M/s. Tulsidas Khimji

Vs

Their Workmen

Civil Appeal No. 503 of 1961

(CJI B. P. Sinha, T. L. Venkatarama Ayyar, K. Subha Rao,

N. Rajgopala Ayyangar, J. R. Mudholkar JJ)

11.04.1962

JUDGMENT

SINHA, C.J. -

This appeal, by special leave, is directed against the award dated May 10, 1961, made by the Central Government's Additional Industrial Tribunal (Shri Salim M. Merchant) Bombay, in Reference No. 4 of 1960, on a reference made by the Central Government under clause (d) of sub-section (1) of section 10 of the Industrial Disputes Act (XIV of 1947). The main point in controversy between the parties relates to the question of bonus, both traditional or customary bonus and profit-sharing bonus.

The appellant are a partnership firm, registered under the Indian Partnership Act, 1932, and have their office at 46, Veer Nariman Road, Fort, Bombay 1. The firm carries on business in the name of Messrs. Tulsidas Khimji and for the relevant year ended October 31, 1958, the partners were (1) Shri Karsondas Tulsidas (2) Shri Ranchhodas Goculdas (3) Shri Narandas Tulsidas (4) Shri Moolsing Karsondas (5) Shri Shantu Karsondas and Shri Narendra Ranchhodas. They are closely related to one another. The first two partners aforesaid have been associated with the firm for about 40 years, the third for about 35 years, the fourth for about 15 years, the 5th for about 8 years and the 6th for about 5-6 years. At all material times, the six partners had been working for and in the interest of the firm, which carried on different kinds of business, namely, (1) Clearing and Forwarding Agents, (2) Godown Keepers, (3) Insurance Agents and (4) Cotton Supervisors and Controllers. For carrying on these different kinds of business, they maintained four different and distinct departments. The respondents are workmen employed under the firm. The question referred to the Tribunal was "quantum of bonus payable to workmen for the year ended October 31, 1958". A number of issues were raised before the Tribunal, of which it is only necessary to notice the 4th and the 5th issues, which are as under :

> "4. Whether the claim under reference should be restricted to a claim for profit-sharing bonus or customary bonus or on basis of implied terms of contract ?
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> 5. Whether it is open to the workmen to claim bonus on the basis of surplus profits, and at the same time claim bonus on the ground of custom and practice or implied terms and conditions of service ? Or whether the workmen should elect the basis on

which they claim bonus ?

The union of the workmen had claimed profit-sharing bonus at the rate of 6 months' wages (inclusive of Dearness Allowance) and traditional or customary bonus at a rate, which is not clear but which may be said to be either three months' or one month's wages, plus dearness allowance, on the occasion of the Dewali festival. The difficulty in clearly stating the case for the workmen is that they were not clear in their own minds as to whether they were claiming the customary or traditional bonus as one of the implied terms of their employment or for the special festival occasion of Dewali. It was not even clear whether the claim for 6 month's wages, inclusive of dearness allowance, was the total claim for bonus or was in addition to the traditional or customary bonus, either implied or as festival bonus on the occasion of Dewali. That accounts for the form of the issues set forth above. The appellants conceded only one month's basic wages as bonus which had already been paid, and contested the claim for traditional or customary bonus either as an implied terms of contract of service or as a festival bonus. As there was some confusion about the claim of the respondents, the Tribunal, after referring to a number of documents and oral statements, came to the conclusion that the respondents had claimed by way of maximum bonus, 6 month's wages on a profit-sharing basis, and that the minimum was the claim for customary or traditional bonus of three months' basic wages and one month's dearness allowance. On Issue No. 4, the Tribunal decided that those were alternative claims, and that it was not necessary for the workmen to elect any one of the alternatives. The Tribunal pointed out that till the decision of this Court in the case of The Graham Trading Co. (India) Ltd. v. Its Workmen ((1960) 1 S.C.R. 107.) a clear distinction was not made in respect of claim for bonus as an implied terms or condition of service and at a customary or traditional bonus, and the respective tests to determine them. The Tribunal, therefore, held that the workmen were entitled to claim bonus on each of the three alternative basis, namely, (1) Profit-sharing bonus, (2) bonus as an implied term of service and (3) customary or traditional bonus on the occasion of Dewali. The Tribunal pointed out that the appellants had already paid to its workmen bonus equivalent to one month's basic wages, which amounted to Rs. 20,780/-. In order to determine the question of the first kind of bonus, namely, profit-sharing bonus, the Tribunal had to determine the available surplus. In order to do that, it had to grant certain deductions from the gross profits. The appellants claimed deductions under a number of heads, but we are concerned only with two out of them, namely, (1) whether the appellants' claim for deduction of 51% out of the gross profits on accounts of Income-Tax was justified, and (2) what should be the amount of remuneration for the six partners, in respect of which also deduction may be granted. The Tribunal decided that the amount of tax payable by the firm, as such, should be deducted and not as claimed by the appellant. On that basis, the Tribunal found that the amount deductable on account of Income-Tax would come to a little over 5% of the total amount of the gross profits. As regards the remunerations of the partners, the Tribunal fixed a lumpsum of twenty thousand rupees, on a basic which is not easily discarnible from the award, and may be said to be more or less conjectural. After making provision for the prior charges on the amount of the residuary surplus, the Tribunal came to the conclusion that a bonus equivalent to 1/4th of the total basic wages earned by the workmen during the year under reference, i.e. the year ended October 31, 1958, would be justified. It then turned to the question of the alternative claim of the workmen to three months' basic wages, plus one month's dearness allowance, either as an implied term of conditions of service or as customary or traditional bonus. On a consideration of the decisions of this Court, and other decision of High Courts and Tribunals, it came to the conclusion that though the respondents may not have succeeded in establishing their claim on the basis of implied terms of contract, they had succeeded in proving their claim for traditional or customary bonus at a uniform rate of one month's basic wages plus dearness allowance. In the result, the Tribunal awarded to the workmen bonus equivalent to 1/4th of

