Management of Shri Chalthan Vibhag Khand Udyog Sahakari Mandli Ltd.

Vs

G. S. Barot, Member, Industrial Court and Another

Management of Shri Mandhi Vibhag Khand Udyog Sahakari Mandli Ltd. and Others

Vs

Its Workmen

Management of Sahakari Khand Udyog Mandli Ltd.

Vs

Its Workmen

Management of Khedut Sahakari Khand Udyog Mandli Ltd.

Vs

Its Workmen

And

Bardoli Taluka Khand Kamdar Union and Others

Vs

Shri Mandhi Vibhag Khand Udyog Sahakari Mandli Ltd., Mandhi

Civil Appeals Nos. 146 of 1977 and 322, 323, 324 of 1979 and Special Leave Petition (Civil) No. 2929 of 1979

(A. P. Sen, Syed M. Fazal Ali, P. S. Kailasam JJ)

04.09.1979

JUDGMENT

KAILASAM, J. –

1. All these appeals and special leave petition are by the management of five co-operative sugar factories in Gujarat State. The demand of the workmen of the factories in Gujarat was for payment of the U.P. Government revised scales for sugar factories U.P. regarding pay, dearness allowance and other benefits.

2. The second Wage Board for the sugar industry gave its report in 1970. The Wage Board's report

was due to expire on October 31, 1974. The Government of U.P. on October 31, 1974, issued the U.P. Pattern Scales of Wages and Dearness Allowance for workmen employed in all sugar factories working by Vacuum Pan Manufacturing Process. The Labour Minister gave the award and as a result of that award, an order was passed under Section 3 sub-clause (b) of the U.P. Industrial Disputes Act, 1947. This order relating to U.P. Pattern of Pay, Graduated Dearness Allowance, Variable Dearness Allowance came into force from October 31, 1974 and effect was to be given to these pay scales and dearness allowance from October 1, 1974. As the sugar factories were seasonal factories a retention allowance for unskilled seasonal workmen for off-season at the rate of 10% of the basic wage and dearness allowance payable during the crushing year 1974-75 was also provided for. The demand put forward by the workmen in all these appeals is for payment according to the U.P. Pattern.

3. The Industrial Court, Gujarat, increased the graduated dearness allowance of the unskilled employees from Rs. 21 to Rs. 40. But this increase was not given at one stage but was spread over in three stages, the first stage being from July 1. 1976 to June 30, 1977, the second stage being from July 1, 1977 to June 30, 1978 and the third stage being from July 1, 1978 to June 30, 1979 and onwards. The increased graduated dearness allowance for the first period would be Rs. 32 per month; for the second period Rs. 36 per month and for the third period Rs. 40 per month. The existing basic wage for the unskilled employee is Rs. 110. The variable dearness allowance of Rs. 151 per month is being paid and the Court found that there was no dispute as raised in demand No. 2(c). Regarding variable dearness allowance demand No. 3, 4 and 5 the Court revised the rate from 83 paise per point on the rise over 301 points of All India Average Consumer Price Index Number for Industrial Workers (Base 1960 = 100) at Rs. 1.00 per point for skilled Be operatives clerks drawing up to Rs. 150 per month as asked for in demand No. 5(i)(b) and from Rs. 0.95 to Rs. 1.12 for All India Average Consumers Price Index for other employees as per demand No. 5(i)(d). This increase was also spread over for a period of three years i.e. 7 paise for the first period from July 1, 1976 to June 30, 1977; 5 paise for the second period from July 1, 1977 to June 30, 1978; and 5 paise for the third period from July 1, 1978 to June 30, 1979 and onwards. Regarding demand No. 7 relating to retaining allowance to be paid to the unskilled seasonal employees at the rate of 10 per cent of the basic wage and dearness allowance payable during the crushing season 1974-75 and for subsequent years, the Court found that the demand was justified. The Court gave a retention allowance of 10% as demanded of the basic wage and dearness allowance payable during the crushing season 1974-75 and also for the three subsequent years.

