

(1966) 01 KAR CK 0013

In the Karnataka High Court

Case No : Writ Petition No's. 1559 and 1628 of 1965

Swastic Cashew Industries (Private) Ltd., Mangalore and
Others

APPELLANT

Vs

Industrial Tribunal, Bangalore and Others

RESPONDENT

Date of Decision : 28-01-1966

Acts Referred:

Industrial Disputes Act, 1947 — Section 10 (1) (b)
Minimum Wages Act, 1948 — Section 3 (1) (a), 5 (2)

Citation : (1966) ILR (Kar) 908 : (1967) 1 LLJ 30 : (1966) 1 MysLJ 373

Hon'ble Judges : M. Sadasivayya, J;K.R. Gopivallabha Ayyangar, J

Bench : Division Bench

Judgement

Per Gopivallabha Ayyangar, J.—Disputes between the petitioners, respondents 3, 4 and 5, the managements of Cashewnut Industries at Mangalore, South Kanara, and their workmen [respondents 2(i) to (vi)] were referred by the Government of Mysore to the industrial tribunal at Bangalore for adjudication under S. 10(1)(b) of the Industrial Disputes Act, 1947, in their reference dated 29 May, 1963 bearing No. PLM 205 LLD 63. The reference included many points of disputes. In these petitions we are only concerned with the fifth point of dispute relating to the claim of dearness allowance. The workmen claimed dearness allowance at Rs. 15 per month or 50 nP. per day. The demands of the workmen included the introduction of a gratuity scheme. The industrial tribunal, respondent 1 in this petition, made an award on 27 May, 1965 refusing the introduction of a gratuity scheme, and directing the management to pay dearness allowance at 50 nP. to each of their workmen, irrespective of the class to which he belonged, for each working day, in addition to the minimum wages prescribed by the Government of Mysore, in their notification No. LLH. 139. LMW. 59(i), dated 16 July, 1960. It is unnecessary for us to refer to the other matters covered by the award as in these petitions the managements feel aggrieved only with regard to the direction relating to the dearness allowance. These petitions are filed under Art. 226 of the Constitution of India praying that a writ of certiorari or any other appropriate writ

or direction may be issued, quashing the award made by respondent 1 on 27 May, 1965 and published in the Mysore Gazette dated 2 July, 1965. Respondent 3 in Writ Petition No. 1559 of 1965 is the petitioner in Writ Petition No. 1628 of 1965.

2. In the claim Dagduas filed before the tribunal, the workmen state that the cashew industry is now in a well-established and prosperous state. The process in these factories consists of roasting and shelling the nuts, peeling the kernels, grading the kernels, conditioning the kernels and packing them for export. It is said that the nature of cashew-processing work is of a very disagreeable type because of the smell of the cashew-roasting smoke. It is also said that the roasting and shelling work involve exposure to shell oil, contract with which causes skin burns, the shelling work has to be done by mixing ash with oil soaking nuts before breaking the shells; it is a very difficult work involving act of dirt and oil and so also peeling, which is a very hard type of work requiring skill and experience. It is complained that the conditions of work in Mangalore are worse than what they are in Quilon, Calicut and Tellicherry (i.e., Kerala), though the industry is the same in that region also. It is stated that comparatively the wages paid in Mangalore are very much lower than in Kerala. It is urged that the cost of living at Mangalore is very high and is similar to that in Calicut, Quilon and Tellicherry. In view of the fact that the prices of essential commodities are very high and they are increasing daily, there is necessity to increase the wages. Apart from the fact that there is need for increase in wages, the workers complain that they are not paid any dearness allowance. It is alleged that the workmen in this industry in Kerala constituting 80 per cent of the workman get dearness allowance while the workmen in South Kanara constituting the remaining 20 per cent do not get it. They claim that the rise in the cost of living has to be neutralized by payment of dearness allowance at Rs. 15 per month or 50 nP. per day as a flat rate.

3. The managements, while denying that the industry is a well-established and prosperous industry, contend that the present circumstances and conditions of the industry are very distressing and that the trade has become speculative and risky. They state that the industry is only a seasonal industry and it mainly relies on the export of the commodity to foreign countries, the United States of America being the biggest buyer. They state that the industry is well-established in Kerala State while it is not so in Mangalore. It is stated that the transport facilities in Kerala are greater than those available in Mangalore and therefore there is a heavy expenditure incurred in respect of transport charges. The labour in Mangalore, it is alleged, is seasonal. The managements deny that the nature of cashew-processing work is disagreeable and that the work of shelling is a difficult one involving dirt and oil as alleged by the workmen. They contend that the minimum wages fixed by the Government of Mysore is satisfactory and that the same is fixed by the State after consultation with the employers and employees and considering the minimum wages fixed by the Government of Kerala in 1959, and that there are no justifying circumstances to revise or modify

