

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

WRIT PETITION NO. 1590 OF 2006

Bajaj Electricals Limited	...Petitioner
Vs.	
Bajaj Electrical Kamgar Sanghatana, Pune	...Respondent

Mr.Sudhir K. Talsania, Senior Advocate with Mr.Kiran S. Bapat i/b. Mr.A.D. Patwardhan for Petitioner.

Mr.S.K. Singhvi, Senior Advocate, with Mr.Mihir Joshi I/b. Mr.Rahul Kamerkar for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 3 JULY 2018

ORAL JUDGMENT :

This petition challenges an order passed by the Industrial Court at Pune allowing a complaint of unfair labour practice. The complaint, filed by the Respondent union, challenged a notice of closure given by the Petitioner management. By this notice, one of the two divisions of the company at its factory at Chakan, Pune, namely, die-casting division, was proposed to be closed. It was the case of the Respondent union that this closure was sham and was, in fact, an illegal lock-out amounting to an unfair labour practice under Item 6 of Schedule II and also under Items 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("PULP Act").

2 It is the case of the Petitioner management that at its Chakan factory, it had two distinct undertakings, namely, the die-casting factory

and the fan factory. The two factories, called divisions, were located in separate premises and buildings though within the same complex. The die-casting division employed about 34 workmen. There was no interchange or transfer of workmen from one division to another; the die-casting division had separate machinery which was not required for manufacturing of components for the fan division; and that the two divisions were totally distinct and separate, with no functional integrality between the two. It is the case of the Petitioner that ever since inception, when the Petitioner only had the die-casting division in its factory, heavy losses were incurred year after year and as a result, the financial position of the company became weak. The Petitioner submits that, in the premises, the Petitioner decided to close the die-casting division and enter into a non-compete agreement with a rival manufacturer of die-casting in consideration of a sum of Rs.3.24 crores to be paid by the latter so as to enable the Petitioner to wipe out some losses and meet liabilities of the die-casting division, including dues payable to the workers and staff towards the closure. The Petitioner, accordingly, effected closure on 18 October 2002 and paid legal dues to the workmen of the die-casting division. The workmen accepted the dues under protest and thereafter filed the present complaint of unfair labour practice through the Respondent union. This complaint was on behalf of all 34 workmen of the die-casting division. It was the case of the union in its complaint that there were no separate die-casting and fan divisions, but the Petitioner was one unitary establishment employing more than 100 workmen and was, accordingly, bound to seek prior permission of the appropriate Government for closure. The closure purportedly effected by the Petitioner without such permission was violative of Section 25-O of Chapter VB of the Industrial Disputes Act, 1947 ("ID Act"). Pending the hearing of the complaint, the Petitioner, however, was allowed to effect the

closure. A writ petition was filed by the Petitioner before this court seeking permission to dispose of the machinery of the die-casting division which was lying idle. That permission was granted subject to deposit of Rs.30 lakhs towards the amount realized from the sale of the machinery in the Industrial Court. As for the merits of the Union's case on prior permission, it was mainly contended by the Petitioner establishment that there were less than 100 workmen working with the concerned undertaking and as such, the provisions of Chapter VB were not applicable. The Petitioner's case was that firstly, the two divisions, namely, the die-casting division and the fan division, were separate undertakings with no inter-dependence or functional integrality between the two and secondly, and at any rate, even if the two undertakings were to be treated as one unitary establishment, the requirement of employment of minimum 100 workmen was not satisfied in the case. It was submitted that having regard to the nature of duties performed by the employees of the company and, particularly managerial and supervisory duties performed by them, the company did not have 100 employees at any time within twelve preceding months of closure answering the definition of "workman" under Section 2(s) of the ID Act.

