Management Of Wenger & Co vs Their Workmen(And Vice Versa) on 11 December, 1962

Equivalent citations: 1964 AIR 864, 1963 SCR SUPL. (2) 862, AIR 1964 SUPREME COURT 864, 1963 6 FACLR 303, 1963 2 LABLJ 403, 1963-64 24 FJR 307

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Bench: P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta, J.C. Shah

PETITIONER:
MANAGEMENT OF WENGER & CO.

Vs.

RESPONDENT:
THEIR WORKMEN(And Vice Versa)

DATE OF JUDGMENT:
11/12/1962

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS
SHAH, J.C.

CITATION:
1964 AIR 864 1963 SCR Supl. (2) 862
CITATOR INFO :
R 1965 SC 839 (3)
R 1966 SC 305 (47)
RF 1966 SC 732 (10)
F 1967 SC1206 (5)
E 1967 SC1286 (14)
E 1968 SC1076 (9)
RF 1969 SC 360 (38)
E 1970 SC 919 (8,36)
R 1970 SC1421 (16)
RF 1972 SC 343 (20)
F 1974 SC1132 (13)
RF 1976 SC2303 (1)
RF 1981 SC1685 (2)

ACT:

Industrial Dispute-Hotels and Restaurants-Whether wine shops are part of the Hotel establishment-Financial position of employer and wage Structure-Bonus-Remuneration of partners-Extent and Scope of interference of this Court in appeal-Firm whether a legal person-Tips-whether to be excluded in the matter of D.A.Gratuity scheme-Whether justified when provident fund scheme available-Misconduct-Involving moral turpitude-Retrospective operation of award-Nature of the Tribunal's power-Constitution of India, Art. 136-Industial Disputes Act, 1947 (14 of 1947), 8. 19A (4).

HEADNOTE:

An industrial dispute arising out of the demands made by the employees against 13 Hotel and Restaurant institutions in Delhi was -referred for adjudication to the Industrial Tribunal and they were heard together with another reference made to it concerning the disputes in the case of two other hotels. The award given by the Tribunal in these two references gave rise to the present four appeals by special leave, two of which had been filed by the employees and the other two by the employers.

The main contentions in the appeals were the following: it was contended on behalf of the employers that the Tribunal was in error in dealing with the two hotels and eleven restau. rants together inasmuch as they were not similar in character. Their next contention was that the Tribunal committed another error in treating the wine shops as part of the restaurant esta. blishment. Thirdly it was contended that in constructing the wage structure the Tribunal did not consider properly the financial position of the employers. The next contention was that the Tribunal erred in reducing the amount of remuneration claimed by the employers for the different partners who took active part in the management of their respective,establishments. It was further contended on their behalf that since each one of the workers got Rs. 50/-to 60/- by way of tips no

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D.A. should have been awarded to the waiters. Another con. tention was that in view of the fact that Employees Provident Fund Scheme had already been introduced in these establishments the introduction by the award of a gratuity scheme was not justified. It was the case of the employers that even if such a scheme was justified on principle the scheme as contained in the present award is bad on merits. It was further contended that the directions of the Tribunal regarding the decisions of the service charges in the future was outside the jurisdiction of the Tribunal, because this was not a matter referred to it for adjudication. They lastly contended that the Tribunal had no power to give retrospective operation to the award.

The employees contended, among other things, that the bonus

awarded was inadequate on the ground that the calculation made by the Tribunal in respect of income-tax claimed by the employees as a prior charge are obviously inconsistent with the decisions of this Court in recent case of Tulsi Das Khimji v. Their Workmen, [1963] 1 S.C.R. 675.

Held, that though the nature of the service rendered in Hotels is in some particulars different from that of the Restaurants, both the establishments are constituents of the catering trade. Taking into consideration that they are situated in similar localities and carry on the same business it is desirable that terms and conditions of service of the employees working in them should as far as possible be uniform; such uniformity is conducive to industrial peace and harmony and to better, efficient and satisfactory management.

The question whether there is functional intregrality between two units has to be decided according to the facts of each case. Absence of functional integrality and the fact that the two units can exist one without the other do not necessarily show that where they exist they are necessarily separate units and do not constitute one establishment.

Associated Cement Co. Ltd. v. Their Workmen, (1960) 1 L. L.L.J. 1, Pratap Press v. Their Workmen, (1960)1 L.L.J. 497, Pakshiraj Studios v. Its Workmen, (1961) II L.L.J. 380, South Indian Millowners' Association v.' Coimbatore District Textile Workers Union, (1962) 1 L. L. J. 223, Fine Knitting Co. Ltd. v. Industrial Court, (1962) 1 L. L. J. 271 and D.C.M. Chemical Works v. Its Workmen, (1962) 1 L.L.J. 388.

Wine shops and Restaurants form part of the same establishment because there is unity of ownership, unity of
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finance, unity of management and unity of labour and they are not separately registered.