the minimum wages so fixed by the Government. It is also alleged that the claim for dearness allowance cannot be borne by the industry in the locality. The managements refer to the fact that in cashew factories the work is mainly piece-rated and the earnings of the workers primarily and mainly depend on their own efficiency and the payment of dearness allowance at a flat rate of 50 nP. per day does not conduce to efficiency and on the other hand it would put a premium on inefficiency. In this connection it is pointed out that in the notification dated 26 April, 1960 issued by the Government of Kerala under the Minimum Wages Act, the provision for payment of dearness allowance is made with reference to two co-ordinates. It is related to the cost of living index, inasmuch as the dearness allowance payable is to be calculated at the rate of one paise per day for every three full points, in the rise in the cost of living index over a particular point. Further, it is provided that workers who fail to give the minimum output for the day as prescribed in the notification shall not be liable to receive the dearness allowance for that day. It is further denied that there has been any appreciable increase in the cost of living index since the fixation of minimum wages in the year 1960 by the State. Besides contending that there is no justification for the claim for separate dearness allowance, the petitioners state that the claim of the workmen is excessive and exorbitant and that they are not in a position to bear any further labour cost burden. The managements also refer to the circumstance that 95 per cent of the workers employed in the industry are women and that their earnings constitute only supplementary income to their families and therefore it would be very inaccurate and misleading to rely on the cost of living index. It is contended that in view of the several amenities made available to the workers, like a weekly holiday, four paid festival holidays, leave with full wages for fifteen days under the Factories Act, maternity benefit and three months" leave with full pay, granted to the female workers and a canteen provided wherein eatables are provided at cheap rates, the demand for dearness allowance is not justifiable.

4. It may be mentioned that 1,800 workmen are employed by petitioner, 11,000 by petitioner 2 and 1,200 by petitioner 3. Respondent 3 who is the petitioner in Writ Petition No. 1628 of 1965, viz., Peirce Leslie & Co., employs 3,655 workmen. Respondents 4 and 5, viz, U. Narayana Mallya & Sons and Yeknath Cashew Industries, who employ 600 and 100 workmen, respectively, have accepted the award and it is only the petitioners and respondent 3, Peirce Leslie & Co., that have challenged the award in these writ petitions.

5. Before the tribunal the parties have adduced oral evidence and several documents have been marked in support of their respective cases.

6. Sri T. Krishna Rao, the learned counsel appearing for the petitioners, contends that the award made by respondent 1 is unsustainable for the reason that it suffers from errors apparent on the face of the record. It is submitted by the learned counsel that the tribunal failed to apply the relevant principles to the facts of the case and thus failed to exercise the jurisdiction vested in it. It is

contended that in coming to a decision on the claim for dearness allowance, the tribunal should have considered the capacity of the industry to pay on industry-cum-region basis. It is urged that the tribunal is in error in taking the conditions in Kerala as applicable to the industry in Mangalore on the basis that Kerala and Mangalore constitute one region. It is further contended that respondent 1 has failed to consider the level of wages prevailing in other industries in the region where the factories of the several managements concerned in these petitioners are located. It is pointed out that while fixing the liability for payment of dearness allowance, the tribunal failed to take into consideration the question whether the management had the capacity to bear the extra burden consequent on the direction to pay the dearness allowance.

7. The tribunal sets out that, in fixing the dearness allowance, the capacity of the industry to pay is one of the essential circumstances that should be taken into consideration; the capacity of the industry to pay being immaterial in cases where bare subsistence or minimum wage payable to a worker is fixed with reference to the industry. It observes that in determining the capacity of the industry to pay, the condition of the industry should be considered on an industry-cum-region basis, after taking a fair cross-section of the industry. It has also set out that in gauging the capacity of the industry the tribunal has to consider several factors like the existing wage-scales prevailing in other industries, in the region, in which the industry in question is carried on. It has further mentioned that the determination of the quantum of fair wage should be based on the capacity of the particular industry in the specified region and as far as possible wages should be prescribed for all units of that industry in the particular region.

8. It is contended that the tribunal has not only failed to apply the principles it has enunciated as set out above to the facts of this case but has also ignored the other factors which it ought to have taken into consideration before fixing the dearness allowance. The petitioners' counsel contends that besides the above factors which the tribunal has set out, there are a few other factors which should also be taken into consideration while fixing the dearness allowance. He submits that the impact of the proposed claim of the workmen on the industry, the future prospects of the industry and the capacity of the industry to bear the burden for a long time to come should also be taken into consideration.

