Jalan Trading Co. (Private Ltd.)

Vs

Mill Mazdoor Union

Civil Appeal No. 187 of 1966

(K. N. Wanchoo, J. C. Shah, M. Hidayatullah JJ)

05.08.1966

JUDGMENT

SHAH, J.

During the pendency, before the Industrial Court, Bombay, of a reference under s. 73A of the Bombay Industrial Relations Act, 1946, which arose out of a demand for payment of bonus for the years 1961 and 1962, the Payment of Bonus Ordinance 3 of 1965 was promulgated by the President on May 29, 1965, with immediate effect. The representatives of the workmen claimed that even if the plea of the employers that the profit and loss account of the establishment for the years in question disclosed a loss, was correct, the Ordinance governed the dispute and that the employees were entitled to receive bonus at the minimum rate of 4% of the salary or wages or Rs. 40/- whichever is higher. The Industrial Court upheld the plea of the workmen and directed the employers subject to the provisions of the Bonus Ordinance, 1965, to pay to each employee bonus for the year 1962 equivalent to 15 days of the salary or wages or Rs. 40/- whichever is higher.

With special leave, the employers have appealed to this Court and they challenge the validity of the Payment of Bonus Act, 1965, which replaced Ordinance 3 of 1965, and especially of the provisions under which bonus at minimum rate is made payable under the Act.

Writ Petitions Nos. 3 of 1966 and 32 of 1966 are filed by two public limited companies. They challenge diverse provisions of the Act and contend that they are not liable to pay bonus under the machinery prescribed by the Act.

A synopsis of the development in the industrial law which led to the enactment of the Payment of Bonus Act, 1965 will facilitate appreciation of the questions argued at the Bar. Claims to receive bonus, it appears, were made by industrial employees for the first time in India in the towns of Bombay and Ahmedabad, after the commencement of the First World War when as a result of inflationary trends there arose considerable disparity between the living wage and the contractual remuneration earned by workmen in the textile industry. The employers paid to the workmen increase in wages, initially called "war bonus" and later called "special allowance". A Committee appointed by the Government of Bombay in 1922 to consider, inter alia, "the nature and basis" of this bonus payments, reported that the workmen had a just claim against the employers to receive bonus, but the claim was not "customary, legal or equitable". During the Second World War the employers in the textile industry granted cash bonus equivalent to a fraction of actual wages (not including dearness allowance) but even this was a voluntary payment made with a view to keep labour contented.

In the dispute for payment of bonus for the years 1948 and 1949 in the textile industry in Bombay, the Industrial Court expressed the view that since labour as well as capital employed in the industry contribute to the profits of the industry, both are entitled to claim a legitimate return out of profits of an establishment, and evolved a formula for charging certain prior liabilities on the gross profits of the accounting year, and awarding a percentage of the balance as bonus to the workmen. In adjudicating upon the claim for bonus, the Industrial Court excluded establishments which had suffered loss in the year under consideration from the liability to pay bonus. In appeals against the award relating to the year 1949, the Labour Appellate Tribunal broadly approved of the method for computing bonus as a fraction of surplus profit.

According to the formula which came to be known as the "Full Bench Formula", surplus available for distribution had to be determined by debiting the following prior charges against gross profits :

(1) Provision for depreciation;

(2) Reserve for rehabilitation;

(3) Return of 6% on the paid-up capital;

(4) Return on the working capital at a lower rate than the return on paid-up capital;

and from the balance called "available surplus" the workmen were to be awarded a reasonable share by way of bonus for the year.

This Court considered the applicability of this formula to claims for bonus in certain decisions : Muir Mills Co., Ltd. v. Suti Mills Mazdoor Union, Kanpur ([1955] 1 S.C.R. 991.); Baroda Borough Municipality v. Its Workmen ([1957] S.C.R. 33.); Sree Mennakshi Mills Ltd. v. Their Workmen ([1958] S.C.R. 878.); and The State of Mysore v. The Workers of Kolar Gold Mines ([1959] S.C.R. 895.). The Court did not commit itself to acceptance of the formula in its entirety, but ruled that bonus is not a gratuitous payment made by the employer to his workmen, nor a deferred wage, and that where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus may legitimately be made by the workmen. The Court however did not examine the propriety nor the order of priorities as between the several charges and their relative importance, nor did it examine the desirability of making any variation, change or addition in the Formula. These problems were for the first time elaborately considered by this Court in the Associated Cement Companies Ltd. v. Its Workmen ([1959] S.C.R. 925.). Since that decision numerous cases have come before this Court in which the basic formula has been accepted with some elaboration. The principal incidents of the formula as evolved by the decisions of this Court may be briefly stated : Each year for which bonus is claimed is a self-contained unit and bonus will be computed on the profits of the establishment in that year. In giving effect to the formula as a general rule from the gross profits determined after debiting the wages and dearness allowances paid to the employees, and other items of expenditure against total receipts, as disclosed by the profit and loss account are accepted unless it appears that the debit entries are not supported by recognized accountancy practice or are posted mala fide with the object of reducing gross profits. Debit items which are wholly extraneous to or unrelated to the determination of trading profits are ignored. Similarly income which is wholly extraneous to the conduct of the business e.g. book profits on account of revaluation of assets may not be included in the gross profits. Against the gross profits so ascertained the following items are charged as prior debits : (1) Depreciation : such depreciation being only the normal or notional depreciation; (2) Income-tax payable for the

accounting year on the balance remaining after deducting statutory depreciation. The income-tax to be deducted is not the actual amount, but the notional amount of tax at the rate for the year, even if on assessment no tax is determined to be payable. For the purpose of the Full Bench Formula income-tax at the rate provided must be deducted, but in the computation of income-tax statutory depreciation under the Indian Income-tax Act only may be allowed. (3) Return on paid-up capital at 6% and on reserves used as working capital at a lower rate. In the Associated Cement Companies case ([1959] S.C.R. 925.) it was suggested that this rate should be 2% in later case 4% on the working capital was regarded as appropriate. (4) Expenditure for rehabilitation which includes replacement and modernisation of plant, machinery and buildings, but not for expansion of building, or additions to the machinery.

It is not open to the Tribunal in ascertaining the available surplus to extend by analogy the prior charges to be debited to gross profits. Therefore for example (a) allocations for debenture redemption fund; (b) losses in previous years which are written off at the end of the year; (c) donations to a political fund are not deducted from gross profits.

Rebate of income-tax available to the employer on the amount of bonus paid to the workmen cannot be added to the available surplus of profits determined in accordance with the Full Bench Formula which should be taken into account only in distributing the available surplus between workmen, industry and employers.

The formula it is clear was not based on any strict theory of legal rights or obligations : it was intended to make an equitable division of distributable profits after making reasonable allocations for prior charges.

Attempts made from time to time to secure revision of the Formula failed before this Court. In the Associated Cement Companies' case, ([1959] S.C.R. 925.) this Court observed :

> "The plea for the revision of the formula raised an issue which affects all industries; and before any change is made in it, all industries and their workmen would have to be heard and their pleas carefully considered. It is obvious that while dealing with the present group of appeals, it would be difficult, unreasonable and inexpedient to attempt such a task."

But the Court threw out a suggestion that the question may be "comprehensively considered by a high-powered Commission", this suggestion was repeated in The Ahmedabad Miscellaneous Industrial Workers' Union v. Ahmedabad Electricity Co. Ltd. ([1962] 2 S.C.R. 934.)

The Government of India then set up a Commission on December 6, 1961 inter alia to define the concept of bonus, to consider in relation to industrial employments the question of payment of bonus based on profits and to recommend principles for computation of such bonus and methods of payment, to determine what the prior charges should be in different circumstances and how they should be calculated, to consider whether there should be lower limits irrespective of losses in particular establishments and upper limits for distribution in one year, and if so, the manner of carrying forward profits and losses over a prescribed period, to suggest an appropriate machinery and method for the settlement of bonus disputes. The Commission held an elaborate enquiry and reported that "bonus" was paid to the workers as a share in the prosperity of the establishment and recommended adherence to the basic scheme of the Bonus Formula viz. determination of bonus as a percentage of gross profits reduced by certain prior charges, viz. normal depreciation admissible

under the Indian Income-tax Act including multiple shift allowance, income-tax and super-tax at the current standard rate applicable for the year for which bonus is to be calculated (but not super profits tax), and return on paid-up capital raised by issue of preference shares at the actual rate of dividend payable, on other paid-up capital at 7% and on reserves used as capital at 4% but not provision for rehabilitation. The Commission recommended that sixty per cent of the available surplus should be distributed as bonus, the excess being carried forward and taken into account in the next year : the balance of forty per cent., should remain with the establishment into which would merge the saving in tax on bonus payable, and the aggregate balance thus left to the establishment may be intended to provide for gratuity, other necessary reserves, rehabilitation in addition to the provision made by way of depreciation in the prior charges, annual provision required for redemption of debentures, return of borrowings, payment of super-profits tax and additional return on capital. They recommended that the distinction between basic wages and dearness allowance for the "purpose" of expressing the bonus quantum" should be abolished and that bonus should be related to wages and dearness allowance taken together : that minimum bonus should be 4% of the total basic wage and dearness allowance paid during the year or Rs. 40/- to each worker, whichever is higher, and in the case of children the minimum should be equivalent to 4% of their basic wage and dearness allowance, or Rs. 25/- whichever is higher, subject to reduction pro rata for employees who have not worked for the whole year, and that the maximum bonus should be equivalent to 20% of the total basic wage and dearness allowance paid during the year : that the bonus formula proposed should be deemed to include bonus to employees drawing a total basic pay and dearness allowance up to Rs. 1600 per month regardless of whether they were "workmen" as defined in the Industrial Disputes Act or other relevant statutes, but subject to the proviso that the quantum of bonus payable to employees drawing total basic pay and dearness allowance over Rs. 750 per month shall be limited to what it would be if their pay and dearness allowance were only Rs. 750 per month. It was proposed that the general formula should not apply to new establishments until they had recouped all early losses including all arrears of normal depreciation admissible under the Income-tax Act, subject to a time limit of six years. They also suggested that the scheme recommended should be made applicable to all bonus matters relating to the accounting year ending on any day in the calendar year 1962 other than those matters in which settlements had been reached or decisions had been given.

The Government of India accepted a majority of the recommendations and the President issued on May 29, 1965 the Payment of Bonus Ordinance, 1965, providing for payment of bonus to all employees drawing salary not exceeding Rs. 1600 under the formula devised by the Commission. It is not necessary to set out the provisions of the Ordinance, for the Ordinance was replaced, by the Payment of Bonus Act 21 of 1965 and by s. 40(2) it was provided that notwithstanding such repeal, anything done or any action taken under the Payment of Bonus Ordinance, 1965, shall be deemed to have been done or taken under the Act as if the Act had commenced on May 29, 1965. Since the action taken under the Ordinance is to be deemed to have been taken under the Act, in these cases validity of the provisions of the Act alone need be considered.

It may be broadly stated that bonus which was originally a voluntary payment out of profits to workmen to keep them contented, acquired the character, under the Bonus Formula, of a right to share in the surplus profits, and enforceable through the machinery of the Industrial Disputes Act. Under the Payment of Bonus Act, liability to pay bonus has become a statutory obligation imposed upon employers covered by the Act.

Counsel for the Jalan Trading Company urged that the Act was invalid in that it amounts to fraud on the Constitution or otherwise is a colourable exercise of legislative power. That argument has no

force. It is not denied that the Parliament has power to legislate in respect of bonus to be paid to industrial employees. By enacting the Payment of Bonus Act, the Parliament has not attempted to trespass upon the province of the State Legislature. It is true that by the impugned legislation certain principles declared by this Court e.g. in Express Newspapers (Private) Ltd., and Anr. v. The Union of India and Ors. ([1959] S.C.R. 12.) in respect of grant of bonus were modified, but on that account it cannot be said that the legislation operates as fraud on the Constitution or is a colourable exercise of legislative power. Parliament has normally power within the frame-work of the Constitution to enact legislation which modifies principles enunciated by this Court as applicable to the determination of any dispute, and by exercising that power the Parliament does not perpetrate fraud on the Constitution. An enactment may be charged as colourable, and on that account void, only if it be found that the legislature has by enacting it trespassed upon a field outside its competence : K.C. Gajapati Narayan Deo and Ors. v. The State of Orissa ([1954] S.C.R. 1.).

