
(1971) 07 BOM CK 0006

In the Bombay High Court

Case No : Special Civil Application No. 1530 of 1968

All India Voltas and Volkart Employees" Federation

APPELLANT

Vs

Voltas Ltd. and Another

RESPONDENT

Date of Decision : 23-07-1971

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(2)

Payment of Bonus Act, 1965 — Section 12, 2(12), 2(13), 2(21), 4

Citation : (1972) 1 LLJ 326

Hon'ble Judges : S.P. Kotval, C.J;G.N. Vaidya, J

Bench : Division Bench

Judgement

S.P. Kotval, C.J.—This petition is directed against an award delivered by the National Industrial Tribunal under S. 10(2) of the Central Industrial Disputes Act. The award was made on 19th April, 1968 and published in the Gazette on the 25th of May, 1968. It is concerned with disputes between Messrs Voltas Limited, Bombay and their workmen represented by the All India Voltas and Volkart Employees" Federation, Bombay. The parties had arrived at settlements for referring voluntarily the issue as to bonus for the years 1964-65 and 1965-66 and consequent upon those settlements a reference was made to the Tribunal by two separate orders of Government dated 20th December, 1966 and 17th April, 1967. Originally the references were to Mr. Salim Merchant but were later on transferred to Mr. Kamal Sahai on 2nd November, 1967. Both the references came to be heard together by consent of parties and were disposed of by an order of the Tribunal passed on 6th March, 1968. The reference were upon three points mentioned in the schedule to the references with two of which we are concerned so far as the present petition is concerned. Those points were :-

"(a) Whether the quantum of bonus paid to the employees is what they are entitled to under the Payment of Bonus Act, 1965 ? If no, what should be the quantum ?

(b) Whether the salesmen employed by the company are entitled to bonus for

the year 1964-65 under the Payment of Bonus Act, 1965 ?"

With the third item under reference we are not concerned in the present petition. The Tribunal found in favour of the employers on both the points of reference and the petition has been preferred against that order at the instance of the union on behalf of the employees.

2. It is unnecessary at this stage to mention the details of the finding given by the Tribunal on each of the points arising under the questions referred. They will appear sufficiently as we dealt with the points raised and argued before this Court.

3. The first head of reference is as to the quantum of bonus payable to the employees. Four points have been raised in the arguments before us. All these points really go to increase "the available surplus" under S. 5 of the Bonus Act of which the Tribunal ordered that 16.22% should be paid as bonus to the employees. All these four points are concerned with the question, what is the available surplus as defined in S. 5 read with S. 6 and the Second Schedule of the Payment of Bonus Act. The findings of the Tribunal are challenged on four items which it is said should have been added back to swell the available surplus. We would merely state these four points and the contentions advanced in regard to each, which will show the nature of the points for determination.

(1) Regarding superannuation scheme and special retiring gratuity :

In the year 1959 the company undertook as a measure of welfare for its higher paid employees a scheme called the superannuation and the special retiring gratuity scheme. As to the terms of this scheme, we will presently mention them, but in the years in dispute, 1964-65 and 1965-66, the company paid certain sums of money under this scheme. The ground on which it is said that these amounts could not be claimed as legitimate expenses which the company could deduct but which must be added back in order to show the gross profits and, therefore, the available surplus, is that the scheme gives nothing more than a bonus to the employees concerned in respect of the previous accounting years and if the payments partake of the nature of bonus then they have got to be added back having regard to the provisions of S. 4(b) read with the Second Schedule item 3(a) of the Act. The contention is that instead of paying the employees drawing a salary of over Rs. 1,600 per month a cash bonus in the particular years the company and the employees entered into this scheme in order merely to pay to the employees the same bonus by deferring its payment to the date of retirement. It was, therefore, urged that the amounts which the company spent in the years in dispute should be added back and that would increase the surplus available for distribution to other employees who are the petitioners before us. This is the main point raised in the arguments before us.

(2) Amount of tax paid on excess dividends declared :

Having regard to the provisions of the Income Tax Act and the relevant Finance

Act for the year, the company could only declare a certain quantum of dividend in the years in question, but if they declared more than the dividend statutorily laid down then on the surplus amount of the dividend the company would be liable to pay an additional tax. It was contended that this additional tax paid by the company cannot be allowed to be excluded from computation as an item of expenditure, because it is not a tax on income, profits and gains but a tax on dividends declared. It was urged that in the years in dispute the company paid tax on the excess dividend which it declared in favour of the shareholders and if it so paid this tax then it was not a direct tax under item 2(c) of the Second Schedule read with the definition of "direct tax" in S. 2(12) of the Act and, therefore, should not have been allowed to be deducted. In other words, it was urged that the tax on the excess dividend charged to the company and paid by it should also be added back and would increase the figure of "available surplus." :

(3) Expenses of issuing debentures :

The third question which has been raised is relative to the issue of debentures by the company in the year 1965-66. The company issued 7% debentures redeemable in the years 1970-75 secured by a mortgage of its assets amounting to one crore of rupees. In so issuing these debentures the company incurred expenses of Rs. 4,41,529. These expenses are in respect of items such as underwriting, commission, brokerage, advertising and printing charges, stamp duty and legal charges. It was contended that the whole of the item cannot be deducted as legitimate expenditure because it does not partake of the nature of revenue expenditure, but is expenditure of a capital nature and, therefore, not taxable in arriving at the gross profits. This position is controverted on behalf of the company.

