Government of West Bengal
Labour Department, I. R . Branch
N.S. Buildings, 12th Floor
1, K.S. Roy Road, Kolkata - 700001

No. Labr/ .84. /(LC-IR)/..... Date : 04.02.2020

ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. 1376-IR dated 27/10/2014, the Industrial Dispute between M/s DWD Pharmaceuticals Limited, 54 Bankim Mukherjee Sarani, Block-C, New Alipore, Kolkata-700053 and their workmen represented by West Bengal Medical and Sales Representatives Union, 5, Sarat Ghosh Street , Kolkata-700014 regarding the issues mentioned in the said order, being a matter specified in the Second Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, 4th Industrial Tribunal, West Bengal.

AND WHEREAS the Judge of the said 4th Industrial Tribunal, West Bengal, has submitted to the State Government its award on the said Industrial Dispute.

NOW, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said award as shown in the Annexure hereto.

ANNEXURE
(Attached herewith)

By order of the Governor,

Deputy Secretary
to the Government of West Bengal

No.Labr/84/1(5)/(LC-IR) Date : 04.02.2020

Copy, with a copy of the Award, forwarded for information and necessary action to :

1. M/s . M/s DWD Pharmaceuticals Limited, 54 Bankim Mukherjee Sarani, Block-C, New Alipore, Kolkata-700053 .
2. The Secretary, West Bengal Medical and Sales Representatives Union, 5, Sarat Ghosh Street , Kolkata-700014 .
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The Labour Commissioner, W.B. New Secretariate Buildings, 1, K. S. Roy Road, 11th Floor, Kolkata- 700001.
5. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.

Deputy Secretary

No. Labr/84/2(2)/(LC-IR) Date : 04.02.2020

Copy forwarded for information to :

1. The Judge, 4th Industrial Tribunal, West Bengal with reference to his Memo No.29-L.T. dated 08/01/2020 .
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

Deputy Secretary

In the matter of an Industrial Dispute between M/s. DWD Pharmaceuticals Limited, 54, Bankim Mukherjee Sarani, Block-C, New Alipore, Kolkata –700 053 and its workmen represented by the West Bengal Medical and Sales Representatives' Union, 5-Sarat Ghosh Street, Kolkata – 700 014.

(Case No. VIII-98/14)

–

BEFORE THE FOURTH INDUSTRIAL TRIBUNAL: WEST BENGAL

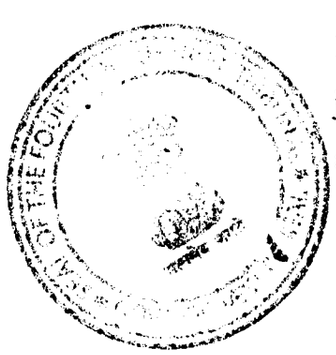
PRESENT

SHRI GOPAL KUMAR DALMIA, JUDGE
FOURTH INDUSTRIAL TRIBUNAL
KOLKATA.

AWARD

In the matter of an Industrial Dispute between M/s. DWD Pharmaceuticals Limited, 54, Bankim Mukherjee Sarani, Block-C, New Alipore, Kolkata – 700 053 and its workmen represented by the West Bengal Medical and Sales Representatives' Union, 5 Sarat Ghosh Street, Kolkata–700 014, vide G.O. No. 1376-IR/IR/11L-135/2014 dated 27.10.2014 referred to this Tribunal for adjudication of the following issues.

ISSUE(S)



1). Whether the management of M/s. DWD Pharmaceuticals Limited is justified in not granting annual increment to the Wages of Sri Indrajit Nan and eleven others (as per Annexure-A) for the year, 2013-2014.

2). If not, what relief if any, are the workmen entitled to?

3). Whether the management of M/s. DWD Pharmaceuticals Ltd. is justified in granting annual increment at unequal and different rates to the wages of

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Sri Niren Nandi and twenty nine others (as per Annexure-B) for the year, 2013-2014.

4). If so, what relief are the workmen entitled to?