the total basic wages, less the amount of bonus equivalent to one month's wages already paid for the year under reference, on the same terms and conditions as had been prescribed in the award in respect of the previous year ended October 31, 1957.

Against this award, the firm had come up in appeal. There is no cross appeal by the workmen, even though, on the findings recorded by the Tribunal, they were founded entitled to three months' wages by way of profit sharing bonus and one month's wages plus dearness allowance by way of traditional or customary bonus on the occasion of Dewali.

Substantially, three questions were raised before us on behalf of the appellants, namely, (1) that deduction for income-tax, in order to arrive at the actual figure of available surplus, should have been, not on the basis of what income-tax is actually payable or has been is in respect of the registered firm, but on a notional basis, which may be analogous to the case of a registered company, or on the basis of the Tax payable on the lumpsum income of 1.95 lakhs by an unregistered firm, or on some other basis which may have some resemblance to what each one of the partners has to pay in respect of his income : (2) that the partners' remuneration should not have been fixed by the Tribunal at Rs. 20,000/-, by a rule of thumb, but should have been fixed on the basis of reasonable remuneration which the firm should pay to the partners for running its business in the four departments, aforesaid. In this connection, it was said that if Rs. 96,000/-, as claimed by the appellants, was thought to be too high, a figure of Rs. 48,000/- which is half the amount claimed, would be highly reasonable in the facts and circumstances of the business of the firm; and (3) that the Tribunal had misdirected itself in arriving at a finding that the workmen had succeeded in establishing their claim to traditional or customary bonus at a uniform rate of one month's basic wages plus dearness allowance.

We shall take up the points in the order indicated above. It is not contested on behalf of the respondents that some deduction has to be made on account of income-tax, but their learned counsel has contended that the tax should be what the firm as such has to pay by way of income-tax. It was said in this connection that a registered firm is a legal entity for the purposes of income-tax, and that the Tribunal was perfectly justified in giving credit only for the sum of about Rs. 10,000/-, worked out on that basis. On the other hand, it was contended on behalf of the appellants that 51.5%, or whatever may be the actual rate of income-tax payable by a company should have been deducted. Alternatively, it was argued that 7 annas in a rupee would be a fair basis. In our opinion, it would not be right to equate a registered firm to a company for the purpose of deduction of income-tax. It is true that the income-tax deduction has to be made on a notional basis, as laid down by a Bench of 5 Judges in this Court, in The Associated Cement Companies Ltd., Dwarka Cement Works, Dwarka v. Its Workmen ((1959) S.C.R. 925.). But even so, the notional basis must have relevance to the law of income-tax in respect of firms. In this connection, the following alternatives were suggested on behalf of the appellants, namely, (1) income-tax at 7 annas in a rupee, which will wipe off about rupees 85 thousand or about 45% of the profits; (2) a sum of about Rs. 53,000/- odd on the basis of income-tax payable on an income of 1.95 lakhs of the firm on the footing of the partners paying the tax at the appropriate rate on their shares of the income, this would account for about 27% of the profits, after adding the ten thousand rupees, which is a registered-firm tax, as already indicated; (3) tax of one lakh forty thousand odd on the basis of the firm being unregistered, which the income-tax authorities are entitled to do in certain circumstances this would account for about 70% of the profits; (4) income tax amounting to roughly 68 thousand rupees, plus ten thousand rupees in respect of registered-firm tax, on the basis of the tax payable by the partners on the income of the registered firm at the rate applicable to their world income, on their shares in the firm. We have no hesitation in rejecting the first suggestion of deducting about 7 annas in the rupee because that will

