract Item 9 of the Schedule IV of the MRTU & PULP Act. He further contended that the action of the appellant-Company in issuing notice of retrenchment is pursuant to the closure of the department/unit of the appellant-Company and not retrenchment of workmen per se. Therefore, it is contended that there is no statutory breach of the aforesaid provisions of the I.D. Act as alleged to have been committed by the appellant-Company. The learned senior counsel for the appellant has further placed reliance upon the judgment of this Court in the case of Isha Steel Treatment, Bombay v. Association of Engineering Workers, Bombay & Anr.[5], in support of his submission that the concerned workmen have not produced evidence to show that the closure is neither bonafide nor genuine, which important aspect of the case is not considered either by the Industrial Court or the High Court. Hence, the concurrent finding of fact recorded by them on the relevant contentious issue No.1-3 and 7 are erroneous in law and the same are wholly unsustainable in law.

Further, it has been contended by the learned counsel for the appellant- Company that the Award of reinstatement and back-wages to be paid to the concerned workmen by both the Industrial Court and the High Court would not be possible in case of admitted closure of the work of one of the department/unit of the establishment and therefore there is no question of reinstatement of the concerned workmen and awarding back-wages to them and prayed for moulding the relief accordingly by this Court. It is contended by him that in the present case, it is an admitted fact that on and from 04.08.1992, the premises of the appellant-Company's clearing department/unit had been handed over to the licensees and that no work of this appellant-Company was being carried out by them from the said premises or elsewhere, except the two activities which were partially retained. Therefore, no back-wages are payable to the workmen as awarded by the Courts below, as the services of the concerned workmen were terminated on account of the closure of the above unit of the appellant-Company for the reasons stated in the Annexure appended to the retrenchment notice. It is also further urged by him that it is an established principle of law that there could be neither reinstatement nor payment of back-wages to the concerned workmen in a closed unit of the appellant-Company in which retrenched workmen were working. He has also urged that indeed, there can be no industrial dispute between the concerned workmen and appellant- Company after the closure of its clearance department/unit, which fact was established by them before the Courts below by producing evidence on record, which is ignored by them while recording the finding on this relevant issue and therefore, the finding of fact is erroneous in law. Hence, the same is liable to be set aside. Further, it is contended by him that both the Industrial Court and the High Court have failed to frame the relevant issue namely, whether there was a closure of the clearance department/unit of the appellant-Company or not despite there being a pleading in this regard in its written statement. The issue in this regard should have been framed by the Industrial Court as per the law laid down by this Court in the case of J.K. Synthetics v. Rajasthan Trade Union Kendra & Ors.[6] He referred to Para 22 of the judgment in support of his above legal contention, which paragraph is extracted hereunder:

> "22. As has been set out hereinabove, amongst other disputes which had been referred to the Industrial Tribunal was Dispute 2, which reads as follows:

> "2. Whether the retrenchment in the 4 divisions of J.K. Synthetics (viz. J.K. Synthetics, J.K. Acrylics, J.K. Tyre Cord and J.K. Staple and Tows, Kota) was justified and if not, to what relief the workers are entitled?"

Thus, the Industrial Tribunal was required to go into the question whether or not the retrenchment was justified. The appellant had sought to justify retrenchment of the 1164 workmen on the basis that there was a closure of a section of the nylon plant. Thus in order to come to the conclusion, whether or not retrenchment was justified, the Industrial Tribunal necessarily had to first decide whether or not there was a closure."

15. It is further contended by him that, the Industrial court has neither framed an issue with regard to the justification of the closure nor has it recorded any finding on this aspect. In not doing so and recording the finding on this important aspect of the case against the appellant-Company by the Industrial Court has adversely prejudiced its case. The learned senior counsel further placed reliance on the judgment of this Court rendered in the case of Kalinga Tubes Ltd. v. Their Workmen[7], wherein it was held that the Company has not justified the reason of the closure of the undertaking was due to unavoidable circumstances beyond the control of the appellant-Company therein and the compensation would be payable as if the undertaking was closed down "for any reason whatsoever" within Section 25FFF (1) of the I.D. Act.

Further, it was contended by him that in the case of PVK Distillery Ltd. v. Mahendra Ram[8], this Court has held that a direction for awarding back wages after a long interregnum is unfair and that the Industrial Court ought to have taken notice of the case where the employer has been declared sick and remained closed for many years and therefore the award of back wages in favour of the concerned workmen is unjustified in law.

On the other hand, the above submissions made by the learned senior counsel on behalf of the appellant-Company are strongly rebutted by the learned senior counsel, Mr. C. U. Singh, appearing on behalf of the concerned workmen of the respondent-Union, by placing reliance upon the order of notice of retrenchment dated 27.07.1992 served upon the concerned workmen.