9. The tribunal has cited its decisions in *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, ; *Williamsons (India) (Private), Ltd. v. Its Workers* [1962 I L.L.J. 302] ; *Workmen of Hindustan Motors v. Hindustan Motors* [1962 II L.L.J. 352] ; *French Motor Car Co., Limited Vs. Workmen*, ; and *Greaves Cotton and Co. and Others Vs. Their Workmen*, which deal with the principles that govern the fixation of wages in the industry. It may be mentioned that wages are classified into several categories. In their descending order they are living wages, fair wages, statutory minimum wages and minimum or bare subsistence wages. It is in the absence of statutory minimum wages that the tribunal can fix the minimum or bare subsistence

wages. The management of an industry is bound to pay the statutory minimum wages or the subsistence wages so fixed. No management of an industry which cannot maintain its enterprise without cutting down the wages of its employees below the bare subsistence or minimum wage has any right to conduct its enterprise on such terms. This is the principle laid down in *Crown Aluminium Works Vs. Their Workmen*, .

10. Concerned as we are in this case with the claim for dearness allowance, it much first be observed that the principles that govern the fixation of fair wages apply to the fixation of dearness allowance also. In *French Motor Car Co., Limited Vs. Workmen*, , the principles that should be applied in considering the question of dearness allowance or wage-structure have been referred to and the observations of the Supreme Court are as follows :

"It is now well-settled that the principle of industry-cum-region has to be applied by an industrial court, when it proceeds to consider questions like wage-structure, dearness allowance and similar conditions of service. In applying that principle industrial courts have to compare wage-scales prevailing in similar concerns in the region with which it is dealing, and, generally speaking, similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration."

11. As mentioned already, the same principle has been enunciated in the other Supreme Court decisions referred to above. The tribunal bearing these principles in mind has first adverted to the question relating to industry-cum-region and has come to the conclusion that for purposes of wage-fixation in cashew industry the West Coast area between Mangalore and Trivandrum should be considered to be one region. This finding is attacked by the petitioners as one without any basis. The tribunal has adverted to the report of the Government of India on the conditions of labour in the cashewnut processing industry in India, which is marked as Ex. W. 8. Though in the said report four main regions are referred to as the areas in which the industry is located and South Kanara district and Malabar are referred to as Region No. 3 and Quilon and Trichur are referred to as constituting Region No. 4, it is contended that this classification cannot lead to the conclusion that South Kanara and Malabar form one region for the purpose under consideration.

12. The tribunal has also taken note of the fact that in so far as the South India western region is concerned, twelve factories are situated in South Kanara and Malabar and 156 in Quilon and Trichur. It has also observed that the cost of living index as at Kozhikode governs Malabar and South Kanara districts also. The tribunal has also placed reliance on the fact that according to the memorandum of settlement marked as Ex. W. 13 in the case, the petitioner in Writ Petition No. 1628 of 1965 has agreed to pay dearness allowance to its clerical staff at Mangalore on the basis of the cost of living index at Kozhikode. It is not denied by the management that the raw cashewnuts required for the cashew industry in South Kanara and Kerala are imported from South Africa and the finished

products are exported to foreign countries. The process involved in converting the raw cashewnuts into kernels is almost the same in all the factories of South Kanara and Kerala. It is no doubt pointed out that the tribunal has not taken into consideration the difference existing in the industry between what is referred to by the management as the Kerala region distinguished from South Kanara, viz., the difference in the process of converting the raw cashewnuts into kernels, the repercussions on the industry on account of its being seasonal in South Kanara and the differences in transport facilities available in the two areas. No material is placed by the managements which substantiate the contention that on account of the circumstances pleaded above, the industry in South Kanara should be treated as different from the industry in Kerala. It is not denied that Kerala and South Kanara are geographically contiguous and that the cashew industry is established in the two areas. It must be noted that Peirce Leslie & Co., respondent 3 in this petition, who employ the largest number of workmen in their industry in South Kanara, have paid the same dearness allowance to their clerical staff in Mangalore as they pay to their staff in Kerala. This would lead to the conclusion that the tribunal's finding that for purposes of fixation of dearness allowance, the area between Mangalore and Trivandrum should be considered to be in one region is supported by evidence. The contesting respondents point out that the above finding of the tribunal is a question of fact and does not call for interference in a petition under Art. 226 of the Constitution. The respondents place reliance on the decisions of the Supreme Court in *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, and *The Hindustan Times Ltd., New Delhi Vs. Their Workmen*, . In *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, , the Supreme Court has observed as follows :

"One of the grounds on which the jurisdiction of the High Court on certiorari may be invoked is an error of law apparent on the face of the record and not every error either of law or fact, which can be corrected by a superior Court, in exercise of its statutory powers as a Court of appeal or revision."

