Indian Link Chain Manufactures Ltd vs Their Workmen on 17 September, 1971

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Author: P. Jaganmohan Reddy

Bench: P. Jaganmohan Reddy, C.A. Vaidyialingam

PETITIONER:
INDIAN LINK CHAIN MANUFACTURES LTD.

Vs.

RESPONDENT:
THEIR WORKMEN

DATE OF JUDGMENT17/09/1971

BENCH:
REDDY, P. JAGANMOHAN
BENCH:
REDDY, P. JAGANMOHAN
VAIDYIALINGAM, C.A.

CITATION:
1972 AIR 343 1972 SCR (1) 790
1971 SCC (2) 759
CITATOR INFO :
R 1972 SC2332 (62,63)
RF 1977 SC2246 (16)
R 1978 SC1113 (24)
E 1980 SC 31 (13,19,25)
RF 1980 SC2181 (135)
R 1990 SC2047 (11)

ACT:
Payment of Bonus Act, 1965, ss. 2(p) and 19(2)--'Settlement' when terminated.
Industrial Dispute-Settlement when terminated--Consolidated wages ,fixed by Tribunal without linking dearness allowance with living wage and without granting adjustments-Propriety-Bonus-Figures of depreciation and development rebate whether to be taken from income-tax assessment order or balance sheet-For determining return on reserves figures of reserves at beginning of year should be taken-Gratuity-Financial

capacity How to be calculated when wage consolidated without indicating how much relates to dearness allowance--Scheme whether fair and reasonable.

HEADNOTE:

The appellant was registered as a public limited company in or about 1956 and commenced production in or about 1958. It employed approximately 170 persons of whom 156 were daily rated workers-the latter being respondents in the present appeal. In respect of certain demands raised by the workmen in 1962 there were conciliation proceedings in the course of which the parties arrived at an amicable settlement on April 5, 1963. Thereby they settled inter alia Demand No. 1 relating to wage scales and Demand No. 2 relating to Dearness Allowance. The parties also agreed to discuss, the existing production bonus scheme and to finalise the same by the end of June 1963. The settlement was signed on behalf of the parties and by the Conciliation Officer. However subsequently there were again disputes between the workmen and the employers and these were referred by the State Government to the Industrial Tribunal on December 27, 1965 under s. 10(A)(d) of the Industrial Disputes Act, 1947 . Both the parties being dissatisfied with the Award of the Tribunal filed appeals by special leave in this Court. The questions that fell for consideration were : (i) whether in view of the absence of a notice of termination as contemplated in s. 19(2) of the Act the settlement dated August 5, 1963 continued to subsist and consequently whether the reference of the dispute to the Tribunal was incompetent, (ii) whether the tribunal was wrong in fixing consolidated wages without linking dearness allowance with cost of living or granting adjustments in the wage scale; (iii) whether in the matter of determining available surplus the Tribunal was justified in taking the figures of depreciation allowance and development rebate from the balance sheet and not from the income-tax assessment orders in which the figures were higher; (iv) whether for the purpose of determining the return on reserves the figures it the end of the year or the beginning of the year had to be taken; (v) whether the Tribunal was right in its conclusion that the financial position of the company justified the framing of a scheme of gratuity; (vi) whether in View of the fact that the Tribunal had prescribed a consolidated wage without indicating what portion of the wage was the basic wage and what portion the dearness allowance, the payment of gratuity based on an average of the basic wages of an employee exclusive of dearness allowance was impossible to implement; (vii) whether the gratuity scheme was incongruous because those who retired were given larger benefits than those who were retrenched.

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HELD : (i) Reading s. 19 with the definition of 'settlement' in s. 2(p) of the Industrial Disputes Act it would appear that a settlement will ensure for the duration of the period for which it has been agreed to between the parties and if no period is agreed upon, for a period of six months from the date on which the memorandum of settlement of-dispute is signed by the parties and where it is put an end to by a notice in writing it will continue to be operative until the expiry of two months from the date of which the notice is given. It would appear that even where an agreement is for a fixed period it will not continue to be binding for the duration of the period of settlement but thereafter also until it is terminated by a notice in writing and even then it will continue for a period of two months from the date of such notice. While no doubt it is true that a notice must be in writing, such a notice can be inferred from correspondence between the parties. [798 A-C]

In the present case the management had in a letter dated 20th March 1965 addressed to the Additional Commissioner of Labour, Bombay, admitted that no settlement or award was in existence, the reference, of the Industrial Disputes was made only after that. It was not a satisfactory explanation of that categorical statement that it was made under a mistake. The said letter must be deemed to be a notice of termination because it made a categorical statement that the settlement had 'been terminated on 31-12-64. The management was therefore estopped from now taking the stand that the settlement was not put an end to or that the reference was invalid. [800 G-801 E]

Cochin State Power, Light Corporation Ltd. v. Its Workmen, [1964] 2 L.L.J. 100, Workmen of Western India Match Co. Ltd. v. Western India Match Co. Ltd., [1963] 2 S.C.R 27 Management of Bangalore Woollen, Cotton & Silk Mills Co. Ltd. v. Workmen & Anr., [1968] 1 S.C.R. 581, applied.

Workmen of Continental Commercial Co. (P) Ltd. v. West Bengal & Ors., [1962] 1 L.L.J. 85, disapproved.

(ii)The Tribunal considered the financial status of the company and the era of prosperous business which it could look forward to, as well as the wage structure prevailing in the relevant units of the industry and other wages. There was no justification for interfering with it on the ground that it bad not fixed a separate dearness allowance linked with, increase or decrease in the cost of living index or to link the consolidated wage itself with it. [803 H; 804 H]

Hindustan Times Ltd. New Delhi v. Their Workmen & Vice Versa, [1964] 1 S.C.R. 234, French Motor Car Co. Ltd.v. Workmen, [1963] Supp. 2 S.C.R. 16 and Bengal Chemical & Pharmaceutical Works Ltd. v, Its Workmen, [1969] 2 S.C.R. 113, referred to.

However this was a fit case in which wage adjustment should have been made. The Tribunal gave no reason for rejecting the claim altogether. Why some adjustment was not made taking into consideration the length of the service bad not

been stated. There was no adjustment in the first wage structure which was the subject of a settlement as such and it would not be fair also not to fix the wages in the wage scales which in fact were those fixed for the first time by the award. From an analysis of the various categories of workers in each of the years it would appear that a larger majority of them had been employed between the years 1963 and 1965. If a direction was given that there should be one increment for every completed 3 years up to the date of reference namely 27-12-65, no

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injustice would occur, nor will there be strain on the financial resources of the appellant which it could not bear. [Directions given. [805 B-E]

(iii)A statement as per Income,-tax Assessment statement 'A' Ex. C-5 was filedby the company on 2-9-66. Similarly another statement of profit and lossaccount as per annual account of the company-Statement 'B' Ex. C6 was filed on the same date. In the former statement C-5 according to item 2, depreciation allowed by the Income-tax Officer for 1964 was shown as Rs. 1,81,054 while according to C-6 depreciation was shown as Rs. 80,190. Similarly development rebates under C-5 was shown as Rs. 5,822 while under C-6 it was shown as Rs. 3,917. There was no challenge to these figures as such, nor did the respondent dispute that these amounts were not as per the assessment orders. The Tribunal had accepted statement C-6 but ignored C-5 even though both the statements were prepared by the company in exactly the same circumstances, one from the assessment orders and the other from the balance sheet. There was no justification for the rejection of the company's claim that depreciation and development rebate' be allowed as per income-tax assessment. [806 F-H]