4. On appeal the High Court passed an order on October 18, 1978 as follows stating that reasons will be given later :

> (1) The impugned award is hereby quashed and set aside.
>
> (2) There is no justification, for the phasing awarded by the Industrial Court and hence, the phasing is quashed and set aside.
>
> #(3) * * * *(4) * * * *##
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> (5) The respective co-operative sugar societies will pay the costs of the other side. Costs quantified at Rs. 300 in each matter. Rule is made absolute accordingly in Special Civil Applications Nos. 1136 of 1977, 1148 of 1977, 602 of 1978 and 311 of 1978, Special Civil Applications Nos. 1036 of 1977 and 1505 of 1977 are dismissed.

By this order the Court quashed the award and set it aside. It also found that there was no justification for phasing as awarded by the Industrial Court and therefore quashed it and set aside. It confirmed with retrospective effect the award as given by the Industrial Court. The High Court also directed that U. P. Pattern will be given full effect with retrospective effect from the date mentioned in the award. The reasons were given by the High Court by its judgment dated January 30, 1979. 5. The judgment of the High Court is assailed on the following grounds :

> 1. The grant of neutralisation of variable dearness allowance at 125% is far in excess of what is permissible under the industrial law.
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> 2. The High Court erred in not taking into account depreciation of the sugar factories in arriving at the financial capacity of the industry for the purpose of fixing the wage structure. In any event, it was submitted that as the administration of the sugar factories is governed by the Gujarat Co-operative Societies Act, 1961, those provisions will have to be followed in arriving at the net profits and for determining the financial capacity of the factories to pay.
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> 3. It was submitted that the Industrial Court and the High Court erred in following the U.P. Pattern on the ground that it has been accepted by the other states in the South zone without taking into account the relevant circumstances relating to individual factories.
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> 4. Lastly it was contended that the High Court after quashing impugned award and setting it aside erred in passing a new award.

We ignore the last ground as we feel it is purely technical. Though the High Court may not be right in stating that is quashed and set aside the award, the intention is clear from the subsequent clauses of the award. We will now proceed to deal with the other three objections.

6. It is strongly urged on behalf of the appellants that the High Court and the Tribunal were in error in allowing neutralisation of variable dearness allowance of 125% which is beyond the permissible limits of the industrial law.

7. It is common ground that 100% neutralisation would be achieved by granting an increase of 83 paise for rise in one point in the cost of living index. By granting an increase of one rupee for increase of one point the neutralisation is by 125%. Dearness allowance was primarily intended as a protection of persons whose salaries are at the subsistence level to protect them against the adverse effects of the rise in prices. The Commission on the Dearness Allowance in May, 1967, stated that historically DA was regarded as applicable to those employees whose salaries are at the subsistence level or at a little above in order to enable them to face the increase in dearness of essential commodities. The National Commission of Labour, 1969, observed that unless money rise as fast as consumer prices it will result in an erosion of real wages. But the extent of its impact will depend on the margin of cushion available at different levels of income. The Commission recommended that 95% neutralisation should be granted against rise in cost of living to those drawing minimum wage in non-scheduled employments.

8. In a series of decisions, this Court has expressed the same view. It has been held that per cent neutralisation cannot be allowed as it would lead to a vicious circle and add to the inflationary spiral. It was observed that there was no reason why the industrial worker should not make

sacrifices like all other citizens. In Clerks of Calcutta Tramways v. Calcutta Tramways Co. Ltd. ((1956) SCR 772, 779 : AIR 1957 SC 78 : (1956) 2 LLJ 450) this Court said :

> We can now take it as settled that in matters of the grant of dearness allowance except to the very lowest class of manual labourers whose income is just sufficient to keep body and soul together, it is impolitic and unwise to neutralise the entire rise in the cost of living by dearness allowance. More so in the case of the middle classes.

