The Indian Link Chain Manufacturers Ltd.

Vs

Their Workmen

The Workmen of Indian Link Chain Manufacturers Ltd.

Vs

The Management

Civil Appeals Nos. 204 and 610 of 1967

(C.A. Vaidialingam, P. Jagmohan Reddy JJ)

17.09.1971

JUDGMENT

JAGANMOHAN REDDY, J. -

1. The Government of Maharashtra had referred the dispute between the Appellant and its workmen to the Industrial Disputes Act, 1947 (hereinafter called 'the Act') in respect of wage-scales, dearness allowance, bonus, gratuity and permanency. The Award made by it is the subject-matter of this Appeal by Special Leave (Civil Appeal No. 204 of 1967), in which the dispute relating to wage-scales and dearness allowance is contested only on the ground that there was a settlement between the workmen and the employers in a conciliation proceedings and as that has not been terminated by either party the Government has no jurisdiction to refer the dispute in relation thereto to the Tribunal. If this plea is not accepted the wage-scales and dearness allowance as awarded by the Tribunal is not challenged. The claim for bonus as awarded is disputed as it often happens, on the manner and method of computation of depreciation and development rebate. It is the case of the employers that it has not the financial capacity to bear the burden of the gratuity scheme framed by the Tribunal for the workmen. Apart from this certain uncongruities in this scheme are pointed out to which we shall refer and deal with at the appropriate place. The fifth issue relating to permanency is not pressed.

2. The workmen have also filed an Appeal (Civil Appeal No. 610 of 1967) against the Award in which the omission by the Tribunal to grant an adjustment in the wage-scale by directing a fitment of the wages of workmen in the said scales in accordance with the length of their service is assailed. It is also pointed out that the Tribunal did not the dearness allowance granted by it with the cost of living index and lastly the Award did not compute the return on reserves in accordance with the Schedule 3 of the Payment of Bonus Act (hereinafter called 'the Bonus Act').

3. A few facts may now be stated for a better appreciation of the matters in controversy. The Appellate was registered as a Public Limited Company in or about 1956 and commenced production in or about 1958. It employees approximately 170 persons of whom 155 are daily-rated workers and it is the later category who are the respondents in this case. In October, 1962, the General Secretary of the Mumbai Kamgar Union which represents the workers of the Appellant (hereinafter referred to

as 'the Union') made certain demands on their behalf relating inter alia to wage-scales and dearness allowance. These disputes formed the subject-matter of conciliation proceedings in the course of which the parties arrived at an amicable settlement on April 5, 1963, the relevant terms of which pertaining to the wage-scale and dearness allowance are as under :

> "Demand No.1 - Wage-scales. - (a) The workers drawing at
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> present up to Rs. 30.309 nP., per day will be given an ad hoc increment of 60 nP., with effect from January 1, 1963 and another increment of 40 nP., with effect from January 1, 1964.
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> (b) Persons drawing more than Rs. 3.30 nP., per day will be given an ad hoc increment of 50 nP., with effect from January 1, 1963 and another increment of 30 nP., with effect from January 1, 1964.
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> (c) The arrears of increment from January 1, 1963, till March 31, will be paid on or before April 20, 1963.
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> Demand No. 2 - Dearness allowance - As the wage-scale agreed to above are consolidated, i.e., including allowance, the Union has withdrawn the demand".

4. The other two demands relating to casual leave and paid holidays are not before us and need not be noticed. The parties also agreed to discuss the existing production bonus scheme and to finalise the suggestion for revising the same by the end of June, 1963, in view of the instalment of new machinery. This settlement was reduced to writing and singed by the Chief Executive of the Appellant, the Conciliation Officer and the General Secretary, Mumbai Kamgar Union and was considered a 'settlement' as defined by clause (p) of Section 2 of the Act. It was averred that as this settlement was binding upon the parties under Section 19(2) of the Act for a period of six months from April 5, 1963 and would continue to bind them after the expiry of the said period until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement and since the settlement was not terminated in accordance with any of the requirements set out above by a notice in writing given by the Respondents, no dispute could be raised again relating to the wage-scale and dearness allowance and therefore the reference made on December 27, 1965, under Section 10-A (d) of the Act for adjudication was incompetent.

5. On the dispute relating to the payment of bonus, the case of the Appellant was that its profits for the year 1964, before depreciation was Rs. 4,11,176/-, and that under then Payment of Bonus Act the available surplus was Rs. 19,921/- out of which an allocable surplus would amount of available surplus and allocable surplus disallowed the claim of the Appellant for a sum of Rs. 1,81,054/- on account of depreciation and Rs. 5,822/- in respect of the development rebate reserve and instead it allowed depreciation of Rs. 80,190/- and development rebate of Rs. 3,917/- as shown in the balance-sheet. In respect of these items the reason given by the Tribunal is that while it is true that the Company was entitled to deduct by way of depreciation an amount admissible in accordance with Section 32(1) of the Income-tax Act by virtue of Section 6(a) of the Bonus Act, there was no material on record to show that the deduction in respect of the aforesaid items was actually made by the Appellant in accordance with the relevant provisions of the Income-tax Act. In these circumstances it did not accept the deduction claimed by the Company, which were admissible under the Bonus Act.

