in similar concerns. It has introduced the slab system so that in the case of employees falling in the higher slabs, the rise in prices is adequately neutralised. The Tribunal did not commit any error of principle.

Nor can we accede to the argument that there was a double provision for house rent. The fact that in the Index for Poona one of the components is house rent only means that the rise in the house rent was also taken into consideration in arriving at the Index. Unless it is established that the house rent was a major item which went in inflating the price index, it cannot be said that the Tribunal by awarding house rent allowance has given a double advantage to the employees in question. It has not been established before us that the Index for Poona was inflated because of its rent component. Indeed, this argument does not appear to have been raised before the Tribunal. We cannot, therefore, accept this argument.

In the result, the contentions raised in respect of dearness allowance are rejected.

C. BONUS

MUIR MILLS CO. v SUTI MILLS MAZOOR UNION
A.I.R. 1955 S.C. 170

[In 1948 the Company made a profit of nearly Rs. 12 lakhs and paid bonus to the workers at the rate of one-fouth of their basic earnings. But in 1949 it paid a bonus of only one-eighth, due to a loss of nearly Rs. 5 lakhs in that year. The Workers claimed a higher bonus on the ground that the Company had paid dividends to the ordinary shareholders out of the last year's profits. A Conciliation Board, by a majority, awarded a bonus of one-fourth. On appeal the Industrial Court (Textiles and Hosiery) Kanpur set the award aside. The Labour Appellate Tribunal reinstated the bonus of one-fourth. The Company obtained special leave to appeal to the Supreme Court, Excerpts from the judgment, delivered by Bhagwati, J. follow:]

The primary meaning of the word "bonus" according to the definition given in the New English Dictionary is:

"A boon or gift over and above what is nominally due as remuneration to the receiver and which is therefore something wholly to the good"....

This imports the conception of a boon, a gift or a gratuity otherwise described as an 'ex gratia' payment.

The word 'bonus' has however acquired a secondary meaning in the sphere of industrial relations. It is classified amongst the methods of wage payment. It has been used especially in the United States of America to designate an award in addition to the contractual wage. It is usually intended as a stimulus to extra effort but sometimes represents the desire of the employer to share with his workers the fruits of their common enterprise. (Vide Encyclopaedia Britannica, Vol. 3, page 856).

The Pocket Part of the Corpus Juris Secundum Vol. II under the heading "As Compensation for Services" quotes the following passage from the—'Attorney-General v. City of Woburn', 317 Mass. 465:

"The word 'bonus' is commonly used to denote an increase in salary or wages in contracts of employment. The offer of a bonus is the means frequently adopted to secure continuous service from an employee to enhance his efficiency and to augment his loyalty to his employer and the employee's acceptance of the offer by performing the things called for by the offer binds the employer to pay the bonus so called."

It also gives another meaning of the word 'bonus' viz.,

"increased compensation for services already rendered gratitously or for a prescribed compensation where there is neither express nor implied understanding that additional compensation may be granted."

This imports the conception that even though the payment be not strictly due to the recipient nor legally enforceable by him, a claim to the same may be laid by the employee under certain conditions and if such claim is entertained either by an agreement with the employer or by adjudication before a properly constituted Tribunal as on an indusrial dispute arising, the same would ripen into a legally enforceable claim....

The Textile Labour Inquiry Committee defined 'bonus' as follows:

"The term bonus is applied to a cash payment made in addition to wages. It generally represents the cash incentive given conditionally on certain standards of attendance and effieciency being attained."

There are however two conditions which have to be satisfied before a demand for bonus can be justified and they are, (1) when wages fall short of the living standard and (2) the industry makes huge profits part

of which are due to the contribution which the workmen make in increasing production. The demand for bonus becomes an industrial claim when either or both those conditions are satisfied.

The principles for the grant of bonus were discussed and a formula was evolved by the Full Bench of the Labour Appellate Tribunal in— 'Mill Owners' Association, Bombay v. Rashtreeya Mill Mazdoor Sangh, Bombay' (1950)-II L.L.J. 1247:

"As both labour and capital contribute to the earnings of the industrial concern, it is fair that labour should derive some benefit, if there is a surplus after meeting prior or necessary charges"

and the following were prescribed as the first charges on gross profits, viz.

(1) Provision for depreciation,

(2) Reserves for rehabilitation,

(3) A return at 6 per cent on the paid up capital,

(4) A return on the working capital at a lesser rate than the return on paid up capital.

The surplus that remained after meeting the aforesaid deductions would be available for distribution as bonus.

It is therefore clear that the claim for bonus can be made by the employees only if as a result of the joint contribution of capital and labour the industrial concern has earned profits. If in any particular year the working of the industrial concern has resulted in loss there is no basis nor justification for a demand for bonus. Bonus is not a deferred wage. Because if it were so it would necessarily rank for precedence before dividends. The dividends can only be paid out of profits and unless and until profits are made no occasion or question can also arise for distribtuion of any sum as bonus amongst the employees. If the industrial concern has resulted in a trading loss, there would be no profits of the particular year available for distribution of dividends, much less could the employees claim the distribution of bonus during that year....

To admit the claim for bonus out of the reserves transferred to the profit and loss account would be tantamount to allowing a second bonus on the same profits in respect of which the workers had already received their full bonus in the previous year. The labour force which earns the profits of a particular year by collaborating with the employers is distinct from the one which contributed to the profits of the previous years and

there is no continuity between the labour forces which are employed in the industrial concern during the several years.

The ratio which applies in the case of the share-holders who acquire the right, title and interest of their predecessors-in-interest does not apply to the labour force and the fact that the share-holders get a dividend by transfer of funds from the reserve and undistributed profits of the previous years would not entitle the workers to demand bonus out of those funds if the working of the industrial concern during the particular year has resulted in a trading loss....

The result therefore is that the decision of the Labour Appellate Tribunal appealed against must be reversed and that of the Industrial Court (Textiles and Hosiery), Kanpur restored. The appeal will accordingly be allowed with costs.

THE MILL OWNERS ASSOCIATION v THE RASHTRIYA MILL MAZDOOR SANGH

Labour Appellate Tribunal, (1950) II L.L.J. 1247

[The Sangh is the representative union of cotton textile workers in the City of Bombay. From 1941 through 1945 the mills, represented by the Mill Owners Association, voluntarily declared bonuses: in 1941—1/8th of the annual basic earnings; in 1942 through 1945—1/6th. In 1946, and 1947, 1/5th and 1/6th of the annual basic earnings for those two years respectively was awarded by the Industrial Court. In 1947 the Association of their own accord paid a bonus equivalent to one month's wages in addition as an 'Independence Bonus.' For the year 1948 the Court awarded 3/8th of the total basic earnings. In 1949 a dispute arose over bonus. The Industrial Court awarded 1/6th of the basic earnings as bonus to all employees, whether permanent or temporary, in all the 55 mills. The Association appealed that award and contended that no bonus ought to have been given because there would be no surplus left after setting apart from the gross profit for 1949 sums necessary to meet prior charges. Both parties suggested formulation by the appellate tribunal of definite principles for determining payment of profit bonus.[1] The decision of the Labour Appellate Tribunal follows:]

1. "In common parlance bonus means 'something given or paid over and above what is due.' The implication of the phrase 'given and paid' is not *ex gratia,* but as an inducement, which broadly speaking, has taken two forms: (a) profit-sharing; and (b) various methods of payment by results." Singh, V. B. *Nature and Scope of Bonus,* 6 *Ind. Jour. Lab. Econs.* 46 (April-July, 1963). *Eds.*

Without doubt principles are necessary in order to serve as guide for future years, as that is likely to lead to a uniform practice and to promote harmonious relations between Capital and Labour and ensure industrial peace, things which are very desirable and which would tend to increase production, which the welfare of the nation urgently requires....

Where the goal of living wages has been attained, bonus like profit sharing,[2] would represent more the cash incentive to greater efficiency and production....

The gross profits[3] are arrived at after payment of wages and dearness allowances to the employees, and other items of expenditure which are not necessary for our present purpose to enumerate in detail. As investment necessarily implies the ligitimate expectation of the investor to secure recurring returns on the money invested by him in the industrial undertaking, it is essential that the plant and machinery should be kept continuously in good working order for the purpose of ensuring that return, and such maintenance of plant and machinery would also be to the advantage of labour, for the better the machinery the larger the earnings, and the better the chance of securing a good bonus. The first charge on the gross profits should, therefore, be the amount of money that would be necessary for rehabilitation, replacement and modernisation of the machinery. As depreciation allowed by the income-tax authorities is only a percentage of the written down value, the fund set apart yearly for depreciation and designated under that head would not be sufficient for these purposes. An extra amount would have to be annually set apart under the heading of "reserves" to make up that deficit.

