

(2003) 01 BOM CK 0118
In the Bombay High Court
Case No : O.O.C.J. W.P. No. 538 of 2001

Mukund Ltd.

APPELLANT

Vs

Mukund Kamgar Union

RESPONDENT

Date of Decision : 08-01-2003

Acts Referred:

Industrial Disputes Act, 1947 — Section 10
Payment of Bonus Act, 1965 — Section 17

Citation : (2003) 1 ALLMR 830 : (2003) 3 BomCR 30 : (2003) 97 FLR 189 :
(2003) 2 LLJ 410

Hon'ble Judges : D.B. Bhosale, J

Bench : Single Bench

Advocate : P.K. Rele, R.P. Rele and Vinod Tayade, instructed by Piyush Shah, for the Appellant; K.K. Singhvi and Sushil Mahadeshwar, for the Respondent

Final Decision : Dismissed

Judgement

D.B. Bhosale, J.—This Writ Petition is directed against the Award dated December 19, 2000, passed by the Industrial Tribunal in Reference (IT) No. 6 of 1998. By the impugned Award, the Tribunal has partly allowed the reference holding that the respondent-union was justified in demanding grant of bonus/ex-gratia to the extent of Rs. 6000/- only as against the demand of bonus at the rate of 20% in accordance with the Payment of Bonus Act, 1965 plus Rs. 10,000/- each for the year 1995-96 in accordance with the attendance.

2. The petitioner is a public limited company registered under the Companies Act, 1956 having its registered office and a factory at L.B.S. Marg, Kurla, Mumbai and another factory at Kalwa, District-Thane. The petitioner employed about 530 workmen at its Kurla factory and 1300 workmen at its Kalwa factory. The workmen at both the places consist of monthly rated and daily rated workmen. In the present writ petition we are concerned with daily rated workmen working at Kurla factory. The petitioner is engaged in the manufacturing of steel bogies, couplers etc. The petitioner's factory is one of the biggest private sector in India.

The respondent-union is a trade union registered under the Trade Unions Act, 1926.

3. It is the case of the petitioner that the payment of annual bonus over the years has been governed by the provisions of comprehensive settlements concluded between the petitioner and the respondent-union covering in single packages, wages and other emoluments as well as annual bonus. In other words, the payment of bonus effected by the petitioner in past was covered by the specific settlements between the petitioner and the respondent. The annual bonus was paid to the workmen working at Kurla and Kalwa factories for the years 1990-91 to 1994-95 on the basis of the Memorandum of settlement dated July 8, 1991. In 1995-96, the daily rated workmen at Kurla factory were not paid annual bonus since, according to the petitioner, they refused to accept the conditions. In view thereof, the respondent Union raised a dispute for payment of bonus and ex-gratia payment before the Deputy Commissioner of Labour by their letter dated December 13, 1996. The letter was sent along with the notice of demand and statement of justification to the Deputy Commissioner of Labour (Admn). The petitioner filed its reply before the Deputy Commissioner of Labour vide its letters dated April 28, 1997 and August 4, 1997. Since the matter could not be settled by the Assistant Commissioner of Labour (Conciliation), a failure report was sent to the Government of Maharashtra and in turn the Government of Maharashtra referred the dispute for adjudication to the Industrial Tribunal, Mumbai, vide Reference (IT) No. 6 of 1998 stating that all the workers should be paid amount at the rate of 20% in accordance with the Payment of Bonus Act, 1965 plus Rs. 10,000/- each for the year 1995-96 in accordance with the attendance. The respondent union filed its statement of claim on September 15, 1998. The petitioner filed its written statement on January 12, 1999.