6. On the question of gratuity the case of the Appellant was that it has only been in existence for 8 years from 1958 and that for the years 1958 to 1960 its working showed losses. For 1961, there was a carry forward from prior years of a loss of Rs. 2,19,948/- which when set off against the profit of Rs. 93,062/- in the year 1961, left a carry forward of loss of Rs. 1,26,886/-. In the year 1962, it earned profits of Rs. 84,837/- but the losses incurred in the earlier years could not be wholly set off and the balance of the loss of Rs. 42,049/- had to be carried forward to the year 1963. After setting off this carry forward of loss against the profit for the year 1963, there was only a profit of Rs. 65,323/-. In these circumstances no divided was paid to the share-holders for the years 1958 to 1962. Dividends however were paid for the year 1963, 1964 and 1965 but the stand of the Appellant was that notwithstanding the earning of profits and declaration of divided the depreciation and development rebate could not be provided for fully in accordance with the Income-tax law. Apart from this there were large foreign loans the payment of which was made difficult by the further burden imposed upon it on account of devaluation of the Rupee. To this was also added the increase in the wage bill consequent on the settlement entered into with the Union as well as the increase of Rs. 20,869/- due to interim wage relief recommended by the Wage Board for Engineering Industry. Taking all these factors into consideration the Company's case before the Tribunal was that it had not the financial ability to sustain a scheme of gratuity. Apart from this ground of attack, the Appellant also contested the scheme as being vague, contradictory and impossible to implement. The Tribunal it is said while it had prescribed a consolidated wage, directed the payment of gratuity by reference to the basic wage excluding the dearness allowance. It is therefore contended that it is not possible to ascertain which portion of the consolidated wage is the basic wage and which portion the dearness allowance and consequently the implementation of the scheme has become impossible. It is also submitted that as the scheme stands it is incongruous. It is also submitted that as the scheme stands it is incongruous because a person who resigns or retires after 10 years gets a larger gratuity than a person whose services are terminated.

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

8. The question whether the settlement in Ex. C-9 was in force at the time when the Government made the reference of the dispute to the Tribunal, will depend on whether the provisions of Section 19(2), read with Section 2(p) of the Act were complied with. There is no dispute that Ex. C-9 would amount to a settlement but on behalf of the workmen it is contended that it only records an ad hoc settlement, the operative portion of which relates to two increments one to be given from January 1, 1963 and the other from January 1, 1964, and it is during this period that the dearness allowance was given up. In these circumstances the management, it is claimed, terminated the agreement by making counter proposals to the workmen in the conciliation proceedings which terminated the settlement. This averment is supported by the finding of the Tribunal, to that namely that there was

a waiver of the requirement of a written notice putting an end to the settlement. The contention on behalf of the Appellant on the other hand is that there could be no waiver of a statutory notice required by the provisions of the Act to be in writing to put to an end to the settlement, and that the analogy of waiver of a notice required to be given in suits against the Government under Section 80 of the Civil Procedure Code is neither apt nor is it applicable to cases where as a matter of public policy a written notice is required to be given by one of the parties to the other party to terminate the settlement. Section 2 (p) of the Act defines 'settlement' as meaning :

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

9. In so far as it is relevant, Section 19 is as follows :

> "19(1) A settlement shall came into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.
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> (2) Such settlement shall be binding for such period as is agreed upon by the parties, and if so such period is agreed upon, of a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.
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> #X X X X##
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> (7) No notice given under sub-section (2) or sub-section (6) shall have effect, unless it is given by a party representing the majority of persons bound by the settlement or award, as the case may be".

10. Reading Section 19 with the definition in Section 2(p) it would appear that a settlement will enure for the duration of the period for which it has been agreed to between the parties and if no period is agreed upon for a period of six months from the date on which the memorandum of dispute is signed by the parties and where it is put an end to by a notice in writing it will continue to be operation until the expiry of two months from the date on which that notice is given. It would appear that even where an agreement is for a fixed period it will not only continue to be binding for the duration of the period of settlement but thereafter also until it is terminated by a notice in writing and even then it will continue for a period of two months from the date of such notice. While no doubt it is true that a notice must be in writing, such a notice can be inferred from correspondence between the parties.

11. In Cochin State Power Light Corporation Ltd. v. Its Workmen, (1964-II LLJ 100 : 1964 (9) FLR 107) a settlement between the employers and the employees had been arrived at on November 25, 1954, and was to remain in force for a period of five years from October 1, 1954, i.e., up to

September 1, 1959. While this was so under Section 19(2) of the Act it would continue to be in operation till it was terminated by a notice in writing. The case of the employers in that case was that the settlement was never terminated by notice in writing, as such it continued to be in force when the reference was made, and since a reference of a dispute made during the continuance of the settlement is bad, the Tribunal had no jurisdiction to adjudicate the dispute relating to wage fixation and dearness allowance. It however appeared that the workmen has presented a charter of demands on October 14, 1959 in which there was a reference to the settlement and it was stated therein that the Union had on October 13, 1959, resolved to terminate the existing settlement and submit the charter of demands to the management. Then followed the charter of demands. It was contended that this did not put an end to the settlement as required by Section 19(2) of the Act because there was no reference to the termination of the settlement by that charter. The Court however rejected this contention and held that as there was a reference under the charter of demands to a resolution in which a specific statement that the sufficient notice as required under Section 19(2) of the Act and hence the reference in regard to items covered by the settlement were valid. Wanchoo, J. at Page 101 observed :

> "There is however no form prescribed for terminating settlements under Section 19(2) of the Act and all that has to be seen is whether the provisions of Section 19(2) are complied with and in substance a notice is given as required thereunder".