13. In the case of *The Hindustan Times Ltd., New Delhi Vs. Their Workmen*, , the Supreme Court observes as follows :

"On an examination of the tribunal's award as regards the wage-scale, we are satisfied that all the considerations mentioned above were present in the mind of the adjudicator and we are of opinion that there is nothing that would justify us in modifying the award either in favour of the employer or in favour of the workmen."

14. These observations in our opinion apply to this case also. We are unable to accept the contention that the tribunal has failed to apply the principles that govern the determination of the first factor, viz., the region which ought to be taken into consideration in so far as the cashew industry is concerned. The finding of the tribunal is one of fact and in view of the above decisions of the Supreme Court relied on by the respondents, we cannot accept the contention of

the petitioners" counsel.

15. The next question that follows is whether the tribunal was right in fixing dearness allowance at 50 nP. to each of the workmen for each working day. It is contended that the industry cannot bear this additional burden and therefore it should not have been granted. It is pointed out that the State of Mysore has under its notification dated 16 July, 1960 fixed the minimum rates of wages, under Clause (a) of Sub-section (1) of S. 3 and Sub-section (2) of S. 5 of the Minimum Wages Act, 1948, at particular rates which are all inclusive. In considering the capacity of the industry to pay, the tribunal is to be guided by the conditions obtaining in a fair cross-section of the industry. It is not disputed in this case that the cost of living is increasing day by day and that the increase is not neutralized in any manner either by fixation of even fair wages or by the grant of dearness allowance. It must be stated that the need for the grant of dearness allowance is not seriously disputed. It is the incapacity of the industry that is pleaded by the petitioners. What is now fixed by the notification issued by the State of Mysore and referred to above is only the minimum wages, the non-payment of which would prevent the carrying on of the industrial enterprise altogether. To determine what would be a fair cross-section of the industry, the managements have not placed any reliable material. The tribunal has taken note of the fact that under the Kerala Government's notification which is marked as Ex. W. 1 the minimum wages are fixed on piece-rate basis in the same manner as in the Mysore Government's notification. It is submitted on behalf of the respondents that the Kerala notification reflects the conditions in and the capacity of a fair cross-section of the industry in the region. In the matter of dearness allowance, the Kerala Government have under their notification dated 25 July, 1964 provided for the payment of dearness allowance in addition to the minimum piece-rates, on a sliding scale. They have prescribed dearness allowance calculated at the rate of 1 nP. per day for every 3 full points in the cost of living index for Quilon in excess of 400. It is further provided that piece-rate workers in the shelling and peeling sections who fail to give the minimum output on any particular day as prescribed therein shall not be eligible to receive the dearness allowance for that day. The respondents" counsel have brought to our notice that the cost of living index or what is otherwise at present called the consumers" price index has been on the increase from 1960, when the Government of Mysore fixed the minimum wages. From the extract of the consumers" price index which has been referred to in the award of the tribunal, it is clear that there has been a considerable increase in the cost of living. It is mentioned by the respondents" counsel that the index for 1965 is 605.33. Calculated on the basis of the Kerala Government's notification dated 26 April, 1960, the dearness allowance payable to the workmen would exceed that which has been awarded by the tribunal. It would not make any difference even if the cost of living index as for Mangalore for the year 1960 is taken into consideration. It is admitted by the assistant manager of Peirce Leslie & Co., Mangalore, who has been examined as witness 6 for the management, that in

Kerala they pay dearness allowance of 52 nP. per day with effect from January 1965 as per Kerala minimum wages notification. In view of the finding that Kerala and South Kanara form one region, the above material is relevant for the fixation of 50 nP. per working day as dearness allowance. The tribunal in support of its finding relies also on the memorandum of agreement marked as Ex. W. 9 dated 3 April, 1961 between the management of Peirce Leslie & Co. and the members of the monthly paid staff at all its branches and factories in India. According to this settlement, the workmen are paid dearness allowance at the rate of 25 nP. per point over 400 in the cost of living index for the concerned month. It is contended by the counsel for the petitioners is both the above writ petitions that the tribunal has committed an error in relying on the abovesaid agreement. It is submitted that the tribunal has overlooked the fact that the agreement refers only to monthly paid workmen, being subject to transfer from one place to another. We are not convinced that the fact that they are liable to be transferred is a factor that should prevent the tribunal from taking the agreement into consideration for the purpose of assessing the quantum of the dearness allowance. It is pointed out by the respondents' counsel that Peirce Leslie & Co. employ the largest number of workmen in the industry. It is also brought to our notice that U.N. Mallaya & Sons and Eknath Cashew Industries have accepted the award and have not complained against the grant of dearness allowance made by the tribunal. Taken together, these three industrial concerns employ over 60 per cent of the labour force involved in this reference. Reliance is placed on behalf of the workmen, on the decision of the Supreme Court in Greaves Cotton and Co. and Others Vs. Their Workmen, for the contention that the employees whether they be clerical staff or factory workmen should be treated on the same basis and the provision for dearness allowance intended as it is to neutralize the increase in the cost of living should depend on the wage-packet of each employee. In that decision the Supreme Court has made the following observations which apply to this case also :