So far there can be no dispute, nor it be denied that the paid up capital is entitled to a fair return. It is common ground that the fair

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2. Profit sharing had been defined by the International Congress (1889) Paris as "an Agreement (formal or informal) freely entered into by which employees receive a share, fixed in advance, of the profits. Profit sharing... should never be confused with efficiency or incentive schemes. It is primarily and exclusively a device for promoting a feeling that industrial production is as much the workers' concern as that of the industrialists." Dasgupta, B.N., *Profit-Sharing,* in *Singh, V. B., Industrial Labour in India,* (Bombay, (1963). *Eds.*

3. Gross profit "is the difference between the total expenses incurred in producing and acquiring a commodity and the total revenue accruing from its sale." It is called *gross* because it may include certain receipts which, strictly speaking, may not be called profits. These receipts are: earnings of management, part of rent on land owned by the proprietor. *Cairncross, A.B. Introduction to Economics* 360-361 (London, 1951) *Eds.*

return on paid up capital in this case should be 6 per cent. The Millowners claim in addition a fair return on the reserves employed as working capital. The employees, however, dispute the right of the Millowners to any return on the reserves employed as working capital. This is a question of principle, and requires a decision.

The reserves which are carried over from year to year in law belong to the company, and in our view the company is entitled to some return for the money employed as working capital. The company is entitled to deal with this return as it chooses, and neither the shareholders individually nor the employees can as of right claim any direct benefit accruing out of the employed capital; therefore this amount has to be credited to the company. There cannot be any doubt that the employment of the reserves as working capital[4] obviates the borrowing of money *pro tanto* from outside sources for the same purppose, and may be at higher rates of interest. The payment of higher interest would necessarily reduce the gross profits; to that extent the employment of reserves as working capital would be beneficial to the employees.

The paid-up capital, however, runs a double risk, viz., (1) normal trade risks and (2) risks incidental to trade cycles;[5] whereas in the case of the reserves employed as working capital which is more liquid than fixed capital the incidence of risk to which it is subject is rather small. So the fair return on reserves employed as working capital must necessarily be much lower than the fair return on paid-up capital....

The claim of the employees for bonus would only arise if there should be a residue after making provision for (a) prior charges and (b) a fair return on paid up capital and on reserves employed as working capital.... The subject is not readily responsive to any rigid principle or precise formula, and so far we have been unable to discover a general formula.... Essentially the quantum of bonus must depend upon the relative prosperity

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4. Working capital or circulating capital is that part of capital which consists in goods which are required to be changed in each period of production. These include raw materials, goods in process of manufacture, and stocks held by producers or traders, *Benham, F., Economics* 137 (London, 1960). *Eds.*

5. "That the economic systems of modern times are liable to fluctuations of a particular sort, which can properly be called cyclical, is a very obvious inductive generalization from the main facts of economic history." (Hicks, J.R., *A Contribution to the Theory of Trade Cycle* 1 (London, 1951). It is these rythmic upward and downward fluctuations in economic activities, with a more or less regular periodicity, which are called trade cycles. But some economists now question the existence of trade cycles and their regularity. *Eds.*

of the concern during the year under review, and that prosperity is probably best reflected in the amount of the residuary surplus; the needs of labour at existing wages is also a consideration of importance; but we should make it plain that these are not necessarily the only considerations; for instance, no scheme of allocation of bonus could be complete if the amount out of which a bonus is to be paid is unrelated to employees' efforts; and even when we have mentioned all these considerations we must not be deemed to have exhausted the subject....

The claim of the employees to a bonus in this case cannot be denied. The quantum of such bonus is a subject to which we have given our very careful consideration. Applying the principles and the considerations which we have indicated above we have come to the conclusion that there are no grounds for disturbing the decision of the Industrial Court on this quantum of bonus....

[The calculation of profit bonus for the decision of the case at bar came to be known as the "Full Bench Formula." This became a storm-center of controversy. Its interest is now chiefly historical, in the light of the Payment of Bonus Act, 1965 and the *Jalan Trading Companies* case, below.]

JALAN TRADING COMPANY (PRIVATE) LTD. v MILL MAZDOOR UNION

Supreme Court, (1966) II L.L.J. 546

[A dispute over bonus for 1961 and 1962 had been referred to the Industrial Court, Bombay and was pending when the Payment of Bonus Ordinance was promulgated, and when it was replaced by the Payment of Bonus Act, 1965. Section 10 of the Act requires a minimum bonus to be paid even when the establishment makes no profit. The Industrial Court awarded bonus under Section 10 although the Company had made no profits in either of the two years 1961 or 1962. An appeal to the Supreme Court, by special leave under Article 136, challenged the constitutional validity of the entire Bonus Act. This was Civil Appeal No. 187 of 1966.

In two companion cases, Punalpur Paper Mills, Ltd., Kerala v. Union of India (Petition No. 3 of 1966) and Travancore Rayons, Ltd. v. Union of India (Petition No. 32 of 1966) two public limited companies, by writ petitions under Article 32, also challenged the validity of the Act. Excerpts from the majority and the minority judgments of the Court follow:]

Per J. C. Shah, J. (on behalf of K. N. Wanchoo and S. M. Sikri, JJ., and himself):—

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

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

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

(1) provision for depreciation,
(2) reserve for rehabilitation,
(3) return of 6 per cent on the paid-up capital,
(4) return on the working capital at a lower rate than the return on paid-up capital.

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

This Court considered the applicability of this formula to claims for bonus in certain decisions: Muir Mills Company, Ltd. v. Suti Mills Mazdoor Union, Kanpur [1955-I L.L.J. 1]; Baroda Borough Municipality v. its workmen [1957-I L.L.J. 8]; Sri Meenakshi Mills, Ltd. v. their workmen [1958-I L.L.J. 239]; and State of Mysore v. workers of Kolar Gold Mines [1958-II L.L. J. 479]. The Court did not commit itself to acceptance of the formula in its entirety, but ruled that bonus is not a gratuitous payment made by the employer to his workmen, nor a deferred wage, and that where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus may legitimately be made by the workmen. The Court, however, did not examine the propriety nor the order of priorities as between the several charges and their relative importance, nor did it examine the desirability of making any variation, change or addition in the formula. These problems were for the first time elaborately considered by this Court in Associated Cement Companies, Ltd. v. its workmen [1959-I L.L.J. 644]. Since that decision numerous cases have come before this Court in which the basic formula has been accepted with some elaboration. The principal incidents of the formula as evolved by the decisions of this Court may be briefly stated: Each year for which bonus is claimed is a self-contained unit and bonus will be computed on the profits of the establishment in that year. In giving effect to the formula, as a general rule, the gross profits determined after debiting the wages and dearness allowances paid to the employees, and other items of expenditure against total receipts, as disclosed by the profit and loss account, are accepted, unless it appears that the debit entries are not supported by recognized accountancy practice or are posted mala fide with the object of reducing gross profits. Debit items which are wholly extraneous to or unrelated to the determination of trading profits are ignored. Similarly income which is wholly extraneous to the conduct of the business, e.g., book profits on account of revaluation of assets, may not be included in the gross profits. Against the gross profits so ascertained the following items are charged as prior debits:

(1) Depreciation: such depreciation being only the normal or notional depreciation.

(2) Income tax payable for the accounting year on the balance remaining after deducting statutory depreciation. The income tax to be deducted is not the actual amount, but the notional amount of tax at the

rate for the year, even if on assessment no tax is determined to be payable. For the purpose of the Full Bench formula income tax at the rate provided must be deducted, but in the computation of income tax statutory depreciation under the Indian Income Tax Act only may be allowed.

(3) Return on paid-up capital at 6 per cent and on reserves used as working capital at a lower rate.

In the *Associated Cement Companies* case [1959-I L.L.J. 644] (vide supra it was suggested that this rate should be 2 per cent; in later cases 4 per cent on the working capital was regarded as appropriate.

(4) Expediture for rehabilitation which includes replacement and modernization of plant, machinery and buildings, but not for expansion of building, or additions to the machinery.

It is not open to the tribunal in ascertaining the available surplus to extend by analogy the prior charges to be debited to gross profits. Therefore, for example,

(a) allocations for debenture redemption fund,

(b) losses in previous years which are written off at the end of the year,

(c) donations to a political fund, are not deducted from gross profits.

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

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

Attempts made from time to time to secure revision of the formula failed before this Court. In the *Associated Cement Companies* case [1959-I L.L.J. 644] (vide supra) this Court observed:

"The plea for the revision of the formula raised an issue which affects all industries; and before any change is made in it, all industries and their workmen would have to be heard and their pleas carefully considered. It

is obvious that while dealing with the present group of appeals, it would be difficult, unreasonable and inexpedient to attempt such a task."

But the Court threw out a suggestion that the question might be "comprehensively" considered by a high-powered Commission; this suggestion was repeated in *Ahmedabad Miscellaneous Industrial Workers' Union* v. *Ahmedabad Electricity Company, Ltd.* [1961-II L.L.J. 377].