3 The parties went to trial on the main issue of applicability of Chapter VB of the ID Act to the facts of the case. The Petitioner filed numerous documents including attendance cards, production reports, quality control reports of supervisors, etc. and also adduced oral evidence in support of its case on both aspects, namely, the independent existence of, and lack of functional integrality between, the two undertakings and the number of workmen being below the statutory minimum of 100. The union, for its part, examined three witnesses in rebuttal evidence. After

hearing the parties, the Industrial Court allowed the union's complaint partly and directed the Petitioner to pay full wages and other benefits of employees of the die-casting division from the date of closure, i.e. 18 October 2002, till the date of the order and thereafter regularly till their lawful termination. Being aggrieved, the Petitioner has filed the present petition.

4 As noticed above, the main controversy in the present matter concerns the number of workmen employed by the Petitioner establishment. That, in turn, partly depends on whether or not the two undertakings, namely, the die-casting division and the fan division, were separate undertakings or establishments and partly on whether, even on a case of demurrer, that is to say, taking them to be one undertaking or establishment, the Petitioner could be said to be employing not less than 100 workmen during the relevant period.

5 Before we come to the facts of the case on the question of interdependence of the two undertakings, let us note the law on the point. Our Court in the case of **Saurashtra Trust Karmachari Sangh vs. States' People (P) Ltd.**¹ considered the various tests considered by Courts for reckoning unity of industrial establishments or undertakings from the point of view of labour statutes, including the well-known test of functional integrality and functional interdependence. The Court particularly noted the law laid down by the Supreme Court in this behalf in the case of **Associated Cement Companies Ltd. (Chaibasa Cement Works, Jhinkpani) vs. Their Workmen.**² The Supreme Court, in that case, was considering whether a limestone quarry and a cement manufacturing

1 **1995 II CLR 781**

2 **1960 I LLL 1**

factory, which were some distance away from each other but owned by the same company, could be considered as one industrial establishment for the purposes of application of Section 25-E of the ID Act. After noting that the issue could be considered from several points of view such as (1) ownership, (2) control and supervision, (3) finance, (4) management and employment, (5) geographical proximity and (6) general unity of purpose and functional integrality, with particular reference to the industrial process of making cement, what the Supreme Court held was as follows :

" It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes a disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time".

Our Court thereafter noted that though the Supreme Court had in **Associated Cement Companies'** case indicated that the question would have to be viewed from several angles, it had, thereafter, in its successive judgments, veered progressively towards the test of general unity of purpose and functional integrality as being of overwhelming importance. For example, as our court noted, the shift in the thinking was evident in

Workmen of the Straw Board Manufacturing Company Ltd. vs. M/s. Straw Board Manufacturing Company Ltd.³ In that case, the Supreme Court held that the most important aspect in the case relating to closure was “whether one unit had such componental relation with the other, so that the closing of one must lead to the closing of the other, or the one cannot reasonably exist without the other”. That is how the functional integrality test was described by the Court. Thereafter, even in **S.G. Chemicals and Dyes Trading Employees' Union vs. S.G. Chemicals and Dyes Trading Limited**⁴, the Supreme Court emphasised the functional integrality and interdependence test. In **Isha Steel Treatment, Bombay vs. Association of Engineering Workers, Bombay**⁵, which was also a case of closure, the Supreme Court was of the view that unity of ownership, supervision and control over the two mills involved as also identity of service conditions of workmen of the two, were not by themselves sufficient to hold that there was functional integrality between the two mills. The case of **Hindustan Steel Works Construction Ltd. vs. Hindustan Steel Works Construction Ltd. Employees' Union, Hyderabad**⁶ was one more instance where the Court did not consider the tests of unity of ownership, management and control to be as significant as the test of functional integrality and interdependence. Our Court in **Saurashtra Trust Karmachari Sangh** accordingly held that though several tests were evolved in **Associated Cement Companies** case (supra), the test of functional integrality and functional interdependence had emerged as a superior test, particularly in cases involving retrenchment and closure.