The same view was expressed in the Hindustan Motors case (Workmen v. Hindustan Motors, ((1962) 2 LLJ 352 (SC) : (1962-63) 23 FJR 109) and was reaffirmed in Hindustan Times Ltd. v. Their Workmen ((1964) 1 SCR 234, 247 : AIR 1963 SC 1332 : (1963) 1 LLJ 108), where it was observed that the whole purpose of dearness allowance being to neutralise a portion of the increase in the cost of living it should ordinarily be on a sliding scale and provide for an increase on rise in the cost of living and a decrease on a fall in the cost of living. In Kamani Metals and Alloys Ltd. v. Their Workmen ((1967) 2 SCR 463 : AIR 1967 SC 1175 : (1967) 2 LLJ 55), it was held that 100% neutralisation is not advisable as it will lead to inflation and therefore dearness allowance is often a little less than one hundred than one hundred per cent neutralisation. In Bengal Chemical and Pharmaceutical Works Ltd. v. Its Workmen ((1969) 2 SCR 113 : (1969) 1 LLJ 751 : AIR 1969 SC 360, 366) it has laid down that in considering a claim for dearness allowance or revision of dearness allowance, amongst other factors it should be borne in mind : (1) Full neutralisation is not normally given, except to the very lowest class of employees; (2) The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, (emphasis supplied) should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living. In Silk and Art Silk Mills' Association Ltd. v. Mill Mazdoor Sabha ((1973) 1 SCR 277 : (1972) 2 SCC 253 : (1972) 2 LLJ 175), a grant by the Industrial Tribunal of 99% neutralisation of increase in the cost of living was confirmed as the workmen cannot be denied their subsistence wage at its real level because some other comparable concern is paying at a lower rate. In Killick Nixon Ltd. v. Killick & Allies Companies Employees' Union (1975 Supp SCR 453 : (1975) 2 SCC 260 : 1975 SCC (L&S) 316 : (1975) 2 LLJ 53) this Court after approving the propositions laid down in Bengal Chemical ((1969) 2 SCR 113 : (1969) 1 LLJ 751 : AIR 1969 SC 360, 366) case proceeded to state at page 467 : (SCC p. 273, para 37)

There is, however, one thing which we must point out, lest there should be some misconception about it and that it that so far as the lowest paid employees at or just above the subsistence level are concerned, they are entitled to 100% or at any rate not less than 95% neutralisation of the rise in the cost of living and hence there should be no ceiling on dearness allowance payable to employees within the slab of first Rs. 100, unless it can be shown by the management that the rate of neutralisation in their case is more than 100 per cent.

The decision is authority for the proposition that the rate of neutralisation cannot be more than 100% even in the case of lowest paid employees. The proposition laid down in the decisions cited above were reiterated and followed in Shivraj Fine Art Litho Works v. Industrial Court, Nagpur ((1978) 3 SCR 411 : (1978) 2 SCC 601 : 1978 SCC (L&S) 371 : (1978) 1 LLJ 532).

9. The law is thus clear that dearness allowance is intended to neutralise a portion of the increase in the cost of living. Though 100% neutralisation is not advisable as it will lead to inflation, full neutralisation may be permissible only in the case of the lowest class of employees. The management is entitled to complain if the neutralisation is more than 100%.

10. The purpose of grant of dearness allowance is to neutralise the increase in the cost of living due to rise in prices. Neutralisation may be such as to neutralise fully the increase in cost of living or may be restricted to neutralise only a portion of the increase. Full or cent per cent neutralisation can be achieved if the increase in the cost of living is fully compensated so that the pay of the worker is not adversely affected. But an award of more than 100% of an increase in the cost of living would be more than neutralisation and would in effect give the worker an increased wage. The result would be the worker would be getting an increased wage packet whenever there is a price rise - a result which would not have been envisaged in making provision for grant of dearness allowance.

11. Mr. M. K. Ramamurthi learned Counsel for the respondents submitted that the permissible limit of 100% neutralisation is not applicable to case where persons are seasonally employed. The learned Counsel pointed out that the sugar industry does not function for the whole year and for months it is closed and the workers are left without employment during the off-season. In order to give some relief to such seasonal workers he submitted that the award of equalisation of more than 100% is justified. This plea cannot be accepted for the award of equalisation of more than 100% in these cases is not based on seasonal employment. To mitigate the hardship of unemployment during the off-season a retention allowance has been provided for the seasonal workers. The plea that the neutralisation of more than 100% is based on seasonal employment was not taken in the pleadings or raised before the courts below.

