

MINIMUM BONUS—A SEARCH FOR SOCIAL JUSTICE

Introduction

JUSTICE HIGGINS, the founding father of the Australian system of arbitration and conciliation, once remarked that “the war between the profit maker and wage earner is always with us.” This observation becomes more important in the Indian context where disputes relating to wages, bonus and other financial matters constitute the bulk of industrial disputes,¹ for the obvious reason that the majority of the people even today live below the poverty line.² Thus, the social and economic upliftment of the labour becomes of paramount importance. To achieve the desired goal, the government has come out with various legislative measures not only to fill up the existing gap between capital and labour³ but also to secure industrial peace which is essential to maintain efficiency of labour and thus to increase ultimately the productivity. One of such legislative measures in the field of industrial law is the enactment of the Payment of Bonus Act 1965.⁴

The Act makes it imperative for the employer to give minimum bonus to the employees irrespective of the fact whether the establishment has earned any profit or not.⁵ Whether the provision relating to statutory minimum bonus is in conformity with the notion of social justice as understood in industrial law, particularly in the case of an establishment incurring trading losses, has always been a debatable issue. The question is vital because as early as 1955, the Supreme Court in *Muir Mills Co. Ltd v. Suti Mills Mazdoor Union*⁶ had opined that to ask a failing concern to give bonus to employees would be a negation of the very idea of social justice. The question can properly be answered on an analysis of the correct notion of social justice, its applicability to industrial law in general and in the field of bonus law in particular, the ratio of judicial decisions and the scope of the Act.

Concept of social justice

“Social justice” remains an obscure expression, incapable of any

1. K.N. Subramanian, *Labour-Management Relations in India* 388 (1967).

2. It can be equated with the subsistence level.

3. Art. 43 of the Constitution providing a guideline in this direction says : “The State shall endeavour to secure, by suitable legislation or economic organisation...to all workers... a living wage...”

4. Hereinafter referred to as the Act.

5. S. 10 (as amended).

6. A.I.R. 1955 S.C. 170.

precise definition.⁷ Every prevailing system regards the welfare of the common man as the goal and promises social justice, but the expression remains undefined. The difficulty is that it can be understood on the basis of several social, economic and humanitarian considerations. This necessarily means that its content and scope would differ from person to person, depending upon his social and economic philosophy. It behoves us, therefore, to specify the content and contours of social justice in our context. In this direction, certain basic principles of social justice may still be ascertained for an understanding of the concept.

It is an established fact that society is more or less a self-sufficient association of persons who, in their relations with one another, recognize certain rules of conduct as binding and who, for the most part, act in accordance with them. Generally, these rules specify a system of cooperation designed to advance the good of those taking part in it. Then, even though society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as an identity of interests. There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for, in order to pursue their ends, each prefers a larger to a smaller share. A set of principles is thus required for choosing among the various social arrangements which determine this distribution of advantages. These principles are the principles of social justice. They provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.⁸ Viewing from this angle, if social justice is used in a broad perspective, it strives to remove the imbalance in the political, social and economic life of the people. As observed by Justice P.B. Gajendragadkar :

The concept of social justice thus takes within its sweep the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities.⁹

These principles were also given due importance at the time of the framing of the Indian Constitution. The preamble to the Constitution uses the term "social justice"¹⁰ and so does part IV, which engrafts in it the goals and values to be secured in the Republic of India as a welfare state. Part IV, it may be said, gives a broad picture of the progressive philosophy on which the Republic is expected to function in social, economic, political, and international spheres. Article 38, inter alia,

7. According to Bhagwati J., "[s]ocial justice is a very vague and indeterminate expression and that no clear-cut definition can be laid down which will cover all the situations." *Id.* at 175.

8. John Rawls, *A Theory of Justice* 4 (1972).

9. *Law, Liberty and Social Justice* 78 (1965).

10. The preamble to the Constitution declares, inter alia, that the citizens shall be secured social, economic and political justice.

provides that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life. The term "justice" without doubt means justice to the deprived and weaker sections of society by bringing an egalitarian order under which equal opportunities are afforded to the weaker sections of society. In other words, the concept seeks to afford necessary assistance to the under-privileged. It is to be remembered that it does not aim at pulling down the upper sections of society. It uplifts the weaker sections without unduly and unreasonably affecting the interests of the former. This principle also forms the basis of other constitutional provisions. It is important to note that the constitutional document, without defining the concept, intends to secure social justice with the help of some of these principles.