6 Let us now see if this test, which has emerged as a superior

3 1974 I LLJ 499

4 (1986) 2 SCC 624

5 AIR 1987 SC 1478

6 AIR 1995 SC 1163

and more appropriate test particularly in cases *inter alia* involving closure, is satisfied in the present case. As the outset, Mr. Singhvi, for the Respondent union, submits that the Petitioner had never pleaded separateness of die-casting and fan divisions as distinct industrial establishments. That is far from the truth. The record of the case clearly indicates that the whole emphasis of the union, as a complainant, was on commonness of facilities and works in the fan section and die-casting section such as tool room, maintenance section, etc. as also commonness of employees. It had clearly pleaded that there was “no Die Casting Division of the company at Chakan”. In its written statement, the Petitioner had clearly joined issues with this. There was a specific plea that the “Fan Division was totally independent and was not functionally dependent on the Die Casting Division at any point of time”; and that “even after the total permanent closure of the Die Casting Division since 18.10.2002, the Fan Division has not closed down and is functional, which itself shows that both the divisions are totally independent with each other and there is no functional integrality between the two divisions”. The Industrial Court itself not merely took note of the divergent pleas of the parties on this issue, but even went ahead and decided the issue against the Petitioner. In the face of all this, it is futile to suggest that there was no specific plea of separateness of the establishments.

7 Coming now to the merits, the only evidence before the Industrial court in this behalf, and on which it held the test of functional integrality as satisfied in the present case, was the admission of the Petitioner's witness that (a) the registration of the factory manufacturing die-casting as well as fans was under the name and style as Bajaj Electricals Ltd., Chakan Unit, and (b) some dies required for manufacturing electrical

fans were to be prepared in Chakan unit, though they were also bought from other vendors. These two circumstances by themselves can hardly make out a case of functional integrality or interdependence. In fact, the Industrial Court appears to have squarely based its conclusion in this behalf on the fact that “the activity of Die Casting as well as manufacturing of fans was going on in Bajaj Electricals Ltd. Chakan.” The ratio of **Isha Steel Treatment** (supra) was, curiously enough, held by the Industrial Court to be inapplicable on the ground that it was not the case of the Petitioner employer that the die-casting and fan divisions were separate establishments.

8 Mr.Singhvi emphasises the aspects of (i) employments of all workmen being under the same employer, namely, Bajaj Electricals Ltd., without reference to any particular division, (ii) the entire factory having one registration and licence, (iii) nine sections out of eleven sections named by the complainant union being common to both undertakings (meaning thereby that 60% of work force employed in the Petitioner company was entrusted with common work of the two divisions) and (iv) appointment letters of workmen showing inter-division transferability. We are considering here whether the two divisions, which are owned by one and the same employer, are separate industrial undertakings or establishments by virtue of complete lack of functional integrality and functional interdependence between the two. If that is so, that the employments of workmen of the two divisions were under a common employer (and without reference to any particular division) would hardly be relevant. So also, the factory having one registration or licence.

9 In this respect, Mr.Singhvi, however, relies on a decision of a

learned Single Judge of our court in **S.B. Patole vs. Fujitsu ICIM Ltd.**⁷ Relying on this decision, Mr.Singhvi submits that since the die-casting division is not a separate entity as there is no registration or incorporation of that division under the Companies Act, there is no need to consider functional integrality between it and the fan division of the Petitioner. The case of **S.B. Patole**, in my opinion, is not an authority for the proposition that unless there is a separate incorporation of any particular undertaking under the Companies Act, there is no scope for treating that undertaking as a separate industrial establishment or undertaking for the purpose of Section 25-O of the ID Act. **S.B. Patole's** case involved a company manufacturing computer hardware which was also engaged in software development and had several divisions for such work including the Manufacturing and Supply Division ('MSD') and Engineering Support Division ('ESD'). MSD was closed by the company. The case of the workmen was that the two divisions, namely, MSD and ESD, formed one undertaking and the combined strength of workmen employed in them was over 100. The learned Judge held that these divisions formed one integrated whole which was the registered company itself and hence there was no need to establish separately functional integrality between the divisions as components of one integrated whole. The learned Judge held that in a given case, a company might have a finance division, maintenance division, administrative division, sales division, etc. all of which might be part of the company, but that did not call for an inquiry into their functional integrality. That was, in other words, a case of separate departments of the company carrying out its business, which was, in that case, software development. Having separate departments for individual areas of software development, did not imply that each was a separate