(1). The case of the West Bengal Medical and Sales Representatives' Union (hereinafter referred to as the Union), in brief, is that it is a registered trade union having Registration No.–17866. It is affiliated to the CITU and FMRAI. The company under reference i.e. M/s. DWD Pharmaceuticals Limited (hereinafter referred to as the Company) is a pharmaceutical company having registered office at Dalamal House, 4th Floor, Noriman Point, Mumbai-400 021 and its office of the West Bengal is at 54, Bankim Mukherjee Sarani, Block-C, New Alipore, Kolkata –700 053.

(2). It has been claimed by the Union that a good number of workmen are employed in the Company to promote its pharmaceutical products and that about 72 workmen are working under the Company within the territorial limit of the West Bengal to promote sale of its product. Approximately 65 sales promotion employees are members of the Union and that an another union namely All West Bengal Sales Representatives Union is in existence which represents a few sales promotion employees of the West Bengal. It is also alleged by the Union that the Company is doing huge discrimination in granting increment to the wages of its sales promotion employees working at different head quarters situted in the State of West Bengal, without assigning any reason thereof. Even the management of the Company arbitrarily denied increment to the wages of a section of its sales promotion employees.

(3). It has been alleged by the Union that there is no Order / Rule or Regulation of the Company for granting increment. Even in the appointment letter nothing has been indicated about the policy of fixation of the increment and for that the Union has given a number of representations to the Company for bringing transparency in granting increment but in vain. The Union in its State Committee's meeting held on 10.03.13 unanimously took decision to raise an industrial dispute against the discriminatory attitude of the Company towards sales promotion employees working in the State of West Bengal.

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(4). It is also claimed by the Union that before going to the office of the Labour Commissioner, it gave a representation in writing to the management of the Company on 18.5.2013 against discrimination in granting yearly increment to the wages of its sales promotion employees working in the state of West Bengal, for the financial year, 2013-14 which is varied from zero to Rs. 1,200/-. On 14.6.13, the management of the Company sent a reply to the Union rejecting its demand. It is also claimed by the Union that though, all such employees are doing the same job of sales promotion by following the guidelines of the Company but discrimination in granting yearly increment to their wages was done illegally.

(5). That the Union by its representation dated 12.06.13 raised the matter before the Labour Commissioner, Government of West Bengal and on the basis of said representation, conciliation meetings were held by the Assistant Labour Commissioner. In the course of conciliation proceedings, after realizing the justification of demand, the Company released increment amounting to a sum of Rs. 500/- to twelve concerned workmen i.e. Sri Indrajit Nan & eleven others whose names are mentioned in the Annexure-A to the order of reference, for the period from October, 2013 without any arrear from April, 2013. But the financial year of the company starts from the month of April and ends at the end of the month of March of the following year. It is also urged by the Union that in the year, 2014 the management of the Company issued letters of appointment to its sales promotion employees in Form-A as provided under the Sales Promotion Employees (Conditions of Service) Act, 1976 and Rules made thereunder. It is also urged by the Union that there is no provision in said enactment that the increment will be performance based only. On the contrary, in the prescribed form of appointment letter under the said Rules there is a paragraph for declaring the scale of wages/rate of increment in wages.

(6). The Union has also claimed that the sales promotion employees whose names are appearing in Annexure–A to the order of reference are working since long under the Company.

(7). The Union has also claimed that the dispute could not be settled due to uncompromising attitude of the management of the Company and ultimately the matter has been referred to this Tribunal for adjudication of the issues as mentioned in the order of reference.

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(8). It is further claimed by the Union that the management of the Company cannot do discrimination in granting increment to the same category of employees on the plea of having sole discretionary power on the matter and that showing favoritism towards one section of employees is a glaring instance of unfair labour practice, as specified under the 5th Schedule of the Industrial Disputes Act, 1947 and it is clearly barred under the provisions of Section–25T of the said Act.

(9). In respect of the employees whose names are mentioned in the Annexure-B to the order of reference, the Union has claimed that there is discrimination in granting increment to them in the year, 2013-14, while they were working in the same category.

(10). It is also claimed by the Union that the product wise growth and / or de-growth does not depend upon the performance of the Sales Promotion Employees only, because various factors like demand of product in market, competitiveness in the area of work, procurement of order, supply of products in time to the distributors and retailers in the market and acceptability of the product among the doctors etc. are also involved.