Social justice versus industrial adjudication

The above attempt of ascertaining the principles of social justice makes one to wonder as regards its applicability to industrial law. But one comes back home when struck with the erudite observation of Krishna Iyer J. :

Social justice is the signature tune of the Constitution of India and this note is nowhere more vibrant than in industrial jurisprudence.¹¹

Again, in *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Indian Express Newspapers (Bombay) Employees Union*,¹² the court observed :

The Industrial Tribunals of India, in areas unoccupied by precise block letter law, go by the constitutional mandate of social justice in the claims of the "little people".¹³

Efforts have been made to define and redefine the concept of social justice in the background of labour relations law but here too, no precise and clear-cut meaning has so far been evolved. Reference has always been made to articles 41, 42 and 43 of the Constitution, because of their relevance in the field of industrial law. In fact, these articles are said to be the substratum of industrial jurisprudence.

In the field of industrial law, the instrumentality of social justice seeks to make it possible that wealth is distributed as equally as possible, and that the fruits of labour and capital are shared and divided with reasonable equity. The principle is that the employer and employees are so inter-related and dependent on each other that it is in the interest of both that they survive together and it is in the interest of society that both should be

11. *Punjab National Bank v. Ghulam Dastagir*, A.I.R. 1978 S.C. 481.

12. A.I.R. 1978 S.C. 1137.

13. *Id.* at 1139.

kept functioning in harmony with each other.¹⁴ Even this conceptualization of the expression "social justice" in the field of industrial law derives its force from the concept as commonly understood. Social justice in this sense, as seen earlier, aims to remove imbalances in every aspect of human life; thus, bridging the gap between the upper section and management on the one hand and the weaker section and working class on the other, by uplifting the latter but not at the cost of the former.

Bonus versus social justice

Position before 1965 Act

The scheme of bonus is very much in vogue in India today. But it has not attained so far a final shape and spelt out its objective. The basic concepts of bonus, evolved in every scheme introduced so far, are so much shrouded with vagueness and uncertainty that the concept connotes different meanings to different persons. This is so probably because bonus is a dynamic concept with many aspects—philosophical, theoretical, humanitarian, financial, administrative, social, economic and political etc.

In one sense, bonus may be a mere gift or gratuity as a gesture of goodwill,¹⁵ or it may be something to which an employee is entitled on the happening of a condition precedent and is enforceable when the condition is fulfilled. Or it may be some extra consideration to what is ordinarily received,¹⁶ or strictly due to the recipient as bonus.

In industrial adjudication in India, however, the concept of bonus has acquired a special meaning and significance.¹⁷ In the early stages of industrial adjudication, the employers advanced the plea that the payment of bonus was an ex-gratia payment and that the workmen had no legal right. The court, however, while rejecting the plea, held that "[b]onus is not, as its etymological meaning would suggest, a mere matter of bounty, gratuitously made by the employer to his employees."¹⁸ Nor does it partake of the character of deferred wage because, if it were so, it would necessarily rank for precedence before the dividend.¹⁹

Eventually, bonus came to be regarded as filling the gap existing between the living wage and the actual paid wage. This gap theory²⁰ emerged as the wages continued to fall short of living wage and bonus was claimed in partial satisfaction of the deficiency. However, this gap theory did not hold good for long as the workers were enabled to share in the prosperity of the concern without disturbing the underlying basic wage structure.

14. G.M. Kothari, *Labour Demands and Their Adjudication*, vol. I at 114 (1972).

15. *Oxford Concise Dictionary*.

16. *Webster's New World Dictionary*.

17. *Mumbai Kamgar Sabha v. Abdulbhai*, A.I.R. 1976 S.C. 1455.

18. *Sree Meenakshi Mills Ltd. v. Their Workmen*, 1958 S.C.R. 878 at 883.

19. *Lipton Ltd. v. Their Employees*, A.I.R. 1959 S.C. 676.