7 2011(2) Mh.L.J. 72

undertaking. There was a general unity of purpose of these departments; the departments were part of one whole business; running them as separate departments was a means of organizing the business of the company in a better way. The observations of the learned Judge in connection with the company as one corporate entity must be seen in that light or in that context. Corporate entities in modern times have multifarious activities and businesses. They may, as owners of these separate businesses, organize these businesses through separate undertakings. These undertakings would be independent undertakings, whether conducted from separate places or from one place. If at any time, their separateness is a matter of contest for the purpose of an industrial legislation, the matter is to be decided on the tests laid down by the Supreme Court, including the more important and relevant test of functional integrality and functional interdependence, as we have seen above.

10 The case of **R.K. Shinde vs. Shekoba Auto Pvt.Ltd.**⁸ cited by Mr.Singhvi is also clearly distinguishable. Our court, in that case, considered various aspects of the matter bearing on the unity of the establishment and held the two concerned companies to be one industrial undertaking or establishment. No doubt, one of the factors considered by our court in that case was interchangeability of workmen and the nature of their work and commonness of their service conditions. But that was considered in conjunction with common ownership of the partners, who kept on changing the names of the companies from time to time, geographical location of the companies being in the same building, the original firm being one undertaking which was later on converted into

8 2007 SCC OnLine Bom 1039

these two companies with option being given to the workmen to work for one of the two, etc. On those facts, our court came to the conclusion that the two companies were part of the same establishment. The conclusion of the court must be ascribed to the assessment of the evidence in that case. It cannot support the case of the Respondent union here, which is based on altogether different set of facts.

11 As for some of the sections being common for the two divisions, though it may be one important circumstance, it is by no means decisive. It is very much conceivable that two completely independent establishments have common services such as accounts, administration, etc. Besides, there is no case, as suggested by Mr.Singhvi, of nine out of eleven sections being common to both divisions or undertakings. The union's pleading is only in respect of two sections being common, namely, the tool room and the maintenance section. There is no pleading or evidence for the other sections. There is absolutely nothing to suggest, as claimed by Mr.Singhvi, that 60 per cent of work force was entrusted with common work.

12 That leaves only the aspect of transferability of workmen of the two divisions. Though transferability of workmen *per se* is not decisive of interdependence or integrality, as held by our court in **Yashwant G. Chikhalkar vs. Killick Nixon Ltd.**⁹, if the undertakings are altogether different and have no connection or relation with each other concerning their activities, even on facts the Respondent union has no case in this behalf. Of the three witnesses produced by the Respondent union, all were doing die-casting section work. Neither was at any time transferred to the

9 1999 II CLR 390

fan section. Only one of the three talked of workers in one section being transferred to the other section, though without any particulars, and even he, in his cross-examination, admitted that he had always worked only in the die-casting section. The management's evidence, on the other hand, that none of the workers of the die-casting division had ever worked in the fan division was not subjected to any cross-examination. Thus, there is no credible evidence that there was inter-division transfers of workmen of the two divisions. If anything, the evidence was to the contrary.

13 In sum, there is nothing on record to suggest that there was componental relation of one division with the other such that one could not reasonably exist without the other or that closing of one would lead to the closing of the other. There was, accordingly, no functional integrality or interdependence between the two and the two were separate establishments or undertakings. The combined strength of the workmen of the two divisions, thus, could not have been taken into account for considering the applicability of Chapter VB.