be on the basis of a tax on a corporation, the basis which were have already rejected as unfair. Even more unacceptable is the suggestion of knocking off a lakh and 4 thousand rupees, which has the effect of setting apart the major share of the profits for income-tax on a highly notional basis. The 4th alternative of taking into account the word income of the partners of the firm world be equally unjust and unfair to the workmen in the case of the members of the firm being very rich persons. This course would be highly objectionable from another point of view, which is a very important consideration, namely, that in order to determine the bonus payable for a particular year of working of the firm, the word income of the partners of the firm may have to be determined in the first instance, which process may take years. As the appellants themselves have rightly stated that the deduction on account of income tax has to be on a notional basis, the basis has got to be such as to be readily ascertainable, and that can only be done by making calculations on the profits of the firm itself, for the particular year. The last alternative of allowing deduction under this head of calculating income tax on the actual figures of the profits of each of the partners separately appears to be reasonable, because the figures are known and the tax of each constituent members of the firm can be easily calculated on the basis of his share. But it has been argued on behalf of the respondents that the amount of income-tax payable by the firm as such, viz., about Rs. 10,000/- should be permissible deduction and not what each partner had to pay on his share of the profits, because it is the firm which is the employer and which can claim deduction under this head. But this contention cannot be pushed to its logical conclusion because a firm is not a legal person within the meaning of the Industrial Disputes Act. It is the partner 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 as in other matters like remuneration, etc.; i.e., 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 quit different form the actual, though not wholly dissociated form it. But the question still arises whether the registered-firm tax can also be added to the figure of income-tax arrived at by the process just indicated. In our opinion, it would not be right to give the employers the double benefit of granting deduction on the basis of income-tax payable by each partner in respect of his share in the profits of the firm, and at the same time adding the registered-firm tax, which is paid by the firm in order to obtain certain reliefs under the Income Tax Act, which they would not otherwise have obtained. Hence, as a result of the foregoing considerations, the sum of 53 thousand rupees, in round figures, should be allowable under this head of income-tax. Even that figure, it was admitted, would represent about one quarter of the profits.

The next question that falls to be determined is what amount should be allowed under the hear 'Remuneration to the partners of the firm'. In this connection, it has been found by the Tribunal that the claim of the partners that they devoted their whole time to the business of this firm only, is not correct; and that the individual partners, on their own account, and certainly as partners of another firm, have been carrying on their other business activities. It has also to be borne in mind that the partners have not been able to adduce any reliable date to determine the amount of time and energy which they devote to the business of the firm in question. It is equally true that the sum of Rs. 20,000/- fixed by the Tribunal, under this head, amounting roughly to 10% of the gross profits is more or less conjectural. We know that the sum of Rs. 4,60,000/- represents roughly the wage bill for the year in question. Comparing the sum allowed by way of remuneration to the partners to this figure, it appears to us that the amount fixed by the Tribunal errs on the said of inadequacy. But this Court is not in a position to come to any definite conclusion of its own the record as it stands, assuming that it is open to this Court to record a finding, which is more or less one of fact, in disagreement with the finding of the Tribunal. It must be added that this Court does not function as a regular Court of Appeal from the Tribunal. Its function is merely to see that the law is being

properly administered, in accordance with well settled ruled of natural justice. Hence, we would not embark upon a fruitless task of determining a figure which will not have any substratum of solid facts and figures to support our conclusion.

The remaining question of traditional or customary bonus has been pressed upon us on behalf of the appellants. It has been argued that the Tribunal has not followed the rulings of this Court on the question of a bonus of the kinds we are now dealing with. The Tribunal has come to the conclusion that the workmen have proved that bonus at a uniform rate of one month's basic wages plus dearness allowance, on the occasion of Dewali, has been paid throughout the period of more than 15 years, between 1940-41 and 1956-57. That is a finding of fact. But it has been contended that according to the judgments of this Court, in order to establish the claim for a bonus of this kind, four conditions must be fulfilled, namely, (1) that the payment has been made over an unbroken series of years; (2) that it has been so made for a sufficiently long period, (3) that the payment has been made at a uniform rate throughout, and (4) lastly, that it has been paid even in years of loss, and did not depend upon the earning of profits. It has been found by the Tribunal that the first three conditions, if they can be so called, have been fulfilled, but that the last one has not been established and could not be established because the firm was singularly fortunate in having an unbroken record of profits, year after year. It was vehemently argued on behalf of the appellants that as this last condition has not been fulfilled, the Tribunal was not justified in law in coming to the conclusion that the claim of traditional or customary bonus at the rate indicate above had been established. In our opinion, this contention is not acceptable for several reasons. Firstly, the four so-called conditions are not really in the nature of conditions precedent but are circumstances which have been taken into account by this court in The Graham Trading Co. (India) Ltd. v. Its Workman ((1960) 1 S.C.R. 107.) for coming to a conclusion as to whether or not a claim to customary or traditional bonus had been made out. In the case just referred to, this Court pointed out that the Tribunal has to consider those four circumstances. That those are circumstances, and not conditions precedent, is shown by the fact that this Court has pointed out that the length of the period will depend upon the circumstances of each case. A condition precedent, as such, has to be more definite than one which depends upon the circumstances of each case. Secondly, there is no rational ground for holding that payment even when there were losses is a condition precedent because, as has happened in this case a company or a firm may have an unbroken record of profits ever since it started working. Hence, if it were to be held as a condition precedent, payment of bonus satisfying the three conditions aforesaid but not this one, for however, long a period, would have to be held as insufficient to establish the claim for this kind of bonus. Between profits and loss in a particular year, there may be a very small gap. The loss may be of one rupee; and similarly profits may be equally nominal. The third alternative, which may be supposed, is neither loss nor profit. According to the appellants' contention, the case for such a bonus is made out in the first supposition of a nominal loss, but not of the second or the third alternatives. The law cannot be founded on such unsubstantial considerations. The question in such cases is always one of substance, and not of form. We cannot, therefore accept the submission that loss substantial or otherwise is a sine qua non. The observations of this Court in the decisions referred to above must be understood as based on considerations of substance and not of form. Such a bonus has reference to a special occasion like a festival, for example, the Punjab in Bengal and the Dewali in Western India - occasions which are generally utilised by employers to reward the services of their employees. Hence in our opinion, what is more important to negative a plea for customary bonus would be proof that it was made ex gratia, and accepted as such, or that it was unconnected with any such occasion like a festival, as laid down by this Court in the case of B. N. Elias & Co. Ltd. Employees' Union v. B. N. Elias & Co. Ltd. ([1960] 3 S.C.R. 382.). In our opinion, therefore, the Tribunal was fully justified in finding that the traditional or customary bonus had been