12. Demand No. 7 relates to claim for payment of retaining allowance for the unskilled seasonal employees in the off-season at the rate of 10% of their basic wage and dearness allowance payable during the crushing season 1974-75. The Industrial Court as regards demand No. 7 directed that the unskilled seasonal employees be paid retaining allowance for the season 1975 at the rate of 10% of the basis wage and dearness allowance payable during the crushing season 1974-75. The claim regarding the variable dearness allowance is demand No. 2(c) and 5(1)(a)(b). There is no reference in the proceedings before the Industrial Court or the High Court that the variable dearness allowance of more than 100% equalisation was awarded due to the seasonal employment of the workers. In the result we accept the contention of the appellants that variable dearness allowance cannot be more than 100% neutralisation.

13. The second contention raised on behalf of the appellants is that in fixing fair wages and dearness allowance financial capacity of the co-operative societies should be arrived after taking into account the depreciation. Mr. Nariman the learned Counsel submitted that in order to keep an industry running it is necessary to make provision for depreciation as otherwise when the machinery gets worn out the industry would grind to halt. The learned Counsel submitted that though there are certain observations by this Court in Unichem Laboratories Ltd. v. The Workmen ((1972) 2 SCR 567 : (1972) 3 SCC 552 : AIR 1972 SC 2332), and Indian Link Chain Manufacturers Ltd. v. Workmen ((1971) 2 SCC 759, 776 : (1972) 1 SCR 790 : (1971) 2 LLJ 581), that depreciation could not be taken account in fixing the gross profits. They do not rule out taking into account the depreciation in all cases in determining the financial capacity of the industry to bear the increased burden.

14. Before considering the decisions which bear on the question we will refer to the plea of the appellants that financial capacity of sugar industry functioning under the Co-operative Societies Act should only be decided according to the provisions of Section 66 of the Gujarat Co-operative Societies Act, 1961, Act X of 1962. Section 66(1) runs as follows :

> A society earning profit, shall calculate its annual net profits by deducting from gross

> for the year, all accrued interest which is overdue for more than six months, establishment charges, contributions, if any, towards the provident fund and gratuity fund of its employees, interest payable on loan and deposits, audit fees, working expenses including repairs, rents, taxes and depreciation, and after providing for or writing off bad debts and losses not adjusted against any fund created out or profits. A society may, however, add to the net profits for the year, interest accrued in the preceding years, but actually recovered during the year. The net profits thus arrived at, together with the amount of profits brought forward from the previous year shall be available for appropriation.

Relying on the provisions of the section which requires that taxes and depreciation should be deducted from gross profits for arriving at net profits, it was submitted that in determining the financial capacity of the industry the net profits as prescribed in the section would have to be determined. We do not read the section as meaning that wages and dearness allowance could only be determined after the net profit are arrived at. The sub-section itself provides that contributions towards provident fund and gratuity fund of its employees should all be deducted from the gross profits for arriving at the net profits. The provision for deducting depreciation occurs after providing for contribution towards provident fund and gratuity. The determination of the net profits under the section is for a different purpose, namely for appropriation of the net profits as provided for in the Act and does not in any way supper the contention of the appellants.

15. In deciding the financial capacity of an industry this Court has laid down in Ahmedabad Mill Owners' Association v. Textile Labour Association ((1966) 1 SCR 382, 420 : AIR 1966 SC 497, 519 : (1966) 1 LLJ 1, 28), that :

> Industrial adjudication must always take into account the problem of additional burden which such wage structure would impose upon of the employer and ask itself whether the employer can reasonably be called upon to bear such burden ..... It is a long-range plan, and so, in dealing with this problem, (which is difficult and delicate) (These words are not to be found in the law reports) the financial position of the employer and the future prospects of the industry and the additional burden which may be imposed on the consumer must be carefully examined.

This Court after referring to the Reserve Bank Bulletin about the financial position of the industry and about cotton textile industry and other authorities on determining the financial capacity of an industry observed that industrial adjudication cannot lean too heavily on such single-purpose statements or adopt any one of the tests evolved from such statements, whilst it is attempting the task of deciding the financial capacity of the employer in the context of the wage problem.

The financial capacity of the industry will have to be decided in the context of the wage problems and the methods adopted in determining financial capacity of the industry for other purposes need not be followed. While examining the financial capacity in detail we must ultimately base our decision on a broad view which emerges from a consideration of all relevant factors, such as financial position of the employer, the interests of the consumer, etc.

