THE GRAHAM TRADING CO. (INDIA) LTD.

v.

ITS WORKMEN

1959

May 7

(B. P. SINHA, P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Industrial Dispute—Puja Bonus—Customary and traditional payment of—Test.

The appellant had been paying puja bonus to its workmen continuously from 1940 to 1952 at the rate of one month's wages. From 1948 to 1952, the appellant whenever it paid this bonus, made it clear that it was *ex gratia* payment and would not constitute any precedent in future years. The dispute arose regarding the payment of bonus in 1953. The workmen claimed that the sole object of bonus which had been granted to them upto that year was to meet puja expenses and that the payment of this bonus had become customary and a term of employment. The appellant contended that payments in the past years had been entirely *ex gratia* and as there was loss in 1953 no *ex gratia* payment could be made in that year.

Held, that the workmen were not entitled to puja bonus as an implied term of employment for an implied agreement could not be inferred when the appellant had made it clear that the payments from 1948 to 1952 were *ex gratia*; but they were entitled to puja bonus on the basis that it was a customary and traditional payment. In determining whether the payment was customary and traditional the following circumstances have to be established:

(i) that the payment has been made over an unbroken series of years;

(ii) 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;

(iii) that it has been paid even in years of loss and did not depend on the earning of profits; and

(iv) that the payment has been made at a uniform rate throughout.

The fact that the employer made the payment *ex gratia* made no difference; nor did unilateral declarations of one party inconsistent with the course of conduct adopted by it matter.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 161 of 1959.

Appeal by special leave from the judgment and order dated the 31st January 1956 of the Labour Appellate Tribunal at Calcutta in Appeal No. Cal. 301

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of 1954, arising out of the Award dated the 20th October 1954, of the Second Industrial Tribunal, West Bengal.

B. Sen and *S. N. Mukherjee*, for the appellants.

D. N. Mukherjee, for the respondents.

1959. May 7. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—This is an appeal by special leave in an industrial matter. The appellant is the Graham Trading Co. (India) Ltd. (hereinafter called the company). There was a dispute between the company and its workmen about bonus, which was referred by the Government of West Bengal by its order of December 17, 1953, to the Second Industrial Tribunal. Though the order of reference did not specify the year for which the bonus was in dispute, it is common ground between the parties that the dispute was for bonus for the year 1953. The case of the workmen, who are respondents before us, was that the company had been paying one month's bonus invariably from 1940 to 1950. In 1951, one month's bonus was paid in October and half a month's further bonus was paid in December. In 1952 one month's bonus was paid. The demand that the workmen made in their letter of August 27, 1953, was for three month's bonus. The company replied that payments in past years had been entirely *ex gratia* and as there was loss in 1953 it was not possible to make any *ex gratia* payment that year. The workmen then contended in their letter of September 21, 1953 that the sole object of bonus which had been granted upto that year was to meet puja expenses and that the payment of this bonus had become customary and a term of employment. The matter could not be settled between the parties and that is how the dispute was referred for adjudication.

The company's case was that payment of bonus had all along been *ex gratia* depending upon profits except in a few years. But in those years it was also made clear that the payment was *ex gratia* and without creating any precedent for future. Therefore, there was neither a term of employment nor any custom,

which put any obligation on the company to pay any bonus in a year of loss.

The question was considered by the Industrial Tribunal from three aspects. Firstly, it considered whether any bonus was payable for this year as profit bonus, on the basis of the Full Bench formula evolved in *The Mill-Owners' Association, Bombay*, v. *The Rashtriya Mill Mazdoor Sangh, Bombay* (1) and it came to the conclusion that there was no available surplus of profit to justify such bonus. It then considered the remaining two aspects, namely, whether puja bonus could be awarded either as an implied term of employment according to the decision in *Mahalakshmi Cotton Mills Ltd., Calcutta* v. *Mahalakshmi Cotton Mills Workers' Union* (2) or on the basis of custom. It seems to have mixed up the discussion on these aspects and having come to the conclusion that puja bonus could not be awarded in this case on the basis of an implied term of employment it proceeded to dismiss the claim on the basis of custom also.

The workmen then went up in appeal to the Labour Appellate Tribunal, which allowed the appeal. The decision of the Appellate Tribunal has also mixed the two aspects of puja bonus, namely, whether it is based on an implied term of employment or on custom; but it came to the conclusion that there was sufficient evidence to establish custom and therefore ordered payment of one month's basic wages as puja bonus. It was also inclined to the view that the company's accounts showing loss were not reliable and there might even be a case for profit bonus; but eventually it granted one month's basic wages as customary puja bonus. Thereupon the company filed an application for special leave to appeal to this Court, which was allowed; and that is how the matter has come up before us.

Puja is a special festival of particular importance in Bengal; and it has become usual with many firms there to pay their employees bonus to meet special puja expenses. Disputes have arisen with respect to this bonus which were adjudicated upon by various tribunals. As

(1) 1950 L.L.J. 1247. (2) 1952 L. A. C. 370.

