

(1975) 01 GUJ CK 0010

In the Gujarat High Court

Case No : Spl. Civil Application No. 1079 of 1973

Chandan Metal Products (Pvt.) Limited

APPELLANT

Vs

Engineering Kamdar Union, Baroda and Another

RESPONDENT

Date of Decision : 29-01-1975

Acts Referred:

Constitution of India, 1950 — Article 133(1), 226
Industrial Disputes Act, 1947 — Section 10(1), 10(5)
Working Journalists and Other Newspaper Employees (Conditions of Service) and
Miscellaneous Provisions Act, 1955 — Section 9(1)

Citation : (1976) GLR 849 : (1977) 2 LLJ 27

Hon'ble Judges : D.A. Desai, J;B.J. Diwan, J

Bench : Division Bench

Judgement

D.A. Desai, J.—The petitioner, Messrs. Chandan Metal Products Private Limited has challenged the award made by the industrial Tribunal (Gujarat) in Reference (IT) No. 162 of 1973 between petitioner and its workmen by which the Industrial Tribunal directed that the petitioner should implement the recommendations of the Central Wage Board for Engineering Industries in their application to the petitioner according to the phased out programme as set out in the award itself.

2. Government of India constituted a Wage Board by the Resolution of Ministry of Labour and Employment dated January 12, 1964 for the Engineering Industries. The terms of reference inter alia include : (a) to determine the categories of employees (manual, clerical, supervisory, etc.) who should be brought within the scope of the proposed wage fixation : and (b) to work out a wage structure based on the principles of fair wages as set forth in the report of the Committee on fair wages. The composition of the Wage Board included a Chairman, two independent members, three members representing employees and three members representing employers. The Wage Board undertook an extensive inquiry as to what constitutes Engineering Industry, the nature of employment therein, the condition of the industry including its growth and profits, the existing wages in the industry, the capacity of the industry to pay higher wages and

various relevant factors and completed its work on December 23, 1968 and submitted its report to the Government of India on January 3, 1969. The Government of India by its resolution dated March 21, 1970 declared that the unanimous recommendations made by the Wage Board in Chapters III and IV of the report regarding coverage of the engineering establishments and their employees in relation to the new wage structure be accepted. It also took note of the divergent proposals on the question of wage structure made severally by the representatives of employers, and those of employees and by the Chairman and independent members of the Wage Board and expressed its view that talks then in progress between the parties in various States should be continued and wherever such talks had not been started they should be initiated in order to arrive at mutually acceptable settlements, Statewise or undertakingwise, in the light of the recommendations made by the Chairman and independent members of the Board in Chapter VII of the report, with such adjustments as may be necessitated and agreed upon to suit the conditions in different State/undertakings. Government of India also expressed a hope that the settlements as and when made should be considered valid for a sufficiently long period, preferably for five years. As the recommendations of the Wage Board on the question of wage structure were not unanimous, Government of India left it to the States and to the parties to arrive at settlement with regard to wage structure for employees in establishments in Engineering Industry to be settled between the parties or to be determined by industrial adjudication, especially in the light of the recommendations of the Chairman and independent members and Government of India did not itself proceed to take steps to enforce the recommendations on the question of wage structure. Sometime thereafter a dispute arose between the machinery and Equipment Manufacturers Private Limited and its workmen on the question of implementation of the recommendations of the Wage Board on the question of wage structure. Government of Gujarat, as per its order dated December 9, 1971 made a Reference under s. 10(1) of the Industrial Disputes Act, 1947 (hereafter referred to as "the Act" to the industrial Tribunal consisting of Shri I. G. Thakore for adjudication. The Reference was in respect of only one dispute couched in this language -

"All the recommendations of the Central Wage Board for Engineering Industry should be implemented in the light of the indications made by the Government of India in its Resolution No. W.B. 4(8) 69, dated the 21st march, 1970."

When this Reference was pending before the Industrial Tribunal, Government of Gujarat in exercise of the powers conferred upon it under S. 10(5) of the Act, by its order dated June 27, 1972 included 77 undertakings in the reference between machinery and Equipment Manufacturers Private Limited, Ahmedabad and its workmen as in the opinion of the Government the dispute in the pending reference was of such a nature that the employers of the undertakings mentioned in the Schedule appended to the order and workmen employed by them were likely to be affected by such dispute. The petitioner. Messrs. Chandan

Metal Products Private Limited, Baroda, is shown at S. No. 7 in the Schedule appended to the order. Similarly, by another order dated August 10, 1972 in exercise of the same powers, Government of Gujarat included 76 other establishments in Engineering Industry in the pending reference. Petitioner in Special Civil Application No. 1085 of 1973 is shown at S. No. 33 in the Schedule appended to the second order. Similarly, petitioner in Special Civil Application No. 1531 of 1974 Punjabhi Vanmali and Sons is shown at S. No. 66 in the Schedule annexed to the order dated June 27, 1972.

3. The petitioner in this petition raised several contentions before the Tribunal and most of them are repeated before us. Broadly stated, according to the petitioner the petitioner undertaking was not an establishment in Engineering industry and that even if it is an undertaking in Engineering Industry, it was not similar to Machinery and Equipment manufacturers Private Limited and, therefore, it could not have been included in the reference pending between the latter and its workmen and on a proper construction, S. 10(5) would not permit such an inclusion. It was also contended that there was no material before the Government on which it could have been satisfied that petitioner was an establishment similar in nature to Machinery and Equipment Manufacturers Private Limited or was interested or affected by the dispute between the latter and its workmen and, therefore, the order of reference suffers from the vice of non-application of mind and is bad. A very serious controversy was raised on the question that neither the Wage Board nor the Industrial Tribunal examined the paying capacity of the Industry according to the settled legal position and, therefore, not only the recommendations of the Wage Board themselves were ineffective but the Industrial Tribunal could never have accepted the same. As the petitioners in the other two petitions also raised identical conditions and were interested in raising the same contentions, they were permitted to intervene in this petition. The Industrial Tribunal negated all these objections and directed implementation of the recommendations of the Wage Board according to a revised phased out programme.

4. Mr. I. M. Nanavati, learned advocate who appeared for the petitioner, raised the following contentions before us :

(1) The Wage Board had before them a very large number of diverse industries having engineering as a genus. It was a heterogeneous mass of various kinds of industries lumped together. The Wage Board had no materials before it to classify different Engineering Industries into different classes of engineering and the approach of the Wage Board to group the heterogeneous mass of all Engineering Industries and then merely to divide them into groups and area was unscientific. The Wage Board has merely proceeded on a very general survey made by the Reserve Bank of India and the Association of Indian Trade and Industry, none of which included steel furniture industry; and, therefore, even if the recommendations of the Wage Board are not struck down as being contrary to the known principles, they must be held inapplicable to steel furniture industry

more particularly when the adjudication was in respect of only one establishment in Engineering Industry before the Industrial Tribunal.

(2) Establishment of the petitioner and that of the Machinery and Equipment Manufacturers Private Limited are not of "similar nature" and hence the establishment of the petitioner could not have been included in Reference (IT) 162 of 1971 in exercise of the power conferred by S. 10(5) of the Industrial Disputes Act.

(3) The inclusion of establishment of the petitioner in Reference (IT) 162 of 1971 is illegal because -

(a) the establishment of the petitioner cannot be said to be an establishment in Engineering Industry :

(b) that, in any event, there is nothing to show that the petitioner's establishment is interested in or affected by the dispute then pending between Machinery and Equipment Manufacturers Private Limited and its workmen.

(4) The notification dated June 27, 1972, Annexure "E" is illegal and ineffective in that it discloses a complete lack of application of mind by the Government before exercising powers under S. 10(5) of the Industrial Disputes Act as the notification does not record the satisfaction of the Government that the petitioner's establishment was similar in nature to Machinery and Equipment Manufacturers Private Limited.

(5) The Tribunal was in error in refusing to examine the capacity of the industry to meet with the proposed additional burden which would be cast upon it if the recommendations of the Wage Board are applied and enforced and was further in error in not applying the principle of region-cum-industry while directing implementation of the recommendations of the Wage Board.

(6) Once the Industrial Tribunal disposed of Reference (IT) 162 of 1971, it become functus officio and could not have proceeded further with the adjudication of the dispute in respect of the establishment of the petitioner.

(7) The award of the Tribunal is vitiated because :

(a) The Tribunal has not taken into consideration the collective agreements and awards made in respect of the establishment participating in the award while directing implementation of the Wage Board recommendations :

(b) the Tribunal has failed to consider the case of the petitioner for fixing wage structure linked with production.

We shall deal with the contentions herein set out seriatim.

5. As the challenge is to the very recommendations of the Wage Board on which the Industrial Tribunal acted, it would be advantageous to refer briefly to the salient features of the report of the Wage Board. The Wage Board was constituted inter alia : (a) to determine the categories of employees who should

be brought within the scope of the proposed wage fixation 1 and (b) to work out a wage structure based on the principles of fair wages as set forth in the report of the Committee on Fair Wages. The Wage Board was directed that in evolving a wage structure, in addition to the considerations relating to fair wages, also to take into account :

- (i) the needs of the industries in a developing economy;
- (ii) the special features of the engineering industries including the aspects relating to exports;
- (iii) the requirements of social justice;
- (iv) the need for adjusting wage differentials in such a manner as to provide incentives to workers for advancing their skill.

The Wage Board was also directed to bear in mind the desirability of extending the system of payment by result. In the preamble of the Resolution Constituting the Wage Board it was stated that the Wage Board was constituted for the Engineering Industries and the term "Engineering Industries" for the purpose will include also foundries except those to which the recommendations of any other Wage Board have already been applied. Initially it became necessary for the Wage Board to determine the scope of its inquiry and the coverage and for that purpose to define generally what constitutes "Engineering Industries". The Wage Board took the view that the units engaged in the production and/or shaping of ferrous and non-ferrous metals by turning, fabrication, processing, moulding, joining, etc. are the units in the Engineering Industries with which the Board is concerned. The board was conscious of the fact that Engineering Industries being heterogeneous, lacking homogeneity of other industries, and the engineering goods produced being the result of manufacturing activity of various types, various classes and types of units come within the fold of engineering industries. It referred to the classification of the Engineering industry as made by the National Standard Industrial and Occupational Classification which amongst others included Manufacture of Metal Products (except Machinery and Transport equipment) and Miscellaneous Manufacturing Industries. The resolution constituting the Board itself had excluded the establishment employing less than fifty workers and a note was taken of it. While examining the growth and importance of the Engineering Industry in the country's economic development, the Board observed that :

"A farmer's plough, shovel, or hoe, his hurricane lantern, nails, screws, bolts, and nuts for his house, a village merchant's cart wheel or axle, a village artisan's tools, a child's tricycle, a student's mathematical instruments, a scientist's laboratory equipment, a housewife's domestic cooking-stove, an iron, a sewing machine or a frigidaire, a doctor's surgical instruments, a computer or a typewriter for an office, an executive's car and several other domestic goods like safes, cupboards, pipes and pipe fittings, utensils, steel furniture, cutlery, airconditioners, electrical fans all these consumer goods come from the

engineering industries"