The Government of India then set up a Commission on 6 December 1961 *inter alia* to define the concept of bonus, to consider in relation to industrial employments the question of payment of bonus based on profits and to recommend principles for computation of such bonus and methods of payment, to determine what the prior charges should be in different circumstances and how they should be calculated, to consider whether there should be lower limits irrespective of losses in particular establishments and upper limits for distribution in one year, and if so, the manner of carrying forward profits and losses over a prescribed period, and to suggest an appropriate machinery and method for the settlement of bonus disputes. The Commission held an elaborate enquiry and reported that "bonus" was paid to the workers as a share in the prosperity of the establishment and recommended adherence to the basic scheme of the bonus formula, viz., determination of bonus as a percentage of gross profits reduced by certain prior charges, viz., the normal depreciation admissible under the Indian Income Tax Act including multiple-shift allowance, income tax and super-tax at the current standard rate applicable for the year for which bonus is to be calculated (but not super-profits tax), and return on paid-up capital raised by issue of preference shares at the actual rate of dividend payable, on other paid-up capital at 7 per cent and on reserves used as capital at 4 per cent but no provision for rehabilitation. The Commission recommended that 60 per cent of the available surplus should be distributed as bonus, the excess being carried forward and taken into account in the next year: the balance of 40 per cent should remain with the establishment into which would merge the saving in tax on bonus payable, and the aggregate balance thus left to the establishment may be intended to provide for gratuity, other necessary reserves, rehabilitation, in addition to the provision made by way of depreciation in the prior charges, annual provision required for redemption of debentures, return of borrowings, payment of super-profits tax and additional return on capital. They recommended that the distinction between basic wages and dearness allowance for the purpose of expressing the bonus quantum should be abolished and that bonus should be related to wages and dearness allowance taken together; that minimum bonus should be 4 per cent of the total basic wage and

dearness allowance paid during the year or Rs. 40 to each worker, whichever is higher, and in the case of children the minimum should be equivalent to 4 per cent of their basic wage and dearness allowance, or Rs. 25 whichever is higher, subject to reduction *pro rata* for employees who have not worked for the whole year, and that the maximum bonus should be equivalent to 20 per cent of the total basic wage and dearness allowance paid during the year; that the bonus formula proposed should be deemed to include bonus to employees drawing a total basic pay and dearness allowance up to Rs. 1,600 per month regardless of whether they were "workmen" as defined in the Industrial Disputes Act or other relevant statutes, but subject to the proviso that the quantum of bonus payable to employees drawing total basic pay and dearness allowance over Rs. 750 per month shall be limited to what it would be if their pay and dearness allowance were only Rs. 750 per month. It was proposed that the general formula should not apply to new establishments until they had recouped all early losses including all arrears of normal depreciation admissible under the Income Tax Act, subject to a time-limit of six years. They also suggested that the scheme recommended should be made applicable to all bonus matters relating to the accounting year ending on any day in the calendar year 1962 other than those matters in which settlements had been reached or decisions had been given.

The Government of India accepted a majority of the recommendations and the President issued on 29 May 1965 the Payment of Bonus Ordinance, 1965, providing for payment of bonus to all employees drawing salary not exceeding Rs. 1,600 under the formula devised by the Commission. It is not necessary to set out the provisions of the Ordinance, for the Ordinance was replaced by the Payment of Bonus Act, 21 of 1965; and by S. 40(2) it was provided that notwithstanding such repeal, anything done or any action taken under the Payment of Bonus Ordinance, 1965, shall be deemed to have been done or taken under the Act as if the Act had commenced on 29 May 1965. Since the action taken under the Ordinance is to be deemed to have been taken under the Act, in these cases the validity of the provisions of the Act alone need be considered

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

Counsel for the Jalan Trading Company urged that the Act was invalid in that it amounts to fraud on the Constitution or otherwise is a colourable exercise of legislative power. That argument has no force. It is not denied that the Parliament has power to legislate in respect of bonus to be paid to industrial employees. By enacting the Payment of Bonus Act, the Parliament has not attempted to trespass upon the province of the State legislature. It is true that by the impugned legislation certain principles declared by this Court, e.g., in *Express Newspaper (Private) Ltd., and another v. Union of India and others,* [1961-I L.L.J. 339] in respect of grant of bonus were modified, but on that account it cannot be said that the legislation operates as fraud on the Constitution or is a colourable exercise of legislative power. Parliament has normally power within the framework of the Constitution to enact legislation which modifies principles enunciated by this Court as applicable to the determination of any dispute, and by exercising that power the Parliament does not perpetrate fraud on the Constitution. An enactment may be charged as colourable, and on that account void, only if it be found that the legislature has by enacting it trespassed upon a field outside its competence: *K. C. Gajapati Narayan Deo and others* v. *State of Orissa,* [1954 S.C.R. 1]

The provisions of the Act and its scheme may now be summarized. The Payment of Bonus Act was published on 25 September 1965. By S. 1(4), save as otherwise provided in the Act, the provisions of the Act shall, in relation to a factory or other establishment to which the Act applies, have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year. Section 2(4) defines "allocable surplus" as meaning:

(a) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income Tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of S. 194 of that Act, 67 per cent of the available surplus in an accounting year,

(b) in any other case 60 per cent of such available surplus,

and includes any amount treated as such under Sub-sec. (2) of S. 34.

"Available surplus" is defined in S. 2(6) as meaning the available surplus computed under S. 5.... By S. 5 available surplus in respect of any accounting year is the gross profit for that year after deducting therefrom the sums referred to in S. 6. The sums liable to be deducted from gross profits under S. 6 are:

(a) any amount by way of depreciation admissible in accordance with the provisions of Sub-sec. (1) of S. 32 of the Income Tax Act, or in accordance with the provisions of the agricultural income tax law, as the case may be;

(b) any amount by way of development rebate or development allowance which the employer is entitled to deduct from his income under the Income Tax Act;

(c) any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year; and

(d) such further sums as are specified in respect of the employer in Sch. III. Section 7 deals with calculation of direct taxes payable by the employer for any accounting year for the purpose of Cl. (c) of S. 6. Sections 8 and 9 deal with eligibility for and disqualifications for receiving bonus. Sections 10 to 15 deal with payment of minimum and maximum bonus and the scheme for "set-on" and "set-off. Every employer is by S. 10 bound to pay to every employee in an accounting year minimum bonus which shall be 4 per cent of the salary or wage earned by the employee during the accounting year or Rs. 40 whichever is higher, whether there are profits in the accounting year or not. In the case of employees below the age of 15, the minimum is Rs. 25. By S. 11 where in respect of any accounting year the allocable surplus exceeds the amount of minimum bonus payable the employer shall be bound to pay to every employee in the accounting year bonus which shall be an amount proportionate to the salary or wage earned by the employee during the accounting year, subject to a maximum of twenty per cent of such salary or wage. Section 15 provides that if for any accounting year the allocable surplus exceeds the amount of maximum bonus payable to the employees in the establishment under S. 11, then, the excess shall, subject to a limit of 20 per cent of the total salary or wage of the employees employed in the establishment in that accounting year, be carried forward for being "set on" in the succeeding accounting year, and so on up to and inclusive of the fourth accounting year, and be utilized for the purpose of payment of bonus. By Sub-sec. (2) it is provided that where for any accounting year, there is no available surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees in the establishment under S. 10, and there is no amount or sufficient amount carried forward and "set on" under Sub-sec. (1) capable of being utilized for the purpose of payment of the minimum bonus, then, such minimum amount or the deficiency, shall be carried forward for being "set off" in

the succeeding accounting year up to and inclusive of the fourth accounting year. By Sub-sec. (3) it is provided that the principle of "set-on" and "set-off" as illustrated in Sch. IV shall apply to all other cases not covered by Sub-sec. (1) or (2) for the purpose of payment of bonus under the Act. Bonus payable to an employee drawing wage or salary exceeding Rs. 750 *per mensem* has to be calculated as if the salary or wage were Rs. 750 *per mensem*, and to an employee who has not worked for all the working days in an accounting year, the minimum bonus of Rs. 40 or Rs. 25 would be proportionately reduced (Ss. 12 and 13). Section 16 makes special provisions relating to payment of bonus to employees of establishments which have been newly set up. Sections 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 deal with certain procedural and administrative matters. By S. 20 establishments in the public sector are in certain eventualities also made subject to the provisions of the Act, Section 32 excludes from the operation of the Act employees of certain classes and certain industries specified therein. By S. 33 the Act is made applicable to pending industrial disputes (regarding payment of bonus relating to any accounting year not being an accounting year earlier than an accounting year ending on any day in the year 1962) immediately before 29 May 1965, before the appropriate Government or any tribunal or other authority under the Industrial Disputes Act, 1947, or under any corresponding law, or where it is pending before the conciliation officer or for adjudication. By S. 34(1) the provisions of the Act are declared to have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service made before 29 May 1965. Subsection (2) of S. 34 makes special overriding provisions regarding payment of bonus to employees computed as a percentage of gross profit reduced by direct taxes payable for the year (subject to the maximum prescribed by S. 11), when bonus has been paid by the employer to workmen in the "base year" as defined in Expln. II. By S. 36 the appropriate Government is authorized, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, to exempt for such period as may be specified therein such establishment or class of establishments from all or any of the provisions of the Act, and by S. 37 power is conferred upon the Central Government by order to make provision, not inconsistent with the purposes of the Act, for removal of difficulties or doubts in giving effect to the provisions of the Act....