14 That is just one part of the controversy. The second part concerns the status of the employees as workmen employed with the die-casting division, or even with the Petitioner company as a whole. The Petitioner disputes the union's case that the industrial establishment, namely, its die-casting division, or even the combined establishment of the die-casting and fan divisions, for that matter, employed not less than 100 workmen. Learned Counsel for the Petitioner submits that there was no evidence before the Court, either adduced by the Respondent union or extracted from the Petitioner's own testimony, that the industrial undertaking, whether individual or combined, employed the statutory

minimum number of 100 workmen. Learned Counsel for the Respondents counters that. He submits that firstly, the onus to show that the persons, who were admittedly employed in the undertaking, were not workmen within the meaning of Section 2(s) of the ID Act was on the Petitioner employer and secondly, there was ample evidence to conclude in favour of the complainant union on the issue.

15 On the question of onus of proof, firstly, it is important to note that as a matter of principle, the onus to show that the closure declared by the Petitioner employer was illegal was clearly on the Respondent union. It is the Respondent who went before the court with a prayer to declare the closure of the establishment as illegal. It is the Respondent's case that for a closure to be legal, prior permission of the appropriate Government was required if the number of workmen employed in the establishment was not less than 100; and that the establishment in the present case did employ such number and yet failed to obtain the requisite permission, and hence, the closure was illegal. As a necessary ingredient of that case, it was for the Respondent to allege and prove the existence of the statutory minimum number of 100 workmen working in the establishment. Law fixes the incident of onus on that person who should loose if the onus is not discharged. If the statutory minimum number of workmen cannot be shown, the union should fail in its complaint. The onus to show that number is, thus, on it. Secondly, and equally importantly, the law generally eschews placing of the onus on anyone to prove a negative fact. If the question before the court is whether or not a certain state of affairs exists, onus would be to prove that it so exists rather than to prove that it does not. Normally, thus, that is to say, other considerations apart, in a complaint like this, the law would require proof of existence of not less

than 100 workmen rather than proof of want of at least 100 workmen. There are, of course, subsidiary rules such as the burden being ordinarily on the party, who ought to be in the knowledge of the fact, to prove it, and we shall also deal with them presently.

16 Our Court in **Varsha Vishwanath Kolambkar vs. Ravindra Hindustan Platinum Pvt.Ltd.**¹⁰ (Per Bharucha J., as the learned Judge then was), in the context of applicability of Model Standing Orders to industrial establishments employing 100 or more workmen, had held that a workman complainant before the Industrial Court would, ordinarily, have no knowledge and would find it well-nigh impossible to prove that on any day or days in the preceding 12 months his employer had employed more than 100 employees. The court observed that how many employees were employed at any given point of time, whether on permanent or temporary basis, was within the special knowledge of the employer and in the premises, it would be for the employer to satisfy the Industrial Court that at the relevant time he had not employed 100 workmen. Later a Division Bench of our court in **Arvind Anand Gaikwad vs. Uni Abex Alloy Products Ltd.**¹¹ held that it did not read the observations of the learned Single judge referred to above as concluding that the burden in such cases was on the employee. The Division Bench held that indeed it was not possible to conclude that the burden was on the employer because the issue was raised by the employee and when the employer disputed that fact, then the burden to establish the negative fact could not be laid at the doorstep of the employer. That really settles the matter.