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for back as 1949, in a dispute between *The Bengal Chamber of Commerce, Calcutta* and *Its Employees* (1), the Industrial Tribunal, which adjudicated upon the dispute, observed that Durga Puja was a national festival in Bengal and it was customary to make presents to near and dear ones and to relatives at that time. As it was difficult for poorly paid employees to make savings out of the monthly income for this purpose, it, therefore, had become traditional and customary in Bengal for employers to make a monetary grant at the time of the pujas. The Bengal Chamber of Commerce had not been slow in appreciating this and had been granting bonus equivalent to one month's pay, and the tribunal had been assured that there was no intention to discontinue it. Later the matter was considered in *Mahalaxmi Cotton Mills case* (2), where certain tests were laid down which would justify the inference that there was an implied term of employment for payment of bonus at the time of the annual Durga Puja. That case, however, was concerned with puja bonus as an implied term of employment and not as a matter of tradition or custom in Bengal. It is, however, clear that puja bonus which is usually paid in Bengal is of two kinds; namely, (1) where it is paid as an implied term of employment as explained in *Mahalaxmi Cotton Mills case* (2) and (2) where it is paid as a customary and traditional payment as stated in the Industrial Tribunal's award referred to above. We have considered the tests to be applied where it is a case of payment on an implied term of employment in *Messrs. Ispahani Ltd.* v. *Ispahani Employees' Union* (3) and we need not repeat what we have said there. In the present case it has been pointed out by the company that payments which had been made in the past years from 1940 to 1952 could not be considered as based on an implied term of employment in the circumstances of this case. This contention, in our opinion, is correct. An implied term of employment cannot be inferred in this case, for right from

(1) Publication of Government of West Bengal, 'Awards made by the Tribunals for the quarter ending March 1949', p. 116.

(2) 1952 L.A.C. 370.

(3) [1960(1)] S.C.R. 24.

1948 to 1952, the company whenever it paid this bonus, made it clear that it was an *ex gratia* payment and would not constitute any precedent for future years. In the face of such notice year by year it would not be possible to imply a term of employment on the basis of an implied agreement, for agreement postulates a meeting of minds regarding the subject-matter of an agreement; and here one party was always making it clear that the payment was *ex gratia* and that it would not form a precedent for future years. In dealing with the question of an implied term of the condition of service, it would be difficult to ignore the statement expressly made by the employer while making the payment from year to year.

The question, however, whether the payment in this case was customary and traditional, still remains to be considered. In dealing with puja bonus based on an implied term of employment, it was pointed out by us in *Messrs. Ispahani Ltd.* v. *Ispahani Employees' Union* (1) that a term may be implied, even though the payment may not have been at a uniform rate throughout and the Industrial Tribunal would be justified in deciding what should be the quantum of payment in a particular year taking into account the varying payments made in previous years. But when the question of customary and traditional bonus arises for adjudication, the considerations may be somewhat different. In such a case, the Tribunal will have to consider: (i) whether the payment has been over an unbroken series of years; (ii) whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case: even so the period may normally have to be longer to justify an inference of traditional and customary puja bonus than may be the case with puja bonus based on an implied term of employment; (iii) the circumstance that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss. In dealing with the question of custom, the fact that the payment was called *ex gratia* by the employer when it

(1) [1960(1)] S.C.R. 24.

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was made, would, however, make no difference in this regard because the proof of custom depends upon the effect of the relevant factors enumerated by us; and it would not be materially affected by unilateral declarations of one party when the said declarations are inconsistent with the course of conduct adopted by it; and (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern. It will be seen that these tests are in substance more stringent than the tests applied for proof of puja bonus as an implied term of employment.

Let us now see whether these tests are satisfied in the present case. The practice in the present case began in 1940 and was unbroken upto 1950. In between there was an adjudication in 1948 to which the company was a party. At that time it was said on behalf of the company before the industrial tribunal that some bonus was being paid and that there was no intention to discontinue it and consequently the tribunal did not adjudicate upon the matter, which shows that the company recognised the traditional and customary nature of the payment and it assured the tribunal that there was no intention then to discontinue the payment. The payment was continued from 1949 to 1951. In 1952, there was some dispute and originally the company paid one month's wages as advance of pay and not as bonus. Some of the workmen, however, accepted the payment while others did not, because they were not satisfied with the amount being paid as advance of pay. The chairman of the board of directors of the company visited Calcutta in 1952 and then on the representation of the workmen the advance was converted into one month's bonus and even those workmen who had not accepted the advance were allowed to draw the bonus. It cannot therefore be said that there was any break in the payment of bonus from 1940 to 1952, for if the chairman had not converted what was advance of pay into bonus in December 1952, the workmen might have raised the dispute even in that year and then

there would have been no break up to 1951. So there has been unbroken payment and the period has been sufficiently long to justify an inference of customary and traditional bonus. It was pointed out that in four years during this period the payment was made in November and December and not about the time of the pujas; and, therefore, it could not be said that this was traditional and customary puja bonus. The delay in payment is not in our opinion material in this case, for one of the directors of the company, who appeared as a witness, stated as to this one month's bonus that it was paid by the company to help its staff during pujas.

The condition that the payment should have been made in years of loss also to exclude the hypothesis that it was paid only because profits had been made, has also been satisfied, for the evidence is that payments were made in at least two years of loss. Lastly, the condition that payment should have been at a uniform rate has also been satisfied because one month's basic wage is the quantum of bonus from 1940 right up to 1952 without any change. It is true that in December 1951 further bonus for half a month was paid; but that year was a year of profit in which cloth-bonus for half a month was specially paid. Thus the rate so far as the puja bonus is concerned has always remained uniform at one month's basic wage. It is true that the workmen pitched their demand too high for three month's bonus in 1953. But that does not in our opinion detract from the inference to be drawn from the facts proved in this case. All the conditions, therefore, of a customary and traditional bonus are satisfied in this case and there is no reason to interfere with the order of the Appellate Tribunal, though we should like to make it clear that we do not agree with the observations of the Appellate Tribunal in connection with the profit bonus aspect of the matter. The appeal therefore fails and is hereby dismissed. As this question has arisen for the first time in this Court as a distinct issue and was not clearly considered before by the Appellate Tribunal, we order the parties to bear their own costs.

15 *Appeal dismissed.*