(iv)The claim of the Respondent for return on reserves also must be allowed because under s. 6(d) read with item (1) (iii) of the Third Schedule to; the Bonus Act the Tribunal ought to have allowed 6% of the company's reserves shown in its balance-sheet as at the commencement of the accounting year including any profits carried forward from the previous accounting year. The Tribunal was wrong in taking into account the figures of reserves as at the end of the accounting year. [807 B-C]

(v)In dealing with the financial capacity of an undertaking to bear the burden of a gratuity scheme it would not be appropriate to approach the question 'from an investors point of view. The overall picture of the soundness of the undertaking and its future prospects must be taken into account. [812 D-E]

In the present case the financial position of the company was such that the implementation of the scheme of gratuity was not likely to place an undue or unconscionable burden upon the company. [812H]

M/s. British Paints (India) Ltd. v. its Workmen [1966] 2

S.C.R. 523, Management of Wengar & Co. v. Workmen, [1963] Supp. 2 S.C.R. 962, Burlianpur Tapti Mills Ltd. v. B. T. Mills Mazdoor Sangh, [1965] 1 L.L.J. 453, Hindustan Antibiotics Ltd. v. The Workmen, [1967] 1 S.C.R. 652, Gramaphone Company Ltd. v. Its Workmen, [1964] 2 L.L.J. 131 and Bharatkhand Textile Mfg, Co. Ltd. v. Textile Labour Association, Ahmedabad, [1960] 3 S.C.R. 329, referred to.

(vi)While no doubt the general rule is that gratuity must be related to the basic wage, in cases where the wages are not very high and a consolidated wage has been fixed taking into account the dearness allowance, the scheme of gratuity may be related to the consolidated wage, which will be the basic wage in the subsequent years. At any future date having regard to the price index, the claim of the workmen either for a rise in the wage based on the cost of living index or the grant of separate dearness allowance to neutralise that rise is bound to be considered and adjudicated. No difficulty in implementing the scheme could therefore arise because of the fact that the Tribunal had prescribed a consolidated wage without indicating what position of that wage was the basic wage and what position the dearness allowance. [815 E-F; 8 1 3 H-814 A]

Management Ghaziabad Engineering Co. (P) Ltd. v. Its Workmen, [1970] 1 S.C.R. 622, Delhi Cloth & General Mills Co. Ltd. v. Workmen &

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Ors. [1969] 2 S.C.R. 307, Remington Rand of India Ltd. v. The Workmen, [1968] 1 L.L.J. 542, referred to.

(vii)The criticism that the scheme was unfair and incongruous because those that retire are given larger benefits than those who are retrenched was unwarranted. The difference between the gratuity payable to persons who resign or retire voluntarily and those whose services are terminated is that the latter will receive in addition to the gratuity the retrenchment compensation admissible to them under the Industrial Disputes Act, while in the case of the former he will not be entitled to it. The scheme was not only reasonable but fair. [815 G-816 B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 204 and 610 of 1967.

Appeals by special leave from the Award dated September 30, 1966 of the Industrial Tribunal, Maharashtra, Bombay in Reference (IT) No. 468 of 1965.

I.N. Shroff, for the appellant (in C.A. No. 203 of 1967) and Respondent No. 1 (in C.A. No. 610 of 1967).

Madan G. Phadnis and Janardan Sharma, for the respondents (in C.A. No. 204 of 1967) and the appellants (in C.A. No. 610 of 1967).

The Judgment of the Court was delivered by P.Jaganmohan Reddy, J. The Government of Maharashtra had referred the dispute between the Appellant and its Workmen to the Industrial Tribunal under the Industrial Disputes Act 1947 (hereinafter called 'the Act') in respect of Wage scales, dearness allowance, bonus, gratuity and permanency. The Award made by it is the subject matter of this appeal by Special Leave (Civil Appeal No. 204 of 1967) in which the dispute relating to wage scales and dearness allowance is contended only on the ground that there was a settlement between the workmen and the employers in a conciliation proceedings and as that has not been terminated by either party the Govt. has no jurisdiction to refer the dispute in relation thereto to the Tribunal. If this plea is not accepted the wage scales and dearness allowance as awarded by the Tribunal is not challenged. The claim for bonus as awarded is disputed as it often happens, on the manner and method of computation of depreciation and development rebate. It is the case of the employers that it has not the financial capacity to bear the burden of the gratuity scheme framed by the Tribunal for the workmen. Apart from this certain incongruities in this scheme are pointed out to which we shall refer and deal with at the appropriate place. The fifth issue relating to permanency is not pressed. The workman have also filed an Appeal, (Civil Appeal No. 610 of 1967) against the Award in which the omission by the Tribunal to grant an adjustment in the wage scale by directing a fitment of the wages of workmen in the said scales in accordance with the length of their service is assailed. It is also pointed out that the Tribunal did not link the dearness allowance granted by it with the cost of living index and lastly the award did not compute the return on reserves in accordance with the schedule 3 of the Payment of Bonus Act (hereinafter called 'the Bonus Act). A few facts may now be stated for a better appreciation of the matters in controversy. The Appellant was registered as a Public Limited Company in or about 1956 and commenced pro- duction in or about 1958. It employs approximately 170 per- sons of whom 155 are daily rated workers and it is the later category who are the Respondents in this case. In October '62 the General Secretary of the Mumbai Kamgar Union which represents the workers of the Appellant (hereinafter referred to as 'the Union') made certain demands on their behalf relating inter-alia to wagescales and dearness allowance. These disputes formed the subject matter of conciliation proceedings in the course of which the parties arrived at an amicable settlement on 5th April '63, the relevant terms of which pertaining to. the wage scale and dearness allowance ire as under :

> Demand No.1-Wage scales:
>
> The workers drawing at present upto Rs. 30.30 np. per day will be given an ad-hoc increment of 60 np. with effect from 1-1-1.963 and another increment of 40 np. with effect from 1-1-1964.
>
> (b)Persons drawing more than Rs. 3.30 np. per day will be given an adhoc increment of 50 np. with effect from 1-1-1963 and anotherincrement of 30 np. with effect from 1-1- 1964.

(c)The arrears of increment from 1-1-1963 till 31st March will be paid on or before 20th April, 1963.

Demand No. 2-Dearness allowance:

As the wage, scale agreed to above are consolidated i.e. in- cluding allowance, the Union has withdrawn the demand". The other two demands relating to Casual leave and paid holidays are not before us and need not be noticed. The parties also agreed to discuss the existing production bonus scheme and to finalise the suggestion for revising the same by the end of June '63, in view of the instalment of new machinery. This settlement was reduced to writing and signed by the Chief Executive of the Appellant, the Conciliation Officer and the General Secretary, Mumbai Kamgar Union and was considered a 'settlement' as defined by clause 'p' of Section 2 of the Act. It was averred that as this settlement was binding upon the parties under Section 19(2) of the Act for a period of six months from 5th April '63 and would continue to bind them after the expiry of the said period until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement and since the settlement was not terminated in accordance with any of the requirements set out above by a notice in writing given by the Respondents, no dispute could be raised again relating to the wage scale and dearness allowance and therefore the reference made on 27th December '65 under Sec. 10(A)(d) of the Act for adjudication was incompetent. On the dispute relating to the payment of bonus, the case of the Appellant was that its profits for the year 1964 'before depreciation was Rs. 4,11,176/- and that under the payment of Bonus Act the available, surplus was Rs. 19,921/- out of which an allocable surplus would amount to Rs. 11,977/-. The Tribunal however, in arriving at its own computation of available surplus aid allocable surplus disallowed the claim of the Appellant for a sum of Rs. 1,81,054/- on account of depreciation and Rs. 5,822/in respect of the development rebate reserve and instead it allowed depreciation of RE. 80.190/- and development rebate of Rs. 3,917/- as shown in the balance sheet. In respect of these items the reason given by the Tribunal is that while it is true, that the Company was entitled to deduct by way of depreciation an amount admissible in accordance with Section 32(1) of the Income tax Act by virtue of Sec. 6 (a) of the Bonus Act, there was no material on record to show that the deduction in respect of the aforesaid items was actually made by the Appellant in accordance with tile relevant provisions of the Income tax Act. In these circumstances it did not accept the deduction claimed by the Company, which were admissible under the Bonus Act.