17 Let us now see if and how this burden has been discharged by

¹⁰ 1987(54) F.L.R. 172

¹¹ 1988 I CLR 26 HC

the Respondent union. At the outset, it may be noted that the Respondent union did not lead any evidence before the Industrial Court about there being not less than 100 workmen employed in the establishment, whether in the establishment of die-casting division or the combined establishment of die-casting and fan divisions. In particular, there is nothing to show that so many persons were (a) employed to do any manual, unskilled, skilled, technical, operation, clerical or supervisory work for hire (and drawing wages not exceeding the statutory ceiling in Section 2(s)), as required by the first part of the definition, and (b) not employed mainly in a managerial or administrative capacity or exercising functions, by nature of duties or powers, mainly of a managerial nature, as required by the second part of the definition in Section 2(s) of the ID Act. The contention of Mr.Singhvi is that for the purposes of identifying the party on whom the onus lies, one must have regard to the pleadings before the court. Learned Counsel submits that the pleadings in the present case indicate that the Petitioner establishment never questioned the fact that the employees alleged to be workmen fell within the first part of the definition and the only contest was on whether or not the concerned employees performed managerial or supervisory or administrative duties. Learned Counsel submits that the onus to show that they were performing managerial, supervisory or administrative duties would be on the employer, since the union cannot be asked to prove a negative fact that they were not. Mr.Singhvi relies on the judgment of this court in **Aloysius Nunes vs. Thomas Cook India Ltd.**¹² in support of his submission.

18 Mr.Singhvi is not right there. The pleadings do not indicate that the Petitioner employer in the present case did not question the

12 2000(3) L.L.N.160

applicability of the first part of the definition in Section 2(s) to the employees listed by the Respondent union in its complaint. The Respondent, in paragraphs 4(C) and (D) of the complaint, had alleged that on an average 133 employees were engaged by the employer in the preceding 12 months. It had given a section-wise break-up of employees and even their names. The Petitioner had disputed each of these averments. The Petitioner had claimed (in para 12 of the written statement) that the departments shown as sections as well as the strength of the section-wise or total number of workmen was incorrect. The Petitioner also had not admitted employment of workmen listed by the Respondent. The Petitioner had also in terms averred that the burden to prove employment of not less than 100 workmen during the relevant period was on the Respondent. In the face of these pleadings, it is not possible to claim that any particular fact, whether covered by the first part or the second part of the definition in Section 2(s), was admitted by the Petitioner. Merely because at one place, in addition to a general denial concerning the alleged employment of more than 100 workmen, the Petitioner had alleged engagement of listed employees in supervisory or managerial category as a reason for its plea, it cannot be said that it only disputed their category and not their engagement to do manual, unskilled, skilled, technical, operational or clerical work (i.e. the first part of the definition). The burden was, thus, clearly on the Respondent.

19 It cannot even be said that the union was not in a position to testify to the nature of the work carried on by the employees listed by it. After all, it had given section-wise list of employees including their names. Nothing prevented it from deposing to these matters. Lack of knowledge of, or means to prove, engagement of workmen that may ordinarily be

attributed to an individual workmen-complainant, and which was considered by the learned Single Judge of our court in **Varsha Kolambkar**, certainly cannot be attributed to the union who was espousing the workmen's cause here. Besides, the Senior General Manager of the Petitioner gave evidence before the court, in which he furnished a detailed account of the employees and their duties in the die-casting as well as the fan division of the Petitioner. The Respondent union could well have asked appropriate questions to him in cross-examination and even sought documents. The union not only did not seek any documents, but there is hardly any cross-examination on the nature of work performed by the employees mentioned by the witness.

20 Even though the Respondent union did not examine anyone to prove the nature of work performed by individuals listed by it, the Petitioner employer examined as many as 44 individual employees, each of whom deposed to the nature of work carried out by them. This evidence was assessed by the Industrial Court. It was held, on such assessment, that these employees were workmen; they could not be said to be employed in supervisory or managerial capacity or carrying out any supervisory or managerial work. This court is conscious of the fact that it is not for this court to reassess that evidence or to draw another conclusion on that evidence simply because it is possible to do so. This court has merely to consider if the conclusion of the Industrial Court is a possible conclusion supported by some evidence and whether any relevant or germane material is disregarded, or irrelevant or non-germane material is considered, to arrive at the conclusion. Whilst there is nothing of this nature to challenge it, the conclusion still does not imply that the union has discharged its burden to prove the statutory minimum number of 100 workmen. The

reasons are discussed below.