The provisions of the Act and its scheme may now be summarised. The Payment of Bonus Act was published on September 25, 1965. By s. 1(4) save as otherwise provided in the Act, the provisions of the Act shall, in relation to a factory or other establishment to which the Act applies, have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year. Section 2(4) defines "allocable surplus" as meaning (a) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of s. 194 of that Act, sixty-seven per cent of the available surplus in an accounting year; (b) in any other case, sixty per cent of such available surplus, and includes any amount treated as such under sub-s. (2) of s. 34. "Available surplus" is defined in s. 2(6) as meaning the available surplus computed under s. 5. "Employee" is defined in s. 2(13) as meaning any person (other than an apprentice) employed on a salary or wage not exceeding one thousand and six hundred rupees per mensem in any industry to do any skilled or unskilled manual, supervisory, managerial, administrative, technical or clerical work for hire or reward whether the terms of employment be express or implied. By s. 2(21) "salary or wage" is defined as meaning all remuneration (other than remuneration in respect of overtime work) capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living), but does not include certain specified allowances, commissions, value of amenities etc. Section 4 provides for computation of gross profit in the manner provided by the First Schedule in the case of a banking company and in other case in the manner provided by the Second Schedule. By s. 5 available surplus in respect of any accounting year is the gross profits for that year after deducting therefrom the sums referred to in s. 6. The sums liable to be deducted from gross profit under s. 6 are :

> (a) any amount by way of depreciation admissible in accordance with the provisions of sub-section (1) of section 32 of the Income-tax Act, or in accordance with the provisions of the agricultural income-tax law, as the case may be;
>
> (b) any amount by way of development rebate or development allowance which the employer is entitled to deduct from his income under the Income-tax Act;
>
> (c) any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year; and

(d) such further sums as are specified in respect of the employer in the Third Schedule.

Section 7 deals with calculation of direct taxes payable by the employer for any accounting year for the purpose of cl. (c) of s. 6. Sections 8 & 9 deal with eligibility for and disqualifications for receiving bonus. Sections 10 to 15 deal with payment of minimum and maximum bonus and the scheme for "set-on" and "set-off". Every employer is by s. 10 bound to pay to every employee in an accounting year minimum bonus which shall be four per cent of the salary or wage earned by the employee during the accounting year or Rs. 40 whichever is higher, whether there are profits in the accounting year or not. In case of employees below the age of 15, the minimum is Rs. 25. By s. 11 where in respect of any accounting year the allocable surplus exceeds the amount of minimum bonus payable the employer shall be bound to pay to every employee in the accounting year bonus which shall be an amount proportionate to the salary or wage earned by the employee during the accounting year, subject to a maximum of twenty per cent of such salary or wage. Section 15 provides that if for any accounting year the allocable surplus exceeds the amount of maximum bonus payable to the employees in the establishment under s. 11, then, the excess shall, subject to a limit of twenty per cent of the total salary or wage of the employees employed in the establishment in that account year, be carried forward for being "set-on" in the succeeding accounting year, up to and inclusive of the fourth account year, and be utilised for the purpose of payment of bonus. By sub-s. (2) it is provided that where for any accounting year, there is no available surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees in the establishment under s. 10, and there is no amount or sufficient amount carried forward and "set on" under sub-s. (1) capable of being utilised for the purpose of payment of the minimum bonus, then, such minimum amount or the deficiency, shall be carried forward for being set off in the succeeding accounting year up to and inclusive of the fourth accounting year. By sub-s. (3) it is provided that principle of "set-on" and "set-off" as illustrated in the Fourth Schedule shall apply to all other cases not covered by sub-s. (1) or sub-s. (2) for the purpose of payment of bonus under the Act. Bonus payable to an employee drawing wage or salary exceeding Rs. 750 per mensem has to be calculated as if the salary or wage were Rs. 750 per mensem, and an employee who has not worked for all the working days in an accounting year, the minimum bonus of Rs. 40 or Rs. 25 would be proportionately reduced (ss. 12 & 13). Section 16 makes special provisions relating to payment of bonus to employees of establishments which have been newely set up. Sections 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 & 31 deal with certain procedural and administrative matters. By s. 20 establishments in the public sector are in certain eventualities also made subject to the provisions of the Act. Section 32 excludes from the operation of the Act employees of certain classes and certain industries specified therein. By s. 33 the Act is made applicable to pending industrial disputes (regarding payment of bonus relating to any accounting year not being an accounting year earlier than the accounting year ending on any day in the year 1962) immediately before May 29, 1965, before the appropriate Government or any Tribunal or other authority under the Industrial Disputes Act, 1947, or under any corresponding law, or where it is pending before the Conciliation officer or for adjudication. By s. 34(1) the provisions of the Act are declared to have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service made before May 29, 1965. Sub-s. (2) of s. 34 makes special overriding provisions regarding payment of bonus to employees computed as a percentage of gross profits reduced by direct taxes payable for the year, (subject to the maximum prescribed by s. 11), when bonus has been paid by the employer to workmen in the "base year" as defined in Explanation II. By s. 36 the appropriate Government is authorised, having regard to the financial position and other relevant circumstances of any

establishment or class of establishments, to exempt for such period as may be specified therein such establishment or class of establishments from all or any of the provisions of the Act, and by s. 37 power is conferred upon the Central Government by order to make provision, not inconsistent with the purposes of the Act, for removal of difficulties or doubts in giving effect to the provisions of the Act.

The scheme of the Act, broadly stated, is four dimensional :

> (1) to impose statutory liability upon an employer of every establishment covered by the Act to pay bonus to employees in the establishment :
>
> (2) to define the principle of payment of bonus according to the prescribed Formula;
>
> (3) to provide for payment of minimum and maximum bonus and linking the payment of bonus with the scheme of "set-off" and "set-on"; and
>
> (4) to provide machinery for enforcement of the liability for payment of bonus.

Ordinarily a scheme imposing fresh liability would, it is apprehended, be made prospective, leaving the pending disputes to be disposed of according to the law in force before the Act. But the Legislature has given by s. 33 retrospective operation to the Act to certain pending disputes, and has sought to provide by s. 34 while extinguishing all pre-existing agreements, settlements or contracts of service for freezing the ratio which existed in the base year on which the bonus would be calculated in subsequent years.

It was urged by counsel for the employers that s. 10 which provides for payment of minimum bonus, s. 32 which seeks to exclude certain classes of employees from the operation of the Act, s. 33 which seeks to apply the Act to certain pending disputes regarding payment of bonus and sub-s. (2) of s. 34 which freezes the ratio at which the available surplus in any accounting year has (subject to s. 11) to be distributed if in the base year bonus has been paid, are ultra vires, because they infringe Arts. 14, 19 and 31 of the Constitution. It was also urged that conferment of power of exemption under s. 36 is ultra vires the Parliament in that it invests the appropriate Government with authority to exclude from the application of the Act, establishments or a class of establishments, if the Governments, are of the opinion having regard to the financial position and other relevant circumstances that it would not be in the public interest to apply all or any of the provisions of the Act. Power conferred upon the Government under s. 37 is challenged on the ground that it amounts to delegation of legislative power when the Central Government is authorised to remove doubt or difficulty which had arisen in giving effect to the provisions of the Act.

The plea of invalidity of ss. 32, 36 and 37 may be dealt with first. It is true that several classes of employees set out in cls. (i) to (xi) of s. 32 are excluded from the operation of the Act. But the petitions and the affidavits in support filed in this Court are singularly lacking in particulars showing how the employees in the specified establishment or classes of establishments were similarly situate and that discrimination was practised by excluding those specified classes of employees from the operation of the Act while making it applicable to others. Neither the employees, nor the Government of India have chosen to place before us any materials on which the question as to the vires of the provisions of s. 32 which excludes from the operation of the Act certain specified classes of employees can be determined. There is a presumption of constitutionality of a statute when the challenge is founded on Art. 14 of the Constitution, and the

onus of proving unconstitutionality of the statute lies upon the person challenging it. Again many classes of employees are excluded by s. 32 and neither those employees, nor their employers, have been impleaded before us. Each class of employees specified in s. 32 requires separate treatment having regard to special circumstances and conditions governing their employment. We therefore decline to express any opinion on the plea of unconstitutionality raised before us in respect of the inapplicability of the Act to employees described in s. 32.

By s. 36 the appropriate Government is invested with power to exempt an establishment or a class of establishments from the operation of the Act, provided the Government is of the opinion that having regard to the financial position and other relevant circumstances of the establishment, it would not be in the public interest to apply all or any of the provisions of the Act. Condition for exercise of that power is that the Government holds the opinion that it is not in the public interest to apply all or any of the provisions of the Act to an establishment or class of establishments, and that opinion is founded on a consideration of the financial position and other relevant circumstances. Parliament has clearly laid down principles and has given adequate guidance to the appropriate Government in implementing the provisions of s. 36. The Power so conferred does not amount to delegation of legislative authority. Section 36 amounts to conditional legislation, and is not void. Whether in a given case, power has been properly exercised by the appropriate Government would have to be considered when that occasion arises.

But s. 37 which authorises the Central Government to provide by order for removal of doubts or difficulties in giving effect to the provisions of the Act, in our judgment, delegates legislative power which is not permissible. Condition of the applicability of s. 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, s. 37 is not saved from the vice of delegation of legislative authority. The section authorises the Government to determine for itself what the purposes of the Act are and to make provisions for removal of doubts or difficulties. If in giving effect to the provisions of the Act any doubt or difficulty arises, normally it is for the Legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases final accentuates the vice in sub. s. (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act.

We may now turn to the challenge to s. 10 Under the Full Bench Formula bonus being related to available surplus it can only be made payable by an employer of an establishment who makes profit in the accounting year to which the claim for bonus relates. If no profit was made there was no liability to pay bonus. As pointed out by this Court in Muir Mills Company's case ([1955] S.C.R. 991.) :

> "It is therefore clear that the claim for bonus can be made by the employees only if as a result of the joint contribution of capital and labour the industrial concern has earned profits. If in any particular year the working of the industrial concern has resulted in loss there is no basis nor justification for a demand for bonus. Bonus is not a deferred wage..... The dividends can only be paid out of profits and unless and until profits are made no occasion or question can also arise for distribution of any sum as bonus amongst the employees. If the industrial concern has resulted in a

> trading loss, there would be no profits of the particular year available for distribution of dividends, much less could the employees claim the distribution of bonus during that year."

But by s. 10 it is provided that even if there has resulted trading loss in the accounting year, the employer is bound to pay bonus at 4% of the salary or wage earned by the employee or Rs. 40 whichever is higher. This, it was urged, completely alters the character of bonus and converts what is a share in the year's profits in the earning of which labour has contributed into additional wage. It was pointed out to us that in giving effect to the Full Bench Formula, this Court set aside the directions made by the Industrial Tribunal awarding minimum bonus where the establishment had suffered loss, and remanded the case for a fresh determination consistently with the terms of the Full Bench Formula : New Maneck Chowk Spg. and Weaving Co. Ltd. v. Textile Labour Association ([1961] 3 S.C.R. 1.). In that case there was a five year pact between the Ahmedabad Mill owners' Association and the Textile Labour Association. After the expiry of the period, the Labour Association demanded bonus on the basis of the pact, but the Mill owners claimed that the pact was contrary to the Full Bench Formula and the claim was not sustainable. The Industrial Tribunal held that the pact did not "run counter to the law laid down by this Court in the Associated Cement Companies' case ([1959] S.C.R. 925.)" and the extension of the agreement for one more year would help in promoting peace in the industry in Ahmedabad. This Court held that the agreement departed from the Full Bench Formula in that matter of bonus and when the Tribunal extended the agreement after the expiry of the stipulated period, it ignored the law as laid down by this Court as to what profit bonus was and how it should be worked out, and that the Tribunal had no power to do by extending the agreement to direct payment of minimum bonus for the year 1958 when there was no available surplus to pay minimum bonus.