It is contended by him that the Statement of Reasons appended to the retrenchment notice issued to the concerned workmen by the appellant- Company does not show that the retrenchment of the workmen from their services is on account of closure of the clearing department, which is the part of the undertaking of the appellant-Company. According to him, the concurrent finding of fact recorded by the courts below on the relevant issue is on proper appreciation of pleadings and both documentary and oral evidence on record and is not shown to be erroneous, yet the same is sought to be challenged by the appellant-Company without showing material evidence on record against the finding of fact on the points of dispute and relevant contentious issues framed by the Industrial Court. He placed strong reliance upon paragraphs 2 and 3 of the written statement of the appellant-Company to the complaint, wherein it is stated that due to severe recession in the dominant areas in the industry in which the concerned workmen were engaged and various other factors, which were having direct impact on the business activities and therefore, it was found imperative for the appellant-Company to shut down some of their activities as detailed by them in the Statement of

Reasons appended to the notice of retrenchment. Strong reliance was placed upon by him on the decision of this Court in the case of S.G. Chemicals And Dyes Trading Employees' Union v. S.G. Chemicals And Dyes Trading Ltd. & Anr.[9], in justification of the finding of fact recorded by the Industrial Court and concurred with by the High Court on the issue that the notice of retrenchment served upon the concerned workmen is bad in law. Relevant paragraph of the said case is extracted as under:

> "23. .....If the services of a workman are terminated in violation of any of the provisions of the Industrial Disputes Act, such termination is unlawful and ineffective and the workman would ordinarily be entitled to reinstatement and payment of full back wages. In the present case, there was a settlement arrived at between the Company and the Union under which certain wages were to be paid by the Company to its workmen. The Company failed to pay such wages from September 18, 1984, to the eighty-four workmen whose services were terminated on the ground that it had closed down its Churchgate division. As already held, the closing down of the Churchgate Division was illegal as it was in contravention of the provisions of Section 25-O of the Industrial [pic]Disputes Act. Under sub- section (6) of Section 25-O, where no application for permission under sub- section (1) of Section 25-O is made, the closure of the undertaking is to be deemed to be illegal from the date of the closure and the workmen are to be entitled to all the benefits under any law for the time being in force, as if the undertaking had not been closed down. The eighty-four workmen were, therefore, in law entitled to receive from September 18, 1984, onwards their salary and all other benefits payable to them under the settlement dated February 1, 1979. These not having been paid to them, there was a failure on the part of the Company to implement the said settlement and consequently the Company was guilty of the unfair labour practice specified in Item 9 of Schedule IV to the Maharashtra Act, and the Union was justified in filing the complaint under Section 28 of the Maharashtra Act complaining of such unfair labour practice."

19. The learned senior counsel for the respondent-Union contended that the alleged closure of the department/unit is void ab initio in law for non- compliance of the aforesaid statutory provisions of the I.D. Act, the orders of retrenchment are vitiated in law, liable to be set aside and accordingly, the Industrial Court has rightly set aside the same and the High Court has rightly confirmed the award of the Industrial Court.

The learned senior counsel on behalf of the respondent-Union further contended that the admitted fact is that the appellant-Company did not adduce any evidence before the Industrial Court that the closure of the department/unit and the retrenchment of the concerned workmen of that department was made by complying with the mandatory provisions of Section 25F clauses (a) & (c) and Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules. The contention of the learned senior counsel for the appellant-Company that non-compliance of Section 25FFA (1) in not serving the notice atleast 60 days before the intended date of closure on the State Government is directory but not mandatory for the reason that non- compliance of the same would amount to penalty as provided under Section 30A of the I.D. Act and therefore, the appellant-Company has to face penal

action as provided under the above provision of the I.D. Act, since its action could not have been held as void ab initio in law by the Courts below, the said contention is vehemently rebutted by the learned senior counsel for the respondent-Union.

The learned senior counsel for the respondent-Union submitted that the above contention of the learned senior counsel on behalf of appellant- Company is wholly untenable in law. He contended that the said statutory provisions of Section 25FFA of the I.D. Act which contemplates issue of notice of closure of the department/unit of the Company to the State Government are mandatory in law as it was inserted by the Parliament by way of an Amendment Act No. 32 of 1972, with an avowed object to protect the workmen who will be retrenched on account of the such closure of Industry or unit/department, which amended provision of the Act has come into force with effect from 14.06.1972 and he has placed strong reliance upon the Statement of Objects and Reasons of the above amended provisions, which would clearly state that the aforesaid provisions are mandatorily to be complied with by the appellant-Company before taking action it against the concerned workmen.