21 In the first place, the Industrial Court wrongly cast the burden of proof on the Petitioner employer. It relied, whilst doing so, on the law stated by our court in **Varsha Kolambkar's** case (supra). As we have seen above, the law has since been explained by a Division Bench of our Court in **Arvind Anand Gaikwad's** case (supra), where the Division Bench has held that that the observations in **Varsha Kolambkar's** case could not be read to mean that the burden was on the employer. The second misdirection in law was to draw an adverse inference against the Petitioner employer, since 37 employees were not examined. The reasoning of the Industrial Court goes like this. The Respondent union had produced a list of 133 employees, 35 of which, i.e. from Serial Nos.99 to 133, were daily rated employees, who could very well be said to be workmen. Of the others, Serial Nos.1 to 17 were admittedly not workmen (the union not having disputed their status as managerial employees). Out of the balance 81 employees, Sr.Nos.18 to 98, only 44 were examined by the Petitioner employer, leaving out 37 employees. Non-examination of these 37 employees called for drawing of an adverse inference that if these employees had been examined, they would have falsified the employer's case that they were not workmen. The Industrial Court, accordingly, concluded that it was just and proper to infer on the basis of evidence before the court that $35+37=72$ employees were workmen. It then assessed the evidence of 44 employees and held them to be workmen, adding up the total number of workmen to be 116, i.e. above the statutory minimum of 100. This so-called adverse inference is a clear instance of misdirection in law, as we shall presently see.

22 An adverse inference is drawn on the basis of the presumption under Section 114 of the Evidence Act, particularly illustration (g) thereunder. This presumption, in the first place, is only a permissible inference and not a necessary inference. Drawing of such presumption, as explained by the Supreme Court in the case of **Tomaso Bruno vs. State of Uttar Pradesh**¹³ depends upon the nature of the fact required to be proved and its importance in the controversy, the usual mode of proving it, the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account before drawing such inference. Such adverse inference is drawn when the court holds that any document or evidence, the omission of which would directly establish the case of the other side, has been withheld by the party against whom the adverse inference is to be drawn. Even the conduct and diligence of the other party, as the Supreme Court held in **Union of India vs. Ibrahim Uddin**¹⁴, is of paramount importance. The court may in this connection consider whether the other party could have filed interrogatories or applied for inspection or production of the documents, etc. Nothing of this is considered by the Industrial Court in the present case before drawing a far reaching adverse inference concerning the status of as many as 37 different employees of the Petitioner as workmen under Section 2(s) of the Act. There are two fundamental infirmities concerning the whole exercise. As we have noticed above, the very starting point of this exercise was wrong. It started with an incorrect placement of the burden of proof regarding the status of these employees. It thereafter simply went on to conclude that since no evidence was produced to prove the contrary, the other side's case stood proved. It is one thing to say that the burden to prove a fact or its non-existence is not

13 (2015) 7 SCC 178

14 2012(5) ALL MR 462 (S.C.)

discharged, and quite another to say that by that means, the contrary is proved. Besides, the Industrial Court did not take into account any of the relevant considerations noted above for drawing the particular adverse inference, even assuming that it were permissible to do so. It did not, for example, consider whether the oral evidence of 37 employees was the only means of proving their status; was such evidence only accessible to the Petitioner, and not to the Respondent; could it be said to have been withheld by the Petitioner; could the Respondent not have filed interrogatories or sought summonses; could it not have cross-examined the Petitioner's witness when he deposed to the status of each of these employees or sought documents in that behalf. Nothing of this was considered by the court.

23 This twin misdirection in law has resulted into a clear failure of justice. Merely on the basis of the evidence before the court concerning the nature of duties performed by 44 employees, the court has come to the conclusion that 116 employees of the Petitioner were workmen. Even if we were to concede that it was futile to suggest that 35 daily rated employees were anything other than workmen, there is absolutely no evidence about the other 37 being workmen. They were held to be so simply by (a) wrongly casting the burden of proof on the employer and (b) illegally drawing an adverse inference. The evidence, thus, at its best, accounts for 79 workmen (i.e. 44+35) and not 100 or more.