On the question of gratuity the case of the Appellant was that it has only been in existence for 8 years from 1958 and that for the years 1958 to 1960 its working showed losses. For 1961 there was a carry forward from prior years of a loss of Rs. 2,19,948/- which when set off against the profit of Rs. 93,062/in the year 1961 left a carry forward of loss of Rs. 1,26,880' In the year 1962 it earned profits of Rs. 84,837/- but the losses incurred in the earlier years could not be wholly set off and the balance of the loss of Rs. 42,049/- had to be carried forward to the year 1963. After setting off this

carry forward of loss against the profit for the year 1.963 there was only a profit of Rs. 65,323/-. In these circumstances no dividend was paid to the shareholders for the years 1958, to 1962. Dividends however were paid for the year 1963,1964 and 1965 but the stand of the Appellant was that notwithstanding the earning of profits and declaration be provided for fully in accordance with the Income tax Act. Apart from this there were large foreign loans the payment of which was made difficult by the further burden imposed upon it on account of devaluation of the Rupee. To this was also added the increase in the wage bill consequent on the settlement entered into with the Union as well as the increase of Rs. 20,869/- due to Interim wage relief recommended by the Wage Board for Engineering Industry. Taking all these factors into consideration the Company's case before the Tribunal was that it had not the financial ability to sustain a scheme of gratuity, Apart from this ground of attack, the Appellant also contested the scheme as being vague, contradictory and impossible to implement. The Tribunal it is said while it had prescribed a consolidated wage, directed the payment of gratuity by reference to the basic wage excluding the dearness allowances. It is therefore contended that it is not possible to ascertain which portion of the consolidated wage is the basic wage and which portion the dearness allowance and consequently the implementation of the scheme has become impossible. It is also submitted that as the scheme stands it is incongruous because a person who resigns or retires after 10 years gets a larger gratuity than a person whose services are terminated.

In so far as the claim for bonus is concerned the Respondents in their Appeal have challenged the Award of the Tribunal on the ground that it had worked out the return no reserves not as they were shown in the balance sheet at the beginning of the year viz. Rs. 2,70,497/- as required under Schedule III of the Bonus Act but on the reserves appearing at the end of the year amounting to Rs. 4,92,349/-. This method of computation would reduce the return on the reserve deductable as a prior charge by Rs. 14,000/and consequently would increase the available and allocable surplus. We have already stated that the Respondents in their Appeal have further challenged the Award relating to the fixation of wage scales and dearness allowance, the former on the ground that the Tribunal gave no directions on the question of adjustments or fitments notwithstanding the fact that the issue was specifically referred for adjudication and the latter by not linking it to the cost of living index allegedly on the ground that "no change for worse is likely to take place for some time to come". It will be convenient to examine these rival contentions in respect of each of the items separately.

The question whether the settlement in Ex. C. 9 was in force at the time when the Government made the reference of the dispute to the Tribunal, will depend on whether the provisions of Sec. 19(2) read with Sec. 2(p) of the Act were complied with. There is no dispute that Ex. C9 would amount to a settlement but on behalf of the workmen it is contended that it only records an ad-

hoc settlement, the operative portion of which relates to two increments one to be given from 1.1.63 and the other from 1-1-64, and it is during this period that the dearness allowance was given up. In these circumstances the management, it is claimed, terminated the agreement by making counter proposals to the workmen in the conciliation proceedings Which terminated the settlement. This averment is supported by the finding of the Tribunal to That effect, namely, that there was a waiver of the requirement of a written notice putting an end to the settlement. The contention on behalf of the Appellant on the other hand is that there could be no waiver of a statutory notice required by the

provisions of the Act to be in writing to put an end to the settlement, and that the analogy of waiver of a notice required to be given in suits against the Govt. under Sec. 80 of the Civil Procedure Code is neither apt nor is it applicable to cases where as a matter of public policy a written notice is required to be given by one of the parties to the other party to terminate the settlement. Section 2(p) of the Act defines `settlement' as meaning :

> " a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer"

In so far as it is relevant, Section 19 is as follows 19(1) A settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute. (2) Such settlement shall be binding for such. period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum, of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement. (3) No notice given under sub-section (2) of sub-section (6) shall have effect, unless it is given by a party representing the majority of persons' bound by the settlement or award, as the case may be.,, Reading Sec. 19 with the definition in sec. 2(p) it would appear that a settlement will enure for the duration of the period for which it has been agreed to between the parties and if no period is agreed upon for a period of six months from the date on which the memorandum of settlement of dispute is signed by the parties and where it is put an end to by a notice in writing it will continue to be operative until the expiry of two months from ;the date on which that notice is given. It would appear that even where an agreement is for a fixed period it will not only continue to rebinding for the duration of the period of settlement but thereafter also until it is terminated by a notice in writing and even then it will continue for a period of two months from the date of such notice. While no doubt it is true that a notice must be in writing, such a notice can be inferred from correspondence between the parties. In Cochin, State Power, Light Corporation Ltd. v. Its Workmen(1) a settlement between the employers and the employees had been arrived at on 25th November 1954 and was to remain in force for a period of five years from 1st October '54 i.e., upto 30th September '59. While this was so under Section 19(2) of the Act it would continue to be in operation till it was terminated by a notice in writing. The case of the employers in that case was that the settlement was never terminated by notice in writing, as such it continued to be in force when the reference was made, and since a reference of a dispute made during the continuance of the settlement is bad, the Tribunal had no jurisdiction to adjudicate the dispute relating to wage fixation and dearness allowance. It however appeared that the workmen had presented a charter of demands on 14th October '59 in which there was a reference to the settlement and it was stated therein that the Union had on the 13th October '59 resolved to terminate the existing settlement and submit the charter of demands to the management. Then followed the charter of demands. It was contended

that this did not put an end to the settlement as required by Section 19(2) of the Act because there was no reference to the termination of the settlement by that charter. The Court however rejected this contention and held that as there was a reference under the charter of demands to a resolution in which a specific statement that the settlement was being terminated thereby was made it was held that that was sufficient notice as required under Section 19 (2) of the Act and hence the reference in regard to items covered by the settlement were valid. Wanchoo, J. at page 101 observed "There is however no form prescribed for terminating settlements under S. 19(2) of the Act and all (1) [1064] 2 L.L.J. 100.

that has to be seen is whether the provisions of S. 10 (2) are complied with and in substance a notice is given as required X X thereunder".

