

(1963) 05 PAT CK 0007

In the Patna High Court

Howrah-Amta Light Railway Company Ltd. and Another

APPELLANT

Vs

Central Government Industrial Tribunal and Others

RESPONDENT

Date of Decision : 03-05-1963

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 10, 2

Citation : (1966) 2 LLJ 294

Hon'ble Judges : V. Ramaswami, C.J;N.L. Untwalia, J

Bench : Division Bench

Judgement

N.L Untwalla, J.—The Howrah-Amta Light Railway Company, Ltd., and the Howrah-Sheakhala Light Railway Company, Ltd., belonging to the group of Martin's Light Railways have obtained a rule from this Court against the Central Government Industrial Tribunal at Dhanbad, respondent 1, Light Railways Employees' Union, respondent 2, and Martin Light Railways Mazdoor Union, respondent 3, to show cause why the award dated 22 March 1960 made by respondent 1 in Reference Case No. 66 of 1959 be not set aside by issuing a writ in the nature of certiorari under Article 226 of the Constitution of India. The petitioner's workmen represented by the two unions, respondents 2 and 3, have been separately impleaded as respondent 4 in the application. Cause has been shown by the two unions. Sri C. B. Ghosh represented respondent 2 and Sri Ras Behari Singh appeared for respondent 3.

2. The petitioners had been paying since the year 1949 (a special bonus commonly and popularly known as puja bonus in West Bengal to the workmen of their line staff with whom we are concerned in this case, every year on the occasion of the well-known and well-celebrated puja festival, According to the petitioner's case, they had been making these payments as ex gratia and out of bounty, and, in doing so, after the close of the financial year on 31 March, each year, they had been taking into account the trading results of the previous completed financial year and the prospects of the then current year. Neither of the petitioners had sustained any loss in any of the years in which such ex gratia

payments were made and the apparent loss in case of petitioner 2 in the year 1949-50 was explained by the fact that certain compensation amounting to Rs. 50,000 recoverable by the said company from East India Railway in respect of the said year was not received during that year and was received and included in year 1950-51. The petitioner's case further is that under the terms of employment their line staff had never been entitled to any holiday during the pujas. Until the year 1953 the petitioners used to make the said ex gratia payments after the pujas and only to those members of the line staff who had not absented themselves from the work during the puja. From the year 1954 onwards at the request of the petitioner's line staff made through respondent 2, the petitioners have been making the said ex gratia payments before the pujas in order to assist the workmen to make their puja purchases but this has been done expressly on the condition that the amount of such payment would be refundable by any member of the line staff who absented himself from work during the pujas. The petitioners were motivated at different times in addition to bounty, by different factors and circumstances prevailing in each year when the payments were made. Such payments never were or became a term of the employment of the petitioners' line staff. On or about 13 September 1958, respondent 2 requested the petitioners to make an ex gratia payment equivalent to three months' basic salary fifteen days before the puja to the workmen of the line staff. But by reason of the petitioners' difficult financial position in the said year, they declined to make an ex gratia payment of such a large amount but sanctioned the ex gratia payment equivalent to one-and-one-third months' basic salary as in the immediately preceding years. They, however, made it clear that, unless their (petitioners) financial position improved it would not be possible for them to make any similar payment in future. The workmen accepted the payment. In June 1959, various demands were made on behalf of their workmen through respondent 2 including, inter alia, demands for bonus for 1958-59. The petitioners contended that their profits for the years in question did not justify payment of any bonus at all. On or about 17 September 1959 the petitioners declared that they would make an ex gratia payment equivalent to one month's basic salary to the line staff and that they would also make an advance to such staff of amounts equivalent to their basic salary for ten days to be recovered back in three instalments. On 21 September 1959, an agreement was reached between the petitioners and respondent 2 which was incorporated in a memorandum of settlement arrived at in a conciliation proceeding in the presence of the conciliation officer on 24 September 1959, according to which the petitioners were to advance an amount equivalent to one month and ten days' basic salary as loan to their line staff pending adjudication of the demand made by respondent 2.

3. By an order dated 11 November 1959, the Central Government referred to respondent 1 the industrial dispute between the petitioners and their workmen represented by respondents 2 and 3 and the dispute specified in the order of reference was in the following terms:

What quantum of bonus, the workmen of the Martin's Light Railway are entitled to, in respect of the years 1958 and 1959?