4. The respondent Union, thereafter, on January 12, 1999, filed an application before the Tribunal praying, inter alia, that the company be directed to deposit an amount of Rs. 22,52,000/- in the Court and that the office be directed to put this amount in the scheduled bank in fixed deposit for a period of one year. The petitioner company filed its reply to the said application on February 22, 1999. The Industrial Tribunal, by its Award Part-I dated November 25, 1999 directed the petitioner company to deposit the amount of Rs. 22,50,000/- in Court within 15 days from publication of the said Award. Feeling aggrieved by the said Award Part-I, the petitioner company filed writ petition challenging the same, being Writ Petition No. 220 of 2000. This Court, by order dated January 31, 2000, modified the award part I and directed the petitioner company, inter alia that they shall furnish a bank guarantee of a nationalised bank in the sum of Rs. 22,50,000/- to the satisfaction of the Industrial Court within four weeks from the date of the said order. The Industrial Court was also directed to decide reference expeditiously and in no case later than December 31, 2000. The bank guarantee was accordingly furnished by the petitioner company.

5. The Industrial Court, thereafter, proceeded with the hearing of reference,

during which the witnesses were examined by both the parties. After concluding the hearing, final Award was passed by the Industrial Tribunal on December 19, 2000 in respect of annual bonus for the year 1995-96. The Industrial Tribunal has awarded Rs. 6000/- by way of payment of bonus and cost of Rs. 250/- to each workman. Feeling aggrieved by the said Award of the Industrial Tribunal, the petitioner filed present writ petition challenging the same. This Court while issuing rule on March 19, 2001, had also granted interim order in terms of prayer Clause (b) thereby granting stay to the Award dated December 19, 2000 in Reference (IT) No. 6 of 1998.

5. In the backdrop of the matrix of minimal facts necessary to highlight the controversy, stated above, I heard Mr. Rele, learned senior counsel for the petitioner and Mr. Singhvi, learned senior counsel for the respondent at length and perused the writ petition and documents annexed thereto.

7. Mr. Rele, learned senior counsel for the petitioner, at the outset, submitted that the Award of the Industrial Tribunal is perverse, illegal and is passed in excess of its jurisdiction and shows total non-application of mind. The Industrial Tribunal, according to Mr. Rele, erred in traversing beyond the scope and ambit of the terms of reference according to which the Tribunal has declined to adjudicate whether all the workers should be paid amount at the rate of 20% in accordance with the Payment of Bonus Act, 1965 (for short, Bonus Act) plus Rs. 10,000/- each for the year 1995-96 in accordance with attendance and held that bonus paid over the years was customary in nature. He submitted that the payment towards bonus for all earlier years was made on the basis of negotiations and settlements and it was not customary payment. In support thereof, he invited my attention to the Memorandum of Settlement dated July 8, 1991, Clause (8) thereof in particular. Referring to the evidence of witnesses and other documents, Mr. Rele submitted that the custom to pay such amount to workers concerned is not established. In so far as draft settlement exchanged between the parties, relied upon by the Tribunal is concerned, he submitted that the Tribunal ought not to have placed reliance upon the draft settlement since the settlement was not finalised and signed by the parties. Mr. Rele also submitted that the payment of bonus cannot be adjudicated on the basis of amounts paid in other factories/undertakings and that in any event the instances cited by the union before the Industrial Tribunal cannot constitute practice. The two instances cited are cases of establishments in entirely different business and having different service conditions.

8. Mr. Rele, learned senior counsel placed reliance upon the judgment of the Apex Court in Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others, and submitted that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. He further submitted that issue of customary bonus cannot be said to be incidental to the points specifically

mentioned in the reference. The reliance was also placed upon the judgment of the single Judge of Calcutta High Court in *Bengal River Transport Association v. Calcutta Port Shramik Union and Ors.* 1978 LIC 1416 to emphasise that the Tribunal in exercising its jurisdiction is only bound by the terms of reference and the jurisdiction is confined to the actual points of disputes referred to. According to Mr. Rele, the Industrial Tribunal, in the present case, has traversed beyond the scope and ambit of the terms of reference and has erred in holding that the bonus paid to daily rated workers, working at Kurla factory, was customary bonus when no such custom existed in the establishment. Mr. Rele submitted that the bonus paid to the workmen was related to profit and productivity and at no point related to any custom or usage. He submitted that bonus was paid by the company pursuant to the settlement signed between the parties and the payment was not made at uniform rate. Heavy reliance was placed upon the judgment of the Apex Court in *Upendra Chandra Chakraborty and Another Vs. United Bank of India*, by Mr. Rele, who submitted that the test laid down by the Apex Court in the report to determine what exactly is customary or festival bonus, has not been complied with in the present case. In short, the principal submission of Mr. Rele is that the Tribunal has not only enlarged the scope of reference in the present case, but has substantially changed the very character of the dispute as customary bonus which is entirely different from profit-based bonus or ex- gratia payment.