The Board clearly kept within its mind the peripheral aspect of the coverage in the genus engineering industries and for that purpose tried to recapitulate what varieties of goods are produced by engineering industry which according to the Board includes furniture, fittings, fixtures, etc. Appendix VI set out the details of classification of Engineering Industries into major and minor groups and sub-groups. It may be mentioned here that the description is illustrative and not exhaustive but as an argument was based on entries in Appendix VI, it has become necessary to refer to it. After examining in detail the character of the Engineering Industry by referring to what are its major products, which vary from aeroplane to small jackpin the Board proceeded to tabulate the number of units of Engineering Industries and employment therein during the period 1951 to 1962. It also tabulated Engineering Industries employing more than fifty workers and employments therein by referring to the number of factories registered, number of factories reporting and the total number of persons employed. The Board examined the production index of various groups/sub-groups of Engineering industries. Having thus acquired a comprehensive view of what would be the coverage under the generic term "Engineering Industries" in respect of which the Wage Board was constituted, the Board tackled the main and real question of the capacity of the industry to pay. The Board recapitulated the inherent limitations that it faced while tackling the important question of capacity of the industry to pay. The three Central Organisations of workers, namely, National Federation of Metal and Engineering Workers, Indian National Engineering Workers Federation and Indian Metal and Engineering Workers' Federation submitted their memoranda bearing on the question. These three Federations of workers requested the Board that for measuring the capacity to pay, the industry should be taken as a whole and regional consideration should have no relevance. On the other hand the two principal Employers' Associations, namely, Indian Engineering Association and Engineering Association of India, in terms requested the Board to measure the paying capacity on industry-cum-region basis. The Board realised at the early stage of its inquiry that the determination of capacity to pay of any industry is a complex exercise and that this complex exercise could not be undertaken with some fruitful results because the response of the industry to the Board's questionnaire was poor, only about 54 per cent. of units having submitted replies and even those replies did not furnish data in the shape of balance sheets, etc. The Board conceded that the financial data thus received by it could hardly be said to be representative and board on them no definite conclusions could be drawn on the capacity of the industry to pay. But the exercise did not end there. The non-co-operation of the employers could not have the effect of the Wage Board being rendered ineffective. At that stage Shri Bagri, a member of the Board representing employers, presented some data relating to the financial position of the industries from time to time and that was examined in detail. Similarly, Shri Bharat Doshi, another member on the Board representing industry, also

submitted a note on the question of capacity and that was examined in detail. The Board did point out that the units covered by the notes of Shri Bagri and Shri Doshi could by no means be considered as representing a fair cross-section of the industry which consists of nearly 4000 units. The Board recalled that the industry experienced varying degrees of recession in 1965, 1966 and 1967, and the results of these years would not be a fair guide to judge the capacity of the industry to pay in normal times. After having disposed of the material that was before it, it was not possible for the Board like this to say that they are not in a position to proceed with the inquiry entrusted to them. If such an approach was ever adopted any Wage Board could be easily rendered thoroughly ineffective by the employers refusing to submit the data about the financial capacity to bear the extra burden that might be imposed upon them on account of the recommendations which the Wage Board may choose to make. Nor could the Board adopt a position that as the employers have not submitted convincing useful and material data of arriving at an appropriate conclusion on the question of capacity to pay, it would proceed something like in an ex parte manner as in a civil proceeding. The Board then referred to a study undertaken by the Reserve Bank of India on the working of financial results of a selected group of 1333 non-financial, non-Government medium and large public limited companies, each with a paid up capital of over Rs. 5 lakhs. Working results of the study have been published in the monthly bulletins of the Reserve Bank of India. The Board pointed out that of the 1333 companies covered in 1965-66, 1967 were Engineering Companies consisting of (a) Aluminium; (b) Non-ferrous Metals; (c) Transport Equipment; (d) Electrical Machinery Appliances, Apparatus, etc.; (e) Machinery; (f) Foundries and Engineering Workshops; and (g) Ferrous/Non-ferrous Metal Products. The Board then meticulously analysed the study undertaken by the Association of Indian Trade and Industry, Bombay. This study was undertaken at the instance of Indian Engineering Association and Engineering Association of India, the two principal Associations of employers in the field of Engineering Industry. This study covered the corporate units of the industry in the private sector and is based on the financial data relating to a period of ten years from 1955 to 1965. Keeping in view these two working results of the aforementioned two studies, the Board attempted to analyse various aspects of working results (Financial) of the Engineering Companies on the basis of the data presented in the above two studies and it proceeded in a scientific manner. The Board first examined the growth of Gross Block and sales and observed that it increased from Rs. 22,826 lakhs in 1960-61 to Rs. 48,243 lakhs in 1965-66 registering an increase of 111 per cent. over a period of five years. Examining the question of gross and net capital formation, the Board came to the conclusion that there has been a rise of 97 per cent. over the year 1960-61. The Board then proceeded to examine the profit position in the Engineering Industry as revealed by the study of the Reserve Bank of India which disclosed that the position has been very attractive during the period covered by the study. In 1960-61 the gross profits including depreciation amounted to Rs. 6,334 lakhs; gross profits excluding depreciation stood at Rs.

4,980 lakhs; profits before tax were Rs. 4,152 lakhs; profits after tax were Rs. 2,393 lakhs; and distributed profits were Rs. 1,419 lakhs. The Board also found that there has been a consistent and progressive increase in this respect in the subsequent years. Treating the results of 1960-61 as the base, the Board compelled the index of increase registered under all these items by the industry and tabulated it. The Board then compared the results of this study with what was available in other industries, such as Coal Mining Industry, Sugar, Iron and Steel, Cement, and Cotton Textiles and came to an affirmative conclusion that the position has been much lower in all these industries than in Engineering Industry which would be easily perceptible from Statement III annexed to the report. The Board then examined the profitability ratio and determined it regionwise in respects of Engineering Industry. For this study the country was divided into four regions, Eastern, Northern, Western and Southern. It also shows the units of Engineering industries covered by the study. The Board recorded its conclusions in paragraphs 6.39 that when compared to other individual Industries as also to all industries taken together, it is seen that this ratio has been lower in all other Industries except for Cotton Textile Industry during 1960-61 and 1961-62 Cement Industry in 1962-63 which showed a higher ratio as will be seen from Statement IV. The Board was of the opinion that on the whole the position of the Engineering Industry as revealed has been very bright. Examining the question of ratio of profit after tax to net worth, the Board found that the overall position of the Engineering Industry taken together has been much better except that in the iron and steel industry this ratio was higher for the years 1962-63 and 1963-64 and in Cotton Textile Industry during 1960-61 and 1961-62. The Board observed that the Engineering Industries' position has been better than that of all other industries. The Board then examined the ratio of gross profits to net sales and profits before tax as percentage of net sales. It also adopted the standard of examining the profitability ratio by referring to equity dividends as percentage of equity paid up capital, dividend as percentage of paid up capital, Total dividend as percentage of net worth and again observed that the Engineering Industry fared better than Coal, Cotton Textiles, Sugar and Iron and Steel. (6.48). The Board then examined the average propensity to retain profits, distribution of dividends, and then dividends and retained profits and found that in the Engineering Industry there is an increasing tendency of retaining profits than distributing them and on account of this the percentage of profits distributed has taken a declining trend which indicates a sound management policy for making provision for expansion of the industry in future. After having undertaken this exercise the Board proceeded to compare certain ratios worked out by it in respect of companies having paid up capital of Rs. 5 lakhs or below and those having Rs. 5 lakhs and above. The purpose behind this was to ascertain rates of capital for

mation. In the course of this exercise the Board found that there is a direct Correlation between the size of the units and the profitability and consequently the paying capacity. The Board referred to a brochure called "Engineering Industries

- How they Benefit Indian Society" and the position of the industry as summarized by the Economic Times dated November 15, 1968. After the detailed exercise the Board observed that the profitability ratios of the Engineering Industry have overall been much higher than those of other industries studied including all industries taken together and this establishes the comparative prosperity of the Engineering Industry. Inter regional comparison within the Engineering Industry shows the financial positions of Eastern region as the best of all.

6. The Board then proceeded to examine the question of wage fixation. For this purpose the Board first referred to the principles for wage fixation as formulated by the Committee on fair wages and the resolution passed at the 15th session of the Indian Labour Conference held at New Delhi on July 11/12, 1957. The Board referred to the norms laid down by the Conference which have been guiding the deliberations of authorities charged with the duty of determining minimum wage as also Wage Board and Wage Committees. The Board then examined what Dr. Arkroyd recommended about caloric requirements in diets which was accepted as a norm by the Indian Labour Conference. On the basis of Arkroyd's recommendations, commonly known as "Balanced Diet Theory" to be resorted to for the maintenance of good health, the Board worked out the components of the balanced diet with the approximate nutritive value of each. The Board then referred to a recommendation made in the Third Five Year Plane suggesting re-examination of the nutritional requirements of a working class family in the light of most authoritative and scientific data on the subject and pursuant to this recommendation a Sub-Committee set by the Nutritional Advisory Committee undertook the examination of the question towards the middle of 1964 and submitted its report. This Sub-Committee, after examining all available scientific data relevant to the subject concluded that the average daily caloric requirements of an industrial worker in India comes to about 2,816 or 2,800 calories per day. Taking this as the standard the Sub-Committee worked out the requirements per family per day at 8,206 calories which would mean about 2,750 calories per day per adult consumption unit. As there was noticeable difference of opinion, between the employers' representatives on the Wage Board and the workers' representatives, the Chairman and the independent Members then proceeded to examine the views of workers as well as of the employers. Thereafter the Chairman and the independent members turned their attention to the prevalent wages in some other industries and referred to the difficulties encountered by them in arriving at a wage structure for the industry on the ground that Engineering Industry is a heterogeneous one spread over the whole country, the wage structure differing from place to place and from product to product. The Board realised that evolving a wage structure for the entire industry is a complicated task and then proceeded to set out how they have attempted to solve that problem. At that stage the Board notices the most important feature which the Wage Board must keep in view in devising a wage structure for an industry that there cannot be a uniform pay structure for all establishments in an

industry producing diverse products and spread over the whole country and stated that to have a uniform wage structure and to apply it uniformly to all sectors of this wide spread industry would be not only unrealistic but would create many practical difficulties. At the other end of the spectrum the Board noticed that it would be impossible for them to fix the wage structure for each unit separately. The Board, therefore, reached a conclusion that the wage structure has to be fixed for the industry as a whole but in order to adopt a rational approach keeping in view the principles governing wage fixation, the Board decided to divide the country into manageable regional and size groups. For the purpose of geographical location the Board decided to divide the country into five areas and in order to see that large sized, medium sized, small sized units do not get agglomerated in one wage structure, it again classified the Industry as per the strength of each unit. In this connection the Board readily accepted the suggestion of the employers' representatives to divide the country into four regions but adopted a little more conservative approach by dividing the country into five regions. The prevailing wage levels at different places and the cost of living at important centers were adopted as the criteria for regional re-division of the country for the purpose of wage fixation. After applying this criterion, the Wage Board divided the country into following five regions :

- (1) Bombay City, and Greater Bombay including Thana, Ambarnath & Kalyan industrial areas.
- (2) Calcutta, Greater Calcutta, Howrah industrial area, Jamshedpur industrial areas, Dargapur, Asansol and Ranchi industrial areas.
- (3) Madras industrial area, Bangalore industrial area, Hyderabad industrial area, Poona-Chinchwad industrial area, Delhi industrial area and Ahmedabad.
- (4) Coimbatore, Nagpur, Bhopal Kanpur, Baroda and Faridabad industrial areas.
- (5) The rest of the country.