12. The facts in the Workmen of Western India Match Co. Ltd. v. The Western India Match Co. Ltd., ((1963) 2 SCR 27 : AIR 1966 SC 976 : (1962) 1 Lab LJ 661) were that during the pendency of negotiations the Union by a letter had asked the Company to treat the charter of demands as notice under Section 19(2) of the Act without first terminating the earlier settlement in an Award and the Company had agreed to refer the matter in dispute to the adjudication of a Tribunal. But nonetheless it was contended that when there was no notice of termination of settlement in the charter of demand the subsequent reference in a letter that it should be terminated as from the charter of demand was not valid. This contention was however negatived on the ground that a formal notice under Section 19(2) of the Act was immaterial inasmuch as the presentation of the charter of demands filed by a letter amounted to a notice of termination of settlement. In the Management of Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. The Workmen and Another, ((1968) 1 SCR 581 : AIR 1968 SC 585 : (1968) 1 Lab LJ 555) it was sought to be contended that the case in the Workmen of Western India Match Co. Ltd. (supra) supported the proposition that an inference to terminate an award or settlement can be gathered from the various correspondences that passed between the management and the Union but one of us Vaidialingam, J. at Page 586, pointed out that that decision "does not lend any support to such a view". It was ultimately held in that case though no such formal notice was given in the earlier correspondence the letter of April 8, 1957, written by the Union could itself be construed as notice within the meaning of Section 19(2) and therefore the Tribunal had jurisdiction to adjudicate upon the claim as the reference was made by the State Government long after the expiry of two months from April 8, 1957. It is true that though a written notice can be spelled out of the correspondence there must be a certainty regarding the date on which such a written notice can be construed to have been given because a settlement notwithstanding such notice continues to be in force for a period of two months from that date.

13. The Tribunal drew support from the Workmen of Continental Commercial Co. (Private) Ltd. v. Government of West Bengal and Others, (1962-I LLJ 85) for holding that the charter of demands itself constitute the notice as required under Section 19(2) of the Act. It thought that case was decided by this Court. This however was a case decided by the Calcutta High Court where it was held that the charter of demands was a tacit representation by the workmen not to remain bound any

more by a settlement arrived at in conciliation proceedings but sub-section (2) of Section 19 contemplates an express representations physical, in the form, of writing terminating the agreement. While holding so it nonetheless observed that a notice under Section 19(2) of the Act can also be waived by the party to whom the notice is to be sent. This view of the Calcutta High Court is opposed to the view taken by the this Court and must be rejected as not god law because in our view there cannot be any waiver by conduct or implication of the requirement of a written notice which that Court had itself recognised must not be a tacit representation but an express representation in the form of writing terminating the settlement.

14. This being the legal position it is necessary to examine what in fact took place in this case. The settlement in Ex. C-9 would appear to be as contended by the Respondent's Advocate on an ad hoc basis because it provides even in respect of the demand for wage-scale that the employees will be given two ad hoc increments one with effect from January 1, 1963, and another with effect from January 1, 1964. Even in respect of the bonus scheme which was not part of the settlement it was agreed to finalise the suggestion for revising it by the end of June, 1963, in view of the instalment of new machinery. Nonetheless Ex. C-9 embodies a settlement and even if the duration of that settlement is not fixed as contended, it will continue to be in operation until a notice in writing to terminate it is given, or from the correspondence such a notice to terminate can be ascertained. The Company had in its written statement taken up the stand that Ex. C-9 still subsists but the correspondence shows that the Company had put and end to it before the charter of demands were presented to it. It would appears that during the proceedings in conciliation of the dispute that has given rise to the reference which is the subject-matter of this Appeal, the Additional Commissioner of Labour, Bombay, wrote to the Manager on January 26, 1965, before entering upon the conciliation asking him to give information as to whether there is any agreement, settlement or an Award governing the demand raised on behalf of the Workmen in the present dispute. The Company by its reply, dated March 20, 1965, informed him that the agreement between itself and its workmen had expired. It said :

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

15. The stand taken by the Company that there is no settlement in force covering the demands raised by the workmen is clear. In the statement of claim the General Secretary of Sarva Shramik Sangh representing the workmen said that the private agreement between the Company and Mumbai Kamgar Union, dated April 5, 1963, was duly terminated and thereafter a charter of demands were presented on February 4, 1965. Thereafter the Assistant Labour Commissioner tried to conciliate and in his report Ex. U-6 while stating that conciliation proceedings have ended in a failure, relying upon the letter of the management, stated that there was no subsisting settlement/agreement or Award presently in this dispute. The admission by the management is said to be made under a mistake. We do not think this is a satisfactory explanation of a categorical statement. In our view the letter of March 20, 1965, must at any rate be deemed to be a notice of termination, because there is a categorical statement that the settlement has been terminated on December 31, 1964. Even if there is no evidence of written notice terminating it on the date specified, the letter which said that it had so terminated must be taken as the requisite notice, if so, the reference to adjudication under the Act has been made long after the expiry of the two months, i.e., on December 27, 1965. If we view the matter slightly differently, the result is the same, because when both the parties to the dispute

proceeded on the specific plea that there was no settlement binding on either of them in respect of the wages and dearness allowance, even prior to conciliation, the Government had no option, on a failure of the conciliation proceedings and on bearing information by the written representation of the Appellant that there was no settlement in force, but to refer the dispute to the Tribunal. The management therefore is estopped from now taking the stand that the settlement was not put an end to or that the reference was invalid.