9. Mr. Rele, learned senior counsel for the petitioner while criticising the Award contended that the Industrial Tribunal erred in holding that it is a practice to pay such amount by way of bonus/ex-gratia payment to all the workers and that there was custom to pay such amount to the workers concerned. He submitted that the figure mentioned in the draft settlements cannot be looked into in isolation as the offer was made subject to conditions which were admittedly not accepted. The evidence, placed reliance upon by the Tribunal, according to Mr. Rele, does not show that the settlement earlier was for quantification of bonus or that they were de hors the provisions of the Bonus Act. In fact, the right of workmen who were not covered by the Bonus Act to receive payment of bonus under the earlier settlement was specifically created by the provisions of Clause 8.8 of the settlement of July, 1991. In so far as the notice dated November 26, 1996 relating to the payment of annual bonus and annual incentive for reducing energy consumption, reducing accidents and reducing absenteeism for the accounting year 1995- 96 to daily rated workmen at Kurla, Mr. Rele, submitted that the said notice was issued as the daily rated workmen were entitled to receive annual bonus only at the minimum for the accounting year 1995-96 under the Bonus Act. u/s 19 of the Bonus Act, it was mandatory for the company to declare bonus and in pursuance thereof the said notice was issued. Issuance of the said notice deciding to pay a sum of Rs. 2983/- to daily rated workmen at Kurla cannot be said to have been declared as customary bonus.

10. Per contra, Mr. Singhvi, learned senior counsel for the respondent submitted that on a fair reading of order of reference along with the averments contained in

the statement of claim and the written statement would go to show that the workers demand was for payment of customary bonus and ex-gratia payment, notwithstanding the fact that the Bonus Act is not applicable to the concerned workers. In support, he placed heavy reliance on the judgment of this Court in the case of Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others, and the judgment of the Apex Court in the case of State of Madras Vs. C.P. Sarathy and Another, . He submitted that the petitioner company has been paying bonus year after year since 1975 without reference to the Bonus Act and without reference to the profits and productivity for that particular year. Mr. Singhvi submitted that foundation or source of bonus was in the custom based upon continuous course of conduct since 1975. Quantification was, however, based on negotiation. In support he placed reliance on the judgment of the Apex Court in the case of Hukumchand Jute Mills Ltd. Vs. Second Industrial Tribunal, West Bengal and Others, and Modistone Limited Vs. Modistone Employees Union and another, . In so far as demand for ex-gratia is concerned, Mr. Singhvi submitted that it is not based on Payment of Bonus Act, but on the principle of region-cum-industry. While commenting on the notice dated November 26, 1996, Mr. Singhvi, learned senior counsel submitted that the notice was issued unilaterally, without any settlement. However, he submitted that the act of issuance of notice supports the case of customary bonus inasmuch as the quantum was disputed by the Union, they did not accept the offer made in the said notice. According to him, the quantum ought to have been fixed by the negotiation. Negotiations for fixing of quantum did take place in 1997 between the parties, as a result the workers sent draft settlement dated December, 1997 wherein the Union stated that bonus at the rate of Rs. 6000/- per year for the years 1995-96 and 1996-97, i.e. Rs. 12,000/-for two years should be paid. The same figures were mentioned in the draft settlement sent by the petitioner company. In view thereof, Mr. Singhvi submitted that so far as payment of customary bonus was concerned, both parties were ad idem at Rs.6000/- per year for the years 1995-96 and 1996-97. Mr. Singhvi also invited my attention to the fact that before and after 1995-96, the company did pay annual bonus to daily rated as well as monthly rated workmen at their Kalwa factory and monthly rated workmen at Kurla factory. In view of this, he submitted that the Tribunal was right in awarding payment of bonus to daily rated workmen at Kurla factory who were similarly situated. Mr. Singhvi lastly submitted that the Award of the Tribunal is based on justice, equity and good conscience. The said Award is based on the material placed before the Tribunal which was entitled to appreciate the evidence in its own way and it has jurisdiction to make the Award. This Court will, therefore, not interfere in the proceedings under Article 226 of the Constitution of India. In support of this submission, he placed reliance on the judgment of this Court in the case of Paygonda Surgonda v. Jingonda, 69 B.L.R. 579 and in the case of State of Bombay v. Morarji Cooverji, 61 B.L.R. 318.