Having thus by common consent divided the country for the purpose of wage fixation into meaningful zones or areas, the Wage Board proceeded to classify the units for the same purpose. This was very much necessary because in every area there will be large sized industries, medium sized industries and small units though units employing less than fifty workers were beyond the purview of the Wage Board. For the purpose of classification of the units of the industry into a few homogeneous size groups which aspect is intimately connected with the capacity to pay, the members representing the employers suggested four such groups and on the other hand the workers were opposed to any such grouping, but who ultimately conceded that if classification on the strength of workers was to be resorted to, there should be only two groups the dividing line being the employment of 250 workers. The Chairman and Independent members carefully examined both the views and while conceding that there should be no differentiation in the minimum wage for workers in the same industry and between those doing the same work in different units of the same industry,

practical considerations dictated a different approach more especially the most relevant question of the financial position and resources of bigger and smaller units being disparate and that to fix a uniform wage for all types of units, small, medium and large would only widen disparities. The Board was fully conscious of such a step being fraught with the danger that many units in the smaller size groups being compelled to close down leading to unemployment of workers. The Board, however, while rejecting the suggestion made by the representatives of employees proceeded to accept the suggestions made in this regard by the members representing the industry and recommended the grouping of the units into four broad classes : (A) employing 50 to 250 workers : (B) 251 to 500 workers : (C) 501 to 1500 workers; and (D) above 1,501 workers. After thus in terms accepting the region-cum-industry principles by first dividing the country into various regions based on valid criterion and then classifying the units in each region, the Board proceeded to determine the minimum wage for the lowest unskilled worker in the country. We would have occasion to examine whether what the Chairman and Independent Members have recommended is the minimum wage or fair wage. Suffice it to say at this stage that at various places the Chairman and independent members in terms say that they have recommended a minimum wage and not a need-based minimum wage or an essential minimum wage for workers in the context of present high prices and that this they have done completely keeping in view not only the paying capacity of the industry as a whole but also the paying capacity of the industry in different regions, from the data that was available to them (7.67). The Board thus not only first divided the country into regions and classified the units in each region but then proceeded to examine the paying capacity not only of the industry as a whole but also of the paying capacity of units of the industry in different regions from the data that was available to them. The Board then proceeded to classify the workmen into three groups : unskilled, semi-skilled and skilled and then proceeded to determine the emoluments payable to the unskilled worker in Group (A) which will comprise the smallest unit in Area "V, which in comparative basis would be the least industrialised area. After having determined the minimum total emoluments in Area V at Rs. 140 in Group 1, Rs. 148 in Group B, Rs. 160 in Group C and Rs. 176 in Group D, the Board proceeded to divide the total emoluments into basic wages and D.A. to the index number 215 (Series (1949-100) Accordingly the Board determined that for Group A in Area V the basic wage would be Rs. 105 plus Rs. 35 as D.A. for Group B Rs. 111 basic plus Rs. 37 D.A.; for Group C Rs. 120 basic Rs. 40 as D.A. and for Group D Rs. 132 basic plus Rs. 44 as D.A. The Board then adopted the concept of area allowance for purpose of determining the wages payable to those in more industrialised areas and zones Nos. 1, 2, 3, and 4. The Board then drew up a time scale in respect of emoluments determined by it, spread over certain period. To illustrate, pay of Rs. 105 was paid over a scale of Rs. 105-1-111-1-117 and that was true of other emoluments also. The Board then categorised the operatives and also recommended basic scales for clerical and other categories. After having determined the component of D.A. in the total emolument fixed by the Board, it

proceeded to examine the question of neutralisation and recommended that the rise in cost of living be neutralised by giving additional D.A. at the following rates :

Rs. 1-50 per 2 points where basic pay is upto Rs. 200 (including).

Rs. 1-70 per 2 points where basic pay exceeds Rs. 200 upto Rs. 300 (including).

Rs. 1-90 per 2 points where basic pay exceeds Rs. 300 upto Rs. 400 (including) :
and

Rs. 2-00 per 2 points where basic pay exceeds Rs. 400.

The Board simultaneously recommended that when there is a fall in the cost of living index, the rates of D.A. would be reduced at the above rates. It would thus appear that D.A. was recommended on a sliding scale making allowance for the rise and fall according to the movement of the cost of living index. However as the cost of living is behaving very erratically and the Board being of the view that the D.A. should not be revised too frequently, further recommended that the adjustment must be made twice in a year only from 1st January and from 1st July. The Board then recommended weightage for length of service. The Chairman and the independent members then examined the question whether the implementation of the recommendation would cause sudden rise in wages of the workers and if so, it would not be desirable from the point of view of the workers or of the industry because a sudden rise in wages may involve a sudden burden on the industry which it may find difficult to bear. Keeping this position in view, they recommended a phased out programme spread over live years. The Chairman and independent members then examined the question of fringe benefits and at the end of the Chapter detailed analysis of what is the need based minimum, and how the phased out programme should be worked out were annexed.

7. The Government of India while accepting the unanimous recommendations of the Wage Board as contained in Chapters III and IV of the report directed that these recommendations should be accepted and enforced but when it came to the question of wage structure the Government of India took notice of the divergent proposals made separately by the representatives of employers and those of workers and by the Chairman and independent members of the Wage Board and then recommended that where the talks are in progress, they may be continued and where they have not been started, they should be initiated in order to arrive at mutually acceptable settlements, Statewise or undertaking wise in the light of the recommendations made by the Chairman and independent members of the Board in Chapter VII of the report with such adjustments as may be necessitated and agreed upon to suit the conditions in different States and undertakings.

8. Re Ground : (1)-Now the first contention raised by Mr. Nanavati, learned advocate for the petitioner was that the recommendations of the Wage Board

including that of the Chairman and independent members must be held inapplicable to the petitioner as the Wage Board has not proceeded according to the well-laid principles of wage fixation. The contention is that the expression "Engineering Industry" was defined in such a wide and all embracing manner that the Wage Board had before it a heterogeneous mass of various kinds of industries lumped together and that no rational approach was possible by merely dividing the country into five regions and dividing the undertaking into four groups in each region. The exercise, according to Mr. Nanavati, would not provide a rational basis for making recommendations on wage structure applicable to the entire industry and that the recommendations of the Wage Board including that of the Chairman and independent members are contrary to the known principles of wage fixation.

9. It should be recalled here that the resolution constituting the Wage Board in terms requires the Wage Board to work out a wage structure based on the principles of fair wages as set forth in the report of the Committee on fair wages. The report of the Committee on fair wages is of the year 1948. The Committee on fair wages has expressed an opinion that -

"While the lower limit of the fair wage must obviously be the minimum wage the upper limit is equally set by what may broadly be called the capacity of industry to pay. This will depend not only on the present economic position of the industry but on its future prospects. Between these two limits the actual wages will depend on a consideration of the following factors and in the light of the comments given below :

- (i) the productivity of labour;
- (ii) the prevailing rate of wages in the same or similar occupations in the same or neighbouring localities;
- (iii) the level of the national income and its distribution; and
- (iv) the place of the industry in the economy of the country".

This report was examined in details in Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, and after an exhaustive examination of the relevant consideration, the Court formulated the following principles bearing on the question of fixation of wages :

"(1) In the fixation of rate of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity;

(2) The capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross section of the industry; and

(3) The proper measure for gauging the capacity of the industry to pay should

take into account the elasticity of demand for the product, the possibility of tightening up the organisation so that the industry could pay higher wages without difficulty and the possibility of increase in the efficiency of the lowest paid workers resulting in increase in production considered in conjunction with the elasticity of demand for the product - no doubt against the ultimate background that the burden of the increased rate should not be such as to drive the employer out of business."

Having evolved these principles the Court proceeded to observe to the normal rule is to leave a wide discretion to the Tribunals responsible for the fixation of wages inasmuch as they being constituted of equal number of representatives of the employers and the employees are best calculated to appreciate the whole position and arrive at correct results.

10. Mr. Nanavati, however, contended that under the expression "Engineering Industries" a heterogeneous mass of various kinds of Industries were lumped together and any attempt to classify such different industries into different classes of engineering was bound to be confusing and misleading and that the easy course adopted by the Wage Board of dividing the country into regions and classifying each unit in the industry by the strength of the workmen is neither rational nor scientific and that, therefore, the recommendations of the Wage Board are not in consonance with the well-recognised principles of wage fixation. Whenever a Wage Board is appointed for one industry, say, like sugar or Cotton Textiles, it is the end product which determines the coverage. But by its very nature engineering industry produces diverse kinds of goods and the product test would hardly be relevant. The product test is not the sole test and we would point out while dealing with the question of similarity of two undertakings that the product test may be wholly unsatisfactory. For the purposes of the present discussion the definition of "Engineering Industries" for the purpose of coverage of the Wage Board recommendations as unanimously adopted by the Wage Board should be accepted and nothing was pointed out to us to show that the definition was unscientific or irrational. Now once the Wage Board determined the coverage it was incumbent upon it for the purpose of wage fixation to classify the industry. Any attempt to fix a wage for the whole industry irrespective of the size of the undertaking and situated anywhere in a big country like our sub-continent would be wholly unrealistic. In every industry there are big units medium size units and small units. Once the paying capacity becomes relevant, the size of the units in industry provides a rational and the intelligible basis for classification and we must remember that the classification is in the context of wage fixation and the Wage Board had reached an affirmative conclusion that size of an undertaking has direct relation to its profitability which in turn should give some idea of the paying capacity even if it is to be examined unitwise. But we would presently point out that when a Wage Board is charged with a duty to devise a wage structure for the whole industry, it is implicit therein to examine and ascertain the paying capacity on the well-recognised principle of region-cum-industry. It is not that in every case there should be the minutes classification

nor is it required that the classification should be according to the product. It was, however, urged that it was impossible to classify the industry because the Engineering Industry produces diverse types of goods, and each product presages technical skill to be employed and any classification not productwise but employees strengthwise would not provide a rational basis for classification when undertaken especially in the context of wage fixation. Let it be remembered that there are broadly speaking two criteria on which classification is based, viz., (1) geographical and (2) size. The first criterion is relatable to the pace and degree of industrialization which is a very relevant criterion. Second is relatable to size and it is indisputable that it is equally a relevant criterion. By the combined operation of both the criteria the Wage Board could group together units which from employment point of view are more or less alike. It is undoubtedly true that the Engineering Industry is engaged in producing diverse types of goods or to accept the oft-repeated phraseology of Mr. Nanavati "from aeroplane to needles" But there would not be a concern manufacturing needles employing more than 1,500 persons nor a concern manufacturing an aeroplane employing less than 50 persons. The nature of the product more often also helps in determining the size of the establishment. The product test by itself if taken to an extreme length would not permit any two industries to be similar because in cotton textiles from longcloth to the best of terelyne mixtures all cloth manufacturing units are covered by the generic expression "Cotton textile industry". Sugar and cement may stand on a different footing because ultimately though there are different grades of sugar, each grade of sugar is sugar none-the-less and so is cement. However, in the context of Engineering Industry, after referring to various products that the industry is engaged in manufacturing, the Wage Board definitely undertook a relevant exercise of classifying the industry and the classification according to the strength of the unit provided a rational and intelligible criterion for classification. Regional and size classification ultimately enabled the Wage Board to determine the paying capacity regionwise and classwise and that is all that the Wage Board was expected to do. A legislative exposition of the relevant criteria can be found in S. 9(1) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 which provides that in fixing rates of wages, the Board shall have regard to the cost of living, the prevalent rates of wage for comparable employments, the circumstances relating to the industry in different regions of the country and any other circumstances which to the Board may seem relevant may be taken into consideration. It cannot be disputed that the Wage Board did keep in view all these relevant considerations while devising the wage structure.

11. In this connection our attention was drawn to Kamani Metals and Alloys Ltd. Vs. Their Workmen, . On the question as to what are the relevant principles which any wage fixing authority should follow the Court observed that -

"... It is first desirable to consider what amount is necessary to maintain and even improve the workers' standard of living, how wages of the workers concerned compare with those paid to workers of similar grade and skill by other

employers in similar or other industries in the region and what wages the establishment or industry can afford to pay. These are the fundamental principles which have to be borne in mind".