Where a wage structure is constructed and it provides for increments the financial position of the employer has to be considered. The hypothetical consideration that total prohibition may be introduced in the near future, cannot play any part in the decision of the wage problem in the present case. It would be open to the employers to raise a dispute for the reduction in the wage structure in case they are able to show that as a result of the introduction of total prohibition their financial position is weakened to such an extent that they cannot bear the burden of the wage structure directed by the award.

When this court entertain appeals in industrial matters under Art. 136 of the Constitution it does not act as a court of appeal on facts. It is only where general 'questions of law are raised that this Court feels called upon to pronounce its decision on them.

A firm is not a legal person within the meaning of the Industrial Disputes Act. It is the partners of the firm who are the employers.

Tulsidas Khimji v. Their Workmen, [19631 1 S.C.R. 675, referred to.
It would not be right to treat the tips received by the waiters as being wholly irrelevant to the decision of the question about the matter of D.A. But it would not be right to make a calculation about the tip; received and treat the said amount as a substitute either whole or partial for the D.A. itself. What can be done is to bear in mind the fact that tips are received and make some suitable adjustment in that behalf.
State Bank of India v. Their Workmen, (1939) 2 L.L J. 205 and Morthaclav v. Regent Street Florida Restaurant, (I 951) 2 K.B. 277, distinguished.
Workmen of M/s. A. Fingo's Ltd. v. M/s. A. Fingo's Ltd., (1953) L.A.C. 480, referred to.
The object intended to be achieved by the Provident Fund Scheme is not the same as the object of the gratuity scheme and in any case where the financial position of the employer justi. fies the introduction of both benefits, there is no reason why the employers should not get the benefits of both the schemes.
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Bharatkhand Textile Mfg. Co. Ltd. v. Textile Labour Association, Ahmedabad, (1960) 2 L.L.J. 21 and Garment Cleaning Works v. Its Workmen, [1962] 1 S.C.R. 71, followed.
For the termination of service caused by the employer the minimum period of service for payment of gratuity should be five years and if the employee resigns he would be entitled to get gratuity only if he has completed ten years service or more. If the termination is the result of misconduct which has caused financial loss to the employer that loss should be first compen. sated from the gratuity payable to the employee.
Since the direction of the Tribunal for the decision of the service charges in future is not covered by the terms of reference that direction is invalid.
Under s. 17A (4) of the Industrial Disputes Act, 1947, it is open to the industrial Tribunal to name the date from which it should come into operation.

JUDGMENT:

CIVIL APPELLATE JURISDTCTION: Civil Appeals Nos. 609 and 610 of 1962.

AND Civil Appeals Nos. 622 and 623 of 1962.

Appeals by special leave from the award dated March 16. 1962, of the Industrial Tribunal, Delhi, in 1. D. Nos. 581 and 620 of 1959.

G.S. Pathak, Veda Vyasa, B. Datta, J. B. Dadachanji, 0. C. Mathur and Ravinder Narain, for the appellants (in C. A. Nos. 609 and 610 of 1962) and the respondents (in C.A. Nos. 622 and 623 of 1962).

M.C. Setalvad, Attorney-General for India and Janardan Sharma, for the respondents (in C. A. Nos. 609 and 610 of 1962) and for the appellants (in C.A. Nos. 622 and 623 of 1962).

1962. December 11. The judgment of the Court was delivered by GAJENDRAGADKAR, J.-An industrial dispute arising out of ten demands made by the employees against 13 Hotel and Restaurant institutions in New Delhi, was referred by the Chief Commissioner, Delhi to the Industrial Tribunal for adjudication. Reference in Ii. D. No. 581 of 1959 which was made on September 9, 1959, included two Hotels-Clari- dge's Hotel and Nirula Hotel-, whereas reference in I. D. No. 620/1959 which related to United Coffee House was made on December 12, 1959. These two references were consolidated by the Tribunal and were heard together. Out of the demands made by the employees, three demands were rejected by the Tribunal ; they were demands Nos. 4, 9 and

10. Demand No. 4 was in regard to medical treatment, No. 9 was in regard to the revision of the hours of work of Chowkidars and No. 10 was in regard to the recognition or appointment of Central Negotiating Committee on Association or Union level. The other demands have been partially allowed. The principal amongst these demands were a claim for a wage structure with adequate provision for increment in scales, provision for Provident Fund and Gratuity and Bonus for the years 1956-57, '57-58 and 58-59. There were, other subsidiary demands to which reference would be made later. The award pronounced by the Tribunal in these two references has given rise to four appeals by special leave before this Court. Appeals Nos. 609-610,/1962 have been preferred by the employers, whereas appeals Nos. 622 and 623/1962 have been filed by the employees.