The facts in the Workmen of Western India Match Co. Ltd. . The Western India Match Co. Ltd.,(1) were that during the pendency of negotiations the Union by a letter had asked the Company to treat the charter of demands as notice under Sec. 19(2) of the Act without first terminating the earlier settlement in an Award and the Company had agreed to refer the matter in dispute to the adjudication of a Tribunal. But nonetheless it was contended that when there was no notice of termination of settlement in the charter of demand the subsequent reference in a letter that it should be terminated as from the charter of demand was not valid. This contention was however negatived on the ground that a formal notice under s. 19(2) of the Act was immaterial inasmuch as the presentation of the charter of demands filed by a letter amounted to a notice of termination of settle- ment. In the Management of Bangalore Woollen, Cotton & Silk Mills Co. Ltd., v. The Workmen & Anr.,(2), it was sought to be contended that the case in the Workmen of Western India Match Co. Ltd., supported the proposition that an inference to terminate an award or settlement can be gathered from the various correspondences that passed between the management and the Union but one of us Vaidialingam, J. at page 586 pointed out that that decision "does not lend any support to such a view". It was ultimately held in that case that- though no such formal notice was given in the earlier correspondence the letter of April 8, 1957 written by the Union could itself be construed as notice within the meaning of Section 19(2) and therefore the Tribunal had jurisdiction to adjudicate upon the claim as the reference was made by the State Government long after the expiry of two months from April 8, 1957. It is true that though a written notice can be spelled out of the correspondence there must be a certainly regarding the date on which such a written notice can be construed to have been given because a settlement notwithstanding such notice continues to be in force for a period of two months from that date.

The tribunal drew support from the Workmen of Continental Commercial Co. (Private) Ltd. v. Govt. of West Bengal and Ors. (3) for holding that the charter of demands itself constitute the notice as required under Section 19 (2) of the, Act. It thought that that case was decided by this Court. This however was a case decided by the Calcutta High Court where it was held that the charter of demands was a tacit representation by the workmen (1) [1963]2 S.C.R. 27. (2) [1968]1 S.C.R. 581. (3) [1962] 1 I.L.J. 85.

not to remain bound any more by a settlement arrived at in conciliation proceedings but sub-.sec. (2) of Sec. 19 contemplates an express representation physical, in the form of writing terminating

the agreement. While holding so it nonetheless observed that a notice under Sec., 19 (2) of the. Act can also be waived by the party to whom the notice is to be sent. This view of the Calcutta High Court is opposed, to the view taken by this Court and must be rejected as not good law because in our view there cannot be any waiver by conduct or implication of the requirement of a written notice which that Court had itself recognised must not be a tacit representation but an express representation in the form of writing terminating the settlement. This being the legal position it is necessary to examine what in fact took place in this case. The settlement in C. 9 would appear to be as contended by the Respondent's Advocate on an ad hoc basis because it provides even in respect of the demand for wage scale that the, employees will be given two ad hoc increments one with effect from 1-1-63 and another with effect from 1-1-64. Even in respect of the bonus scheme which was not part ,of the settlement it was agreed to finalise the suggestion for revising it by the end of June '63, in view of the instalment of new machinery. Nonetheless Exh. C. 9 embodies a settlement and even if the duration of that settlement is not fixed as contended, it will continue to be in operation until a notice in writing to terminate it is given, or from the correspondence such a notice to terminate can be ascertained. The Company had in its written statement taken up- the stand that Exh. C. 9 still subsists but the correspondence shows that the Company had put an end to it before the charter of demands were presented to it. It would appear that during the proceedings in conciliation of the dispute that has given rise to the reference which is the subject matter of this appeal, the Additional Commissioner of Labour, Bombay, wrote to the Manager on 26-1-65 before entering upon the conciliation asking him to give information as to whether there is any agreement, settlement or an Award governing the demand raised on behalf of the workmen in the present dispute. The Company by its reply dated 20th March 1965 informed him that the agreement between itself and its workmen had expired. It said :

"at present we do not have any agreement/settlement or an Award covering the demands raised on behalf of the Workmen in the present dispute with the present Union. We had an agreement with the previous Union M/s. Mumbai Kam2ar Union, for two years, which has expired on 31-12-1964. There are no demands pending for adjudication".

The stand taken by the company that there is, no settlement in force covering the, demands raised by the workmen is clear. In Body text tQ34pe4-~ $-(#,&p{been remitted during his life time he would certainly have been liable to Body textunder the provUtQ34pe4-~ $-(#,&p{with regard to matters sing out of the Administration of the, Act. Sub-s. Body textides, the coUf tQ34pe4-~ $-(#,&p{with regard to matters sing out of the Administration of the, Act. Sub-s. (2) provides, the co On behalf of the Union it is pointed out that by not directing an adjustment in these wage scales a worker who has been in the service of the Company for 8 years drawing less than the initial start in each of the wage scales according to the category in which he is placed will get the same initial wage as a person who is taken into service at or near the date of the claim of the enforcement of the Award which is not in conformity with social justice. The Tribunal it is said should have directed an ad hoc fitment like that given in the case of The Hindustan Times Ltd., New Delhi v. Their Workmen Vice Versa(1), or in French Motor Car Co. Ltd. v. Workmen(2). The Tribunal in the case before us pointed out that the demand of the Union for wage scales was that all the workers should be classified in consultation with the Union and to be fixed in the wage scales claimed by it on a point to point basis with retrospective effect from 1-2-1965. It is these demands that were considered and the Tribunal

did not see its way in adopting either the scales of wages claimed by it or fixing them in the wage awarded on a point to point- basis. There is therefore no question of the Tribunal not exercising a jurisdiction vested in it but it must be taken as having been considered and rejected. The question whether that rejection is valid or not Would depend on the facts and circumstances of the case as can ,be ascertained from the material placed before it. It is contended by the Union that the material before the Tribunal was such that it could have made fitments for instance, from the statement of the dates of joining and the classification and designation of the workmen as given in U-3 statement. From this statement the, Tribunal could have ascertained the length of service of each of the employees, his category, his date of joining and the wage scales which he was drawing on the date of the Award and could have formulated and directed an ad hoc fitment. It is true that taking as typical, a case of a semi-skilled operator who joined on 1- 12-1958, another in the same category who joined on 13-3- 1961 and one who joined on 19-3-1964, more nearer to the date of the Award, it would appeal that as all of them would be drawing less than the initial wage of Rs. 5.50 in their old wage scales they will start with Rs. 5.50 in the new wage scales fixed for semi-skilled workers even though the first of them had on the date when the wage scales came into operation 8 years service and the second of them 5 years and the last of them only 2 years. In the French Motor Car Co. Ltd.'s case (2) this Court after considering the several instances where the Tribunal had granted fitments expressed the view that general adjustments are granted when scales of wages are fixed for the first time. At page 27-28 Wanchoo, J. observed:

(1) [1964] 1 S.C.R. 234.