At another stage the Court observed as under :

"Broadly speaking the first principle is that there is a minimum wage which, in any event must be paid, irrespective of the extent of profits, the financial condition of the establishment or the availability of workmen on lower wages. This minimum wage is independent of the kind of industry and applies to all alike big or small. It sets the lowest limit below which wages cannot be allowed to sink in all humanity. The second principle is that wages must be fair, that is to say, sufficiently high to provide a standard family with food, shelter, clothing, medical care and education of children appropriate to the workmen but not at a rate exceeding his wage earning capacity in the class of establishment at which he belongs. A fair wage is thus related to the earning capacity and the workload. It must, however, be realised that "fair wage" is not "living wage" by which is meant a wage which is sufficient to provide not only the essentials above mentioned but a fair measure of frugal comfort with an ability to provide for old age and evil days. Fair wage lies between the minimum wage which must be paid in any event, and the living wage which is the goal."

The Court reiterated the well-known principle of the region-cum-industry formula as was laid down in *Greaves Cotton and Co. and Others Vs. Their Workmen*, . It reads as under :

"The principle, therefore, which emerges from these two decisions is that in applying the industry-cum-region formula for fixing wage-scales the Tribunal should lay stress on the industry part of the formula if there are a large number of concerns in the same region carrying on the same industry; in such a case in order that production cost may not be unequal and there may be equal competition wages should generally be fixed on the basis of the comparable industries, namely, industries of the same kind. But where the number of industries of the same kind in a particular region is small, it is the region part of the industry-cum-region formula which assumes importance."

12. Mr. Nanavati relied upon the observations in *Workmen of Shri Bajrang Jute Mills Ltd. Vs. Employers of Shri Bajrang Jute Mills Ltd.*, , to urge that the recommendations of the Wage Board in this case suffer from the same vice as were found in the case of Jute Wage Board. The Jute Wage Board was constituted by the Central Government for determining, among other matters, a wage structure, based on the principles of fair wages payable in the jute industry. The Wage Board recommended wage scales, D.A., etc., for all the employees working in all the jute mills situated in the country irrespective of the financial position of the individual mills. It neither divided the country into regions nor classified units in each region and in the absence of it, it was not possible to adjudicate the next important question of the paying capacity on the basis of region cum industry. It

is in this background that the Supreme Court observed as under :-

"No classification was made by the Wage Board of the various jute mills as large, medium and small units; and in prescribing uniform scales for all types of units no distinction has been made between economic and uneconomic units. Small and struggling units have been treated in the same way as large and prosperous units."

After referring to the principles enunciated in the *Express Newspapers (Private) Ltd. v. Union of India* (supra) the Supreme Court came to the conclusion that the Wage Board was in error in determining uniform wage scales for the entire industry and that the Wage Board committed an error in equating Cotton Textile Industry in West Bengal with the jute industry and then reaching a conclusion that the wage scale in jute industry is lower than that of cotton textile industry. The Court observed that the Wage Board gave a go-bye to the well-established principle of industry-cum-region consistently applied by Industrial Tribunals whenever wage-scales had to be devised. The Court, however, recognised that such a disharmony in the approach to the problem of determination of wage scales by a Wage Board on the one hand and an Industrial Tribunal on the other must inevitably occur because whereas the attempt of a Board would be to uniformise wage scales for the entire industry, though it is spread over different parts of the country where condition can rarely be expected to be similar or the same, the concern of a Tribunal would principally be to determine equitably the scales of a single unit with which it is for the time being concerned. The Court was further of the opinion that this difficulty arising from the difference in the functions of the two bodies could well have been obviated if the Wage Board instead of laying down uniform scales for the entire industry, irrespective of where its several units were situate and of the different conditions prevailing in various areas, had considered the units in each area separately and determine the wage scales for each such area by taking from that area a representative cross-section of the industry where possible or where that was not possible by taking comparable units from other industries within that area, thus following the principle of industry-cum-region. It becomes distinctly clear that the recommendations of the Jute Wage Board were found to be unacceptable because the Wage Board in devising a uniform wage structure for the entire industry for the whole country had overlooked the well-recognised principle of fixing wages according to the industry-cum-region principle which would permit it to examine the paying capacity of the industry on the same principle. However, this cannot help the petitioner at all because, in the present case, not only there has been a regional division of the country but the classification of units in each region which enabled the Wage Board to apply-cum-region principle.

13. Reference in this connection was also made to *Management of The Kirlampudi Sugar Mills Ltd. Vs. The Industrial Tribunal, A.P. and Another*, . In that case the recommendations of the Sugar Wage Board came in for examination by the Supreme Court. The Wage Board divided the country into four regions by

adopting the same division as was done by Tariff Commission for price fixation, but thereafter fixed the wage-scale for all units in each region on the same basis. The grievance made was that the Wage Board failed to classify all units in each region and in support of this contention, reliance was placed upon the Bajrang Jute Mills case (supra). Nagating this contention the Court observed -

"There is nothing in the Bajrang Jute Mills case (supra), which makes it obligatory on a Wage Board to divide the industry into regions as well as classes or to examine the financial capacity of every unit in that industry in the region, irrespective of the conditions prevailing in the different regions of that industry. As long as all relevant factors appertaining to that industry, industry-wise have been considered and the capacity of a fair cross-section of that industry to pay in that region has been ascertained, the recommendations of the Wage Board cannot be held to be invalid. It is not in every case that a division into classes in the same region, on a unit-wise capacity should be made before recommendations of the wage structure, dearness allowance or other conditions of service in that industry could be held to be fair and within the financial capacity of the Industry in that region."

14. Mr. Nanavati also referred to the decision in *The Press Trust of India and Another Vs. Union of India (UOI) and Others*, . We fail to see how the decision in this case would help Mr. Nanavati on the question under discussions. The Wage Board for Working Journalists proceeded to classify the newspaper and news agency industry according to gross revenue and seven different classes were devised. According to this criterion the Press Trust of India who challenged the recommendations of the Wage Board should have been placed in Class III but the Wage Board grouped it in Class II observing that "although the classification of the news agencies is the same as that of the daily newspapers, on account of the special position enjoyed by P.T.I. as a national agency it is placed in Class II." After upholding the classification on the basis of gross revenue as being based on an intelligible differential namely, the capacity of each news agency to pay and between newspapers and news agencies on the nature of the service rendered, the sources of income and the manner in which that service is rendered, the Court observed that the Press Trust of India has been singled out without any reasonable basis or being taken above from the third place and pushed into higher group." It is on this ground as well as the finding of the Court that the Press Trust of India had not the capacity to bear the burden of the increased wages, that the recommendations of the Wage Board were held inapplicable to Press Trust of India. However, on the question of paying capacity of Press Trust of India alone being examined by the Court on which an argument was based, it may be disposed of by merely referring to S. 10 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 which provides that the Wage Board constituted under the Act was by notice to call upon newspaper establishments and working journalists and other persons interested in the fixation or revision of rates of wages of working journalists to make a representation and sub-s. (2) provides that every such representation shall be in

writing containing therein the materials showing its capacity to pay any revised pay structure and sub-s. (3) enjoins a duty upon the the Wage Board to take into consideration the representation made under sub-s. (2) It clearly transpires that even through the Wage Board may be for the industry the Act enjoins a duty on the Wage Board constituted under that Act to examine the paying capacity of each unit. The ratio of the case has to be understood in the background of this statutory provision.

15. In the light of the principles depucted from precedents can be said with confidence that the Wage Board recommendations and especially of the Chairman and the independent members as contained in Chapter VII did not suffer from any infirmity. It is not the function of this Court to devise a wage structure nor is it called upon to do so. The only limited question is whether the Wage Board in the course of its deliberations and while reaching its conclusions and recording the same acted in accordance with the well-formulated principles bearing on the question of wage fixation not only as enunciated in the report of the Committee on fair wages but as has been done by the Supreme Court in the cases hereinbefore referred to and other relevant cases. On the specific question of paying capacity, we would be independently examining that question from a slightly different angle because some argument was advanced on that question independent of Point No. 1 which is under discussion. However, as far as the present point is concerned, it clearly appears from an exhaustive examination of the report of the Wage Board that it kept before its eye all the relevant principles and especially the principle of region-cum-industry and formulated its recommendations. In fact at the cost of repetition we may say that the question of regional division of the country and of dividing the units in each region into four groups sizewise, the Chairman and independent members have more or less accepted the suggestion of the representatives of the Industry wholly. Incidentally, overlooking or ignoring or rejecting the views expressed by the representatives of the employees. In this back ground we find it a little exching that the petitioner should make a grievance both about the regionwise distribution and classification into groups of units in each region. In short here we may say that the paying capacity on the region-cum-industry basis has well been kept in view and has been meticulously examined and, therefore, we cannot accept the submission that the recommendations of the Wage Board are contrary to the will-known principles and, therefore, they must be held inapplicable.

16. In passing it was observed that the steel furniture industry had not appeared before the Wage Board. It was also observed that the data supplied by the units in industry was of a scanty nature and it was also urged that the Wage Board has depended upon a very general survey made by the Reserve Bank of India and the Association of Indian Trade and Industry none of which included steel furniture industry. As we have pointed out in the earlier part of this judgment the Engineering Industry is engaged in production of diverse products and, therefore, the product test could not have be employed nor was it possible to adopt that

test because if that be so, no two undertakings can be similar except when we say that steel furniture is a product by itself. It is not the product but the process by which the product is manufactured which makes the unit a unit in Engineering Industry and the process includes turning, drilling, fitting, welding, casting, all well-known processes known as engineering process. That is how the expression was defined to be all enveloping and all embracing. Having done that, the Board adopted the well-known principle of regional division and classification in the region, then examined the paying capacity of industry-cum-region basis, again a well-recognised principle, and thereafter proceeded to determine wages for the lowest group in the most backward area and worked out the differentials. Now it is undoubtedly true, as the Wage Board itself admits, that the response of the industry to their questionnaire was rather poor but Wage Board is not a body which can raise its hands and throw away the burden of determining what it was charged to do on the ground that the parties did not supply sufficient material. It then attempted to collect as much material as was possible and based its findings on these materials and it can hardly be said that the material was not relevant. To reject the material as too general or lacking in details is to put a premium on the non-co-operation of the industry. Any worker can thwart the working of a Wage Board by simply refusing to respond to the invitation of the Wage Board and the recommendations of the Wage Board cannot be in respect of individuals. It has to be done industrywise and that is what the Wage Board appears to have done. After the questionnaire was drafted, it was issued to various unions and organizations connected with the Engineering Industry with which the Board was concerned. The questionnaire was also issued to workers, unions and to their Federations, Central Organisations of employers, various Chambers of Commerce and Industry as also to various State Governments, Commissioners of Labour and other concerned and allied interests (1.10). Undoubtedly as the Wage Boards records, replies were received mainly from bigger units. But the Wage Board did not confine itself to the material received in response to the questionnaire but went into the relevant literature and collected materials from whatever source it was available and then after examining in minutest details the material and analysing it and tabulating it, the Chairman and independent members based on their findings on it and it cannot be said that such recommendations must be held to be wholly inapplicable to steel furniture industry. It is no doubt true that at the time of the Reference the petitioner was the only unit manufacturing steel furniture in respect of whom the recommendations were being examined. In such a situation to what extent the capacity of the unit to pay must enter the verdict would be presently examined. Suffice it to say that examining the Wage Board recommendations in all its details we find nothing therein to come to the conclusion that they are contrary to the well recognised principles or are in any way vitiated.

