The result is, the appeal succeeds and the order passed by the tribunal for the payment of compensation of 75% of the consolidated wages is set aside....

B. RETRENCHMENT

Until recently there was no statutory provision to immunize workmen from the hazards of involuntary unemployment. Protective measures were enacted in 1953 defining retrenchment and stipulating, *inter alia,* for payment of compensation as a condition precedent to a valid retrenchment.

According to Section 2(oo) retrenchment means removal of surplus staff by the management for any reason whatsoever. That section—probably out of abundance of caution—excludes from retrenchment a worker's retirement, and also his removal as a punishment or because of extended ill health, Economic motives usually underlie retrenchment.

The management alone can determine when workmen have to be retrenched, and how many have to go. A tribunal can only interfere where retrenchment has been resorted to in bad faith and with an ulterior motive.[1]

In retrenching workmen the management has to follow the rule "last come, first go." If in any case it does not follow that rule, it must record its reasons therefor. Departure from this rule without valid reasons renders a retrenchment invalid.

Retrenchment is ordinarily resorted to in a continuing business. But a 1957 amendment—a sequel to a Supreme Court decision[2]— has brought discharge of workmen consequent on a bona fide closure of a business within the scope of retrenchment.

Since 1953 a retrenchment of workmen with at least one year's continuous service, employed in a non-seasonal factory having fifty or more workers[3], is valid only when it satisfies the following conditions[4]:

i. Service of one month's notice on the workmen, or payment of wages for the notice-period;

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1. Tea Districts Labour Association v. Ex-Employees of Tea District Labour Association, (1960) I L.L.J. 802 (Supreme Court).

2. Hari Prasad Shiv Shankar Shukla v. A. D. Divelkar, A.I.R. 1957 S.C. 121.

3. See Section 25-A.

4. See Section 25-F.

ii. payment of retrenchment compensation to the workmen; and

iii. Service of notice on the appropriate government or on the specified authority in the prescried manner.

Before the enactment of Section 25-F the tribunals had been awarding retrenchment compensation by taking into consideration a bewildering variety of complex factors. This section, which has standardized the tribunals' practice of awarding compensation, has adopted a simple yardistick of length of service. The compensation to be paid under the section is fifteen days' average pay for every completed year of service or any part thereof in excess of six months.

A failure to either give the worker one months' notice or pay him retrenchment compensation will vitiate the retrenchment. A failure to serve notice on the appropriate government, on the other hand, does not render retrenchment invalid.

Acceptance of retrenchment compensation does not disqualify the workman from questioning the validity of the retrenchment. Nor does it bar him from claiming the benefits of provident fund and gratuity if there are such schemes in his fatory.

On the transfer of an establishment or undertaking, workers with at least one year's service will be entitled to the benefits of Section 25-F unless the transfer does them no harm. The benefits of that section are available also in cases of a bona fide closure. If this occurs because of unavoidable circumstances, the compensation to be paid to the workman under section 25-F(C) must not exceed his average pay for three months. Such things as financial difficulties, accumulation of stocks, or expiration of license are not unavoidable circumstances.

THE VISHWAMITRA PRESS v THEIR WORKMEN
Labour Appellate Tribunal, (1952) I L.L.J. 181

[The Company retrenched 31 workmen, as surplus, because of the introduction of monotype machines and because of the Newspaper Price Control Order 1951. The workers contended that the so-called retrenchment was for motives of victimisation. A question arose whether the workmen had preclude themselves from raising an industrial dispute about their discharges, and to what extent the company had a free hand to determine the extent of this retrenchment. The Industrial Tribunal decided that even where workers had accepted pay in lieu of notice of discharge, they could raise an industrial dispute about their discharges. The Tribu-

nal also held that the management had the right to determine the labour force but in doing so it had to act bona fide. Victimisation, unfair labour practice, increase of work-loads, and the like would be evidence of lack of bona fides; in such cases the management had to justify the extent of retrenchment. Excerpts from the award of the tribunal, given by J. N. Majumdar and R. C. Mitter, follow:]

The first question to be considered by a tribunal is whether a case for retrenchment has been established. On this question, the onus would be on the management. If it fails, its case would end there. If, however, the management is able to establish a case for retrenchment either on the ground of rationalisation, economy or other sufficient causes, the next question to consider would be the extent of retrenchment. Here the matter has to be considered under two sub-heads, namely (1) when the action of the management in retrenching the workmen is bona fide and (2) where in determining the extent of the retrenchment, it acts partly on extraneous considerations or on improper motives.

It is the prime facie right of the management to determine its labour force and the management would be the best judge to determine the number of workmen who would become surplus on the ground of rationalization economy or other reasons on which retrenchment can be sustained. Where in effecting the retrenchment, the management acts in a bona fide manner, the number retrenched by it ought to be accepted. It is not possible or desirable to give an exhaustive list of the cases that would be covered by the 2nd class. The increase of workload on the workmen retained would be an instance of extraneous considerations. Similarly, victimisation or unfair labour practice in effecting retrenchment, would be instances of improper motives. When the management is influenced by extraneous considerations or improper motives, the tribunal must scrutinize the matter with great circumspection and must confine the number of retrenchments strictly within the limits of actual requirement. In such cases, the management must justify by evidence the extent of the retrenchment. . . .

From the above facts the conclusion is irresistible that although there may have been some necessity for retrenchment, for the reason alleged by the concern, there were other considerations which influenced the management for retrenching these employees. In our opinion this retrenchment was not a bona fide one, and the motive for getting rid of the employees who are undesirable from the point of view of the management is present. At least some have been discharged under the garb of necessity, but really with the motive of victimising them for the part they had taken in the

strike. In these circumstances this case falls under the 2nd sub-head we have mentioned above, namely, when in retrenching, the management acts partly on extraneous considerations or improper motives. The retrenchment, therefore, can only be allowed to stand strictly in so far as it is established that there is the necessity for it on the grounds alleged by the concern....

In these circumstances, we award that the retrenched employees would have one month's total amoluments which they were receiving or were entitled to receive for the month of March, 1951, in addition to what they are entitled to in lieu of notice of discharge. [The mere fact of receipt of wages for the notice period does not mean that the workers voluntarily gave up their service and so cannot be precluded from questioning the propriety of their discharge.]

MAY AND BAKER (INDIA) LTD. v THEIR WORKMEN
A.I.R. 1967 S.C. 678

[The Company appealed from several provisions of an award by the Industrial Tribunal, Delhi dated October 19, 1957. Excerpts dealing with two of the issues are quoted below from the judgment of the Court delivered by Wanchoo, J.]

The company next attacks the provision as to working hours. Its main contention is that fixation of working hours is peculiarly a management function and there was no reason for the tribunal to interfere with the hours of work fixed by the company, particularly when they were well within the hours allowed under the Delhi Shops and Establishments Act. It appears that the company's working hours are from 9 a.m. to 5 p.m. with three rest intervals—one hour for lunch, 15 minutes for morning tea, and 15 minutes for afternoon tea. The tribunal changed the hours to 9-30 a.m. to 5 p.m. with one hour's interval for lunch. Theoretically, therefore, there was no reduction in the working hours but practically there was because the tribunal directed that instead of the two intervals of 15 minutes each for tea which was supplied by the company to its workmen, it should see that the tea was supplied to the workmen at their tables. Obviously, therefore, what will happen is that the workmen will take their time for tea because they cannot both work and take tea at the same time; and the tribunal has in effect reduced the working hours by half an hour each day. There is in the circumstances no justification for this reduction. Similarly, the tribunal has reduced the working hours for the subordinate staff for which again we find no justification. In the circumstances the existing working

hours which are well within the hours of work prescribed under the Delhi Shops and Establishments Act will continue and the tribunal's modilcation of them is set aside....