"It appears that on account of different scales of dearness allowance for subordinate and clerical staff, a member of the subordinate staff drawing the same wages would get less dearness allowance than a member of the clerical staff. The discrepancy is very glaring as between clerical staff and the factory-workmen who also have different scales of dearness allowance. The tribunal therefore thought that dearness allowance which is means to neutralize the rise in cost of living, should be paid to clerical staff, subordinate staff as well as factory-workmen on the same scale, for the need for neutralization was uniformly felt by all kinds of employees. It also pointed that there was a trend towards uniformity in the matter of scales of dearness allowance as between clerical staff and other staff and factory-workmen and referred to a number of firms where same scales prevailed for all the staff. It has however been urged on behalf of the appellants that the pattern in the region is that there are different scales of dearness allowance for clerical staff and other staff including factory-workmen and the tribunal therefore should have followed this pattern. The

reasons given by the tribunal for giving the same scales of dearness allowance to all the categories of staff, including the factory-workmen, appear to us to be sound. Time has now come when employees getting same wages get the same dearness allowance irrespective of whether they are working as clerks, or members of subordinate staff or factory-workmen. The pressure of high prices is the same on these various kinds of employees. Further, subordinate staff and factory-workmen these days are as keen to educate their children as clerical staff and in the circumstances there should be no difference in the amount of dearness allowance between employees of different kinds getting same wages. Further, an employee whether he is of one kind or another getting the same wages hopes for the same amenities of life and there is no reason why he should not get them, simply because he is, for example, a factory-workmen though he may be coming from the same class of people as a member of clerical staff. On the whole, therefore, the tribunal was in our opinion right in following the trend that has begun in this region and in fixing the same scale of dearness allowance for subordinate staff and factory-workmen as in the case of clerical staff."

16. It has further indicated that :

"The tribunal has to take into consideration the total wage-package for fixing wages and dearness allowance."

17. In these circumstances, it cannot be said that the tribunal has not taken into consideration a fair cross-section of the industry in fixing the dearness allowance at 50 nP. per working day. The managements have not placed any material as to the capacity of the wage-scales prevailing in similar industries in the region in question to indicate the impact of the proposed claim for dearness allowance on the future prospects of the industry and the capacity of the industry to bear the burden for a long time to come. It is contended on behalf of the workmen that the apprehension of the managements regarding the future of the industry attributable to expected competition from other countries in this trade is merely hypothetical and no data is placed in proof of this apprehension. Our attention is drawn to the figure given in the Cashew Bulletin issued by the Cashew Export Promotion Council, Ernakulam, based upon the statistics, furnished by the Director General of Commercial Intelligence and Statistics, Calcutta, relating to the export of cashew kernels and cashewnut shell liquid from India during the periods January to December 1963 and 1964 and January to August 1964 and 1965, and January to December 1962, 1963 and 1964 and January to August 1963, 1964 and 1965, respectively. Thus figures regarding import of raw cashewnuts during January to December 1960 to 1964 and January to August 1961 to 1965 are also given. It is pointed out on behalf of the respondents that the figures indicate that there has been progress in the industry. It is difficult to accept the position that without progress in the industry, the petitioner in Writ Petition No. 1628 of 1965 and the other concerns within the Kerala State would have paid the dearness allowance as they have been doing. In these circumstance we cannot accept the contention of the petitioners that the tribunal