17. Re : Ground (2) :- The next contention of Mr. Nanavati was that the establishment of the petitioner and that of the Machinery and Equipment Manufacturers Private Limited are not of "similar nature" and hence the

establishment of the petitioner could not have been included in Reference (IT) 162 of 1971 in exercise of the power conferred by S. 10(5) of the Industrial Disputes Act Section 10(5) of the Industrial Disputes Act reads as under :

"10. (5) Where a dispute Concerning any establishments or establishment has been, or is to be, referred to a Labour Court Tribunal or National Tribunal under this section and the appropriate Government is of opinion, whether on an application made to it in this behalf or otherwise, that the dispute is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in, or affected by, such dispute, the appropriate Government may, at the time of making the reference, or at any time thereafter but before the submission of the award, include in the reference such establishment, group of class or establishments whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments."

In order to attract the application of S. 10(5) it must be shown (1) that there is an existing dispute in respect of which a reference has been made to an Industrial Tribunal, and (2) that the dispute is of such a nature that any other establishments of a similar nature is likely to be interested in, or affected by, such dispute. And this power can be exercised before the initial Reference in which the other employers are to be included has not been disposed of. The Government of Gujarat had made a reference in respect of Machinery and Equipment Manufacturer Private Limited as per its order No. KH-SH-3791-AJM-3771-JH. dated December 9, 1971 and the dispute referred to the Tribunal for its resolution was stated as under :

"All the recommendations of the Central Wage Board for Engineering Industry should be implemented in the light of the indications made by the Government of India in its Resolution No. WB. 4(8) 69 dated the 21st March, 1970."

After this initial reference was made, the Government of Gujarat by its order dated June 27, 1973 included the petitioner and 76 others in the said reference because, in the opinion of the Government of Gujarat, the pending dispute in the initial reference is of such a nature that the establishments mentioned in the Schedule appended to the order were likely to be interested in, or affected by, such dispute. The contention is that before power under sub-s. (5) of S. 10 can be invoked, it must be shown that the establishment which is being included is of "similar nature" as the one in respect of which a reference is pending and that the dispute involved in the pending reference is such in which the other establishments sought to be included under S. 10(5) are interested, or affected by such dispute. The argument ran thus. The Machinery and Equipment Manufacturers Private Limited is a company engaged in the manufacturer of machinery and its spare parts while the petitioner-company, on the other hand, is engaged in the business of manufacturing steel furniture and that these two establishments could not be said to be of "similar nature". If the product test were to be applied, certainly the Machinery and Equipment Manufacturers Private

Limited and the petitioner-company could not be said to be of "similar nature" but the expression "similar nature" has to be understood in the context in which it is used. Similarity envisaged by the sub s. (5) is not something akin to two establishments being wholly identical. No two establishments can be wholly identical and attempt must be made to find substantial similarity and the similarity is to be judged in the context in which it is to be determined. The establishment must be of "similar nature". In order that the one establishment in respect of which a dispute is pending under reference is likely to be interested in, or affected by, such a dispute. It is the nature of dispute which would provide a criterion for comparability in order to ascertain similarity of two establishments. The dispute between Machinery and Equipment Manufacturers Private Limited and its workmen was with regard to the implementation of the recommendations of the Wage Board for Engineering Industry. Now if the present petitioner-company is also an establishment in Engineering Industry, undoubtedly a question is bound to arise whether the recommendations of the Wage Board as directed by the Government of India should be applied to it or not or should be enforced against it or not. Once these recommendations are being enforced against a unit or establishment in Engineering Industry in this part of the country, a question is bound to arise whether it should for the very reasons be applied or enforced against other units or establishments in Engineering Industry in this part of the country. Once a unit is directed by an award in an industrial adjudication to implement the recommendations of the Wage Board, other units in Engineering Industry may be faced with a demand that they should also implement and enforce the recommendations of the Wage Board. Therefore, all units and establishments in Engineering Industry in this part of the country, that is, the western region, will have to face a demand by their workmen that the relevant portions of the recommendations of the Wage Board applicable to each unit according to the formula should be implemented. All such be implemented. All such units and establishments in Engineering Industry are likely to be interested in, and affected by the dispute and it is the nature of the dispute which will decide similarity of establishments.

18. Now it cannot be gainsaid that manufacturing steel furniture with mechanical process is a process of Engineering and the unit employing such process is a unit or establishment in Engineering Industry. This is unquestionably established. If petitioner-company is a unit in Engineering Industry, it is likely to be interested in, or affected by the dispute pending against another unit or establishment in Engineering Industry in respect of whom the workmen have made a demand that the recommendations of the Wage Board should be implemented and enforced. It is in this context that the petitioner-company can be said to be "similar in nature" to Machinery and Equipment Manufacturers Private Limited.

19. However, Mr. Nanavati contended that before similarity can be determined, certain well-recognised tests must be applied such as the product test, the use of tool or machinery of the same kind test, size of the establishment test, functional integrality test and approach test. It is undoubtedly true that some test will have

to be applied before it can be said with confidence that two establishments are of "similar nature". One such test could be, whether by the dispute in one undertaking, a similar dispute in terms of the same language could be raised in another establishment or the decision in one is likely to raise a demand in the other of the same nature or a decision in one may create unrest or disharmony in another unit, conceding for the time being that both are units in the same industry. Engineering Industry is a genus of which there may be number of specie but when it comes to implementation of the recommendations of the Wage Board constituted for the whole industry, namely, all its specie, two units producing any diverse product would be equally interested in or affected by the dispute referable to implementation of the recommendations of the Wage Board. That is also a valid test and applying that test, similarity in nature has been clearly established. But, it was contended that unless functional integrality test is satisfied, it can never be said that two establishments are similar in nature. Functional integrality test is not the sole test or the exclusive test to determine similarity of nature. It was relied upon in the context of the case in which it has been applied. In fact test was evolved in the facts and circumstances of the case. Reference in this connection may be made to National Iron and Steel Co. Ltd. and Others Vs. The State of West Bengal and Another, . By an order dated August 25, 1959 the Government of West Bengal made a reference under S. 10 of the Industrial Dispute Act, 1947 of what was described as an industrial dispute between Messrs. National Iron and Steel Company Ltd., and their allied concerns, viz., Tatanagar Foundry Co. Ltd., Britannia Building and Iron Co. Ltd. and National Screw and Wire Products Ltd., of the one part and their workmen represented by the two unions on the other regarding the matters specified in the Schedule for adjudication. The Schedule referred to about eight different industrial matters. The validity of this reference was challenged contending that as all the companies were not concerned in all the item of dispute, one order of reference embracing all of them in some of which some of the appellants were interested while in other they were not, should not have been made. The Tribunal negatived this contention observing that there was sufficient functional integrality between the four concerns which would justify one order of reference. The Supreme Court confirming this finding observed under :

"In order to find out whether there was sufficient functional integrality between the employers and whether it would be proper to have one reference in respect of the four concerns which are separate entities in the eye of law, it is necessary to taken an overall picture of their activities and the interest, if any, which they had in common. In this case, we find that all the four establishments were engineering concerns producing iron and steel goods through of different types. They had a common General Manager who later on become their Works Manger, they had a common time office, a common canteen and a common Labour Officer. That their Standing Orders were the same may be due to the fact that they were all members of the Engineering Association. But the things they had in common are sufficient to show a commonalty of interests so far as industrial

disputes are concerned. If the wages, the dearness allowance or benefit of gratuity or leave rules were altered in one without affecting the others, the industrial peace and harmony in the other establishments were bound to be disturbed. The workmen of all the four concerns were so closely associated that it would be asking for trouble if the conditions of employment in one concern were varied to the benefit of the workmen of that particular establishment, leaving the conditions of service in other three concerns undisturbed."

Based on these findings the court was of the opinion there was sufficient functional integrality between the employers and a common reference was quite competent. In fact the Court went so far as to state that there would be no conflict of interest because they are represented by a common lawyer and it was only National Iron and Steel Company Limited which more or less paid attention to the Reference. Now this decision is not an authority for the proposition that in order to establish similarity of industry, the functional integrality test is the only exclusive test. In fact the reference was under S. 10(1) and it is well-recognised that all those undertakings can be grouped together where it can be shown that the dispute was common to all. The test in sub-s. (5) is of a wider nature and as far as the requirements of sub S. (5) are concerned, similarly of nature to be judged in the background of the dispute which is pending and in which other establishments are being included on the ground that they are likely to be interested in or affected by the dispute being decided one way or the other. It can not be said with confidence that the Supreme Court laid down the functional integrality determining similarity of nature for purposes of Sub-s. (5) or even for purpose sub s. (1).

20. We would also like in this connection to refer to *Management of Wenger and Co. Vs. Their Workmen*, . In that case an industrial dispute arising out of ten demands made by the employees against 13 hotel and restaurant institutions in Delhi was referred by the Chief Commissioner, Delhi to the Industrial Tribunal adjudication. There were two independent reference, one included two hotels Claridge's Hotel and Nirula Hotel and another one related to United Coffee House and others. The two reference were consolidated by the Tribunal and were heard together. It was contended before the Supreme Court that the Tribunal was in error in dealing with two hotels and eleven restaurants together. The argument was that the hotels and restaurants are not similar in character so as to justify the employee's claim made against the two sets of establishments to be tried together. Repelling this contention it was observed that even in the past restaurants and hotels had been grouped together for the purpose of adjudication. However, the test evolved was that though the nature of service rendered by hotels is in some particulars different from that of the restaurants, both the establishments are constituents of catering trade. Referring to the situation of the restaurants and hotels covered by the reference. It was further observed that they are carrying on the same business in about the same locality and it is desirable that terms and conditions of service of the employees working in them should, as far as possible, be uniform. Such uniformity not only

conducive to peace and harmony amongst the employees and their employers, but would be helpful to the management themselves because it would tend to avoid migration of labour from one establishment to another. Undoubtedly it has been stated that peace and harmony in the industry and discouraging migration of labour are also vital considerations in deciding the interest of two establishments in the same dispute so as to be treated similarly. In fact the primary test applied is that the establishments covered by the references were constituents of a catering trade. The general trade test was applied. If that is adhered to, it is unquestionably established that petitioner-company and Machinery and Equipment Manufacturers Private Limited are constituents in the Engineering Industry and that they could be said to be similar. But again we would like to point out that this test of similarity was devised in the context of S. 10(1) where prima facie before grouping together or lumping together different establishments in one reference it must be ascertained that there is no conflict of interest and that by and large the dispute will have to be resolved in a manner as to encourage peace and harmony in the industry. But, as pointed out earlier, as far as the requirements of sub. s. (5) are concerned, the only test and the valid test that can be adopted is that the similarity of the nature has to be judged in the context of the dispute which is pending and the effect of its decision on other establishments. The question whether two establishments are similar or not will have to be answered in the background of the facts of each case. No one test can be evolved, no one test can be devised. Functional integrality test was devised in the case of National Iron and Steel Company's case (supra) in the facts and circumstances of that case. Broadly it can be said that when two establishments are similar, the workmen would expect a sort of same or identical conditions of service and change or revision of conditions of service in one may disturb peace and harmony in another, consequently resulting into migration of labour. Even if these three tests are cumulatively applied and keeping in view that the well-known different occupations in establishments in Engineering Industry, such as, a fitter or a turner or a welder would expect almost a similar treatment and if Wage Board recommendations are enforced in one and not in the other, it would be directly affecting peace and harmony in the industry and encourage migration of labour. Therefore, apart from test applied by us, if we are to supply the test in Wenger's case, the conclusion would not be different.

21. There was a contention that the petitioner-company could not be included a pending reference between Machinery and Equipment Manufacturers Private Limited, more particularly in the light of the dispute which was pending, cannot be entertained and must be negated.