By a corrigenda issued subsequently, the wordings of the said dispute were slightly altered and instead of the years 1958 and 1959, the years substituted were 1957-58 and 1958-59. Statements were filed by the parties before the tribunal, evidence was adduced and on considering them the impugned award was made. The answering respondents claimed that they were entitled to puja bonus for the years in question of the amount equivalent to two and a half months' basic salary for each year as condition of service or as customary bonus. The tribunal has held that they are entitled to puja bonus as an implied condition of service of an amount equal to one and one-third months' basic salary each year. In that view of the matter, it has decided that relating to the year 1957-58 the puja bonus would be one and one-third months basic pay which had already been paid and in respect of the year 1958-59 the workmen are entitled to the same amount of bonus out of which one month's basic pay had already been paid as bonus and that the amount equivalent to basic salary of one-third of the month paid as loan should not be recovered.

4. Learned Government Advocate who has appeared in support of the rule has urged four points:

(i) The tribunal has committed an error of law in deciding that the scope of reference includes a determination as to whether the workmen are entitled to puja bonus either as an implied term of service or as a customary bonus whereas the wordings of dispute mentioned in the order of reference, as amended by the corrigenda, left no room for doubt that the tribunal was required to make an award as to the quantum of bonus only in respect of the financial years 1957-58 and 1958-59 on the basis of profit.

(ii) The decision of the tribunal that the workmen are entitled to puja bonus as an implied condition of service is erroneous in law on the face of the record.

(iii) The quantum of bonus determined by the tribunal is illegal and arbitrary as it is based upon no valid ground.

(iv) The award is vague and does not specify as to which of the workmen of the petitioner-companies were entitled to receive the bonus.

5. The first point urged on behalf of the petitioners, in my opinion, has no substance. "Industrial dispute" according to Section 2(k), means:

any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or with the conditions of labour, of any person.

It is provided in Section 10(1) of the Act?

Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing,?

* * * (d) refer the dispute or any matter appearing to be connected with or relevant to the dispute, whether it relates to any matter specified in Sch. II or IIT, to a tribunal for adjudication,

Under Sub-section (4) of Section 10 the tribunal is to confine its adjudication to the points of dispute specified for adjudication by the appropriate Government in its order of reference or in a subsequent order, and matters incidental thereto. Under Rule 10B of the Industrial Disputes (Central) Rules, 1947, the demands of the workmen annexed to the order of reference are to be treated as their statement of case and the employer is required to file a rejoinder. The order of reference with extracts from such enclosures and the corrigenda is annexure F to the petition. The demand of the workmen in Para. 10 was:

Puja bonus of 1958 and 1959 should be two and a half months' pay for each year as condition of service and on the basis of equity since the head office staff of the company is paid bonus at that rate. At any event and on the basis of the profit also the bonus should not be less than two and a half months' pay for each of the aforesaid years.

In the agreement dated 21 September 1959 signed between the management and the union followed by the agreement dated 24 September 1959 before the conciliation officer, both of which are annexed as annexure E to the petition, it is said?

Whereas the Light Railway Employers' Union demanded a bonus equivalent to two and a half months' basic salary to be paid to the staff on Howrah-Amta and Howrah-Sheakhala Light Railways for the year ended 31 March 1959, and

Whereas the management of these two companies contended that the profits earned by the companies during the year ended 31 March 1959 did not justify payment of any bonus at all, and

Whereas the union had already made an application for reference of this dispute to a tribunal for adjudication.

6. It was agreed that the management in order to help the staff in making their puja purchases would make a loan equivalent to one month and ten days' basic salary to all members of the permanent staff who were in the employment of these companies on 1 September 1959, such advance to be recovered in eight consecutive monthly instalments commencing from the salary for March 1960, or from the month after one month from the publication of the award of the tribunal mentioned above whichever is earlier.