has failed to consider a fair cross-section of cashew industry in determining the question of the financial stability and ability of the industry. It is no doubt true that while referring to the balance sheet and profit and loss accounts of the petitioners in Writ Petition No. 1559 of 1965 the tribunal has committed a mistake. The petitioners have given a comparative statement containing the figures as in the profit and loss accounts, and as mentioned in the award. There is no mistake in the figures relating to petitioner 1. With respect to the figures pertaining to petitioner 2, the tribunal has committed a mistake, for the year 1957 though there is a loss of Rs. 49,357.09, the tribunal has mentioned that it has made a profit of Rs. 2,18,027. Similarly for the year 1958, the award mentions that petitioner 2 has made a profit of Rs. 2,71,815, while actually the balance sheet indicates a profit of Rs. 35,204.06. Similarly for the year 1961 instead of a loss of Rs. 7,550.17 a profit of Rs. 2,17,310 has been mentioned. It is explained by the respondents that these mistakes have occurred as the tribunal has taken the gross profits instead of the net profits. In any event on an analysis of the figures pertaining to petitioner 2 and the figures for four years relating to petitioner 2, it can be gathered that the finding of the tribunal that the industry is making steady progress year after year in their business cannot be held to be baseless. The fact that petitioner 3 has sustained a loss during the years 1956 to 1959, 1961 and 1963 would not, in our opinion, render the conclusion arrived at by the tribunal perverse or patently wrong. In circumstances mentioned above, there is considerable force in the contention that the conclusion of the tribunal regarding the capacity of the industry to pay is also one of fact and does not warrant any interference in these proceedings under Art. 226 of the Constitution. Another circumstance that is brought to our notice is that the petitioner in Writ Petition No. 1628 of 1965 has not pleaded that he has no capacity to pay whatever dearness allowance is fixed on the basis of the capacity of the industry to pay.

18. Another fact to which our attention is drawn by the petitioners is that the tribunal, while considering the question of the introduction of a gratuity scheme for the benefit of the workmen, has found that the profit-earning capacity, profit earned in the past by the management as can be seen from their profit and loss accounts and the balance sheets do not warrant a conclusion that the concerns have the financial stability for the introduction of a long-term scheme like the one for gratuity. Therefore, it is submitted that the tribunal committed an apparent error in not applying the same finding in regard to the dearness allowance also. Reliance is placed by the petitioners' counsel on the decision in *Management of the D.C.M. Chemical Works Vs. Their Workmen*, . In that case one of the contentions advanced was that while considering the demand for fixation of incremental wage-scales, the industrial tribunal had found that the financial position and stability of the concern was not sound and rejected the demand, but in respect of the demand for dearness allowance the tribunal had directed an increase. On appeal, the Supreme Court held that the increase in the dearness allowance could not be sustained on the finding of the tribunal

regarding the financial capacity of the concern. It appears to us that the claim for dearness allowance does not stand on the same footing as the introduction of gratuity scheme. Undoubtedly it stands on the same footing as the claim for incremental wage-scales. The introduction of a gratuity scheme would involve future liability in respect of deferred payment while the dearness allowance is like wages, a current liability. One other factor which should be taken into consideration is that it is open to the managements to apply for reduction in the wage-scales or the scale of dearness allowance in case of supervening incapacity to bear the increased labour cost. It appears therefore that the petitioners cannot derive any assistance from the abovesaid decision.

19. The next point that is strongly urged by the petitioners' counsel in Writ Petition No. 1559 of 1965 is that the tribunal has failed to consider the capacity of each one of the industrial units to bear the additional financial burden consequent on the direction of the tribunal for payment of dearness allowance. It is mentioned in the affidavit filed by the petitioners that the impact of the award on the managements is Rs. 1,13,750, Rs. 1,70,500 and Rs. 1,63,800, respectively, on the petitioners annually. In addition to this burden, it is submitted that they have to bear the statutory burden of the Employees' State Insurance contribution. They are also liable to pay the minimum bonus as per the Bonus Ordinance. It is contended that if the capacity of the individual concerns to bear these additional financial burdens had been taken into consideration by the tribunal, it would not have granted the dearness allowance as it has done, and the failure on the part of the industrial tribunal to consider this aspect of the petitioners' case is an error apparent on the face of the record and amounts to excessive or illegal exercise of jurisdiction.

20. It is submitted by the counsel for the labour unions that no interference is called for in this regard also, in view of the fact that three units, viz., Eknath Cashew Industries, Peirce Leslie & Co. and U.N. Mallays & Sons, representing more than 60 per cent to the workmen failed to produce their account books to substantiate the contention that they are incapable of bearing any further burden and this according to them indicates that the financial position of each of the managements is sound, and can bear the extra financial burden. It is pointed out that two units, viz., U.N. Mallaya & Sons and Eknath Cashew Industries, have complied with the terms of the award.