22. Re. Ground (3) :- The third ground of attack was a sort of a corollary to the second. It was contended that the petitioner could not be described as an establishment in Engineering Industry and that there is nothing to show that the petitioner's establishment is interested in or affected by the dispute then pending between machinery and Equipment Manufacturers Private Limited and its workmen. In fact this is a repetition of Ground No. (2) in a slightly different

phraseology. "Engineering Industry" as pointed out earlier, has been defined by the Wage Board and it is the Wage Board's definition which is relevant for us as meaning that the units engaged in the production and/or shaping of ferrous and non-ferrous metals by turning, fabrication, processing, moulding joining, etc., are the units in the engineering industry. Manufacturing steel furniture such as cupboards, tables, chairs, etc., is nothing but shaping or fabrication of ferrous metal sheets. In paragraph 5.14 of Wage Board Report which we have hereinabove quoted, it is stated that steel cupboards and steel furniture are products of Engineering Industry. It was, however, contended, that the Tribunal in Appendix Vi has set out major groups, minor groups, and sub-groups of engineering industry according to the National Standard Industrial and Occupational Classification Indicative of the items of manufacture in the industry and it does not refer to steel furniture. The Appendix first refers to the six major groups devised by the National Standard Industrial Occupational Classification of Engineering Industries. Group II is headed "Manufacture of Metal Products Except Machinery and Transport Equipment". Sub-item (a) refers to manufacturing of fittings, fixtures and fasteners. The dictionary meaning of "fittings" includes furniture. The Concise Oxford Dictionary includes furniture in the meaning assigned to the expression "fittings". Even apart from this meaning, Appendix VI is merely illustrative and could not be said to be exhaustive of all engineering products. The broad heading "Manufacture of Metal Products except machinery and Transport Equipment" should unquestionably include "steel furniture" which is nothing else but shaping or fabrication of ferrous metal sheets. But, urged Mr. Nanavati engineering industry is a genus of which there are a number of specie such as electrical engineering, mechanical engineering, general engineering and accordingly even steel furniture making engineering is a distinct and separate type of engineering and as there is no reference to it in any portion of the report of the Wage Board, it must be held that the Wage Board did not consider units engaged in manufacture of steel furniture as being included in Engineering industries. As pointed out earlier, in paragraph 5.15 the Wage Board in terms says that steel cupboards and steel furniture are products of Engineering Industry. To describe manufacture of steel furniture as manufacture of general products would certainly bring it within the compass of Engineering Industries. However, every branch of engineering industry cannot derive its nomenclature from the product. Encyclopedia Britannica at page 391 defines "Engineering" to mean creative application of scientific principles to design or develop structure, machines, apparatus, etc. The test appears to be the application of scientific principles in manufacturing various products but each product does not make it a separate branch in engineering industry. That becomes clear also from the Occupational Classification resorted to by the National Standards Industrial and Occupational Classification. Mr. Nanavati sought support an observation of the Supreme Court to urge that each product can be still a separate branch of engineering industry. He invited our attention to Regional Provident Fund Commissioner Vs. Shibu Metal Works, . The construction of entry "Electrical, Mechanical of general engineering products" in Schedule to

the Employees Provident Fund Act 1952 came up for construction before the Supreme Court in the context of the argument put forth by the employer urging that it is engaged in the manufacture of brass utensils which is neither electrical engineering product nor mechanical engineering product nor general engineering product. Referring to the observation that there are several branches of engineering such as civil, mining and metallurgical, electrical, chemical, aeronautical and industrial, it was urged that each branch is a separate and independent branch of engineering and units in two separate branches could not be said to be similar only because they are grouped together in the common genus engineering industries. The Court in that case also pointed out that there are other less clearly defined branches of engineering, such as sanitary, structural, drainage, hydraulic, highway, railway, electric power, electrical communications, steam power, internal combustion, marine welding production, petroleum production, fire protection, safety architectural, nuclear and management administrative engineering. These observations have to be understood in the context in which the question arose before the Supreme Court. Employees in all establishments any branch of engineering industry were not sought to be covered by the entry Schedule 1 to the Act. The entry in terms was "Electrical Mechanical or General Engineering products" and it is in that background that different branches of engineering industry were referred to, to find out which are included and which are not included. As far as the Wage Board was concerned, the expression used was "Engineering Industries" and, therefore, all those units which can be said to be units in Engineering Industries could for the purposes of the recommendations of the Wage Board be said to be establishments in Engineering Industries. Even if a product test were to be applied, though the Court definitely emphasised that the word "product" should not be given undue importance yet steel furniture manufacture by mechanical process is certainly an engineering process and the units engaged in such manufacture would unquestionably be units in engineering industry.

23. The second argument need not be independently examined here. It was contended that there is nothing to show that the petitioner's establishment is interested in or effected by the dispute then pending between the Machinery and Equipment manufacturers Private Limited and its workmen. We have exhaustively dealt with this aspect while repelling the first contention. Suffice it to say here that for the purpose of sub-s. (5) of S. 10 of the Government is satisfied that the dispute in a pending reference is such that an establishment of similar nature in respect of which the reference is pending is likely to be interested in or affected by the dispute it can include that establishment in the pending reference. In the context of the demand by the workmen of the Machinery and Equipment Manufacturers Private Limited, namely, that the recommendations of the Wage Board in Engineering Industries should be implemented and enforced it is undeniable that other units in engineering industries in the same or nearby area would certainly be interested and would be definitely affected because once it is enforced in one unit, there would be clamor

for enforcing the same in another unit which is of similar nature and to avoid multiplicity of reference and unrest amongst employees in establishments of similar nature and disturbance of peace and harmony in industry, the Government was perfectly justified in including the petitioner-company in the pending reference. The very fact that the workmen of the petitioner-company also persisted in seeing that the recommendations of the Wage Board should be enforced and implemented would affirmatively show that the petitioner company if not interested in, is affected by the dispute.

24. Re. Ground (4) : The next ground of the attack has only to be mentioned to be rejected. It was contended that the notification dated June 27, 1972, Annexure "E" to the petition, including the petitioner in the pending reference between Machinery and Equipment Manufacturers Private Limited and its workmen is illegal and Ineffective in that it disclosed non-application of mind because the notification does not record the satisfaction of the Government that petitioner-Company was "similar in nature" compared to Machinery and Equipment Manufacturers Private Limited. Undoubtedly, as stated earlier, before exercising powers under Sub s. (5) of S. 10, the Government must be satisfied that there is a pending dispute between an establishment and its workmen and that the dispute is of such a nature that any other establishment group or class of establishments of a similar nature is likely to be interested in, or affected by, such dispute. In the order making the reference it has been stated that the Government of Gujarat is of opinion that the said dispute is of such a nature that the establishments mentioned in the Schedule appended thereto are likely to be interested in, or affected by such dispute. Urged Mr. Nanavati, the order does not show that the Government was satisfied that the petitioner-company is an establishment of a similar nature with that in respect of which there was a pending reference in which the petitioner company was being included. Undoubtedly the order making the reference does not state in express terms that the petitioner-company is similar in nature to the one in respect of which the reference was pending. But it has been now found as a fact both by the Industrial Tribunal and by this Court that the petitioner-company is an establishment of a similar nature with the Machinery and Equipment Manufacturers Private Limited. Should we at this stage reject the reference ex hypothesi on the ground that the Government had no such material ? The material has been existing in the past and continues to exist till to-day. But the better answer to the question would be that these are jurisdictional facts which need not be examined on affidavit that may be filed in this Court in a petition under Art. 226 but they are properly to be appreciated by the Tribunal on the evidence placed before it. If a reference is incompetent, it is open to the parties so contending to urge the same before the Industrial Tribunal. Such a contention was taken and the Tribunal. Such a contention was taken and the Tribunal on the material placed before it, negatived it. In fact, before the Industrial Tribunal it has not been contended that the Government was not justified in making the reference without being satisfied that the two establishments are of a

similar nature. The contention has slightly been modified here though, of course, in fairness to Mr. Nanavati, it must be stated that both the limbs have been placed before this Courts. In any case whether these two establishments are of similar nature or not is a question of fact which the Tribunal has answered in the affirmative. The Tribunal was not called upon to decide whether the Government had some material before it to come to the said conclusion but the jurisdictional fact can be investigated by the Tribunal and has in fact been investigated by the Tribunal and that is the competent authority to do so. In this connection it would be advantageous to refer to *Express Newspapers (P.) Ltd. v. The Workers* (supra). A contention was raised whether what the employer had done did amount to a lockout or a closure. When the writ petition was filed in the High Court and when it came up before the learned single Judge, he was of the opinion that the petitioner had resorted to closure and that it did not amount to lock-out and so the substantial part of the dispute between the parties did not amount to an industrial dispute at all. The Court of appeal held that having regard to somewhat complex nature of facts, it would be appropriate that the said questions should be fully investigated and tried in the first instance by the Industrial Tribunal itself. When the matter came to the Supreme Court the same contention was repeated and repelling the contention and confirming the finding of the appellate Court, it was observed as under :

In fact, Industrial Tribunals have been specially established in order to deal with industrial disputes in different places. That is one consideration which is relevant. The other consideration which is equally material is that a question of this complicated character cannot be satisfactorily dealt with merely on affidavits. The theoretical distinction between a closure and a lock-out is well-settled."

At another stage it was observed as under :

"But would it be proper for the High Court to adopt such a course unless the ends of justice seem to make it necessary to do so ? Normally, the question of fact though they may be jurisdictional facts the decision of which depends upon the appreciation of evidence should be left to be tried by the Special Tribunals constituted for that purpose."

The contention as is now sought to be placed, had it been placed before the Tribunal that the State Government had no material before it to form an opinion that the two establishments were of a similar nature, the fact could have been inquired into. That was not done. What was contended was that the two establishments are not of a similar nature, and that has been investigated. We are even satisfied on the material placed before us and in the context in which the question has arisen that the two establishments for the purpose of S. 10(5) are of similar nature. In that even the contention that as the Government has not recorded its satisfaction in the order making the reference about the similarity of nature, the whole reference is bad in law cannot be accepted.

25. Re : Ground (5) : The next ground of attack was that the Tribunal was in

error in refusing to examine the capacity of the petitioner to bear the likely additional financial burden which would be cast upon it if the recommendations of the Wage Board are applied and enforced and was further in error in not applying the principle of region-cum-industry while directing the implementation of the recommendation of the Wage Board. Before we examine the contention on merits, at the outset it is necessary to state as to how the Tribunal has approached the question of capacity of the industry to pay. The Tribunal extensively referred to the report of the Wage Board and reached a conclusion that it would be incorrect to say that the Wage Board did not go into the questions of the capacity to pay at all. Tribunal then examined the classification done. The Tribunal also referred to the minimum emoluments of an unskilled worker as on March 1, 1968 in the case of other industries. Then the Industrial Tribunal referred to minimum wages for a number of other industries as fixed by the Government of Gujarat. However, an attempt was made asking the Tribunal to examine the paying capacity of the petitioner-company alone. Then the Tribunal referred to various decisions bearing on the question and was of the opinion that both because of the manner in which this dispute is referred to the Tribunal, the terms of reference and the general principles for wage fixation which have now been enunciated by the Supreme Court, it would not be proper for the Tribunal to consider the capacity to pay of individual units but only to deal with the question whether the Wage Board recommendations should be implemented or not, if necessary, with adjustments. In this view of the matter the Tribunal refused to consider the capacity of individual unit which appeared before it including the Chandan Metal Products Limited, the petitioner herein, in respect of whom it was making more or less a common award.