16. In view of this finding though the management does not assail the wages and dearness allowance as awarded by the Tribunal, as already noticed, this Award is challenged by the Union on the ground that no adjustment in the wage-scale was granted and that the dearness allowance was not linked with the cost of living index. It is also contended that the Tribunal by not making an Award in respect of fitments in the wage-scale committed an error and in no adjudicating the dispute in respect thereof, has failed a exercise a jurisdiction vested in it. It is true that while the Tribunal prescribed a consolidated wage-scale of daily-wages, it did not direct fitments in those wage-scales. The scale that have been prescribed for the various categories of workers are as follows :

#Unskilled .. .. Rs. 4.50-0.20-6.50Semi-skilled .. .. Rs. 5.50-0.25-8.00Skilled .. .. Rs. 7.00-0.35-10.50Highly skilled .. .. Rs. 8.50-0.50-12.50##

17. On behalf of the Union it is pointed out that by not directing an adjustment in these wage scales a worker who has been in the service of the Company for 8 years drawing less than the initial start in each of the wage-scale according to the category in which he is placed will get the same initial wage as a person who is taken into service at or near the date of the claim or the enforcement of the Award which is not in conformity with social justice. The Tribunal it is said should have directed an ad hoc fitment like that given in the case of The Hindustan Times Ltd., New Delhi v. Their Workmen Vice Versa, ((1964) 1 SCR 234 : AIR 1963 SC 1332 : (1963) 1 Lab LJ 108) or in French Motor Car Co. Ltd. v. Workmen. (1963) Supp 2 SCR 16 : AIR 1963 SC 1327 : (1962) 2 Lab LJ 744) The Tribunal in the case before us pointed out that the demand of the Union for wage-scales was that all the workers should be classified in consultation with the Union and to be fixed in the wage-scale claimed by it on a point to point basis with retrospective effect from February 1, 1965. It is these demands that were considered and the Tribunal did not see its way in adopting either the scales of wages claimed by it or fixing them in the wage awarded on the point to point basis. There is therefore no question of the Tribunal not exercising a jurisdiction vested in it but it must be taken as having been considered and rejected. The question whether that rejection is valid or not would depend on the facts and circumstances of the case as can be ascertained from the material placed before it. It is contended by the Union that the material before the Tribunal was such that it could have made fitments for instance, from the statement of the dates of joining and the classification and designation of the workmen as given in Ex. U-3 statement. From this statement the Tribunal could have ascertained the length of service of each of the employees, his category, his date of joining and the wage-scales which he was drawing on the date of the Award and could have formulated and directed an ad hoc fitment. It is true that taking as typical, a case of a semi-skilled operator who joined on December 1, 1958, another in the same category who joined on March 13, 1961, and one who joined on March 19, 1964, more nearer to the date of the Award, it would appear that as all of them would be drawing less than the initial wage of Rs. 5.50 in their old wage-scale they will start with Rs. 5.50 in the new wage-scales fixed for semi-skilled workers even though the first of them had on the date when the wage-scales came into operation 8 years service and the second of them 5 years and the last of them only 2 years. In the French Motor Car Co. Ltd's case (supra) this Court after considering the several instances where the Tribunal had granted fitments expressed the view that general adjustments are granted whom scales of wages are fixed for the first time. At pages 27-

28 Wanchoo, J. observed :

> "A review therefore of the cases cited on behalf of the respondents shows that generally adjustments are granted when scales of wages are fixed for the first time. But there is nothing in law to prevent the Tribunal from granting adjustment even in cases where previously pay-scales were in existence; but that has to be done sparingly taking into consideration the facts and circumstances of each case. The usual reason for granting adjustment even where wage-scales were formerly in existence is that wage-sales were particularly low and therefore justice required that adjustment should be granted a second time".

18. This principle in our view recognises that the payment in a graduated wage-scale should reflect the years of service of an employee in that grade. When the graduated wage-scale is first fixed and a fitment is made therein subsequent revision in wage-sales do not require any further fitment because the original fitment will continue to give them the advantage of their service. The cases of Hindustan Times Ltd. v. Their Workmen (supra), is one where the Tribunal took into consideration in deciding the question of adjustment that it would be fair to give some relief to the existing employees by means of an adjustment, while at the same time not burdening the employer with higher rates of wages for new incumbents. In the circumstances it has held that there was no justification for interfering with the directions given by the Tribunal in the matter of adjustments.

19. The decision referred to would clearly indicate, that in each case depending on the facts and circumstances, the question whether any fitments should be made at all or if fitments are to be made, what adjustments should be effected, will have to be considered. In this case while no doubt the wage-scales and dearness allowance demanded by the Union which was said to be prevalent in as many as 26 concerns engaged in the Engineering Industry in the region of Bombay would place fairly heavy burden on the financial resources of the Company, the Tribunal observed that there was no material on record which would furnish a basis for treating the concerns relied upon by the Union as comparable concerns. It was also pointed out that there were about 21 concerns in the same unit of the industry which were paying minimum consolidated daily wages of Rs. 5.08 to their employees and therefore their wage structure would thus represent a cross-section of the wage structure of the employees working in Engineering concerned and would be very relevant for fixation of wage structure of employees in the Company. In the end the Tribunal considering the financial status of the Company and the era of prosperous business which it can look forward to, as well as the wage structure prevailing in the relevant units of industry and other relevant consideration, prescribed the consolidated scales of wages. We must therefore reject the claim for dearness allowance being linked with cost of living index. The case of the Respondents is that the Tribunal had misdirected itself by relying upon a recent Award made by it in the case of another Company where it was said that the cost of living had gone up to 70 points but that was not taken into consideration because the Company was a flourishing Company and as such the minimum consolidated wage was fixed as being proper. The criticism against the approach of the Tribunal is in our view not warranted because it specifically stated in respect of the Award which it considered that "award may not be taken as laying down a standard minimum wage in the engineering unit of industry, the Award would have its own importance as a contributory factor for determination of the wage-structure of the employees in the Company". As we pointed out the Tribunal considered several factors in fixing the wage-scale. Each case must be considered on its own merits and hat was awarded in the Hindustan Times Ltd., case (supra) or in the Bengal Chemical and Pharmaceutical Works Ltd. v. Its Workmen, ((1969) 2 SCR 113 : AIR 1969 SC 360 : (1969) 1 Lab LJ 751) cannot be a determining factor in other cases. The principles relating to the fixation of fair wage including

the payment of dearness allowance to provide for adequate neutralisation, which would be taken into consideration in industrial adjudication, were stated by one of us, Vaidialingam, J. at page 123 of which the two that are relevant are as follows :

> #"(1) X X##
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> (2) The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living.
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> #(3) X X(4) X X##
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> (5) The additional financial burden which a revision of the wage-structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account".