The plea of invalidity of Ss. 32, 36 and 37 may be dealt with first. It is true that several classes of employees set out in Cls. (i) to (xi) of S. 32 are excluded from the operation of the Act. But the petitions and

the affidavits in support filed in this Court are singularly lacking in particulars showing how the employees in the specified establishment or classes of establishments were similarly situate and that discrimination was practised by excluding those specified classes of employees from the operation of the Act while making it applicable to others. Neither the empolyees nor the Government of India have chosen to place before us any materials on which the question as to the *vires* of the provisions of S. 32 which excludes from the operation of the Act certain specified classes of employees can be determined. There is a presumption of constitutionality of a statute when the challenge is founded on Art. 14 of the Constitution, and the onus of proving unconstitutionality of the statute lies upon the persons challenging it. Again, many classes of employees are excluded by S. 32 and neither those employees, nor their employers, have been impleaded before us. Each class of employees specified in S. 32 requires separate treatment having regard to special circumstances and conditions governing their employment. We, therefore, decline to express any opinion on the plea of unconstitutionality raised before us in respect of the inapplicability of the Act to employees described in S. 32.

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

But S. 37 which authorizes the Central Government to provide by order for removal of doubts or difficulties in giving effect to the provisions of the Act, in our judgment, delegates legislative power which is not permissible. The condition of the applicability of S. 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the

Act, S. 37 is not saved from the vice of delegation of legislative authority. The section authorizes the Government to determine for itself what the purposes of the Act are and to make provisions for removal of doubts or difficulties. If in giving effect to the provisions of the Act any doubt or difficulty arises, normally it is for the legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of S. 37 which purports to make the order of the Central Government in such cases final, accentuates the vice in Sub-sec. (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act.

We may now turn to the challenge to S. 10. Under the Full Bench formula, bonus being related to available surplus, it can only be made payable by an employer of an establishment who makes profit in the accounting year to which the claim for bonus relates. If no profit was made, there was no liability to pay bonus. As pointed out by this Court in the *Muir Mills Company Case* [1955-I L.L.J. 1, at 4] (vide supra):

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

But by S. 10 it is provided that even if there has resulted trading loss in the accounting year, the employer is bound to pay bonus at 4 per cent of the salary or wage earned by the employee or Rs. 40 whichever is higher. This, it was urged, completely alters the character of bonus and converts what is a share in the year's profits in the earning of which labour has contributed, into additional wage. It was pointed out to us that in giving effect to the Full Bench formula, this Court set aside the directions

made by the industrial tribunal awarding minimum bonus where the establishment had suffered loss, and remanded the case for a fresh determination consistently with the terms of the Full Bench formula: *New Maneck Chowk Spinning and Weaving Company, Ltd.* v. *Textile Labour Association,* [1961-I L.L.J. 521]. In that case there was a five-year pact between the Ahmedabad Millowners' Association and the Textile Labour Association. After the expiry of the period, the labour association demanded bonus on the basis of the pact, but the millowners claimed that the pact was contrary to the Full Bench formula, and the claim was not sustainable. The industrial tribunal held that the pact did not "run counter to the law laid down by this Court in the *Associated Cement Companies* case, [1959-I L.L.J. 644]" (vide supra) and the extension of the agreement for one more year would help in promoting peace in the industry in Ahmedabad. This Court held that the agreement departed from the Full Bench formula in the matter of bonus and when the tribunal extended the agreement after the expiry of the stipulated period, it ignored the law as laid down by this Court as to what profit bonus was and how it should be worked out; and [held] that the tribunal had no power to do [what it did] by extending the agreement to direct payment of minimum bonus for the year 1958 when there was no available surplus to pay minimum bonus.

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

Section 10 at first sight may appear to be a provision for granting additional wage to employees in establishments which have not on the

year's working an adequate allocable surplus to justify payment of bonus at the the rate of 4 per cent on the wages earned by each employee. But the section is an integral part of a scheme for providing for payment of bonus at rates which do not widely fluctuate from year to year and that is sought to be secured by restricting the quantum of bonus payable to the maximum rate of 20 per cent and for carrying forward the excess remaining after paying bonus at that rate into the account of the next year, and by providing for carrying forward the liability for amounts drawn from reserves or capital to meet the obligation to pay bonus at the minimum rate. Under the Act, for computing the rate of payment of bonus each accounting year is distinct, and bonus has to be worked out on the profits of the establishment in the accounting year. But it is not in the interest of capital or labour that there should be wide fluctuations in the payment of bonus by an establishment year after year. The object of the Act being to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment reflected by the profits earned by the contributions made by capital, management and labour, Parliament has provided that bonus in a given year shall not exceed one-fifth and shall not be less than one twenty-fifth of the total earning of each individual employee, and has directed that the excess share shall be carried forward to the next year, and that the amount paid by way of minimum bonus not absorbed by the avaliable profits shall be carried to the next year and be set off against the profits of the succeeding years. This scheme of prescribing maximum and minimum rates of bonus together with the scheme of "set-off" and "set-on" not only secures the right of labour to share in the prosperity of the establishment, but also ensures a reasonable degree of uniformity.

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

Section 10 undoubtedly places in the same class establishments which have made inadequate profits not justifying payment of bonus, establishments which have suffered marginal loss, and establishments which have suffered heavy loss. The classification so made is not unintelligible: all establish-

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

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

We need say nothing at this date about the plea that S. 10 by imposing unreasonable restrictions infringes the fundamental freedom under Art. 19(1)(g) of the Constitution, for by the declaration of emergency by the President under Art. 352, the protection of Art. 19 against any legislative measure, or executive order which is otherwise competent, stands suspended. The plea that S. 10 infringes the fundamental freedom under Art. 31(1) of the Constitution also has no force. Clause (1) of Art. 31 guarantees the right against deprivation of property otherwise than by authority of law. Compelling an employer to pay sums of money to his employees, which he has not contractually rendered himself liable to pay, may amount to deprivation of property; but the protection against depriv-

ing a person of his property under Cl. (1) of Art. 31 is available only if the deprivation is not by authority of law. Validity of the law authorizing deprivation of property may be challenged on three grounds:

(i) incompetence of the authority which has enacted the law;

(ii) infringement by the law of the fundamental rights guaranteed by Chap. III of the Constitution; and

(iii) violation by the law of any express provisions of the Constitution.

Authority of the Parliament to legislate in respect of bonus is not denied and the provision for payment of bonus is not open to attack on the ground of infringement of fundamental rights other than those declared by Arts. 14 and 19(1)(g) of the Constitution. Our attention has not been invited to any prohibition imposed by the Constitution which renders a statute relating to payment of bonus invalid. We are, therefore, of the view that S. 10 of the Bonus Act is not open to attack on the ground that it infringes Art. 31(1).

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

> "Where, immediately before 29 May 1965, any industrial dispute regarding payment of bonus relating to any accounting year, not being an accounting year earlier than the accounting year ending on any day in the year 1962, was pending before the appropriate Government or before any tribunal or other authority under the Industrial Disputes Act, 1947 (14 of 1947) or under any corresponding law relating to investigation and settlement of industrial disputes in a State, then, the bonus shall be payable in accordance with the provisions of this Act in relation to the accounting year to which the dispute relates and any subsequent accounting year, notwithstanding that in respect of that subsequent accounting year no such dispute was pending.
>
> *Explanation*:—A dispute shall be deemed to be pending before the appropriate Government where no decision of that Government on any application made to it under the said Act or such corresponding law for reference of that dispute to adjudication has been made or where having received the report of the conciliation officer (by whatever designation known) under the said Act or law, the appropriate Government has not passed any order refusing to make such reference."

The section plainly seeks to apply the provisions of the Act to a pending dispute, if the dispute relates to payment of bonus for any accounting year

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

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

the employer and the workmen in one establishment and there is no such dispute pending in the other.