26. At the outset it would be better to prescribe guidelines for determining the question of paying capacity. In the earliest decision in *Express Newspapers Private Limited (supra)* the Courts extracted the following observation from the report of the Committee on fair wage which has almost become a classic :

"In determining the capacity of an industry to pay it would be wrong to take the capacity of a particular unit or the capacity of all industries in the country. The relevant criterion should be the capacity of a particular industry in a specified region and, as far as possible, the same wages should be prescribed for all units of that industry in that region. It will obviously not be possible for the wage fixing board to measure the capacity of each of the units of an industry in a region and the only practicable method is to take a fair cross-section of that industry"

After referring to this observation in the report of the Committee on fair wages and while formulating the principles set out in paragraph 73, it has in terms been held that the capacity of the industry to pay should be gauged on an industry-cum-region basis after taking a fair cross-section of that industry. This has been confirmed over and over again in *Kamani Metals & Alloys Ltd. v. Workmen* AIR 1967 S.C. 1975 *Jaydip Industries, Thana Vs. The Workmen, and Management of*

The Kirlampudi Sugar Mills Ltd. Vs. The Industrial Tribunal, A.P. and Another, . Therefore, it is now well-established that while considering the question of capacity of the industry to pay, the industry-cum-region formula has to be kept in view and for each region a fair cross-section of the industry in that region should be taken into consideration. A faint attempt was made by Mr. Nanavati to urge that even where the Wage Board has computed wage structure on the industry-cum-region basis after taking fair cross-section of the industry in various regions, it would still be open for an individual unit to content that it cannot bear the burden that may be cast upon it if the recommendations in respect of the revised wages are to be enforced. In support of this contention reliance was sought to be placed on certain observations in the Kirlampudi Sugar Mills case (supra). The challenge in that case to the recommendations of the Wage Board was firstly based on the ground that the wage structure recommended by the Wage Board for sugar industry were contrary to the well recognised principles of wage fixation. The gravaman of the charge was that after the Wage Board divided the country into four regions, it did not proceed to classify the suits in each region and fixed a fair wage for the industry in each of the regions and this was contrary to the well-known and well recognised principle of wage fixation on Industry cum region basis after taking a fair cross-section of the industry. The Supreme Court negated this contention by first saying that the classification into clauses is not an obligatory one but is required only in cases where otherwise a fair wage cannot be determined. The cryptic observation really bring this out. It says : "Any injunction that the industry in a region should in all cases be divided into classes in determining a fair wage for that industry would on the other hand likely to introduce greater disparity." After reaffirming the principles enunciated by the Committee on fair wages that it is wrong to take the capacity of a particular unit or the capacity of all industries in the country into account and the relative criterion should be the capacity of a particular industry in a specified area and as far as possible same wages should be prescribed for all unit in that region the court in terms accepted that there is nothing wrong in prescribing the same wage for all units of the industry in the same region if it is justified in the circumstances of the case. It has observed as under :

"It would, therefore, appear that the Wage Board following the principles laid down by this Court has considered the capacity of the Industry-region-wise and has also fixed wages different from region to region, having regard to the difference in the capacity of the industry region-wise. Further it has given good reason for not furnishing a criteria for further classification of the industry within the region. In these circumstances prescribing the same wage for all units of industry in the same region. In these circumstances prescribing the same wage for all units of industry in the same region is in our view justified and the fact that the industry in the region has not been divided into classes cannot vitiate the recommendation of the Wage Board."

27. The Wage Board for the Engineering Industry not only first divided the

country into various regions on well-recognized and process of growth of industrialization in various regions and the cost of living and them as under the generic term "Engineering Industries" a heterogeneous mass was collected, it proceeded to classify units in each region on the criterion of size reckoned on the number of workmen employed and recommended wage class-wise region wise. It was, however, urged that seen after affirming the recommendations of Sugar Wage Board, the Supreme Court did examine the capacity of Kirlampudi Sugar Mills. That is undoubtedly true but the decision In Kirlampudi Sugar Mills case, is not an authority for the proposition that been where paying capacity has been examined on the principles of industry-cum-region basis after taking a fair cross-section of the industry, the Tribunal called upon the adjudication the demand for enforcement and implementation of the recommendations of the Wage Board should of necessity or as legal requirement again examine the capacity of the unit to bear the extra burden. Such an approach will run counter to the well recognised principle formulated for wage fixation. The decision in Kirlampudi Sugar mills case must be understood in the light of this fact that the national Wage Board recommended the same wages in the region for the large medium size and small units. This wage Board for Sugar Industry had examined the paying capacity of the industry regionwise but declined to classify the industry. The net result was that once a wage structure was recommended for a region all units in that region large, medium sized or small were to give effect to the same wage structure and it is quite well-known and well-recognized that the capacity to pay, which is related to profit is irrevocably interlinked with the size of the undertaking. It is in the background that the Tribunal before which the demand was made for enforcing the recommendations of the Sugar Wage Board examined the capacity of Kirlampudi Sugar Mills to bear the extra burden and the Supreme Court on an appeal examined the same Question. Mr. Nanavati of course, drew our attention to one observation in this case. Wherein it is stated that "there is warrant for the submission of the learned advocate for the appellant (employer) that notwithstanding the fact that a fair wage has been fixed by the Board which would be applicable to all the units in the region for which wage has been fixed, it may be open to any particular unit to plead that in face its financial position is not such that it can bear the burden of implementing the recommendation". Reliance was also placed by the Supreme Court in its earlier decision in Ahmedabad Mill Owners' Association Etc. Vs. The Textile Labour Association, . In that case the dispute was with regard to the manner and method of payment of D.A. by the Ahmedabad Mill Owners Association and other employers in textile industry in the City of Ahmedabad to the workmen employed in the textile industry. The Industrial Court had found that the additional burden which its award in respect of D.A. would impose upon the millowners would not be beyond their financial capacity. This finding was challenged before the Supreme Court. The Supreme Court observed that where the wages paid to the employees are no better than the basic minimum wage, the question about examining the paying capacity does not figure not the verdict at all. But apart from this going through the whole judgment it clearly appears that an attempt

was made to examine the paying capacity of the industry as a whole. No attempt was made even by the employers inviting the Court to examine the paying capacity of each unit at all and it is quite well-known that the most affluent and the marginal textile units are governed by the same wage structure as also the formula for D.A. Therefore, it clearly appears that where the Wage Board has examined the paying capacity of the industry regionwise classwise and if that is not shown to be defective in any manner, when it comes to enforcement of the recommendations of the Wage Board an award of the Industrial Tribunal, it would not be necessary for the Tribunal to examine the paying capacity of each unit. If paying capacity of each unit in this background is to be examined, the very formula of examining the paying capacity industry-cum-region wise after taking a fair cross section of the industry would be rendered wholly nugatory and it would be entirely worthless and futile to take up that exercise. In fact, it would become fruitless to appoint a Wage Board at all for an industry. The ratio in Kirlampudi Sugar Mills case (Supra) would mean this that where the Tribunal has not undertaken the exercise of ascertaining the paying capacity on the well recognized principle of industry-cum-region after taking a fair cross section of the industry, it would be incumbent upon the Tribunal to call upon to examine the question of enforcement of the recommendations of the Wage Board to ascertain the paying capacity of the units before it. That is how the question was examined in Kirlampudi Sugar mills case. It is, therefore, not possible to accept the submission that even where the wage structure has been devised after ascertaining the paying capacity on industry-cum-region basis, after taking a fair cross section of the industry in various regions, it would still be obligatory on the Industrial Tribunal to re-examine the question of the paying capacity of each unit in respect of whom the reference is made.

28. We would now examine the question of paying capacity from two distinct angles : (1) Is the paying capacity at all relevant if what the Wage Board has recommended is an essential minimum wage only ? and (2) if it has recommended a fair wage, the lowest limit of which being the minimum wage and the upper limit being the capacity of the industry to pay, has the Tribunal examined the paying capacity of the industry according to principles well-known to industrial adjudication ?

29. It is unquestionably established and not disputed by Mr. Nanavati for the petitioner that if only a minimum wage is fixed by wage fixing machinery for any industry, no unit of the industry can be heard to say that it cannot afford to pay the minimum. In Ahmedabad Mill-owners Association case (supra) at page 519 the Constitution Bench of the Supreme Court in terms observed that :

"If what the employer pays to his employees is just the basis subsistence wage, then it would not be open to the employer to contend that even such a wage is beyond his paying capacity. Industrial adjudication has consistently recognized and enforced the principle that social justice requires that an industrial employer must be able to pay his employees a wage structure which can be reasonably

regarded as basic minimum wage. No employer can be allowed to pay his employees wages which are below the basic minimum or the subsistence wage. It is well-known that in certain Industries, minimum wages are fixed by the statute. Even where minimum wages are not fixed by the statute, Industrial adjudication can easily determine whether in a given case the wage paid is basic minimum or not. In either case, where the wage answers the description of the basic minimum or subsistence wage. It has to be paid by the employer : and if he cannot afford to pay it, he would not be justified in carrying on his industry."

30. It is a question of fact to examine whether the wage structure recommended by the Wage Board especially the Chairman and independent members in Chapter VII is the basic minimum or a fair wage which may be higher than the basic minimum, though it is well recognised that the lowest limit of fair wage is basic minimum. In other words, fair wage can never be lower than the basic minimum. Now undoubtedly the terms of reference of the Wage Board require the Wage Board to work out a wage structure based on the principles of fair wages as set fourth in the report of the Committee on fair wages but as the Committee itself has minimum wage. We should, therefore, attempt to find out as to whether the wage structure recommended by the Wage Board is the basic minimum wage or fair wage. In chapter VII after considering the various norms for fixing the minimum wage, the diet and nutritional tables and after referring prevalent wages in some other industries and then after determining the regions and the classes, when it came to devise the wage structure the Committee in terms observed as under :

"7.54 Having determined the areas and groups of the units of the industrial for the purpose of fixation of wage structure and the method of its application in practice we now deal with the question of determining the minimum for the lowest paid unskilled workers in the industry. This has been by far the merit important issue the Board had to deal with and have proved to be a time consuming and an extremely controversial affair."

The Board than undertook the exercise of working out a need-based minimum wage and then there is a pertinent observation which again deserves reproduction :

"The idea is that wages will have to fixed not only according to different areas but is each area also, there will be groups according to the paying capacity of the units. While we realise that it would not be possible to recommend the need-based wage at present, we must also consider essential minimum wages for worker in the context of the present high prices. We have also to consider not only the paying capacity of the industry as a whole but also the paying capacity of the industry in different regions, from the data that was available to us."

Again in Paragraph 7.75 the Wage Board says -

"As mentioned above we have fixed the minimum basic pay of Rs. 105".

These observations leave no room for doubt that what the chairman and independent members have recommended is a bare minimum wage or to use their own expression "essential minimum wage". The conclusion is reinforced by the fact that while devising the structure, the Board kept in view minimum emoluments of an unskilled worker as on March 1, 1968 in the case of iron and Steel Industry, Coal Mining Industry, the recommendations of the First Textile Wage Board and Cement Industry Second Wage Board. It is thus unquestionably established that what the Board recommended was a minimum wage or what is called basic minimum wage or essential minimum wage. This may appear to be well-established from another angle, namely, that when the matter was before the Industrial Tribunal, the Tribunal referred to the minimum wages prescribed by the Government of Gujarat in sweated industries for various sizes of units and areas in this State and came to the conclusion that where comparable is the minimum wage. It may be that the Wage Board was charged with devising a fair wage but being aware of the fact that the lowest limit of fair wage is minimum wage and having its own limitations, for want of appropriate data, it probably looking to the expression used, chose to fix the minimum wage. The Chairman who had worked in the field of the Industrial adjudication for greater part of his career, must be deemed to be quite conscious of the connotation of phrases "minimum wage" "subsistence wage", "fair wage" and "living wage" and when the Chairman and independent members manifestly expressed at four distinct places in the report that what they were recommending was a minimum wage, they must be understood to have used the expression in the technical sense in which it is used in industrial relations if we are right in this conclusion, the entire amount of examining the paying capacity must evaporate into thin air because no employer could be heard to say that it would not pay the basic minimum to its workmen whatever be its paying capacity. We would rather repeat the same statement way back made any which has become a classic that an employer who cannot afford to pay the minimum wage to its employees is a drag on the socio-economic conditions of the society and has no right to exist.