16. The wages due to a worker is in the nature of expenses just like payment for raw materials. In this sense the wages are expenses which have to be met whether the company works, makes a profit or not. So far as the minimum wages due to a worker are concerned, the law requires that they should be paid first and if the industry cannot pay them it may as well close. The payment of

dearness allowance as prescribed under the Minimum Wages Act should also be provided for in any event. It is settled law that in fixing fair wages or dearness allowance or for making contribution to provident fund or providing for gratuity the financial capacity of the industry to bear the additional burden will have to be taken into account. On principle of social justice with the development of industrial it has now been accepted that when the industry can bear the burden provision should be made for provident fund and gratuity scheme. In determining the financial capacity of an industry all relevant facts will have to be taken into account. The principles followed in arriving at the profit and loss account for income tax and other purposes may not be conclusive. The claim of the employer to a reasonable profit, that of the shareholders for a fair dividend and the interest of consumer and other relevant facts and circumstances will have to be taken into account. It is necessary to take into account all the facts and circumstances relating to the industry for determining the financial capacity of the industry to pay.

17. We will now proceed to refer in detail to the three decisions of this Court which are relied on as authority for the proposition that depreciation should not be taken into account in fixing the wage structure. In Gramophone Company Ltd. v. Its Workmen ((1964) 2 LLJ 131 : (1964) 9 FLR 10) this Court had to examine the financial capacity of the employer for determining whether the industry could bear the burden of a gratuity scheme. The Court found on examination of the financial position of the company that the profits that were made by the company were rupees 7.6 lakhs in 1956-57, 7.2 lakhs in 1957-58 1.6 lakhs in 1958-59, 1.49 lakhs in 1959-60 and 6.04 lakhs in 1960-61. On behalf of the company it was submitted that the introduction of the gratuity scheme would throw a great burden on the industry involving an initial fund of Rs. 33 or 34 lakhs and that if provision is made for income tax payable and development rebate it will be seen that the company is running at a loss. The Court found that the financial position of the industry showed that the burden of payment of gratuity and provident fund can be made without undue strain on the financial position of the employer. The Court observed that the introduction of a gratuity scheme will not require an initial fund of 33 or 34 lakhs but only involve an additional burden of 1.5 lakhs at the most. Though the introduction of the gratuity scheme may involve an expenditure of Rs. 1.50 lakhs a year the actual burden will be Rs. 60,000 as there will be a reduction of the income tax payable by about 63%. Regarding the plea of the company that if the amounts due to income tax and development rebate are taken out, it would show that the company has suffered a loss, the Court observed that the provisions for income tax and reserves must take a second place as compared to provisions for a wage structure. In declining to accept the contention that provisions for taxation and reserves should have precedence, the Court proceeded to base its decision on the finding that the financial capacity of the industry was such that it could bear the burden. This Court held that if the industry is in a stable condition and the burden of provident fund and gratuity does not result in loss to the employer that burden will have to be borne by the employer like the burden of wage-structure in the interest of social justice.

18. The statement that provision for income tax and development rebate taking only a second place may not be understood as holding that they should on no account be taken into consideration or that a wage increase would be permissible if it would result in reduction of income tax. The decision is based on the finding that the company is in a position to bear the burden and the observations were incidental to and made on the facts of the case. It may be noted that there is no reference about taking into account of depreciation allowance. The judgment should be understood as negativing the plea that the income tax and development rebate should be taken into account to the extent of showing that the industry is running at a loss.