20. In these circumstances we are satisfied that the Tribunal after considering the various factors to which a reference was made awarded a consolidated wage having regard to the financial capacity of the industry and there is no justification for interfering with it on the ground that it had not fixed a separate dearness allowance linked with increase or decrease in the cost of living index or to link the consolidated wage itself with it.

21. We are however satisfied that this is a fit case in which wage adjustment should have been made. The Tribunal gave no reason for rejecting the claim altogether. We could have understood the rejection of the claim of the Union that it should be given the right to make the adjustment itself, buy why some adjustment was not made taking into consideration the length of the service, has not been stated. There was no adjustment in the first wage-structure which was the subject of a settlement as such and it would not be fair also not to fix the wages in the wage-scales which in fact are those fixed for the first time by the Award. Besides we find from an analysis of the various categories of workers in each of the years that a larger majority of them have been employed between the years 1963 and 1965. If we were to direct one increment for every completed 3 years up to the date of reference namely December 27, 1965, no injustice would occur nor will there be a strain on the financial resources of the Appellant which it cannot bear. It would appear that of the 145 workers shown in the statement Ex. U-3 only about 43 workers will have the benefit namely 9 employed in 1958, 7 in 1959, 11 in 1960, 5 in 1961 and 11 in 1962. Of these only 16 will get two-grade increments in the adjustment as proposed. In this view we direct the fitments accordingly subject however, that the other workers will start at the initial wage in their respective categories the their next increment as also the increments in respect of those who have joined service between 1958 to 1962, after the aforesaid fitment is made will be due to them on completion of each year from the date of the enforcement of the Award.

22. On the computation of bonus the three items that have been challenged are those in respect of depreciation, development rebate, and return on reserves. The former two by the Appellant and the latter by the Respondent in its appeal. The computation of bonus as already noticed is governed according to the Bonus Act. Under Section 23 of this Act there is a presumption about the accuracy of balance-sheets and profit and loss accounts of Corporation and Companies and since the accuracy of the particulars contained in these documents have not been challenged in this case, reliance will have to be placed thereon. Taking the first two items regarding which the management had objection, the Tribunal had deducted a sum of Rs. 80,190/- on account of depreciation and Rs.

3,917/- on account of development rebate and rejected the claim of the Company to make the deductions in respect of the aforesaid items in accordance with the Income-tax Act as provided by Section 6(a) of the Bonus Act, by merely adopting the amount as shown in the balance-sheet and profit and loss account. While the Tribunal, no doubt recognised that the Company was entitled to deduct amounts by way of depreciation in accordance with Section 32(1) of the Income-tax Act, it rejected the claim because there was no material on record to show that the deduction as actually made by the Company towards depreciation and development rebate were in accordance with the relevant provisions of the Income-tax Act. The figures for deduction on account of return on reserves have been taken not on those shown in the balance-sheet at the beginning of the year, which is what the Bonus Act prescribes but on the figures shown at the end of the year. It is submitted by the Respondent's advocate that the Tribunal was right in disallowing the first two items because the Company did not prove by satisfactory evidence that the amounts claimed by them were true. This contention must be rejected. There can be no doubt that the employer is entitled to deduct from the gross profits as computed under Section 4, depreciation under Section 6(a) of the Bonus Act in accordance with the Section 32(1) of the Income-tax Act and under Section 6(d) such further sums as are specified in the Third Schedule to the aforesaid Bonus Act. The Only dispute is whether the Appellant has placed material before the Tribunal from which it could make the computation as required under the Income-tax Act. In our view the employer has been claiming from the very beginning depreciation and development rebate reserve under the Income-tax Act and had produced a statement signed by the Company's officials in which these figures were shown as per the Income-tax assessments for each of the year specified therein. Before the Conciliation Officer a statement was filed in which depreciation as per Income-tax was claimed as Rs. 1.80 lakhs. In the statement of claim also this amount was claimed. Apart from these averments a statement as per Income-tax assessment, statement 'A', Ex. C-5 was filed by the Company on September 2, 1966. Similarly another statement of profit and loss account as per annual account of the Company-Statement 'B' Ex. C-6 was filed on the same date. In the former document Ex. C-5 according to Item 2, depreciation allowed by the Income-tax Officer for 1964, was shown as Rs. 1,81,054/- while according to Ex. C-6 depreciation as per annual account of the Company was shown as Rs. 80,190/-. Similarly development rebate under Ex. C-5 was shown as Rs. 5,822/- while under Ex. C-6 it was shown as Rs. 3,917/-. It may be mentioned that there was no challenge to these figures as such, nor did the Respondent dispute that these amounts were not as per the assessment orders. The Tribunal had accepted statements in Ex. C-6 but ignored Ex. C-5 even though both the statements were prepared by the Company in exactly similar circumstances, one from the assessment orders and the other from the balance-sheet. We find no justification whatever in the reduction of the claim by the Company. The claim of the Company for a deduction on account of depreciation and development rebate of Rs. 181,054/- and Rs. 5,822/- instead of Rs. 80,190/- and Rs. 3,970/- is therefore, accepted.