31. Assuming that Mr. Nanavati is right in contending that what is a fair wage the question is, whether the Wage Board had examined the paying capacity of the industry on industry-cum-region basis after taking a fair cross-section of the industry. The Wage Board has devoted the whole of its Chapter VI on the question measuring the capacity of industry to pay in the context of payment of fair wages. It has kept in view the criterion, namely, that in determining the capacity of an industry to pay regard should be had to : (a) a fair return on capital and remuneration to the management and (b) fair allocation to reserves and depreciation so as to keep the industry in a healthy condition. The Board reiterated its limitations and handicap suffered by it for purity of data but the Board examined the material supplied by the two members of the Board, namely, Shri Bharat Doshi and Shri Bagri. Thereafter the report relied upon a study made by the Reserve Bank of India in respect of 1333 companies of which 196 were units in Engineering Industry. The report of the study made by the Association of

Indian Trade and Industry, Bombay on the financial working of the Engineering Industry in 1967 was referred to an examined in details. The Board found that the present labour cost is only about 13.7 per cent. to 16.2 per cent. of the total income. The Board worked out the profitability ration regionwise. Some of the conclusions of the board we have already noted in the earlier part of this judgment which show that the position of the Engineering Industry as a whole, both regionwise and class wise, is far superior to other industries such as Cement, Sugar, Cotton Textiles etc. It is, therefore, not necessary to repeat the detailed analysis made in Chapter VI of the paying capacity of the industry on the industry-cum-region basis after taking a fair cross section of the industry. The Board was clearly aware of this principle when it says in paragraph 7.31 that they were aware that wages should be fixed on industry-cum-region basis and that in considering its capacity to pay, a fair cross section of the industry in each region should be taken into account. The Board has meticulously gone into the question of paying capacity on well-recognised principles and after a through examination of whatever data was available to it, it came to the conclusion that the industry has the capacity to bear the extra burden. This whole thing cannot be set at naught now by saying that the Industrial Tribunal should undertake the exercise of examining the paying capacity of each unit and come to the conclusion that the burden cast by the enforcement and implementation of the recommendations of the Chairman and independent members would be so heavy that the employer would be compelled to go out of the industry. Therefore, the Industrial Tribunal was justified in refusing to examine the paying capacity of the petitioner-company alone because the Industrial Tribunal was right in coming to the conclusion that the question has been properly examined keeping in view the well-recognised principle, by the Wage Board and that the attempt of the petitioner to invite the Tribunal to examine its own paying capacity would run counter to the well recognised principles firmly formulated for examining the paying capacity of an industry.

32 In fact Mr. Nanavati was at pains to point out us that there is a steep rise in the burden in the fourth year of the implementation of the recommendation as per the phased out programme and he was keen that we should examine the balance sheets of the company. The attempt was to urge that even if the paying capacity has been correctly examined, the Wage Board has not examined the question of the burden that its recommendations would cast on the industry. In the very nature of things, looking to the member of establishments in the Engineering Industry, once the paying capacity was properly determined, it was not possible to work out the burden unit wise because fitments were left to be determined by the employer. The Board categorised the employees into unskilled, semiskilled and skilled and also devised a wage scale for clerical and supervisory category. But the fitments were to be made by the employer and unless that was done it was not possible to work out the quantum of burden that would be imposed on units or on the industry while implementing the recommendations made by the Chairman and the independent members.

However, the Board did find the profitability ratios. The Board has examined the quantum of retained profits to net sales. It also worked out equity dividends as percentage of equity paid up capital. The Board observed that there is an increasing tendency of retaining the profit than distributing them and that this indicates a sound management policy for making provision for expansion of the industry in future. Therefore, once we conclude that the paying capacity was correctly examined by the Wage Board and no exception can be taken, to us its findings, it is not open to the individual unit to complain that it has no capacity to implement the recommendations of the Wage Board. Accordingly it cannot be said that the tribunal was in error in refusing to examine the capacity of the industry to come with the likely additional burden which would be imposed upon the petitioner if it were called upon to implement the recommendations of the Wage Board.

33. Here we must not with satisfaction one submission of Mr. Nanavati. He states that whatever may be the defects in the recommendations of the Wage Board or the impropriety of the Industrial Tribunal in not examining its paying capacity, the petitioner is willing and ready to implement the recommendations for the first three years as phased out by the Industrial Tribunal because, according Mr. Nanavati, the petitioner has the where, withal to meet with the obligation. His real grievance is that there is a steep rise in the fourth year and looking to its profits, the petitioner can by no stretch of imagination be able to meet the higher liability. There was a grievance that the steep rise to the tune of Rs. 10 lakhs while in the first three years the rise is Rs. 1,12,550. Rs. 75,000 and Rs. 1,17,420 respectively. They are for the period April 1972 to March 1973, April 1973 to March 1974 and April 1974 to March 1975 respectively. According to Mr. Nanavati effective from April 1975 to March 1976 to steep rise would be about Rs. 10,44,000. There was some dispute about the calculations but we have not gone into them. It is possible that as D.A. was linked to the cost of living index in the recommendations made by the Chairman and independent members and as there has been an erratic upward movement of the index during the relevant period, there is a distinct possibility of steep rise in the total wage bill. But this would also be fate of the employers in all industries where D.A. is linked to index. The D.A. has been recommended on the well-recognized formula of linking it to the cost of living index complex for industrial workers, namely, $1949 = 100$ series. In passing an argument was made that the neutralisation offered has been 100 per cent., and it was pointed out by reference to Kamani Metal Works case (supra) that 100 per cent. neutralisation is just not possible. We would have examined this argument in detail if by calculation it was pointed out to us that Rs. 1-50 rise per month for every 2 points rise in the index to be calculated twice in a year would ever come to 100 per cent. neutralisation. Any one who has even a faint perception of computation of D.A. as linked to index would immediately say that this formula can never come to 100 per cent. neutralisation. Mr. G. P. Vyas oversimplified the proposition by saying that if 212 index rises to 424; the rise is 100 per cent. He unfortunately over looked the fact that Rs. 1-50 for 2

points per month could never be 100 per cent. neutralisation and that is what the Wage Board has said. Therefore, while rejecting his contention we would record with appreciation Mr. Nanavati's Statement that the petitioner albeit all his objections would enforce and implement the recommendations of the Wage Board for three years, that is, upto and inclusive of March 31, 1975.

34 Re : Ground (6) : It was next contended that once the Industrial Tribunal disposed of Reference (IT) 162 of 1971, it became functus officio and could not have proceeded further with the adjudication of dispute in respect of the establishment of the petitioner. This contention has to be stated to be rejected. When in a pending reference other establishments of a similar nature likely to be interested in, or affected by the dispute are included, ipso facto the reference becomes one between that establishment and its workmen. If in one reference a large number of employer are grouped together as they had commonality of approach or had functional integrity and are likely to be affected by the outcome of the dispute one may or the other, a settlement in one or a disposal of the reference as between one unit and its workman would not have the effect of making the Tribunal functus officio qua the other establishment. On a proper construction of Sub-s. (5) it becomes crystal clear that when in a pending reference number of other establishments are included on the ground that the dispute in that pending reference is of such a nature that the other establishment, group or class of establishments of a similar nature are likely to be interested in, or affected by such dispute, by the mere inclusion, there comes into existence a reference between each of the establishments and its workmen. If the first reference which provided a basis or a nucleus for including the other establishments in the pending reference stands disposed of, the Tribunal does not become functus officio. The Tribunal must proceed with the reference as if it is made in respect of each establishment and dispose it of. Therefore, there is no force in this contention and it must be negated.

35. Re : Ground (7) : The last contention was that the award of the Tribunal is vitiated because : (a) the Tribunal has not taken into consideration the collective agreements and awards made in respect of the establishments participating in the award while directing implementation of the Wage Board recommendations, and (b) the Tribunal has failed to consider the case of the petitioner for fixing wage structure linked with production. Taking the first limb of the argument, it may be that before the Wage Board was constituted for the Engineering Industry, each unit may have entered into a settlement or a collective agreement or there may be an award in respect of its wage structure but once a Wage Board for the whole industry is established and the only dispute or demand included in the reference is whether the employers should be called upon to implement the recommendations of the Wage Board or not, at that stage the subsisting agreements or previous awards lose significance and become meaningless. The whole concept of Wage Board is that there should be a sort of a uniform wage structure for the entire industry, of course, regionwise classwise. Subject to these two distinguishing features the concept of Wage Board is that individual

units should not be permitted to coerce a workman into submitting to the wage structure devised by it resulting in frustration and disharmony because of invidious comparisons. In other words, it is an attempt at enforcing one of the Directive Principles of State Policy, namely, equal pay for equal work. If that be so, when the dispute before the Tribunal was whether the employer should be called upon to implement the recommendations of the Wage Board, any reference to the previous agreements or awards becomes irrelevant. In fact comparison with such previous state of affairs would put a premium on the employers' capacity to pay the lowest or as low as he can manage and the employee may have the choice of getting something or being unemployed. It may be that if an individual dispute is raised by workmen in an individual unit, the previous collective agreements or awards bearing on the question brought before the Tribunal may have some relevance and may have to be looked into. But in the context of the demand for implementation of the recommendations of the Wage Board, the previous agreements and awards have no significance and have been rightly overlooked.

36. The second limb of the argument was that the Tribunal has failed to consider the case of the petitioner for fixing wage structure linked with production. Undoubtedly, one of the terms of reference of the Wage Board was to determine the desirability of extending the system of payment by results. On this question the Wage Board has observed in paragraph 7.73 that payment by results is desirable. However, they were not able to devise a common scheme for the entire industry in view of the heterogeneous character of the industry and its production processes. In this background the Wage Board observed that the "formulation of a uniform incentive scheme or formation of a piece rate system in the industry on a common pattern for the entire industry would not be possible nor any suggestion was made in that behalf." The Wage Board, therefore, even though it was charged with the specific term of reference, looking to the nature of the industry, could not devise a system of industry could not devise a system of payment by results. Now the dispute before the Industrial Tribunal was whether the employer should be called upon to implement the recommendations of the Wage Board. The Industrial Tribunal was not called upon to devise a system of payment by results. The system of Payment by results was not recommended by the Wage Board. The dispute before the Industrial Tribunal was about the implementation of the recommendations of the Wage Board and if a Wage Board had not recommended a system of payment by results, the Industrial Tribunal could not have undertaken that exercise at the instance of the present petitioner. That would be clearly beyond the scope of reference. The Industrial Tribunal could not have implemented a recommendation which was non-existent. Therefore, there is no substance in this contention and it must be rejected.

37. Having examined all the contentions put forward by Mr. Nanavati as extensively as we could, we see no substance in them and, therefore, this petition fails and must be dismissed. Rule is discharged. The petitioner must pay

the costs of the respondents. At this stage Mr. K. S. Nanavati made as oral request for a certificate under Art. 133(1) of the Constitution. The judgment proceeds upon application of well-recognized principles laid down by the Supreme Court and we do not find any question of general public importance which, in our opinion, should be decided by the Supreme Court. Certificate is accordingly refused and the application is rejected.