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

There is one other ground which emphasizes the arbitrary character of the classification. If a dispute relating to bonus is pending immediately before 29 May 1965, in respect of the years specified in S. 33, before the appropriate Government or before any authority under the Industrial Disputes Act or under any corresponding law, the provisions of the Act will be attracted; if the dispute is pending before this Court in appeal or before the High Court in a petition under Art. 226, the provisions of the Act will not apply. It is difficult to perceive any logical basis for making a distinction between pendency of a dispute relating to bonus for the years in question before this Court or the High Court, and before the industrial tribunal or the appropriate Government. This Court is under the Constitution competent to hear and decide a dispute pending on 29 May 1965 relating to bonus as a Court of appeal, but is not required to apply the provisions of the Act. If because of misconception of the nature of evidence or failure to apply rules of natural justice or misapplication of the law, this Court sets aside an award made by the industrial tribunal and remands the case which was pending on 29 May 1965, for rehearing, the industrial court will have to deal with the case under the Full Bench formula and not under the provisions of the Act. The High Court has also jurisdiction in a petition under Art. 226 to issue an order or direction declaring an order of the industrial tribunal invalid, and issue of such writ, order or direction will ordinarily involve retrial of the proceeding. Again, pendency of a dispute in respect of the previous year before the appropriate Government or the industrial tribunal will entail imposition of a statutory liability to pay bonus in respect of the year for which the dispute is pending, and also in respect of years subsequent thereto, but if immediately before 29 May 1965, a proceeding arising out of a dispute relating to bonus is pending before a superior Court, even if it be for the years which are covered by S. 33, statutory liability to pay bonus to employees will not be attracted. Take two industrial units; one has a dispute with its workmen or some of them pending before the Government or before

the authority under the Industrial Disputes Act and relating to an accounting year ending in the year 1962. For the years 1962, 1963 and 1964 this industrial unit will be liable to pay bonus according to the statutory formula prescribed by the Act, whereas another industrial unit in the same industry which may be regarded as reasonably similar would be under no such obligation, if it has, on 29 May 1965, no dispute relating to bonus pending because the dispute has not been raised or has been settled by agreement or by award or because the dispute having been determined by an award had reached a superior Court by way of appeal or in exercise of the writ jurisdiction. There appears neither logic nor reason in the different treatment meted out to the two establishments. It is difficult to appreciate the rationality of the nexus—if there be any—between the classification and the object of the Act. In our view, therefore, S. 33 is patently discriminatory.

By Sub-sec. (2) of S. 34 it is provided:

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

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

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

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

Explanation II:—In this subsection,—

(a) 'base year' means—

(i) in a case where immediately before 29 May 1965 any dispute of the nature specified in S. 33 was pending before the appropriate Government or before any tribunal or other authority under the Industrial Disputes Act, 1947 (XIV of 1947), or under any corresponding law relating to investigation and settlement of industrial disputes in a State, the accounting year immediately preceding the accounting year, to which the dispute relates;

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

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

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

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

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

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

Section 34(2) contemplates a somewhat complicated enquiry into the determination of the bonus payable. Gross profits of the base year being

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

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

Here again, units or establishments which had paid bonus in the base year and those which had not paid bonus in the base year are classified separately without taking into consideration the special circumstances which operated upon the payment of bonus in the base year which may vary from establishment to establishment. The ratio under S. 34(2), so long as the Act remains on the statute book, determines the minimum allocable surplus for each accounting year of those establishments which had paid bonus in

the base year. The fact that under Sub-sec. (3) the employees and the employers are not precluded from entering into agreements for granting bonus to the employees under a formula which is different from that prescribed under the Act has little significance. If by statute a certain ratio is fixed which determines the bonus payable by the employer whether or not the profits of the accounting year warrant payment of bonus at that rate, it would be futile to expect the employees to accept anything less than what has been statutorily prescribed.

In our view, S. 90 (2) imposes a special liability to pay bonus determined on the gross profits of the base year on an assumption that the ratio which determines the allocable surplus is the normal ratio not affected by any special circumstance and perpetuates for the duration of the Act that ratio for determining the minimum allocable surplus each year. If bonus contemplated to be paid under the Act is intended to make an equitable distribution of the surplus profits of a particular year, a scheme for computing labour's share which cannot be less than the amount determined by the application of a ratio derived from the working of the base year without taking into consideration the special circumstances governing that determination is *ex facie* arbitrary and unreasonable. The Additional Solicitor-General appearing for the Union of India and the representatives of the labour unions and counsel appearing for them contended in support of their plea that S. 34 (2) was not invalid, because the ratio was intended to stabilize previous grant of bonus and to maintain in favour of labour whatever was achieved by collective bargaining in the base year. But the validity of a statute is subject to judicial scrutiny in the context of fundamental freedoms guaranteed to employers as well as employees and the freedom of equal protection of the laws becomes chimerical, if the only ground in support of the validity of a statute *ex fecie* discriminatory is that Parliamen- intended inconsistently with the very concept of bonus evolved by it to maintain for the benefit of labour an advantage which labour had obtained in an earlier year, based on the special circumstances of that year, without any enquiry whether that advantage may reasonably be granted in subsequent years according to the principles evolved by it and for securing the object of the Act. If the concept of bonus as allocation of an equitable share of surplus profits of an establishment to the workmen who have contributed to the earning has reality, any condition that the ratio on which the share of one party computed on the basis of the working of an earlier year, without taking into consideration the special circumstances which had a bearing on the earning of the profits and the payment of bonus in that year, shall not be touched, is in our judgment arbitrary and unreasonable. The vice of the provision lies in the imposition of an arbitrary ratio governing distri-

bution of surplus profits. In our view, S. 34 (2) is invalid on the ground that it infringes Art. 14 of the Constitution. It is in the circumstances unnecessary to consider whether the provisions of Ss. 33 and 34 (2) are invalid as infringing the fundamental rights conferred by Art. 19(1)(g) and 31 (1).

But the invalidity of Ss. 33 and 34(2) does not affect the validity of the remaining provisions of the Act. These two provisions are plainly severable. All proceedings which are pending before the Act came into force including those which are covered by S. 33 will therefore be governed by the Full Bench formula; and in the application of the Act the special ratio for determining the allocable surplus under S. 34(2) will be ignored for application of the Full Bench formula to pending proceedings on 29 May 1965; and refusal to apply the special ratio in the determination of allocable surplus under S. 34(2) does not affect the scheme of the rest of the Act. The declaration of invalidity of S. 37 which confers upon the Central Government power to remove difficulties also does not affect the validity of the remaining provisions of the Act.

The industrial tribunal has awarded to the workmen of the Jalan Trading Company bonus at the minimum rate relying upon S. 33 of the Act. The claim for bonus related to the year 1962, and could be upheld only if S. 10 was attracted by the operation of S. 33. But we have held that S. 33 is invalid. The profit and loss account was accepted by the workmen before the tribunal. It is now common ground that the appellant-company had suffered loss in 1962. Civil Appeal No. 187 of 1966 will therefore be allowed and the order passed by the industrial tribunal imposing liability for payment of minimum bonus set aside. In Writ Petitions Nos. 3 of 1966 and 32 of 1966, it is declared that Ss. 33 and 34(2) are invalid as infringing Art. 14 of the Constitution, and that S. 37 is invalid in that it delegates to the executive authority legislative powers.

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

Per Hidayatullah, J. (on behalf of V. Ramaswami, J., and himself):—

The first attack is on the provision for minimum bonus in S. 10 irrespective of profits. It is submitted that a concept of minimum bonus, unrelated to profits, makes the payment an accretion to wages and leads indirectly to the erosion of capital since such payment, if it does not come from profits, must come from reserves or capital. The provision is thus said to be a "fraud on the Constitution" or "a colourable exercise of

power" conforming neither to the accepted concept of bonus nor to the principles on which minimum wages are fixed. Section 10 is also said to offend Art. 14 in as much as it makes no difference between companies making profits and companies having losses whether marginal or heavy. It is said that the fixation of the minimum bonus irrespective of considerations such as the kind of wages and dearness allowance prevailing in an establishment, profit or loss in its business, and whether bonus is integrated with wages or not, creates inequality. It is pointed out that while bonus was formerly calculated on basic wage only and took no note of dearness allowance, the Act, by defining "wage or salary" to include dearness allowance, has increased the quantum of bonus payable. Even the five years' exemption to new establishments is criticized as discriminatory. Section 10 is said to enable deprivation of the property of the employers with a view to paying it to the workmen. The contending parties could not attack the Act under Art. 19 in view of the emergency, but did not also give up the point, although corporations, not being citizens, have been held by this Court to be not entitled to invoke the provisions of that article. In our judgment none of the arguments against S. 10 can be accepted....