The last contention raised on behalf of the company is regarding Iqbal Singh who has been awarded retrenchment compensation as well as gratuity. So far as retrenchment compensation is concerned, the tribunal has held that Iqbal Singh was entitled to retrenchment compensation under S. 25-F of the Industrial Disputes Act. This view of the tribunal is in our opinion incorrect. Section 25-F came into force on October 24, 1953, while the services of Iqbal Singh were terminated on September 30, 1953. He was informed that his services would be terminated after September 30, 1953, and he was directed to take one month's salary in lieu of notice, as he was surplus. The tribunal was not right in holding that this meant that Iqbal Singh continued in service till October 30, 1953, and was, therefore, entitled to the benefit of S. 25-F. This is a case where the services were terminated from September 30, 1953, on payment of one month's salary in lieu of notice. In such a case the service comes to an end on the date from which it is terminated. The matter would be different if one month's notice had been given to Iqbal Singh and after that month his services had been terminated. In that case he would be actually working for the month of notice and his services would have terminated after the notice period.... But, though the tribunal was wrong in holding that S. 25-F applied to Iqbal Singh, we see no reason to interfere with the order allowing one month's average pay as retrenchment compensation to Iqbal Singh, for it is not disputed that industrial tribunals used to give retrenchment compensation even before S. 25-F was enacted and that section merely standardised the practice which was generally prevalent. In the circumstances, the order as to payment of one month's average salary as retrenchment compensation to Iqbal Singh must stand. However, the other part of the order with respect to payment of gratuity is clearly unjustified. Under the scheme in force in the company at the relevant time, gratuity could only be awarded to an employee who had been in service for five years. Iqbal Singh was not in service for that period. In the circumstances no gratuity could be granted by the tribunal under the scheme. The tribunal has noted that the company granted gratuity to some workmen who had less than five years' service. That is so but there was a voluntary act of the company. The tribunal, however, cannot compel the company to grant gratuity against the scheme of gratuity in force. In the circumstances, the order allowing one month's basic salary as gratuity to Iqbal Singh must be set aside.

Questions:

1. On the issue of hours of work, compare Labour Union v. Inter-

national Franchises, and the preceding cases, in the part of this book dealing with adjudication. What conclusion might you draw?

2. Here the Supreme Court dealt with a detailed award ten years old. Consider the disadvantages and confusions created by such delays.

3. Was affirmance of retrenchment compensation technically correct? If not, why not?

KANKANEE COLLIERY v THEIR WORKMEN

Central Industrial Tribunal, Dhanbad, (1959) II L.L.J. 460

[After purchasing four collieries from the Eastern Coal Co., the Bhowra Kankanee Colleries agreed to absorb the existing staff and to observe, with respect to them, the existing service conditions. Later the Bhowra Company compulsorily retired from service one Mr. Chakravarti under one of its own service conditions, providing for retirement from service at the age of 55. Mr. Chakravarti, one of the employees of the Eastern Coal Co. who had been absorbed into the service of the new company, questioned the validity of his retirement. He argued that under the existing service conditions, which alone governed his service, he was entitled to serve as long as he was physically fit. The Colliery Mazdoor Sangh espoused his cause.

On the failure of conciliation, the dispute was referred to a Tribunal. The Union contended that the retirement of Mr. Chakravarti in violation of the existing service conditions amounted to retrenchment and that the Company's failure to follow the prescribed procedure rendered his retrenchment illegal. The Company contended that the retirement ordered under its rules, which were binding on Mr. Chakravarti, was valid. Excerpts from the award of the Tribunal, Mr. Salim M. Merchant, follow :]

The first point to determine therefore is whether the service rules of Karamchand Thapar and Bros. (Private) Ltd., applied to Chakravarti. Now it is admitted that Chakravarti was employed in the Kankanee Colliery of which the owners are Bhowra Kankanee Collieries, Ltd., and of which Karamchand Thapar & Bros. (Private) Ltd., are only the managing agents. It is further admitted that there are no service rules of Bhowra Kankanee Collieries, Ltd., but that its employees in the collieries are governed by the certified standing orders framed under the Industrial Employment (Standing Orders) Act, 1946, for all collieries in Bihar State. It is also admitted that when Chakravarti joined the service of the Company on 1 January 1955, he was never given a separate letter of appointment, nor

was it stated that he would be governed by the service rules of Karamchand Thapar & Bros. (Private), Ltd....

Surely, therefore, as such the certified standing orders applicable to the workmen of the Kankanee colliery were applicable to him on the date of his superannuation. His superannuation must, therefore, be governed by his status not with the old company but on the basis of his status as on the date of his superannuation....

I, therefore, hold that the service rules of Karamchand Thapar & Bros. (Private), Ltd., did not apply to Chakravarti and that he was governed by the certified standing order applicable to the Kankanee Colliery, which admittedly do not contain... the age of retirement....

In this case, as admittedly there was no stipulation with regard to the point of retirement and with regard to the age of retirement in the contract of service of Chakravarti with Bhowra Kankanee Collieries, Ltd., or in the standing order applicable to the Kankanee Colliery and as I have held that the service rules of Karamchand Thapar & Bros. (Private), Ltd., do not apply to Chakravarti... his retirement amounted to retrenchment as defined by S. 2(00) of the Act and was not covered by the exception provided by Cl. (b) thereof.

[The tribunal ordered the reinstatement of Mr. Chakravarti on payment of half of his back pay.]

BOMBAY UNION OF JOURNALISTS v STATE OF BOMBAY

Supreme Court, (1964) I L.L.J. 351

[In this case the issue was whether Section 25F (c) is mandatory. Section 25F, dealing with conditions precedent to retrenchment, requires, in clauses (a) and (b), service of one month's notice on and payment of retrenchment compensation to workmen. In clause (c) that section requires that no workman shall be retrenched until notice is served on the government.

There is no doubt that clauses (a) and (b) are mandatory. But there was a cleavage of judicial opinion on whether clause (c) also is mandatory. Excerpts from the judgment of Gajendragadkar J., follow:]

It is the latter provision of Cl. (a) [permitting payment of wages in lieu of notice] which requires careful consideration in dealing with the character of the requirement prescribed by S. 25F (c). This latter provision allows the employer to retrench the workman on paying him his wages in lieu

of notice for one month prescribed by the earlier part of Cl. (a), and that means that if the employer decides to retrench a workman, he need not give one month's notice in writing and wait for the expiration of the said period before he retrenches him; he can proceed to retrench him straightaway on paying him his wages in lieu of the said notice. Take a case where retrenchment is effected under this latter provision of Cl. (a); how would the requirement of Cl. (c) operate in such a case? If it is held that the notice in the prescribed manner has to be served by the employer on the appropriate Government before retrenching the employee in such a case, it would mean that even in a case where retrenchment is effected on payment of wages in lieu of notice, it cannot be valid unless the requisite notice is served on the appropriate Government; and that does not appear to be logical or reasonable. Reading the latter part of Cls. (a) and (c) together, it seems to follow that in cases falling under the latter part of Cl. (a) the notice prescribed by Cl. (c) has to be given not before retrenchment, but after retrenchment; Otherwise the option given to the employer to bring about immediate retrenchment of the workman on paying him wages in lieu of notice would be rendered nugatory. Therefore, it seems that Cl. (c) cannot be held to be a condition precedent even though it has been included under S. 25F along with Cls. (a) and (b) which prescribed conditions precedent.

The argument based on the negative form in which the provision is enacted and the use of the word"until" no doubt are in favour of the appellant's contention, but the context seems to require a different treatment to the provision contained in Cl. (c). Besides, the requirement introduced by the use of the word "until" is complied with even on the view we are inclined to take about the nature of the condition prescribed by Cl. (c) because after the retrenchment is effected, the employer has to comply with the condition of giving notice about the said retrenchment to the appropriate Government, and that is where the provision in Cl. (c) that the notice has to be served in the prescribed manner assumes significance. Rules have been framed by the Central Government and the State Governments in respect of this notice and, stated broadly, it does appear that these rules do not require a notice to be served in every case before retrenchment is effected. In regard to retrenchment effected on paying the workmen his wages in lieu of notice, the rules seem to provide that the notice in that behalf should be served within the specified period prescribed by them; that is to say, under the rules, notice in such a case has to be served not before the retrenchment, but after the retrenchment within the specified period.... We are therefore satisfied that S. 25F (c) cannot

be said to constitute a condition precedent which has to be fulfilled before retrenchment can be validly effected....