(2) [1963] Supp. 2 S.C.R.16.

the statement of claim the General Secretary of Sarva Shramik Sangh representing the workmen said that the private agreement between the Company and Mumbai Kamgar Union dated 5th April 1963 was duly terminated and thereafter a charter of demands were presented on 4-2-1965. Thereafter the Assistant Labour Commissioner tried to conciliate and in his report Ex. U , 6 while stating that conciliation proceedings have ended in a failure, relying upon the fetter of the management, stated that there was no subsisting settlement/agreement or Award presently in this dispute. The admission by the management is said to be made under a mistake. We do not think this is a satisfactory explanation of a categorical statement. In our view the letter of 20th March 1965 must at any rate be deemed to be a notice of termination, because there, is a categorical statement that the settlement has been terminated on 31-12-1964. Even if there is no evidence of written notice terminating it on the date specified, the letter which said that it had so terminated must be taken as the requisite notice, if so, the reference to adjudication under the Act has been made long after the expiry of the two months i.e., on 27-12-1965. If we view the matter slightly differently, the, result is the same, because when both the parties to the dispute Proceeded on the specific plea that there was no settlement binding on either of them in respect of the wages and dearness allow- ance even prior to conciliation, the Government had no option, on a failure of the conciliation proceedings and on being informed by the written representation of the appellant that there was no settlement in force, but to refer the dispute to the Tribunal. The management therefore is estopped from now taking the stand that the settlement was not put an end to or that the reference was invalid. In view of this finding though the management does not assail the wages and dearness allowance as awarded by

the Tribunal, as already noticed, this Award is challenged by the Union on the ground that no adjustment in the wage scale was granted and that the dearness allowance' was not linked with the cost of living index. It is also contended that the Tribunal by not making an Award_ in respect of fitments in the wage scale committed an error and 'is not adjudicating the dispute in respect thereof, 'has failed to exercise a jurisdiction vested in it. It is true that while the Tribunal prescribed a consolidated wage scale of daily wages, it did not direct fitments in those wage scales. The scales that have been prescribed for the various categories of workers are as follows Unskilled..... Rs. 4 .50-0 .20-6 .50 Semi-skilled Rs. 5 .50-0 .25-8 .00 Skilled Rs. 7 -00-0 .35-10 .50 Highly skilled Rs. 8 .50-0 .50-12 .50 .lm15 "A review therefore of the cases cited on behalf of the respondents shows that generally adjustments are granted when scales of wages are fixed for the first time. But there is nothing in law to prevent the Tribunal from granting adjustment even in cases where previously pay scales were in existence; but that has to be done sparingly taking into consideration the facts and circumstances of each case. The usual reason for granting adjustment even where wage scales were formerly in existence is that wage scales were particularly low and therefore justice required that adjustment should 'be granted a second time." This principle in our view recognises that the payment in a graduated wage scale should reflect the years of service of an employee in that grade. When the graduated wage scale is first fixed and a fitment is made therein subsequent revision in wage scales do not require any further fitment because the original fitment will continue to give them the advantage of their service. The case of Hindustan Times Ltd. v. Their Workmen(1), is one where the Tribunal took into consideration in deciding the question of adjustment that it would be fair to give some relief to the existing employees by means of an adjustment, while at the same time not burdening the employer with higher rates of wages for new incumbents. In the circumstances it has held that there was no justification for interfering with the directions given by the Tribunal in the matter of adjustments. The decision referred to would clearly indicate, that in each case depending on the facts and circumstances, the question whether any fitments should be made at all or if fitments are to be made, what adjustments should be affected, will have to be considered. In this case while no doubt the wage scales and dearness allowance demanded by the Union which was said to be, prevalent in as many as 26 concerns engaged in the Engineering Industry in the region of Bombay would place fairly heavy burden on the financial resources of the Company, the Tribunal observed that there was no material on record which would furnish a basis for treating the concerns relied upon by the Union as comparable concerns. It was also pointed out that there were about 21 concerns in the same unit of the industry which were paying minimum consolidated daily wages of Rs. 5.08 to their employees and therefore their wage structure would thus represent a cross-section of the wage structure of the employees working in Engineering concern and would be very relevant for fixation of wage structure of employees in the Company. In the end the Tribunal considering the financial status of the Company and the era of prosperous business which it can look forward to, as well as the wage- (1) [1964] 1 S. C. R. 234.

structure prevailing in the relevant units of industry and other relevant considerations, prescribed the consolidated scales of wages. We must therefore reject the claim for dearness allowance being linked with cost of living index. The case of the Respondents is that the Tribunal had misdirected itself by relying upon a recent award made by it in the case of another Company where it was said that the cost of. living had gone up to 70 points but that was not taken into consideration because the Company was a flourishing Company and as such the minimum consolidated wage was fixed as

being proper. The criticism against the approach of the Tribunal is in our view not warranted because it specifically stated in respect of the Award which it considered that that "award may not be taken as laying down a standard minimum wage in the engineering unit of industry, the award would have its own importance as a contributory factor for determination of the wage-structure, of the employees in the Company'. As we pointed out the Tribunal considered several factors in fixing the wage scale. Each case must be considered on its own merits and what was awarded in the Hindustan Times Ltd. case(1) or in the Bengal Chemical & Pharmaceutical Works Ltd. v. Its Workmen (2) , cannot be a detemining factor in other cases. The principles relating to the fixation of fair wage including the payment of dearness allowance to provide for adequate neutralisation, which should be taken into consideration in industrial adjudication, were stated by one of us, Vaidialingam J, at page 123 of which the two that are relevant are as follows "(1) (2) The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living.

(3) (4) (5) The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account".

In these circumstances we are satisfied that the Tribunal after considering the various factors to which a reference was made awarded a consolidated wage having regard to the financial capacity of the industry and there is no justification for interfering with it on the ground that it had not fixed a separate dearness (1) [1964] 1 S.C.R. 243.

(2) [1969] 2 S.C.R. 113.

allowance linked with increase or decrease in the cost of living index or to link the consolidated wage itself with it.

We are however satisfied that this is a fit case in which wage adjustment should have been made. The Tribunal gave' no reason for rejecting the claim altogether. We could have understood the rejection of the claim of the Union that it should be given the right to make the adjustment itself, but why some adjustment was not made taking into consideration the length of the service, has not been stated. There was no adjustment in the first wage structure which was the subject of a settlement as such and it would not be fair also not to fix the wages in the wage scales which in fact are those fixed for the first time by the away Besides we find from an analysis of the various categories of workers in each of the years that a larger majority of them have been employed between the years 1963 and 1965. If we were to direct one increment for every completed 3 years upon the date of reference namely 17-12-1965, no injustice would occur nor will there be a strain on the financial resources of the Appellant which it cannot bear. It would appear that of the 145 workers shown in the statement U-3 only about 43 Workers will have the benefit namely 9 employed in 1958, 7 in 1959, It in 1960, 5 in 1961 and 1 1 in 1962. Of these only 16 will get two grade increments in the adjustment as proposed. In this view we direct the fitments accordingly subject however, that the other workers will start at the initial wage in their respective categories and their next increment as also the