7. In their demand dated 13 September 1958 (annexure D to the petition) the workmen had claimed the puja bonus equivalent to three months' basic wages since the prices of essential commodities had increased too much. And, in reply to that, the management had written on 14 October 1958 that the managing agents were pleased to sanction ex gratia payment equivalent to one and one-third months' basic salary but it was to be clearly understood that it may not be

possible to make any similar payment in future unless there was a definite improvement in the financial condition of the company. In the background of the nature of dispute between the parties, it is clear that the workmen were claiming puja bonus for the puja festivals of the years 1958 and 1959 as a condition of service or as customary bonus as stated in one of their letters, dated 23 September 1959, which is also a part of annexure P. And, "in support of their claim for the amount of such bonuses at the rate of two and a half months' basic wages, they were claiming that the profit made by the companies would also justify the said amount. On the other hand, the companies were refuting their claims for puja bonuses on the ground of fall in profit. In this background, the industrial dispute between the parties which was referred to the tribunal for adjudication, by necessary implication, was not merely about the quantum of bonus as was contended by the learned Government Advocate but also its basis. At the time of the dispute the petitioners were trying to show that bonuses had been paid on the occasion of puja festivals on the basis of profit, while the workmen were claiming that they were paid either as customary or traditional bonuses or as a condition of service. It is manifest that in such a situation the tribunal could not determine the quantum of bonus without first deciding as to what kind of bonus on the occasion of puja the workmen were entitled to. Different considerations would govern the determination of the quantum for different kinds of bonus. The mere fact that by the corrigenda the years of dispute were changed from the calendar years 1958 and 1959 to the years 1957-58 and 1958-59 could not make the dispute as confined to one on the basis of profit bonus relating to the financial years 1957-58 and 1958-59. It appears that the dispute in regard to the payment of bonus arose on the occasion of puja festivals in the years 1958 and 1959 and such bonuses were to be paid to such workmen who were in the employment of the companies on 1 September, each year. It may well be that the calendar years 1958 and 1959 were, under the corrigenda, described as the years 1957-58 and 1958-59 in order to determine as to who were the workmen who had worked for 240 days during the period from 1 September 1957 to 1 September 1958, and from 1 September 1958. It may also well be that since the companies were claiming that bonuses were being paid on the occasion of puja festivals on the profit basis, the calendar years, by the corrigenda, were changed to the previous financial years. In any view of the matter, this, by itself, could not and was not meant to change the nature of the industrial dispute as to the kind of bonus and confine it to, and specify it as, one of the profit bonus only. No particular points of dispute were specified for adjudication by the Central Government either in its order of reference or in the subsequent orders incorporated in the corrigenda. The whole of the industrial dispute which, in my opinion, related to the "claims for bonuses on the occasion of puja in the years 1958 and 1959 and their quantum" was referred for adjudication which, as I have said above, by necessary implication, embraced within its ambit the dispute as to the kind or basis of bonus also. I have, therefore, no hesitation in rejecting the first point urged on behalf of the petitioners.

8. After having rejected the claim of the union to puja bonus as customary or traditional bonus, the tribunal has upheld its claim as an implied condition of service on the following findings:

(a) that the payment of bonus has been unbroken over a period of ten or eleven years, that is, from 1949 to 1959:

(b) that such bonus was paid on conditions

(1) of compulsory duty during the week of the puja holidays, and

(ii) that it was given in consideration of the extra heavy traffic during these few days of puja week as special trains were run and overcrowding was there; and

(c) that in the case of petitioner 2 there was a trading loss in the year 1949 and 50 yet puja bonus equivalent to seven days' basic pay was paid; and

(d) that the bonus was not paid as a bounty, even if it could be assumed that it could not be shown that it was paid during any year of loss.

9. Learned Government Advocate took us to the various circulars issued from time to time at the time of payment of puja bonus and laid stress on the fact that it was always paid *ex gratia* in express terms, it was so accepted by the workmen, and that being so, on the authority of the decision of the Supreme Court in *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, it must be held that there could not be any implied condition of service for payment of puja bonus. He further contended that it was never paid in any year of loss and the quantum of bonus paid was always dependent upon the amount of profit earned by the two companies, as will appear from the statements of their gross earnings and net profits (annexure B to the application).

10. All the circulars (annexure C to the application) are more or less on the same lines. I would quote relevant portions of only two of them. The circular No. E/46, dated 3 October 1951, from the two petitioner-companies states:

In consideration of the extra traffic to be dealt with on the Howrah-Amta and Howrah-Sheakhala Light Railways during the pujas an *ex gratia* payment of seven days' basic salary will be paid to those members of the permanent staff of these two railways (including the Bankra Loco Depot staff but excluding the clerical staff) who will be on duty during the puja holidays.