Indisputably Parliament has the power to enact legislation with in the constitutional limits to modify the Full Bench Formula even after it has received the approval of this Court. It was urged, however, that exercise of that power by treating establishments inherently dissimilar as in the same class and subject to payment of minimum bonus amounted to making unlawful discrimination. It was said that establishments when suffered losses and establishments which made profits; establishments paying high rates of wages and establishments paying low rates of wages; establishments paying "bonus-added wages" and establishments paying ordinary wages; establishments paying higher dearness allowance and establishments paying lower dearness allowance, do not belong to the same class, and by imposing liability upon all these establishments to pay bonus at the statutory rate not below the minimum irrespective of the differences between them, the Parliament created inequality. It was also submitted that by directing establishments passing through a succession of lean years in which losses have accumulated and establishments which had made losses in the accounting year alone, to pay minimum bonus, unlawful discrimination was practised.

Section 10 at first sight may appear to be a provision for granting additional wage to employees in establishments which have not on the year's working an adequate allocable surplus to justify payment of bonus at the rate of 4% on the wages earned by each employee. But the section is an integral part of a scheme for providing for payment of bonus at rates which do not widely fluctuate from year to year and that is sought to be secured by restricting the quantum of bonus payable to the maximum rate of 20% and for carrying forward the excess remaining after paying bonus at that rate into the account of the next year, and by providing for carrying forward the liability for amounts drawn from reserves or capital to meet the obligation to pay bonus at the minimum rate. Under the Act, for computing the rate of payment of bonus each accounting year is distinct and bonus has to be worked out on the profits of the establishment in the accounting year. But it is not in the interest

of capital or labour that there should be wide fluctuations in the payment of bonus by an establishment year after year. The object of the Act being to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment reflected by the profits earned by the contributions made by capital, management and labour, Parliament has provided that bonus in a given year shall not exceed 1/5th and shall not be less than 1/25th of the total earning of each individual employee, and has directed that the excess share shall be carried forward to the next year, and that the amount paid by way of minimum bonus not absorbed by the available profits shall be carried to the next year and be set off against the profits of the succeeding years. This scheme of prescribing maximum and minimum rates of bonus together with the scheme of "set off" and "set on" not only secures the right of labour to share in the prosperity of the establishment, but also ensures a reasonable degree of uniformity.

Equal protection of the laws is denied if in achieving a certain object persons, objects or transactions similarly circumstanced are differently treated by law and the principle underlying that different treatment has no rational relation to the object sought to be achieved by the law. Examined in the light of the object of the Act and the scheme of "set off" and "set on", the provision for payment of minimum bonus cannot be said to be discriminatory between different establishments which are unable on the profits of the accounting year to pay bonus merely because a uniform standard of minimum rate of bonus is applied to them.

The Judgment of this Court in Kunnathat Thathunni Moopil Nair v. The State of Kerala and Another, ([1961] 3 S.C.R. 77.) and especially the passage in the judgment of the majority of the Court at p. 92, has not enunciated any broad proposition as was contended for on behalf of the employers, that when persons or objects which are unequal are treated in the same manner and are subjected to the same burden or liability, discrimination inevitably results. In Moopil Nair's case ([1961] 3 S.C.R. 77.) the validity of the Travancore-Cochin Land Tax Act, 1955, was challenged. By s. 4 of the Act all lands in the State, of whatever description and held under whatever tenure, were charged with payment of land tax at a uniform rate to be called the basic tax. Owners of certain forest lands challenged certain provisions of the Act pleading that those provisions contravened Arts. 14, 19(1) (f) and 31(1) of the Constitution. This Court held that the Act which obliged every person who held land to pay the tax at a uniform rate, whether he made any income out of the land, or whether the land was capable of yielding any income, attempted no classification and that lack of classification by the Act itself created inequality, and was on that account hit by the prohibition against denial of equality before the law contained in Art. 14. The Court also held that the Act was confiscatory in character, since it had the effect of eliminating private ownership of land through the machinery of the Act, without proposing to acquire privately owned forests for the State. The Travancore-Cochin Land Tax Act, it is clear, contained several peculiar features : it was in the context of these features that the Court held that imposition of a uniform liability upon lands which were inherently unequal in productive capacity amounted to discrimination, and that lack of classification created inequality. It was not said by the Court in that case that imposition of uniform liability upon persons, objects or transactions which are unequal must of necessity lead to discrimination. Ordinarily it may be predicated of unproductive agricultural land that it is incapable of being put to profitable agricultural use at any time. But that cannot be so predicated of an industrial establishment which has suffered loss in the accounting year, or even over several years successively. Such an establishment may suffer loss in one year and make profit in another. Section 10 undoubtedly places in the same class establishments which have made inadequate profits not justifying payment of bonus, establishments which have suffered marginal loss, and establishments which have suffered heavy loss. The classification so made is not unintelligible : all establishments which are unable to pay bonus under the scheme of the Act, on the result of the working of the

establishments, are grouped together. The object of the Act is to make an equitable distribution of the surplus profits of the establishment with a view to maintain peace and harmony between the three agencies which contribute to the earning of profits. Distribution of profits which is not subject to great fluctuations year after year, would certainly conduce to maintenance of peace and harmony and would be regarded as equitable, and provision for payment of bonus at the statutory minimum rate, even if the establishment has not earned profit is clearly enacted to ensure the object of the Act.

Whether the scheme for payment of minimum bonus is the best in the circumstances, or a more equitable method could have been devised so as to avoid in certain cases undue hardship is irrelevant to the enquiry in hand. If the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. With a view to secure a particular object a scheme may be selected by the Legislature wisdom whereof may be open to debate; it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the Legislature may be shown to be erroneous, but unless the enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law, it will not be subject to judicial interference under Art-14. Invalidity of legislation is not established by merely finding faults with the scheme adopted by the Legislature to achieve the purpose it has in view. Equal treatment of unequal objects, transactions or persons in not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law. Plea of in validity of s. 10 on the ground that it infringes Art. 14 of the Constitution must therefore fail.

We need say nothing at this date about the plea that s. 10 by imposing unreasonable restrictions infringes the fundamental freedom under Art. 19(1)(g) of the Constitution, for by the declaration of emergency by the President under Art. 352, the protection of Art. 19 against any legislative measure, or executive order which is otherwise competent, stands suspended. The plea that s. 10 infringes the fundamental freedom under Art. 31(1) of the Constitution also has no force. Clause (1) of Art. 31 guarantees the right against deprivation of property otherwise than by authority of law. Compelling an employer to pay sums of money to his employees which he has not contractually rendered himself liable to pay may amount to deprivation of property : but the protection against depriving a person of his property under cl. (1) of Art. 31 is available only if the deprivation is not by authority of law. Validity of the law authorising deprivation of property may be challenged on three grounds : (i) incompetence of the authority which has enacted the law; (ii) infringement by the law of the fundamental rights guaranteed by Ch. III of the Constitution and (iii) violation by the law of any express provisions of the Constitution. Authority of the Parliament to legislate in respect of bonus is not denied and the provision for payment of bonus is not open to attack on the ground of infringement of fundamental rights other than those declared by Art. 14 and Art. 19(1)(g) of the Constitution. Our attention has not been invited to any prohibition imposed by the Constitution which renders a statute relating to payment of bonus invalid. We are therefore of the view that s. 10 of the Bonus Act is not open to attack on the ground that it infringes Art. 31(1).

We may now turn to s. 33 of the Act. The section provides :

> "Where, immediately before the 29th May, 1965, any industrial dispute regarding payment of bonus relating to any accounting year, not being an accounting year earlier than the accounting year ending on any day in the year 1962, was pending before the appropriate Government or before any Tribunal or other authority under the Industrial Disputes Act, 1947 (XIV of 1947) or under any corresponding law relating to investigation and settlement of industrial disputes in a State, then, the

bonus shall be payable in accordance with the provisions of this Act in relation to the accounting year to which the dispute relates and any subsequent accounting year, notwithstanding that in respect of that subsequent accounting year no such dispute was pending.

Explanation. - A dispute shall be deemed to be pending before the appropriate Government where no decision of that Government on any application made to it under the said Act or such corresponding law for reference of that dispute to adjudication has been made or where having received the report of the Conciliation Officer (by whatever designation known under the said Act or law, the appropriate Government has not passed any order refusing to make such reference."

The section plainly seeks to apply to provisions of the Act to a pending dispute, if the dispute relates to payment of bonus for any accounting year not being an accounting year earlier than the accounting year ending on any day in the year, 1962, and is pending on May 29, 1965 before the Government or other authority under the Industrial Disputes Act or any other corresponding law. The Provisions of the Act also apply even if there be no dispute pending for the year subsequent to the year ending on any day in the year 1962, provided there is a dispute pending in respect of an earlier year. By s. 1(4) the provisions of the Act have effect in respect of the accounting year commencing on any day in the year 1964 add in respect of every subsequent accounting year. But by the application of s. 33 the scheme of the Act is related back to three accounting years ending on any day in 1962, in 1963 and in 1964.

In considering the effect of s. 33 regard must first be had to s. 34(1) which provides that save as otherwise provided in the section, the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement settlement or contract of service made before May 29, 1965. All previous awards, agreements, settlements or contracts of service made before May 29, 1965, therefore are, since the commencement of the Act rendered ineffective, and if there be a dispute relating to bonus pending on the date specified for the year ending on any day in 1962 or thereafter, before any appropriate Government or before any authority under the Industrial Disputes Act, bonus shall be computed and paid in the manner provided by the Act. Even if in respect of an year there is no such dispute pending on May 29, 1965, because of a dispute pending in respect of an earlier year, not being earlier than the year ending on any day in 1962, the same consequences follow.

Application of the Act involves departure in many respects from the scheme of computation of bonus under the Full Bench Formula. Under the Full Bench Formula bonus was a percentage of total wage not inclusive of dearness allowance, and in the computation of available surplus rehabilitation allowance was admissible as a deduction. It was also well-settled that an establishment which suffered loss in the accounting year was not liable to pay bonus : and a reference under the Industrial Disputes Act on a claim to bonus could be adjudicated upon only if the claimants were workmen as defined in the Industrial Disputes Act. Since the expression "Industrial dispute" used in s. 33 has not been defined in the Payment of Bonus Act, the definition of that expression in the Industrial Disputes Act will apply : vide s. 2(22). The expression "industrial dispute" under the Industrial Disputes Act inter alia means a dispute or difference between employer and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person : s. 2(k) : and the expression "workmen" is defined in s. 2(s) of the Industrial Disputes Act means "any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or

reward, ... but does not include any such person -

(i) . . .

(ii) . . .

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of managerial nature."