The Learned senior counsel further contended that the non-compliance of Section 25F clauses (a), (b) & (c) and Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules i.e. deviation from 'last come first go' principle, reasons should have been recorded by the appellant-Company for retrenching senior workmen while retaining the juniors in the department or unit. The appellant-Company has not made out a case in this regard by adducing justifiable reasons for retaining the junior workers in the Company and thus, they have deviated from the principle of 'last come first go'. Thus, the concurrent finding of fact recorded on this important aspect of the case is based on evidence on record, which is in conformity with law laid down by this Court. It is further contended by the learned senior counsel that onus is on the appellant-Company to prove as to why juniors to the retrenched workmen are retained in the department or unit of the Company pursuant to the alleged closure of the unit/department of the appellant-Company. The same is not established by the appellant-Company by assigning cogent reasons. He has rightly brought to our notice that not even a single question was put to the witnesses of the workmen in this regard in their cross-examination before the Industrial Court as to why the appellant-Company retained junior workmen in the Company while retrenching the senior workmen in the said department/unit of the appellant-Company.

The aforesaid rival legal contentions are carefully examined by us with reference to the pleadings, evidence adduced by both the parties on record before the Industrial Court, the relevant statutory provisions of the I.D. Act inter alia, Section 2(cc) read with Sections 25F (a) & (c), 25FFA, and 25G of the I.D. Act read with Rule 81 of the Bombay Rules to find out as to whether the findings recorded by the Industrial Court on the relevant issue nos. 1 to 3 and 7 in the award in favour of the concerned workmen are either erroneous or bad in law and warrant interference by this Court.

The Industrial Court, being the original court, for appreciation of facts & evidence on record has rightly applied its mind to the pleadings and evidence on record and recorded its finding of fact on the contentious issues referred to supra by assigning valid & cogent reasons after adverting to the statutory provisions of the I.D. Act and the law laid down by this Court and the High Court of

Bombay. However, it would be necessary for this Court to refer to the notice of retrenchment served upon the concerned workmen on 27.07.1992 along with Statement of Reasons assigned by the appellant-Company in justification of the same which is appended to the retrenchment notice. The same reads as under:

> "STATEMENT OF REASONS Mackinnon Mackenzie & Company Limited has been carrying on the business of Ship Agency, Ship Managing, Ship Owning Operating, Travel and Tourism, Clearing and Forwarding, Overseas Recruitment and property Owning and Development. The Company is presently employing approximately 150 workmen.
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> Other than Clearing & Forwarding and property owning and Development, the rest of the activities of the Company are related to the shipping industry. Because of severe recession in the industry from 1978 onwards, the Company's accumulated losses have been increasing dramatically from Rs.12.41 crores as at December 1983 to Rs.70 crores as at 31st march 1991. Because of the financial condition of the Company, the Ship manning and Ship Agency Principals either set up their own separate operations or appointed other agents for India. These included our erstwhile parent company namely, P & D Steam Navigation Company, London. Apart from this, the Company has not been able to improve its financial position or set off substantially the accumulated losses, for the following reasons:
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> 1. Stiff competition in respect of all activities.
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> 2. Very high wages and dearness allowance and other benefits payable as per the agreement to the staff which are for higher than those paid by our competitors to their staff.
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> 3.Abnormal increases in other infrastructural costs and overheads.
>
> 4. Decreasing work output in relation to the staff employed to work on hand The company incurred a loss of Rs. 6.67 crores for the year ended 31st March, 1990 which rose to Rs.6,83 crores for the year ended 31st March, 1991. During the current year the loss is likely to escalate.

In most areas of our activities, including that of Clearing & Forwarding, the Company has been unable to improve its revenue by attracting fresh business. Over the past few years the Company has found itself in a position of great difficulty in paying salaries to the staff in Bombay office in the time.

The above situation principally relates to the Bombay office and in a situation where the Company cannot present itself to Principals and clients as a viable business institution, the position of the Company will continue to deteriorate.

The Board of Directors debated all aspects of this issue extensively and, in view of the facts stated above and the reduction of the workload suffered in recent years, coupled with the high cost of infrastructure and overheads, the Board of Directors came to the decision to rationalize the activities in the Bombay office of the Company by closing down its activities apart from Property Owning and Development and a portion of the Clearing and Development business relating to contracts with Government of India institutions, such as, Central Railway and Lubrizol India Limited.

Needless to add, the Company will pay off all workmen who have not been retained, their legal terminal dues.

The Directors have taken this opportunity to convey their thanks to your years of service with the Company."