The object which the legislature had in mind in making these two conditions [(a) and (b) of S. 25F] obligatory and in constituting them into conditions precedent is obvious. These provisions have to be satisfied before a workman can be retrenched. The hardship resulting from retrenchment has been partially redressed by these two clauses, and so, there is every justification for making them conditions precedent. The same cannot be said about the requirement as to Cl. (c). Clause (c) is not intended to protect the interests of the workmen as such. It is only intended to give intimation ot the appropriate Government about the retrenchment, and that only helps the Government to keep itself informed about the conditions of employment in the different industries within its region. There does not appear to be present any compelling consideration which would justify the making of the provision prescribed by Cl. (c) a condition precedent as in the case of Cls. (a) and (b).

HARIPRASAD SHIV SHANKAR SHUKLA v A. D. DIVELKAR*

(Barsi Light Ry. Co. v *Dinesh Woollen Mills)*
Supreme Court, A.I.R. 1957 S.C. 121
(1957) I L.L.J. 243; [1956-57] II F. J.R. 317

[These were two civil appeals which raised common questions of law. The judgment governs both. In one appeal the workmen of the Barsi Light Railway Co., and in the other the workmen of the Dinesh Woollen Mills Ltd., were involved.

I. The Government of India decided to take over the undertaking of the Barsi Light Railway Co. with effect from January 1954. The Company served a notice on its workmen that due to termination of its contract with the Government, their services would also be terminated from January, 1954. When the undertaking was actually taken over, about 77% of the staff of the Company were reemployed; those who were not, filed applications for payment of retrenchment compensation under S. 25F of the Industrial Disputes Act. The Bombay High Court held that the workmen were entitled to retrenchment compensation. The Company appealed.

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* This case led to the 1957 amendment which, *inter alia,* provided that workmen discharged on a bonafide closure of business are entitled to compensation under S. 25-F. *Eds.*

II. Because of certain business difficulties, Dinesh Woollen Mills Ltd. issued a notice to its workmen closing the business, and terminating their services. The Workmen moved the Bombay High Court for payment of retrenchment compensation, and again the Court held that the workmen were entitled to it. The Company appealed.

Excerpts from the judgment of S. K. Das J., follow:]

Section 25-F occurs in Chapter V-A of the Act; that chapter dealing with 'lay-off and retrenchment' was inserted by an amending Act (Act 43 of 1953) in 1953. Section 25 is in these terms:

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

[(a) a month's notice (with reasons) or pay; (b) pay for 15 days for every year's service, and (c) notice to the appropriate government].

Leaving out the excluding sub-cls. (a), (b) and (c) for the time being—these sub-clauses not being directly applicable to the cases under our consideration—the definition when analysed consists of the following four essential requirements—(a) termination of the service of workman; (b) by the employer; (c) for any reason whatsoever; and (d) otherwise than as a punishment inflicted by way of disciplinary action. It must be conceded that the definition is in very wide terms. The question, however, before us is: does this definition merely give effect to the ordinary, accepted notion of retrenchment in an existing or running industry by embodying the notion in apt and readily intelligible words or does it go so far beyond the accepted notion of retrenchment as to include the termination of services of all workmen in an industry when the industry itself ceases to exist on a bona fide closure or discontinuance of his business by the employer?.... It has been argued that by excluding a bona Ide closure of business as one of the reasons for termination of service of workmen by the employer, we are cutting down the amplitude of the expression 'for any reason whatsoever' and reading into the definition words which do not occur there. What after all is the meaning of the expression 'for any reason whatsoever'? When a portion of the staff or labour force is discharged as surplusage in a running or continuing business, the termination of service which follows may be due to a variety of reasons; e.g., for eco-

nomy, rationalisation* in industry, installation of new labour-saving machinery, etc. The legislature in using the expression 'for any reason whatsoever' says in effect: 'It does not matter why you are discharging the surplus; if the other requirements of the definition are fulfilled, then it is retrenchment'. In the absence of any compelling words to indicate that the intention was even to include a bona fide closure of the whole business, it would, we think, be divorcing the expression altogether from its context to give it such a wide meaning.... What is being defined is retrenchment and that is the context of the definition. It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of the definition; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended....

The provisions of the Act, almost in their entirety, deal with an existing or continuing industry. All the provisions relating to lay-off in Ss. 25A to 25E are also inappropriate in a dead business....

Retrenchment means discharge of surplus workmen in an existing or continniug business; it had acquired no special meaning so as to include discharge of workmen on a bona fide closure of business, though a number of Labour Appellate Tribunals awarded compensation to workmen on a closure of business as an equitable relief for a variety of reasons. It is reasonable to assume that in enacting S. 25F, the legislature standardised the payment of compensation to workmen retrenched in the normal or ordinary sense in an existing or continuing industry; the legislature did away with the perplexing variety of factors for determining the appropriate relief in such cases and adopted a simple yard stick of the length of service of the retrenched workmen. If the intention of the legislature was to give statutory effect to those decisions which awarded compensation on a real and bona fide closure of business, the legislature would have said so, instead of being content by merely adding a definition clause ,every requirement of which is fulfilled by the ordinary, accepted meaning of the words 'retrenchment'....

There is in fact a distinction between transfer of business and closure of

* "The term 'rationalization' when used with reference to an industry means introduction of reform so that its working may be on a rational and scientific basis with a view to having the optimum of output at the minimum of effort and cost. Five M's contribute to production, namely, men, macline, material, money and management. An ideal rationalization of an industry is one which reforms it in all these five facets" Prasad, B. B., *'Rationalization'*, in *Singh, V. B., Industrial Labour in India* (Bombay, 1963). *Eds.*

business; but so far as the definition clause is concerned, both stand on the same footing if they involve termination of service of the workmen by the employer for any reason whatsoever, otherwise than as a punishment by way of disciplinary action. On our interpretation, in no case is there any retrenchment, unless there is discharge of surplus labour or staff in a continuing or running industry....

So far as running or continuing industry is concerned, an obvious answer may be that unemployment relief is not the only purpose or object of S. 25F. We have pointed out earlier that it is reasonable to assume that standardisation of retrenchment compensation and doing away with a perplexing variety of factors for granting retrenchment compensation may well have been the purposes of S. 25F though the basic consideration must have been the granting of unemployment relief. However, on our view of the construction of S. 25F, no compensation need be paid by the appellants in the two appeals....

KHADAR HUSSAIN v MOHAMAD SHERIFF & ANOTHER

Madras High Court, (1962) I L.L.J. 361

[The petitioner operated his bus as a stage carriage under a permit issued under the Motor Vehicles Act. Finding the business a loss, he sold it to another man. Petitioner's conductor and checking inspector voluntarily gave up their employment and agreed to serve the purchaser instead. But they claimed retrenchment compensation. The petitioner contended that no such compensation was due because the services of the two workmen were transferred to the purchaser with their consent. He took shelter under section 25FF. The Labour Court, however, held that he was liable to pay compensation under S. 25F. He moved the High Court by writ petition. Excerpts from the judgment of Sri Ganapatia Pillai, J., follow:]

What amounts to retrenchment cannot possibly determine whether a transfer of an undertaking or the ownership of that undertaking becomes in law a transfer indicated in S. 25FF. Certainly on the sale of the bus along with the permit, the management of the bus and the ownership of the bus have changed hands. It might be said that unless the appropriate authority recognizes the transfer and allows the purchaser to use the bus on the route for which it was licensed to ply, there may be actual transfer of the undertaking, because undertaking implies the carrying on of a business actively by the purchaser in the way in which it was being done by the seller. There is no dispute in this case that so far as Nainar, the purchaser, was concerned, he was able to use the bus in the same way in

which it as being used by the petitioner. On that assumption, namely that the purchaser was able to use the bus under the permit already granted for the remaining period of that permit, I see no hinderance to my taking the view that the transfer of a bus by the petitioner amounts to the transfer of its ownership or of the undertaking even though the seller may still be continuing the business of a bus owner by plying other buses for profit. The labour court was therefore right in its view that there was a transfer of ownership or management of the undertaking in this case when the bus was sold to Nainar.