It would be convenient to set out briefly the broad features of the directions issued by the Tribunal in respect of the employees' claims. The Tribunal has examined the employees' claim with regard to bonus for the three years in question. It took the claim for bonus in respect of each one of the employers, it examined the financial position of the employer for the respective years and determined the question as to the available surplus by the application of the Full Bench Formula in each individual case. Claims made by the employers for deduction of certain items were examined in the light of the comments made by the employees in respect of them. The usual prior charges were taken into account, and on determining the available surplus, directions were issued for the payment of bonus for the three respective years. In some cases, the employer has been asked to pay bonus for all the three years, while in some others the employer has been asked to pay bonus for one or two years according as the available surplus justified or did not justify the award of bonus for the particular year. The Tribunal then proceeded to deal with the other demands made by the employees. The claim made by the employees for suitable uniforms and other apparel according to the nature of the duties of individual workman was, in substance, rejected by the Tribunal. It has, however, ordered that all the managements, with the exception of Delhi Restaurant, should give winter uniforms consisting of a woollen coat and a pair of woollen trousers to Waiters, Bearers, Page Boys, Lift Boys, Peons and Chowkidars and Butlers once in three years. Similarly, the managements have been asked to give to 'Masalchis, Sweepers and Malis a woollen jersy once in three years.

The Tribunal then examined the claim for additional leave facilities and held that there was no justification for granting separately sick leave as such. Three national holidays were allowed by the employers on the January 26, August 15, and October 2. The Tribunal has held that three more holidays should be allowed, one for Holi, one for Dussehra and one for Diwali.

On the question of the introduction of Provi. dent Fund Scheme and the, Cratuity Scheme, the Tribunal noticed the fact that the P. F. Scheme had been introduced by the employers in accordance with the requirements of the relevant statute. The employers' case that in view of the fact that a P.F. Scheme had been introduced, no Gratuity Scheme should be framed, was rejected and a provision has been made for the introduction of the Gratuity Scheme.

The Tribunal then proceeded to consider the vexed question about the construction of a suitable wage structure, and in dealing with this problem, the Tribunal first examined the point as to what should be the minimum wage in those concerns. It appears that before the Tribunal it was conceded by the managements that the total pay packet in the case of Hotels should be Rs. 70/- p.m. inclusive of service charges and in respect of Restaurants Rs. 60/p.m. he Tribunal came to the conclusion that, on the whole, it would be fair and reasonable if the minimum total wage packet includes Rs. 65/- p.m. Rs. 30/- being the minimum basic wage and Rs. 351being a flat dearness allowance payable to each one of the employees. Having thus determined the minimum content of the total wage packet, the Tribunal took into account the fact that several establishments gave food and accommodation to some of their employees and it has accordingly directed that for food Rs. 15/- should be deducted from the D. A. for accommodation Rs. 51- should be deducted and Rs. 7/- or Rs. 3/50 nP. should be deducted for tea according as tea was given twice or once. In other words, having fixed the flat rate of Rs. 35/- for the payment of D.A. the Tribunal provided for appropriate deductions for amenities which the employers gave to their employees in this trade.

The Tribunal then classified the workmen into unskilled, semi-skilled and skilled, and in the last category it provided for two grades Grade II and Grade I. Having thus classified the employees in three categories, the Tribunal prescribed a wage scale for each one of them. In respect of this wage scale, the Tribunal has given certain appropriate directions as to the adjustment of the employees in the new wage scale. One of the important directions given in that behalf is on the usual lines that no workman should be prejudicially affected by this process of adjustment and that if he was getting higher emoluments than he would be entitled to by virtue of the adjustment in the new wage scale, he would continue to get the higher emoluments.

Then the Tribunal considered the question as to whether the award should be given retrospective effect and it held that it should come into effect as from January 1, 1961, the award having been pronounced on March 16, 1962. The employees in the Claridge's Hotel had made a demand for a share in the service charges collected by the employer. The Tribunal held that for the period prior to the reference, the employer had paid to the employees about 3 months' wages out of the service charges and so, it took the view that no further direction was required in respect of the said period. It however, proceeded to issue a direction to the management of the Claridge's Hotel that from April 1, 1962, it should distribute 85 per cent of the service charges collected by it among the workmen rateably according to and on the basis of the basic wage drawn by' each one of them during the

relevant year. That, in brief, is the nature of the directions issued by the Tribunal in respect of the demands which have been partially allowed. The first point which Mr. Pathak for the employers has urged before us is that the Tribunal was in error in dealing with the two Hotels and eleven Restaurants together. The argument is that the Hotels and Restaurants are not similar in character so as to justify the employees' claims made against the two sets of establishments to be tried together. Service in Hotels is usually non-stop 24 hours' service: in regard to hotels, residence is provided for a number of employees, the nature of the business is different and the nature and extent of the expenses incurred are not also the same. Therefore, it is urged that the Tribunal committed a basic error in dealing with the two sets of establishments together.

