

PETITIONER:
MANAGEMENT OF SHRI CHALTHAN VIBHAG KHAN UDYOG SAHAKARIMANDAL

Vs.

RESPONDENT:
B.S. BAROT MEMBER, INDUSTRIAL COURT, GUJARAT, AND ANR. ETC.

DATE OF JUDGMENT 04/09/1979

BENCH:
KAILASAM, P.S.
BENCH:
KAILASAM, P.S.
FAZALALI, SYED MURTAZA
SEN, A.P. (J)

CITATION:
1980 AIR 31 1980 SCR (1) 509
1979 SCC (4) 622
CITATOR INFO :
D 1981 SC 905 (4)

ACT:
Labour law-Dearness allowance to workers-Its nature-If could be given at 125% of increase in the cost of living-Depreciation, if should be a first charge in arriving at the capacity of the industry to pay wages.

HEADNOTE:

The respondent workmen who were employees of Sugar mills in the State of Gujarat demanded grant of dearness allowance, among certain other benefits, on the basis of revised scales for sugar factories in Uttar Pradesh. The Industrial Court, Gujarat increased the dearness allowance on a graded scale spread over three years.

On appeal the High Court set aside the award by the Industrial Court in respect of phasing but confirmed the award in regard to dearness allowance and directed that the U.P. pattern should be given full effect with retrospective effect from the date mentioned in the award.

The employers questioned the correctness of the High Court's judgment on the ground that (1) grant of neutralization of variable dearness allowance at 125% is far in excess of what is permissible under the industrial law and (2) the High Court failed to take into account depreciation in arriving at the financial capacity of the industries while fixing the wage structure.

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HELD: 1. (a) Variable dearness allowance cannot be more than 100% neutralization. [517D]

(b) The purpose of dearness allowance is to neutralise a portion of the increase in the cost of living due to rise in prices. Neutralization may be such as to neutralize fully the increase in the cost of living or may be restricted to only a portion of the increase. Cent percent neutralization can be achieved if the increase in the cost of living is fully compensated so that the pay of the workers is not adversely affected. But an award of more than 100% of increase in the cost of living would be more than neutralization and would in effect give the worker an increased wage. The result would be that the worker would be

getting an increased wage packet whenever there is a price rise, a result which would not have been envisaged in making provision for grant of dearness allowance. [516D-G]

Clerks of Calcutta Tramways v. Calcutta Tramways Co. Ltd., [1956] S.C.R. 772, Kamani Metals and Alloys Ltd. v. Their Workmen [1967] 2 S.C.R. 463, Bengal Chemical and Pharmaceutical Works Ltd. v. Its Workmen, A.I.R. 1969 S.C. 360, Silk & Art Silk Mills Association Ltd. v. Mill Mazdoor Sabha, [1973] 1 S.C.R. 277 and Killick Nixon Ltd. v. Killick

JUDGMENT:
followed.

510

(c) It is not correct to say that neutralization of more than 100% dearness allowance is based on the seasonal nature of employment in the industry. The retention allowance provided to seasonal workers in sugar industry is to mitigate the hardship of unemployment during the off season. [517A-B]

2. (a) Section 66(1) of the Gujarat Cooperative Societies Act 1961 requires that taxes and depreciation should be deducted from gross profits for arriving at net profit. That does not mean that wages and dearness allowance could only be determined after the net profits are arrived at. The sub-section itself provides that contributions towards provident fund and gratuity even of its employees should all be deducted from the gross profits for arriving at the net profits. The provision for deducting depreciation occurs after providing for contribution towards provident fund and gratuity. The determination of the net profits under the section is for different purpose, namely, for appropriation of the net profit as provided for in the Act and does not in any way support the contention of the appellant. [518E-F]

(b) It is settled law that in fixing fair wages or dearness allowance or making contribution to provident fund or providing for gratuity the financial capacity of the industry to bear the additional burden will have to be taken into account. On principle of social justice with the development of industrial law it has now been accepted that when the industry can bear the burden, provision should be made for provident fund and gratuity schemes. In determining the financial capacity of an industry all relevant facts will have to be taken into account. The principles followed in arriving at the profit and loss account for income-tax and other purposes may not be conclusive. The claim of the employer to a reasonable profit, that of the shareholders for a fair dividend the interest of consumer and other relevant factors and circumstances will have to be taken into account. It is necessary to take into account all the facts and circumstances relating to the industry for determining the financial capacity of the industry to pay. [519-G]

Ahmedabad Mills owners' Association etc. v. The Textile Labour Association, [1966] 1 S.C.R. 382, Gramophone Company Ltd. v. Its Workmen, [1964] 2 LL.J. 131, Indian Link Chain Manufacturers Ltd. v. Their Workmen, [1972] 1 S.C.R. 790 and Bharatkhand Textile Mfg. Co. Ltd. and ors. v. The Textile Labour Association, Ahmedabad, [1960] 3 S.C.R. 329; followed.