11. Before I proceed further, it would be advantageous to narrate few admitted facts to appreciate the arguments advanced by the learned senior counsel

appearing for the parties and decide the question involved in the writ petition. Admittedly the workmen concerned in the dispute referred to the Industrial Tribunal were not covered by Section 2(13) of the Bonus Act as they were drawing wages exceeding Rs. 3500/- per mensem. There is no dispute that the workmen working at both factories of the petitioner company were paid bonus till 1994-95. It is also admitted position that the company by notice dated November 26, 1996 unilaterally without any settlement declared bonus of Rs. 2983/(Rs. 2500/- plus Rs. 483/-) for the year 1995-96 which the respondent-union refused to accept. The bonus for the year ending March, 1996 has been paid to Kalwa workmen and the monthly rated workmen at Kurla as per the settlement of December, 1996. It is also admitted that the drafts of settlement were exchanged by the parties and in both the drafts Rs.6000/- was proposed towards bonus plus ex-gratia for the year under reference and subsequent years.

12. The principal question raised in the instant petition for my determination is whether bonus paid to the daily rated workers at Kurla factory over the years was customary in nature or statutory bonus paid either under the provisions of the Bonus Act or paid on the basis of negotiations and settlements, as contended by Mr. Rele, learned counsel for the petitioner and further whether the Tribunal has traversed beyond the scope and ambit of the terms of reference. Since both these issues are inter-linked, I would like to deal with them jointly.

13. The Government of Maharashtra in exercise of the powers vested u/s 10 of the Industrial Disputes Act, 1947 (for short, I.D. Act) made a reference for adjudication of the dispute between the petitioner and the respondent vide order dated February 4, 1998. Section 10(1) of the I.D. Act empowers the appropriate Government to refer the existing and apprehensive dispute or any matter appearing to be connected with or any matter relating to any items specified in the second schedule to Labour Court for adjudication. The dispute between the parties sent for adjudication as specified in the Schedule annexed to the order of reference reads thus:

"That all the workers should be paid amount at the rate of 20% in accordance with the Payment of Bonus Act, 1965 plus Rs. 10,000/- each for the year 1995-96 in accordance with the attendance."

Plain reading of reference would show that it neither refers to (sic) any custom nor profit or productivity. It only states that all workers should be paid amount at the rate of 20% in accordance with the Payment of Bonus Act, 1965 plus Rs.10,000/- for the year 1995-96 in accordance with attendance. Admittedly the workmen concerned in the dispute referred to the Industrial Tribunal were not covered by the Bonus Act as they were drawing wages exceeding Rs. 3500/- per mensem. Therefore, in my opinion, on the face of it, the Award of reference is defective and susceptible to different interpretations as tried to be interpreted by the learned counsel for the parties. According to Mr. Rele, learned senior counsel for the petitioner, the Tribunal ought not to have gone beyond the reference which directed to consider whether workers should be paid in accordance with

the Bonus Act, whereas Mr. Singhvi, learned senior counsel for the respondent submitted that reference to the Bonus Act in "the reference was made only to follow formula provided in the Act or in other words, reference to the Act was made only for the guidance, and , therefore, while deciding the reference, the Tribunal has taken into consideration the pleadings and other documents produced on record, to determine the nature of bonus whether customary or statutory or by way of settlements linked with profit and productivity.