20. See *Muir Mills*, *supra* note 6.

In 1950, the labour appellate tribunal, which had the first opportunity to consider the question of social justice in relation to bonus,²¹ equated the rights and liabilities of employer and employees with a view to achieve a just formula, commonly known as full bench formula,²² for the computation of bonus. The formula was based on the idea that as both labour and capital contributed to the earnings of the industrial concern, it was fair that labour should derive some benefit, if there is a surplus after meeting prior or necessary charges. The following were prescribed as the first charges on gross profits : (a) Provision for depreciation; (b) reserve for rehabilitation; (c) a return at six per cent on the paid up capital; and (d) a return on the working capital. The surplus that remained after making the aforesaid provisions was held to be available for distribution amongst the shareholders, the industry and the workmen. This notion was reiterated in *Textile Mills v. Their Workmen*²³ and *Famous Cinc Laboratory v. Their Workmen*.²⁴

Of late, the Supreme Court in *Muir Mills*,²⁵ endorsing the basic principle underlying the full bench formula, refused to allow the grant of bonus to workers in the year when the company had no profits and refuted the employees' plea that it should be allowed on considerations of social justice. The decision of the labour appellate tribunal granting bonus out of reserves and undistributed profits on the ground of social justice was reversed by the court. The court deprecated the tendency to import such fanciful notions of social justice. It was also of the opinion that to ask a failing concern to give bonus to employees would be a negation of the very idea of social justice.

Subsequently, the same view was endorsed by the highest court in *State of Mysore v. Workers of Gold Mines*,²⁶ where it was observed :

The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of a welfare state. It is on this concept of social justice that the formula in question has been founded and the experience in the matter of industrial adjudication shows that, on the whole, the formula has attained a fair amount of success.²⁷

The echoes of the above case again found a place in the leading case

21. The reason for such a delay was that the judges were slow to adjust themselves to the new requirements and challenges thrown by poverty, hunger, unemployment and inequitable distribution of wealth. See, for a detailed analysis, Bakshish Singh, *The Supreme Court of India as an Instrument of Social Justice* 73-78 (1976).

22. *Millowners' Association, Bombay v. Rashtriya Mills Mazdoor Sabha*, 1950 (II) Lab. L.J. 1247.

23. 1952 (I) Lab. L.J. 625.

24. 1953 (I) Lab. L.J. 466.

25. *Supra* note 6.

26. 1958 S.C.J. 1243.

27. *Id.* at 1248.

Associated Cement Companies v. The Workmen,²⁸ where the Supreme Court observed :

This formula is based on considerations of social justice and is intended to satisfy the legitimate claims of both capital and labour, in respect of the profits made by the industry in a particular year.²⁹

Various judicial pronouncements in the pre-1965 Act era thus reveal that no doctrinaire view about bonus is possible or desirable. It is judicially settled that bonus is neither an *ex gratia* payment nor deferred wage. In the industrial jurisprudence of a modern economic society, it is a legal claim. The recognition of workers' claim is, therefore, based upon the desirability of a balance of adjustments of the different interests concerned in the industrial structure of a country in order to promote harmony amongst them on an ethical and economic foundation. No bonus can, therefore, be claimed or justified unless there is profit out of which bonus is to come and that profit is the result of joint contribution of capital and labour.

Thus, the essential features of the concept of bonus as evolved by the industrial adjudication reflect the view that the judicial wisdom in India has not only striven to adjust the substantive law of trade and commerce but has also attempted to transform the adjective and procedural laws so as to accelerate the attainment of socio-economic justice.

Position after 1965 Act

Though at one time the full bench formula was ruling the day, yet the Supreme Court in *Associated Cement Companies* threw a suggestion for revision of the aforesaid formula through the venue of the legislature, observing :

If the legislature feels that the claim for social and economic justice made by labour should be redefined on a clearer basis it can step in and legislate in that behalf.³⁰

Keeping in tune with the constitutional guarantee of securing justice—social, economic and political—and inspired by the Supreme Court's suggestion for the revision of the full bench formula, the government appointed a high powered commission,³¹ whose efforts culminated in the passage of the Payment of Bonus Act 1965. The terms of reference for the commission put profit in the forefront as the foundation of the scheme—"to define the concept of bonus, to consider in relation to industrial employments the question of payment of bonus based on profits."

Even a glance at various chapters of the report of the commission brings home the point that bonus based on profits is its central theme. The

28. A.I.R. 1959 S.C. 967.

29. *Id.* at 980.

30. *Id.* at 984.

31. The Bonus Commission was appointed by the Government of India on 6 December 1961 under the chairmanship of M.R. Mehar.

Bonus Act 1965, substantially modelled on the commission's proposals, adopts a blue print essentially worked on profits.