The employers rely upon *New Maneckchowk Spinning and Weaving Company Ltd., Ahmedabad and others v. Textile Labour Association, Ahmedabad,* [1961-I L.L.J. 521] in which this Court rejected the fixation by the tribunal of minimum bonus for a year beyond the pact period although this was done in the interest of industrial peace. This case is of no value because the question here is one of the power of the Parliament and not of the power of the tribunal. The powers of Parliament to fix minimum bonus cannot be questioned because it flows from jurisdiction over industrial and labour disputes, welfare of labour including conditions of work and wages. The legislation is therefore neither a fraud on the Constitution nor a colourable exercise of power. Under any of these powers, or all of them viewed together, the fixation of minimum bonus is legal and if these topics of legislation were found to be insufficient, the residuary power of Parliament must lend validity to the enactment....

It has been said before that every uniform legislation can be made to appear ridiculous by citing a few extreme examples and comparing them and this statement will bear repetition in the context of discrimination said to arise from S. 10. Even under the Minimum Wages Act, a prosperous establishment could be shown to be placed on the same footing as another establishment not so prosperous, but this Court did not strike down the

Minimum Wages Act on that ground. In our judgment, the provision for payment of fifteen day's wages to workmen as bonus irrespective of profits is a measure well-designed to keep industrial peace and to make way for the need-based wages which the Tripartite Conference emphasized. Some unequal treatment can always be made to appear when laws apply uniformly. Two establishments cannot be so alike as the hypothetical examples taken before us suggested. Differences must exist but that does not prevent the making of uniform laws for them provided the law made has a rational relation to the object sought to be achieved and the inequality is trivial and hypothetical. Classification can only be insisted upon when it is possible to classify, and a power to classify need not always be exercised when classification is not reasonably possible. In our judgment, S. 10 does not lead to such inequality as may be called discrimination.

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

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

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

The functions so exercised are not legislative functions at all but are intended to advance the purpose which the legislature has in mind. The power to pass an order of this character cannot be used to add to or deduct from that which Act provides. The order only makes smooth the working of the Act particularly in its initial stages. This power is given to the Central Government so that litigation may not ensue as the policy of the Act is to avoid litigation. The rejection of such a provision is only possible if we begin with a concept of trinity of powers with the legislature performing delegated power on behalf of the people, as is sometimes held in the United States. The rejection there takes place by the application of the maxim *delegatus non protest delegare*. This doctrine, it has been accepted on all hands, was originated by the glossators and got introduced into English law by a misreading of Bracton as a doctrine of agency and was applied by Coke in decisions to prevent the exercise of judicial power by another agency and later received its present form in the United States. The question is not one of a delegate making a sub-delegation but of the sovereignty of the Parliament. Parliament has not attempted to set up another legislature. It has stated all that it

wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to the courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and differences by a suitable order. The order, of course, would be passed within the four corners of the parliamentary legislation and would apply the Act to concrete cases as the Courts do when they consider the application of an Act. The order of the Central Government is made final for the reason that it is hardly practical to give power to the Central Government and yet to leave the matter to be litigated further. The fact that in the Government of India Act, 1935 and in the Constitution such power was and is contemplated and it has been conferred in diverse Acts without a challenge before, shows amply that the argument that the section amounts to conferral of legislative powers on the Central Government is erroneous. All other cognate provisions have never been challenged on the ground that they amount to delegation of legislative power. We accordingly hold S. 37 to be validity enacted....

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

Our brethren have struck down Ss. 33, 34 and 37, but have upheld the other sections. We are, however, of opinion that if Parliament can legally, constitutionally, and validly order payment of bonus according to its formula, fix minimum bonus without profits, fix a ceiling in spite of high profits, evolve a principle of set-on and set-off and make disobedience subject to penalty, there is no reason why it cannot order decision of pending cases treated as a class, according to the new formula and

open up the intervening years of account for reconsideration. The power in S. 33 is of the same character as the other and no special competence is required; of course, in doing this, it should treat alike all establishments in which there is a pending dispute. This Parliament has done. Similarly, by S. 34 Parliament orders that a certain proportion between profits and allocable surplus shall be maintained. This exercise of the power is of the same character as the prescription that bonus shall be paid in this manner and no other. If the other action is legal, so is this, provided there is no discrimination. There is none in this class either. The power to remove difficulties reserved to Government is in hundreds of statutes. All Land Reform Acts, State Reorganization Acts, Industrial Disputes Acts, Encumbered Estates Acts, many taxation laws and such widely differing statutes as University Acts and Election Acts have it and the power of exemption is always included but is seldom abused. We have, therefore, respectfully dissented from their view.

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

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

ORDER

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

NOTE

The logic behind the provision for the rehabilitation was explained by the Supreme Court in M/s. Pierce Leslie and Company v. Their Workmen, A.I.R. 1960 S. C. 826, 829. The Court said: "Because the fixed capital[1] of any industry is the victim of gradual deterioration the prudent businessman creates reserves out of his profits so that as soon as any portion of the fixed capital has become too deteriorated for efficient working, it may be replaced. The economic welfare of the country as a whole no less than the interests of the businessman requires that the company's capital fund should remain intact. It is for this reason that an amount reasonably sufficient for the national requirement during the relevant year is deducted as a prior charge in as certaining surplus profits from which bonus can be paid."

QUESTIONS:

1. In what respects, and how, is the Full Bench formula modified by the Payment of Bonus Act?

2. Specifically, what changes does the Bonus Act make in the calculation of "available surplus"?

3. On the issues where the majority and minority of the Court differ, which arguments do you find most persuasive?

4. Frame imaginary cases which would require the Court to decide points which it left undecided. (Consider particularly Sections 32 and 36 of the Bonus Act and Article 19 of the Constitution).

5. Section 20 of the Bonus Act provides that any public-sector undertaking (not departmentally operated) shall come within the Act if 20% of its sales and services in any year compete with those of private-sector undertakings. If the Act once applies, it continues to apply. Consider the arguments for and against this provision, in the light of the views expressed by the Supreme Court in the *Hindustan Antibiotics* case above. What of public-sector undertakings, not thus competitive, which do pay

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1. Fixed capital is that part of the capital which consists in relatively durable goods used in production, which do not require to be changed in each period of Production. These include factories, warehouses, offices, shops and either buildings used in industry and trade, plant and machinery and equipment and means of transport and communication. *Benham, F., Economics* 137-38 (London, 1960). *Eds.*

bonus already? What problems of discrimination, if any, between workers in different public-sector undertakings are to be apprehended? See Report of the Bonus Commission 88-89 (1964).

TITAGHUR PAPER MILLS CO. v THEIR WORKMEN
A.I.R. 1959 S.C. 1095

[A dispute arose between the Company and its Workmen over the issue of profit bonus for the years 1945-46 and 1946-47. While that was under consideration by the Tribunal, in 1949, the Company initiated a scheme of production bonus[1]. The basis of the scheme was that the workmen would get 13 days' basic wage by way of bonus on a production of 30,000 tons. Over and above that they would get an additional day's basic wage for every 460 tons produced, up to a maximum of 36,000 tons when the production bonus would come to 26 days' basic wage (which would be equivalent to one month's basic wage including weekly holidays). The Tribunal, while dealing with the issue of profit bonus, accepted the production bonus scheme.

In 1953 the workmen in two mills raised disputes claiming profit bonus of 1950-51 and 1951-52, and also praying for a revision of the production bonus scheme. These disputes were referred to a Tribunal which rejected the worker's demands. On appeal, the Labour Appellate Tribunal allowed the claim of profit bonus for one month's wage, and revised the production bonus for 1951-52. The appeal came by special leave to the Supreme Court. Excerpts from the judgment, delivered by Wanchoo J., follow:]

The payment of production bonus depends upon production and is in addition to wages. In effect, it is an incentive to higher production and is in the nature of an incentive wage. There are various plans prevalent in other countries for this purpose known as Incentive Wage Plans worked

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1. Bonus may be conceived as profit sharing as well as incentive for higher production. Incentives have taken varioss forms of payment according to results, *e.g.,* (i) bonus based on standard time, (ii) task bonus, (iii) point-rating, (iv) differential price and (v) progressive bonus systems. The names will give some idea of the complexities. For details see Dobb, M.H., *Methods of Wage Payment.* in *Singh, V. B. (Ed.), Industrial Labour in India,* (Bombay, 1963). Many incentive plans are based not on the production of each separate worker but on the production of groups or teams of workers. *Eds.*

out on various bases, for example, Halsey Premium Plan, Bedaux Point Premium Plan, Haynes Manit System and Emerson Efficiency Bonus Plan; (see Labour Law by Smith, Second Edition, p. 723). The simplest of such plans is the straight piece-rate plan where payment is made according to each piece produced, subject in some cases to a guaranteed minimum wage for so many hours' work. But the straight piece-rate system cannot work where the finished product is the result of the co-operative effort of a large number of workers each doing a small part which contributes to the result. In such cases, production bonus by tonnage produced, as in this case, is given. There is a base or standard above which extra payment is made for extra production in addition to the basic wage. Such a plan typically guarantees time wage up to the time represented by standard performance and gives workers a share in the savings represented by superior performance. But whatever may be the nature of the plan the payment in effect is an extra emolument for extra effort put in by workmen over the standard that may be fixed. That is the reason why all these plans are known as Incentive Wage Plans and generally speaking have little to do with profits. The extra payment depends not on extra profits but on extra production. This extra payment calculated on the basis of extra production is in a case like the present where the payment is made after the annual production is known, in the nature of emoluments paid at the end of the year. Therefore, generally speaking, payment of production bonus is nothing more nor less than a payment of further emoluments depending upon production as an incentive to the workmen to put in more than the standard performance. Production bonus in this case also is of this nature and is nothing more than additional emolument paid as an incentive for higher production....