14. The reference under scrutiny is undoubtedly cryptic, vague and not properly worded. I would, therefore, like to consider whether it is possible to examine the pleadings and documents to locate the exact nature of the dispute. In Sheshrao Bhaduji Hatwar (supra), the Division Bench was considering somewhat similar situation. In the report, the Labour Court upheld the preliminary objection raised by employer that the reference was vitiated due to non-application of mind by the Deputy Commissioner since it does not refer to the defence of the employer denying the termination and the workman having voluntarily abandoned the service. This Court while dealing with the issue involved in para 5 of the report held Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others, :

"There is a long line of decisions of the Supreme Court taking a view that order of reference should be liberally construed and the reference should not be rendered incompetent merely because it is made in general terms and it is always permissible for the Labour Courts or the Tribunals to construe the reference in the light of the backdrop against which it is made and to bring out the real dispute for its decision. The obvious reason for this approach is not only the width of language used in the definition of "industrial dispute", Sections 2A and 10 of the I.D. Act but also the object behind the labour legislations. Industrial peace has to be achieved as early as possible and the battle generally between unequals. At least one party, namely, the worker cannot afford to fight continuous long drawn battle against the employer and hence technical, formal and procedural points have almost no place in such disputes. Indeed the duty of Courts and Tribunals is to discourage ingenuity on such points and to adjudicate the controversy on merits. Many times the reference is cryptic and vague and is not properly worded. Sometimes it is not even possible to mention therein the defence of the other party. In such cases it is the duty of the adjudicating authority to examine the pleadings, documents etc. and to locate the exact nature of dispute."

The reliance was also placed on the judgment of the Supreme Court in C.P. Sarathy case (supra). In that case an objection was raised before the Magistrate that he had no jurisdiction to proceed with the enquiry because the award on which the prosecution was based was void and ultra vires and void on the ground that reference to the Industrial Tribunal which resulted in the award was not made by the Government in accordance with the requirement of Section 10 of the Act. The Magistrate had refused to deal with the objection as a preliminary point. The respondent therein had, therefore, applied to the High Court under

Article 226 for a writ of certiorari to quash the proceedings pending before the Magistrate. The application was heard in the first instance by a learned single Judge who referred the matter to the Division Bench in view of the important question involved, and it was accordingly heard and decided by the Division Bench which upheld the objection and quashed the proceedings. From that order the State of Madras had preferred an appeal which was under consideration before the Apex Court. The issue raised before the Apex Court in the report was that the reference made to the Industrial Court was not competent as it was too vague and general in term containing no specification of disputes or of the parties between whom the dispute arose. The Apex Court while considering the issue involved held that if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters". The Apex Court ultimately set aside the order of the High Court and dismissed the petition filed by the State of Madras. The judgment of the Constitution Bench of the Apex Court in the case of C.P. Sarathy (supra) and followed by this Court in the case of Shesh Rao B. Hatwar are sufficient enough for my guidance and clear answer to the argument advanced on behalf of the petitioner that the Tribunal has traversed beyond the scope and ambit of the reference and that the case of customary bonus was not there before the appropriate Government which made reference u/s 10 of the I.D. Act.

15. Reference in the present petition is undoubtedly not happily worded. The appropriate Government ought to have made reference in the reference under scrutiny either to the custom or profit or productivity in view of the admitted position that the workmen in the dispute were not covered by the provisions of the Payment of Bonus Act. I am of the considered view that reference does not contain specification of the dispute. It does not specify whether the payment of amount made to the workmen till 1995 by way of bonus was customary in nature or it was statutory bonus linked with profit and productivity. There is no dispute that the reference made for adjudication of the dispute between the parties was an industrial dispute as defined in the Act. Reference made in the reference to "Payment of Bonus Act, 1965", therefore, need to be read in the context of the facts and circumstances of the case. Its factual existence and the expediency of making reference in the circumstances of the present case was a matter entirely for the Government to decide on. The Tribunal was not competent to hold reference bad. It had no alternative but to examine the pleadings and documents to locate the exact nature of dispute. Legal position is thus clear that order of reference should be liberally construed and it is always permissible for the Tribunal to construe the reference in the context of the backdrop against which it is made and to bring out the real dispute for its decision.