Therefore no dispute relating to bonus between an employer and persons employed in managerial or administrative capacity or persons employed in supervisory capacity drawing wages exceeding Rs. 500/- per mensem could be referred under the Industrial Disputes Act. But under s. 33 a pending industrial dispute between the workmen and the employer, by reason of the application of the Act gives rise to a statutory liability in favour of all employees of the establishment as defined under the Act by s. 2(13) for payment of bonus under the scheme of the Act. Whereas under the Industrial Disputes Act a dispute could only be raised by employees who were workmen within the meaning of the Act, under the scheme of the Act Statutory liability is imposed upon the employer to pay to all his employees as defined in s. 2(13) bonus at the rates prescribed by the Act. Even if before May 29, 1965, there had been a settlement with some workmen or those workmen had not made any claim previously, and there would on that account be no industrial dispute pending qua those workmen, pendency of a dispute relating to bonus in which some other workmen are interested imposes statutory liability upon the employer to pay bonus to all employees in the establishment. Even if the employer had suffered loss or the available surplus was inadequate, the employer will by virtue of s. 33 be liable to pay minimum bonus at the statutory rate : the formula for computation of gross profits and available surplus will be retrospectively altered and a percentage of wages inclusive of dearness allowance will be allowed as bonus to all employees (whether they were under the Full Bench Formula entitled to bonus or not), in computing the available surplus rehabilitation will not be taken into account, and bonus will also have to be paid to employees who were not entitled thereto in the year of account. Application of the Act for the year for which the bonus dispute is pending therefore creates an onerous liability on the employer concerned because :

(1) employees who could not claim bonus under the Industrial Disputes Act become entitled thereto merely because there was a dispute pending between the workmen in that establishment, or some of them and the employer qua bonus;

(2) workmen who had under agreement, settlements, contracts or awards become entitled to bonus at certain rates cease to be bound by such agreements, settlements, contracts or even awards and become entitled to claim bonus at the rate computed under the scheme of the Act;

(3) basis of the computation of gross profits, available surplus and bonus is completely changed;

(4) the scheme of "set on" and "set off" prescribed by s. 15 of the Act becomes operative and applies to establishments as from the year in respect of which the bonus dispute is pending; and

(5) the scheme of the Act operates not only in respect of the year for which the bonus dispute was pending, but also in respect of subsequent years for which there is no bonus dispute pending.

If therefore in respect of an establishment there had been a settlement or an agreement for a subsequent year, pendency of a dispute for an earlier year before the authority specified in s. 33 is sufficient to upset that agreement or settlement and a statutory liability for payment of bonus according to the scheme of the Act is imposed upon the employer. Application of the Act retrospectively therefore depends upon the pendency immediately before May 29, 1965, of an industrial dispute regarding payment of bonus relating to any accounting year not earlier than the year ending on any day in 1962. If there be no such dispute pending immediately before the date on which the Act becomes operative, an establishment will be governed by the provisions of the Full Bench Formula and will be liable to pay bonus only if there be adequate profits which would justify payment of bonus. If however a dispute is pending immediately before May 29, 1965, the scheme of the Act will apply not only for the year for which the dispute is pending, but even in respect of subsequent years. Assuming that the classification is founded on some intelligible differentia which distinguishes an establishment, from other establishments, the differentia has no rational relation to the object sought to be achieved by the statutory provision, viz., of ensuring peaceful relations between capital and labour by making an equitable distribution of the surplus profits of the year. Arbitrariness of the classification becomes more pronounced when it is remembered that in respect of the year subsequent to the year for which the dispute is pending, liability prescribed under the Act is attracted even if for such subsequent years no dispute is pending, whereas to an establishment in respect of which no dispute is pending immediately before May 29, 1965, no such liability is attracted. Therefore two establishments similarly circumstanced having no dispute pending relating to bonus between the employers and the workmen in a particular year would be liable to be dealt with differently if in respect of a previous year (covered by s. 33) there is a dispute pending between the employer and the workmen in one establishment and there is no such dispute pending in the other.

Liability imposed by the Act for payment of bonus is for reasons already set out more onerous than the liability which had arisen under the Full Bench Formula prior to the date of the Act. Imposition of this onerous liability depending solely upon the fortuitous circumstance that a dispute relating to bonus is pending between workmen or some of them immediately before May 29, 1965, is plainly arbitrary and classification made on that basis is not reasonable.

There is one other ground which emphasizes the arbitrary character of the classification. If a dispute relating to bonus is pending immediately before May 29, 1965, in respect of the years specified in s. 33 before the appropriate Government or before any authority under the Industrial Disputes Act or under any corresponding law, the provisions of the Act will be attracted : if the dispute is pending before this Court in appeal or before the High Court in a petition under Act. 226, the provisions of the Act will not apply. It is difficult to perceive any logical basis for making a distinction between pendency of a dispute relating to bonus for the years in question before this Court or the High Court, and before the Industrial Tribunal or the appropriate Government. This Court is under the Constitution competent to hear and decide a dispute pending on May 29, 1965 relating to bonus as a Court of Appeal, but is not required to apply the provisions of the Act. If because of misconception of the nature of evidence or failure to apply rules of natural justice or misapplication of the law, this Court sets aside an award made by the Industrial Tribunal and remands the case which was pending on May 29, 1965, for rehearing, the Industrial Court will have to deal with the case under the Full Bench Formula and not under the provisions of the Act. The High Court has also jurisdiction in a

petition under Art. 226 to issue an order or direction declaring an order of the Industrial Tribunal invalid, and issue of such writ, order or direction will ordinarily involve retrial of the proceeding. Again pendency of a dispute in respect of the previous year before the appropriate Government or the Industrial Tribunal will entail imposition of a statutory liability to pay bonus in respect of the year for which the dispute is pending, and also in respect of years subsequent thereto, but if immediately before May 29, 1965, a proceeding arising out of a dispute relating to bonus is pending before a superior court even if it be for the years which are covered by s. 33 statutory liability to pay bonus to employees will not be attracted. Take two industrial units - one has a dispute with its workmen or some of them pending before the Government or before the authority under the Industrial Disputes Act and relating to an accounting year ending in the year 1962. For the years 1962, 1963 and 1964 this industrial unit will be liable to pay bonus according to the statutory formula prescribed by the Act, whereas another industrial unit in the same industry which may be regarded as reasonably similar would be under no such obligation, if it has on May 29, 1965, no dispute relating to bonus pending because the dispute has not been raised or has been settled by agreement or by award, or that the dispute having been determined by an award has reached a superior Court by way of appeal or in exercise of the writ jurisdiction. There appears neither logic nor reason in the different treatment meted out to the two establishments. It is difficult to appreciate the rationality of the nexus - if there by any - between the classification and the object of the Act. In our view therefore s. 33 is patently discriminatory.

By sub-s. (2) of s. 34 it is provided :

> "If in respect of any accounting year the total bonus payable to all the employees in any establishment under this Act is less than the total bonus paid or payable to all the employees in that establishment in respect of the base year under any award, agreement, settlement or contract of service, then, the employees in the establishment shall be paid bonus in respect of that accounting year as if the allocable surplus for that accounting year were an amount which bears the same ratio to the gross profits of the said accounting year as the total bonus paid or payable in respect of the base year to the gross profits of the base year :

Provided that nothing contained in this sub-section shall entitle any employee to be paid bonus exceeding twenty per cent of the salary or wages earned by him during the accounting year :

Provided further that if in any accounting year the allocable surplus computed as aforesaid exceeds the amount of maximum bonus payable to the employees in the establishment under the first proviso, then, the provisions of section 15 shall, so far as may be apply to such excess.

Explanation I. - For the purpose of this sub-section, the total bonus in respect of any accounting year shall be deemed to be less, than the total bonus paid or payable in respect of the base year if the ratio of bonus payable in respect of the accounting year to the gross profits of that year is less than the ratio of bonus paid or payable in respect of the base year to the gross profits of that year.

Explanation II. - In this sub-section, -

(a) "base year" means -

> (i) in a case where immediately before the 29th May, 1965, any dispute of the nature specified in section 33 was pending before the appropriate Government or before any

Tribunal or other authority under the Industrial Disputes Act, 1947 (XIV of 1947), or under any corresponding law relating to investigation and settlement of industrial disputes in a State, the accounting year immediately preceding the accounting year to which the dispute relates;

(ii) in any other case, the period of twelve months immediately preceding the accounting year in respect of which this Act becomes applicable to the establishment;

(b) "gross profits" in relation to the base year or, as the case may be, to the accounting year, means gross profits as reduced by the direct taxes payable by the employer in respect of that year."

This sub-section makes a departure from the scheme for payment of bonus which pervades the rest of the Act. The expression "allocable surplus" in s. 34(2) does not mean a percentage of the available surplus under s. 2(4) read with ss. 5 and 6, as that expression is understood in the rest of the Act. It is a figure computed according to a special method. Under s. 34(2) if the total bonus payable in any accounting year after the Act had come into force is less than the total bonus paid or payable in the "base year" under any award, agreement, settlement or contract of service, bonus for the accounting year has to be determined according to the following scheme :

First determine the ratio of the bonus paid or payable to all employees (not workmen merely as defined in the Industrial Disputes Act) for the base year as defined in Explanation II(a) to the gross profits as defined in Explanation II(b) of that year, and apply that ratio to the gross profits as defined in Explanation II to the accounting year and determine the allocable surplus. That allocable surplus will be distributed among the employees subject to the restriction that no employee shall be paid bonus which exceeds 20% of the salary or wage earned by an employee, and that if the allocable surplus so computed exceeds the amount of maximum bonus payable to the employees in the establishment then the provisions of s. 15 shall so far as may be apply to the excess.

Gross profits which are to be taken into account for determining the ratio both in the accounting year and the base year are also specially defined for the purpose of this sub-section. They are not the gross profits as determined under the Full Bench Formula nor under s. 4 of the Act, but by a method specially prescribed by the Explanation : they are gross profits under s. 4 as reduced by the direct taxes payable by the employer in respect of that year. Under the Full Bench Formula bonus was determined as a percentage is of the gross profits minus prior charges. Under s. 5 of the Act available surplus of which the normal allocable surplus is a percentage is determined by deducting from the gross profits of the year the four heads of charges items which are referred to under s. 4 - depreciation, development rebate or development allowance, direct taxes and other sums specified in the Third Schedule. But in applying the scheme under s. 34 only the direct taxes are debited. Bonus which becomes payable under s. 34(2) is therefore not worked out as a percentage of the available surplus, but as a fraction of gross profits computed according to the special formula. The expression "base year" is also a variable unit : in any case where a dispute of the nature specified in s. 33 is pending immediately before May 29, 1965, before the authorities specified in s. 33, the accounting year immediately preceding the accounting year to which the dispute relates is the base year : in other cases a period of twelve months immediately preceding the accounting year in respect of which the Act becomes applicable to the establishment, is the base year. For instance, if there be a dispute pending in respect of the accounting year on any day ending in 1962, 1963 or 1964, the base years will be the accounting years ending on a day in 1961, 1962 or 1963 as the case may be. If there be no dispute pending the period of twelve months immediately preceding the accounting year

in which the Act becomes applicable to the establishment is the base year. Determination of the base year therefore depends upon the pendency or otherwise of a bonus dispute immediately before May 29, 1965, for any of the years ending on any day in 1962, 1963 and 1964.

There is also a special method for determining whether the total bonus payable to all the employees is less than the total bonus paid or payable in respect of the base year. By the First Explanation it is provided that the total bonus in respect of any accounting year shall be deemed to be less than the total bonus paid or payable in respect of the base year, if the ratio of bonus payable in respect of the accounting year to the gross profits of that year is less than the ratio of bonus paid or payable in respect of the base year to the gross profits of that year.

> Section 34(2) contemplates a somewhat complicated enquiry into the determination of the bonus payable. Gross profits of the base year being determined in the manner prescribed by the Act and reduced by the direct taxes payable by the employers in respect of that year, the ratio between the gross profits and the bonus paid or payable in respect of that base year is to be applied to the gross profits of the accounting year to determine the allocable surplus. Apart from the complexity of the calculations involved it was forcefully pointed out before us that in certain cases the ratio may be unduly large or even infinite. In order to buy peace and in the expectation that in future the working of the establishments would be more profitable, employers had in certain cases paid bonus out of reserves, even though there was no gross profit or insufficient gross profit, and those establishments are under s. 34(2) saddled with liability to allocate large sums of money wholly disproportionate to or without any surplus profits, and even to the amount which would be payable if the scheme of the Act applied. For in cases where there were no gross profit, the ratio between the amount paid or payable as bonus and gross profit would reach infinity : in cases where the gross profits were small and substantial amounts were paid or became payable by way of bonus, the ratio may become unduly large. These are not cases hypothetical but practical, which had arisen in the fact, and application of the ratio irrevocably fixes the liability of the establishment to set apart year after year large amounts whether the establishment made profits or not towards allocable surplus.