movement in respect of those who have joined service between 1958 to 1962 after the aforesaid fitment is made will be due to them on completion of each year from the date of the enforcement of the Award. On the computation of bonus the three items that have been challenged are those in respect of depreciation, development rebate, and return on reserves-the former two by the Appellant and the latter by the Respondent in its appeal. The computation of bonus as already noticed is governed according to the Bonus Act. Under Section 23 of this Act there is a presumption about the accuracy of balance-sheets and profit and loss accounts of Corporations and Companies and since the accuracy of the particulars contained in these documents have not been challenged in this case, reliance will have to be placed thereon. Taking the first two items regarding which the management had objection, the Tribunal had deducted a sum of Rs. 80,190/- on account of depreciation and Rs. 3,917/- on account of development rebate and rejected the claim of the Company to make the deductions in respect of the aforesaid items in accordance with the Income-tax Act as provided by Section 6 (a) of the Bonus Act, by merely adopting the amount 'as shown in the balance-sheet and profit and loss account. While the, Tribunal, no doubt recognised that the Company was entitled to deduct amounts by way of depreciation in accordance with Section 32(1) of the Income- tax Act it rejected the claim because there was no material on record to show that the, deduction as actually made by the Company towards depreciation and development rebate were in accordance with the relevant provisions of the Income-tax Act. The figures for deduction on account of return on reserves have been taken not on those shown in the balance- sheet at the beginning of _the year, which is what the Bonus Act prescribes but on the figures shown at the end of the year. It is submitted by the Respondent's advocate that the Tribunal was right in disallowing the first two items because the Company did not prove by satisfactory evidence that the amounts claimed by them were true. This contention must be rejected. There can be no doubt that the employer is entitled to deduct from the gross profit,-, as computed under Sec. 4, depreciation under Section 6(a) of the Bonus Act in accordance with Section 32(1) of the Income-tax Act and under Section 6(d) such further sums as are specified in the Third Schedule to the aforesaid Bonus Act. The only dispute is whether the Appellant has placed material before the Tribunal from which it could make the computation as required under the Income-tax Act. In our view the employer has been claiming from the very beginning depreciation and development rebate reserve under the Income-tax Act and had produced a statement signed by the Company's officials in which these figures were shown as per the Income-tax assessments for each of the year specified therein. Before the conciliation officer a statement was filed in which depreciation as per Income-tax was claimed as Rs. 1.80 lakhs. In the, statement of claim also this amount was claimed. Apart from these averments a statement, as per Income-tax assessment, statement 'A', Ex. C-5 was filed, by the Company on 2-9-1966. Similarly another statement of profit and loss account as per annual account of the Company-Statement 'B' Ex. C-6 was filed on the same date. In the former document C-5 according to item 2, depreciation allowed by the Income-tax Officer for 1964 was, shown as Rs. 1,81,054/- while according to C-6 depreciation as per annual account of the Company was shown as Rs. 80,190/-. Similarly development rebate under C-5 was shown as Rs. 5,822/while under C-6 it was shown as Rs. 3,917/-. It may be mentioned that there was no challenge to these figures as such, nor did the Respondent dispute that these amounts were not as per the assessment orders. The Tribunal had accepted statements in C-6 but ignored C-5 even though both the statements were prepared by the Company in exactly similar circumstances, one from the assessment orders and the other from the balance-sheet. We find no justification whatever in the reduction of the claim by the Company. The

claim of the Company for a deduction on account of depreciation and development rebate of Rs. 1,61,054/and Rs. 5,822/- instead of Rs. 80,190/- and Rs. 3,970/- is therefore, accepted.

The claim of the Respondent for return on reserves also must be allowed because under s. 6(d) read with item 1(iii) of the Third Schedule of the Bonus Act the Tribunal ought to have allowed 6% of the Company's reserves shown in its balancesheet as at the commencement of the accounting year including any profits carried forward from the previous accounting year. A reference to the balance-sheet for the year ending 31-12-1964, would show that the 3 items of reserves at the end of the previous year which will be the beginning of the accounting year 1964 were (1) development rebate reserve-Rs. 1,82,174/-, (2) general reserve-Rs. 60,000/-, and (3) profit and loss account Rs. 5,323/- which together add to Rs. 2,47,497/-. A return of 6% on this amount should have been taken into account but instead the Tribunal allowed 6% on Rs. 4,92,349/- which were the reserves at the end of the year comprised of Rs. 1,86,091/as development rebate reserve, Rs. 30,000/- as General reserve and Rs. 6,289/- profit and loss account. The computation under the Bonus Act is as stated and not as the Tribunal has calculated. It would make a difference of Rs. 14.000/- in respect of this item. We have at the end of the arguments asked both the learned Advocates to give us an agreed statement on the lines indicated above in respect of depreciation, development rebate and return on reserves. We give below that statement:

> "BONUS CALCULATION FOR THE YEAR 1964 (1-1-1964 to 31-12-1964) Rs.
>
> Gross profits of the year 1964 4,11,176.00 Add bonus paid for the year 1963 19,129.00 Deduct prior charges 4,30,304.00
>
> (a) Less Depreciation as per Income-tax1,81,054.00 2,49,250.00
>
> (b) Less Development Rebate Reserve5,822.00 2,43,428.00
>
> (c) Less Income-tax as 5% and Surcharge 1,21,714.00 1,21,714.00
>
> (d) Less Return on capital at 8-1/2 Y. on Rs. 8,50,000/-

72,250.00 49,464 .00

(e) Less Return at 6% on Reserve of Rs. 2,47,497/- (Rs. 1,82,174+Rs. 60,000/-+Rs. 5,323/-) 14,849 .82-

Available Surplus 34,6118 Allocable surplus (60 Y. of Available Surplus)20,768.50 Annual Wage Bill during 1964 2,43,562.98 Therefore, Allocable Surplus of Rs. 20,768 .50"

> According to this statement the available surplus will be Rs. 34,614.18 and the allocable surplus which is 60% of the available surplus amounts to Rs. 20,768.50. This will be the amount which will be available for distribution as bonus instead of Rs. 42,783/- as computed by the Tribunal. The Award will have 'to be accordingly

> modified. The, item relating to gratuity is challenged by the Appellant mainly on the ground that the Company's financial capacity is not such as to bear the burden of the increase in the wage scale and dearness allowance. A good deal of criticism was directed against the method adopted by the Tribunal in laying emphasis on the fairly heavy wage bill-which it was said the Company could bear and by picking and choosing convenient passages from the Director's Reports to buttress the conclusion that the financial position of the Company was sound. Some of these are as follows That the Company turned the profits received in the year 1963 into losses and very substantially reduced the profits for the years 1961 to 1965; that the observations of the Chairman of the Board of Directors in the Director's Report for the year ending 31st December 1965 had shown that the loan was increasing and the capital was being raised and that the import licences had been received, that orders for principal equipment had been finalised and that production of alloy steel chains will commence in the last quarter of 1966. The observation that this expansion project was responsible for the foreign exchange loan of the Company; that all these loans are payable in well-spaced instalments and with the increasing business turnover and profits from year to year, that the Company should not find itself in an embarrassing financial position or that it is in a sound financial position are, all it is said a mere speculation. In our view this criticism is not justified because everything that the Tribunal has pointed out as we shall show presently is warranted by the material on record. The Tribunal it may also be noticed did not prescribe a very onerous or burdensome scheme either. After referring to the decisions of this Court in M/s. British Paints (India) Ltd. v. Its Workmen(1), Management of, Wenger & Co.

v. Their Workmen(2), Burhanpur Tapti Mills Ltd. v. B. T. Mills Mazdoor Sangh(3), it had on the principles laid down therein observed that it would be necessary and proper to make a modest beginning by introducing a lower scheme of gratuity consistently with the standing and business potential of the Company.