19. The second decision is Indian Link Chain Manufacturers Ltd. v. Their Workmen ((1971) 2 SCC

759, 776 : (1972) 1 SCR 790 : (1971) 2 LLJ 581). The question arose whether in the matter of determining surplus the Tribunal was justified in taking the figures of depreciation allowance and development rebate from the balance-sheet and not from the income tax assessment orders in which the figures were higher and whether for determining the return on reserves the figures at the end of the year or the beginning of the year had to be taken. It was held by this Court that there was no justification for the rejection of the company's claim for depreciation and development rebate and the same be allowed as per income tax assessment. The Court allowed depreciation and development rebate. In determining the financial position of the company the Court observed that it would not be appropriate to approach its capacity to bear the burden from an investor's point of view. The overall picture of the soundness of the under taking and its future prospects must be taken into account. The Court adopted the principles laid down in the Bharatkhand Textile Mfg. Co. Ltd. v. Textile Labour Association, Ahmedabad which are as follows :

> It is not disputed that the benefit of gratuity is in the nature of retiral benefit and there can be no doubt that before framing a scheme for gratuity industrial adjudication has to take into account several relevant facts; the financial condition of the employer, his profit-making capacity, the profits earned by him in the past, the extent of his reserves and the chances of his replenishing them as well as the claims for capital invested by him, these and other material considerations may have to be borne in mind in determining the terms of the gratuity scheme.

Thus the facts that have to be taken into account in determining an overall picture of the financial capacity is the financial condition of the employer, his profit-making capacity, the profits earned by him in the past, the extent of his reserves and the chances of his replenishing them as well as the claim for capital invested by him. After referring to the decision in to Hindustan Antibiotics Ltd. v. Workmen ((1967) 1 SCR 652 : AIR 1967 SC 948 : (1967) 1 LLJ 114), at p. 809 the Court made the following observations : (SCC p. 773, para 28)

It is pertinent to notice that gratuity and wages in industrial adjudication are placed on the same footing and have priority over income tax and other reserves, as such in considering the financial soundness of an undertaking. For the purposes of introduction of a gratuity scheme the profits that must be taken into account are those computed prior to the deduction of depreciation and other reserves.

As already pointed out in Gramophone Company ((1964) 2 LLJ 131 : (1964) 9 FLR 10) case there is no reference to deduction of depreciation. In the case under Consideration i.e. Indian Link Chain Ltd. ((1971) 2 SCC 759, 776 : (1972) 1 SCR 790 : (1971) 2 LLJ 581), the Court at p. 807 allowed the claim of the company for a deduction on account of depreciation and development rebate at Rs. 1,61,054 and Rs. 5822 instead of Rs. 80,190 and Rs. 3970. On the facts of the case it is found that the industry was in a position to bear the burden.

20. In Unichem Laboratories Ltd. v. Workmen ((1972) 2 SCR 567 : (1972) 3 SCC 552 : AIR 1972 SC 2332) it was found that the average gross profits of the company exceeded Rs. 40 lakhs and the additional financial burden by the revision of the wage structure was Rs. 5.55 lakhs. On the facts the Court held that the Tribunal was justified in computing gross profits without deducting tax, depreciation and development rebate. The Court accepted the plea on behalf of the company that the decision in Gramophone Company Ltd. ((1964) 2 LLJ 131 : (1964) 9 FLR 10) had no occasion to consider whether depreciation reserve can be deducted or not.

21. Scrutinising the figures given at p. 581 (SCC p. 567, para 45) of the Reports the Court found that the average net profit worked out to Rs. 1,3,84,691.00. The depreciation that was claimed was Rs. 5,44,918 for 1965-66, 5,55, 035 for 1966-67, 7,84,824 for 1967-68, 11,11,775 for 1968-69 and 9,16,719 for 1969-70. On the facts the Court found that the company had the financial capacity. The inclusion or exclusion of the depreciation allowance would not have made any difference to the capacity of the industry to bear the additional burden. The decision may not be under stood as laying down a principle of law that in no case the depreciation could be taken into account.

22. It may be remember that in Bharatkhand Textile Mfg. Co. Ltd. ((1960) 3 SCR 329, 342, 343 : AIR 1960 SC 833 : (1960) 2 LLJ 21) the guidelines that were indicated were that in determining the capacity to pay by the industry the financial condition of him in the past, the extent of his reserves and the chances of his replenishing them as well as the claim for capital invested by him, these and other material considerations may have to be born in mind. Thus the extent of the reserves, the chances of replenishing them as well as the claim for capital invested by him as observed in Ahmedabad Mill Owners' Association v. Textile Workers ((1966) 1 SCR 382, 420 : AIR 1966 SC 497, 519 : (1966) 1 LLJ 1, 28), will have to be taken into account. The position of the industry should be examined in detail and the decision should be based on a broad view which emerges from a consideration of all relevant factors such as whether the employer can reasonably be called upon to bear the burden and whether the additional burden imposed on the consumer is justified would also have to be carefully examined. As pointed out in the Ahmedabad Mill Owners' Association case ((1966) 1 SCR 382, 420 : AIR 1966 SC 497, 519 : (1966) 1 LLJ 1, 28)