(c) The facts that have to be taken into account in determining an overall picture of the financial capacity are the financial condition of the employer his profit making capacity, the profits earned by him in the past, extent of the reserves and the chances of his replenishing them as well as the claim for capital invested by him. [521F-G]

Hindustan Antibiotics Ltd. v. The Workmen and ors., [1967] 1 S.C.R. 652. referred to.

(d) An employer claiming depreciation allowance is only entitled to the actual or probable depreciation of the machinery etc. for the period due to wear and tear. The depreciation cannot be computed on an actuarial basis or on the profit and loss account furnished by the company. In the instant cases, the accounting was for the purpose of minimising the profits to deprive are

511

workers their due. Such depreciation cannot be allowed. If the inflated figures are left out of account the industry has the capacity to bear the additional burden. [524A-B, E]

(e) Even though the wages were fixed on industry-cum-region basis it is open to industry to plead that it has not the financial capacity to bear the increased burden. When such a plea is specifically raised, it is the duty of the industrial court to determine whether the increased burden could be borne by the particular industry. [525 F-G]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 146/78.

Appeal by Special Leave from the Award dated 22-2-77 of the Industrial Court, Gujarat in Ref. I.C. No. 53/75.

AND

CIVIL APPEAL NOS. 322-324 OF 1979.

Appeals by special leave from the Order dated 18-10-1978 of the Gujarat High Court in SCA No. 1036/77.

AND

SPECIAL LEAVE PETITION (CIVIL) NO. 2939/79.

From the Judgment and Order dated 30-1-1979 of the Gujarat High Court in SCA No. 311/78.

Dr. Anand Prakash, Laxmi Anand Prakash, Arun B. Desai and H. K. Puri for the Appellant in CA 146/78 and 323/79.

F. S. Nariman, H. K. Puri, Arun B. Desai and Mrs. Laxmi Anand for the Appellants in CA 322/79.

A. K. Sen, Arun B. Desai, V. K. Behl, H. K. Puri and Mrs. Laxmi Anand for the Appellant in CA 324/79.

M. K. Ramamurthy and Promod Swarup for the Respondents in C.A. 146/78 and C.A. 322/79.

S. S. Khanduja and Miss Kusum Chowdhry for the Respondent in C.A. 146/78 and 323-324/79.

J. G. Shah (CA 322) M. K. Ramamurthi (SLP. 2939 and CA 322) and A. K. Srivastava and Vineet Kumar for the Respondents in C.A. 322 and for the Petitioner in SLP. 2939/79.

The Judgment of the Court was delivered by

KAILASAM, J. All these appeals and special leave petition are by the management of five cooperative sugar factories in Gujarat State. The demand of the workmen of the factories in Gujarat was for pay-

512

ment of the U.P. Government revised scales for sugar factories in U.P. regarding pay, dearness allowance and other benefits.

The second Wage Board for the sugar industry gave its report in 1970. The Wage Board's report was due to expire on 31st October, 1974. The Government of U.P. on 31st October, 1974, issued the U.P. Pattern Scales of Wages and Dearness Allowance for workmen employed in all sugar factories working by vacuum Pan Manufacturing Process. The Labour Minister gave the award and as a result of that award, an order was passed under section 3 sub-clause (b) of the U.P.

Industrial Disputes Act, 1947. This order relating to U.P. Pattern of Pay, Graduated Dearness Allowance, Variable Dearness Allowance came into force from 31st October, 1974 and effect was to be given to these pay-scales and dearness allowance from 1st October, 1974. As the sugar factories were seasonal factories a retention allowance for unskilled seasonal workmen for off-season at the rate of 10% of the basic wage and dearness allowance payable during the crushing year 1974-75 was also provided for. The demand put forward by the workmen in all these appeals is for payment according to the U.P. Pattern.