(4) Donations paid to the Maharashtra Housing Board :

The last item in dispute pertains to donations given by the company to the Maharashtra Housing Board for the purpose of accommodation for its lower paid staff. The Maharashtra Housing Board constructs houses in certain schemes of its own for accommodation of industrial workers and the company in the year in dispute donated certain sums of money which it claimed to deduct as revenue expenditure in arriving at its gross profits. It is contended that these donations were given in order to acquire an asset of an enduring nature, that is to say a capital asset, and that, therefore, these expenses could not legitimately be deducted from the gross profits as revenue expenditure. On behalf of the company it has been contended that the amount was merely given as a donation to the Housing Board and the company in return acquired no asset but what it spent was spent merely for the benefit of its employees and so that a certain number of tenements would be allotted by the Housing Board to the employees of the company. Actually the company acquired no asset by expenditure much less a capital asset.

These are the contentions which were advanced upon the question as to what is

the quantum of available surplus for the purposes of payment of bonus to the employees. These points arise upon the first term of reference before the Tribunal.

(5) Whether salesmen on commission are entitled to bonus :

This point was based the second term of reference before the Tribunal, namely, whether salesmen employed by the company are entitled to bonus for the year 1964-65 under the Payment of Bonus Act. It was contended that in this company there are two categories of salesmen - salesmen who are paid monthly wages and other salesmen who are paid not only monthly wages but also a commission. In fact so far as this category is concerned the commission is by far the larger part of their emoluments and the whole contention was that none the less they are employees and entitled to payment of bonus. On behalf of the company "salesmen on commission" as they have throughout been referred to in the Award were really not entitled to bonus because they were not employees at all. It was pointed out that having regard to the substantial nature of the duties of these salesmen, they would not fall within the definition of "employee" in the Act and would not, therefore, be employees at all. Reference was made in this respect to certain decisions to which we will presently refer.

4. Regarding superannuation scheme and special retiring gratuity scheme :

The bonus payable under the Act is out of the available surplus which is to be computed in accordance with the provisions of S. 5 of the Act. As to what the available surplus is depends upon the gross profits, because S. 5 says that the available surplus in respect of any accounting year shall be the gross profits for that year after deducting therefrom the sum referred to in S. 6. As to what is gross profits, S. 4. clause (b) is the relevant provision applicable to the present case of a company which is not a banking company. 4(b) says that the gross profits shall be calculated in the manner specified in the Second Schedule. A glance at the Second Schedule shows that the basis of computation of gross profits is the net profit as per the profit and loss account of the company. Then certain expenses and other items which normally are claimable as deductions for purposes of Income Tax are expressly ordered to be added back to the amount of net profits and certain items mentioned in item 6 of Schedule 2 are to be deducted. Thus for accounting for the purposes of ascertainment of "gross profit" and the "available surplus" under the Act the basis is the net profits to which additions and deductions have to be made as specified. Two of the items which by the provisions of the schedule have to be added back are mentioned in item 2(a) "Bonus to employees" and in item 3(a) "Bonus paid to employees in respect of previous accounting years". These items of bonus whether actually paid in the year of account or paid in respect of previous accounting years have to be added back in order to arrive at the gross profits.

5. The argument on behalf of the employees is based upon these provisions of the law. What is contended so far as the first point is concerned is that the

scheme by which retirement gratuity was assured to some of the higher paid staff of this company was a scheme which grants no more and no less than a bonus in a different garb. In other words, that it was a bonus, the payment of which was deferred in point of time. Reference was made in this respect to the provisions of S. 34(3) which permits the employees to enter into an agreement with their employer for granting them an amount of bonus under a formula which is different from that under the Act. It was urged that the agreement reached in the present case is such a formula under S. 34(3) and therefore it is nothing except the payment of bonus in another shape or form. It was also urged that the company had written a circular letter dated 14th January, 1966 to each of its employees inviting them to join the scheme. That letter itself shows that what was being granted to the employees was bonus under an arrangement which was different from that contemplated in the Act but none the less a bonus. In the petition as well as before the Tribunal allegations were also made against the company that they were by entering into this scheme attempting to avoid the impact of the Act so far as their staff are concerned and in order to benefit them but the consequence of granting such bonus to the higher paid staff was that the surplus distributed to the lower paid staff in payment of the statutory bonus was being deliberately reduced. The letter just referred on behalf of the employees was relied on to indicate such a motive on the part of the company.