We are not impressed by this argument. It is significant that the history of industrial adjudication in respect of catering establishments in New Delhi shows that restaurants and hotels have been grouped together for the purpose of one adjudication in the past. It appears that in 1950, a similar industrial dispute in respect of 14 catering establishments was referred to Mr. Dulat; amongst them were 3 Hotels and 11 Restaurants. In fact, some of the Restau- rants in the present proceedings were included in that reference. Besides, there is no doubt that though the nature of the service rendered by Hotels is in some particulars different from that of the Restaurants, both the establishments are constituents of a catering trade. In fact, Mr. Nirula is the Secretary of the Association whose membership is open to both Hotels and Restaurants. It will be noticed that all the Restaurants included in the refe- rence, except the Delhi Restaurant which is situated at Karolbagh, work in Connaught Place, and Claridge's Hotel is situated in Aurangzeb Road which is also an important locality. Thus, the situation of the Restaurants and the Hotels which have been included in the present reference shows that they are carrying on the same business in about the same locality and it is desirable that terms and conditions of service of the employees working in them should, as far as possible, be uniform. Such uniformity is not only conducive to peace and harmony amongst the employees and their employers, but would be helpful to the managements themselves because it would tend to avoid migration of labour from one establishment to another. It is true that it might have been possible to classify these restaurants according to the extent of their custom and their general financial position and standing in the trade : but no material has been produced before the Tribunal in that behalf and no attempt appears to have been made to suggest to the Tribunal that it would either be po- ssible or appropriate to make any such classification. That is why we think Mr. Pathak is not justified in attacking the award on the ground that in approaching the problem, it has considered all the establishments together. The next point which has been strenuously pressed before us by Mr. Pathak on behalf of the employers is that in dealing with the financial position of the managements, the Tribunal has committed an error inasmuch as it has assumed that the wine shops and the restaurants form part of the same establishment. It appears that in several cases the same employer conducts a restaurant and a wine shop; and the argument is that in determining the terms and conditions of service in these establishments, wine shops should have been treated as separate units,-distinct from the restaurants. The question as to whether industrial establishments owned by the same managements constitute separate units or one establishment has been considered by this Court on several occasions. .-'Several factors are relevant in deciding this question. But it is important to bear in mind that the significance or importance of these relevant factors would not be the same in each case; whether or not the two units constitute one establishment or are really two separate and independent units, must be decided on the facts of each

case Mr. Pathak contends that the Tribunal was in error in holding that the restaurants cannot exist without the wine shops and that there is functional integrality between them. It may be conceded that the observation of the Tribunal that there is functional integrality between a restaurant and a wine shop and that the restaurants cannot exist without wine shops is not strictly accurate or correct. But the test of functional integrality or the test whether one unit can exist without the other though important in some cases, cannot be stressed in every case without having regard to the relevant facts of that case, and so, we are not prepared to accede to the argument that the absence of functional integrality and the fact that the two units can exist one without the other necessarily show that where they exist they are necessarily separate units and do not amount to one establishment. It is hardly necessary to deal with this point elaborately because this Court had occasion to examine this problem in several decisions in the past, vide Associated Cement Companies Ltd. v. Their Workmen (1); Pratap Press, etc. v. Their Workmen(2); Pakshiraja Studios v. Its Workmen (3); South India Millowners' Association v. Coimbatore District Textile Workers Union(4); Fine Knitting Co. Ltd. v. Industrial Court (5) and D.C.M, Chemical Works v. lts Workmen(6).

Let us then consider the relevant facts in the present dispute. It is common ground that wherever the employer runs a restaurant and a wine shop, the persons interested in the trade are the same partners. The capital supplied to both the units is the same. Prior to 1956, wine shops and restaurants were not conducted separately, but after 1956 when partial prohibition was introduced in New Delhi, wine shops had to be separated because wine cannot be sold in restaurants. But it is significant that the licence for running the wine shop is issued on the strength of the fact that the management was running a wine shop before the introduction of prohibition. In fact, LII licence to run wine shops has been given in many (1) (1960) 1 L.L.J. 1.

(3) (1961) 11 L.L.J.380 (5) (1962) 1 L.L.J. 275:

(2) (1960) 1 L.L..T. 497.

(41 (1962) 1 L.L.L.J. 223.

(6) (1962) 1 L.L.J. 388.

cases to previous restaurants on condition that the wine shops are run separately according to the prohibition rules. It is true that many establishments keep separate accounts and independant balancesheets for wine shops and restaurants ; but that clearly is not decisive because it may be that the establishments want to determine from stage to stage which line of business is yielding more profit. Ultimately, the profits and losses are usually pooled, together. Thus, generally stated, there is unity of ownership, unity of finances, unity of management and unity of labour; employees from the restaurant can be transferred to the wine shop and vice versa. Besides, it is significant that in no case has the establishment registered the wine shops and the restaurants separately under:,. 5 of the Delhi Shops and Establishments Act, 1954 (No. VII of 1954). In fact when Mr. Nirula, the Secretary of the Employers' Association, was called upon to register his wine shop separately, he protested and urged that separate registration of the several departments was unnecessary; and that clearly indicated that wine shop was treated by the establishment as one of its departments and nothing

more. The failure to register a wine shop as a separate establishment is, in our opinion, not consistent with the employers' case that wine shops are separate and independent units. Having regard to all the facts to which we have just referred, we do not think it would be possible to accept Mr. Pathak's argument that the Tribunal was in error in holding that the wine shops and restaurants form part of the same industrial establishments.