(11). The Union has prayed for an Award holding that the decision of the management of the Company for non-granting of increment to the wages of the employees named in the Annexure-A to the order of reference for the period from April, 2013 to September, 2013 and granting of annual increment at unequal rates to the wages of the employees named in the Annexure-B to the order of reference as illegal and unjustified. The Union has also prayed for consequential reliefs.

(12). On the other hand, the Company by filing its written statement has denied the material allegations made by the Union against it and claimed inter alia that the Union under reference has no locus standi to espouse the cause of the sales promotion employees. In the written statement, it has challenged the maintainability of the Reference on various counts by claiming that the reference is beyond the jurisdiction of the Government, bad for non application of mind of the appropriate authority etc.

(13). The Company has claimed that increment is always given rationally which is correlated with the performance of the employees concerned. There is no question of denial of increment. The employees who do not deserve increment as per their performance cannot be entitled to get it and that there is nothing which is arbitrary or unreasonable or unjustified. It is also claimed on behalf of the Company that increment cannot be claimed as a matter of right and it is correlated with the performance. If there is lack of performance there is no scope of being entitled to get increment and that the policy in this respect is clear and candid. The manner in which the increment is being granted is

transparent. It is further averred in the Written Statement of the Company that there are different types of system for measuring the excellence of the performance of the employees and 1. Ranking, 2. Person to person comparison and 3. Grading are amongst them.

(14). It is further claimed on behalf of the Company that while determining the aspect of increment, the Company has applied the system of performance rating taking into account the following basic structures of performance rating:–

PERFORMANCE RATING

Performance Factors	Does not meet job requirements_	Partially meets job requirements	Meets job requirements	Exceeds job requirements	Far exceeds job requirements
Quality of Work:	Consistently unsatisfactory	Occasionally unsatisfactory	Consistently satisfactory	Sometimes superior	Consistently superior
Accuracy, Skill, thoroughness, neatness					

Performance Factors	Does not meet job requirements	Partially meets job requirements	Meets job requirements	Exceeds job requirements	Far exceeds job requirements
Quality of Work:	Consistently below requirements.	Frequently below requirements	Usually meet requirements	Frequently exceeds requirements	Consistently exceeds requirements.
Output, consider not only regular duties, but also how promptly he completes					

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'extra' or such assignments.

PERFORMANCE RATING

100% and Above	Target – Excellent Increment – Rs. 1000-0 – Rs. 1500/-
90% and Above	Target – Good Increment – Rs. 700/- – Rs. 1000/-
Below 90%	Poor Increment – Rs 500/-

Condition –

1. Higher amount for higher value sales per month

   .. e.g. Rs. 1.50 lakhs above per month.

2. If No Growth – No increment till Growth comes in 3 – 6 months.

(15). The Company has claimed that there was never any discrimination in the matter of granting yearly increment in financial year, 2013-2014 and that increment is correlated with the performance and if the performance is not up to the mark the question of expecting good increment does not arise. It is also claimed that the increment is always based on performance especially in the context of the nature of job which a sales promotion employee is required to perform and that the nature and extent of performance are the sine qua non of being entitled to get increment. It is also urged on behalf of the Company that working in the same category does not lead to the conclusion that same amount of increment would be paid and that if there is deficiency in performance the increment will be reduced accordingly. There is no irregularity or illegality or favoritism in the matter of granting increment which has been effected

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dispassionately on a proper assessment of performance. It is baseless to allege that the whole action of the management of the Company is unjust or improper or bad in law.

(16). It is also claimed on behalf of the Company that the concerned employees who were entrusted with the duty of promoting sales did not perform well or discharge their duties properly.

(17). The Company has prayed for an Award holding that the Reference is not maintainable and that the concerned workmen are not entitled to get any relief.