* * * It is to be clearly understood, however, that these payments will be made only if the operation of train service is fully maintained during the heavy traffic period of the pujas as required by the company.

11. The first paragraph of circular No. 124, dated September (sic) 1954, is on the same line as that of circular, dated 3 October 1951, but its second paragraph reads:

At the request of the staff concerned, it has been decided to make the *ex gratia* payment before the puja holidays on condition that if any employee receiving

payment before the pujas be absent from duty between 1 and 10 October the amount paid will be refundable to the company.

12. Reading any circular as a whole, it is clear that, although the word " ex gratia " was used in all the circulars, the payment of bonus on the occasion of the puja was " in consideration of the extra traffic to be dealt with " on the two railways during the pujas and it was to be paid to those members of the permanent staff who were on duty during the puja holidays. In Para. 5 of the petition filed in this Court, it has been stated that the terms of employment" of the workmen of the line staff disentitle them to have any leave during the puja holidays; but nothing could be shown to us from the service regulations of the Martin's Light Railways or from anything else that there was any such term. We were informed at the Bar that the railways toeing public utility service, they could not be nor were closed during the puja (public) holiday. But, of course, as is well-known, everybody in Bengal wants to be free from work during the pujas to avail of holidays, if any, or take leave from duty if there are no holidays in the concern where he is working. It is equally true that the railways being public utility servioe could not be dosed even for a day. In that event, if the workmen of the line staff are deprived of their privilege to take leave during the pujas and are made not only to work but sometimes also to overwork, then mere payment for overwork or payment of normal basic wages for the period is not sufficient to compensate them for being so deprived. And that is the reason, as is clear from the circulars, that bonus was being paid to the, workmen concerned, on the occasion of pujas in order to induce them to work and work more strenuously, during puja holidays. The petitioner-companies were on the horns of a dilemma. On the one hand, they were not prepared to pay puja bonus to those workmen of the line staff who were not prepared to work during the puja holidays?rather, when the system was changed from the year 1954 onwards to make the payment of puja bonus before the beginning of the festival in order to enable the workmen to make their puja purchases, they made it a further condition, as appears from the circular, dated 11 September 1954, that if the employee receiving the payment before the puja would be absnt from duty between 1 and 10 October 1954 the amount paid would #be refundable to the company; on the other "hand, the petitioners were anxious to put a show that such payments were being made ex gratia out of bounty, the one contradicting the other. In that situation, I can reasonably infer that the payment of puja bonus was primarily and necessarily made as an implied condition of service, namely, that it was to be made and was made only to those workmen of the line staff who worked during the puja Holidays. In substance, it was not ex gratia as it purported to be according to one part of the circulars.

13. Our attention was drawn to the letter of demand dated 13 September 1959 (annexure D to the application) of the workmen for puja bonus where in brackets the word " ex gratia " has been used after the words " puja bonus " as also to the statement of P.W. 1, a witness examined on behalf of the union before the tribunal, at the end of which it is to be found mentioned:

In all their circulars the company described this bonus as ex gratia payment. They paid it as such.

14. But, in my opinion, those words were used either in the demand letter of the workmen or in the statement of P.W. 1 because the petitioner-companies in all their circulars had used them. P.W. 1 himself stated in examination-in chief, that the puja bonus was given not as a bounty but as fulfilment of a service condition, and the condition was that the period was fixed during the puja when nobody was permitted to go on leave and the workmen had to do overtime duty in special trains run during the puja holidays.