23. The claim of the Respondent for return on reserves also must be allowed because under Section 6(d), read with Item 1 (iii) of the Third Schedule of the Bonus Act the Tribunal ought to have allowed 6% of the Company's reserves shown in its balance-sheet as at the commencement of the accounting year including any profits carried forward from the previous accounting year. A reference to the balance-sheet for the year ending December 31, 1964, would show that the three items of reserves at the end of the previous year which will be the beginning of the accounting year 1964, were : (1) development rebate reserve Rs. 1,82,174/-, (2) general reserve Rs. 60,000/- and (3) profit and loss account Rs. 5,323/- which together add to Rs. 2,47,497/-. A return of 6% on this amount should have been taken into account but instead the Tribunal allowed 6% on Rs. 4,92,349/- which were the reserve at the end of the year comprised of Rs. 1,86,091/- as development rebate

reserve, Rs. 30,000/- as general reserve and Rs. 6,289/- profit and loss account. The computation under the Bonus Act is as stated and not as the Tribunal has calculated. It would make a difference of Rs. 14,000/- in respect of this item. We have at the end of the arguments asked both the learned advocates to give us an agreed statement on the lines indicated above in respect of depreciation, development rebate and return on reserves. We give below that statement :

> #"BONUS CALCULATION FOR THE YEAR 1964(1-1-1964 to 31-12-1964)Rs.Gross profits of the year 1964 4,11,176.00Add bonus paid for the year 1963 19,128.00----------4,30,304.00Deduct prior charges Rs.(a) Less Depreciation as per Income-tax 1,81,054.00----------2,49,250.00(b) Less Development Rebate Reserve 5,822.00----------2,43,428.00(c) Less Income-tax at 50% and Surcharge 1,21,714.00----------1,21,714.00(d) Less Return on capital at 8 1/2% on Rs. 8,50,000/- 72,250.00----------49,464.00(e) Less Return at 6% on Reserve of Rs. 2,47,497/-(Rs. 1,82,174/- plus Rs. 60,000/- plus Rs. 5,323/-) 14,849.82----------34,614.18----------Available SurplusAllocable surplus (60% of available surplus) 20,768.50----------Annual Wage Bill during 1964. 2,43,562.98----------Therefore, allocable surplus of Rs. 20,768.50".##

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

24. The item relating to gratuity is challenging by the Appellant mainly on the ground that the Company's financial capacity is not such as to bear the burden of the increase in the wage-scale and dearness allowance.

25. A good deal of criticism was directed against the method adopted by the Tribunal in laying emphasis on the fairly heavy wage bill which it was said the Company could bear and by picking and choosing convenient passages from the Director's reports to butteress the conclusion that then financial position of the Company was sound. Some of these are as follows :

26. That the company turned the profits received in the year 1963, into losses and very substantially reduced the profits for the years 1961 to 1965; that the observations of the Chairman of the Board of Directors in the Director's report for the year ending December 31, 1965, had shown that the loan was increasing and the capital was being raised and that the import licences had been received, that orders for principal equipment had been finalised and that production of alloy steel chains will commence in the last quartet of 1966. The observation that this expansion project was responsible for the foreign exchange loan of the Company; that all these loans are payable in well-spaced instalments and with the increasing business turnover and profits from year to year that the Company should not find itself in an embarrassing financial position or that it is in a sound financial position are all it is a mere speculation. In our view this criticism is not justified because everything that the Tribunal has pointed out as well as show presently is warranted by the material on record. The Tribunal it may also be noticed did not prescribe a very onerous or burdensome scheme either. After referring to the decisions of this Court in M/s. British Paints (India) Ltd. v. Its Workmen, ((1966) 2 SCR 523 : AIR 1966 SC 732 : (1966) 1 Lab LJ 407) Management of Wengar & Co. v. Their Workmen, (1963 Supp 2 SCR 862 : AIR 1964 SC 864 : (1963) 2 Lab LJ 403) Burhanpur Tapti Mills Ltd. v. B. T. Mills Mazdoor Sangh, (1965-I LLJ 453 : AIR 1965 SC 839 : (1965) 2 SCJ 737) it had on the principles laid down therein observed that it would be necessary and proper to

make a modest beginning by introducing a lower scheme of gratuity consistently with the standing and business potential of the Company.

27. In determining the financial capacity of an industry what should be the approach of a Tribunal has been dealt with by this Court in some of the cases. In the Hindustan Antibiotics Ltd. v. The Workmen and Others, ((1967) 1 SCR 652 : AIR 1967 SC 948 : (1967) 1 Lab LJ 114) Subba Rao, J., as he then was, held that :

> "The Tribunal considered all the relevant circumstances; the stability of the concern, the profits made by it in the past, its future prospects and this capacity and came to the conclusion that in the concern in question, the labour should be provided with a gratuity scheme in addition to that of a provident fund scheme. We see no justification to disturb this conclusion". (Page 674)

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. In the Gramanbone Company Ltd. v. Its Workmen, (1964-II LLJ 131 : 1964 (9) FLR 10) the introduction of a scheme for the benefit of only 72 employees who were non-factory workmen, working at the Bombay Branch of the Company was contested on the ground that the Company had already a provident fund scheme for the benefit of the employees and at the time when the Award for the introduction of the scheme was made the percentage of contribution to the provident fund had been increased though that benefit was not given to a small number of non-factory workmen at Calcutta and to the concerned workmen at the Bombay Branch but was made a available only to factory workers. This contention was negatived on the ground that the mere existence of a provident fund scheme is not by itself a reason for reducing the gratuity scheme particularly when a good part of the services of existing workmen were not covered by the provident fund scheme. In that case while considering the financial position of the Company and the contention on behalf of the Company that before the real profits for each year can be arrived at amounts to be provided for compensation and development reserves should be deducted. Wanchoo, J., as he then was, observed at page 136 :