established in this case, notwithstanding that it had not been shown, as it could not have been shown, that it was paid in a year of loss. On behalf of the respondents an attempt was made to show that such a bonus could be granted as an implied term of contract of service. But as such a case has not been made in the statement of the case in this Court, we did not allow that case to be made out at the time of the arguments. We must make it clear that this Court has to be very strict in enforcing the rules of pleading, as laid down in the rules of this Court bearing on the question of statement of case of the parties. These rules have been laid down with a view to help the Court in narrowing down the controversies between the parties and also for the purpose of giving notice to the other side that a particular question will be raised, and that that party should be ready to meet that particular point. This Court would not ordinarily permit any laxity in the matter of pleadings in this Court, and litigants and their legal advisers must take note of what we have said so often in the course of arguments in a number of cases coming before us recently.

It remains to consider what is the effect of our finding on the first question relating to deduction on account of income-tax on the award made by the Tribunal. At page 129 of volume I of the paper book, there is a statement of the profits of the firm between the years 1943-44 and 1957-58 and at page 157 of the reasons of the Tribunal in volume II appears a tabular statement of the bonus paid for the corresponding period of years, which, has consistently been equivalent to three months' basic wages, which is the bonus allowed in respect of the year in question also. This was so in spite of the fact that the profits have fluctuated considerably from year to year. Even after payment of the bonus as directed by the Tribunal, and making allowance for the higher amount of income-tax as determined by us, the appellants are left with a substantial amount by way of their share of the profits. It would thus appear that the Tribunal has not been too generous to the workmen when it allowed a consolidated bonus of three month's basic wages minus the amount already paid to them.

In the result, the appeal fails and is dismissed with costs.

AYYANGAR, J. -

I regret my inability to agree in the order proposed by my Lord the Chief Justice. The facts of the case and the points in dispute arising for decision have been exhaustively set out in that judgment and I consider it unnecessary to respect them. It will be seen that the controversy is confined to two matters : (1) the quantum of the profit-bonus, if any to which the respondents would be entitled, for Samvat year 2013 (1956-1957) and (2) the correctness of the declaration by the Tribunal in its award now under appeal that the respondents are entitled to customary or festival bonus on the occasion of Diwali, and these I shall deal in that order.

Taking up first the question of profit-bonus, its quantum admitted depends upon the surplus available for distribution. The Tribunal has awarded a bonus equivalent to three months' basic wages, this including the bonus equivalent to one month's basic wage already paid by the appellant-firm. The figure of 3 months' basic wages has been derived by following the formula enunciated by the Full Bench of the Labour Appellate Tribunal in Mill Owners' Association, Bombay v. Rashtriya Mill Mazdoor Sangh ([1950] L.L.J. 1247.) which has received the approval of this Court in several decision of which it is sufficient to refer to the Associated Cement Companies Ltd. v. Its Workmen ((1959) S.C.R. 925.). The gross profit i.e., the net profit earned by the firm during the relevant year after adding back items which are inadmissible for the purpose of calculating bonus for workmen for that year was Rs. 1,95,060/-. Both the parties before us accepted this figure as correct and the only dispute related to the items to be deducted from it for the purpose of ascertaining the residuary surplus available for distribution among the parties entitled to a share in it. Out of this sum of Rs.

1,95,060/- the Tribunal deducted the following :

#1. For income tax.		10,305/
2. For return on partners' capital.		9,810/
3. For return on working capital.		5,595/
4. Remuneration for the six partners.	20,000/	

		45,710/-

> which left a residuary surplus of Rs. 1,49,350/- out of which bonus equivalent to three months' basic wages absorbing Rs. 62,340/- was awarded to the workmen leaving Rs. 87,010/- as the share of the employer and the Tribunal added that the latter "would be adequate share for the Company providing Rs. 4,250/- for gratuity and taking into consideration the income tax rebate on the amount of bonus awarded."