That takes us to the question about the financial position of the different establishments. The Tribunal has carefully examined the relevant balancesheets and considered the profit and loss position of each establishment for the three years in respect of which bonus was claimed; they are 1956- 57, 57-58 and 58-59. In constructing a wage structure, industrial adjudication has undoubtedly to take into account the overall financial position of the employer because a scheme of wage structure including scales of increment is a long- term scheme and before it is framed the Tribunal must be satisfied that the burden imposed by the scheme would not be beyond the means of the employer. In regard to the minimum wage, no such consideration arises because it is the duty of an industrial employer to pay the basic minimum to his employees. But when a wage structure is constructed and it provides for increments, the financial position of the employer has to be borne in mind. The Tribunal has recognised this. principle and on examining the accounts produced before it, it has come to the conclusion that the establishments in question have shown uniform prosperity and all of them, except the Delhi Restaurant, can be properly characterised as established concerns. Besides, it has referred to the fact that in the Delhi region, there are various establishments which have pay scales for workmen, though, except for the award made by Mr. Dulat, there were no previous instances of pay scales having been introduced in restaurants in the awards or settlements cited before the Tribunal. It was, however, urged before the Tribunal and the same plea has been repeated before us that the possibility of the introduction of total prohibition in New Delhi should have been borne in mind in considering the problem of wage structure in the present proceedings. We do not think that the award made by the Tribunal in this case can be validly attached on the ground that the Tribunal refused to attach due importance to the apprehension expressed before it by the employers that total pro- hibitition may soon be introduced in New Delhi -and that may impair the prosperity of the trade. The Tribunal has noticed that even after the partial introduction of prohibition, the profits of the trade have not shown any adverse effect. On the contrary they show an upward tendency, and the Tribunal was not satisfied that there was any evidence adduced before it to justify the contention that in the very near future total prohibition would be introduced in New Delhi. It was urged by the employees that all indications pointed to the fact that total prohibition may not be introduced in New Delhi and the Tribunal thought, and we think rightly, that it would be idle to speculate in this matter; if in course of time, total prohibition is introduced and it materially affects the prosperity of the trade, it would be open to the employers to raise a dispute for the reduction in the wage structure and in case they are able to show that as a result of the introduction of total prohibition their financial position is weakened to such an extent that they cannot bear the burden of the wage structure directed by the present award, the matter may have to be examined on the merits. Therefore, we do not think that the hypothetical consideration that total prohibition may be introduced in the near future, can play any part in the decision of the wage problem in the present proceedings.

That takes us to the question about bonus. The main point which Mr. Pathak raised in regard to bonus was that the Tribunal was in error in reducing the amount of remuneration claimed by the employers for the different partners who took active part in running and supervising the management of their respective establishments. It appears that whereas each partner claimed a thousand rupees per month, the Tribunal has reduced it to Rs. 500/-, and in one case it has ordered that Rs. 500/p. m. should be paid to three partners together. The argument is that this interference is wholly unjustified. In dealing with this contention it is necessary to emphasise that when this Court entertains appeals in industrial matters under Art. 136 of the Constitution, it does not act as a Court of Appeal on facts. It is only where general questions of law are raised that this Court feels called upon to pronounce its decisions on them for the guidance of industrial adjudication in this country. The decisions of Industrial Tribunals on questions of fact and their conclusions in matters within their discretion are not usually revised by this Court under Art. 136. Besides, the claim made by the employers by way of remuneration to the partners has not been properly established by adequate evidence. That is the conclusion of the Tribunal, and on the record it seems to be well founded. It also appears that in some cases, the amounts of remuneration claimed are not debited in the books of account; but the present claim is made for the purpose of working the Full Bench Formula. Therefore, on a question of this kind, we do not think Mr. Pathak is justified in making a grievance before us under Art. 136.

The learned Attorney-General for the employees characterises the award in respect of bonus as inadequate and contends that larger amounts should have been allowed, and he argues that the calculations made by the Tribunal in respect of income-tax claimed by the employers as a prior charge are obviously inconsistent with the recent decision of this Court in the case of Tulsidas Khimji v. Their Workmen. (1) In that case., the majority decision was that a firm is not a legal person within the meaning of Industrial Disputes Act. It is the partners of the firm who are the employers. It is that fact that has to be taken into account in considering the question of income-tax, even in other matters like remuneration, etc., that is to say, the amount of tax payable by each partner, qua the business of the firm, irrespective of their other sources of income or loss, because notional is quite different from the actual, though not wholly dissociated from it. Mr. Pathak has conceded that the calculations made by (1)(1962) 1 L.L.J. 435, 441.

the Tribunal in dealing with the question of incometax in the working of the formula must now be regarded as erroneous and that would clearly negative his plea that the bonus should not have been awarded or the amount awarded should have been less. It is true that the employees claim additional bonus on this ground; but we are not satisfied that the difference made by a fresh calculation of the income-tax according to the decision of this Court would justify any addition to the amount already awarded by the Tribunal by way of bonus for the respective years in question.