(Emphasis laid by this Court) It is evident from the Statement of Reasons that the appellant-Company has not been able to improve its revenue and was having cumulative losses. There is a reference with regard to the activities of the appellant-Company including that of Clearing and Forwarding Department. The appellant-Company was unable to improve its business and further found itself in great difficulty in paying salaries to the staff on time. By a careful reading of the aforesaid Statement of Reasons, it has not been explicitly made clear that the Board of Directors of the Company have taken a decision to close down Clearing and Forwarding Section, which is a part of the undertaking of the appellant-Company. As rightly contended by the learned senior counsel appearing on behalf of the respondent-Union, the cumulative effect of the pleadings, Statement of Reasons appended to the retrenchment notice, it is made very clear that the retrenchment notice served upon the concerned workmen was an action of closure of Clearing and Forwarding Section of the appellant-Company. According to the learned senior counsel on behalf of the respondent-Union, the concurrent finding of fact recorded by the Industrial Court on the above relevant contentious issues is further fortified by the retrenchment notice and the Statement of Reasons annexed to the same.

On the contention urged on behalf of the appellant-Company is that it was a closure of the department/unit of the appellant-Company as per the definition of "closure" under Section 2(cc) of the I.D. Act, we are of the view that with respect to the above contentious issues framed by the Industrial Court has been answered against the appellant-Company based on the finding of fact recorded by it. Therefore, the said contention urged on behalf of the appellant-Company cannot be allowed to sustain in law. Further, with regard to the allegation against the appellant-Company that its action of retrenchment of the concerned workmen is in contravention with the provisions of Section 25F clauses (a), (b) and (c) of the I.D. Act. Section 25F clause (a) states that no workmen employed in continuous service for not less than one year under an employer shall be retrenched until 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. In the case on hand, the workman were served with the retrenchment notice on 27.07.1992 stating that their services stand retrenched from the close of business hours on 04.08.1992 in terms of the reasons appended to the said notice and further stated the amount of retrenchment compensation and one month's salary in lieu of notices that would be

due to the concerned workmen. However, no cogent evidence has been brought before us by the appellant-Company to prove that the above referred one month's salary of the concerned workmen in lieu of the retrenchment notice has been actually paid to them. Further, the concerned workmen were given notice of retrenchment with Statement of Reasons appended therewith by the appellant-Company only on 27.07.1992 which was effective from 4.08.1992. Therefore, one month notice was not given to the concerned workmen before their retrenchment came into effect nor one month's salary in lieu of the retrenchment notice was paid to the concerned workmen. Therefore, the said action by the appellant-Company is a clear cut breach of the above said provision of condition precedent for retrenchment of the workmen as provided under Section 25F clause (a) of the I.D. Act. The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law.

Further on examining the aforesaid retrenchment notice referred to supra that was served upon the concerned workmen, we are of the considered view that they are retrenched from their services on account of the alleged closure of the Clearing and Forwarding department/unit of the appellant-Company, which in fact is not proved by the appellant-Company, by adducing positive evidence on this vital aspect except placing reliance upon the above Statement of Reasons. The said finding of fact by the Industrial Court on the contentious issue Nos. 1-3 and 7 on the part of the appellant-Company is further supported by its conduct in not complying with the mandatory provisions under Section 25FFA of the I.D. Act as it has not served atleast 60 days notice on the State Government before the alleged closure of the department/unit of the appellant-Company stating its reasons for the same. In this regard, the contention raised by Mr. Jamshed Cama, the learned senior counsel appearing on behalf of the appellant-Company is that the above said provision is not mandatory but directory for the reason that there is a penal provision under Section 30A of the I.D. Act and therefore, the competent authority can take penal action against the appellant-Company for non compliance of the above said provision. Per contra, the learned senior counsel Mr. C.U. Singh appearing on behalf of the respondent-Union has rightly rebutted the above contention by placing reliance upon the Statement of Objects and Reasons by inserting Section 25FFA by Amending Act No. 32 of 1972 to the I.D. Act with a definite object to be achieved. The said Statement of Objects and Reasons to the above referred Amending Act is extracted hereunder:

> "The problem of closure of industrial undertakings resulting of late in loss of production and unemployment of large numbers of workmen has become very serious. Employers have declared sudden closures of industrial establishments without any notice or advance intimation to the Government. Several factors appeared to have led to these closures, amongst which are accumulated losses over a

number of years and mismanagement of the affairs of the establishments. The unsatisfactory state of industrial relations (in the sense of labour unrest making it difficult to sustain regular production) has been pleaded as a precipitating factor. Certain other causes like financial difficulties and non-availability of essential raw material had also been mentioned.