Out of the four items of deductions those in controversy before us are two (1) the quantum of the income tax deductable, and (2) the remuneration allowable to the partners. As regards the first item, viz., income tax payable, I am in respectful agreement with the reasoning and conclusion of my Lord the Chief Justice that where the employer is a firm that is Registered under section 26-A of the Indian Income Tax Act the income tax that the employer is entitled to deduct, is not the "Registered firm tax" on the gross profits of the firm but the tax that would be payable on the share income of each partner. Both the learned Attorney-General for the appellants and Mr. Aggarwala for the workmen laid stress on the fact that the deduction from gross profits of income tax for computing the available surplus has been referred to by this Court as a "notional" item (vide e.g. p. 381 1960 3

S.C.R. 378) and each of them developed an argument founded on this description. Relying on the "notional" character of the tax deduction, the learned Attorney General contended that the figure deducted ought to be the some whether the employer was a company, firm or any other unit of assessment, viz., 7 annas in the Rupee at one age and 51% when the income tax payable by a company was raised to that figure. Mr. Aggarwala on the other hand submitted that in the case of a registered firm one should ignore the tax the individuals composing the firm were under an obligation to pay on the profits desired but the Tribunal had to take into account that only "the registered firm tax" which had been imposed on registered firm ever since the Finance Act of 1956. I consider that both these arguments proceed on a mis-apprehension or a misunderstanding of the real import of the expression "Notional" in the context in which the term has been used by this Court. The expression "notional" has been used to distinguish it form the actual tax payable by the employer for the year for which profit-bonus is being calculated and the reason why the actual tax paid was discarded as a proper deduction was thus explained by this Court in the Associated Cement Coy's case. "The formula for awarding bonus to workmen is based on two considerations; first that Labour is entitled to claim a shared in the trading profits of the industry because it has partially contributed to the same,.... In consequence in working out the formula it should not be ignored that the formula proceeds to deal with the labour's claim for bonus on the basis that the relevant year for which bonus is claimed is a self-sufficient unit and the appropriate accounts have to be made on the notional basis in respect of the said year. It is because the bonus year is taken as a unit self-sufficient by itself that the refund amount received by the employer being the refund paid by him in previous years is not included on the credit side..... Similarly, the same principle governs losses incurred in previous years which the employer is entitled to have claimed under section 24(2) during the bonus year..... Similarly, that the employer was not required to pay tax during the bonus year as a result of the adjustment of previous year's unabsorbed depreciation has no relevance in determining the available surplus from the trading profits of the bonus year. It is on the same ground viz., that the unit is the bonus year and the trading profits of that year determining the quantum of bonus available that the initial and additional depreciations besides a statutory depreciation are held not allowable".

But after these factors which are either exceptional being either special reliefs for the purpose of aiding an industry or reflecting the credits or debits attributable to different year are eliminated, one has to work out the actual tax payable on the income under the relevant provisions of the Income Tax Act before the figure of available surplus which could be distributed between the employer and the workmen could be ascertained. The rate of 7 annas in the Rupee was applied by this court to cases where the employer was company to whom that rate applied under the then Income Tax Act, and not as any "notional" figure to be deducted. It has to be borne in mind that the calculations are for the purpose of ascertaining the available surplus and so have to be related to the amount available after payment of the tax. The fact that certain items such as, for instance, the penalty payable for defaults under the Income Tax Act or credits received thereunder which are unrelated to the normal tax payable on the income derived by the employer are ignored, does not imply that the amount deductible under this head is wholly unrelated to the provisions of the Income Tax Act or to the amount that would be available as surplus in an idealised condition, i.e. after elimination of the inadmissible factors. It is only in that sense that the figure is notional i.e. in the sense that it does not take into account the actual tax payable. But it is real and otherwise then notional if the irrelevant factors are excluded. It is for this reason that I find no basis for the argument that in the case of an employer such as the one we are concerned with, the rate of tax applicable to companies for the year in question is relevant as affording any basis for computing the amount deductible under the head "income tax". I therefore reject without hesitation the main submission of the learned Attorney

General.

For the same reason I consider that the contention urged by Mr. Agarwala should also be rejected. If the income tax payable has to be related to the actual available surplus, taking the business as a unit and after eliminating the factors that are not relevant for determining the tax payable for the bonus year in question and in respect of that business income, we must necessarily reach the conclusion that it is the tax payable by the several partners who constitute the firm on their share Income from the business that affords a real basis for computing the deduction under this head. In saying this I have not overlooked the fact that for the purpose of the Indian Income Tax Act a firm is a unit of assessment and that in the case of a registered firm there is a special "registered firm" tax payable by that unit since 1956. Though a firm is regarded as an entity for the purpose of Income Tax Act, it is undeniable that a partnership is not an entity at law and it is the partners who constitute the employers for all purpose other than for income tax. It is in this view that I concur in the opinion expressed by my Lord the Chief Justice that it is the tax payable by the individual partners on their share income from the firm without taking into account any income derived by them otherwise i.e. their word income, without allowing for any losses suffered by them in their other ventures, that would constitute the item of income tax payable by the employer which would be the deductable head for the purpose of computing the available surplus.

I, however, do not agree with my Lord that the registered firm tax paid by the appellant-firm is not to be added to the tax payable by the individual partners on their share of the profits in arriving at the total of the income tax payable by the business.