The most important achievement of the Act is the provision relating to the payment of minimum bonus.³² It has been made imperative for the employer to pay minimum bonus in case of those employments which are covered by the Act. Its justification would rest essentially on the ground that the mass of the workers do not, as yet, enjoy even the minimum need based wages and so long as that minimum level is not reached, they are entitled to additional yearly payment to meet a part of their pent up essential needs. The question, however, remains : Could the minimum statutory bonus be considered as being in conformity with the concept of social justice? Will it not be against the spirit of social justice aimed at penalizing the employer alone, particularly in the case of failing concern? These questions can be answered if we know the circumstances under which bonus can be given under the Act and its nature as provided in the Act.

Though the Act introduces the concept of statutory bonus, it covers only those establishments which might have suffered trading loss in a particular accounting year, but are financially sound enough to pay the statutory minimum bonus after applying the set-on and set-off principles.³³ Section 10(3) of the Act, which is a part and parcel of the main provision dealing with statutory minimum bonus, provides :

For the purposes of this section, the allocable surplus shall be computed taking into account the amount set-on or set-off in the three immediately preceding accounting years in respect of which the bonus is payable.

In fact, the payment of bonus scheme, as contemplated by the Act, does not take a year as a unit. The Act applies set-on and set-off principles for a cycle of four years as an industrial establishment may have trading loss in a particular year for reasons not controllable by the two partners of industrial production, *viz.*, the employer and the employee, *e.g.*, scarcity of raw materials, non-availability of power or the lack of demand for the products. And the same establishment can earn huge profits in the succeeding year. Under these circumstances, the employees deserve something in recognition of their honest cooperation with the employer in running the industry.

With regard to establishments which continue to suffer trading losses and render the set-on and set-off principle ineffective, the Act confers upon the government the power to exempt them from the operation of the Act, having regard to the financial position and other relevant circumstances of the establishment.³⁴ As rightly observed by the Bonus Review Committee :

If there is an establishment which goes on making losses conti-

32. S. 10.

33. S. 15.

34. S. 36.

nuously for years, evidently there is something basically wrong with such an establishment and the remedy lies in other directions. Any tinkering with the minimum bonus is not going to provide solution.³⁵

Thus, the Act adopts a blueprint essentially worked on profits. Schematically speaking, statutory bonus as provided by the Act is a profit bonus. The relevant statutory provisions clearly demonstrate that the legislature never intended to penalize the employer. Any claim by the employees for bonus would, therefore, be justifiable on the basis of social justice as corroborated by the earlier judicial pronouncements.

This provision for statutory minimum bonus was eclipsed for a short period by the Payment of Bonus (Amendment) Act 1976,³⁶ which linked bonus to production or productivity and made the employer liable to pay minimum bonus only when the establishment had any allocable surplus during the year in question. The amendment Act thus dispensed with the relevance of the set-on and set-off principles. Theoretically, it was in consonance with the efforts made by the Supreme Court in extolling the justification of a claim relating to bonus on the plea of social justice. However, in the absence of a properly devised scheme of determining bonus based on production and productivity, the basic premise of the amending Act appeared to be hollow and lacking in rationality.

The government received complaints that in many cases, despite profits there was no allocable surplus and hence no bonus was payable to workers. Doubts were also expressed about the accuracy of balance sheets and profits and loss accounts. To remedy this problem the government announced in January 1977 that a minimum bonus of Rs. 100 will be payable to every adult employee even if there is no allocable surplus but there is profit as per profit and loss account. Thereafter, bonus has been sanctioned from year to year by ordinances.

All said and done, there is still a long way to go to achieve the desired goal. Whether the Act actually does justice to both partners—employer and employee—remains a debatable proposition. What about the cases where trading loss has resulted due to some factors which are beyond the control of employees, e.g., level of managerial talent, the rates of taxes, conditions of recession and inflation, the state of plant and machinery, the political motivation of the government and, above all, manipulations by the management to show loss? In such situations, it will be illogical either to reward or penalize the working class.

In a society which is being organized on the basis of the concept of social justice, there should be a constant reconciliation of the interests of

35. *Interim Report of the Bonus Review Committee 44 (1972).*

36. The preamble to the amending Act reads as follows: "An Act to provide for the bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity..."

all sections. The employer usually possesses superior strength which may become a source of injustice and oppression, unless he has a keen sense of fairness and justice and is scrupulous in regard to the rights and interests of others, particularly in those matters which give rise to industrial conflict quite often. Bonus must be viewed as one of such delicate and vital matters.

The compass of social justice is wide enough to cover other values as well. The phenomenon cannot be demonstrated by the legislative step itself. There is need for reconstruction of the prevailing ideological values so that each party may realize its duty in a more satisfactory manner. This is the only way by which we can achieve justice—social, economic and political.

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