The scheme is headed "Tonnage Production Bonus Scheme" and not a scheme for profit bonus based on the Full Bench formula. It is true that this nomenclature is not decisive but is nevertheless a factor which may properly be taken into consideration. The primary and basic object of the scheme, as given in cl. (2), is to stimulate the interests and endeavours of the clerks and workers of the company in increasing the production of saleable paper and to ensure that the workers will get by way of incentive an increased return for their labour contributing to the benefits which would accrue from such increased productivity. This again shows that this is a production bonus scheme and nothing else. Then comes cl. (4), which lays down that up to a minimum of 30,000 tons the bonus would be 13 days' basic wage; thereafter there is increase of one day's basic wage for every 460 tons, till the figure of 26 days' basic wage is reached for a total production of 36,000 tons. Here again there is no

connection between profits and bonus that accrue under this clause. If, for example, production falls below the minimum of 30,000 tons, there will be no bonus at all under the scheme whatever may be the profits. This one circumstance clearly brings out the true nature of this scheme, namely, that it is a scheme of production bonus and not of profit bonus under the Full Bench formula. That formula had nothing to do with production. Bonus under that formula depended entirely on the available surplus of profits worked out in the manner provided therein. Then we come to clause (14). That clause lays down that the scheme will be subject to one most important general exception, namely, that the profit earning capacity of the company, irrespective of the volume of production of saleable paper, remains satisfactory during the financial year. Accordingly the clause prescribes that the directors may at their sole discretion either cancel altogether or reduce in scale of monetary payments the bonus in any one or more financial years in which the gross profit earned by the company over the whole financial year is not sufficient to meet fixed dividends and interest, depreciation charges and taxation and thereafter pay for the whole year dividend not less than 10 per cent, to the ordinary share-holders of the company. It is said that this makes the scheme a Profit Bonus Scheme. We are unable to agree with this contention. It is true that the scale of payment is likely to go down or there may even be no payment of bonus at all in the circumstances mentioned in cl. (14). But the circumstances mentioned there are admittedly not the same which have to be taken into account in arriving at the available surplus according to the Full Bench formula. Clause (14) appears to us to be just one condition upon which the payment of production bonus would depend, like some other clauses in the scheme. For example, cl. (5) seems to provide that workers who work for less than half the total number of working days in the financial year for which bonus is being paid, shall not get any bonus, for it only makes these workers who work for more than half the total number of working days, worked out according to other rules, entitled to bonus. Clause (6) says that certain kinds of workers will not be entitled to bonus, namely, Bungalow servants, Budli clerks or workers, temporary clerks or workers, casual workers or clerks. It also provides that any person guilty of any major misdemeanour may at the sole discretion of the Mill Manager or the Cost Accountant not be given this bonus either in part or in whole as a punishment, and that this would be done after taking proceedings in writing for the purpose. Clause (7) provides another condition as to what service will count towards earning bonus and what will not; for example, leave on full or part pay shall count as bonus service while leave without pay will not count as qualifying service towards bonus. Again cl. (8) lays down that a worker will be en-

titled to the maximum bonus if he works for all the working days during the financial year, for which the bonus is declared. Clause (9) then provides how the maximum bonus can be reduced, if a worker does not work for all the working days. Clause (14) therefore is also another clause which may either lead to no payment of bonus or less payment than prescribed under cl. (4). Further the fact that this is not a profit bonus scheme but a production bonus scheme will also be clear from what cl. (14) actually provides. It says that if the conditions mentioned in it are not fulfilled, the workers would not be entitled to bonus or may get less. This means that if the conditions are fulfilled, workers would be entitled to bonus. Now, suppose that the gross profit in a year is sufficient to meet fixed dividends and interest, depreciation charges and taxation and 10 per cent dividend to the ordinary shareholders. Thereafter the balance of profit left is only (let us say) Rs. 5. But as the conditions of cl. (14) are fulfilled, the workers would be entitled to production bonus, though the amount of Rs. 5 which remains, cannot possibly meet the claim of bonus. It is clear therefore that this bonus scheme is not the same as the profit bonus worked out under the Full Bench formula and it cannot be called a profit bonus scheme even otherwise. This is nothing more nor less than a pure production bonus scheme on tonnage, depending on certain conditions one of which is related to profit also. The nature of this bonus, therefore, in our opinion, is entirely different from the nature of profit bonus under the Full Bench formula and we do not see why if there is an available surplus of profits according to the Full Bench formula, the workmen should not get profit bonus in accordance with that formula. The two things, in our opinion, are different. Under the scheme what the workers get is a supplementary emolument worked out on certain basis. Under the Full Bench formula, what they get is something out of the profits, if there is an available surplus, on the ground that both capital and labour contribute to the accrual of profits and it is only fair that labour should get a part of it....

Appeals partly allowed.

NOTE

In Muir Mills Co. v. Their Workmen, A.I.R. 1960 S.C. 985, the Company, a textile Mill, employed in its carding department workmen doing various jobs, who were paid on a piece-rate basis. In addition, they were entitled to (i) further emoluments if production exceeded a certain norm, and also (ii) some extra payments if the production on any day was more than usual. The Tribunal treated (i) as a production bonus and (ii) some

extra payments if the production on any day was more than usual. The Tribunal treated (i) as a production bonus and (ii) as an incentive bonus[1]. It held the right to receive both to be parts of the terms of service of these workmen. With effect from January 1948 the Company introduced higher piece-rate wages to the workers and stopped payment of the production as well as the incentive bonus. The question arose whether production bonus was a part of the basic wages. The adjudicator held that because of the non-payment of production and incentive bonus the wages of the workmen were actually reduced. It, therefore, directed the management to restore those bonuses. The Appellate Tribunal agreed. The Management moved the Supreme Court in appeal.

The Supreme Court observed that the phrase "basic wages" mean that part of the price of labour which the employer must pay to all workmen belonging to all categories, and that it was used in marked contradiction to dearness allowance, the quantum of which varies from time to time, in accordance with the rise or fall in the cost of living. The Court said,

"Thus understood 'basic wage' never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earnings in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation excludes this part of workmen's emoluments from the connotation of 'basic wages'...."

"The appeal is accordingly dismissed with costs."

ISPAHANI LTD. v ISPAHANI EMPLOYEES' UNION
A.I.R. 1959 S.C. 1147

[The Company, doing business in Calcutta, used to pay puja bonus to its employees at the rate of one month's wages for each year from 1948 through 1952. A predecessor company, which moved to East Pakistan in 1947, had paid puja bonus from 1934 onwards. In 1953 no puja bonus

1. "Incentive Bonus" is a system of bonuses whereby the bonus for additional output gets greater the higher the output rate above a certain norm or standard." See note 17 above, *Dobb, M. H., Methods of Wage Payment, in Singh, V. B. (Ed.), Industrial Labour in India,* (Bombay, 1963).

was paid by the Company; and the workmen raised a dispute. The Industrial Tribunal held that it had not been established that puja bonus had been paid at a uniform rate of one month's wages for a sufficiently long time and for an unbroken period. It, therefore, rejected the claim for puja bonus for 1953. On appeal the Labour Appellate Tribunal held that the puja bonus had become a term of employment and that the workmen were entitled to it. The Company appealed to the Supreme Court, by special leave. Excerpts from the judgment, delivered by Wanchoo, J., follow:]

Puja is a special festival in Bengal and it has become usual with many firms there to give bonus before puja to their workmen. This matter came up before the Appellate Tribunal in *Mahalaxmi Cotton Mills Ltd., Calcutta* v.*Mahalaxmi Cotton Mills Workers' Union*, 1952 Lab AC 370 (LATI). In that case puja bonus was claimed as a matter of right, pay- (LATI). In that case puja bonus was claimed as a matter of right, payable by the employer at a special season of the year, namely at the time of the annual Durga Puja. This right was not based on the general principle that labour and capital should share the surplus profits available after meeting prior charges. It was held in that case that this right rested on an agreement between the employer and the employees, and that the agreement might be either express or implied. Where the agreement was not express, circumstances might lead the tribunal to an inference of implied agreement. The following circumstances were laid down in that case as material for inferring an implied agreement:

(1) The payment must be unbroken;

(2) It must be for a sufficiently long period; and

(3) The circumstances in which payment was made should be such as to exclude that it was paid out of bounty.