16, Coming back to the question whether the Tribunal was right in holding that

there was a custom to pay bonus to the workers concerned by the petitioner company. It is true that the statement of justification annexed to the letter dated December 13, 1996, does not make any reference to customary bonus. However, the statement of claim filed by the respondent-union, which was basic documents before Tribunal, in terms make reference to customary bonus. In para 8 of the statement of claim, it has been specifically stated that the union states and submits that the company has always been paying bonus not as per the Payment of Bonus Act but as per the negotiations. Hence this has partaken a character of a customary bonus and since the negotiations have failed the union had sought the intervention of the office of the Commissioner of Labour. As a matter of fact, in paragraph 4 of the written statement, the petitioner has denied that the payment of additional bonus and ex-gratia amounts has become customary and further in paragraph 5(a) the petitioner has reiterated that the workmen were paid by the provisions of settlement between the petitioner and the respondent and the same was not customary bonus as alleged by the union or otherwise. In paragraph 12 of the written statement also it was denied that the bonus paid in the past by the company was customary in character. The averments in the written statement, thus, show that even the petitioner understood the claim of the respondent for the bonus as customary in nature which they specifically denied in the written statement. The evidence led by the respondent of one Anant More, General Secretary of the respondent union also shows that bonus was paid to the workmen since 1975. Mr. Rele, learned senior counsel for the petitioner however, submitted that payment of bonus prior to 1991 was in accordance with the settlement and it was linked with profit and productivity. The petitioner has not placed settlements prior to July, 1991 on record to substantiate their contention. In view thereof, I find substance in the submission that foundation of bonus was customary in nature since for long number of years the company had been paying to the workmen irrespective of profit or productivity and as far as settlements are concerned they were only in respect of quantification of the amount of bonus.

17. Mr. Rele, learned senior counsel for the petitioner invited my attention to the Memorandum of Settlement dated July 8, 1991. Clause (8) of the said Settlement deals with annual bonus to be paid to the daily rated workmen which, according to Mr. Rele, was conditional and the condition was that the workmen shall maintain and further improve the level of production, extend full co-operation in implementing technological improvements and modernization plans, improve standards of productivity, quality, efficiency and discipline and extend full co-operation in implementing measures of economy and in eliminating wasteful practices. Clause 8.3 provides that payment of annual bonus shall be linked up with the weighted average annual indices of performance by direct production departments or Kurla Works. I perused Clause (8) in its entirety. In short, the submission of Mr. Rele was that payment of bonus even under the settlement dated July 8, 1991 was linked with profit and productivity and in view thereof it cannot be said to be customary in nature. The Clause (8) in the

settlement, though it refers to maintain and further improve the levels of production etc., it is definitely not a precondition for payment of annual bonus. This is further clear from the evidence of Krishnan Nair, witness of the petitioner who has specifically stated that during the year 1995- 96 Kurla foundry had incurred loss of Rs. 9.39 crores which was 9.14 crores in the previous year. He has further stated that since 1992-93 the said foundry had been continuously incurring loss. It is thus clear that payment of bonus since 1992-93 till 1995-96 was definitely not linked with either productivity or profit. It is thus clear that the payment of annual bonus was made even in the years of loss. Moreover, the workmen concerned were admittedly not covered by the Bonus Act.

18. Mr. Rele placed heavy reliance upon the judgment of the Apex Court in the case of Delhi Cloth & General Mills Co. (supra). He relied on the following observations of the Supreme Court in the report Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others, :

"From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word "incidental" means according to WEBSTER'S NEW WORLD DICTIONARY: "happening or likely to happen as a result of or in connection with something more important; being an incident; casual, hence, secondary or minor, but usually associated."

"something incidental to a dispute" must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct."