The next question for my consideration is whether on the facts found by the labour court, namely, the taking over of the workmen by the purchaser without any break in service would not amount to retrenchment. Section 25FF contains three clauses in the proviso, all of which should be satisfied before the petitioner could contend that S. 25FF would cease to apply to this case. [(a) There should not be any interruption in the service of the workman by such transfer; (b) his service conditions should not become less favourable than what they were previously; and (c) his service should be treated as a continuous service for purposes of retrenchment compensation.]

The labour court held that though cls. (a) and (b) of the proviso were satisfied in this case, cl. (c) was not satisfied. It is not contended by Sri Viswanathan for the petitioner that under the terms of the scale, there was any legal liability cast upon the purchaser to pay compensation to the workman... on the basis that the service of such workman had been continuous and had not been interrupted by the transfer. A reading of the sections shows that all the three clauses of the proviso must coexist before the proviso can come into operation.... We are, therefore, thrown back upon the applicability of S. 25FF of the Act....

I would rather prefer to base my conclusion upon the view that whenever a sale of a bus with a permit takes place and the purchaser employs the workmen employed in the bus by the vendor without any written contract compelling him to pay retrenchment compensation, taking into account the services under the previous employer, the case must be governed by S. 25FF. Even though the transfer of the workman may be loosely called a willing transfer in the sense that the previous employer was willing to release him and the employee himself was willing to work under the new employer, in law a transfer of an undertaking does not depend upon the transfer of the employee from the previous employer to the new employer. That is a matter of separate arrangement between the

parties.... That is why in my view the legislature has thought fit to include in S. 25FF three conditions in the proviso, because all these conditions ensure fair play to the workmen transferred to the new employer consequent on the transfer of the undertaking and therefore if these three conditions in the proviso are satisfied, S. 25FF is not attracted and the workmen are not entitled to claim retrenchment compensation from the old employer. The labour court was therefore right in viewing the case as one falling under S. 25F and not under S. 25FF.

Sri Vishwanathan [for the petitioner] pointed out that Cl. (1) of the proviso to S. 25FF related to the service of the workmen being not interrupted by the transfer of the undertaking. From this he wanted me to draw the inference that if such interruption had not taken place, the workmen concerned would not be entitled to wages in lieu of one month's [notice]. If I accept this argument, it will amount to reading words into S. 25F which are not there. If a workman is entitled to retrenchment compensation, the quantum of that compensation is governed solely by S. 25F, because Cl. (1) of the proviso to S. 25FF is not at all concerned with the quantum of retrenchment compensation. It only deals with the question of the applicability of the main provision in S. 25FF. Even though in these cases the service was continuous and uninterrupted, S. 25F (a) is attracted because factually no notice as required by that clause has been given by the petitioner. The award by the labour court of wages in lieu of a month's notice, is therefore proper.

ANAKAPALIA CO-OPERATIVE AGRICULTURE AND INDUSTRIAL SOCIETY v ITS WORKMEN

Supreme Court, (1962) II L.L.J. 621

[A sugar and refinery company, when it suffered a loss, sold its business to a co-operative society, and paid retrenchment compensation to its employees. The successor society hired some of the employees of the old company. Those who were not hired argued that the society, being the successor-in-interest of the company, was liable to reemploy all the employees of the company. The Tribunal accepted that argument and ordered their absorption by the society with continuity of service and on payment of one-fourth of back wages. It is against this order that the society appealed to the Supreme Court by special leave. Excerpts from the judgment of Gajendragadkar J., follow:]

Before S. 25FF was introduced in the Act in 1956, this question was considered by industrial adjudication on general consideration of fair play and

social justice. In all cases where the employees of the transferor concern claimed reemployment at the hands of the transferee concern, industrial adjudication first enquired into the question as to whether the transferee concern could be said to be a successor-in-interest of the transferor concern. If the answer was that the transferee was a successor-in interest in business, then industrial adjudication considered the question of re-employment in the light of broad principles. It enquired whether the refusal of the successor to give re-employment to the employees of his predecessor was capricious and unjustified, or whether it was based on some reasonable and bona fide grounds. In some cases, it appeared that there was not enough work to justify the absorption of all the previous employees; sometimes a purchaser concern needed bona fide the assistance of better qualified and different type of workers; conceivably, in some cases, the purchaser has previous commitments for which he is answerable in the matter of employment of labour:.... In such a case, it was obviously impossible to lay down any hard and fast rules. Indeed, experience of industrial adjudication shows that in resolving industrial disputes from case to case and from time to time, industrial adjudication generally avoids—as it should—laying down inflexible rules because it is of the essence of industrial adjudication that the problem should be resolved by reference to the facts in each case so as to do justice to both the parties....

It may be relevant to add that this section [25FF] conceivably proceeded on the assumption that if the ownership of an undertaking was transferred, the cases of the employees affected by the transfer would be treated as cases of retrenchment to which S. 25F would apply. That is why S. 25FF begins with a non obstante clause [*sic*] and lays down that the change of ownership by itself will not entitle the employees to compensatton, provided the three conditions of the proviso are satisfied. Prima facie, if the three conditions specified in the proviso were not satisfied, retrenchment compensation would be payable to the employees under S. 25F; that apparently was the scheme which the legislature had in mind when it enacted S. 25FF in the light of the definition of the word "retrenchment" prescribed by S. 2(oo) of the Act....

If the three conditions specified in the proviso are satisfied, there is no termination of service either in fact or in law, and so, there is no scope for the payment of any compensation. That is the effect of the proviso. Therefore, reading S. 25FF as a whole, it does appear that unless the transfer falls under the proviso, the employees of the transferred concern are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking....

As soon as the transfer is effected under S. 25FF, all employees are entitled to claim compensation, unless, of course, the case of transfer falls under the proviso; and if Mr. Chari [counsel for respondents] is right, these workmen who have been paid compensation are immediately entitled to claim re-employment from the transferee. This double benefit in the form of payment of compensation and immediate re-employment cannot be said to be based on any considerations of fair play or justice. Fair play and justice obviously mean fair play and social justice to both the parties. It would, we think, not be fair that the vendor should pay compensation to his employees on the ground that the transfer brings about the termination of their services, and the vendee should be asked to take them back on the ground that the principles of social justice required him to do so.... We are, therefore, satisfied that the general principles of social justice and fair play on which this alternative argument is based, do not justify the claim made by the respondents.

In the result, the appeal is allowed and the award is set aside....

WORKMEN OF SUBONG TEA ESTATE v SUBONG TEA ESTATE
Supreme Cour., (1964) I L.L.J. 333

[The Subong Tea Estate was transferred to the Hindustan Tea Co. and it was agreed that such transfer would take effect from January 1959. Pending the execution of the conveyance (which took place on the 17th February, 1959) and the Reserve Bank's approval (which was obtained on the 15th of July, 1959) the Hindustan Tea Co. (hereinafter called the "Company") was put in possession of the tea garden and all its employees got instructions about their work, and received their salaries, from it. The vendor wanted to lay off certain employees as a measure of economy in respect of all the tea gardens under its management. It asked the vendee whether the proposed lay-off should apply to the estate transferred. The vendee replied that it wanted to retain members of the staff (whom it listed) in its employ; but it asked the manager to terminate the services of the members of the staff who were surplus. Consequently, the manager of the vendor on August 31, 1959 issued notices to eight workmen terminating their services at once. They were paid retrenchment compensation, which they received under protest. The workmen's Union challenged the validity of the retrenchment, on the basis that it contravened the provisions of Ss. 25F and 25G of the Act.