> "When an industrial tribunal is considering the question of wage structure and gratuity which in our opinion stands more or less on the same footing as wage-structure it has to look at the profits made without considering provision for taxation in the shape of income-tax and for reserves. The provision for Income-tax and for reserves must in our opinion take second place as compared to provision for wage-structure and gratuity, which stands on the same footing as provident fund which is also a retired benefit, payment towards provident fund and gratuity is expense to be met by an employer like any other expense including wages and if the financial position shows that the burden of payment of wages and provident fund can be met without undue strain on the financial position of the employer, that burden must be borne by the employer. It will certainly result in some reduction in profits but if the industry is in a stable condition and the burden of provident fund and gratuity does not result in loss to the employer, that burden will have to be borne by the employer like the burden of wage-structure in the interest of social justice".

29. On the facts of this case it may be mentioned that the Tribunal did not award a separate basic

wage and dearness allowance but a consolidated wage. That apart while no doubt the Company did not, from the years 1958 to 1962, declare any dividends as it had made losses, it began to make profits increasingly each year from 1963 to 1965. During this period not only did the capital which was in 1958 at Rs. 2,25,000/- increase to Rs. 11,00,000/- in 1965, but the salaries and wage bill correspondingly increased from Rs. 43,443/- to Rs. 3,42,609/-. The loans no doubt also increased from Rs. 2,81,129/- to Rs. 8,29,343/- but this by itself is not indicative of the financial insecurity of the Appellant because we find that notwithstanding these loans the Company steadily built up reserves from about Rs. 0.70 lakhs in 1958 to Rs. 6.16 lakhs in 1965. The losses which continued up to 1962 from 1.05 lakhs in 1958, came to be reduced to Rs. 0.42 lakhs in that year, no doubt mostly due to the Appellant earning profits in 1961 and 1962 of 0.80 and 0.84 lakhs respectively. Thereafter the profits were on the increase which in 1963 were Rs. 1.81 lakhs, in 1964 Rs. 3.21 lakhs and in 1964 Rs. 2.80 lakhs. All these profits it may be mentioned are computed after deducting depreciation and this should be taken into account considering the desirability of formulating a gratuity scheme for the Appellant. The gross block which consists of assets and loans, etc., has also progressively increased from Rs. 5.01 lakhs in 1958 to Rs. 20.00 lakhs in 1965. The two statements one on behalf of the Appellant and then other on behalf of the Respondents, the figures in which we have checked up from the balance-sheets for the corresponding years and with respect to which there is no dispute, are given below :

#STATEMENT OF THE APPELLANT----------Year Capital Loan Loss/Profit Salaries and DividendWages----------Rs. Rs. Rs. Rs. Rs.1958 2,25,000 81,129.00 |2,00,000.00 | - 1,05,283.84 43,443.29 Nil1959 3,00,000 71,347.00 |2,60,000.00 | - 1,59,537.68 88,801.10 Nil1960 3,00,000 1,10,588.68 |2,77,800.00 | - 2,19,948.91 1,15,947.60 Nil1961 4,20,000 85,786.49 |2,41,260.00 | - 1,26,886.45 1,42,090.43 Nil1962 8,50,000 2,04,720.00 |3,99,535.67 | - 42,049.80 1,56,805.23 Nil1963 8,50,000 81,626.00 }1,68,180.00 } + 56,322.00 2,22,986.69 51,0003,77,500.00 }1964 8,50,000 29,294.00 }1,31,640.00 } + 74,289.00 3,21,242.00 68,0003,31,415.00 }1965 11,00,000 94,100.00 }2,82,727.00 } + 96,999.00 3,42,609.00 93,7674,52,516.00 }----------STATEMENT OF THE RESPONDENTAll figures in lakhs1958 1959 1960 1961 1962 1963 1964 1965---- ---- ---- ---- ---- ---- ---- ----Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs.Paid upCapital .. 2.25 3.00 3.00 4.20 8.50 8.50 8.50 11.00Reserves .. 0.70 0.82 0.92 Nil 0.80 2.47 4.92 6.16Loans .. 4.56 4.11 5.24 3.27 6.04 6.25 4.92 8.29Losses .. 1.05 1.59 2.19 1.26 0.42 -- -- --Profits .. -- -- -- 0.80 0.84 1.31 3.21 2.80Gross .. 5.01 6.39 7.07 7.79 15.27 16.79 18.78 20.00BlockDividend .. -- -- -- -- -- 6 P.C. 8 P.C. 10 P.C.----------##