15. The contention of Sri Lalnarayan Sinha that the quantum of payment depended upon the amount of profits earned by the two petitioner-companies is also not borne out by their own documents. The gross earnings and the net profits of Howrah-Amta Light Railway Company, Ltd., petitioner 1, were as follows:

Year	Gross earnings	Net profit	Rs.	Rs.
1948-49	...	23,99,581	1,97,056	
1949-50	...	23,83,010	1,20,127	
1950-51	...	27,18,209	1,71,954	
1951-52	...	28,83,757	1,93,103	
1952-53	...	28,64,195	1,91,314	
1953-54	...	28,03,897	92,344	
1954-55	...	29,22,219	1,58,000	
1955-56	...	28,68,600	1,27,971	
1956-57	...	29,76,779	1,19,968	
1957-58	...	30,31,693	1,23,794	
1958-59	...	30,14,541	1,17,067	

16. The gross earnings and net profits of Howrah-Sheakhala Light Railway Company, Ltd., petitioner 2, were?

Year	Gross earnings	Net profit	Rs.	Rs.
1948-49	...	5,24,500	45,419	
1949-50	...	5,09,649	9,412	
1950-51	...	6,62,401	88,876	
1951-52	...	6,42,074	29,153	
1952-53	...	6,13,138	25,212	
1953-54	...	6,76,151	25,049	
1954-55	...	8,70,908	1,07,019	
1955-56	...	7,19,081	28,916	
1956-57	...	7,12,696	26,186	
1957-58	...	7,48,144	26,235	
1958-59	...	7,60,579	24,771	

17. It is claimed, on behalf of petitioner 2, that as a matter of fact, Rs. 50,000 receivable as compensation from East India Railway in respect of the year 1949-50 was received in the year 1950-51 and that would, indeed, show that the amount of apparent loss of Re. 9,412 in the year 1949-50 was really net profit of Rs. 40,588. But even assuming that to be correct, that would reduce the net profit of Rs. 88,876 apparently -shown in relation to the year 1950-51 to Rs. 3,88,876. It is to be remembered that up to the puja of 1952 following the close of the financial year 1951-52, the amount of puja bonua paid was equivalent to seven days' basic salary. This was increased to one month's basic salary in the years 1953 and 1954. The increase of the amount of bonus from seven days' basic salary to one month's salary was not at all connected with or depended upon, either the gross earnings or the net profits of the two companies. The amount of puja bonus was raised to one and one-third months' basic salary from the year 1955, and, although in the case of both the companies there was some increase in the amount of gross earnings and the net profits in the year 1954-55,

it was not so in the years 1955-56 and 1956-57, Even then puja bonus at the same rate of one and one-third months' basic salary was paid in the year 1956-57. Gross earnings and net profits had slightly gone up in the case of both the petitioners in the year 1957-58 and yet the petitioner-companies resisted the claim of the workmen to the puja bonus on the ground of fall in profit. The trading results for the year 1958-59, although slightly low, are not sufficiently low to indicate that the payment of puja bonus could be refused as being dependent on the amount of profit earned by the petitioner-companies.

18. In order to decide whether the meaning of the word "bonus" payment of which is dependent upon the amount of profits earned by an industrial undertaking, in *Muir Mills Co. Ltd. Vs. Suti Mills Mazdoor Union, Kanpur*, Bhagwati, J., has quoted from various authorities the meaning of the word "bonus." It would appear from those quotations that a bonus is a sum of money given or paid beyond what is legally required to be paid to the recipient; something given in addition to what is ordinarily received by, or strictly due to, the recipient. And, yet it is not a mere gratuity, though there is an element of bounty in it. The bounty, if granted, is given for good reason of national policy. It has also been given another meaning of being an increased compensation for services already rendered gratuitously or for a prescribed compensation where there is neither express nor implied understanding that additional compensation may be granted. Of course, as has been held by Bhagwati, J., in *Muir Mills Co. Ltd. Vs. Suti Mills Mazdoor Union, Kanpur*, following the Full Bench decision of the Labour Appellate Tribunal in *Millowners' Association, Bombay v. Rashtriya Mill Mazdoor Sangh, Bombay* 1950 I LLJ 1247 that the claim for profit bonus can be made by the employees only if as a result of the joint contribution of capital and labour the Industrial concern has earned profits. It is to be appreciated in the background of the meaning given to the word, "bonus" in relation to profits that strictly speaking in common law or under the law of contract even if the industrial concern has earned profits, the workmen are not entitled to a share in that profit as part of their wages, as, if there is any loss incurred by the concern, they cannot be asked to take less wages or refund a portion of them already paid. Yet the sense of social justice of the advancing society in all till civilized countries has recognized the necessity of giving a share in the profit earned by the industrial concern to its workmen in the shape of profit bonus, which has become, for the maintenance of the industrial peace, a part of their right.