Payment of bonus by agreement was generally determined not by legalistic considerations and not infrequently generous allowances were made by employers as bonus to workmen by buy peace especially where industry wise settlements were made in certain regions, and weak units were compelled to fall in line with prosperous units in the same industry and had to pay bonus even though on the result of the working of the units no liability to pay bonus on the application of the Full Bench Formula could arise. But if in the base year such payment was made, for the duration of the Act the ratio becomes frozen and the total bonus payable to the employees in the establishment under the Act can never be less than the bonus worked out on the application of the ratio prescribed by s. 34(2).

Here again units or establishments which had paid bonus in the base year and those which had not paid bonus in the base year are separately classified without taking into consideration the special circumstances which operated upon the payment of bonus in the base year which may very from establishment to establishment. The ratio under s. 34(2), so long as the Act remains on the statute book, determines the minimum allocable surplus for each accounting year of those establishments which had paid bonus in the base year. The fact that under sub-s (3) the employees and the employers are not precluded from entering into agreements for granting bonus to the employers

under a formula which is different from that prescribed under the Act has little significance. If by statute a certain ratio is fixed which determines the bonus payable by the employer whether or not the profits of the accounting year warrant payment of bonus at that rate, it would be futile to expect the employees to accept anything less than what has been statutorily prescribed.

In our view s. 34 imposes a special liability to pay bonus determined on the gross profits of the base year on an assumption that the ratio which determines the allocable surplus is the normal ratio not affected by any special circumstance and prepetuates for the duration of the Act that ratio for determining the minimum allocable surplus each year. If bonus contemplated to be paid under the Act is intended to make an equitable distribution of the surplus profits of a particular year, a scheme for computing labour's share which cannot be less than the amount determined by the application of a ratio derived from the working of the base year without taking into consideration the special circumstances governing that determination is ex facie arbitrary and unreasonable. The Additional Solicitor-General appearing for the Union of India and the representatives of the Labour Unions and counsel appearing for them contended in support of their plea that s. 34(2) was not invalid because the ratio was intended to stabilize the previous grant of bonus and to maintain in favour of labour whatever was achieved by collective bargaining in the base year. But the validity of a statute is subject to judicial scrutiny in the context of fundamental freedoms guaranteed to employers as well as employees and the freedom of equal protection of the laws becomes chimerical, if the only ground in support of the validity of a statute ex facie discriminatory is that the Parliament intended, inconsistently with the very concept of bonus evolved by it, to maintain for the benefit of labour an advantage which labour had obtained in an earlier year, based on the special circumstances of that year, without any enquiry whether that advantage may reasonably be granted in subsequent years according to the principle evolved by it and for securing the object of the Act. If the concept of bonus as allocation of an equitable share of the surplus profits of an establishment to the workmen who have contributed to the earning has reality, any condition that the ratio on which the share of one party computed on the basis of the working of an earlier year, without taking into consideration the special circumstances which had a bearing on the earning of the profits and payment of bonus in that year, shall not be touched, is in our judgment arbitrary and unreasonable. The vice of the provision lies in the imposition of an arbitrary ratio governing distribution of surplus profits. In our view, s. 34(2) is invalid on the ground that it infringes Art. 14 of the Constitution. It is in the circumstances unnecessary to consider whether the provisions of s. 33 and s. 34(2) are invalid as infringing the fundamental rights conferred by Arts. 19(1)(g) and 31(1).

But the invalidity of ss. 33 and 34(2) does not affect the validity of the remaining provisions of the Act. These two provisions are plainly severable. All proceedings which are pending before the Act came into force including those which are convered by s. 33 will therefore be governed by the Full Bench Formula and that in the application of the Act the special ratio for determining the allocable surplus under s. 34(2) will be ignored, for application of the Full Bench Formula to pending proceedings on May 28, 1965, and refusal to apply the special ratio in the determination of allocable surplus under s. 34(2) does not affect the scheme of the rest of the A__ct. The declarationf invalidity of s. 37 which confers upon the Central Government power to remove difficulties also does not affect the validity of the remaining provisions of the Act.

The Industrial Tribunal has awarded to the workmen of the Jalan Trading Company bonus at the minimum rate relying upon s. 33 of the Act. The claim for bonus related to the year 1962, and could be upheld only if s. 10 was attracted by the operation of s. 33. But we have held that s. 33 is invalid. It is now common ground that the appellant Company had suffered loss in 1962. The profit and loss account was accepted by the workmen before the Tribunal. Civil Appeal No. 187 of 1966 will

therefore be allowed and the order passed by the Industrial Tribunal imposing liability for payment of minimum bonus set aside. In Writ Petitions Nos. 3 of 1966 and 32 of 1966, it is declared that ss. 33 and 34(2) are invalid as infringing Art. 14 of the Constitution, and that s. 37 is invalid in that it delegates to the executive authority legislative powers.

There will be no order as to costs in all these proceedings.

HIDAYATULLAH J.

The Judgment in this appeal shall also govern Writ Petitions Nos. 3 of the 1966 (The Management of M/s. Punalur Paper Mills Ltd., Kerala State v. The Union of India and others) and 32 of 1966 (The Travancore Rayons Ltd., v. The Union of India and others). The Jalan Trading Co. Pvt. Ltd. (appellant) was the opposite party to an industrial dispute concerning a claim for bonus for the years 1961, 1962 raised by the workmen of the Company represented by the Mill Mazdoor Sabha, Bombay (respondents). The Sabha gave notice of change on May 13, 1963 and demanded 25% of the total wages as bonus for each of the two years. This demand was refused by the employers on the ground, among others, that there was no surplus as the Company was carrying forward a big loss. Conciliation was tried but failed and a reference was made by the Sabha to the Industrial Court, Maharashtra, Bombay under s. 73-A of the Bombay Industrial Relations Act. While this reference was pending the Payment of Bonus Ordinance of 29th May, 1965 came into force. Applying s. 10 of the Ordinance, the Industrial Court awarded for the year 1962, 4% of the total salary or wage or Rs. 40/- (whichever was greater) to the workmen entitled under the Ordinance, regardless of the absence of profit and set down the dispute concerning 1961 for trial. In this appeal, by special leave against the said order the validity of s. 10 of the Payment of Bonus Act, which received the assent of the President on 25 September 1965 and replaced the Ordinance with a few changes, is challenged.

In Writ Petitions 3 and 32 of 1966, heard with this appeal, two other companies (The Punalur Paper Mills Ltd. and Travancore Rayons Ltd.) question the validity of s. 10, and also ss. 32-37 of the Act, in respect of bonus for one or more of the years 1962, 1963 and 1964. These sections, they contend, cut across the accepted and well-defined concept of bonus and lead to discrimination and anomalies of various sorts, and, of course, incidentally to the payment of a larger amount as bonus than would be payable under subsisting agreements or the previous state of law. Comparative tables to demonstrate these and other points are filed with the petitions.

At the hearing of this appeal and the two writ petitions many Companies and Workers' Unions intervened in one or more of them. The contending parties also intervened in matters other than their own. The operative sections of the Bonus Act were challenged as ultra vires the Constitution. These sections lay down the machinery for calculation of bonus generally and in particular on foot of a past base year, apply the provisions with modifications to pending cases, permit Government to exclude establishments from the operation of the provisions of the Act and pass orders for the removal of doubts and difficulties in the application of the Act. We shall refer to terms of the relevant sections presently.

In short, the departures from the existing laws on the subject of bonus to workmen, are challenged in principle and also as discriminatory. The arguments were full and were illustrated by examples which ingenuity of counsel or reliance on statistics could suggest. To understand the arguments it is necessary to glance at the history of payment of bonus in India, the principles on which it was based and the relevant provisions of the Act impugned before us.

The payment of bonus had its origin in the generosity of the textile employers during the First World War when they voluntarily gave away 10% (later up to 35%) additional wages as "war bonus". The profits were then high and this extra payment gave a boost to production and indirectly to the profits of the employers. When the lean years came payment of bonus was sought to be stopped but disputes and strikes followed. The workmen had begun to consider "bonus" as one of their rights. The first dispute was settled by conciliation by the acceptance of bonus equal to one month's wages, with a tacit understanding that this payment could be more if profit allowed. The second had to be referred to a Committee presided over by Chief Justice Macleod of Bombay. The Committee found no legal foundation for the claim especially when there were no profits.

During the Second World War the question of dearness allowance was raised but it included consideration of bonus etc. A Board of Conciliation with Mr. Justice Rangnekar as Chairman, awarded -/2/- per person per day as dearness allowance but that was obviously a mere nothing. Therefore, at the intercession of Government a cash bonus of 12 1/2% of Wages (that is to say, As. -/2/- per rupee of wage) was agreed upon and given to workmen. Bonus was thereafter paid voluntarily for a number of years and was the result, by and large, of agreements of some sort.

When the law enjoining compulsory reference to adjudication of trade disputes came the question of bonus, as did many others, reached the courts and the claim for bonus became an industrial claim and had to be settled on some tangible principle. Various reasons were advanced to justify the legality of the claim and the court accepted some of them. At first it was merely treated as rooted in fair play but later it was held to be claimable as of right and ranking in importance next only to the claim of minimum wages and dearness allowance which were considered the first liability of the employer. After the Industries Conference of 1947, grant of bonus became a settled fact, as a very slender means to bridge somewhat, the gap between actual and living wages. The workmen had become accustomed to expect additional payment to meet extra-ordinary expenditures, or, in other words, treated bonus as a kind of nest-egg for emergencies.

The principles underlying the grant of bonus were at first nebulous but after the deliberations of the Committee on Profit Sharing (1948), some clear principles began to emerge. The Labour Appellate Tribunal, Bombay then evolved a formula for calculation of the profits to find out the surplus from which the workmen could be paid. This formula goes under the name of "the Full Bench Formula." The first step in the application of the Formula was to ascertain gross profits. This was done by adding back to the net profit as shown in the Profit & Loss Account, all amounts transferred to reserves etc., and, in fact, all income except what could not be attributed to the efforts of labour. In this way depreciation, taxes paid and donations and such other items were all added back to determine the gross profits. From these gross profits were deducted notional normal depreciation and notional taxes, that is to say, not the depreciation or the taxes which the Income-tax Authorities would have allowed in the case, but which would be admissible on the amounts found under the Formula. There were further deductions of amounts as reserve for rehabilitation of machinery etc., of return on paid-up capital and on reserves employed as working capital. After these deductions were made the net amount was taken as the available surplus and bonus was awarded to the workmen according to the size of this surplus. There was no settled principle as to how the available surplus should be divided between the employers and workmen and this Court, in the absence of any discernable principles, suggested a half and half division. The Formula was approved and applied in numerous cases by this Court and when the Tribunal attempted to revise it this Court put down the attempts, and recommended the establishment of a Commission. At the second and third meeting of the 18th Session of the Standing Labour Committee in 1960 the proposal to establish a Commission was considered and was agreed upon. As a result the Government of India, on

December 6, 1961, appointed a commission under the Chairmanship of Mr. M.R. Meher. The Commission made its recommendations and they were accepted by Government, with some modifications, by Resolution dated September 2, 1964. The Bonus Ordinance as well as the Bonus Act were passed to implement the recommendations accepted in the Government's Resolution.

The Full Bench Formula, although not legislatively recognised' was binding as a decision of the courts. In essence it was only a workable solution. It satisfied neither the employers nor the workmen. Disputes continued even though the Formula was generally adhered to. The workmen, while conceding that rehabilitation was necessary, used to represent that large sums deducted from the gross profits as rehabilitation reserves were not spent for that purpose. Often enough this was true. They also used to dispute the reserves used as Working capital and asked the employers to prove what amount was so used. Lastly, there was quarrels about the division of the available surplus. The employers, on the other hand, used to contend that if rehabilitation charges were not deducted, depreciation allowable under the Indian Income-tax Act, being only a percentage of the written down value, was inadequate to enable rehabilitation of machinery etc. They also used to submit that the return on capital at 6% was too little and, in fact, succeeded in getting the return on reserves employed as capital, increased from 2% to 4%. It was in this context that the Bonus Commission made its recommendations. It is not necessary or profitable to Summarise these recommendations in their entirety. Only the fundamental proposals can be mentioned here for we are concerned with them as part of the history lying at the back of the legislation impugned here, and because a great deal of thought went into the formulation of these proposals.