The vendor's contention was that whatever he did he did under the orders of the vendee. On the other hand, the vendee contended that it

could not be made a party to the dispute because at the time of retrenchment the vendor was the real employer and the vendee was acting only as his agent. The Tribunal held that the vendor had rightly terminated the services of these workmen. They were paid proper compensation and were not entitled to further relief. The Union appealed to the Supreme Court. Excerpts from the judgment of Gajendragadkar J., follow:]

Section 25FF deals with cases where the ownership or management of an undertaking is transferred. Such a transfer may be effected either by agreement or by operation of law. The section provides that in all cases which do not fall under the proviso to the section on a transfer of ownership or of management of an industrial undertaking, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer, shall be entitled to notice and compensation in accordance with the provision of S. 25F, as if the workman had been retrenched.... The appellants contend that in the present case transfer of management took place on 17th February 1959 when the vendor delivered over to the vendee possession and management of the tea estate; and the argument is that it is after the transfer of management thus took place that the retrenchment in question was effected. It is not a case where workmen were paid compensation on the eve of transfer; it is a case where workmen of the transferred undertaking continue to be employed by the vendee after transfer of management of the undertaking took place and as such, the retrenchment in question must, in law, be deemed to have been effected by the vendee and must satisfy the test prescribed by Ss. 25F and 25G of the Act.

Sri Sastri for the vendee, on the other hand, strenuously argues that on the date of retrenchment, the vendee was not in law concerned either with the ownership or with the management of the undertaking....

[All the relevant facts in regard to the running of the estate and its management after the estate was delivered over to the vendee on 17th February, 1959, clearly thus unambiguously show that the vendee took charge of the estate and in fact, became the employer of the employees who were working in the estate....

If that be so, whether or not the transfer of management took place on 17 February 1959, there can be little doubt that after 15 July 1959 the vendee accepted the employees as its workmen and became answerable to them in that character. The impugned retrenchment cannot, therefore, be taken to attract the operation of S. 25FF at all. It is not retrenchment consequent upon transfer; it is retrenchment effected after the trans-

fer was made and it had been brought about by the transferee who, in the meanwhile, had become the employer of the retrenched workmen....

It is conceded that if the retrenchment is held to be effected by the vendee, it has not complied with S. 25F or 25G of the Act, and there can be little doubt that failure to comply with S. 25F would make the retrenchment invalid and so would the failure to comply with S. 25G, because no reasons have been recorded by the vendee for departing from the rule prescribed by S. 25G. In fact, we ought to add that no case has been made out for effecting any retrenchment at all, and as we have already emphasized, the employer's right to retrench his employees can be validly exercised only where it is shown that any employee has become surplus in the undertaking.

That being so, we must hold that the retrenchment of the eight workmen, being invalid in law, cannot be said to have terminated the relationship of employer and employee between the vendee, respondent 2, and the eight workmen concerned. They are accordingly entitled to reinstatement with continuity of service; they would also be entitled to recover their full wages for the period between the date of the retrenchment and the date of their reinstatement....

JOHN v COIR YARN TEXTILES, LTD.
Kerala High Court, (1960) I L.L.J. 304

[The Company suffered heavy losses due to adverse trade conditions. It, therefore, took necessary steps for liquidation. The liquidator terminated the service of all workmen except that he retained 17 for meeting pending orders. Later these 17 were also retrenched by the liquidator, in two stages and with the permission of the High Court. The workmen claimed retrenchment compensation under Section 25F. The liquidator restricted the claim to retrenchment compensation allowed under the proviso to S. 25FFF on the ground that they were retrenched on account of closure of the undertaking due to unavoidable circumstances. The workmen moved the High Court under Art. 226, claiming compensation under Section 25F. Excerpts from the judgment of Raman Nayar, J., follow]

It seems to me that the case of all the workmen comes within the proviso to S. 25FFF (1). The closing down of an undertaking need not be, and rarely is, all of a sudden and a matter of an instant; it can be, and often is in stages and spread over some time. It cannot be disputed that by 1955 the company had suffered such heavy losses and the general trade outlook was so gloomy that it had little chance of survival; and indeed, the petition for winding up was based on the ground that the very

substratum of the company was gone. It was in these circumstances that the board of directors, in whom the management vested, decided in June 1955 that business be closed down....

I take the view that the termination of the services of all the petitioners was on the closing down of the undertaking. And, from the facts stated above, it should be clear that this closure was on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to S. 25FFF (1) of the Industrial Disputes Act. [Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F shall not exceed his average pay for three months.

Explanation—An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed stock [or the expiry of the period of the lease or the licence granted to it...] shall not be deemed to have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this subsection.] There is nothing to show that the company was responsible for the adverse trade conditions which made it impossible for it to continue—in fact it would appear that the company was depending solely on foreign buyers and that its business fell, owing to import restrictions imposed by the countries concerned. In the end, the company had to be compulsorily wound up and there is no allegation that the winding-up petition was fraudulent or collusive. In the circumstances, it can scarcely be said that the undertaking was closed down by reason merely of financial difficulties or financial losses....

It is true enough that the Act does not apply to a dispute arising after an undertaking has closed down or with reference to the closure, but that does not mean that a subsequent closure can affect a proceeding properly initiated under the Act. The very decision [Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mill Mazdoor Union 1957 I L.L.J. 235] relied upon states that notwithstanding a closure, the machinery provided by the Act would continue to be available for working out any rights accrued prior to the closure. As pointed out therein, if that were not so, an employer could escape the consequences of what I might call industrial misconduct by the simple expedient of a closure, and his workmen would be left without remedy in respect of the rights given to them by the Act....

INDUSTRIAL AND GENERAL ENGINEERING CO. v THEIR WORKMEN

Mysore High Court, (1964) II L.L.J. 438

[The Company closed the bobbin section of their undertaking because it was uneconomical. The result was that the workmen employed in that section were discharged. The workmen of another section, the workshop section, went on strike in sympathy. In spite of the Company's warning that they must return to work, they did not. The Company was therefore compelled to close down the workshop section also. The dispute was referred to the Labour Court. The Court was of the view that the closure of the bobbin section was bona fide, necessitated by adverse business circumstances. The workshop section was maintained to prepare spare parts needed for the bobbin section or for repairing purposes. It was natural for the Company to close the workshop once it closed the bobbin section. The Court also pointed out that the closure of the workshop, due to the strike, prevented the Company from carrying out a government contract and so caused it a loss of 20 lakhs. Nevertheless the Court held that the closing of the workshop section was a lockout. It, therefore, awarded full wages to workers for nearly nine months in addition to retrenchment compensation payable under S. 25FFF. The Company challenged the award of the Labour Court through a writ petition before the High Court. Excerpts from judgment of Somnath Ayyar, J., follow:]

In my opinion, once the labour court came to the conclusion that it was natural and proper for the petitioner to close down the workshop after he had closed down the bobbins section,... [from which]he had derived no benefit to himself during the long period of eight years,... it was impossible for it to reach the extraordinary conclusion... that although there was a pre-eminently proper closure of the workshop of the petitioner, what he did amounted to an illegal lockout....

Nor do I find any substance in the argument advanced before us by Sri Nagesha Rao [Counsel for workmen] that the omission on the part of the petitioner [Company] to issue a notice under S. 25F of the Industrial Disputes Act or to make a payment of the wages in lieu of such notice can have any materiality. If the notice prescribed by S. 25F was not issued and the wages referred to in it were not paid, the employees would of course have the right to claim those wages. But, if a closure is a good closure, non-compliance with the provisions of S. 25F cannot, in my opinion, make it bad....