6. In the first place we do not think that the company had any such motive as was sought to be attributed to it because though no doubt the letter of 14th January, 1966 was written after the Bonus Act came into force, the scheme itself was in force in the company long before the Bonus Act was brought into force or even contemplated. The scheme is contained in the printed pamphlet issued by the company the gist of which is given in a circular letter No. MG-906/2 dated 19th February, 1959 which the company issued. That scheme, therefore, could never have been proposed in contemplation of the Bonus Act, much less in order to defeat any of its provisions. The circular letter dated 14-1-1966 on which so much reliance has been placed to suggest such a motive on the part of the company was written pursuant to the need to dovetail the provisions of the old scheme which was already extant in the company with the provisions of the new status and that is why the following sentence on which great emphasis was just put on behalf of the employees by Mr. Kulkarni finds place in the letter of 14th January, 1966 :-

"Fortunately the Bonus Act permits an employees to come to an arrangement with the employer different from the one provided under the Bonus Act, and, therefore, we could continue our present arrangements unaffected".

But in order that the present arrangement should continue unaffected, the consent of each and every employee had to be obtained and that is why the letter came to be written. There is not the slightest indication that the company wrote this letter or did anything else in order to circumvent the provisions of the Bonus Act.

7. Turning then to the provisions of the Act and the scheme it is clear that there is nothing in the provisions of the Act to bar bonus being paid by an agreement with the workers by the company subject of course to the minimum bonus being payable in any case as prescribed by the Act and subject to the other limitations which the Act prescribes. In entering into an agreement, therefore, to implement the bonus scheme which was already in force in this company, we cannot see that the company in any manner contravened any provision of the Bonus Act.

8. As to the scheme itself it is clear from its provisions that the main object and purpose of the scheme was to provide for post retirement benefits to the company's worker. The scheme is that the company out of its own funds was to pay the annual equivalent of two months' basic salary payable to each member of the scheme, to the Life Insurance Corporation plus a lump sum contribution on behalf of each member (out of his accrued retiring gratuity) as agreed upon by the worker and within such limits as may be fixed on the amount of gratuity that could be absorbed. The amount thus contributed by the company and paid over to the Life Insurance Corporation was not to be subject to tax in the hands of the employee. This amount would be available to the employee only after retirement. These draft rules of superannuation and retiring gratuity scheme were submitted to the Central Board of Revenue for approval and the scheme was only brought into force after such approval was granted. The company had also undertaken to protect the members and to pay the benefits equivalent to the contribution paid for them by the company in the event of the scheme being discontinued.

9. Clause 4 of the circular says that membership of the superannuation scheme will be compulsory for all employees drawing a basic salary of Rs. 850 per mensem (by a subsequent amendment it was reduced to Rs. 500 per mensem) and over that amount, and the scheme was to be optional for all other categories of staff, though if once the option is exercised to join the scheme, the employee cannot opt out. This was one of the clauses upon which was founded the charge that the company was attempting to prefer the higher paid staff to the other lower paid staff who would be entitled to the benefits under the Bonus Act, because it is said that the scheme would be optional to other categories of staff receiving a basic salary of Rs. 500. The reason for this difference in terms is obvious. Of the higher paid staff very few would be entitled to the benefits of the Bonus Act because in the first instance it limits the definition of employee to an employee receiving less than Rs. 1,600 per month and secondly because the overall bonus payable could never exceed that bonus which is to be calculated on a salary which must not exceed Rs. 750 per mensem, vide S. 12. In view of these provisions the scheme could not be of much advantage to the lower paid staff and, therefore, it was left open to them to join or not to join, but it was of some advantage to the higher paid staff drawing a salary of over Rs. 500 per month and since they had agreed with the company their joining this scheme was made compulsory.

10. Considerable stress was laid on behalf of the union upon the following

passage occurring in paragraph 5 of this circular :-

"It must be made clear that a condition precedent to joining the superannuation scheme is that each member of the scheme will be called upon to agree in writing not to participate in the annual bonus distributed by the company and be bound by this for the remainder of his service with the company. The form of letter to be taken from the concerned employee is referred to in paragraph 6 below".

It was urged that this gives the real clue to the scheme, namely, that it was nothing except a scheme to defer the payment of bonus because from this passage it is clear that the employees were giving up their right to annual bonus, and be bound to give it up for the rest of their service in the company. It was urged that it shows that, therefore, the scheme was nothing but a scheme in consideration of the bonus amount foregone.