(18). Shri Sangram Bhattacharya and Shri Sandeep Banerjee who are the members of the Union and employees of the Company have deposed as P.Ws.-1 and 2. Shri Sasanka Mouli Roy, the Secretary of the Union has deposed as P.W.-3. Documents filed on behalf of the Union have been marked as Exhibits 1 to 23. On the other hand, Shri Sandeep Nath, the Sales Manager of the Company has deposed as O.P.W.-1. Documents filed on behalf of the Company have been marked as Exhibits – A to N.

(19). Rulings of the Hon'ble Courts referred to by the Ld. Advocate of the Union:– (1). AIR 1960 SC 207, (2). AIR 1957 SC 1, (3). AIR 1959 SC 1035, (4). AIR 1962 SC 486, (5). (2010) 3 Supreme Court Cases 192, (6). (1986) 3 Supreme Court Cases 156, (7). 2017 SCC OnLine Cal 3978, (8). (1984) 4 Supreme Court Cases 324 and (9). 2018 SCC OnLine Cal 8831.

(20). Rulings of the Hon'ble Courts referred to by the Ld. Advocate of the Company:– (1). 1977 E-Juris (Cal) (8) 16, (2). LAWS (SC) 2015 24, (3). LAWS (CAL) 2011 259, (4). LAWS (SC) 2014 616, (5). LAWS (SC) 2007 971, (6). LAWS (SC) 2004 865 and (7). LAWS (SC) 2011 193.

DECISION WITH REASONS

(21). Before deciding the other matters, I find it appropriate to deal with the claim of the Company that the Union does not have any locus standi to espouse the cause of the workmen concerned.

(22). Ld. Advocate of the Union by refuting the above claim of the Company has submitted that the workmen concerned are members of the present Union and it has locus standi to espouse their cause.

(23). In respect of the above rival claims of the parties, I find it just to mention here the provisions of sub-section (1) of Section 36 of the Industrial Disputes Act, 1947 which runs as follows: –

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(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by –

(a) any member of the executive or other office bearer of a registered trade union of which he is a member;

(b) any member of the executive or other office bearer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by any member of the executive or other office bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorized in such manner as may be prescribed.

(24). From the above provisions it is clear that any member of the executive or other office bearer of a registered trade union of which the workman concerned is a member or any member of the executive or other office bearer of a federation of trade unions to which said trade union is affiliated, may represent the concerned workman in any proceeding under the Industrial Disputes Act, 1947. Even any member of the executive committee or other office bearer of a connected trade union of which the worker is not a member is also entitled to represent the workman, subject to compliance of statutory provisions. In this case it appears to have been claimed on behalf of the Union that the concerned workmen are its members. In this regard, P.W.-1, Shri Sangram Bhattacharya and P.W.-2, Shri Sandeep Banerjee who are members of the Union have clearly supported its said claim by their evidences. P.W.-3, Shri Sasanka Mouli Roy who is the Secretary of the Union has deposed about the membership of the Union concerned and sales promotion employees. He has also stated about the variation of quantum of the increment granted to the wages of the sales promotion employees named in the Annexure-B to the order of reference. He has identified some documents filed by the Union i.e. a copy of its Constitution and Rules (Exhibit-19), a certified copy of the resolution of its state committee taken in a meeting held on 10.03.2013 (Exhibit-20), minutes of the said meeting (Exhibit-20/1), a certified copy of the list of its

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members working under the present Company (Exhibit-21), a photocopy of its registration certificate under Trade Unions Act (Exhibit-22) and photocopies of its annual returns for the years ending 31.12.2013 and 31.12.2014 (Exhibits 23 and 23/1) to show its locus standi for espousing the cause of the workmen concerned. It appears from the Exhibit-21 that the workmen named in the Annexures A & B to the order of reference are members of the present Union. In view of the aforesaid facts and regard being had to the provisions of law contained in Section 36 of the Industrial Disputes Act, 1947 I have no hesitation to hold that the Union has locus standi to espouse the cause of the workmen concerned.

(25). The Company in its written statement has challenged the maintainability of the Reference by claiming inter alia that it is beyond the jurisdiction of the Government, bad for non-application of mind of the appropriate authority etcetera but during hearing of argument Ld. Advocate of the Company did not press said claim of it. That apart, on careful perusal of the materials available on record and regard being had to the provisions of law I do not find anything to hold that the order of reference is bad for the aforesaid reasons.