It is a long-range plan and in dealing with the problem, which is difficult and delicate the financial position of the employer and the future prospects of the industry and the additional burden which may be imposed on the consumer must be carefully examined.

23. It may be that or prudent management of an industry it will be desirable to take into account to some extent the depreciation of the machinery for otherwise after lapse of years the machinery may get worn out and without provision of replacement the industry itself will come to a stop. Whether provision for such depreciation should be made and if so to what extent will depend upon the facts of the case. Depreciation allowance to the extent of making out a loss need not be accepted but reasonable provision should be made. The three decisions of this Court referred to were given on the particular facts of the case and may not be understood as laying down that under no circumstances deduction for depreciation, reserves etc. could be made. It is of utmost importance that the industry must be kept going as long as it could pay the minimum wages. It may sometimes be necessary for the workers to make some sacrifice to keep industry going. It is not wise to kill the goose that lays the golden eggs. The capacity of industry to bear the burden will have to be taken into account in determining whether provision could be made for fixing a wage structure including provision for contribution to provident fund, gratuity etc. In determining the capacity of the industry to bear the burden all relevant facts will have to be taken into account and actual state of affairs determined. The procedure adopted by the industry to determine the financial capacity for other purposes may not be relevant. It cannot be taken as a hard and fast rule that provision for depreciation, provision for development rebate, tax liabilities should never be allowed. While the preservation of the industry is paramount the attempts of the management to show that the company is running at a loss by boosting the depreciation allowance etc. should not be permitted. In short the real capacity of the industry to bear the extra burden will have to be determined.

24. An employer claiming depreciation allowance is only entitled to the actual or probable depreciation of the machinery, tools etc. for the period due to wear and tear. The depreciation cannot

be computed on any notional basis or on the profit and loss account furnished by the company. In the cases before us the management has claimed by way of depreciation the cost of purchase of machinery for expansion of the manufacturing plant. In the matter relating to Chalthan Sugar Mills in the profit and loss account for year ending June 30, 1975 Rs. 1,07,56,523 is claimed by way of depreciation at the end of the year. The balance brought forward on this account from the previous year is Rs. 79,11,066. During the year, an amount of Rs. 28,45,457 is added. In the profit and loss account for the year ending June 30, 1976 the depreciation fund increased from Rs. 1,07,56,523 to Rs. 1,30,24,742. In the profit and loss account for the year ending June 30, 1977 an amount of Rs. 22,97,553 is added to the depreciation fund. The figures furnished by the other sugar factories follow the same pattern. During the course of arguments the appellants admitted that the amount shown as depreciation actually represented the cost of purchase of new machinery and balance for expansion of the manufacturing units. These amounts relate to expansion of the industry and should be shown in the capital account and cannot be claimed as deduction due to depreciation. The accounting of the sugar factories concerned is for the purpose of minimising the profits and showing loss for the purpose of depriving the workers their due. Such depreciation cannot be allowed. But as pointed out by us the actual depreciation which should be deducted in the interest of the industry can be taken into account. In the cases before us if the inflated figures should be left out of account, we feel that the industry has the capacity to bear the additional burden.