2.Since the problem of closure has been acute in the State of West Bengal, a President's Act-The Industrial Disputes (West Bengal Amendment) Act, 1971 was enacted on 28th August, 1971. This provided that an employer who intended to close down an undertaking should serve at least sixty days' notice on the State Government stating clearly the reasons for intended closure of the undertaking. While enacting this legislation for West Bengal Government considered it desirable to promote Central legislation on the subject since the problem of closure was not limited to West Bengal but was found in varying degrees in other States as well.

3.It is however, felt that before Central legislation was enacted, the matter should be considered by the Indian Labour Conference. The Indian Labour Conference which met on the 22nd and 23rd October, 1971 generally endorsed the proposal for Central legislation gives effect to the recommendation of the Indian Labour Conference. It provides for the service of a notice, at least sixty days before the intended closure of an undertaking is to become effective, so that within this period prompt remedial measures could be taken, where the circumstances permit to prevent such closure. No notice will be required to be served in the case of undertaking set up for construction of buildings, roads, canals, dams and other construction works and projects or in the case of small establishments employing less than fifty persons. The Bill also provides penalty for closing down any undertaking without serving the requisite notice". (Gazette of India, 06.12.1971, Pt. II, Section 2, Ext. page 893) The contention urged by Mr. C. U. Singh, the learned senior counsel for the respondent-Union is that if the interpretation of provision under Section 25FFA of the I.D. Act as contended by the learned counsel on behalf of the appellant-Company is accepted to be directory and not mandatory as it would attract the penal provision against the appellant-Company under Section 30A of the I.D. Act, then the purpose and intentment of the amendment in the year 1972 made to Section 25FFA of the I.D. Act, will be defeated and would nullify the Objects and Reasons for amending the provisions of the I.D. Act and it would be contrary to the legislative wisdom of the Parliament. The statutory protection has been given to the workmen under the provision of Section 25FFA of the I.D. Act, with an avowed object to protect workmen being retrenched due to closing down of a department/unit of the undertaking as the livelihood of such workmen and their family members will be adversely affected on account of their retrenchment from their service. To avert such dastardly situation to be faced by the concerned workmen in the Company/establishment, the statutory obligation is cast upon the employer to serve atleast 60 days notice on the State Government before such intended closure of the department/unit to be served upon the State Government informing the reasons as to why it intends to close down its

department/unit.

The learned senior counsel appearing for the respondent-Union has rightly placed reliance upon the judgments of this Court, namely, The State Of Uttar Pradesh And Others V. Babu Ram Upadhya, State of Mysore & Ors. v. V.K. Kangan & Ors and Sharif-Ud-Din vs Abdul Gani Lone, all referred to supra, wherein this Court while referring to certain statutory provisions, consistently held that the statutory provisions of the statutory enactment are mandatory and not directory and that they are required to be rigidly complied with. The relevant paras from the decision of this Court in the case of Babu Ram Upadhya (supra) are extracted hereunder:

"28. The question is whether Rule I of para 486 is directory. The relevant rule says that the police officer shall be tried in the first place under Chapter XIV of the Criminal Procedure Code. The word "shall" in its ordinary import is "obligatory"; but there are many decisions wherein the courts under different situations construed the word to mean "may". This Court in Hari Vishnu Kamath v. Syed Ahmad Ishaque dealt with this problem at p. 1125 thus:

"It is well established that an enactment in form mandatory might in substance be directory and that the use of the word 'shall' does not conclude the matter."

It is then observed:

"They (the rules) are well-known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context."

The following quotation from Crawford On the Construction of Statutes, at p. 516, is also helpful in this connection:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...."

This passage was approved by this Court in State of U.P. v. Manbodhan Lal Srivastava. In Craies on Statute Law, 5th Edn., the following passage appears at p. 242:

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

A valuable guide for ascertaining the intention of the Legislature is found in Maxwell on The Interpretation of Statutes, 10th Edn., at p. 381 and it is:

> "On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

This passage was accepted by the Judicial Committee of the Privy Council in the case of Montreal Street Railway Company v. Normandin and by this Court in State of U.P. v. Manbodhan Lal Srivastava.

29. The relevant rules of interpretation may be briefly stated thus: When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

31. Further, the relevant paras 4 and 10 from the case of V.K. Kangan & Ors. (supra) are extracted hereunder:-

> "4. The only point which arises for consideration is whether the provisions of Rule 3(b) were mandatory and therefore the failure to issue the notice to the department concerned as enjoined by the rule was fatal to the validity of the notifications under Sections 4 and 6 of the Act.
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> XXX XXX XXX
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> 10. In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate

analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. We see no reason why the rule should receive a permissible interpretation instead of a pre-emptory construction. As we said, the rule was enacted for the purpose of enabling the Deputy Commissioner (Land Acquisition Collector) to have all the relevant materials before him for coming to a conclusion to be incorporated in the report to be sent to the Government in order to enable the Government to make the proper decision. In Lonappan v. Sub-Collector of Palghat1 the Kerala High Court took the view that the requirement of the rule regarding the giving of notice to the department concerned was mandatory. The view of the Madras High Court in K.V. Krishna Iyer v. State of Madras is also much the same.