As regards firms registered under section 26-A of the Income tax Act the position since 1956 is briefly this. Income tax as specially low rates is assessable on the profits of a registered firm, but not super tax. The partners of the registered firm are liable to be charged in their individual assessments to both income tax and super tax in respect of their share of profits derived from the firm. There is thus an element of double taxation-in the case of registered firms, in respect of income tax but not for super tax and only a partial relief against the double taxation is afforded by section 14(2)(aa) of the Income Tax Act. What I desire to point out is that the "registered firm tax" is as much a tax paid by the partners together and is as much a deduction out of the surplus profits available for distribution as the income tax paid by the partners individually. I do not therefore see any basis for the distinction between the "registered firm tax" paid by the partners together and the individual income tax payable on their share income by each of the partners. In my opinion, subject to the rebate allowed under section 14(2)(aa) the amount of "registered firm tax" payable by the firm should be added to the Rs. 53,000/- and odd payable by the partners individually in respect of their share of profits. Making allowance for the rebate I would, therefore, compute the sum deductible under the head "income tax payable" at Rs. 60,000/-.

The next item in dispute is as regards the sum allowed as the remuneration for the six partners for carrying on the work of his firm. I respectfully agree with the conclusion of my Lord that the figure of Rs. 20,000/- allowed by the Tribunal is not based on any relevant evidence but is merely a conjectural figure and cannot, therefore, be accepted. The proper way to have approached the question would have been for the parties to have led evidence as to what would have been the reasonable remuneration payable to strangers if the work had been entrusted to and performed by such persons. It is common ground that neither of the parties nor the Tribunal approached the problem from this point of view. In this state of circumstance two courses would be open to this Court (1) that the matter be remitted to the Tribunal, so that parties might adduce necessary evidence on these lines for a satisfactory finding to be recorded, or (2) determine the figure

ourselves. Mr. Agarwala learned counsel for the workmen suggested that if we did not agree with the finding of the Tribunal that Rs. 20,000/- was reasonable remuneration for the six partners to have attended to the work of the firm, we might remand the case to the Tribunal for evidence being led and fresh findings reached and an award passed on the basis of such findings. The learned Attorney-General on the other hand, suggested that as the appeal was concerned, with the bonus only for one year and that as evidence on these lines would be led if any question arose in regard to the later years, it was not necessary that the parties should be driven to incur more expenses in further proceedings before the Tribunal and that in the interests of both the parties we might ourselves record a finding as regards the figure which we considered reasonable taking into account the materials already on the record. He further pointed out that though before the Tribunal the appellants had claimed Rs. 96,000/- as the reasonable remuneration allowable to these partners he was prepared to step down the claim to Rs. 48,000/- if that would be accepted by the respondents. Though Mr. Aggarwala first appeared to consider that Rs. 48,000/- was reasonable, he however, latter stuck to the position that it we did not accept the finding of the Tribunal that Rs. 20,000/- was reasonable, remuneration the case should be sent back for a computation on the basis of further evidence which the parties might adduce.

Bearing in mind that the dispute before us relates only to one year and that the parties might adduce more satisfactory evidence in regard to latter years if there should be a dispute, I consider that it would not be worthwhile as it would impose an unnecessary strain on the parties, to have the matter remitted to the Tribunal for a fresh finding on the Issue. In the circumstances, I consider that the best courts would be for this Court to determine the reasonable remuneration on the basis of the materials already on record.

It is in evidence that the managerial staff, who are undoubtedly working under the partners, were paid a remuneration of Rs. 750/- p.m. That, in my opinion would afford some indication of the scale or wages in this concern payable to the superior staff. If a paid manager instead of a partner were employed, his remuneration would reasonably be take as Rs. 1,000/- P.M. Now there were four separate departments in this concern carrying on four different types of business, viz. Clearing & Forwarding Agents, Godown-Keepers, Insurance Agents and Cotton Supervisors and Controllers. If four persons had been employed in each of these departments as superior Supervisory staff the remuneration payable to them would be Rs. 4,000/- a month or Rs. 48,000/- for a year. Having regard to this mode of approach I consider that the regard to this mode of approach I consider that the figure suggested by the learned Attorney General was reasonable and I was therefore not surprised that Mr. Aggarwala at first seemed to agree that this would be a reasonable figure. I would only add that even if each of the heads of the four departments were paid only Rs. 750/- P.M. the total remuneration would come upto Rs. 36,000/- I, therefore, consider that the amount reasonable under this head cannot in any event be less than Rs. 40,000/-. I would therefore increase the item 'Remuneration of partners' in the award now under appeal from Rs. 20,000/- to Rs. 40,000/-.

I shall now proceed to consider the effect of these revisions on (a) the surplus available for distribution, and (b) the fair share which could be allowed to labour for being distributed as bonus. On the basis of the revised figures the fresh computation would be :

#Gross profit :	1,95,060/-
Less	
1. Income-tax	60,000/-

2. Return on partners' capital 9,810/-

3. Return on working capital 5,595/-

4. Remuneration for the partners 40,000/-

Net available surplus 79,655/- or roughly 80,000/-. Even if this is divided equally between the employers and labour, making no provision for reserves etc. it would yield only Rs. 40,000/- as the share of labour available for distribution as bonus. The total amount which would be payable if a bonus of a month's basic wages were awarded would be Rs. 20,780/-. The utmost that could be allowed to labour would be a bonus equivalent to two months' basic wages and even taking into account the concession that the learned Attorney-General made that the return on partners' working capital be computed not at 9 per cent. as the Tribunal has done, but at 6 per cent.; the result would not be very different, for the would add only Rs. 3000/- and odd rupees to the surplus pool. In my opinion therefore, the bonus that should be awarded to the respondents should be reduced from three months' basic wages to basic wages for a period of 2 months' which would absorb Rs. 41,560/- and leave something less then Rs. 40,000/- to the employer instead of the Rs. 87,000/- which the Tribunal considered as a reasonable apportionment for the employer.