25. The High Court after referring to the decisions of this Court in Gramophone Co. ((1964) 2 LLJ 131 : (1964) 9 FLR 10) and Indian Link Chain Manufactures ((1971) 2 SCC 759, 776 : (1972) 1 SCR 790 : (1971) 2 LLJ 581) and the Shivraj Litho Works ((1978)n 3 SCR 411 : (1978) 2 SCC 601 : 1978 SCC (L&S) 371 : (1978) 1 LLJ 532) came to the conclusion that gross profits before allowance is made for depreciation has to be taken into account for the purpose of considering the paying capacity of the industry. The High Court added the amount of depreciation to the net profits as shown in the balance-sheet and found that large profits were available as gross profits. The High Court was of the view that the position of the three factories in South Gujarat, namely Gandevi, Bardoli and Madhi is not at all gloomy so far as their financial prospects are concerned. The High Court found that though the price of sugarcane was fixed for delivery at the factory, it has paid the price to the growers ex-sugar can filed, thus bearing the charges for cutting sugarcane and for carrying it to the factory premises from the field. This payment was unjustified and was intended for the benefit of the members of the co-operative society and resulted in showing of a 'Paper Loss '. We are unable to agree with the conclusion of the High Court that this payment is unjustified and is for the purpose of benefiting its own members. It is submitted on behalf of the factories that the sugar factories pay an extra amount to the growers to induce them to cultivate sugarcane for a profit and thereby preventing them from cultivating other crops and reducing the area under sugarcane cultivation. The finding of the High Court that this extra payment is to benefit the members of the society itself is also not borne out as there are members who are not growers of sugarcane. The benefits by way of giving fertilisers at a discount etc. will not profit members who are not growers. The High Court has not estimated the likely increase in profits due to increase in the price of sugar levy along with the increase in expenditure due to the revision of the wage structure which it has estimated at about Rs. 5 Lakhs. Further as pointed out by us earlier the High Court erred in adding back the depreciation and other reserves without determining as to what extent such allowances are permissible on the facts of the case. For the reasons stated we feel that the financial capacity of the industry has not been determined in the manner in which it ought to have been done.

26. The wages are normally fixed on the basis of industry-cum-region. The U.P. Pattern was fixed by the Uttar Pradesh Government on an agreement between the parties under Section 3(b) of the U.P. Industrial Disputes Act, 1947 (U.P. Act No. 18 of 1947). The order under Section 3(b) is

provisional in character. Section 3(d) provides for fixing the wages after proper adjudication. No such adjudication took place in U.P. after the passing of the order under Section 3(b). Even though normally the wages are fixed on the industry-cum-region basis it is open to the industry to plead that it has not the financial capacity to bear the increased burden. When such a plea is specifically raised it is the duty of the Industrial Court to determine whether the increased burden could be borne by the particular industry. The reason given by the Industrial Court and the High Court for following the U.P. Pattern is that it has been accepted by various sugar factories in the southern region and a neighboring factory Kodinagar Sugar Factory and hence there is no reason for not applying the same rates to the appellant factories. On behalf of the appellant it was pleaded that it is not admitted that all the sugar factories in the southern region have accepted the U.P. Pattern. It was submitted that the case of the Kodinagar is different because it was established long time ago and is a flourishing concern.

27. In view of the order we propose to make we do not feel called upon to examine in detail the financial capacity of the various factories or to remit it to the Industrial Court for the purpose. We have found that the order of the Industrial Court and the High Court relating to the provision for variable dearness allowance of more than 100% neutralisation is not sustainable in law and will have to be set aside. Regarding the award relating to the retention allowance of the unskilled workers at 10% of the basic wage and the dearness allowance payable during the crushing season, it was not challenged before the High Court. The only question therefore which is in dispute is the increase of graded dearness allowance from Rs. 21 to Rs. 40 with effect from the date of the award. We do not think that the increase in burden under his head would be beyond the financial capacity of the factories especially as we are satisfied that the claim for depreciation is highly exaggerated. Taking all the circumstances relating to the financial capacity of the factories we are satisfied that the increase in the burden due to the increase in the graduated dearness allowance will be within the capacity of the industry. We, therefore, find no reason for remitting the matter back to the Industrial Court. We set aside the award relating to the grant of graduated dearness allowance at more than 100% but direct that it will be confined to 83 paise for increase of one point, i.e., limited to cent per cent neutralisation. So far as the increment of the graduated dearness allowance from Rs. 21 to Rs. 40 from the date of the award and the retention allowance at 10% of the basic wage and dearness allowance payable during the crushing season to the unskilled workers is concerned, it is confirmed.

28. The appeals are disposed of accordingly. The appellant will pay costs of the respondents one set of Rs. 2000 which will be divided amongst the respondents.

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