11. We are unable to accept this contention. In the first place despite this scheme every employee of the company continues to get bonus still. Secondly it seems to us that there is nothing in the Act which prevents an employee from surrendering his right to bonus or to a part of bonus payable to him, and since the payments which the company made to the Life Insurance Corporation under the scheme would ultimately be of greater benefit to the employees than if they were to receive the regular bonus paid to them by the company year after year the employees agreed to accept the scheme. In the case of the higher paid staff the high rates of income and super tax would leave very little out of the bonus if it were paid to them annually. It is, therefore, understandable that the higher paid staff was agreeable to forego their right to receive the yearly bonus because it would be considerably to their advantage if they could be better safeguarded financially when they have to retire and it was therefore an advantage to contribute to the retiring gratuity scheme. We can see nothing improper or illegal in this arrangement. It is permissible under the Act and in any event was permissible when the scheme was first adumbrated and put into force in 1956 long before the Act came into force. We must, however, add that no part of the scheme touches the minimum bonus prescribed under the Act which every employee entitled under the Act continues to receive nor does it in any way legally affect the right of the rest of the employees to receive bonus under the Act. The scheme is thus primarily a scheme for provision for superannuation. There are various rights and privilege recognised in favour of the employee under the Industrial Law such as right to bonus, free housing, leave, overtime allowance etc. These are all distinct heads of payments or benefits which the employee may normally receive under the Industrial Law. Two such heads which are also recognised are superannuation benefits and retirement gratuity benefits. If superannuation and gratuity benefits are recognised heads of the rights and privileges to which an employee may be entitled, the terms of the scheme cannot be held to be illegal or improper. It seems to us that the scheme which the company launched upon was primarily and mainly for providing these latter

benefits to its employees. All the employees were entitled to that benefit if they so chose to take it. It could not therefore be said that it was a scheme to provide a bonus either immediately or in future to any of its employees. Any payment made under the scheme can hardly be said to be bonus paid to employees in respect of previous accounting years as mentioned in item 3(a) of the Second Schedule.

12. The word "bonus" is surprisingly enough not defined in the Bonus Act and that prompted an argument that it should be given a wide connotation as used in items 2(a) and 3(a) of the Second Schedule. Bonus which was originally intended to be purely an ex gratia payment by an employer to his employee has, however, with the passage of time and the arising of the idea of social justice and equality, undergone a major change, so much so that today bonus is recognised as a right in an employee and does not depend upon the volition of the employer. Originally also the word "bonus" implied a reward or a gratuitous payment of the profits earned by an employer, but with the development of the idea of social justice that idea of bonus has also undergone a change and today according to the provisions of the very Act with we are dealing the payment of bonus does not depend upon the making of profits by an employer. The minimum bonus under the Act is payable irrespective of whether he makes a profit or not. Some of these shades of meaning of the word "bonus" have been dealt with and pronounced upon by the Supreme Court itself. One of such cases is to be found reported in *The Associated Cement Companies Ltd., Dwarka Cement Works, Dwarka Vs. Its Workmen and Another*, , and that is what the Supreme Court said after considering their previous decision in *Muir Mills Co. Ltd. Vs. Suti Mills Mazdoor Union, Kanpur*, :-

"The judgment in that case indicates that without committing itself to the acceptance of the formula in its entirety, this Court in general accepted as sound the view that since labour and capital both contribute to the earnings of the industrial concern, it is fair that labour should derive some benefit if there is a surplus after meeting the four prior or necessary charges specified in the formula. It is relevant to add that in dealing with the concept of bonus this Court ruled that bonus is neither a gratuitous payment made by the employer to his workmen nor can it be regarded as a deferred wage. According to this decision, 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 can be legitimately made".

Since this pronouncement the concept has further changed by virtue of the provisions of the Bonus Act itself as we have indicated above. But giving it the widest possible connotation we cannot find that any payment to be made under this scheme framed by the company is a payment of bonus to its employee in present or as a deferred payment. When item 3 of the Second Schedule says "bonus paid to employees in respect of previous accounting years" it necessarily means bonus paid as bonus to the employees, and not a retirement gratuity

even though in receiving it or becoming entitled to it the employee may have in the past given up partially his right to bonus. In this view we are unable to accept the contention. We think that on this point the Tribunal came to a correct decision.