The Bonus Commission found it difficult to accept the proposition that bonus represented the means to bridge the gap between the actual and living wages but expressed the opinion that bonus afforded the means of bridging the gap between actual and needbased wages and that such a claim was admissible when profit exceeded a certain base. The formula suggested by the Bonus Commission was different in many particulars from the Full Bench Formula. A comprehensive mode for determining the gross profits was evolved and to the net profits disclosed in the statement of Profit & Loss were added numerous items which it is not necessary to mention here. From the gross profits the first deduction was depreciation and this was not the notional normal depreciation of the old Formula but the depreciation allowable under the Income-tax law including multiple-shift allowance. Income-tax and super-tax were next deducted. The development rebate which took the place of initial depreciation under the previous Income-tax law was not allowed to be deducted but the Commission was of opinion that the tax concession on account of development rebate should be retained by the employers and must, therefore, be deducted from the gross profits. As normal depreciation and the tax concession on development rebate were to be retained by the companies, rehabilitation charges were abolished. The super profits tax was not made a prior charge mainly because bonus was treated as expenditure under the Indian Income-tax Act and some saving to the employers was likely to result.

The Commission suggested a 7% return on paid-up capital and a 4% return on reserves employed as capital. The balance left after these deductions was the available surplus from which 60% was to be paid as bonus to workmen and 40% was to be retained by the employers. The Commission also suggested that the employers must pay a minimum bonus equal to 4% of the total basic wage and dearness allowance or Rs. 40% (whichever was greater) to each workman whether the allocable surplus permitted it or not and also set a ceiling on bonus by providing that not more than 20% of the total basic wage and dearness allowance bill may be paid as bonus in any year. If there were no profits or if profits could allow payment of bonus more than the 20% maximum, a principle of set on and set off was devised. The amount paid out as minimum bonus or the extra over and above the

20% maximum had to be carried forward to future years to be set on or set off against the profits in those years. In this way the payment of minimum bonus when no bonus was payable, was made less onerous and similarly the amount in excess of 20% which might have been paid as bonus under a 60 to 40 division was to be carried over to the future years to be available when the profits were low. The set on and set off were to be valid only for 4 years at the end of which the amounts available for set on or set off were to be ignored. The Commission also recommended payment of bonus to persons whose total basic pay and dearness allowance did not exceed Rs. 1,600/- per month regardless of whether they were "workmen" or not according to the definition of this word in the Industrial Disputes Act. The amount of bonus, however, was flat after the basic wage and dearness allowance taken together reached Rs. 750/- per month. In respect of new units. Bonus was to be payable from the 6th year or when profits (after wiping off old losses and allowing for depreciation etc.) permitted.

Government by its Resolution accepted these recommendations but with certain modifications. Government allowed deduction of all direct taxes from the gross profits and increased the return on capital to 8.5% (taxable) on paid-up equity capital and 6% on reserves (for banks 7.5% and 5% respectively). Government also gave retrospective effect to the recommendations of the Bonus Commission as amended by itself by resolving that they should apply to all bonus matters other than those cases in which settlement had been reached or decisions had been given already, relating to accounting year ending on any day in the calendar year 1962 in respect of which dispute was pending. The Ordinance and the Act follow the recommendations of the Bonus Commission as modified in the Government Resolution. We shall now refer to the terms of the Act, contrasting them, where necessary, with the terms of the Payment of Bonus Ordinance which has since been repealed.

The foregoing discussion of the recommendations of the Bonus Commission renders it unnecessary to quote many of the provisions of the Act which consists of 40 sections and four schedules. Some terms, which have been used before by us, may be explained first. Bonus is payable from "available surplus" which is the result of certain deductions under s. 6 from the gross profits determined in accordance with the provisions of Schedules I and II which apply respectively to banking companies and companies other than banking companies. "Allocable surplus" in relation to a company (other than a banking company), which has not made arrangements prescribed under the Indian Income-tax Act for the declaration of payment within India of the dividends payable out of its profits in accordance with the provisions of s. 194 of that Act, means 67% of the available surplus in the accounting year and in any other case 60% of the available surplus including any amount treated as available surplus under s. 34(2) to be mentioned hereafter. "Direct tax" means any tax chargeable under the Indian Income-tax Act, the Super Profits Tax Act, 1963, the Companies (Profits) Surtax Act, 1964, the agricultural income-tax law, and any other tax declared to be a direct tax. "Employer" means a person employed on a salary or wage which does not exceed Rs. 1,600/- per month. "Salary or wage" means all remuneration (other than remuneration in respect of over-time work) capable of being expressed in terms of money, including dearness allowance but not including any other allowance or amenity such as house accommodation, supply of light, water, medical attendance or food-grain or other article or any travelling concession, bonus, contribution to Provident Fund, retrenchment compensation or gratuity or commission payable to the workmen.

The calculation of gross profits is to be done as laid down in the first two Schedules. In both the Schedules the net profits as shown in the Profit & Loss Account are adjusted by additions and substractions to determine the gross profits for purposes of bonus. The available surplus is then reached by making deductions as laid down in s. 6. Three of the deductions are applicable to all

employers and the fourth deduction, which is return on capital, is different in the case of different employers and the special deduction is set down separately for them. The first deduction is depreciation admissible under the Indian Income-tax Act and agricultural income-tax laws. Where, however, an employer was paying bonus under a settlement, award or agreement made before the date of the Ordinance he is entitled to deduct the notional normal depreciation at his option to be exercised once and for all before 29th May, 1966. The second deduction is the amount of development rebate or development allowance which the employer is entitled under the Income-tax Act to deduct from his income. The third deduction embraces all direct taxes subject to certain special provisions. The fourth deduction is return on capital and in respect of a company other than a banking company the deduction according to Schedule II is as follows :-

> "(i) The dividends payable on its preference share capital for the accounting year calculated at the actual rate at which such dividends are payable;
>
> (ii) 8.5 per cent. of its paid up equity share capital as at the commencement of the accounting year;
>
> (iii) 6 per cent. of its reserves shown in its balance-sheet as at the commencement of the accounting year, including any profits carried forward from the previous accounting year :

Provided that where the employer is a foreign company within the meaning of section 591 of the Companies Act, 1956 (I of 1956), the total amount to be deducted under this Item shall be 8.5 per cent. On the aggregate of the value of the net fixed assets and the current assets of the company in India after deducting the amount of its current liabilities (other than any amount shown as payable by the company to its Head Office whether towards any advance made by the Head Office or otherwise or any interest paid by the company to its Head Office) in India."

The deduction varies in respect of banking companies, corporations, co-operative societies, licencees under the Electricity Supply Act, 1948 and other employers. After these deductions are made and the available surplus is determined the allocable surplus (either 67% or 60%, as the case may be) is payable as bonus. The amount so payable is subject to an upper and a lower limit determined in relation to salary or wage of the workmen qualified to receive it. Under s. 10 every workman is entitled to receive 4% or Rs. 40 (in the case of children below 15 years Rs. 25) whichever be greater, whether there are profits in the accounting year or not. Under s. 11 the total amount payable as bonus in any accounting year may not exceed 20% of the total salary or wage bill. Although bonus is payable to employees drawing salary or wage up to Rs. 1600 per month, the amount of bonus in any case cannot exceed the amount payable to a person whose salary or wage is Rs. 750 per month.

Bonus is payable proportionately to the number of days on which the workman works. The principle of set on and set off of allocable surplus, as laid down by s. 15, has been adverted to in brief already. It may be explained a little more fully. If the allocable surplus exceeds the 20 per cent upper limit, the excess in the accounting year is to be carried forward to be set on in the succeeding accounting years up to and inclusive of the 4th accounting year so as to be available for payment of bonus if the allocable surplus in those years falls below 20%. Similarly, if minimum bonus of 4% of the wage bill is paid, despite loss, the amount so paid may be carried forward for four years for being set off against profits in the subsequent years. Schedule IV serves to illustrate the application of the principle of set on the and set off by giving some illustrations. Section 16 makes special provision

with respect to new establishments and new departments or undertakings in old establishments and generally gives them exemptions from payment of bonus for the first five years or till profit is made, whichever be earlier. Section 17 allows adjustment of customary and interim bonus against bonus payable under the Act. Section 18 to 31 are regulatory in character providing for accounts, inspections, offences, penalties and protection of authorities. These do not concern us. Section 32 then exempts 11 kinds of employers from the operation of the Act. Then follow s. 33, which applies the Act to certain pending disputes regarding payment of bonus, s. 34 which lays down certain special rules regarding the effect of laws and agreements inconsistent with the Bonus Act, s. 36 which gives power of exemption, and s. 37 which enables the Central Government, by order to remove any difficulty or doubt arising in giving effect to the provisions of the Act. Section 38 enables the Central Government to make rules and under s. 39 the provisions of the Act are to be in addition to and not in derogation of the Industrial Disputes Act, 1947 or any corresponding law relating to investigation and settlement of industrial disputes in force in a State. Section 35, which we omitted, preserves intact the provisions of the Coal Mines Provident Fund and Bonus Schemes Act, 1948 or any scheme made thereunder, and the last section (s. 40) repeals the Payment of Bonus Ordinance, 1965, but notwithstanding repeal, anything done or any action taken under the said Ordinance is to be deemed to have been done or taken under the Act as if the Act had commenced on the 29th May, 1965 when the Ordinance was promulgated.

The payment of bonus is now legislatively recognised and the Full Bench Formula is not only altered but it is to be seen that payment of some bonus is compulsory and the payment in any year lies within two termini of minimum and maximum bonus established by the Act. The calculation of bonus becomes almost mechanical and, therefore, disputes are less likely to take place. But the Act, although the result of a tripartite deliberation, has not satisfied the employers generally. They object to some of its provisions on various grounds and we shall now proceed to examine them.

The first attack is on the provision for minimum bonus in s. 10 irrespective of profits. It is submitted that a concept of minimum bonus, unrelated to profits, makes the payments an accretion to wages and leads indirectly to the erosion of capital since such payment, if it does not come from profits, must come from reserves or capital. The provision is thus said to be a "fraud on the Constitution" or "a colourable exercise of power" confirming neither to the accepted concept of bonus, nor to the principles on which minimum wages are fixed. Section 10 is also said to offend Art. 14 inasmuch as it makes no difference between companies making profits and companies having losses whether marginal or heavy. It is said that the fixation of the minimum bonus irrespective of considerations such as the kind of wages and dearness allowance prevailing in an establishment; profit or loss in its business; and whether bonus is integrated with wages or not, creates inequality. It is pointed out that the while bonus was formerly calculated on basic wage only and took no note of dearness allowance, the Act, by defining "wage or salary" to include dearness allowance has increased the quantum of bonus payable. Even the 5 years' exemption to new establishments is criticised as discriminatory. Section 10 is said to enable deprivation of the property of the employers with a view to paying it to the workmen. The contending parties could not attack the Act under Art. 19 in view of the Emergency, but did not also give up the point, although corporations not being citizens, have been held by this Court to be not entitled to invoke the provisions of that article. In our judgment none of the arguments against s. 10 can be accepted.

No doubt this Court allowed claim to bonus only if there was profit but that was not because any universally accepted recondite theory lay at the root. The Bonus Commission points out in its report that there were bonus pacts under which bonus equal to 15 days' wages irrespective of profits was payable and a maximum limit was also provided. The principle of set on and set off was also a part

of these pacts. In fact, the desire to fix a maximum limit for bonus must inevitably lead to the fixation of a minimum limit also. The workmen were not slow to suggest that if minimum bonus is abolished the maximum limit must also go.