21. Another circumstance that is brought to our attention, is that the petitioner in Writ Petition No. 1628 of 1965 has not pleaded that he has no capacity to pay whatever dearness allowance is fixed on the basis of the capacity of the industry of pay. It is further urged that even if 50 nP. should be taken as proper dearness allowance, the total amount that the workmen get per mensem would not amount to a fair wage and, therefore, no interference is called for. This submission is based on the ground that the workmen get about Rs. 7 or Rs. 8 per week by way of wages. Adding the dearness allowance that is now granted under the award, the total earning of the workman does not exceed Rs. 45 per

mensem. Compared with the wages earned by the workmen in South Kanara with those earned by the workmen in the Kerala factories, the total wage earned by the workmen concerned in these references is less and therefore it is submitted that no interference is called for.

22. Sri Rama Kamath, the learned counsel appearing for one of the labour unions, raised a further contention that the total wage earned by the workmen inclusive of the dearness allowance granted under the award, brings the wage to a bare subsistence level answering the description of minimum wage and therefore the capacity of the industry to pay is not a relevant factor; much less is it necessary to consider the capacity of the individual unit of the industry to bear the additional burden. He further submits that it is competent for the tribunal to adjudicate what the minimum wage should be and that is what the tribunal has done in this case. In support of this contention the learned counsel relied on the observations made by the Supreme Court in Ahmedabad Mill-owners' Association case [1966 I L.L.J. 1] to the following effect :

"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 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 had to be paid by the employer, and if he cannot afford to pay it, he would not be justified in carrying on his industry - vide Crown Aluminium Works Vs. Their Workmen, ."

23. We are unable to accept this contention of Sri Rama Kamath. The present case is not one where the minimum wage is not fixed. As already pointed out, under the notification dated 16 July, 1960 issued by the Government of Mysore, the minimum wages have been fixed under the Minimum Wages Act. The minimum wages so fixed cannot be altered by the industrial tribunal. It can be altered only by a subsequent notification issued by the competent authorities. This position is clear from the observations made by the Madras High Court in South India Estate Labour Relations Organization v. State of Madras [1954 I L.L.J. 8]. The Madras High Court, while discussing the scope of the provisions of Minimum Wages Act and the Industrial Disputes Act has observed as follows :

"So construing the two statutes the position that emerges might thus be stated. The object of Act 11 of 1948 (the Minimum Wages Act, 1948) is to ensure the payment of living wages to workmen. The fixation is made from the point of view of the workmen. The capacity of the employer does not enter into the calculation. It may be that he cannot afford to pay at the rate fixed and may even be obliged to close down; but as long as he continues to employ, he cannot pay less (vide S. 22). A rate fixed under those conditions has to be the "minimum"; and that is why its determination is entrusted to administrative authorities. After wages are fixed under Act 11 of 1948, it may happen that the

workmen are content to accept them, in which case no further question would arise. But if they do not accept it and ask for more, then there is an industrial dispute; and under S. 10 of Act 14 of 1947, the Government gets jurisdiction to refer it for adjudication by a tribunal."

24. The reference in this case relates to an increase in wages in the shape of dearness allowance intended to neutralize the increased cost of living. Therefore, while adjudicating the reference made by the Government under S. 10 of Act 14 of 1947, the tribunal, on a consideration of all the circumstances, including the capacity of the industries to pay more, has power to decide that the wage be increased; but the wage so increased cannot form part of the minimum wage fixed under the notification issued under the Minimum Wages Act. To accept the contention of Sri Rama Kamath would mean that no industrial unit which cannot bear the increase in wages as decided by the tribunal would have a right to carry on the industry. Further it overlooks the right of the parties to apply for any variation of the increase granted by the tribunal depending upon the variation in the cost of living or capacity of the industry to bear the increased wages. Further, the Supreme Court in *Ahmedabad Millowners' Association case* [1966 I L.L.J. 1] (vide supra), observed that it is where minimum wages are not fixed by statute, that industrial adjudication can determine in a given case the basic minimum or the subsistence wage which the employer would be bound to pay. Therefore, the capacity of the industry to pay as well as the capacity of the industrial unit to pay are both relevant factors in fixing the quantum of dearness allowance payable to the workmen.

25. It is contended by the contesting respondents that the capacity of the particular unit to pay is not a factor that need be considered by the tribunal at all in fixing the dearness allowance. Support for this contention is sought, from the decision of the Supreme Court, in *Lipton Limited and Another Vs. Their Employees*, . It does not appear that the said decision lends any support to the above argument. It is pointed out by the petitioner that from p. 442 of the above decision it is clear that the financial capacity of the appellant-concern was a factor that was taken into consideration. From the observation of the Supreme Court in *Ahmedabad Millowners' Association case* [1966 I L.L.J. 1] (vide supra), it is clear that the capacity of the employer is a factor that should be taken into consideration. In the said decision a reference is made to the capacity of the employer to bear the burden of a wage-structure. It is observed that if the employer cannot really bear the burden of the increasing wage-bill, industrial adjudication, on principle, cannot refuse to examine the employer's case and should not hesitate to give him relief if it is satisfied that if such relief is not given, the employer may have to close down his business. In *Novex Dry Cleaners v. Its Workmen* [1962 I L.L.J. 271], the Supreme Court has observed as follows :

"It is well-known that in fixing the wage-structure on a fair basis, an attempt is generally made in assessing the additional liability imposed upon the employer by the new wage-structure and trying to anticipate whether the employer would

be able to meet it for a reasonably long period in future."