13. Another ancillary point raised in this connection is that in any event bonus paid in any shape or form to officers drawing a salary of more than Rs. 1,600 must under the provisions of item 3(a) or 2(a) of the Second Schedule be added back to the profits in order to arrive at the figure of gross profits. The argument is advanced on the basis of the provisions of S. 12 of the Bonus Act which lays down that where the salary or wage of an employee exceeds seven hundred and fifty rupees per mensem, the bonus payable to such employee shall be calculated as if his salary or wage were seven hundred and fifty rupees per mensem. It was, therefore, urged that any employee whose salary is in excess of the amount mentioned in S. 12 may receive a bonus, but that cannot be a bonus which is deductible under item 3(a) of the Second Schedule. The short answer to this contention is that though the Bonus Act makes these provisions, it makes these provisions for payment of bonus compulsorily only to a limited extent. It guarantees firstly a minimum bonus and next regulates the payment of bonus in favour of employees receiving a certain salary (i.e., up to Rs. 750 per mensem only) but it does not prohibit the payment of bonus in excess of that amount. Any amount paid in excess of S. 12 is not thereby rendered illegal. One indication may be found in the definition of "employee" itself where an "employee" is defined as any person (other than an apprentice) employed on a salary or wage not exceeding one thousand and six hundred rupees per mensem. If the bonus paid to all the employees drawing a salary below Rs. 750 were not to be bonus under the Act, then the definition of "employee" could as well have been limited to an employee receiving a salary or Rs. 750 only, but since the Act never intended such a consequence and only intended to secure payment of bonus to employees receiving up to a certain wage or salary, the definition could limit it to an employee receiving a salary or wage of Rs. 1,600 per mensem. In any case as we have shown, the payments made under the gratuity scheme are not payments of bonus by any stretch of the meaning of that word and, therefore, it is unnecessary to consider whether in the case of employees receiving over Rs. 750 per mensem the same payment ought or ought not to be deducted.

Amount of tax paid on excess dividend declared :

14. The next point that we have to consider is regarding the excess dividend declared by the company, and the consequent tax which it was called upon to pay. The limit of dividend to be declared is 10% but this company declared in the year of account a higher dividend at 15% and by virtue of the provisions of the then extant Finance Act of 1959 S. 6(3) paragraph (f), it became liable to pay a higher rate of Income Tax at 7.5% on the excess dividend so declared. The contention is that nobody had forced the company to declare this higher dividend

and simply because it declared it and became ready and willing to pay the extra tax the worker cannot be made to suffer by the resultant depletion of the available surplus. This extra payment of tax was made, it was said, at the sweet will of the company. Whether the company chose to declare the dividend or not was its own business decision but if it did pay the excess dividend and was consequently called upon to pay the extra tax, that tax ought not to be deducted as an expenditure in arriving at the gross profits of the company, because if it is deducted as expenditure, it reduces the figure of gross profits and, therefore, the figure of available surplus under S. 5 and to that extent injures the interests of the workers in getting their bonus.

15. We are not here really concerned with the general provisions of the Income Tax Act or the normal principles of accounting adopted by a company. What is to be deducted, and what is not to be deducted is statutorily prescribed in the Act and we must go strictly in accordance with the provisions of that Act. The company has claimed to deduct the total amount of Income Tax under the provisions of S. 6(c) of the Act. Under the Income Tax Act and other special laws the declaration of dividends is now severely controlled by the law and it is not possible for a company to keep on declaring higher and higher dividends to any extent. One such provision is the one to which we have already referred in the Finance Act, 1966. Therefore, it is very doubtful if a company can use its discretion to declare dividend as an instrument to defeat the employees' rights under the Bonus Act. There is moreover nothing to show that this company declared the dividend in question with that object in view. We have no evidence of any such intention on the part of this company. It also appears to us that the Act did not intend to further fetter the discretion of the company to declare such dividends as the company in a general meeting may decide to declare and it is not permissible for one of workers, taking advantage of the provisions of the Act to say that another of workers shall not be given a certain benefit, so long as the company acts fairly and in a bona fide manner as in the present case.

Expenses of issuing debentures :

16. In the accounting year 1965-66 the company issued 7% debentures redeemable in 1970-75 secured by a mortgage of its assets and a floating charge on other assets upon certain conditions. The total debentures issued were of the order of one crore of rupees and in connection with that issue the company incurred certain expense. This the company deducted in arriving at its figure of gross profits. The expenses amount to Rs. 4,41,528 and are to found debited under the head "expenses" item 4(d) in the balance-sheet for the year ending 31st August, 1966. It was urged that this amount is really in the nature of a capital expenditure and, therefore, must be added back having regard to the provisions of items 3(d) of the Second Schedule which defines the item as follows :-

"Capital expenditure (other than capital expenditure on scientific research which is allowed as a deduction under any law for the time being in force relating to

direct taxes) and capital losses"