In determining the financial capacity of an industry what should be the approach of a Tribunal has been dealt with by this Court in some of the Cases. In the Hindustan Antibiotics Ltd. v. The Workmen & Ors. (4) Subba Rao, J. as he then was held that :

> "The Tribunal considered all the relevant circumstances; the stability of the concern the profits made by it in the past, its future prospects and its capacity and came to 'the conclusion that in the concern in question, the labour should be provided with a gratuity scheme in addition to that of a provident fund scheme. We see no justification to disturb this conclusion." (page 674) It is pertinent to notice that gratuity and wages in industrial adjudication are placed on the same footing and have priority over Income-tax and other reserves, as such in considering the financial soundness of an undertaking for the purposes of introduction of a gratuity scheme the profits that must be taken into account are those computed prior to the deduction of depreciation and other reserves. In the Gramophone Company Ltd. v. Its Workmen("), the introduction of a scheme for the benefit of only 72 employees who

were non-factory workmen, working at the Bombay Branch of the Company was contested on the ground that the Company had already a provident fund 'Scheme for the benefit of the employees and'at the time when the Award for the introduction of the scheme was made the percentage of contribution to the provident fund had been increased though that benefit was not given to a small number of non- factory workmen at Calcutta and to the concerned workmen at the Bombay Branch but was made available only to factory workers. This contention was negatived on the ground that the mere existence of a provident fund scheme is not by itself a reason for reducing the gratuity scheme particularly when a good part of the services of existing workmen were not covered by the provident fund scheme. In that case while considering the financial position of the Company and the contention on behalf of the Company that before the real profits for each year can be arrived at amounts to (1)[1966] 2 S.C.R. 523. (2) [1963]Supp. 2 S.C.R. 862. (3) [1965] 1 L.L.J. 453. (4) [1967] 1 S.C.R. 652. (5)[1964] (2) L.L.J. 131.

be provided for compensation and development reserves should be deducted. Wanchoo J, as he then was observed at page 136 "When an industrial tribunal is considering the question of wage structure' and gratuity which in our opinion stands nor or less on the same footing as wage structure it has to look at the profits made without considering provision for taxation in the shape of income- tax and for reserves. The provision for income-tax and for reserves must in our opinion take second place as compared to provision for wage structure and gratuity, which stands on the same footing as provident fund which is also a retrial benefit, payment towards provident fund and gratuity is expense to be met by an employer like any other expense including wages and if the financial position shows that the burden of payment of gratuity and provident fund can be met without undue strain on the financial position of the employer, that burden must be borne by the employer. It will certainly result in some reduction in profits but if the industry is in a stable condition and the burden of provident fund and gratuity does not result in loss to the employer, that burden will have to be borne by the employer like the burden of wage- structure in the interest of social justice". On the facts of this case it may be mentioned that the Tribunal did not award a separate basic wage and dearness allowance but a consolidated wage. That apart while no doubt the Company did not, from the years 1958 to 1962 declare any dividends as it had made losses, it began to make profits increasingly each year from 1963 to 1965. During this period not only did the capital which was in 1958 at Rs. 2,25,000/- increase to Rs. 1 1,00,000/in 1965 but the salaries and wage bill correspondingly increased from Rs. 43,443/- to Rs. 5,42,609/-. The loans no doubt also increased from Rs. 2,81,129/- to Rs. 8,29,343/- but this by itself is not indicative of the financial insecurity of the Appellant because we find that notwithstanding these loans the Company steadily built up reserves from about Rs. 0.70 lakhs in 1958 to Rs. 6.16 lakhs in 1965. The losses which continued upto 1962 from 1.05 lakhs in 1958 came to be reduced to Rs. 0.42 lakhs in that year, no doubt mostly due to the Appellant earning profits in 1961 and 1962 of 80 and 84 lakhs respectively. Thereafter the profits were on the increase; which in 1963 were Rs. 1.81 lakhs, in 1964-Rs. 3.21 lakhs and in 1965-Rs. 2.80 lakhs. All these profits it may be mentioned are computed after deducting depreciation and this should be taken into account in considering the desirability of formulating a gratuity scheme for the Appellant. The gross block which consists of assets and loans etc. has also progressively increased from Rs. 5.01 lakhs in 1958 to Rs. 20.00 lakhs in 1965. The two statements

one on behalf of the Appellant and the other on behalf of the Respondents, the figures in which we have checked up from the balance-sheets for the corresponding years and with respect to which there is no dispute, are given below Statement of the Appellant

---------- Year Capital LoanLoss/ProfitSalaries & Dividend Wages

---

	Rs.	Rs.	Rs.	Rs.	Rs.
1958	2,25,000	81,129.00	1,05,283.84	43,443.29	Nil
	2,00,000.00				
1959	3,00,000	71,347.00			
	2,60,000.00		1,59,537.68	88,801.01	Nil
1960	3,00,000	1,10,588.68			

2,77,800.00 2,19,948.91 1,15,947.60 Nil.

1961	4,20,000	85,786.49	1,26,886.45	1,42,090.43	Nil
	2,41,260.00				
1962	8,50,000	2,04,720.00			
	3,99,535.67		42,049.80	1,56,805.23	Nil
1963	8,50,000	81,626 -60			

1,68,180.00 56,322.00 2,22,986.69 51,000 3,77,500.00 1964 8,50,000 29,294 -00 1,31,640.00 74,289.00 3,21,242.00 68,000 3,31,415 -00 1965 11,00,000 94,100.00 2,82,727.00 96,999.00 3,42,609.00 93,767 4,52,516.00

---------- Statement of the Respondent

All figures in lacs

1958 1959 1960 1961 1962 19631964 1965

	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
Paid up capital	2.25	3.00	3.00	4.20	8.50	8.50	8.50	11.00
Reserves	0.70	0.82	0.92	Nil	0.80	2.47	4.92	6.16
Loans	4.56	4 -11	5.24	3.27	6.04	6.25	4.92	8.29
Losses	1.05	1.59	2.19	1.26	0	-42-	-	
Profits---	0.80	0.84	1.81	3.21	2.80			
Gross Block	5.01	6.39	7.07	7.79	15.27	16.79	18.78	20.00
Dividend---	-	6 P.C.	8 P.C.	10 P.C.				

---------- Both the above statement$ would lead to the same conclusion namely that the Company's financial position was pro- gressively getting better and stronger each year and that from the year 1968 when the gratuity scheme will be given effect to it would not be difficult for the Appellant to bear the burden of its implementation. At any rate there is nothing to indicate that the financial position of the Appellant would not be further strengthened as and from that year. Even the Appellant's Advocate could not contend that it will deteriorate. Nor has the Company placed before us any other material from which we could judge that the financial implication of the gratuity scheme would place a heavy burden on the Company's finances which it will not be able to bear, nor are we in a position to ascertain how the pressure of the implementation of the scheme is distributed over the years because the employer does not have to provide the gratuity for all its members at once. The Tribunal has stated and in our view justifiably so, having regard to the list of the employees and the years in which they have joined the Company that they are comparatively young and not likely to retire all at once. In fact our own examination of the statement Ex. U-3 showing classification of the employees incline us to the view taken by the Tribunal. The years in which the employees have joined service were all staggered and even if they retire by completion of their full service the pressure on the Company's financial resources is pretty well uniformally spread out. In dealing with the financial capacity of an undertaking to bear the burden it would not be appropriate to approach its capacity to bear the burden from an investors point of view. The overall picture of the soundness of the Undertaking and its future prospects must be taken into account. In' this regard Gajendragadkar, J. as he then was in the Bharatkhand Textile Mfg. Co. Ltd.& Ors. v. The Textile Labour Association, Ahmedabad(1), said at page 342-343 "It is not disputed that the benefit of gratuity is in the nature of retiral benefit and there can be no doubt that before framing a scheme for gratuity industrial adjudication has to take into account several relevant facts; the financial condition of the employer, his profit making capacity, the profits earned by him in the past, the extent of his reserves and the chances of his reple- nishing them as well as the claim for capital invested by him, these and other material considerations may have to be borne in mind in determining the terms of the gratuity scheme". In our view the financial position of the Company is such that the implementation of the scheme of gratuity is not likely to place an undue or unreasonable burden upon the Company.