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

513

onwards. Regarding demand No. 7 relating to retaining allowance to be paid to the unskilled seasonal employees at the rate of 10 per cent of the basic wage and dearness allowance payable during the crushing season 1974-75 and for subsequent years, the Court found that the demand was justified. The Court gave a retention allowance of 10%, as demanded, of the basic wage and dearness allowance payable during the crushing season 1974-75 and also for the three subsequent years.

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

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

1977 are dismissed."

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

The judgment of the High Court is assailed on the following grounds:-

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

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

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

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

recommended that 95% neutralisation

515

should be granted against rise in cost of living to those drawing minimum wage in non-scheduled employments.

In a series of decisions, this Court has expressed the same view. It has been held that cent per cent neutralisation cannot be allowed as it would lead to a vicious circle and add to the inflationary spiral. It was observed that there was no reason why the industrial worker should not make sacrifices like all other citizens. In *Clerks of Calcutta Tramways v. Calcutta Tramways Co. Ltd*(1) this Court said "We can now take it as settled that in matters of the grant of dearness allowance except to the very lowest class of manual labourers whose income is just sufficient to keep body and soul together, it is impolitic and unwise to neutralise the entire rise in the cost of living by dearness allowance. More so in the case of the middle classes". The same view was expressed in the *Hindustan Motors' (2)* case and was reaffirmed in *Hindustan Times Ltd. New Delhi v. Their Workmen*, (3) where it was observed that the whole purpose of dearness allowance being to neutralise a portion of the increase in the cost of living it should ordinarily be on a sliding scale and provide for an increase on rise in the cost of living and a decrease on a fall in the cost of living. In *Kamani Metals and Alloys Ltd. v. Their Workmen*, (4) it was held that 100% neutralisation is not advisable as it will lead to inflation and therefore dearness allowance is often a little less than one-hundred per cent neutralisation. In *Silk & Art Silk Mills Association Ltd. v. Mill Mazdoor Sabha* (6) it was laid down that in considering a claim for dearness allowance or revision of dearness allowance amongst other factors it should be borne in mind (1) Full neutralisation is not normally given, except to the very lowest class of employees; (2) The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, * should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living. In *Silk & Art Silk Mills Association Ltd. v. Mill Mazdoor Sabha* (6) a grant by the Industrial Tribunal of 99% neutralisation of increase in the cost of living was confirmed as the workmen cannot be denied their subsistence wage at its real level because some other comparable concern is paying at a lower rate. In *Killick Nixon Ltd. v. Killick &*

516

Allied Companies Employees Union (1) this Court after approving the propositions laid down in *Bengal Chemical case* (supra) proceeded to state at p. 467: "There is, however, one thing which we must point out lest there should be some misconception about it and that is that so far as the lowest paid employees at or just above the subsistence level are concerned, they are entitled to 100% or at any rate not less than 95% neutralisation of the rise in the cost of living and hence there should be no ceiling on dearness allowance payable to employees within the slab of first Rs. 100, unless it can be shown by the management that the rate of neutralisation in their case is more than 100 per cent. The decision is authority for the proposition that the rate of neutralisation cannot be more than 100% even in the case of lowest paid employees. The proposition laid down in the decision cited above were reiterated and followed in *Shivraj Fine Art Litho Works v. State Industrial Court, Nagpur & Ors.* (2)

The law is thus clear that dearness allowance is

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

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

Mr. M. K. Ramamurthi learned counsel for the respondents submitted that the permissible limit of 100% neutralisation is not applicable to cases where persons are seasonally employed. The learned counsel pointed out that the sugar industry does not function for the whole year and for months it is closed and the workers are left without employment during the off-season. In order to give some relief to such sea-

517
sonal workers he submitted, that the award of equalisation of more than 100% is justified. This plea cannot be accepted for the award of equalisation of more than 100% in these cases is not based on seasonal employment. To mitigate the hardship of unemployment during the off-season a retention allowance has been provided for the seasonal workers. The plea that the neutralisation of more than 100% is based on seasonal employment was not taken in the pleadings or raised before the courts below.

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

The second contention raised on behalf of the appellants is that in fixing fair wages and dearness allowance financial capacity of the cooperative societies should be arrived after taking into account the depreciation. Mr. Nariman the learned counsel submitted that in order to keep an industry running it is necessary to make provision for depreciation as otherwise when the machinery gets worn out the industry would grind to a halt. The learned counsel submitted that though there are certain observations by this Court in Unichem Laboratories Ltd. v. The Workmen(1), and Indian Link Chain Manufacturers Ltd. v.