There is a foot-note added which says "if, and to the extent, credited to Profit and Loss Account". The item here has been credited to the profit and loss account but the question whether this is an expenditure of a capital nature. We are quite unable to see how expenditure incurred by a company in negotiating and settling a loan to it albeit upon the security of its assets could possibly partake of the assets of a capital nature. On behalf of the company a statement showing the break-up of this figure of Rs. 4,41,528 has been given and the break-up shows the following payments of expenditure; Underwriting commission, brokerage, legal charges, stamp duty, printing charges and advertising charges. Every one of these charges are normally and in business practice always considered as revenue expenditure. It is hardly necessary to elaborate upon this. We may only refer to one decision of the Supreme Court in *India Cements Ltd. Vs. Commissioner of Income Tax, Madras*, In that case the assessee had obtained a loan of Rs. 40 lakhs from the Industrial Finance Corporation secured by a charge on its fixed assets, and in connection with the obtaining of that loan it had spent a sum of Rs. 84,633 towards stamp duty, registration fees, lawyer's fees etc., and it claimed that amount as business expenditure. It was held that it was allowable under S. 10(2)(xv) of the old Income Tax Act and that the amount spent was not in the nature of capital expenditure but was laid out or expended wholly and exclusively for the purpose of the assessee's business and therefore was allowable as a deduction. The Supreme Court also observed that the act of borrowing money was incidental to the carrying on of business, and that the loan obtained was not an asset or an advantage of an enduring nature. The expenditure was made for securing the use of money for a certain period, and it was irrelevant to consider the object with which the loan was obtained. That is precisely the case here. The company did not acquire any asset of an enduring nature or, in other words, any capital assets, when it borrowed moneys on the issue of debentures. It was a simple transaction of loan albeit secured by its immovable property but the company did not acquire any asset which was in the nature of a capital asset. Any expenditure, therefore, which was incurred in securing the loan was rightly allowed to be deducted as a business expenditure. We do not think that there is any difference in the expression "capital expenditure" in item 3(d) and the accepted connotation of that term in business and under the Indian Income Tax Act. This item, therefore, cannot be ordered to be deducted.

Donations paid to the Maharashtra Housing Board :

17. The next point argued is with reference to an amount of Rs. 1,60,000 given by the company to the Maharashtra Housing Board. The company has called it a donation in the accounting year 1965-66. The amount was paid to the Maharashtra Housing Board for the purpose of securing allotment of tenements in the housing scheme of the Board. On behalf of the company a copy of the scheme is shown to us. Paragraph 3 of the scheme provides for employers"

contribution and says that those employers who desire to have houses constructed for their workers will be required to deposit in advance with the State Government or the Housing Boards, as the case may be, 25% of the cost of the houses in accordance with the ceiling costs prescribed under the subsidised Industrial Housing Scheme (S.I.H. Scheme), as their contribution towards the building of houses for their employees. Accordingly the company paid this sum of Rs. 1,60,000 and what was the benefit acquired is to be found from the provisions of the scheme itself. Paragraph 8 provides for the allotment of tenements to its workmen whose family income does not exceed Rs. 350 per month and sub-clause (2) of clause 8 provides that the allotment of houses will be entrusted to a managing committee consisting of an equal number of representatives of the employer and of his workers with a Chairman nominated by the State Government. The employer is given the option at his discretion to allot up to 25% of the houses, out of turn, to workers who are eligible for the benefits of the scheme. The managing committee, however, is responsible for the allotment of remaining houses to eligible workers. Clause 9 provides that the ownership of the houses will vest absolutely in the State Government or the Housing Board, as the case may be, and they will be responsible for realising the rents of those houses and administering the estate in the same manner as they adopt in cases of houses built by them under Subsidised Industrial Housing Scheme. The last mentioned clause is of considerable importance in this connection. It shows that the ownership of the houses continues in the State Government or the Housing Board and that no part of the property of the housing scheme vested in the company. In other words, no part of the capital assets or any assets of enduring value vested in the company. If at all this amount can be claimed to be added back it is only under clause 3(d) of the Second Schedule which deals with capital expenditure and this was not expenditure for acquiring a capital asset. On the other hand, it is quite clear from the provisions of the scheme and the nature of the contribution that it is nothing more than an expenditure incurred by the company pursuant to the scheme of the Maharashtra Housing Board which required a deposit in order to give rights to its employees to preferential allotment of houses. The company gained no rights much less any property rights or any capital assets. Therefore, the expenditure of the company was not expenditure of a capital nature. It was a simple business expenditure.

18. These were all the items which were disputed and which go to make up the figure of gross profits on the basis of which the available surplus is to be computed under S. 5 of the Act for the purposes of giving of bonus under the Act. We are unable to allow any one of these amounts to be added back and, therefore, we must hold that the figure of gross profit is a correct computation. The figure of available surplus and the bonus awarded on that basis will, therefore, be correct.