The next matter in controversy is whether the Tribunal was right in declaring that the workmen were entitled to customary festival bonus of one months' basic wage on the occasion of Diwali. The question of customary bonus has been the subject of consideration by this Court on more than three occasions. Before referring to these decisions it is necessary to restate some facts which are not in controversy : (1) It is an admitted fact that a bonus has been paid of one month's basic wage from Samwat year 1997 (1940-41) to Samwat year 2013 (1956-57) i.e., continuously and without any break until disputes arose in respect of the year now in controversy-1957-58. (2) Though there is some little controversy as to the precise day when it was paid in relation to the Diwali festival - whether it was on that day or the day succeeding etc., it is common ground that it was paid at or about the time of Diwali and obviously to enable the workmen to meet the extra expenses which the festival involved. This has to be taken along with the fact that Diwali is one of the most or the most important Hindu festival in the Bombay area, (3), that during the several years for which we have evidence i.e. from 1940 onwards the firm has been making more than adequate profits to enable it to pay this amount as bonus. In other words, during all these long years there has not been any year

when the firm has either sustained a loss or has been in receipt of less than adequate profits to justify this payment of bonus of one month's basic wage.

In the light of these admitted facts the very narrow point of controversy before us turns on whether it is or it is not a necessary essential prerequisite for the establishment of a claim to customary festival bonus that it should have been paid in a year of loss ar at least in a year when there was no adequate profit to justify the payment.

The requisite conditions for the workers to establish a claim to customary bonus have been laid down in at least three decisions of this Court to the immediately referred to. It was, however, not the contention of any of the parties that these rulings were erroneous or required reconsideration. The only point urged before us by either side was as to the proper construction of the requirements as laid down in these decision. I am emphasizing this because in the appeal before us the court is not called upon to decide afresh the circumstances in which customary bounds would be payable but its task is only to construe the previous decision of this Court as to the conditions laid down in them as necessary for establishing such a custom.

The point on which the learned Attorney General for the appellants laid stress was that each one of the decision of this Court had laid down as one of the essential condition for the establishment of a right to customary bonus that the said payment should have been made in a year in which there was loss and as admittedly this condition was not satisfied in the case of the appellants' business, the declaration granted by the Tribunal was unjustified.

I shall now proceed to refer to the authorities : Messrs Ispahani Ltd. Calcutta v. Ispahani Employee's Union ([1960] 1 S.C.R. 24.) and Graham Trading Co. (India) Ltd. v. Its Workmen ([1960] 1 S.C.R. 107.) were heard by the same Bench and the judgment in both were delivered by Wanchoo J., the earlier on May 6, 1959 and the latter on the next day. One of the point involved in Ispahani's case was whether the workmen were entitled to Puja bonus for 1953. It was an appeal by special leave from a judgment of the Labour Appellate Tribunal, Calcutta. The Industrial Tribunal had held that it had not been established that Puja bonus had been paid at uniform rates for a sufficiently long and unbroken period, an rejected the claim for Puja bonus for 1953. There was an appeal by the workmen against this award of the Tribunal which was allowed by the Labour Appellate Tribunal which held that the claim to Puja bonus had been established. This decision of the appellate Tribunal was upheld by this Court. Wanchoo, J., summarised the facts upon which this finding was based was based, in these terms :

> "In the circumstances, it was established in this case that (1) the payment was unbroken and (2) it was not paid out of bounty due to profit having arisen, for is was paid in some years of loss also".

In the decision rendered the next day - Graham Trading Co. v. Its Workmen ([1960] 1 S.C.R. 107.) the learned Judge made a more elaborate examination of the conditions for the establishment of a claim to festival bonus. He first drew a distinction between puja bonus as an implied term of employment on the one hand and as a customary or a traditional payment on the other. He observed :

> "It is, however, clear that puja bonus which is usually paid in Bengal is of two kinds; viz. (1) where it is paid as an implied term of employment..... and (2) where it is paid as a customary and traditional payment..... We have considered the tests to

> be applied where it is a case of payment on an implied term of employment in Messrs. Ispahani Ltd. v. Ispahani Employees' Union and we need not repeat what we have said there. In the present case it has been pointed out by the company that payments which had been made in the past years from 1940 to 1952 could not be considered as based on an implied term of employment in the circumstances of this case..... The question, however, whether the payment in this case customary and traditional, still remains to be considered. In dealing with puja bonus based on an implied term of employment, it was pointed out by us in Messrs. Ispahani Ltd. v. Ispahani Employees' Union that a term may be implied, even through the payment may have been at a uniform rate throughout and the Industrial Tribunal would be justified in deciding what should be the quantum of payment in a particular year taking into account the varying payment made in previous year. But when the question of customary and traditional bonus arises for adjudication, the consideration may be somewhat different. In such a case, the Tribunal will have to consider (i) whether the payment has been over an unbroken series of years; (ii) whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case : even so the period may normally have to be longer to justify an inference of traditional and customary puja bonus than may be the case with puja bonus based on an implied term of employment; (iii) the circumstance that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss..... (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern. It will be seen that these tests are in substance more stringent than the tests applied for proof of puja bonus as an implied term of employment."