(26). For the convenience of discussion, now, I find it just to deal with the issue No. 3 i.e. "Whether the management of M/s. DWD Pharmaceuticals Ltd. is justified in granting annual increment at unequal and different rates to the wages of Sri Niren Nandi and twenty-nine others (as per Annexure-B) for the year, 2013-2014". In respect of the employees whose names are mentioned in the Annexure-B to the order of reference, the Union has claimed that there is a discrimination in granting increment to them in the year, 2013-14, though they were working in the same category. It is claimed that the Company is doing huge discrimination in granting increment to the wages of its sales promotion employees working at different head quarters within the State of West Bengal, without assigning any reason thereof. It has also been alleged by the Union that there is no Order / Rule or Regulation of the Company for granting increment. Even in the appointment letter nothing has been indicated about the policy for fixation of the increment and for that the Union has given a number of representations to the Company for bringing transparency in granting increment but in vain. It is further claimed by the Union that the

management of the Company cannot do discrimination in granting increment to the same category of employees on the plea of having sole discretionary power on the matter and that showing favoritism towards one section of employees is a glaring instance of unfair labour practice, as specified under the 5th Schedule of the Industrial Disputes Act, 1947 and it is clearly barred under the provisions of Section–25T of the said Act. It is also claimed by the Union that the product wise growth and / or de-growth does not depend upon the performance of the Sales Promotion Employees only, because various factors like demand of product in market, competitiveness in the area of work, procurement of order, supply of products in time to the distributors and retailers in the market and acceptability of the product among the doctors etc. are also involved.

(27). The Company has claimed that increment is always given rationally which is correlated with the performance of the employees concerned. There is no question of denial of increment. The employees who do not deserve increment as per their performance cannot claim it and that there is nothing which is arbitrary or unreasonable or unjustified. If there is lack of performance there is no scope of being entitled to get increment and that the policy in this respect is clear and candid. It is also claimed on behalf of the Company that the manner in which the increment is being granted is transparent. The Company has claimed that there was never any discrimination in the matter of granting yearly increment in financial year, 2013-2014. It is further claimed that the increment is always based on performance especially in the context of the nature of job which a sales promotion employee is required to perform and that the nature and extent of performance are the sine qua non of being entitled to get increment. It is also urged on behalf of the Company that working in the same category does not lead to the conclusion that same amount of increment would be given and that if there is deficiency in performance, the increment will be reduced accordingly. There is no irregularity or illegality or favoritism in the matter of granting increment which has been given dispassionately on a proper assessment of performance. It is also claimed on behalf of the Company that the concerned employees who were entrusted with the duty of promoting sales did not perform well.

(28). Ld. Advocate of the Union has advanced two fold arguments, firstly that as nature of work of all the sales promotion employees is same the management of the Company cannot do any discrimination in granting annual increment to their wages and that there must be an uniformity in the rate of annual increment, and secondly, that the performance of the employees concerned should have been assessed on the basis of their individual performance only and not on the basis of their team work. He has drawn my

attention to the Exhibit-7 i.e. a copy of the letter of appointment dated 28.04.2014 issued on behalf of the Company for a sales promotion employee namely Mr. Sandip Kumar Chandra and submitted that the appointment letter is also silent about the manner in which the increment was being granted to the employee concerned.

(29). In this regard, Ld. Advocate of the Company has emphatically submitted that there are two types of increment- one is fixed and another is variable based on performance of the employee concerned which is called as merit increment. He has also submitted that the Company is giving merit increment to its sales promotion employees on the basis of their performance which is being assessed as per performance of their respective team. He has also submitted that the sales promotion employees posted at a head quarter are considered as one team and on the basis of performance of the said team the merit increment is given to all members of said team at an equal rate and as such it cannot be said that there is any discrimination in granting increment to the employees concerned.