19. Apart from the profit bonus, the sense of social justice has led to the recognition in law of the right of the workmen to get other kinds of bonus which do not depend upon nor are necessarily connected with the earnings of profits by the industrial concern. One such kind of bonus is that which is paid on the occasion of special festivals well celebrated in particular parts of India, as for example, puja bonus in Bengal and diwali bonus in Western India. In *Mahalaxmi Cotton Mills, Ltd. v. their workmen* 1952 II LLJ 635 (vide supra) the Labour Appellate Tribunal has observed:

Puja bonus is a bonus claimed by the workers as a matter of right, payable by the employers at a special season of the year, namely, at the time of the annual Durga Puja. The right is not based on the general principle that labour and capital should share the surplus left after meeting the necessary and prior charges, but it rests on agreement between the employer and the workers. That agreement may either be express or implied and where not expressed, past practice may lead to an inference of an implied agreement. But, for implying an agreement, the practice must be unbroken and for a sufficiently long period to exclude the hypothesis that the payments had been made out of bounty. It is not possible to say in general terms what should be the length of the period. That would depend upon the circumstances of each particular case but the fact that payments had been made even in a year of loss would be an important factor on the question whether the payments were mere acts of bounty or of obligation on the part of the employers.

20. The circumstances laid down by the Appellate Tribunal in the case aforesaid were quoted with approval by Wanchoo, J., In *Ispahani Ltd., Calcutta Vs. Ispahani Employees' Union*, and the three circumstances for an inference of implied agreement to pay such a bonus were enumerated as follows:?

- (1) the payment must be unbroken ;
- (2) it must be for a sufficiently long period; and
- (3) the circumstances in which payment was made should be such as to exclude that it was paid out of bounty.

It was further observed:

... that the fact of payment in a year of loss would be an Important factor In excluding the hypothesis that the payment was made out of bounty and In coming to the conclusion that it was as a matter of obligation based on implied agreement.

It was also pointed out that?

even if payment was not at a uniform rate throughout the period, the implied agreement to pay something could be Inferred and it would be for the tribunal to decide what was the reasonable amount to be paid as puja bonus.

21. On the facts proved in that case before the Appellate Tribunal, it was observed that it could draw an inference in law that an implied term of agreement for grant of puja bonus had been established.

22. In the case of *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, the point came to be considered again as to whether the puja bonus in that case could be allowed as an implied term of employment or as a customary or traditional bonus. In that connexion, with reference to the facts of that case, it was said by Wanchoo, J. (at p. 396):

An implied term of employment cannot be inferred in this case, for right from 1948 to 1952, the company whenever it paid this bonus, made it clear that it was an ex gratia payment and would not constitute any precedent for future years. In the face of such notice year by year it would not be possible to imply a term of employment on the basis of an implied agreement, for agreement postulates a meeting of minds regarding the subject-matter of agreement; and here one party was always making it clear that the payment was "ex gratia" and that it would not form a precedent for future years.

23. Great reliance was placed on this passage in the judgment of the Supreme Court in *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, on behalf of the petitioners. But I do not think that the Supreme Court has laid down that the mere use of the words "ex gratia" in the circular of a company was sufficient to take the case out of the sphere of implied agreement. What other terms had been used by the company in *Graham's case* (vide supra) along with the use of the words "ex gratia" in the notice year by year are not known. In the present case, I have held above, the mere use of the words "ex gratia" on reading any circular as a whole, is not sufficient to exclude the inference of implied agreement which is deducible from the other parts of the circular. The Supreme Court in *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, proceeded to consider further as to whether the claim of the workmen to the puja bonus in that case could be upheld on the ground of its being a customary or traditional bonus, The tests laid down in support of the claim for customary or traditional bonus are these vide *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*,

- (i) whether the payment has been over an unbroken series of years ;
- (ii) whether it has been for a sufficiently long period, though the length of the period might depend of the circumstances of each case; even so the period may normally have to be longer to justify an inference of traditional and customary puja bonus than may be the case with puja bonus based on an implied term of employment;
- (iii) the circumstance that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss. In dealing with the question of custom, the fact that the payment was called "ex gratia" by the employer when it was made, would however, make no difference in this regard because the proof of custom depends upon the effect of the relevant factors enumerated by us, and it would not be materially affected by unilateral declarations of one party when the said declarations are instant with the course of conduct adopted by it; and
- (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern.