The proposition enumerated in the aforesaid paragraph in the judgment of the Apex Court cannot be disputed. As a matter of fact, this proposition has not been disputed by Mr. Singhvi also. The Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its adjudication to the points of dispute referred and matters incidental thereto. However, consideration of the issue of customary bonus by the Tribunal while answering the reference in the present case, as observed earlier, cannot be said to be enlarging the scope of the dispute. The Industrial Court has only referred to the pleadings and documents and construed the reference in the light of the backdrop against which reference was made and to bring out the real dispute for its decision. The judgment of the Calcutta High Court in Bengal River Transport Association case (supra) has affirmed the view expressed by the Apex Court in the case of Delhi Cloth & General Mills Co. which in my considered opinion, does not apply to the facts of the present case.

19. The Apex Court in *Chakraborty & Anr. (supra)* in paragraph 7 of the report has made reference to the decision of the Apex Court in *Vegetable Products Ltd. Vs. Their Workmen*, wherein the Apex Court has laid down the test to determine what exactly customary or festival bonus means. The tests laid down in the report read thus at p. 470 of LLJ:

"(1) that the payment has been made over an unbroken series of years; (2) that it has been for a sufficiently long period - the period has to be longer than in the case of an implied term of employment; (3) that it has been paid even in years of loss and did not depend on the earning of profits; and (4) that the payment has been made at a uniform rate throughout."

The bonus sought as a matter of tradition or custom has been distinguished from the bonus payable under the settlements. Section 17 of the Bonus Act may be seen for that matter which has also demonstrated the distinction between the customary bonus and bonus payable under the Bonus Act. It is provided in Section 17 that where an employer has paid any Puja bonus or other customary bonus, he will be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him under the Act. The customary bonus is, thus, recognised statutorily and, if at any instance, it happens to be higher than the bonus payable under the Act, there is no provision totally cutting of customary bonus. Profit-based bonus is not the only kind of bonus recognised by law. Customary bonus has been recognised and is now well settled by the decisions of the Supreme Court and High Courts.

20. As a matter of fact, the tests laid down by the Apex Court in *Vegetable Products Ltd. v. Workmen*, which is referred to in the judgment of *Chakraborty and Anr. (supra)* were originally laid down in *The Graham Trading Co. (India) Ltd. Vs. Its Workmen*, . The Apex Court in *Tulsidas Khimji Vs. Their Workmen*, , Chief Justice, speaking for majority, has held that the four so-called conditions laid down in the *Graham Trading Company* case are not really in the nature of conditions precedent but are circumstances which have been taken into account by the Apex Court in that case for coming to a conclusion as to whether or not the claim to customary or traditional bonus had been made out and that the observations in *Graham Trading Company* must be understood as based on consideration of substance and not of form.

21. It is thus clear that in as far as the first and second tests/circumstances are concerned, what is important to see that the payment has been made over an unbroken series of years and for a sufficiently long period. The length of period would naturally depend on the circumstances of each case. However, it should be normally a longer period to justify an inference to customary bonus based on an implied term of employment. The third test/circumstance lays down that it has to be proved that the payment has been made even in the years of loss and not depending upon earning of profits. This only means that where there have been years of loss, payment should have been made in those years also. The Apex Court in *Vegetable Products Ltd.* case has gone a step further and held that, but

it does not mean that where there has been no year of loss at all and the concern has been fortunate enough always to earn profit, there can be no customary or traditional bonus connected with a festival like Puja, even though payment at a uniform rate has been made for a larger number of years. The fourth circumstance mentioned in the Vegetable Products Ltd. case provides that the payment should have been made at a uniform rate throughout. That, however, does not mean that uniformity should be established from the beginning to the end. By the way of instance, the Apex Court in the case of Vegetable Products Ltd. has also quoted that a case where for the first few years payment at a certain rate was made. But later on, for a much larger number of years payment at a somewhat different but uniform rate has been made. In those circumstances, the Tribunal may well come to the conclusion that the payment was at a uniform rate ignoring the first years.