26. In that case the Supreme Court observed that the tribunal had not considered the balance sheet produced by the appellant showing the position of profit and loss of the appellant itself. The Supreme Court has laid down in *Airlines Hotel (Private), Ltd., Bombay v. Its Workmen* [1964 I L.L.J. 415], that :

"Where the question of wages is referred for adjudication, before any increases can be ordered by any industrial adjudication, the adjudicator has to be satisfied positively that the financial condition of the employer is such as will enable it to bear the additional burden imposed. To impose an additional burden in the shape of increased wages without giving a definite finding as to the financial position is wholly improper."

27. In view of these Supreme Court decisions, the contention that the tribunal has committed a patent error in not considering the capacity of the individual unit to pay, has much force. This does not apply to the petitioner in Writ Petition No. 1628 of 1965 who had not produced his account books and has not complained of any incapacity to bear the additional financial burden resulting from the award. Sri Kurien, the learned advocate who appeared for the petitioner in Writ Petition No. 1628 of 1965, plainly stated before us that the petitioner does not plead incapacity. We have accepted the view of the tribunal in regard to the capacity of the industry to pay the specified rate of dearness allowance. There being no question of any incapacity on the part of the petitioner in Writ Petition No. 1628 of 1965, he should pay the same and his writ petition is liable to be dismissed.

28. One other contention advanced on behalf of the petitioners is that the tribunal has committed a patent error in directing the payment of dearness allowance at a flat rate and that it should have been linked with production. It is contended that, as unlike the Kerala Government's notification dated 25 July, 1964 whereunder the payment of dearness allowance is made subject to the employee giving the minimum output, fixing a flat rate would put a premium on laziness of a worker. It is not obligatory on the tribunal to always link up the dearness allowance with either the cost of living index or the output. It is, no doubt, true as observed by the Supreme Court in *The Hindustan Times Ltd., New Delhi Vs. Their Workmen*, , the whole purpose of dearness allowance being to neutralize a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase or rise in the cost of living and decrease on a fall in the cost of living. But, this does not mean, that dearness allowance at a flat rate is not at all permissible. The Supreme Court has further observed in *Management of Rajendra Mills Ltd. and Management of Jawahar Mills Ltd. Vs. Their Workmen and Others*, , as follows :

"The argument that a piece-rate system becomes unworkable if dearness allowance is made independent of production is therefore belied by the appellant's own conduct and experience.

As we have already pointed out, the dearness allowance has subsequent to 23 May, 1956, been made independent of production in this very factory. They also show that however beneficial to production it might be to link dearness allowance with production in a piece-rate system, a piece-rate system does not necessarily become unworkable if dearness allowance is payable independent of production."

29. Thus, it is clear that it is not always necessary to link the dearness allowance with production or with the cost of living index. It could be at a flat rate also. With reference to this matter, the workmen also complain that the fixation of dearness allowance at a flat rate is prejudicial to them as they would be entitled to get more dearness allowance, if it is not at a flat rate, but if it is linked with the cost of living index. These are matters which are entirely within the discretion of the tribunal.

30. It is clear from the award that the tribunal has not considered the question relating to the capacity of each individual unit to bear the additional financial burden resulting from the direction for payment of dearness allowance. We think it proper that the tribunal should consider the capacity of the petitioners in Writ Petition No. 1559 of 1965 to bear the increased financial burden and decide what should be the quantum of dearness allowance, if any, that each of the petitioners have to pay. We make it clear that the finding of the tribunal relating to the capacity of the industry is not disturbed and it stands. The award made by the tribunal is quashed to the extent that it impose liability on the petitioners in Writ Petition No. 1559 of 1965. We direct the tribunal to consider this matter in the light of the observations made above, on the evidence already on record and on such further evidence as either party may adduce. For this purpose proper opportunities shall be given by the tribunal to both the parties. The parties in Writ Petition No. 1559 of 1965 will bear their own costs. We dismiss the Writ Petition No. 1628 of 1965 with costs of respondent 1. Advocate's fee Rs. 250.