24. The Division Bench deciding *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, consisted of B. P. Sinha, J. (as he then was), Gajendra-gadkar, and

Wanchoo; JJ. But B. P. Sinha C.J., delivering the judgment of the Court in *Tulsidas Khimji Vs. Their Workmen*, on behalf of himself and Subba Rao, Mudholkar and Venkatarama Ayyar, JJ. (Rajagopala Ayyangar, J., dissenting), while considering as to whether to support a claim to customary bonus it must be shown as condition precedent that the payment has been made even in a year of loss, as held in *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, has said at p. 443 ;

We cannot, therefore, accept the submission that loss, substantial or otherwise, is a *sine qua non*. The observations of this Court in the decisions referred to above must be understood as based on considerations of substance and not of form, Such a bonus has reference to a special occasion like a festival, for example, the puja in Bengal and the diwali in Western India?occasions which, are generally utilized by employers to reward the services of their employees. Hence, in our opinion, what is more important to negative a plea for customary bonus would be proof that it was made *ex gratia* and accepted as such, or that it was unconnected with any such occasion like festival as laid down by this Court in the case of *B. N. Elias & Co., Ltd. Employees' Union v. B.N. Elias & Co., Ltd.* 1962 II LLJ 219 In our opinion, therefore, the tribunal was fully justified in finding that the traditional or customary bonus had been established in this case, notwithstanding that it had not been shown, as It could not have been shown, that it was paid a year of loss.

25. It is, therefore, to be noticed that the decision of the Supreme Court in *Tulsidas Khimji Vs. Their Workmen*, which is a majority decision of a Bench consisting of five. Judges, has modified the decision in *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, to the extent that?

- (1) the tests laid down in support of the claim for customary bonus are circumstances and not conditions precedent;
- (2) it is not necessary in all cases? rather it may not be possible to show that such bonus has been paid even in years of loss;
- (3) what is more important to negative a plea, for customary bonus would be proof that it was made *ex gratia* and accepted as such.

26. I do not see any justification in principle in making a difference in regard to the test of fulfilment of the circumstance that payment of puja bonus either as an Implied term of agreement or as a customary one has not been made out of bounty. In the case of customary bonus as held by the Supreme Court in *Tulsidas Khimji Vs. Their Workmen*, it is not always necessary and incumbent to show that puja bonus as a customary bonus has been paid even in years of loss; on a parity of reasoning, I think, it is not so even in support of the puja bonus as an implied term of service. As a matter of fact, in the instant case, at all places, the finding of the tribunal is that in case of petitioner 2, puja bonus in the year 1950 was paid even in a year of loss. But even assuming that to be not correct, in view of the explanation given by the said petitioner in this Court as referred to above,

it must be held that it is not possible in this case to show that puja bonus was paid to the workmen of the line staff in any year of loss as there was none in the case of elder of the petitioners. The other two conditions have been held to have been fulfilled, namely, that the payment was unbroken and, on the facts and in the circumstances of the case, was for a sufficiently long period. The third circumstance that it was not paid out of bounty is also fulfilled and satisfied in this case, even though it cannot be shown that it was paid in any year of loss, by the fact, that, although the gross earnings or the net profits of the two petitioner-companies did not sufficiently vary to justify the "increased rate of payment as discussed above, the rate of payment was increased from seven days" basic wages to one month's basic wages and thereafter to an amount equivalent to one and one-third months.