(Emphasis laid by this Court)

32. Further in the case of Sharif-Ud-Din (supra) it was held as under by this Court:-

"9. The difference between a mandatory rule and a directory rule is [pic]that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

(emphasis laid by this Court)

33. Apart from the said decisions, this Court has followed the Privy Council of 1939 and Chancellor's decisions right from the year 1875 which legal principle has been approved by this Court in the case of Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh[10] and the same has been followed until now, holding that if a statutory provision prescribes a particular procedure to be followed by the authority to do an act, it should be done in that particular manner only. If such procedure is not followed in the prescribed manner as provided under the statutory provision, then such act of the authority is held to be null and void ab initio in law. In the present case, undisputedly, the statutory provisions of Section 25FFA of the I.D. Act have not been complied with and therefore, consequent action of the appellant-Company will be in violation of the statutory provisions of Section 25FFA of the I.D. Act and therefore, the action of the Company in retrenching the concerned workmen will amounts to void ab initio in law as the same is inchoate and invalid in law.

It would be appropriate for us to refer to the decision of this Court in the case Babu Verghese & Ors v. Bar Council Of Kerala & Ors[11], to show that if the manner of doing a particular act is prescribed under any statute, and the same is not followed, then the action suffers from nullity in the eyes of law, the relevant paragraphs of the above said case are extracted hereunder:

> "31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all.
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> The origin of this rule is traceable to the decision in Taylor vs. Taylor (1875) 1 Ch.D 426 which was followed by Lord Roche in Nazir Ahmad vs. King Emperor 63 Indian Appeals 372 = AIR 1936 PC 253 who stated as under :
>
> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

This rule has since been approved by this Court in Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh 1954 SCR 1098 = AIR 1954 SC 322 and again in Deep Chand vs. State of Rajasthan 1962(1) SCR 662 = AIR 1961 SC 1527.

32. These cases were considered by a Three-Judge Bench of this Court in State of Uttar Pradesh vs. Singhara Singh & Ors. AIR 1964 SC 358 = (1964) 1 SCWR 57 and the rule laid down in Nazir Ahmad's case (supra) was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."

(Emphasis laid by this Court) The statutory provisions contained in Section 25FFA of the I.D. Act mandate that the Company should have issued the intended closure notice to the Appropriate Government should be served notice atleast 60 days before the date on which it intended to close down the concerned department/unit of the Company. As could be seen from the pleadings and the findings recorded by the Industrial Court, there is a categorical finding of fact recorded that there is no such mandatory notice served on the State Government by the appellant-Company. The object of

serving of such notice on the State Government is to see that the it can find out whether or not it is feasible for the Company to close down a department/unit of the Company and whether the concerned workmen ought to be retrenched from their service, made unemployed and to mitigate the hardship of the workmen and their family members. Further, the said provision of the I.D. Act is the statutory protection given to the concerned workmen which prevents the appellant-Company, from retrenching the workmen arbitrarily and unreasonably & in an unfair manner.

The cumulative reading of the Statement of Reasons, the retrenchment notice served on the concerned workmen, the pleadings of the appellant- Company and in the absence of evidence on record to justify the action of retrenchment of concerned workmen on the alleged closure of the department/unit of the appellant-Company is shown as bonafide. However, the concurrent finding of fact recorded by the High Court on this aspect of the case cannot be held to be bad in law by this Court in exercise of its Appellate Jurisdiction in this appeal.

36. The learned senior counsel for the appellant-Company further contended that violation of the above statutory provisions of the I.D. Act and the infraction of the same on the part of the appellant-Company in retrenching the concerned workmen must have been pleaded and proved by them, which has not been done by them in the instant case, and therefore, the finding recorded by the Industrial Court is wholly erroneous in law and the same is liable to be set aside. He further contented that the said finding of the Industrial Court has been erroneously accepted by the Division Bench of the High Court without examining the case in proper perspective and erroneously rejected the contention of the appellant- Company as the same is devoid of merit. He further placed reliance upon the decision of this Court on case of Bharat Forge Co. Ltd. v. Uttam Manohar Nakate[12], in support of his contention, wherein this Court has observed that the complainant must set out in the first instance the deviation to show that the management has committed unfair labour practice and only then the other party be asked to lead evidence to rebut the same.