That the explanation to S. 25FFF (1) does not govern a case in which the closure is caused not merely by financial difficulties or accumulation of undisposed of stocks but also what was forced by other external circumstances....

A fortiori the case would be one which would fall within the proviso rather than the explanation if, in addition to financial difficulties and accumulation of undisposed stocks, there are other reasons which brought about the closure of the business.... In my opinion, this case is one which undoubtedly falls within the proviso to S. 25FFF (1) and not within the explanation to that sub-section.

In modification of the direction of the labour court we should, therefore, make a direction that the employees of the workshop section shall be paid the lower compensation specified in the proviso to S. 25FFF (1) which the petitioner, as submitted to us by his learned advocate... is even now willing to pay, and it is ordered accordingly.

HATHISING MANUFACTURING CO. v UNION OF INDIA
A.I.R. 1960 *S.C.* 923; (1960) II L.L.J. 1

[The three petitioners owned a cotton textile mill, a coal mine and a spinning and weaving factory. All had to close down their undertakings because they were losing money. They were required to pay their workmen compensation under section 25FFF (1). They challenged the validity of the section before the Supreme Court, on three grounds:

(i) that it imposes an unreasonable restriction on freedom of occupation guaranteed to every citizen in Art. 19(1)(g) of the Constitution, which includes the right to close his business; (ii) that it discriminates between different employers, who are similarly situated, and thereby contravenes Article 14 of the Constitution; and (iii) that contrary to Art. 20 of the Constitution, it penalises acts which, when committed, were not offences. Excerpts from the judgment of Shah J., follow:]

Re I:

Section 25FFF (1) is impunged as imposing unreasonable restrictions upon the fundamental freedom to close down an undertaking because liability to pay compensation is made a condition precedent to closure of an undertaking even if it is effected bona fide by an employer who is unable on account of unavoidable circumstances to carry on the undertaking and also because it operates retrospectively on closure effected since a date

arbitrarily fixed by the Act. It is also impugned on the ground that compensation is not related to the loss suffered by the employees by termination of employment on closure, but is awarded at standardized rates without taking into account the capacity of the employer to pay compensation to discharged employees....

On closure of an undertaking, the workmen are undoubtedly entitled to notice and compensation in accordance with S. 25F as if they had been retrenched, i.e. the workmen are entitled, besides compensation, to a month's notice or wages in lieu of such notice, but by the use of the words "as if the workman had been retrenched" the legislature has not sought to place closure of an undertaking on the same footing as retrenchment under S. 25F. By S. 25F, a prohibition against retrenchment until the conditions prescribed by that section are fulfilled is imposed; by S. 25FFF (1), termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice, is not prohibited. Payment of compensation and payment of wages for the period of notice are not therefore conditions precedent to closure.

By Art. 19(1) (g) of the Constitution freedom to carry on any trade or business is guaranteed to every citizen, but this freedom is not absolute. By cl. (6) of Art. 19, operation of any existing law or any law which the State may make in so far as such law imposes in the interest of the general public reasonable restrictions on the exercise of the right is not affected. In the interest of the general public, the law may impose restrictions on the freedom of the citizens to start, carry on or close their undertakings. Whether an impunged provision imposing a fetter on the exercise of the fundamental right guaranteed by Art. 19(1) (g) amounts to a reasonable restriction imposed in the interest of the general public must be adjudged not in the background of any theoretical standards or predeterminate patterns, but in the light of the nature and incidents of the right, the interest of the general public sought to be secured by imposing the restriction and the reasonableness of the quality and extent of the fetter upon the right....

Does the impugned provision impose an unreasonable restriction because it imposes liability to pay compensation which is not related to the capacity of the employer?.... Where the business is continuing its capacity to meet the obligation to pay dearness allowance, gratuity and provident fund, etc. may have to be taken into account.... But where a business is closed, the capacity to pay is not a relevant consideration.... Once the undertaking is closed and liability to pay compensation under the impugned section is not made a condition precedent, the amount which

the workmen may be able to recover must depend upon the assets of the employer which may be available to meet the obligation. The workmen would be entitled to recover compensation only if the employer is able to meet the obligation; otherwise they would have to rank pro rata with the other ordinary creditors of the employer.

The legislature has imposed restricted liability in cases where a closure is due to circumstances beyond the control of the employer. By the proviso to sub-s. 1 of S. 25FFF, where the undertaking is closed down on account of circumstances beyond the control of the employer, the compensation to be paid to the workman is not to exceed his average pay for three months. If the principal provision is not unconstitutional as imposing an unreasonable restriction, it is not suggested that the proviso is on any independent ground unconstitutional....

The effect of the impugned section along with the proviso is to classify the undertaking into two classes; viz., (1) those which are closed down on account of unavoidable circumstances beyond the control of the employer and (2) the remaining. When the closure of an undertaking is due to circumstances beyond the control of the employer, the maximum limit of compensation is average pay for three months, irrespective of the length of service of the workmen; in the residuary class, the liability is unrestricted. The explanation is in substance a definition clause which sets out what shall not be deemed to be closures on account of circumstances beyond the control of the employer. By this explanation, employers who had to close down their industrial undertakings merely because of financial difficulties including financial losses or accumulation of undisposed of stocks are excluded from the benefit of the proviso to S. 25FFF(1). The proviso restricts the liability of employers who are compelled to close down their undertakings on account of unavoidable circucstances beyond their control, but in view of the Parliament, in that category are not to be included employers compelled to close down their undertakings merely because of financial difficulties or accumulation of undisposed of stocks....

A state of financial difficulties or accumulation of undisposed of stocks may be temporary; it may be brought about by past mismanagement directly attributable to the employer or may even be deliberately brought about. The closure on account of financial difficulties or accumulation of undisposed of stocks is accordingly not necessarily the result of unavoidable circumstances beyond the control of the employer. That, in certain events, a statute may impose restrictions which will be irksome and

may be regarded by certain citizens as unreasonable, is not decisive of the question whether it imposes a reasonable restriction....By the explanation, certain persons may, because of persistent losses or accumulation of stocks, find themselves unable to carry on the business, and may still not be a ground for holding that the explanation is unreasonable....

On a review of the relevant circumstances we are of the view that the restrictions imposed by the impugned provision including the proviso are not unreasonable restrictions on the exercise of the fundamental right of the employers to conduct and close their undertakings. The provision requiring the employers to pay compensation to their employees though restrictive of the fundamental freedom guaranteed by Art. 19(1)(g) is evidently in the interest of the general public, and is therefore saved by Art. 19(6) of the Constitution from the challenge that it infringes the fundamental right of the employers.

Re II:

Article 14 of the Constitution is not violated by making by law a distinction between employers who closed their undertakings on or before November 28, 1956, and those who close their undertakings after that date. The State is undoubtedly prohibited from denying to any person equality before the law or the equal protection of the laws, but by enacting a law which applies generally to all persons who come within its ambit as from the date on which it becomes operative, no discrimination is practised. When Parliament enacts a law imposing a liability as flowing from certain transactions prospectively, it evidently makes a distinction between those transactions which are covered by the Act and those which are not covered by the Act, because they were completed before the date on which the Act was enacted. This differentiation, however, does not amount to discrimination which is liable to be struck down under Art. 14. The power of the legislature to impose civil liability in respect of transactions completed even before the date on which the Act is enacted does not appear to be restricted.... Article 14 strikes at discrimination in the application of the laws between persons similarly circumstanced; it does not strike at a differentiation which may result by the enactment of a law between transactions governed thereby and those which are not governed thereby.... If a statute creating a civil liability which is strictly prospective is not hit by Art. 14, a law which imposes liability on transactions which have taken place before the date on which it was enacted, cannot also be hit by Art. 14....