Whether salesmen on commission are entitled to bonus :

19. There then remains the last point, which really arises out of the second term of reference to the Tribunal, namely whether the salesmen employed by the company are entitled to bonus for the year 1964-65 under the Payment of Bonus Act. In the first place, there was some dispute in the argument at the Bar as to the categories of salesmen employed in this company, but after some discussion counsel were able to agree that there are only two categories of salesmen, (a) salesman who are paid a monthly salary and (b) salesmen who receive a monthly salary or wages and in addition also earn commission upon the sales effected by them. The latter category receives no bonus and obviously the point taken turns upon the question whether they are "employees", within the meaning of the Act or not. The latter category has been referred to in the award as salesmen on commission. Actually they receive both salary or wage and commission. It is conceded on behalf of the company, however, that there is no salesman receiving commission exclusively. So far as this latter category is concerned, it appears that the major remuneration which they receive in most cases is the remuneration as commission and the remuneration from the salary is comparatively insignificant. Some of these salesmen on commission have in certain years earned as much as Rs. 55,000 although their salary does not exceed Rs. 200 or 300 per month. Illustrative figures have been given in a statement at annexure No. 2 to the affidavit of B. L. Negandhi on behalf of the company. The short question is whether such salesmen can be said to be "employees" within the meaning of the Act.

20. 2(13) defines "employee" to mean "any person (other than an apprentice) employed on a salary or wage not exceeding one thousand and six hundred rupees per mensem in any industry to do any skilled or unskilled manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied". 2(21) defines "salary or wage" and while its opening provision includes within it "all remuneration (other than remuneration in respect of overtime work) capable of being expressed in terms of money, which would, if the terms of the employment, express or implied, were fulfilled, be payable to an employee in respect of his employment and includes dearness allowance, yet in express terms the definition does not include any commission payable to the employee" vide clause (vii) of S. 2(21). Therefore so far as the payment of the commission is concerned, it cannot be taken into account in judging whether such salesmen are employees of the company because the payment of commission is not the payment of his salary or wage, but none the less upon the admitted position these salesmen do get a small remuneration by way of monthly salary or wage, and the question arises whether for that reason they would fall within the definition of "employee" under S. 2(13). On behalf of the company it was urged that they are not "employees" at all for the reason that they do not do any of the kinds of work specified in the definition. On behalf of the employees it was urged that these salesmen do either "clerical" or "technical" work of a certain kind and in the alternative "supervisory" or "administrative" work. We proceed to examine

these contentions.

21. On behalf of the employees an affidavit was filed by one of the employees F. A. P. D'Souza who is the President of the All India Voltas & Volkart Employees' Federation and being the President presumably he knows what was the correct position regarding the other employees also. In paragraph 4 of that affidavit dated 1st March, 1968, he has stated "I say that my work as a salesman in the company is to market the company's products and to push their sales. I say that for the past many years, I have been marketing chemicals for the paint, rubber, dyes, heavy chemicals. Pharmaceutical and aromatic industries and bulk vitamins for the pharmaceutical and vanaspati industries". Then in paragraph 5 he has stated as follows :-

"I say that from about 1960 onwards the company has taken on new lines like plastic resins, silicones for textiles, vitamin preparations for the animal feed industry and veterinary use and vitamins for the food industry. I say that to market these products I have to often discuss the products with the technical personnel of the clients' organisations like chemists, processing and finishing masters of textile mills, animal husbandry officers, veterinarians and nutritionists. I initiate the idea with these persons of their manufacturing new products that can profitably be manufactured by them with the help of the products offered by Voltas Limited. I say that to market these products requires considerable technical skill, experience and technical knowledge of the products".

Similarly allegations have been made in paragraph 7 that in order to market the company's products, the selling techniques have to be understood and improved by the salesmen "by acquiring and studying the art and technique of modern marketing". On behalf of the company, in the affidavit of B. L. Negandhi it has been stated that the duties and functions of the salesmen working on commission basis have remained the same since the last few years and particularly since a similar question was decided between the same parties by the Supreme Court of India found reported in Voltas Limited Vs. Its Workmen, , on which considerable emphasis was placed. In this affidavit it is further stated "with reference to para 4, I say that it is the normal duty and function of a salesman to market the products of his employer and to push their sales. It is well-known that the main functions of a salesman are to establish contacts, study the markets by finding out the demands and now the competitors are operating and to place before the customers the salient points of the products dealt with by the employer and endeavour to increase the sales". Now it is no doubt true that the decision of the Supreme Court cannot directly be relied upon here as a matter of res judicata between the parties because conditions may have changed and since almost 10 years have elapsed since that decision it will be difficult to hold that those findings inter-parties are today binding, but the Tribunal has gone further and come to the conclusion that "the facts continue to be the same and this point cannot, therefore, be allowed to be reagitated". On this question we think that the Tribunal was not right because even assuming