It is very clear from the averments of the appellant-Company in its written statement that its action in retrenching the workmen is sought to be justified before the Industrial Court, which, in fact, is not justified on the basis of evidence on record. It is clear from the pleadings at paragraphs 3 and 4 of the written statement filed by the appellant-Company before the Industrial Court which would clearly show that the action of the appellant-Company is a clear case of mala fide which cannot be sustained in law. Further, there are no valid reasons assigned in the explanatory note to justify the action of the Company in not following the principle of 'last come first go' as mandated under Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules to retrench the concerned workmen who are seniors to the workmen who were retained in the department. At the time of filing written statement by the appellant-Company before the Industrial Court, no reason was assigned in retaining junior workmen to the concerned workmen in the department. For the reasons recorded above, we have to hold that the concurrent finding of fact recorded by the High Court with regard to non-compliance of Section 25G of the I.D. Act by the appellant-Company is also the statutory violation on the part of the appellant-Company in retrenching certain concerned senior workmen. Therefore, the courts below have rightly answered the issue against it. Hence, the same cannot be termed as erroneous for our interference with the.

The principle of 'last come first go' should have been strictly adhered to by the appellant-Company at the time of issuing retrenchment notice served upon the concerned workmen as provided under Section 25G of the I.D. Act read with Rule 81 of the Bombay Rules which is not properly complied with by it for the reason that the custom clearance and dock clearance are totally different departments and it has retained 7 workmen who are undisputedly juniors to the concerned workmen, which action is sought to be justified by the appellant-Company without giving justifiable reasons. Further, no category wise seniority list of the workmen was displayed on notice board of the appellant-Company as required in law. The learned senior counsel on behalf of the appellant-Company placed reliance on the decision of this Court rendered in the case of Workmen of Sudder Workshop of Jorehaut Tea Co. Ltd. v. Management of Jorehut Tea Co. Ltd. (supra), in justification of the action of the appellant-Company retaining certain junior workmen in the department/unit at the time of retrenching concerned workmen. The relevant paragraphs are extracted hereunder:

> "5. The keynote thought of the provision, even on a bare reading, is evident. The rule is that the employer shall retrench the workman who came last, first, popularly known as "last come, first go". Of course, it is not an inflexible rule and extraordinary situations may justify variations. For instance, a junior recruit who has a special qualification needed by the employer may be retained even though another who is one-up is retrenched. There must be a valid reason for this deviation, and, obviously, the burden is on the Management to substantiate the special ground for departure from the rule.
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> 6. Shri Phadke brought to our notice the decision in Om Oil & Oilseeds Exchange Ltd., Delhi v. Workmen to make out that it was not a universal principle which could not be departed from by the Management that the last should go first. The Management had a discretion provided it acted bona fide and on good grounds. Shah, J., in that very ruling, while agreeing that a breach of the rule could not be assumed as prompted by mala fides or induced by unfair labour practice merely because of a departure or deviation, further observed that the tribunal had to determine in each case whether the Management had acted fairly and not with ulterior motive. The crucial consideration next mentioned by the learned Judge is that the Management's decision to depart from the rule must be for valid and justifiable reasons, in which case "the senior employee may be retrenched before his junior in employment". Surely, valid and justifiable reasons are for the Management to make out, and if made out, Section 25-G will be vindicated and not violated. Indeed, that very decision stresses the necessity for valid and good grounds for varying the ordinary rule of "last come, first go". There is none made out here, nor even alleged, except the only plea that the retrenchment was done in compliance with Section 25-G grade wise. Absence of mala fides by itself is no absolution from the rule in Section 25-G. Affirmatively, some [pic]valid and justifiable grounds must be proved by the Management to be exonerated from the "last come, first go" principle."