27. As in regard to the claim of bonus on the basis of profit it is also to be appreciated and noticed in regard to the claim of bonus on the occasions of special festivals as being customary or traditional that in the absence of the relationship of employer and employee, under the general law, if somebody goes on making some special payments or gifts on the occasion of special festivals to a relation or to a friend even say, for an unbroken period of fifty years, that would not create a right in favour of the relation or the friend to claim such payment in future, because that will always remain an ex gratia payment and a payment made out of bounty. But the changing society in the civilized world has brought in an element of right in favour of labour in order to give it protection against the exploitation of capital and to see that under certain circumstances the industry may be forced to make some extra payments to the labour on occasions of special and well celebrated festivals in order to enable the workmen to discharge their social and religious obligations on such occasions, in which it may be to a limited extent. If the nature of right and the factors upon which it depends in relation to the profit bonus and customary bonus are correctly appreciated and kept in view, then, to found the claim of bonus as a term of service, it would not be necessary to apply all the strict and stringent tests of an implied agreement as understood in the realm of contract law, which is sometimes called "tacit contract or true implied contract." In regard to such contracts, Lord Sumner in *Hirji Mulji v. Cheong Yue S. Co.* (1926) AC 497 :

It is explained in theory as a condition or term of the contract implied by law addition in order to supply what the parties would have inserted had the matter occurred to them on the basis of what is fair and reasonable having regard to the mutual interests concerned and the main object of the contract.

At p. 70 of Vol. I of Chitty on Contracts, 21st Edn. it is stated:

The second class of implied contracts consists of those peculiar relationships which in certain cases give rise to obligations and which are unhappily called quasi-contracts. They are cases to which the law and not the parties attaches an obligation. The name is misleading, for in many of them the essential element of contract, viz., agreement, is entirely absent.

28. I do not mean to suggest that bonus as an Implied term of agreement cornea strictly within the "second class of implied contracts." But, at the same time, I cannot help thinking, as seems to be the accepted position of law with respect to the claim of profit bonus or customary tonus, that strict fulfillment of all the tests necessary to found the claim as an implied term of the agreement in an industrial dispute cannot be insisted upon. The claim to bonus of any kind rests upon the relationship of capital and labour and modern social conditions, to which partly the law and partly the parties attach an obligation. I am, therefore, definitely of the opinion that the circumstances necessary to found the claim of puja bonus of the workmen of the line staff of the petitioner-companies who worked during: the puja holidays have been found by the tribunal in this case, there is no error in its award in this regard; or In any event, there is none of a kind which can justify our interference with the award either under Article 226 or 227 of the Constitution of India.

29. The third point urged by Sri Lalnarayan Sinha on behalf of the petitioners has also got to be rejected. The quantum of bonus has been determined by the tribunal at a rate at which it was being paid for the last four to five years prior to coming into existence of the industrial dispute In question. If the claim to puja bonus is to be upheld in this case on the ground of an implied agreement, as held above, it is manifest that the quantum will depend upon the last rates, as it must also be held by necessary implication that the implied term of agreement to pay puja bonus was at the rate of seven days" basic salary in the beginning, increased to one month"s basic salary in the middle and enhanced to one and one-third month"s basic salary from the year 1955. Unless this rate is again changed either by an express or an implied agreement, the labour tribunal in an industrial dispute, in, my opinion, will not be justified in changing the rate as it must be deemed to be a part of the implied agreement. It seems to me that the rate was increased from time to time due to the ever increasing prices of the essential commodities, judicial notice of which can be taken.

30. The last point urged on behalf of the petitioners does arise in view of some vagueness in the operative portion of the award. On the facts and in the circumstances of this case, it is clear that the puja bonus has been paid only to those workmen of the line staff of the petitioner-companies who have been working and not absented themselves from duty either by taking leave or otherwise during the puja holidays or, to be nacre exact, during the period fixed by the companies for such working at the time of the puja holidays. On the occasion of the puja in the year 1958 bonus equivalent to the basic wages of one and one-third months" has already been paid to the workmen of the line staff and perhaps it has been so done only to those workmen who fulfilled the condition of working at the time of puja holidays. But in regard to case puja which fell In the year 1959, it seems, the entire payment equivalent to one and one-third months" basic pay was advanced as loan and perhaps to all the workmen of the line staff. The observation of the tribunal that only one-third month"s basic pay has been given as an advance does not seem to be correct.

The amounts paid on the occasion of pujas for the two years 1958 and 1959 will be deemed to have been validly paid as puja bonus only to those workmen who fulfilled the conditions of working during or at the time of the puja holidays. But it is to be made clear that it can be recovered back from those workmen of the line staff of the two petitioner-companies who did not fulfil that condition. Subject to this clarification, the application, fails and is dismissed. But I would make no order as to cost.

Ramaswami, C.J.

31. I agree.