that the facts continued to be the same, the point raised is not the same as it was when it was raised before the Supreme Court. In the case before the Supreme Court they were concerned only with the provisions of the then operative Industrial Disputes Act and in fact then the Bonus Act was not even in force, whereas in the present case we are only governed by the provisions of the Bonus Act. Therefore, we do not think that much support can be gained from the decision of the Supreme Court to which we have referred. We, however, notice that in the present case it is urged that salesmen are employees and do the same work as employees because they do some sort of technical or clerical work. There is hardly any evidence in this respect before us beyond the statements in the affidavits to which we have referred and the contrary averments in the affidavit on behalf of the company. The Tribunal has found that these salesmen are not employees within the meaning of the Act. In dealing with this question certain broad principles have to be borne in mind. In almost every sphere of human activity different skills must exist and are called into play. Even a manual worker occasionally writes down specifications and vice-versa. Even a clerk sometimes does manual work. He lifts up a typewriter or a load of books or files from one place and keeps it at another place and thus does some manual work. But it is not the casual or occasional work which a particular employee does which is decisive of what is the nature of his employment nor decisive of the question whether he is an employee at all falling within a particular definition. The test is what is the substance of the work which he does and what he was in substance employed to do. It is not in dispute in the present case that these particular employees, with whom we are concerned, were substantially employed as salesmen and it may be that in the course of their duties as such salesmen they were required to show some special knowledge of the products which they sell. It may be perhaps that the more technical their knowledge the better for them in order to earn their commission but it is not for the technical knowledge that they were employed because they go from business to business and canvass orders and that is the main and substantial part of the work which they have to do and for which they were engaged. It cannot, therefore, be held that they were employed to do clerical or technical work.

22. That this is the light in which questions of this kind ought to be decided is laid down by the Supreme Court in a recent decision in *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, . The Supreme Court laid down the following as the guiding principles (vide paragraph 6) :

"The next aspect that has to be taken notice of is that, in practice, quite a large number of employees are employed in industries to do work of more than one of the kinds mentioned in the definition. In cases where an employee is employed to do purely skilled or unskilled manual work, or supervisory work, or technical work, of clerical work, there would be no difficulty in holding him to be a workman under the appropriate classification. Frequently, however, an employee is required to do more than one kind of work. He may be doing manual work as

well as supervisory work. He may be doing technical work as well as supervisory work. In such cases, it would be necessary to determine under which classification he will fall for the purpose of finding out whether he does or does not go out of the definition of workman under the exceptions. The principle is now well-settled that, for this purpose, a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other types of work."

The Supreme Court in this respect relied upon an earlier decision of its own in *Management of May and Baker (India) Ltd. Vs. Their Workmen*, . In the latter case several categories of workmen were before the Supreme Court, one such category being Sales Engineering Representatives, and a Perusal of paragraphs 24 and 25 and the evidence discussed therein would show that the nature of the work of those workmen was similar to the salesmen in the present case, or perhaps it would be true to say that in those cases more technical knowledge was found to be required. None the less the Supreme Court said in that case, (see page 938 at the end of paragraph 25) that "The amount of technical work that a Sales Engineering Representative does is all ancillary to his chief duty of promoting sales and giving advice. As we have held earlier, the mere fact that he is required to have technical knowledge for such a purpose does not make his work technical work. The work of advising and removing complaints so as to promote sales remains outside the scope of technical work. Consequently, the Tribunal's decision that the Sales Engineering Representative is a workman is set aside". In that case the Tribunal had been impressed by the evidence given as to the quantum of technical knowledge required by a Sales Engineering Representative and, therefore, it held that they were doing technical work. In the present case, as we have said, there is hardly anything to show that any of these employees called salesmen were actually doing clerical or technical work. Even assuming the affidavit of D'Souza to be true, we still do not see that the technical know-how to which he refers or the clerical work which he did, was the main part of his duties as a salesman. On the other hand, it seems to us that all these salesmen on commission were originally non-technical persons who in the course of their work as salesmen did acquire some technical knowledge of the goods that they were daily selling and now claim that they are principally required to display the technical knowledge. It seems to us that, technical knowledge forms an infinitesimal part of their qualities as salesmen. As regards the alternative submission that they were doing some sort of supervisory or administrative work, there is not even an iota of evidence. There is nothing to show that there was anybody to supervise or anything to administer. In fact it does not appear that in the course of salesmen's work he has to supervise anything or anybody nor has he any administrative duty in regard to any personnel in the company.

23. An earnest plea was made on behalf of these employees that their case has gone by default and that although they pleaded that there was considerable evidence of technical knowledge involved in the discharge of their duties as

salesmen, no evidence has been led and that, therefore, an opportunity should be given to them to lead that evidence. In short it was urged that the matter should be remanded to the Tribunal for further evidence. We are unable to accede to this request because we do not find that there was any grievance made before the Tribunal or even a request that either party should be allowed to lead evidence. On the other hand, both the parties chose to go to trial upon the affidavits which they had filed. It does not also appear that any request was made on the part of either party to be allowed to lead evidence in support of their affidavits. We cannot, therefore, without any valid grounds send back the case for fresh evidence.

24. These were all the arguments advanced to show how the award has been vitiated. We are unable to accept them. The petition is dismissed, but in the circumstances there shall be no order as to costs.