The employers rely upon the New Maneck Chowk Spinning and Weaving Co., Ltd., Ahmedabad and Others v. The Textile Labour Association, Ahmedabad ([1961] 3 S.C.R. 1.) in which this Court rejected the fixation by the Tribunal of minimum bonus for a year beyond the pact period although this was done in the interest of industrial peace. This case is of no value because the question here is one of the power of the Parliament and not of the power of the Tribunal. The powers of Parliament to fix minimum bonus cannot be questioned because it flows from jurisdiction over industrial and labour disputes, welfare of labour including conditions of work and wages. The legislation is therefore neither a fraud on the Constitution nor a colourable exercise of power. Under any of these powers, or all of them viewed together, the fixation of minimum bonus is legal and if these topics of legislation were found to be insufficient the residuary power of Parliament must lend validity to the enactment.

The validity of arguments about the integration of dearness allowance with wage to determine the quantum of bonus depends on how wages can be viewed today. Labour considers dearness allowance to be as fundamental as wage and, in fact, we have heard repeated pleas for the merger of dearness allowance in minimum wage. In our opinion, dearness allowance must obviously stay on till at least the need-based wage is reached. The gap between the actual wage and the need-based wage tends to widen as time passes unless the wage and/or dearness allowance are revised to obtain significant neutralization of the cost of living at any given moment of time. It may be that in some industries dearness allowance does, to an appreciable extent, neutralize the cost of living but such companies would hardly be required to pay minimum bonus for their profits would justify a higher bonus. Again, loss can only be established after the prior charges or some of them are deducted. The charge of minimum bonus is only 4% of the wage bill, i.e. equal to 15 days' wages and cannot be said to be heavy. Further, the provision for set off keeps the matter in suspense for at least four years during which the affairs of the company are likely to improve. Taking the provision for minimum bonus with the provision for set off it can hardly be said that the section is so exorbitant that it amounts to deprivation of the property of the employers with a view to giving it to the workmen. The provision makes payment of minimum bonus range next to payment of wages and dearness allowance and to rank in priority over any of the prior charges, deductible in favour of employers.

Comparison of minimum bonus with the Land Tax Act considered in Kunnathat Thathunni Moopil Nair v. The State of Kerala and Another ([1961] 3 S.C.R. 77.) which imposed a flat rate of tax on all lands irrespective of their productivity, is not valid. The observations in that case, wide as they may appear, must not be extended by analogical application to a case of minimum bonus which is intended to promote industrial peace and to be a first step towards the goal of needbased wage. Even if the payment is viewed as a compulsatory payment of wage the power to impose it as part of minimum wage is not lacking. It must not be forgotten that the fixation of minimum wage was also criticised along the same lines but was held justified. The differentials, the paying capacity of establishments or absence of profit made no difference. This was decided over and over again by this Court. See Edward Mills Co. Ltd. Beawar v. State of Ajmer ([1965] 1 S.C.R. 735.), Bijay Cotton Mills Ltd. v. State of Ajmer ([1955] 1 S.C.R. 752) and Express Newspapers (Pt.) Ltd. & Anr. v. Union of India & Ors., ([1959] S.C.R. 12.) U. Unichoyi & Ors. v. State of Kerala ([1962] 1 S.C.R. 946).

It has been said before that every uniform legislation can be made to appear ridiculous by citing a

few extreme examples and comparing them and this statement will bear repetition in the context of discrimination said to arise from s. 10. Even under the Minimum Wages Act a prosperous establishment could be shown to be placed on the same footing as another establishment not so prosperous, but this Court did not strike down the Minimum Wages Act on that ground. In our judgment the provision for payment of 15 days' wages to workmen as bonus irrespective of profits is a measure well-designed to keep industrial peace and to make way for the need-based wage which the Tripartite Conference emphasised. Some unequal treatment can always be made to appear when laws apply uniformly. Two establishments cannot be so alike as the hypothetical examples taken before us suggested. Differences must exist but that does not prevent the making of uniform laws for them provided the law made has a rational relation to the object sought to be achieved and the inequality is trivial and hypothetical. Classification can only be insisted upon when it is possible to classify, and a power to classify need not always be exercised when classification is not reasonably possible. In our judgment s. 10 does not lead to such inequality as may be called discrimination.

It is next contended that s. 32 creates inequality because it excludes 11 kinds of establishments from the operation of the Act. At first sight a provision calculated to exclude a few selected establishments from an otherwise uniform law must savour of discrimination but it must be borne in mind that there are establishments and establishments and certain classes of establishments cannot, with any practical advantage or without fear of harm, be classified with others. Nor is their exclusion from the general body of establishments necessarily discriminatory. In other words, a question of discrimination can only be decided when the circumstances of each exempted establishment are properly weighed and considered. It is only then that the fundamental differences can be noticed. Of the establishments mentioned in s. 32 none was present before us for the simple reason that none was made a party. Nor was any special argument addressed in respect of any particular class. It is, therefore, improper for us to say whether there is any rational classification is s. 32 or not. We accordingly do not express any opinion on this section.

Similarly s. 36, which gives further power to the Central Government to exempt in the public interest an establishment or class of establishments for some period subject to such condition as the Central Government might deem necessary to impose, does not per se augur discrimination. There may be special cases which may require immediate relief and but for such a provision there would be no means of affording the relief. The existence of such a provision is not bad because it merely gives a power. But the exercise of the power must, of course, bear the scrutiny of Art. 14. As no abuse of power is suggested, we cannot say that the section is by reason of a possibility of abuse discriminatory. The Section cannot rightly be described as a piece of delegated legislation.

Section 37 gives power to the Central Government to make orders, not inconsistent with the purposes of the Act as may be necessary or expedient for the removal of any difficulty or doubt and the order is made final. This provision is characterised as delegation of legislative power. There is some misunderstanding as to the function of such a provision which is to be found in several statutes. If a list were drawn up it will fill many pages but for example the following may be seen : s. 14 of the Central Regulation 1962 (VII of 1962), s. 128 of the States Reorganisation Act, 1956, s. 33A of the Business Profits Act of 1947, s. 6 of the Taxation Laws Act of 1949, s. 7 of the Taxation Laws Extension (to Tehri Garhwal) Order, Taxation of Laws (Merged States) (Removal of Difficulties) Order, 1949 and Art. 392 of the Constitution. As a legislative practice this is not new and the fact that one provision is in the Constitution and in some other the order has to be laid on the table of Parliament, makes no difference. The Constituent Assembly gave the power to Government but in this respect as in respect of powers to amendment, Parliament can do so again today. Nor have we got an Act about statutory orders such as in England. Much action under the

Organisation of States Acts was taken under s. 128 and the rest of Part XI of the Act. That Section is in identical words. On this argument all the orders issued under these provisions must be treated as void. None has questioned any action so far.

The functions so exercised are not legislative functions at all but are intended to advance the purpose which the Legislature has in mind. The power to pass an order of this character cannot be used to add to or deduct from that which the Act provides. The order only makes smooth the working of the Act particularly in its initial stages. This power is given to the Central Government so that litigation may not ensue as the policy of Act is to avoid litigation. The rejection of such a provision is only possible if we begin with a concept of trinity of powers with the legislature performing delegated power on behalf of the people, as is sometimes held in the United States. The rejection there takes place by the application of the maxim delegates non protest delegare. This doctrine, it has been accepted on all hands was originated by the glossators and got introduced into English Law by a misreading of Bracton as a doctrine of agency and was applied by Coke in decisions to prevent the exercise of judicial power by another agency and later received its present form in the United States. The question is not one of a delegate making a sub-delegation but of the sovereignty of Parliament. Parliament has not attempted to set up another legislature. It has stated all that it wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to the courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and differences by a suitable order. The order, of course, would be passed within the four corners of the parliamentary legislation and would only apply the Act to concrete cases as the courts do when they consider the application of the Act. The order of the Central Government is made final for the reason that it is hardly practical to give power to the Central Government and yet to leave the matter to be litigated further. The fact that in the Government of India Act, 1935 and in the Constitution such power was and is contemplated and it has been conferred in diverse Acts without a challenge before, shows amply that the argument that the section amounts to conferral of legislative powers on the Central Government is erroneous. All other cognate provisions have never been challenged on the ground that they amount to delegation of legislative power. We accordingly hold a. 37 to be validly enacted.

It remains to consider the validity of ss. 33 and 34. They are in a sense inter-related. The sections need not be quoted as we are concerned only with their scheme. These sections determine how the provisions of the Act are to apply in relation to establishments which differ in certain respects. For this purpose the Act provides for two dates for its own commencement. Under s. 1(4) the provisions of the Act are to have effect from an accounting year commencing on any day in 1964 and in respect of every subsequent accounting year. But by ss. 33 and 34 the provisions are made applicable with some modifications in respect of accounting years earlier than the first accounting year mentioned in s. 1(4). To achieve this result sub-section (1) of s. 34 provides that the provisions of the Act (as modified by s. 34) shall apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service made before the 29th May 1965.

The Act then takes note of establishments which did not pay bonus in an accounting year earlier than the one mentioned in s. 1(4), establishments which either paid bonus in an earlier accounting year with or without a dispute but no dispute was pending on May 29, 1965, and establishments in which a dispute was pending on May 29, 1965 in regard to bonus in aspect of a year not earlier than the accounting year ending on any day in 1962 although no such dispute may be pending for subsequent accounting years. In respect of establishments for which the Act is made retrospective

beyond what is laid down in s. 1(4) bonus is to be calculated in the manner laid down in s. 34(2). Those establishments, which come under the Act for the first time as laid down in s. 1(4), are to be governed by the Act without the modifications envisaged by ss. 33 and 34. These are establishments without a prior history of bonus payment. Establishments with a history of bonus payment come under ss. 33 and 34. They are divided into two categories. Establishments in which a dispute was pending on the date of the passing of the Ordinance in regard to bonus relating to an accounting year not earlier than the accounting year ending on any day in the year 1962 are in another class. The Explanation to s. 33 determines when dispute is to be deemed to be pending. In either of these two cases bonus is payable according to the provisions of the Act but as specially laid down in sub-s. (2) of s. 34. The Bonus Commission met for the first time on January 4, 1962 and the Ordinance came into force on May 29, 1965. These two dates determine the class of establishments to which the special provisions of ss. 33 and 34 are made applicable.

The scheme may be summarized thus. The Act applies to all establishments from the accounting year commencing on any day in the year 1964 and in respect of any subsequent year. Establishments having no prior history of bonus payment are governed by the provisions of the Act without the modifications contained in ss. 33 and 34. In the respect of establishments with a prior history we have two classes : establishments in which a dispute was pending on May 29, 1965 in respect of an accounting year not earlier than the accounting year ending in the year 1962 and those in which no such dispute was pending. The intention is to bring such cases under the Act but with some modifications. If there was a dispute pending in respect of an accounting year not earlier than an accounting year ending in the year 1962, the dispute is to be resolved as laid down in the Act with the special modifications made by s. 34 notwithstanding that there was no dispute in subsequent years and the bonus for the subsequent years is also to be calculated in accordance with the Act so modified. In respect of establishments which had a history of payment but no dispute was pending on May 29, 1965 the provisions of s. 34(2) apply a special ratio between the allocable surplus and gross profits for the determination of the quantum of the amount of available for payment of bonus. In this way, three distinct classes are created which may be summarized still further thus :

> (a) establishments without a history of prior bonus payment. To these section 1(4) applies;
>
> (b) establishments having a prior history of bonus payment with a dispute pending in respect of an accounting year not earlier than the accounting year ending in the year 1962. To these establishments the provisions of the Bonus Act [as modified by s. 34(2)] apply, not only for the accounting year in respect of which the dispute was pending but also for subsequent accounting years;
>
> (c) establishments with a prior history of bonus payment without a dispute such as is mentioned in (b) above. To these the provisions of the Bonus Act apply as modified in s. 34(2).

Section 34(2) takes note of the quantum of bonus paid by establishments in a case year. This base year is different in the case of establishments which come under s. 33 and establishments which do not so come. In respect of establishments falling within s. 33 the base year means an accounting year immediately preceding the accounting year to which the dispute relates and in the case of establishments which do not fall within s. 33 it means a period of 12 months immediately preceding the accounting year in respect of which the Act becomes applicable to the establishments. The second sub-section of s. 34 preserves the same level of payments in the case of establishments which

had in the past paid bonus at a higher rate than would be paid under the formula laid down by the Act. For this purpose the ratio between the bonus and the gross profits in the base year determines the proportion of allocable surplus must have to the gross profits of the account year. Gross profits are defined to mean gross profits reduced by direct taxes only. The payment is, however, subject to the maximum limit and the principle of set on. In this way the level of payment of bonus is maintained to what had been paid in the past as a result of agreement or award.