(1)[1960] 3 S.C.R. 329.

There is also in our view no validity in the criticism that the scheme is difficult if not impossible to implement. It is therefore necessary to examine the scheme proposed by the Tribunal which is given below:

> 1.On the death of an employee while in service of the Company or on his becoming physically or mentally incapacitated for further service in the Company, or on voluntary retirement or resignation of an em-

ployee after ten years of continuous service in the Company; he or his heirs, executors or nominees as the case may be, shall be paid as gratuity 21 days' basic wages for each completed year of service, subject to a maximum of 390 days basic wages.

2.On termination of the services of an employee by the Company after five years but less than ten years of continuous service in the Company, the employee shall be paid as gratuity a sum equivalent to 13 days basic wages for each completed year of service in addition to retrenchment compensation that may be admissible to him under the Industrial Disputes Act, 1947.

3.On termination of the services of an employee by the Company after ten years of continuous service in the Company; the employee shall be paid as gratuity a sum equivalent to 17 days' basic wages for each completed year of service in addition to retrenchment compensation that may be admissible to him under the Industrial Disputes Act, 1947.

4.An employee dismissed for misconduct will not be disentitled to gratuity, but in the case of an employee discharged or dismissed for misconduct causing financial loss to the Company, the losS most be deducted and the balance shall be paid to the employee towards gratuity.

5.The basic wages for the purpose of gratuity shall be the average of the basic wages of an employee exclusive of dearness allowance during the period of twelve months immediately preceding the event entitling him to gratuity.

With reference to, clause 5 it is said that while the Tribunal has prescribed a consolidated wage without indicating what portion of that wage is the basic wage and what portion the dearness allowance, the payment of gratuity based on an average of the basic wages of an employee exclusive of dearness allowance is impossible to implement. In our view this contention is misconceived for the reason that while the Tribunal has awarded a consolidated wage without specifying what part of it is the basic wage and what part dearness allowance, that consolidated wage is the basic wage at a future date when the scheme of gratuity comes into force namely in 1968. The Tribunal when it formulated the scheme was fully aware of the fact that there would only be a consolidated wage from thence onwards till new wage scales are fixed when most likely basic wage and harness allowance will ,be separately fixed, having regard to the price index existing at that time. We have not been referred to any decision of this ,Court laying down that a consolidated wage cannot be treated ,as a basic wage in any subsequent year to the year in which it has been prescribed. On the other hand there is warrant for the proposition that gratuity can be fixed on the basis of a consolidated wage. In Hindustan Antibiotics Ltd. v. The Workmen & Ors.(1), it was observed that gratuity is an additional form of relief for the workers to fall back upon and it would depend on the facts of each case as to whether the scheme, as prepared by the Tribunal was fair and equitable.

The case of Management, Ghaziabad Engineering Co. (P) Ltd. v. Its Workmen(2), has been cited to show that the quantum ,of gratuity is only related to the basic wage and not to the consolidated wage but in our view this decision does not support that contention. In that case what this Court was considering was the gratuity applicable to the workmen who are being paid wages consisting of two components-basic wages and 5001,, of the basic wages as dearness allowance. It also appears that prior to 1960 the Company used to make a consolidated payment without specifying any basic salary or dearness allowance but since 1960 in every appointment letter it was expressly recited that the ,employees will get a consolidated salary consisting of 2/3 of the salary as basic wages and the balance as dearness allowance. In the context of these facts the observations of Shah, J. as he then

was, at page 627 upon which reliance is being placed on behalf of the Appellant in support of the proposition that gratuity must be related to basic wage should be understood. Shah J. said :

> "There is no clear evidence on the record, and precedents have been brought to our notice, to justify a departure from the normal rule that the quantum of gratuity is related not to the consolidated wage packet but to the basic wage".

On the other hand the sentences that follows immediately do not justify any rigid principle relating gratuity to basic wage. It was ,observed (1) [1967] 1 S.C.R. 652.

(2) [1970] 1 S.C.R. 622.

> "A departure may be made from tile normal rule, if there be some strong evidence or precedent in the industry, or conduct of the employer or other exceptional circumstances to justify that course. In the absence of such evidence,we are of the view that gratuity should be related to the basic wage and not to the consolidated wage packet".

In that case as the basic wage and the, dearness allowance was ascertainable because dearness allowance was prescribed as a percentage of the basic wage there was no warrant for relating gratuity to the consolidated wage. In Delhi Cloth & General Mills Co. Ltd. v. Workmen & Ors. etc.(1), Shah, J. after a review of the various cases in which the claim of gratuity in relation either to the consolidated wage or basic wage was considered, admitted that it was not easy to extractany principle from these cases, because they were conflicting. It was also pointed out that in Hindustan Antibiotics Ltd. v.Their Workmen(2), the Tribunal had awarded a scheme for gratuity related to consolidated wages and that order was confirmed. Even in Remington Band of India Ltd. v. The Workmen(3), the claim for gratuity being based on consolidated wages though challenged was accepted. It appears to us that a more reasonable way of reconciling this conflict is, that while no doubt the general rule is that gratuity must be related to the basic wage, in cases where the wages are not very high and a consolidated wage has been fixed taking into account the dearness allowance, the schemes of gratuity may be related to the consolidated wage, which will be the basic wage in subsequent year. As we pointed out earlier the consolidated wage will be the basic wage in subsequent years and at any future date having regard to the price index, the claim of the workmen either for a rise in the wage based on the cost of living index or for the grant of separate dearness allowance to neutralise that rise is bound to be considered and adjudicated.

Lastly the scheme is challenged as unfair and incongruous because those that retire are given larger benefits than those who are retrenched. But this criticism is equally unwarranted. In the first clause of the scheme a worker who voluntarily retires or resigns after 10 years of continuous service is to be paid as gratuity 21 days basic wages for each completed year of service subject to a maximum of 390 days basic wages, while, under clause 3, on termination of services of an employee after 10 years of continuous service he shall be paid as gratuity a sum. equivalent to 17 days basic wages for each completed year. The difference between the gratuity payable to persons who resign (1) [1969] 2 S.C.R. 307/.

(2) [1967] 1 S.C.R. 652.

(3) [1968] 1 L.L.J. 542 or retire voluntarily and those services are terminated is that the latter will receive in addition to the gratuity the retrenchment compensation admissible to him under the Industrial Disputes Act, while in the case of the former he will not be entitled to it. The scheme, itself in clause 3 makes this specific distinction. We do not think that there is any justification for the several criticisms directed against this scheme. In our view the scheme is not only reasonable but fair having regard to the interests of the workmen and the financial capacity of the industry. In the result both the Appeals are partly allowed and the Award is modified in respect of two items (1) that a payment of bonus of Rs. 20,768/50 be made instead of Rs. 42,783/- awarded by the Tribunal, and (2) subject to the directions already given there shall be a fitment of the wages of the workers in the new scales awarded by the Tribunal after taking into account one increment for every three years of completed service up to the date of the statement of claim i.e., 15th January, 1966. In the circumstances the parties will bear their own costs in each of the Appeals. G.C. Appeals partly allowed.