(30). No document appears to have been filed to show that during the year, 2013-14 system of paying any fixed increment was present in the Company. But from the paragraph No. 7 of said letter of appointment (Exhibit-7) it clearly depicts that the rate of increment to wage is Rs. 50/- per year and merit increment shall be based on the performance of the employee concerned. The Union has not challenged the adequacy of said amount of the fixed increment. It appears from said appointment letter that two types of annual increment one at a fixed rate and another at a variable rate based on the performance of the employee are granted by the Company. On being asked, Ld. Advocates of both sides have fairly admitted that presently said fixed increment is given to the employees concerned. It can not be disputed that the sales promotion employees are governed by the provisions of the Sales Promotion Employees (Conditions of Services) Act, 1976. Section 5 of the said Act provides that *"Every employer in relation to a Sales Promotion Employee shall furnish to such employee a letter of appointment, in such form as may be prescribed, –*

(a) in a case where he holds appointment as such at the commencement of this Act, within three months of such commencement; and

(b) in any other case, on his appointment as such.

(31). Rule 22 (1) of the Sales Promotion Employees (Conditions of Services) Rules, 1976 provides that the letter of appointment to be furnished to a sales promotion employee under section 5 shall be in Form A. Paragraph No. 7 of said Form A runs as follows: –

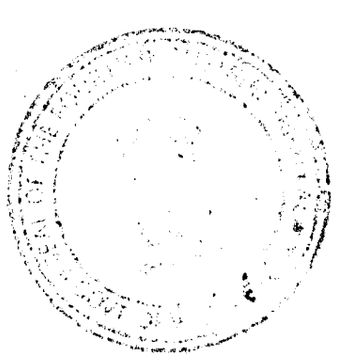
"His/Her scale of wages / rate of increment in wages per... (insert here the period) ..... shall be ..... (insert here the amount)." From the above provisions of law at best it can be said that there should be a provision for

periodical increment to the wages of the sales promotion employees but it cannot be said that no increment would be based on the performance of the employees.

(32). Ld. Advocate of the Union has submitted that though there is no provision in the appointment letters of the workmen concerned to show that the annual increment to their wages would be at par but the Tribunal has ample authority and jurisdiction to modify the terms of their employment in order to curb the discrimination of the management of the Company and with a view to bring uniformity in granting increment to the wages of the workman concerned.

(33). In support of his said submission, he has referred to a ruling of the Hon'ble Supreme Court reported in (2010) 3 Supreme Court Cases 192. It appears that in paragraph No. 31 of the said ruling the Hon'ble Apex has observed that *"It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the directive principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer-public or private."*

(34). From the aforesaid observation of the Hon'ble Apex Court it appears that the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer-public or private.



(35). Ld. Advocate of the Union has also referred to the paragraph Nos. 26, 34, 43, 89 and 101 of a ruling of the Hon'ble Apex Court reported in (1986) 3 Supreme Court Cases 156. In Paragraph No. 26 of the said judgement the Hon'ble Apex Court has observed that *"The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said: "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is*

too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society." In paragraph No. 34 of the said judgement it has been observed by the Hon'ble Court that *"The framers of our Constitution were men of vision and ideals, and many of them had suffered in the cause of freedom. They wanted an idealistic and philosophic base upon which to raise the administrative superstructure of the Constitution. They, therefore, headed our Constitution with a preamble which declared India's goal and inserted Parts III and IV in the Constitution."* In paragraph No. 43 of the said judgement the Hon'ble Court has been pleased to observe inter alia that *"A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community.*

The following passage (at pages 235-36) from the judgment of the Court in that case with respect to the meaning of the expression "executive function" is instructive and requires to be reproduced:

It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws. (emphasis supplied.)".

(36). In paragraph No. 89 of the said judgement the Hon'ble Supreme Court has been pleased to observe that *"Should then our courts not*

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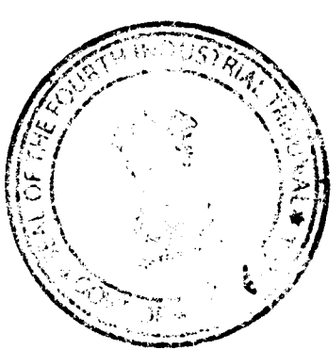
advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances." And in paragraph No. 101 of the said judgement of the



Hon'ble Apex Court it has been observed that *"It was, however, submitted on behalf of the appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the course of its trading activities and the court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee."*

(37). It appears from the aforesaid observations of the Hon'ble Apex Court that the Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power and that a contract of employment cannot be equated with a mercantile contract between two businessmen and that the court must judge each case on its own facts and circumstances.