The next question to consider is about the wage structure. As we have already pointed out, the employers conceded that the wage packet in the case of Hotels should be Rs. 70/- p.m. including service charges and in the case of Restaurants should be Rs. 60/-, and the Tribunal has fixed the minimum content of the wage packet at Rs. 65/- p.m. We see no reason to interfere with this decision. The Tribunal has fixed Rs. 35/- as a flat rate for dearness allowance and has provided for appropriate deductions from the said amount for amenities like food, residence and tea which the

employers provide to some of their employees. We see no reason to interfere with this part of the award as well. The categories of workers into unskilled, semi-skilled and skilled also appear to us to be fully justified, and on the material adduced on the record, no case has been made out against the said categories either.

The main controversy in respect of the wage structure has centered round the problem of Dearness Allowance qua the waiters. Mr. Pathak has strenously contended that no D.A. should be paid to the waiters at all, because, he argues, each one of them gets Rs. 50/- to Rs. 60/- p.m. by way of tips in each one of these establishments. The Tribunal has taken the view that the tips earned by the waiters must be excluded from consideration in dealing with the question of D.A., and in support of this view it has referred to a decision of this Court in the case of State Bank of India v. Their Workmen (1). Mr. Pathak contends that the Tribunal was obviously in error in relying upon this decision in support of its conclusion on the question of tips. This contention is well-founded. In the case of State Bank of India this Court was considering the question as to whether bonus could be said to be a part of remuneration within the meaning of that term under ss. 2 and 10 (1) (b) (2) of the Banking Companies Act, 1949 (unamended by Act XCV of 1956), and the decision was that in s. 10 the word " remuneration" has been used in its widest sense, and in that sense, it would undoubtedly include the profit bonus. It appears that in the course of discussion of the bar, the decision in the case of Mrottaslav v. Regent Street Florida Restaurant (2) was cited, and so, it had to be incidentally considered. That decision was in regard to tips and it held that when a customer gives a tip to a waiter, the money becomes the property of the latter. It was observed by this Court that the English decision itself showed that the word ""remuneration must be given its meaning with reference to the context in which the word occurs in the statute and that the said decision would not justify cutting down the amplitude of the expression used by the relevant provision of the Banking statute with which the Court was concerned. It is hardly necessary to point out that this decision cannot be cited as relevant in determining the question as to whether tips paid to waiters in hotels and restaurants should not be taken into account in dealing with the problem of D.A. On the other hand, it does appear that in Workmen of M/s. A. Fingo's Ltd. v. M/s. A. Fingo's Ltd., (3) the Labour Appellate Tribunal confirmed the award passed by the original Tribunal by which Rs. 15/- had been orderd to be deducted from the D.A. payable to boys and butlers. It was found in (1) (1959) 11 L.L.J. 205. (2) (1951) 2 K.B. 277. (3) (1953) L.A.C. 480.

that case on uncontradicted evidence that the value of the tips received by the boys and butlers would be about Rs. 15/- or so per head per month. Mr. Pathak contends that in the light -of this precedent, the Tribunal should have considered the amount of tips which waiters receive in hotels and restaurants and should not have directed D.A. to be paid to them at the flat rate of Rs. 35/- p.m. The learned Attorney-General has supported the finding of the Tribunal and has referred to an earlier award passed by the same Tribunal in an industrial dispute between the Management of the Marina Hotel and its workmen in 1958 where the Tribunal refused to consider the tips in dealing with the problem of wage structure including D.A. The said Tribunal took the same view when it pronounced its award in an industrial dispute between the management of the Hotel Ambassador and its employees in 1960. The learned Attorney- General also suggested that the compromise award between the Swiss Hotel and its employees reached on December 31, 1959, would tend to support his case that tips may not be taken into account in dealing with the question of D. A. The