Re III:

For reasons already set out, payment of compensation and wages in lieu of notice under the impugned section are not made conditions precedent to effective termination of employment. The section only creates a right in the employees: it does not enjoin the employers to do anything before closure. Section 31(2) of the Act which imposes penal liability for contravention of the provisions of the Act can therefore have no application to failure to make payment of compensation and wages for the period of notice under S. 25FFF(1). The amending Act was, it is true, passed in June, 1957, and liability to pay compensation arises in November 28, 1956*. But, if liability to pay compensation is not a condition precedent to closure, by failing to discharge the liability to pay compensation and wages in lieu of notice, the employer does not contravene S. 25FFF(1). A statute may prohibit or command an act and in either case, disobedience thereof will amount to contravention of the statute. If the statute fixed criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of its enactment the protection of Art. 20(1) may be attracted. But S. 25FFF(1) imposes neither a prohibition nor a command. Under S. 25F, there is a distinct prohibition against an employer against retrenching employees without fulfilling certain conditions. Similar prohibitions are found in Ss. 22 and 23 of the Act. If this prohibition is infringed, evidently, criminal liability may arise. But there being no prohibition against closure of business without payment of compensation, S. 31(2) does not apply. By S. 33(c), liability to pay compensation may be enforced by coercive process, but that again does not amount to infringement of Art. 20(1) of the Constitution. Undoubtedly for failure to discharge liability to pay compensation, a person may be imprisoned, under the statute providing for recovery of the amount e.g., the Bombay Land Revenue Code, but failure to discharge a civil liability is not, unless the statute expressly so provides, an offence. The protection of Art. 20(1) avails only against punishment for an act which is treated as an offence, which when done was not an offence....

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* The Barsi Light Railways case, above, was decided on the 27th November, 1956. Eds.

TULSI DAS KHIMJI v JEE JEE BUOY
Bombay High Court, (1961) I L.L.J. 42

[The petitioners have four departments in their business as shipping and insurance agents. They gave notice of termination of employment to 14 clerks and 2 peons in their clearing and forwarding department and godown department. In doing so they followed the principle of "last come first go" and paid these employees all their wages, one month's pay in lieu of notice, retrenchment compensation, and bonus. The Transport and Dock Workers' Union raised a dispute, in that the Company did not follow the proper procedure of retrenchment. Because the different departments constituted one single industrial establishment, the retrenchment should have been effected on the principle of "last come, first go" with reference to the entire staff of all the departments and the head office taken together, *i.e.*, on the basis of pooled seniority. The Company argued, on the other hand, that the four departments were distinct and different industrial establishments, and that the retrenchment was properly effected on the basis of seniority in each department. The Tribunal took the view that the different departments constituted one single industrial establishment, because all of them were owned by one firm with a single head office; that the departments were all situated within the City of Bombay, and the employees were mostly from the same locality. Consequently, the retrenchment of clerical workers, and of peons should have proceeded on the basis of "last come, first go" among the whole clerical cadre, and among the whole number of peons, respectively. The Company moved the High Court under Art. 226 to quash the order of the Tribunal. Excerpts from the judgment of V. S. Desai J., follow:]

The expression "industrial establishment" had not been defined in the Act, but there can be no doubt that an industrial undertaking or a business organization or firm may have several different and distinct industrial establishments, and a single industrial establishment may also have different and distinct departments. The question whether in a given case there is a single industrial establishment or different industrial establishments will have, therefore, to be determined on considerations [such] as, in ordinary industrial or business sense, determine the unity of an industrial establishment, bearing in mind no doubt the purpose and object of the provision of the Act in which the expression is used.

In our opinion,... S. 25 G relates to the duration or continuance of the services and provides a safeguard in the matter of discontinuance or dispensing with the service by prescribing the rule "last come, first go."

That being the object and purpose of the provision we must proceed to find out in the present case on what basis the recruitment of the employees is made by the employers. Have the employers recruited the employees on the basis that they belong to one category of clerks of the four different departments of the employers taken as an integrated whole, or is the recruitment made on the basis of a category of clerks belonging to each of the different departments separately? Can the employment of the clerks be regarded as the employment in a single category of clerks by reason of the unity of ownership of the different departments or by reason of the geographical proximity of the four different departments or by reason of the further fact that there is a head office supervision of the four different departments functionally integrated or by reason of the conditions of transferability or seniority amongst the clerical cadre, can the four departments be treated as forming a single integrated industrial establishment for the purpose of S. 25G?....

As to the basis on which the recruitment of the employees is made, the facts found by the industrial tribunal show that the recruitment to each of the departments is made separately and is governed by the recruitments of that department alone. The recruitment, therefore, is not made on the basis that the recruited clerk belongs to one single category of clerks belonging to the four departments taken as an integrated whole. The basis of recruitment, therefore, does not show that there is a unity of employment between the clerks belonging to the different departments.

It is true that in the present case the four departments belong to the same business firm. There is also no doubt that the four departments are situated in the same locality and it is also undisputed that there is a general head office supervision over the different departments and the accounts are also finally amalgamated. These facts, however, will not enable us to conclude that the clerks were employed as in a single category for the whole of the business of the four departments together in view of the other facts on record, namely, that the four departments were managed and worked as independent units and that each had its own staff, its own management and its own accounts separately. The fact that each department was amenable to the head office supervision or the fact that the accounts were ultimately amalgamated in the accounts of the firm would not detract from the departments being distinct and independent units so far as the employment and conditions of service of the employees engaged in them are concerned.

Coming now to the third line of enquiry, the facts found by the tribunal show that the four departments are not functionally integrated. The conditions of service on which the employees are recruited are departmentwise, their seniority also is departmentwise and there is no policy or rule of transferability and such stray cases of transfer as there might have been in the long life of the business cannot be regarded as establishing a rule or condition of transferability.

The result of the above discussion is that the four departments of the petitioner cannot be regarded as constituting a single establishment for the purpose of S. 25G of the Act. That section relates to the duration and continuance of the service of the employee and it is from the point of view of the employment, the duration and continuance of the employments, and the terms and conditions of employment that we have to determine whether four departments can be regarded as one single industrial establishment. In the present case we have found that the four departments are distinct and complete units carrying on different lines of business and there is no functional integrity existing between them. The management and control of each department is separate and independent so far as its working and business is concerned. Each department employs its own staff according to its requirements: the employees belong solely and exclusively to that department and are not transferable as a rule. The seniority of the employees is also departmentwise. There is thus no unity of employment and conditions of service between the four departments. These, in our opinion, are the main and important tests in the present case and these tests are against the respondents [workers union]. . . .

[The Court, accordingly, reversed the Tribunal and overruled the Union's claim.]

OM OIL AND SEED EXCHANGE v THEIR WORKMEN

A.I.R. 1966 S.C. 1957

[Because of the ban imposed by an order of the Central Government, the appellant could not carry on its main business of forward trade in groundnut oil and mustard seed. Consequently, the appellant retrenched 30 out of its 37 employees and paid them the required salary and compensation. The retrenched workers, however, alleged that the retrenchment was mala fide, because it was predicated on the ban imposed by the government, and illegal because it departed from the rule of "first come, last go."

On failure of conciliation, the dispute was referred to the Labour Court of Delhi. That Court held that the retrenchment was void to the extent it departed from the "first come, last go" rule. It ordered the reinstatement of the senior workers and payment of 50% of the wages to the others as compensation for their periods of unemployment.

The appellant appealed to the Supreme Court. Excerpts from the judgment of Mr. Justice Shah follow:]

It is an accepted principle of industrial law that in ordering retrenchment ordinarily the management should commence with the latest recruit, and progressively retrench employees higher up in the list of seniority. But the rule is not immutable, and for valid reasons may be departed from. It was observed by this Court in *Swadesamitran Ltd., Madras* v. *Their Workmen,* 1960-1 Lab L.J. 504 (A.I.R. 1960 S.C. 762), that if a case for retrenchment is made out, it would normally be for the employer to decide which of the employees should be retrenched; but there can be no doubt that the ordinary industrial rule of retrenchment is "first come, last go", and where other things are equal, this rule has to be followed by the employer in effecting retrenchment.