The question is whether this classification is so arbitrary and creates such differences that it cannot be reasonably related to the object which the Bonus Act intends to achieve, namely, the settlement of all bonus disputes in future and to lay down a uniform formula which is considered reasonable both for the workmen as well as the employers so long as the Act remains in force.

The objections to ss. 33 and 34 may now be noticed. These sections are criticised on many grounds. Firstly, it is said that the Act creates inequality inasmuch as the formula under the Act is made applicable to cases pending for the application of the Full Bench Formula in respect of accounting years from 1962 onwards but leaves the establishments in which there was no dispute to be governed by the Full Bench Formula. This, it is submitted, is onerous to the establishments in which a dispute was pending. The onerous nature, it is submitted, arises from the fact that payment of minimum bonus even if there is a loss is compulsory, new categories of workmen have become entitled to bonus, "salary or wage" is made equal to wages plus dearness allowance and the employers lose the advantage of deductions on account of rehabilitation. A further criticism is that not only the year of dispute but all intervening years are brought under the Act even though there may be no dispute in those years.

The object of the Bonus Act is to introduce a new uniform formula for calculation of bonus with limits of maximum and minimum and a principle of set on and set off to smoothen inequalities of payment over a number of years. One difficulty in the way of uniform law was the pendency of disputes at the time the Ordinance was promulgated. This would, of course, be the case whenever any law was introduced if a dispute was pending in respect of a prior year. There were two alternatives open. One was to leave the disputes to be decided by the Tribunals under the Full Bench Formula and the other was to apply the Act to the pending cases so that all decisions would be uniform and almost mechanical. If pending cases were to be treated as a class, special provision was required to deal with them. The Act chose to do away with the Full Bench Formula from 1962. If it had been applied and no dispute was pending at all the matter was left there. For other cases there was a clear need for classification and classification was thus resorted to. Pending cases were brought under the Act. The Act, of course, could not be applied without suitable modifications to remove hardships. Section 34, therefore, provided that the Act would apply to all cases as modified in the second sub-section of s. 34. That sub-section applied only to establishments in which there was a prior history of bonus payment and attempted to harmonize the application of the law to establishments in which disputes were pending and those in which there was no dispute. We are thus required to see the provisions of that sub-section before we can deal with the criticism against s. 33.

Section 34 deals with two matters. It deals with establishments in which a dispute, as laid down in s. 33, was pending and also with old establishments in which there was payment of bonus in the past but no dispute was pending when the Ordinance was promulgated. It applies the Act to both sets of cases. It lays down a simple condition that the total bonus for any accounting year should correspond to the level of total bonus paid in a base year and for this purpose the allocable surplus in an accounting year dealt with under the Act must bear the same proportion to gross profits as the total bonus paid in the base year did to the gross profits of the base year, subject however to the

maximum limit and the principle of set on. The base year was so defined that it would be a year in which there would be no dispute. In those cases in which a dispute was pending on May 29, 1965 it meant an accounting year immediately preceding the year of dispute and in other cases a period of 12 months immediately preceding the period of accounting year in respect of which this Act became applicable. Gross profits were differently defined for the purpose of the application of the sub-section and meant gross profits as reduced by direct taxes payable in the year. It is obvious that this definition was evolved to avoid a clash between the Full Bench Formula and the formula under the Act. The provisions of s. 34(2) were specially enacted so that there might not be divergence in the payment of bonus over a number of years and to maintain the level of payment, as had existed in the past. In this way, three classes of cases were contemplated and we shall describe them more fully now.

In the first class were put all establishments which had no history of bonus payment. They came directly under the formula of the Act from the accounting year 1964. All such establishments were dealt with uniformly and there was no discrimination or inequality among them except what was said to arise from s. 10. That alleged inequality does not offend Art. 14 as we have already indicated above.

In the second class were put cases in which a dispute was pending on May 29, 1965 (the date of the promulgation of the Ordinance). The dispute of which the Act took note was a dispute pending before Government or before a Tribunal or Authority under the Industrial law. No note was taken of cases pending before the High Courts and the Supreme Court because the jurisdiction of the High Courts and the Supreme Court is either supervisory or appellate and the intention was to cover cases in which no decisions of the authorities appointed under the law relating to industrial disputes was yet made. Disputes prior to 1962 were not taken note of because a date line had to be fixed and 1962 was the rational date to fix because the Bonus Commission began its deliberations in that year. Selection of this date is said to be arbitrary. In several statutes a date is generally selected to demarcate pending cases and the selection of the date has never been challenged successfully if there is some rational ground for its selection. If the resolution of the dispute by the instrumentality of the Act was contemplated, the Act had also to say which dispute would be so resolved and the only rational date to select was the date on which the Ordinance was promulgated. Thus the pendency of disputes with reference to the Ordinance and reopening of accounting years up to the year in which the Bonus Commission began its deliberation was logical and not arbitrary. The provision with regard to the reopening of the intervening accounts year for refixation of bonus was also logical. If the dispute regarding 1962 or a later year was decided by the application of the Act it was imperative to reconsider the subsequent years even though there was no dispute in those years. The process of the Act is an integrated one and by the principle of set on and set off four accounting years are involved to avoid extraordinary results. It is said that two establishments equally situated are likely to be differently treated depending on the fortuitous circumstance of the existence of a dispute but is not this assumption an imaginary one ? The fact that in one there is a dispute and in the other there is not, clearly distinguishes the two establishments. We have explained in connection with s. 10 why we do not consider such comparison of any value and the same reasoning applies here. The distinguishing feature of the pendency of the dispute on the date of the promulgation of the Ordinance clearly demarcates a distinct class of cases and the classification made by the Act is a rational one. No doubt the liability for bonus under the Act may be more in some cases but it is likely to be less in others. The Act does not make any difference in treatment within the class it deals with. All establishments in which disputes were pending are treated alike. They are brought under the Act in the same manner without any discrimination. If they represent a class, the whole of the class is treated in the same way. Section 33 by providing uniformly for all pending cases,

without any discrimination between them, has established a rational classification. Section 33, therefore, cannot be said to be invalid by reason of any inequality.

Section 34(2) which is next criticised because it sacrifices all principles which this Court had established in the past and fixes a ratio for all time to come is also not invalid. The Act was passed to make for greater certainty, for improving relations between the employers and the workmen and for the avoidance of disputes. It must not be forgotten that in many establishments the payment of bonus in the past was the result of collective bargaining and the advantage which labour had so achieved was not likely to be given up readily. Any legislation to be successful had to preserve, as far as possible, what labour considered to be its right in a particular establishment. For this purpose a base year for comparison had to be established. Section 34(2), therefore, laid down that the total bonus paid in any year should bear the same proportion to gross profits in the accounting year as did the bonus to the gross profits in the base year. Gross profit was, however, defined to mean gross profit minus direct taxes only. This obviously gave an advantage to the employers because the proportion was bound to be less if depreciation and return on capital etc. were ignored. By the establishing a base year and by insisting that the same proportion should be maintained in the payment of bonus the establishments knew with certainty what their liabilities in respect of bonus would be in the future years. The establishment of the maximum and minimum limits further controlled payments. The ratio so established is only applicable if there is allocable surplus and the total payment of bonus cannot, in any event, exceed 20% which it might well have done if there was no limit. In other words, between the maximum and the minimum the same ratio of payment is to be maintained from year to year and the payment will be more or less accordingly as the profits from which the allocable surplus is to be calculated are greater or smaller. If extraordinary circumstances appear set on and set off will make them less onerous for the employers or employees. The existence of this rigid ratio, which applies to all establishments which come under s. 34(2) does not, in our opinion, create any inequality.

It is, however, submitted that the Act has ignored the definition of "workmen" in the Industrial Disputes Act and by allowing bonus to employees drawing salary or wage up to Rs. 1600 per month has increased the burden of the employers. It is also argued that this creates inequality between those establishments which come under s. 33 and those which paid bonus under the Full Bench Formula. This argument ignores several matters. The total bonus now cannot exceed 20% of the total wage bill, i.e. less than 2 1/2 months' total wages and dearness allowance. The demand for bonus in some establishments was much more and it is hardly correct to say that bonus payable under ss. 33 and 34(2) will always be more than that payable under the Full Bench Formula. The controlling factors are the establishment of the ratio, the fixation of a maximum limit and the principle of set off. As a result of the operation of these factors, the net amount cannot be as disadvantageous to the employers as was represented to us. The increase in the number of persons entitled to receive bonus, therefore, will not be of much significance. The number of such employees cannot be very large and in any event no employee will get bonus at a higher rate than a person drawing wage or salary of Rs. 750 per month. We are not in agreement with this argument.

The question thus is one of the power of Parliament to enact a law relating to bonus. Once the power to make the law is found, then the law so made cannot be struck down unless it offends a fundamental right. As the Bonus Act makes valid classifications and everyone in a class is equally treated, it is impossible to say that there is inequality. The arguments have taken examples of what are called "similarly situated establishments" in each class to show unequal treatment when it is obvious that the similarity is imaginary and even similarly situated establishment (if any there be) in different classes cannot be compared. The arguments have not faced the question of classification

but have been extremely ambiguous. For example it was even suggested that the ratio between profits and allocable surplus in a base year might be infinity if there was no profit, overlooking the simple fact that existence of profit is a condition precedent to the finding of the ratio. On this kind of reasoning the provisions of s. 10 were also attacked which we have explained are not affected.

Our bretheren have struck down sections 33, 34 and 37, but have upheld the other sections. We are, however, of opinion that if Parliament can legally, constitutionally, and validly order payment of bonus according to its formula, fix minimum bonus without profits, fix a ceiling in spite of high profits, evolve a principle of set on and set off and make disobedience subject to a penalty, there is no reason why it cannot order decision of pending cases treated as a class, according to the new formula and open up the intervening years of account for reconsideration. The power in section 33 is of the same character as the other and no special competence is required. Of course, in doing this it should treat alike all establishments in which there is a pending dispute. This Parliament has done. Similarly, by section 34 Parliament orders that a certain proportion between profits and allocable surplus shall be maintained. This exercise of the power is of the same character as the prescription that bonus shall be paid in this and this manner and no other. If that action is legal so is this, provided there is no discrimination. There is none in this class either. The power to remove difficulties reserved to Government is in hundreds of statutes. All Land Reforms Acts, State Reorganisation Acts, Industrial Disputes Acts, Encumbered Estates Acts, many taxation laws and such widely differing statutes as University Acts and Election Acts have it and the power of exemption is always included but is seldom abused. We have, therefore, respectfully dissented from their view.

In our judgment, the matter requires to be looked at from the point of view of avoidance of industrial disputes and the imposition of a uniform formula for all establishments. The existence of different kinds of establishments, as set out above, has made it necessary to classify and to make special rules for determination of bonus. By the special rules contained in ss. 33 and 34 the older establishments are treated as equally as possible, except where the pendency of cases has necessitated different rules to make the Act applicable to them. Uniformity in each class has been achieved and there is no discrimination. As the power to frame a new bonus formula cannot be gainsaid, the power to classify cannot also be denied. The Act further confers power to exempt and remove doubts and difficulties (which provisions are unfortunately criticized) and they can be invoked where in spite of so much care there is hardship in a special case.

In our judgment the Bonus Act is validly enacted and this appeal must fail. We would dismiss the appeal and the writ petitions with costs.

ORDER

In accordance with the opinion of the majority, the appeal is allowed and the order of the Industrial Tribunal set aside. The writ petitions are allowed in part and ss. 33, 34(2) and 37 are declared ultra vires. There will be no order as to costs in all these proceedings.

G.C.

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