Lather, dealing with the facts from which the Court drew an inference that the workmen had established the right to customary bonus and particularly condition (iii) italicised earlier, the learned Judge added :

> "The conditions that the payment should have been made in years of loss also to exclude that hypothesis that it was paid only because profit had been made, has also been satisfied, for the evidence is that payments were made in at least two years of loss."

The third case of this Court in which the point arose was Elia Co. Employees Union v. Elia and Co. ([1960] 3 S.C.R. 382.) in which also the judgment of the Court was delivered by Wanchoo, J. The appeal before this Court was by special leave from an award of the Industrial Tribunal and the case of the appellants - the employees was that they were entitled to a bonus irrespective of profit on a scale which they set out. the Tribunal negatived the case of the employees to bonus on all the three grounds upon which bonus was payable, viz. profit bonus, as an implied condition of service and thirdly as customary bonus. Dealing with the question of customary bonus of one month's basis wages of the Subordinate staff, the learned Judge said :

> "This payment of one month's basis wage as bonus at puja appears to have continued uninterrupted from the time it started in 1942 or thereabout upon the time the dispute arose in 1954. The payment was invariably of one month's basis wage and it appears that it was paid even in a year of loss."

On this ground the appeal was allowed it regard to this item. Lastly, in the Management of Tooklai Experimental Station v. Workmen, ([1962] 1 S.C.R. 557.) the judgment was pronounced by Gajendragadkar, J. (who incidentally was a member of the Bench which decided each of the three earlier cases). Dealing with Puja bonus the learned Judge observed :

> "Customary puja bonus undoubtedly prevails in many industries in Bengal but there are certain tests which have to be applied in determining the validity of the claim. The amount by way of puja bonus, it must be shown, has been consistently paid by the employer to his employees from year to year at the same rate, that it has been paid even in year of loss and that it has no relation to the profit made by the employer during the relevant year. The course of conduct spreading over a reasonably long period between the employer and the employer in the matter of payment of puja bonus is of considerable importance in dealing with the claim of customary puja bonus (vide the Graham Trading Co. (India) Ltd. v. Its Workmen)."

The question now for consideration is whether on these authorities, reasonably construed it is or it is not a necessary condition for the establishment of a claim to customary bonus that it has been paid in a year of loss. The extracts that I have made from the judgment of this Court in the Graham Trading Co.'s case where it is referred to as the third condition and the specific reference to loss in the three other decisions, particularly bearing in mind the fact that the same members of the Court had taken part in these several decisions, and Gajendragadkar, J. took part in all the four, I feel unable to hold that the learned Judges did not intend this to be an essential condition. In the Graham case the reason for the insistence of this condition is stated viz. that is only a payment during a year when there is loss that would negative the payment being a bounty. In these circumstances I do not consider it possible to construe these judgments as laying down that payment during a year of loss was merely a relevant circumstance and not a necessary condition. If, as I have pointed out earlier, what the Court is now called on to do is only to construe these decisions, and not consider the question afresh, I feel compelled to hole that in these several decision this Court did lay down that this was a sine qua non for making good the claim.

It was suggested during the course of the argument that there was no difference between a loss of one rupee for the year and a profit of a similar sum and that if the decision were literally understood it would lead to an unreasonable result, for whereas the claim would be excluded in the event of a loss - even though same be nominal, even the existence of a nominal profit would enable the claim to be established. I agree that we are not construing a statue and that in the context in which the condition has been laid down, viz., that it should negative the payment being by way of bounty, the expression loss should be understood in the sense of an inadequacy of profit would not justify the payment of that bonus. But where the profits are adequate to enable the payment of the bonus, it appears to me that these decisions clearly lay down that he right to customary bonus is not established; for as explained in the Graham Trading Coy's case, the payment being by way of bounty would not than be excluded. In this connection is has to be borne in mind that when the right to customary bonus is held to be established, the workmen are entitled to it in future years even in an year of loss and offertory so in a year when the profit are inadequate to justify that payment. In these circumstances it stands to reason that there must be an earlier year in which payment has been made in such circumstances as to serve as a precedent for the future, i.e., to establish the custom for payment in later years. Is in the present case it is admitted that there has been an adequacy of profits to justify the payment of one month's bonus during Diwali during all the earlier years the declaration granted by the Tribunal is without justification and the finding in that regard has to be set aside.

The result therefore is that I would allow the appeal in part, reduce the profit bonus to basis wages for two months including the one month's basis wage as bonus already paid, and delete the declaration as to customary bonus.

BY COURT -

In view of the judgment of the majority, the appeal stands dismissed with Costs.

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