The Appellate Tribunal further pointed out that it was not possible to lay down in terms what should be the length of period to justify the inference of implied agreement and that that would depend upon the circumstances of each case. It also pointed out that the fact of payment in a year of loss would be an important factor in excluding the hypothesis that the payment was out of bounty and in coming to the conclusion that it was a matter of obligation based on implied agreement. As to the quantum of bonus it was laid down that even if payment was not at a uniform rate throughout the period, the implied agreement to pay something could be

inferred and it would be for the tribunal to decide what was the reasonable amount to be paid as puja bonus. The tests laid down in that case have since been followed in a number of cases by the Industrial Tribunals and the Labour Appellate Tribunal. We do not think it necessary to refer to all those cases. It may now be taken as well settled that puja bonus in Bengal stands on a different footing from the profit bonus based on the Full Bench formula evolved in *Mill Owners' Association, Bombay* v. *Rashtriya Mill Mazdoor Sangh, Bombay,* 1950-2 Lab LJ 1247 (FB) (LATI-Bom.). The claim for puja bonus in Bengal is based on either of two grounds. It may either be a matter of implied agreement between employers and employees creating a term of employment for payment of puja bonus, or (secondly) even though no implied agreement can be inferred it may be payable as a customary bonus. In the present case we are concerned with the first category, (namely, that based on an implied agreement creating a term of employment between the employer and the employees) and so we shall confine ourselves to that category. It was this kind of bonus which was considered by the Appellate Tribunal in *Mahalaxmi Cotton Mills* Case, 1952 Lab AC 370 (LATI). We are of opinion that the tests laid down in that case for inferring that there was an implied agreement for the grant of such a bonus are correct and it is necessary that they should all be satisfied before bonus of this type can be granted....

[1] It was found that it [The Company] had been paying bonus ever since it came into existence from 1948 right up to 1952 without any break at the rate of one month's wages and that this bonus was paid even in the years in which the company suffered loss. In the circumstances, it was established in this case that (1) the payment was unbroken and (2) it was not paid out of bounty due to profits having arisen, for it was paid in some years of loss also. The only other question that remains is whether it had been paid for a sufficiently long period... to justify the inference that it was an implied term of employment. The length of the period depends on the circumstances of each case and what may be a short period not justifying an inference of an implied term of employment in one case may belong enough in another. In the present case, since the appellant has paid the bonus continuously since its birth, we agree with the Appellate Tribunal that the circumstances justify the inference of an implied term of employment for payment of puja bonus at the rates of one month's wage every year. The appeal of the company must therefore fail.

M/s. TULSI DAS KHIMJI v THE WORKMEN
A.I.R. 1963 S.C. 1007

[The Company paid to its workmen bonus at a uniform rate of one month's wages plus dearness allowance on the occasion of Deepawali festival for more than fifteen years from 1940-41 through 1956-57. The Tribunal held it to be a traditional or customary bonus which must be paid for 1957-58 (although the Union also claimed a profit bonus). By special leave the Company appealed to the Supreme Court. Excerpts from the judgment, delivered by Sinha, C.J., follow:]

[I]t has been contended that according to the judgments of his Court, in order to establish the claim for a bonus of this kind, four conditions must be fulfilled, namely, (1) that the payment has been made over an unbroken series of years; (2) that it has been so made for a sufficiently long period; (3) that the payment has been made at a uniform rate throughout; and (4) lastly, that it has been paid even in years of loss, and did not depend upon the earning of profits. It has been found by the Tribunal that the first three conditions, if they can be so called, have been fulfilled, but that the last one has not been established and could not be established because the firm was singularly fortunate in having an unbroken record of profits, year after year. It was vehemently argued on behalf of the appellants that as this last condition had not been fulfilled, the Tribunal was not justified in law in coming to the conclusion that the claim of traditional or customary bonus at the rate indicated above had been established. In our opinion, this contention is not acceptable for several reasons. Firstly, the four so-called conditions are not really in the nature of conditions precedent but are circumstances which have been taken into account by this Court in, 1960-I SCR 107: (AIR 1959 SC 1151), for coming to a conclusion as to whether or not a claim to customary or traditional bonus had been made out. In the case just referred to, this Court pointed out that the Tribunal had to consider those four circumstances. That those are circumstances, and not conditions precedent, is shown by the fact that this Court has pointed out that the length of the period will depend upon the circumstances of each case. A condition precedent, as such, has to be more definite than one which depends upon the circumstances of each case. Secondly, there is no rational ground for holding that payment, even when there are losses, is a condition precedent because, as has happened in this case, a company or a firm may have unbroken record of profits ever since it started working. Hence, if it were to be held a condition precedent, payment of bonus satisfying the three conditions aforesaid but not this

one, for however long a period, would have to be held as insufficient to establish the claim for this kind of bonus. Between profits and loss in a particular year, there may be a very small gap. The loss may be of one rupee; and similarly profits may be equally nominal. The third alternative, which may be supposed, is neither loss nor profit. According to the appellants' contention, the case for such a bonus is made out in the first supposition of a nominal loss, but not of the second or the third alternatives. The law cannot be founded on such unsubstantial considerations. The question in such cases is always one of substance, and not of form. We cannot, therefore, accept the submission that loss substantial or otherwise is a *sine qua non*. The observations of this Court in the decisions referred to above must be understood as based on considerations of substance and not of form. Such a bonus has reference to a special occasion like a festival; for example, the Pujas in Bengal and the Dewali in Western India—occasions which are generally utilised by employers to reward the services of their employees. Hence, in our opinion, what is more important to negative a plea for customary bonus would be proof that it was made *ex gratia*, and accepted as such, or that it was unconnected with any such occasion as a festival, as laid down by this Court in the case of *B. N. Elias and Co. Ltd. Employees' Union* v. *B. N. Elias and Co. Ltd.*, 1960-I SCR 382: (AIR 1960 SC 886). In our opinion, therefore, the Tribunal was fully justified in finding that the traditional or customary bonus had been established in this case, notwithstanding that it had not been shown, as it could not have been shown, that it was paid in a year of loss.

NOTE

In Management of Bombay Co. v The Workmen of Bombay Co., A.I.R. 1964 S.C. 1770, the workmen demanded bonus on two grounds, firstly on the basis of profits earned by the Company and secondly on the ground that payment of some bonus at Christmas had become an implied condition of service. The Tribunal held that no profit bonus was payable because the Company had not earned a profit; but that a Festival bonus of one and a half month's wage was payable as an implied condition of service. The Company, by special leave, appealed. The Supreme Court said. "[W]e are of opinion that the tribunal was not right in holding that there could be an implied condition of service as to payment of bonus unconnected with any festival... [W]here the payment is connected with a festival it is possible to infer that there is an implied condition to pay something at the time of the festival, even though the evidence discloses that in previous years payment has not been made at

a uniform rate. But it is difficult to see how the principle which applies to a case of payment at the time of a festival can be extended [so as] to infer an implied term of payment where the payment has been made entirely unconnected with any festival and at rates which have varied from year to year. We are therefore of opinion that when this Court laid down that there was an implied condition of service to pay something about the time of puja festival in *Ispahani's Case,* (1960) I SCR 24; (AIR 1959 SC 1147) it was clear that such implied condition of service could be inferred where the rate of payment was not uniform only when such payment was obviously connected with some festival. In the present case also, the payment has not been uniform over the years and therefore before an implied term of service to pay bonus can be inferred it must be shown that the payment was connected with some festival. . . ." The Court denied the festival bonus because it was "not connected with any festival" and had not been uniformly paid.

D. GRATUITY

INDIAN HUME PIPE CO., LTD. v ITS WORKMEN
Supreme Court, (1959) II L.L.J. 830

[The workmen of the Company raised an industrial dispute in regard to their claims of scale of pay, dearness allowance, provident fund, and gratuity. The dispute was referred to adjudication. The award of the adjudicator provided for a scheme of gratuity, besides other benefits. But neither the employers nor the employees were satisfied with the award. The employees wanted a revision of the whole scheme of gratuity. The Company opposed the scheme on the ground that it was not necessary because the workmen were already entitled to receive retrenchment compensation under S. 25F. The Tribunal held that the workmen were entitled to claim both gratuity and retrenchment compensation. The Labour Appellate Tribunal confirmed the order of the Tribunal. The Company then appealed, by special leave, to the Supreme Court. Excerpts from the judgment, delivered by Gajendragadkar, J., follow:]

Gratuity is a kind of retirement benefit like the provident fund or pension. At one time it was treated as payment gratuitously made by the employer to his employee at his pleasure, but as a result of a long series of decisions of industrial tribunals gratuity has now come to be regarded as a legitimate claim which workmen can make and which, in a proper