Workmen, (2) that depreciation could not be taken into account in fixing the gross profits, they do not rule out taking into account the depreciation in all cases in determining the financial capacity of the Industry to bear the increased burden.

Before considering the decisions which bear on the question we will refer to the plea of the appellants that financial capacity of sugar industry functioning under the Cooperative Societies Act should only be decided according to the provisions of s. 66 of the Gujarat Co-

518

operative Societies Act, 1961, Act X of 1962. Section 66(1) runs as follows:-

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

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

In deciding the financial capacity of an industry this Court has laid down in Ahmedabad Mills Owners' Association etc. v. The Textile Labour Association, (1) that "Industrial adjudication must take into account the problem of additional burden which such wage structure would impose upon the employer and consider whether the employer can reasonably be called upon to bear such burden. It is a long-range plan and in dealing with the problem, which is difficult and delicate the financial position of the employer and the future prospects of the industry and the additional burden which may be imposed on the consumer must be carefully examined." This Court after referring to the Reserve Bank Bulletin about the financial position of the industry

519

and about cotton textile industry and other authorities on determining the financial capacity of an industry observed that "industrial adjudication cannot lean too heavily on such single-purpose statements or adopt any one of the tests

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

The wages due to a worker are in the nature of expenses just like payment for raw materials. In this sense the wages are expenses which have to be met whether the company works, makes a profit or not. So far as the minimum wages due to a worker are concerned, the law requires that they should be paid first and if the industry cannot pay them it may as well close. The payment of dearness allowance as prescribed under the Minimum Wages Act should also be provided for in any event. It is settled law that in fixing fair wages or dearness allowance or for making contribution to provident fund or providing for gratuity the financial capacity of the industry to bear the additional burden will have to be taken into account. On principle of social justice with the development of industrial law it has now been accepted that when the industry can bear the burden provision should be made for provident fund and gratuity scheme. In determining the financial capacity of an industry all relevant facts will have to be taken into account. The principles followed in arriving at the profit and loss account for income-tax and other purposes may not be conclusive. The claim of the employer to a reasonable profit, that of the shareholders for a fair dividend and the interest of consumer and other relevant factors and circumstances will have to be taken into account. It is necessary to take into account all the facts and circumstances relating to the industry for determining the financial capacity of the industry to pay.

We will now proceed to refer in detail to the three decisions of this Court which are relied on as authority for the proposition that depreciation should not be taken into account in fixing the wage structure. In *Gramophone Company Ltd. v. Its Workmen*(1) this Court had to

520
examine the financial capacity of the employer for determining whether the industry could bear the burden of a gratuity scheme. The court found on examination of the financial position of the company that the profits that were made by the company were Rs. 7.6 lakhs in 1956-57, Rs. 7.2 lakhs in 1957-58, Rs. 1.6 lakhs in 1958-59, Rs. 1.49 lakhs in 1959-60 and Rs. 6.04 lakhs in 1960-61. On behalf of the company it was submitted that the introduction of the gratuity scheme would throw a great burden on the industry involving an initial fund of Rs. 33 or 34 lakhs and that if provision is made for income-tax payable and development rebate it will be seen that the company is running at a loss. The Court found that the financial position of the industry showed that the burden of payment of gratuity and provident fund can be made without undue strain on the financial position of the employer. The court observed that the introduction of a gratuity scheme will not require an initial fund of Rs. 33 or 34 lakhs but only involve an additional burden of Rs. 1.5 lakhs at the most. Though the introduction of the gratuity scheme may involve an expenditure of Rs. 1.50 lakhs a year the actual burden will be Rs. 60,000 as there will be a reduction of the income-tax

payable by about 63%. Regarding the plea of the company that if the amounts due to income-tax and development rebate are taken out, it would show that the company has suffered a loss, the Court observed that the provisions for income-tax and reserves must take a second place as compared to provisions for a wage structure. In declining to accept the contention that provision for taxation and reserves should have precedence, the Court proceeded to base its decision on the finding that the financial capacity of the industry was such that it could bear the burden. This Court held that if the industry is in a stable condition and the burden of provident fund and gratuity does not result in loss to the employer that burden will have to be borne by the employer like the burden of wage-structure in the interest of social justice.