(Emphasis supplied by the Court) The learned senior counsel further contended that the above legal principle is laid also down in the case of M/s. Om Oil & Oil Seeds Exchange, Ltd. Delhi v. Their Workmen, wherein this Court has held that breach of Section 25G of the I.D. Act would not per se make the action of the Company mala fide and as such, the action of the appellant-Company in issuing retrenchment notice to the workmen cannot be quashed ipso facto. The learned senior counsel contented on behalf of the appellant-Company that in the present case, the principle laid down in Om Oil & Oil Seeds Exchange's case referred to supra is aptly applicable to the case on hand. We are of the opinion that the High Court has rightly held that the ratio of the said case cannot be disputed, however, the facts of that case and facts of the case on hand are totally different. In Om Oil & Oil Seeds Exchange case (supra), it was established by the employer that the clerk working in a particular branch of the business had shown particular aptitude performance and considering the said performance and his expertise, the management felt in the interest of business to retain him though he is junior to other retrenched workmen, therefore, the same was held to be valid in law. The High Court has rightly held in the impugned judgment and order that in the instant case, the appellant-Company had not adduced any such evidence or reasons of justification for retaining the junior workmen to the retrenched workmen. The reason assigned by the appellant-Company is considered by the Industrial Court and held that there was a clear breach of Section 25G of I.D. Act read with Rule 81 of Bombay Rules in not following the principle of 'last come, first go'. The legal principle laid down in this aspect in the case of Workmen of Jorehaut Tea Co. (supra) does not apply to the fact situation of the case on hand, as the appellant-Company has not published the seniority list at all on its notice board, which is the concurrent finding of fact of the High Court. The same cannot be termed erroneous as it is based on legal evidence on record. It is for the appellate-Company to establish as to whether there is a deviation of the above principle or not by producing justifiable and valid reasons but it has failed to do so by producing cogent evidence on record. Therefore, reliance placed upon the aforesaid judgments of this Court by the learned senior counsel for the appellant-Company are misplaced as they are not applicable to the fact situation on hand as the facts of those cases are distinguishable from the facts of this case on hand. Further, the contention urged by the learned senior counsel on behalf of the Company that the allegation of contravention of Section 25G of the I.D. Act is not sufficient to hold that the 'last come first go' principle is not followed by the Company unless the necessary material particulars in this regard are pleaded and proved by the workmen. This contention in our view is wholly untenable in law and cannot be accepted by this Court. The respondent-Union had laid factual foundation in this regard and proved the same by adducing evidence on record.

Further, it is urged by the learned senior counsel on behalf of appellant- Company that there is no question of reinstatement of the concerned workmen and payment of back wages to them since the concerned department/unit of the appellant-Company in which they were employed no longer exists and therefore, requested this Court to mould the relief granted by the courts below. The said contention is rightly rebutted by the learned senior counsel on behalf of the respondent-Union by placing reliance on the case of Workmen of Sudder Workshop (supra), wherein this Court held that the Court cannot sympathise with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. The said contention urged on behalf of the respondent-Union must be accepted by us as the same is well founded. Therefore, we hold that moulding of the relief is not permissible in this case at this stage when the matter has reached this

Court keeping in mind the legal principle laid down by this Court on this aspect of the matter in the case referred to supra.

Further, with regard to reinstatement of the concerned workmen and back- wages to be paid to them, the learned senior counsel on behalf of the workmen has rightly placed reliance upon the case of Anoop Sharma v. Executive Engineer[13], wherein it was held that since termination of employment is in breach or violation of the mandatory provisions of Chapter V-A or V-B of the I.D. Act is void ab initio in law and ineffective and suffers from nullity, in the eyes of law and in the absence of very strong and compelling circumstances in favour of the employer, the Court must grant a declaration that the termination was non est and therefore the employees should continue in service with full back wages and award all the consequential benefits. Further, with respect to payment of back wages and consequential benefits, reliance was rightly placed on the decisions of this Court in the cases of Deepali Gundu Surwase v. Adhyapak Mahavidyala[14] and Bhuvnesh Kumar Dwivedi v. Hindalco[15]. This Court opined thus in the case of Deepali Gundu Surwase (supra):

> "22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

For the foregoing reasons, the appeal is dismissed. We affirm the impugned judgment and order of the Division Bench of the High Court. The order dated 14.08.2006 extending protection to the appellant-Company shall stand vacated. Since, the concerned workmen have been litigating the matter for the last 23 years, it would be appropriate for us to give direction to the

appellant-Company to comply with the terms and conditions of the award passed by the Industrial Court by computing back-wages on the basis of revision of pay scales of the concerned workmen and other consequential monetary benefits including terminal benefits and pay the same to the workmen within six weeks from the date of receipt of the copy of this Judgment, failing which, the back-wages shall be paid with an interest at the rate of 9% per annum. The appellant-Company shall submit the compliance report for perusal of this Court. There shall be no order as to costs.

.....J. [V.GOPALA GOWDA]
.....J. [C. NAGAPPAN] New Delhi, February 25, 2015

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[1] AIR 1980 SC 1454
[2] AIR 1960 SC 762
[3] (2006) 11 SCC 684
[4] (2006) 8 SCC 508
[5] (1987) 2 SCC 203
[6] (2001) 2 SCC 87
[7] AIR 1969 SC 90
[8] (2009) 5 SCC 705
[9] (1986) 2 SCC 624
[10] AIR 1954 SC 322
[11] (1999) 3 SCC 422
[12] (2005) 2 SCC 489
[13] (2010) 5 SCC 497
[14] (2013) 10 SCC 324
[15] (2014) 11 SCC 85