question thus raised before us needs to be carefully examined. The employees contend that the basis of D.A. is that the employer should make a suitable addition to the amount of basic wage in order to neutralise the rise in the cost of living and it is not open to him to contend that he is absolved from his liability to provide for either partial or complete neutralisation of the rise in the cost of living because his customers pay tips to his employees. Tips are paid not by the employer but by the customers and they are paid not only for the service received in the restaurant or the hotel, but for the promptness shown by the waiter and his smartness and efficiency. Besides it is urged that the amount of tips is variable and uncertain and so, it would be unreasonable to take such an uncertain and indefinite factor into account in fixing the amount of D. A. On the other hand, the employers contend that tips are paid as a matter of conventional requirement in all restaurants and hotels and they are paid not so much to the. waiters as individuals but as waiters working in a particular establishment. The tips thus received by the employees are incidental to their work as waiters and cannot be completely dissociated from it. In theory and in law, it may be true that the tips received by the waiters become their property, but they are received by them as an incident of their employment and so, it would be unreasonable not to take them into account in fixing the D. A. In our opinion, in dealing with this question, it would not be appropriate to adopt an academic or a doctrinaire approach. In considering the problem of wage structure in regard to hotels and restaurants, industrial adjudication has necessarily to adopt a pragmatic approach and in fixing the wage structure and the D. A., it has to take care to see that the legitimate demand of the employees is met without doing injustice to the employer and without acting unfairly by him. If the object of D. A. is to neutralise the rise in the cost of living, it would be purely doctrinaire to ignore altogether the fact that as waiters working in their respective establishments they invariably get some amount of tips from the customer , and so, we think it would not be right to treat the tips received by the waiters as being wholly irrelevant to the decision of the question about the matter of D. A. Similarly, it would not be right to make a calculation about the tips received and treat the said amount as a substitute, either whole or partial, for the D. A. itself. All that we can do is to bear in mind the fact that tips are received and make some suitable adjustment in that behalf It would, of course, not be right to treat these tips as substantially amounting to payments made by or on behalf of the employers for if that were so, logically, it may be open to the employers' to say that the said tips may be taken into account even while fixing a basic wage. That clearly is not and cannot be the employers case. It is true that the amount of tips may vary and in that sense be uncertain. But if evidence adduced by the parties satisfactorily proves that each waiter would invariably receive a certain amount of tips in the minimum, it would not be unfair or un just to take such a minimum amount into account in determining the quantum of D. A. at a flat rate. Such an approach, we think, would do no injustice to the employees' claim for D. A. and would be fair to the employers as well.

We have, therefore, examined the evidence to find out what amount can be reasonably taken to be the minimum which a waiter is bound to get in each one of the establishments before us. As often happens, the witnesses examined by the managements have made overstatements on the point and witnesses examined by the Union have made understatements. According to the former set of witnesses, more than Rs. 60/- are received by the waiter by way of tips every month, whereas according to the latter, between Rs. 10/- to Rs. 15/are received per month. Some employers claimed that if their waiters were sent out for service, they themselves compensated the waiters for the loss of their tips caused by outside service and paid appropriate amounts to them in that behalf, and in

support of this claim, evidence, documentary and oral, was adduced. We are satisfied that the said evidence is not reliable and the claim, based on it is untenable. Tips. are paid by the customers and not by employers in any case. It is commonground that since the introduction of prohibition, tips paid to the employees in the restaurants and hotels have gone down. But it seems to us that there is no difficulty whatever in holding that each one of the waiters gets at least Rs. 10/- p. in. by way of tips. This conclusion may amount to an under estimate in regard to some of the establishments before us because it is likely that waiters employed in the more prosperous establishments must be receiving by way of tips amounts very much larger than Rs. 10/- p. in., but in the absence of adequate and satisfactory evidence in respect of each one of the establishments with which we are concerned, it would not be safe or advisable to make a definite finding that more than Rs. 10/- are received by waiters in each one of these establishments. That being the state of evidence adduced by the employers in the present proceedings, we would content ourselves with accepting the principle that in fixing D. A., a reasonable deduction may be made in respect of waiters on the ground that they receive a certain amount of minimum tips from the customers every day. We are, therefore, inclined to think that in the case waiters who receive tips, it would not be unfair or unjust to direct that a deduction of Rs. 10/should be made from Rs. 35/- per month. In the case of waiters who receive food, tea and accommodation from their employers, Rs. 27/- p. in. are already ordered to be deducted from the D. A. In respect of these waiters, we direct that only Rs. 8/should be further deducted on account of tips because we have no doubt that Do deduction can be made on account of these considerations from the basic wage.

That takes us to the question of the gratuity scheme framed by the Tribunal. Mr. Pathak no doubt attempted to argue that in view of the fact that Employees' Provident Fund Scheme has already been introduced in these establishments, it would not be right to burden the employers with the additional liability of the gratuity scheme. This argument has been considered by this Court on severaloccasions and has been consistently rejected. The object intended to be achieved by the Provident Fund Scheme is not the same as the object of the Gratuity Scheme and in any case, where the financial position of the employer justifies the in- troduction of both benefits, there is no reason why ,the employees should not get the benefit of both the P. F. Scheme and the Gratuity Scheme, vide Bhuratkhand Textile Manufacturing Co. Ltd. v. Textile Labour Association, Ahmedabad, (1) and Garment Cleaning Works v. Its Workmen (2). Besides, in dealing with the financial obligation involved by the introduction of a gratuity scheme, it is necessary to bear in mind that the magnitude of the theoretical impact does not matter so much as the extent of the Actual impact of the scheme. As has been pointed out by this Court in Bharatkhand Textile Mafg. Co. Ltd. (1) there are two ways of looking at the problem of the burden imposed by the gratuity scheme. One is to capitalise the burden on actuarial basis and that would naturally show theoretically that the burden would be very heavy; the other is to look at the scheme in its practical aspect and this would show that, speaking broadly, no more than 3 to 4 per cent of the employees retire every year. It is desirable that in assessing the impact of the gratuity scheme on the financial position of the employer, this practical approach should be taken into account. Thus considered, we see no reason to accept Mr. Pathak's argument that the financial position of the employers would be unable to bear the practical burden which the gratuity scheme would impose on them, vide Sone Valley Portland Cement Co. v. Its Workmen(3). Turning then to the merits of the scheme, we are satisfied that some modifications must be made.