The question then is whether in departing from the rule, the management acted mala fide, or its action amounted to an unfair labour practice. The Tribunal has to determine in each case whether the management has in ordering retrenchment acted fairly and properly and not with any ulterior motive: it cannot assume from mere departure from the rule that the management was actuated by improper motives or that the management had acted in a manner amounting to an unfair labour practice. Nor has the Tribunal authority to sit in appeal over the decision of the management if for valid and justifiable reasons the management has departed from the rule that the senior employee may be retrenched before his junior in employment.

The management of the appellant has recorded a resolution which sets out the reasons for retention of the employees Ram Lal Sethi, Jagdish Pershad, Kidar Nath Thukral, Om Prakash Janeja, Jai Narain, Budhpal Singh and Laljimal. About Ram Lal Sethi the Company has stated that he was looking "after the accounts" and income tax cases of the Company and he was the only accountant in the service of the Company and the senior-most employee in the Accounts Section. The Labour Court has upheld his retention and nothing more need be said about him. Jagdish Pershad was, it was stated, looking "after the share work, collection of building rent and court work and the realisation of rents" and that he was

"in charge of the share work for the last many years." The Labour Court was of the view that a clerk employed in general office duties may be styled as a general assistant, and that the posts of clerks are interchangeable and since clerks are not trained to handle any particular kind of work, the reasons given by the management for retaining this and other clerks cannot be accepted. However, there was not in the employment of the Company any other clerk who could competently hardle "share work" and attend to "court work". Clerical work ordinarily does not require specialisation and clerks may be transferred from one department to another without detriment to the business. But if a clerk has been working in a branch of the business and he is shown to possess special aptitude for a particular duty, performance of which requires application and experience, the management may in the interests of the business while retrenching others retain him even if he is junior to others. The rule of "first come, last go" is intended to secure an equitable treatment to the employees when, having regard to the exigencies of the business, it is necessary to retrench some employees. But in the application of the rule the interests of the business cannot be overlooked. The rule has to be applied where other things are equal. The management of the business must act fairly to the employees; where, however, the management bona fide retains staff possessing special aptitude in the interests of the business, it cannot be assumed to have acted unfairly merely because the rule "first come, last go" is not observed. If retention of a clerical employee is regarded as necessary by the management in the interests of the business, that opinion cannot be discarded merely on the ground that the clerk concerned is not the senior-most. There is nothing on the record to show that there was, among the senior employees, a clerk possessing the aptitude which Jagdish Pershad possessed. Kidar Nath Thukral was doing "typing work" and he was retained because he was the only typist with the Company. Our attention has not been invited to any evidence that there were other typists who were senior to him and they had been retrenched. A typist is undoubtedly a clerk in a business concern, but that does not mean that every clerk, unless specially trained, can become a competent typist. Om Prakash Janeja was retained because he was looking after the records of the Company and was "fully conversant as to where different type of records" were "lying", and that this employee was doing the work satisfactorily. A recordkeeper's work in a business cannot be performed efficiently without special training or long experience. It would be difficult to hold that in retrenching employees, if the management retains an efficient recordkeeper in preference to senior clerk who has no training or experience in recordkeeping, the management acts mala-fide or improperly, or perpetrates an unfair labour practice....

The Labour Court was of the view that retention of junior clerks in service could not be sustained on the ground that they had gained experience in a particular branch of clerical work. To accept that ground of preference, observed the Labour Court, was to destroy the rule "first come, last go" itself, since clerks are not specially trained to handle only a particular kind of work, and their work is easily convertible and one can replace another without dislocation in the department. For ordinary clerical work this is undoubtedly true, but even among the clerical staff if a degree of specialisation is necessary for discharging clerical duties efficiently, retention of a junior clerk on the ground that the duty performed by him requires experience, and aptitude, will not expose the management to a charge of mala fides, or perpetration of an unfair labour practice....

[The Court then considered the following from the judgment of Subba Rao, J., in *J.K. Iron and Steel Co. Ltd.* v. *Its Workmen,* (1960) 2 L.L.J. 64; A.I.R. 1960 S.C. 1288:]

> In regard to the clerks, what is the ground of preference given by the management? It is said that junior clerks, who were retained, have experience in a particular branch of clerical work. To accept this ground of preference without more is to destroy the principle itself. It may be that the clerks entrusted with such works may continue to do the same work till a re-adjustment of the work is made. There is no particular or scientific skill required in one class of work rather than in another. Clerks are not specially trained to handle only a particular kind of work. Their work is easily convertible and one can replace another without any dislocation in the department.

But the judgment does not enunciate a different principle. Ordinarily it is for the management to ascertain who on retrenchment should be retained in the interests of the business and the Industrial Tribunal will not interfere with the decision of the management, unless preferential treatment is actuated by mala fides. Where those retrenched and those retained are doing substantially the same kind of work and no special skill or aptitude is required for doing the work which the retained clerk is doing, preference given to the retained clerk on the ground that he has some experience in the branch may justifiably raise an inference of mala fides. Apparently in *J.K. Iron and Steel Company's* case, 1960-2 Lab LJ 64 (AIR 1960 S.C. 1288), the work required to be done by the clerks retained needed no special aptitude, and the clerks retrenched could as well do the work which was done by the clerks retained. It was in those circumstances that the

court held that mere experience in a particular branch requiring no special aptitude was not sufficient to justify departure from the rule "first come, last go"....

We may turn to the cases of the three peons, Jai Narain, Budhpal Singh and Laljimal. Retention of Jai Narain has been upheld by the Labour Court, and nothing more need be said about him. The other two peons are Budhpal Singh and Laljimal who were working as chowkidars. They are said to be "the senior-most chowkidars", and there is no evidence to show that there were in the employment of the Company other persons who could have worked as chowkidars. That peons Budhpal Singh and Laljimal were retained because they were the "senior-most chowkidars" should not be interfered with by the Tribunal in the absence of clear proof of mala fides. It cannot be assumed without more that every peon can do the work of a chowkidar. The management may ordinarily require the chowkidar to possess good physique and ability to maintain watch over the building and its assets. There is no evidence that the two peons Tara Shanker and Om Prakash had ever worked as chowkidars or were suitable for work as chowkidars. The order of reinstatement of Tara Shanker and Om Prakash will stand vacated.

The second part of the order directing that clerks from Nos. 4 to 14 and peons from Nos. 18 to 23 in the seniority list, shall be entitled, in addition to the retrenchment compensation already paid to them to 50 per cent of the wages as compensation for the period they remained unemployed, is wholly conceded before the Labour Court. It was also conceded that for carrying on the business of the appellant after imposition of the ban by the Central Government, not more than seven employees were required. If the management was entitled to retrench 30 workmen and did so after paying wages for the period of notice and retrenchment compensation, we fail to appreciate the grounds on which an order for payment of 50 per cent of the wages in addition to retrenchment compensation may be made. Retrenchment compensation is paid as solatium for termination of service resulting in unemployment, and if that compensation be paid there can be no ground for awarding compensation in addition to statutory retrenchment compensation. If the Industrial Tribunal comes to the conclusion that an order of retrenchment was not properly made, and the Tribunal directs reinstatement an order for payment of remuneration for the period during which the employee remained unemployed, or a part thereof may appropriately be made. That is because the employee who had been retrenched for no fault of his had been improperly kept out

of employment, and was prevented from earning his wages. But where retrenchment has been properly made and that order has not been set aside, we are not aware of any principle which may justify an order directing payment of compensation to employees properly retrenched in addition to the retrenchment compensation statutorily payable.

The appeal is therefore allowed and for the award made by the Labour Court the following award is substituted:

"That retrenchment of the workmen was not unjustified or illegal and the workmen are not entitled to any relief."