24 Alternatively, it is submitted by Mr.Singhvi that if not Section 25-O, Section 25-FFA of the ID Act would govern the case and there being admittedly over 50 workmen, the requirement of Section 25-F should have been satisfied. No such argument was raised either in the pleadings or in

the evidence or arguments before the Industrial Court or even, for that matter, in the present petition. It is not permissible to raise such contention for the first time at the hearing of the petition, for the Petitioner would, in that case, be taken completely by surprise. Had such contention been raised earlier, the Petitioner might have conducted itself differently. It was not necessary for the Petitioner, for example, on a case under Section 25-O, to contest seriously the Respondent's proof of employment of 79 workmen. It would be an altogether different matter if the Petitioner were now told that there was also a case under Section 25-FFA read with Section 25-F against it, which it had no way of meeting.

25 Mr.Talsania, for the Petitioner, lastly questions the award of back-wages in the present case. Learned Counsel submits that there is no evidence at all in the present case that the workmen concerned were not gainfully employed. On the question of back wages, and particularly in reference to the requirement of showing that there was no gainful employment on the part of the employees, learned Counsel refers to the case of **U.P. State Brassware Corporation Ltd. Vs. Udai Narain Pandey**¹⁵. Mr.Singhvi counters that by submitting that this is not a case of illegal retrenchment or termination, but of illegal closure and here, unlike in the case of illegal retrenchment or termination, reinstatement must follow the declaration of the closure as illegal as a matter of course. There is no particular reason why the case of illegal closure must stand on a different footing from the case of illegal retrenchment so far as the relief of back wages is concerned. Back wages are not granted mechanically wherever there is a reinstatement order. Grant of back wages is in the nature of an equitable relief and involves a discretionary element; the court

15 2006 I CLR 39

in each case has to mould an appropriate relief. Gainful employment of the concerned workman in the interregnum is an important consideration for moulding such relief. This basis of award of back wages, applied in case of reinstatement upon setting aside of an illegal retrenchment, is equally valid and relevant for reinstatement upon declaration of an illegal closure. As held by the Supreme Court in **U.P. State Brassware Corporation's** case (supra), it is now well-settled that it is for the workman to raise a plea that he was not gainfully employed. Admittedly no such plea was raised in the present case and in the premises, award of back wages was not justified.

26 For all these reasons, the impugned order of the Industrial Court cannot pass muster. The impugned order, firstly, reflects a serious misdirection in the trial. The onus to prove that there were not 100 or more workmen employed with the Petitioner employer, was wrongly cast on it. After casting of such onus, yet another wrong principle was invoked, namely, drawing of an adverse inference on account of the employer's failure to examine 37 of his employees. As for the independent existence or functional integrality of the two undertakings, firstly, there was hardly any discussion worth the name and secondly, and more importantly, the only basis of treating the two undertakings as part of one unitary establishment was that the Petitioner was manufacturing some die-castings required for fans in their die-casting division in Chakan and the factory was registered in one name, namely, Bajaj Electricals Ltd. Merely on the basis of these factors, it could not be held that there was functional integrality between the two divisions and they were one establishment. The Industrial Court wrongly distinguished the ratio of **Isha Steel Treatment** (supra) by observing, contrary to the record, that it was not the case of the Petitioner that the die-casting and fan divisions were distinct establishments. Merely

on the basis of these observations, it incorrectly rejected the Petitioner's case of independent existence of the two undertakings.

27 Accordingly, the writ petition deserves to be allowed. Rule is, in the premises, made absolute and the petition is allowed by quashing and setting aside the impugned judgment of the Industrial Court in Complaint (ULP) No.436 of 2002 and dismissing the complaint.

28 The amount of Rs.30 lakhs lying in Fixed Deposit in the Industrial Court in pursuance of the interim order passed in this petition, shall be refunded with accrued interest to the Petitioner.

(S.C. GUPTE, J.)