22. The law laid down by the Apex Court in *Workmen v. Kettlewell Bullen & Company Ltd.* is sufficient enough for my guidance. The Apex Court, while applying the tests/circumstances enumerated above, held thus at p. 1207 of LLJ:

"25. The question is whether the said period was sufficiently long to draw an inference about the payment being customary in nature. In *Graham Trading Co.* the payment had been made continuously from 1940 to 1952 at the rate of one month's wages and this Court upheld the claim of the workmen for bonus as a customary and traditional payment. In *Vegetable Products Ltd.* bonus was paid from 1954 to 1961 and the said payment was at a uniform rate (30 days' wages) from 1956 to 1961. In view of the said payment at a uniform rate from 1956 to 1961 the Industrial Tribunal had held that there was a custom of payment at the rate of 30 days' wages as bonus before Puja in the said concern. This Court, however, found that payment was made without dispute and without condition from 1956 to 1958 and that in 1959 the payment was made *ex gratia* and accepted as such and that in 1960 and 1961 the payment was made on condition that it would be adjusted towards the profit bonus of the previous year and was accepted as such. The Court, therefore, set aside the conclusion of the Tribunal that payment of customary or traditional bonus was established. In the instant case there was payment at a uniform rate of 10.5 per cent of salary or wages for an unbroken period of nine years, from 1965 to 1973, which was a sufficiently long period, and the Tribunal could have reasonably drawn an inference that the said payment was customary or traditional bonus on the occasion of Puja festival."

23. In the present case, as observed earlier, the annual bonus was paid to the daily rated workmen at Kurla since 1975 which period in the light of the judgments of the Apex Court, according to me, is sufficiently long and unbroken too. The petitioner has not disputed the payment of annual bonus prior to settlement of 1991. What was contended was only that for earlier period the bonus was paid on the basis of settlement linked with profit or productivity. What further need to be proved is that the payment has been made even in the years

of loss, which, in other words, means that where there have been years of loss, payment should have been made in those years also. In the present case, though during the year 1995-96 Kurla foundry had incurred loss of Re. 9.39 crores which was 9.14 crores in the previous year and that since 1992-93, Kurla foundry had continuously incurred loss the bonus was admittedly paid to the workmen. This position is not disputed by Mr. Rele, learned senior counsel appearing for the petitioner before me. In my view, thus, the third circumstance also stands satisfied in the present case. In so far as the circumstance mentioned above to the effect that payment should have been made at an uniform rate throughout. The Apex Court in Vegetable Products Ltd. case has, however, made it clear that it does not mean that uniformity should be established from the beginning to the end. Neither the petitioner nor the respondent, though *ad idem* that the bonus was paid since 1975, has placed on record the quantum that was paid prior to 1991 settlement. However, it remained undisputed that at least for five years, i.e. from 1991 till 1994-95 payments of bonus made to the workmen was at uniform rate. In so far as earlier period is concerned, since the figures of payment of bonus are not placed on record, adverse inference cannot be drawn against the respondent inasmuch as the payment for the earlier period was also based on negotiations and settlements between the petitioner and the respondent union. In view of this, I have no hesitation in holding that the claim of annual bonus was rooted in custom but quantified by negotiations/settlements. In other words, bonus paid to the workmen till 1994-95 was customary in nature and not statutory based only on settlements and linked with productivity or profits.

24. While adjudicating the dispute according to the terms of reference, the Tribunal has also taken into consideration the practice to pay *ex-gratia* in other factories. The respondent union has relied on the alleged practice in this regard of the two companies which, in my opinion, stand on different footing. It would not be proper to take into consideration such practice on the basis of evidence on record. The two witnesses examined by the respondent, viz. Goswami and More, have admitted that the bonus/*ex-gratia* was paid only under agreement and not by way of custom, practice or usage and the fact that the activities of and the service conditions in the companies were different, the question of considering the said companies for comparison under the industry-cum-region principle does not arise. Since however in view of the finding recorded earlier, this finding will not have any effect on the decision in the writ petition.

25. In the result, the writ petition is dismissed. Rule discharged. There will be no order as to costs.

26. Authenticated copy of this order may be made available to the parties.