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

521

The second decision is *Indian Link Chain Manufacturers Ltd. v. Their Workmen*. (1) The question arose whether in the matter of determining surplus the Tribunal was justified in taking the figures of depreciation allowance and development rebate from the balance sheet and not from the income-tax assessment orders in which the figures were higher and whether for determining the return on reserves the figures at the end of the year or the beginning of the year had to be taken. It was held by this Court that there was no justification for the rejection of the company's claim for depreciation and development rebate and the same be allowed as per income-tax assessment. The Court allowed depreciation allowance and development rebate. In determining the financial position of the company the court observed that it would not be appropriate to approach its capacity to bear the burden from an investors point of view. The over-all picture of the soundness of the undertaking and its future prospects must be taken into account.* The Court adopted the principles laid down in the *Bharatkhand Textile Mfg. Co. Ltd. & Ors. v. The Textile Labour Association, Ahmedabad* (2) which are as follows:-

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

Thus the facts that have to be taken into account in determining an overall picture of the financial capacity are the financial condition of the employer his profit making

capacity the profits earned by him in the past, the extent of his reserves and the chances of his replenishing them as well as the claim for capital invested by him. After referring to the decision in the Hindustan Antibiotics Ltd. v. The Workmen & Ors., (3) at p. 809 the Court made the following observations:-

"It is pertinent to notice that gratuity and wages in industrial adjudication are placed on the same footing and have priority over Income-tax and other reserves, as such in consi-

522

dering the financial soundness of an undertaking for the purposes of introduction of a gratuity scheme the profits that must be taken into account are those computed prior to the deduction of depreciation and other reserves."

As already pointed out in Gramophone Company's case there is no reference to deduction of depreciation. In the case under consideration i.e. Indian Link Chain Ltd., the Court at p. 807 allowed the claim of the company for a deduction on account of depreciation and development rebate at Rs. 1,61,054 and Rs. 5,822 instead of Rs. 80,190 and Rs. 3,970. On the facts of the case it is found that the industry was in a position to bear the burden.

In Unichem Laboratories Ltd. v. The Workmen(1) it was found that the average gross profits of the company exceeded Rs. 40 lakhs and the additional financial burden by the revision of the wage structure was Rs. 5.55 lakhs. On the facts the court held that the Tribunal was justified in computing gross profits without deducting tax, depreciation and development rebate. The court accepted the plea on behalf of the company that the decision in Gramophone Company Ltd. had no occasion to consider whether depreciation reserve can be deducted or not.

Scrutinising the figures given at p. 581 of the Reports the Court found that the average net profit worked out to Rs. 13,84,691.00. The depreciation that was claimed was Rs. 5,44,918 for 1965-66, Rs. 5,55,035 for 1966-67, Rs. 7,84,824 for 1967-68, Rs. 11,11,775 for 1968-69 and Rs. 9,16,719 for 1969-70. On the facts the Court found that the company had the financial capacity. The inclusion or exclusion of the depreciation allowance would not have made any difference to the capacity of the industry to bear the additional burden. The decision may not be understood as laying down a principle of law that in no case the depreciation could be taken into account.

It may be remembered that in Bharatkhand Textile Mfg. Co. Ltd. (supra) the guidelines that were indicated were that in determining the capacity to pay by the industry the financial condition of the employer, his profit making capacity, the profits earned by him in the past, the extent of his reserves and the chances of his replenishing them as well as the claim for capital invested by him*. these and other material considerations may have to be borne in mind. Thus the extent of the reserves the chances of replenishing them as well as the claim for capital

523

invested by him and as observed in Ahmedabad Millowners' Association v. Textile Workers,(1) will have to be taken into account. The position of the industry should be examined in detail and the decision should be based on a broad view which emerges from a consideration of all relevant factors such as whether the employer can reasonably be called upon to bear the burden and whether the additional burden imposed on the consumer is justified would also have

to be carefully examined. As pointed out in the Ahmedabad Millowners Association case (supra) "It is a long-range plan and in dealing with the problem, which is difficult and delicate the financial position of the employer and the future prospects of the industry and the additional burden which may be imposed on the consumer must be carefully examined."