30. Both the above statements would lead to the same conclusion namely that the Company's financial position was progressively getting better and stronger each year and that from the year 1968, when the gratuity scheme will be given effect to it would not be difficult for the Appellant to bear the burden of its implementation. At any rate there is nothing to indicate that the financial position of the Appellant would not be further strengthened as and from that year. Even the Appellant's Advocate could not contend that it will deteriorate. Nor has the company placed before us any other material from which we could judge that the financial implication of the gratuity scheme would place a heavy burden on the Company's finances which it will not be able to bear, nor are we in a position to ascertain how the pressure of the implementation of the scheme is distributed over the years because the employer does not have to provide the gratuity for all its members at once. The Tribunal has stated and in our view justifiably so, having regard to the list of the employees and the years in which they have joined the Company that they are comparatively young and not likely to retire all at once. In fact our own examination of the statement Ex. U-3 showing

classification of the employees incline as to the view taken by the Tribunal. The years in which the employees have joined service were all staggered and even if they retire by completion of their full service the pressure on the Company's financial resources is pretty well uniformally spread out. In dealing with the financial capacity of an undertaking to bear the burden it would not be appropriate to approach its capacity to bear the burden from an investor's point of view. The overall picture of the soundness of the Undertaking and its future prospects must be taken into account. In this regard Gajendragadkar, J., as he then was, in the Bharakhand Textile Mfg Co. Ltd., and Others v. The Textile Labour Association, Ahmedabad, ((1960) 3 SCR 329 : AIR 1960 SC 833 : (1960) 2 Lab LJ 21) said at pages 342-343 :

> "It is not disputed that the benefit of gratuity is in the nature of retiral benefit and there can be no doubt that before framing a scheme for gratuity industrial adjudication has to take into account several relevant facts; the financial condition of the employer, his profit-making capacity, the profits earned by him in the past, the extent of his reserves and the changes 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".

In our view the financial position of the Company is such that the implementation of the scheme of gratuity is not likely to place an undue or unreasonable burden upon the Company.

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

1. On the death of an employee while in service of the Company or on his becoming physically or mentally incapacitated for further service in the Company, or on voluntary retirement or resignation of an employee after ten years of continuous service in the Company, he or his heirs, executors or nominees as the case may be, shall be paid as gratuity 21 days' basic wages for each completed year of service, subject to a maximum of 390 days basic wages.

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

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

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

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

32. With reference to Clause 5 it is said that while the Tribunal has prescribed a consolidated wage

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

33. The case of Management, Ghaziabad Engineering Co. (P) Ltd. v. Its Workmen, ((1970) 1 SCR 622 : AIR 1970 SC 390 : (1969) 2 Lab LJ 777) has been cited to show that the quantum of gratuity is only related to the basic wage and not to the consolidated wage but in our view this decision does not support that contention. In that case what this Court was considering was the gratuity applicable to the workmen who are being paid wages consisting of two components-basic wages and 50% of the basic wages as dearness allowance. It also appears that prior to 1960 the Company used to make a consolidated payment without specifying any basic salary or dearness allowance but since 1960 in every appointment letter it was expressly recited that the employees will get a consolidated salary consisting of 2/3 of the salary as basic wages and the balance as dearness allowance. In the context of these facts the observations of Shah, J., as he then was, at page 627 upon which reliance is being placed on behalf of the Appellant in support of the proposition that gratuity must be related to basic wage should be understood. Shah, J., said :

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

On the other hand the sentences that follow immediately do not justify any rigid principle relating gratuity to basic wage. It was observed :

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

In that case as the basic wage and the dearness allowance was ascertainable because dearness allowance was prescribed as a percentage of the basic wage there was no warrant for relating gratuity to the consolidated wage.

34. In Delhi Cloth and General Mills Co. Ltd. v. Workmen and Others etc., ((1969) 2 SCR 307 : AIR 1970 SC 919 : 1970 (20) FLR 176) Shah, J., after a review of the various cases in which the

claim of gratuity in relation either to the consolidated wage or basic wage was considered admitted that it was not easy to extract any principle from these cases, because they were conflicting. It was also pointed out that in Hindustan Antibiotics Ltd. v. Their Workmen (supra), the Tribunal had awarded a scheme for gratuity related to consolidated wages and that order was confirmed. Even in Remington Rand of India Ltd. v. The Workmen, (1968-I LLJ 542) the claim for gratuity being based on consolidated wages though challenged was accepted. It appears to us that a more reasonable way of reconciling this conflict is that while no doubt the general rule is that gratuity must be related to the basic wage, in case where the wages are not very high and a consolidated wage has been fixed taking into account the dearness allowance, the scheme of gratuity may be related to the consolidated wage, which will be the basic wage in subsequent years. As we pointed out earlier the consolidated wage will be the basic wage in subsequent years and at any future date having regard to the price index, the claim of the workmen either for a rise in the wage based on the cost of living index or for the grant of separate dearness allowance to neutralise that rise is bound to be considered and adjudicated.

35. Lastly the scheme is challenged as unfair and incongruous because those that retire are given larger benefits than those who are retrenched. But this criticism is equally unwarranted. In the first clause of the scheme a worker who voluntarily retires or resigns after 10 years of continuous service is to be paid as gratuity 21 years basic wages for each completed year of service subject to a maximum of 390 days basic wages, while under clause 3, on termination of services of an employee after 10 years of continuous service he shall be paid as gratuity a sum equivalent to 17 days basic wages for each completed years. The difference between the gratuity payable to persons who resign or retire voluntarily and those whose services are terminated is that the latter will receive in addition to the gratuity the retrenchment compensation admissible to him under the Industrial Disputes Act, while in the case of the former he will not be entitled to it. The scheme itself in Clause 3 makes this specific distinction. We do not think that there is any justification for the several criticisms directed against this scheme. In our view the scheme is not only reasonable but fair having regard to the interests of the workmen and the financial capacity of the industry.

36. In the result both the Appeals are partly allowed and the Award is modified in respect of two items (1) that a payment of bonus of Rs. 20,768.50 be made instead of Rs. 42,783/- awarded by the Tribunal, and (2) subject to the directions already given there shall be a fitment of the wages of the workers in the new scales awarded by the Tribunal after taking into account one increment for every these years of completed service up to the date of the statement of claim, i.e. January 15, 1966. In the circumstances the parties will bear their own costs in each of the Appeals.

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