(1) (1950) II L.L.J. 21. (2) (1962) 1 S.C.R. 771. (3) [1962] 1 L.L.J. 218.

The scheme made by the Tribunal provides as under:

> For service of less than two years. Nil.
>
> For continuous service of Fifteen day's basic pay two years and more, on for every year of completed termination of service of service subject to a maximum the workman for whatever of twelve month's pay. reason except by way of dismissal for misconduct, involving moral turpitude.

The first criticism which Mr. Pathak has made against this provision is that the clause about misconduct involving moral turpitude is unusual and would create complications. This position is not disputed by the learned Attorney- General. We would, therefore, delete the words "involving moral turpitude" from the said provision. The second criticism made by Mr. Pathak against the provision is that the limit of two years imposed by the provision is unduly liberal. We think this criticism also is well-founded. Besides, a distinction must be made between the termination of service caused by the employer and the termination resulting from the resignation given by the employee. We would, therefore, provide that for terminationof service caused by the employer, the minimumperiod of service for payment of gratuity should befive years,and in regard to this category of terminationof service, we would like to add that if the termination is the result of misconduct which has caused financial loss to the employer, that loss should be first compensated from the gratuity payable to the employee and the balance, if any, should be paid to him-. In regard to resignation, we would like to provide that if the employee resigns, he would be entitled to get gratuity only if he has completed ten years' service or more. The rate prescribed by the Tribunal for the payment of gratuity and the ceiling placed by it in that behalf would remain the same.

There is one more point which still remains to be considered, and that is in regard to the claim for a share in the service charges in respect of the Claridge's Hotel. We have already indicated the nature of the directions issued by the Tribunal in that behalf. The Tribunal has held that no direction need be issued in respect of the employees' claim for a share in the service charges for a period prior to the date of the award. It has, however, purported to issue a direction in respect of the division of the service charges in future, and Mr. Pathak contends that this direction is outside the jurisdiction of the Tribunal because this was not a matter referred to it for its adjudication. Paragraph I (d) of the reference clearly supports Mr. Pathak's contention. This clause is worded thus :

> "Are the workmen entitled to share the service charges collected previously by different managements up to the date of reference of this dispute ? if so, what should be the per- centage and what directions are necessary in this respect ?"

It is plain that the claim which has been referred to the Tribunal for adjudication does not cover a period subsequent to the date of reference. This position is not disputed. We must accordingly set aside the direction issued by the Tribunal in respect of the division of service charges in future.

Mr. Pathak no doubt attempted to argue that the directions given by the award in respect of uniforms and holidays should be revised. We are not impressed by Mr. Pathak's argument on these points. These are matters of detail which it was for the Tribunal to consider on the merits and the grievance made by Mr. Pathak raises no question of law on which we can interfere with the decision of the Tribunal. The last point urged by Mr. Pathak is in regard to what he characterised as retrospective operation of the award. It appears that the present demands were made by the employees on October 1, 1958 and the references were made on September 9, 1959 and December 12, 1959 respectively. Tile award was pronounced on March 16, 1962 and it has directed that its directions should take effect from January 1, 1961. Technically -speaking, this direction cannot be said to be retrospective because it takes effect from a date subsequent to the date of the reference. Under s. 17A(4) or the Industrial Disputes Act, 1947 (No. 14 of 1947), it is open to the Industrial Tribunal to name the date from which it should come into operation, and in cases where the Industrial Tribunal thinks that it is fair and just that its award should come into force from a date prior to the date of reference, it is authorised to issue such a direction. When such a direction is issued, it may be said appropriately that the award takes effect retrospective Apart from this technical aspect of the matter', if in the circumstances of this case, the Tribunal held that the Award should take effect not from the date of reference but from a later date which was January 1, 1951, we see no reason why we should interfere with its direction.

The result is, the appeals preferred by the employers partially succeed inasmuch as the provisions made by the award in respect of dearness allowance, Gratuity and future distribution of service charges have been modified. The appeals preferred by the employees fail and are dismissed. There would be no order as to costs.

C.A. Nos. 609-610 of 1962 allowed in part.

C.A. Nos. 622 623 of 1962 dismissed,