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

524

An employer claiming depreciation allowance is only entitled to the actual or probable depreciation of the machinery, tools etc. for the period due to wear and tear. The depreciation cannot be computed on any notional basis or on the profit and loss account furnished by the company. In the cases before use the management has claimed by way of depreciation the cost of purchase of machinery for expansion of the manufacturing plant. In the matter relating to Chalthan Sugar Mills in the profit and loss account for the year ending June 30, 1975 Rs. 1,07,56,523 is claimed by way of depreciation at the end of the year. The balance brought forward on this account from the previous year is Rs. 79,11,066. During the year, an amount of Rs. 28,45,457 is added. In the profit and loss account for the year ending June 30, 1977 the depreciation fund increased from Rs. 1,07,56,523 to Rs. 1,30,24,742. In the profit and loss account for the year ending June 30, 1977 an amount of Rs. 22,97,553 is added to the depreciation fund. The figures furnished by the other sugar factories follow the same pattern. During the course of arguments the appellants admitted that the amount shown as depreciation actually represented the cost of purchase of new machinery and balance for expansion of the manufacturing units. These

amounts relate to expansion of the industry and should be shown in the capital account and cannot be claimed as deduction due to depreciation. The accounting of the sugar factories concerned is for the purpose of minimising the profits and showing loss for the purpose of depriving the workers their due. Such depreciation cannot be allowed. But as pointed out by us the actual depreciation which should be deducted in the interest of the industry can be taken into account. In the cases before us if the inflated figures should be left out of account we feel that the industry has the capacity to bear the additional burden.

The High Court after referring to the decisions of this Court in Gramophone Co. and Indian Link Chain Manufacturers and the Shivraj Litho Works (supra) came to the conclusion that gross profits before allowance is made for depreciation has to be taken into account for the purpose of considering the paying capacity of the industry. The High Court added the amount of depreciation to the net profits as shown in the balance sheet and found that large profits were available as gross profits. The High Court was of the view that the position of the three factories in South Gujarat, namely Gandevi, Bardoli and Madhi is not at all gloomy so far as their financial prospects are concerned. The High Court found that though the price of sugarcane was fixed for delivery at the factory, it has paid the price to the growers ex-sugarcane field, thus bearing the charges for cutting sugarcane and for carrying it to the factory premises from the field. This payment was unjustified

525

and was intended for the benefit of the members of the cooperative society and resulted in showing of a 'Paper Loss'. We are unable to agree with the conclusion of the High Court that this payment is unjustified and is for the purpose of benefiting its own members. It is submitted on behalf of the factories that the sugar factories pay an extra amount to the growers to induce them to cultivate sugarcane for a profit and thereby preventing them from cultivating other crops and reducing the area under sugarcane cultivation. The finding of the High Court that this extra payment is to benefit the members of the society itself is also not borne out as there are members who are not growers of sugarcane. The benefits by way of giving fertilizers at a discount etc. will not profit members who are not growers. The High Court has not estimated the likely increase in profits due to increase in the price of sugar levy along with the increase in expenditure due to the revision of the wage structure which it has estimated at about Rs. 5 lakhs. Further as pointed out by us earlier the High Court erred in adding back the depreciation and other reserves without determining as to what extent such allowances are permissible on the facts of the case. For the reasons stated we feel that the financial capacity of the industry has not been determined in the manner in which it ought to have been done.

The wages are normally fixed on the basis of industry-cum-region. The U.P. Pattern was fixed by the Uttar Pradesh Government on an agreement between the parties under section 3(b) of the U.P. Industrial Disputes Act, 1947 (U.P. Act No. 18 of 1947). The order under sec. 3 (b) is provisional in character. Section 3 (d) provides for fixing the wages after proper adjudication. No such adjudication took place in U.P. after the passing of the order under sec. 3(b). Even though normally the wages are fixed on the industry-cum-region basis it is open to the industry to plead that it has not the financial capacity to bear the increased burden. When

such a plea is specifically raised it is the duty of the Industrial Court to determine whether the increased burden could be borne by the particular industry. The reason given by the Industrial Court and the High Court for following the U.P. Pattern is that it has been accepted by various sugar factories in the southern region and a neighbouring factory Kodinar Sugar Factory and hence there is no reason for not applying the same rates to the appellant factories. On behalf of the appellant it was pleaded that it is not admitted that all the sugar factories in the southern region have accepted the U.P. Pattern. It was submitted that the case of the Kodinar is different because it was established long time ago and is a flourishing concern.

526

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

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

N.K.A

Appeals allowed partly.

527