(38). Ld. Advocate of the Union has also relied upon paragraph No. 5 of a judgement of the Hon'ble Apex Court reported in AIR 1960 SC 207 and paragraph No. 11 of an another judgement of the Hon'ble Apex Court reported in AIR 1957 SC 1. It has been observed by the Hon'ble Apex Court in paragraph No. 5 of the judgement reported in AIR 1960 SC 207 that *"There is no doubt that in the case of an all-India concern it would be advisable to have uniform conditions of service throughout India and if uniform conditions prevail in any such concern they should not be lightly changed. At the same time it cannot be forgotten that industrial adjudication is based, in this country at least, on what is known as industry-cum-region basis and cases may arise where it may be necessary in following this principle to make changes even where the conditions of service of an all-India concern are uniform. Besides, however desirable uniformity may be in the case of all-India concerns, the Tribunal cannot abstain from seeing that fair conditions of service prevail in the industry with which it is concerned. If therefore any scheme, which may be uniformally in force throughout India in the case of an all-India concern, appears to be unfair and not in accord with the prevailing conditions in such matters, it would be the duty of the Tribunal to make changes in the scheme to make it fair and bring it into line with the prevailing conditions in such matters, particularly in the region in which the Tribunal is functioning irrespective of the fact that the demand is made by only a small*

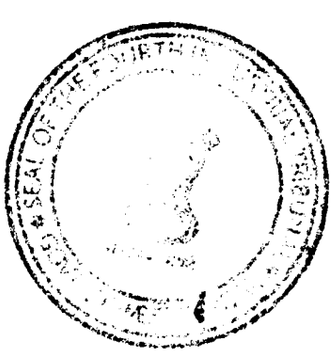
minority of the workmen employed in one place out of the many where the all-India concern carries on business.".

(39). In paragraph No. 11 of the judgement reported in AIR 1957 SC 1 it has been observed by the Hon'ble Court that **"***The discretion which an Industrial Tribunal has must be excercised in accordance with well recognised principles. There is undoubtedly a distinction between commercial and industrial arbitration. As has been pointed out by Ludwig Teller (Labour Disputes and Collective Bargaining) Vol. 1, p.536: "Industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.*"

A court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimization. We cannot, however, accept the extreme position canvassed before us that an Industrial Tribunal can ignore altogether an existing agreement or existing obligations for no rhyme or reason whatsoever."

(40). In respect of the aforesaid matter, Ld. Advocate of the Union has also relied upon the paragraph No. 14 of a judgement of the Hon'ble Supreme Court reported in AIR 1959 SC 1035 and paragraph No. 15 of an another judgement of the Hon'ble Supreme Court reported in AIR 1962 SC 486. It has been observed by the Hon'ble Court in paragraph No. 14 of the judgement reported in AIR 1959 SC 1035 that *"It has, however, been urged before us on behalf of the respondent that, apart from the scheme, the Industrial Tribunal has jurisdiction to make an award calling upon the appellant to provide housing accommodation for its employees. The argument is that, unlike commercial arbitration, industrial arbitration may, and often does, involve the making of a new contract or the imposition of new obligations on the employer in the interests of social justice; and having regard to the fact that the employees are very badly in need of housing accommodation it was open to the Tribunal in the present case to have directed the appellant to make a beginning in that direction by providing housing accommodation to some of its employees. In support of this argument the respondent has relied upon the oft-quoted observation of Ludwig Teller that "Industrial arbitration may involve the extension of an existing agreement or the making of a new one, or, in general, the creation of new obligations or modification of old ones while commercial*

arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements". There is no doubt that in appropriate cases industrial adjudication may impose new obligations on the employer in the interest of social justice and with the object of securing peace and harmony between the employer and his workmen and full cooperation between them. This view about the jurisdiction and power of the Industrial Tribunals has been consistently recognised in this country since the decision of the Federal Court in Western India Automobile Association v. Industrial Tribunal, Bombay. In that case the employer had challenged the jurisdiction of the Industrial Tribunal to direct the reinstatement of his employees; and it was urged that such a direction was contrary to the known principles which govern the relationship between master and servant and was outside the jurisdiction of the Tribunal. This contention was negatived by the Federal Court, and it was observed that Industrial adjudication does not mean adjudication according to the strict law of master and servant. "The award of the Tribunal", observed Mahajan, J. in delivering the judgment of the Court, "may contain provisions for the settlement of a dispute which no court could order if it was bound by ordinary law, but the Tribunal is not fettered in any way by these limitations". The same view has been more emphatically expressed by Mukherjea, J., in Bharat Bank Ltd., Delhi v. Employees. "In settling the disputes between the employers and the workmen", observed the learned Judge, "the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace". In Rohtas Industries Ltd. v. Brijnandan Pandey Mr Justice S. K. Das has expressed the same conclusion when he observed that "a court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimization". Thus there can be no doubt that an Industrial Tribunal has jurisdiction to make a proper and a reasonable order in any industrial dispute; and in that sense the respondent may be right when it contends that it was within the competence of the tribunals below to entertain its grievance about housing accommodation and to give it appropriate relief in that behalf."



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(41). In Paragraph No.15 of the judgement reported in AIR 1962 SC 486 the Hon'ble Supreme Court has been pleased to observe that *"It is well settled that industrial adjudication under the provisions of the Industrial Disputes Act, 14 of 1947 is given wide powers and jurisdiction to make appropriate awards in determining industrial disputes brought before it. An award made in an industrial adjudication may impose new obligations on the employer in the interest of social justice and with a view to secure peace and harmony between the employer and his workmen and full co-operation between them. Such an award may even alter the terms of employment if it is thought fit and necessary to do so. In deciding industrial disputes the jurisdiction of the tribunal is not confined to the administration of justice in accordance with the law of contract. As Mukherjea, J., as he then was, has observed in Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi the tribunal "can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations between them which it considers essential for keeping industrial peace". Since the decision of the Federal Court in Western India Automobile Association v. Industrial Tribunal, Bombay it has been repeatedly held that the jurisdiction of Industrial Tribunals is much wider and can be reasonably exercised in deciding industrial disputes with the object of keeping industrial peace and progress (Vide: Rohtas Industries Ltd. v. Brijnandan Pandey, Patna Electric Supply Co. Ltd., Patna v. Patna Electric Supply Workers' Union). Indeed, during the last ten years and more industrial adjudication in this country has made so much progress in determining industrial disputes arising between industries of different kinds and their employees that the jurisdiction and authority of Industrial Tribunals to deal with such disputes with the object of ensuring social justice is no longer seriously disputed".*

(42). It appears from the aforesaid observations of the Hon'ble Apex Court that uniformity in conditions of service may be desirable in the case of an all-India concern but the Tribunal cannot abstain from seeing that fair conditions of service prevail in the industry with which it is concerned. If any scheme, which may be uniformally in force throughout India in the case of an all-India concern, appears to be unfair and not in accord with the prevailing conditions in such matters, it would be the duty of the Tribunal to make changes in the scheme to make it fair and bring it into line with the prevailing conditions in such matters, particularly in the region in which the Tribunal is functioning irrespective of the fact that the demand is made by only a small minority of the workmen employed in one place out of the many where the all-India concern carries on business. It also appears from the aforesaid rulings of the Hon'ble Apex Court that in appropriate cases industrial adjudication may impose new obligations on

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the employer in the interest of social justice and with the object of securing peace and harmony between the employer and his workmen and full cooperation between them and that the Tribunal can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. Even it can create new rights and obligations between them which it considers essential for keeping industrial peace and to protect legitimate trade union activities and to prevent unfair practice or victimization.

(43). In respect of the present matter, Ld. Advocate of the Union has also relied upon the paragraph Nos. 10 and 13 to 16 of a ruling of the Hon'ble Calcutta High Court reported in 2017 SCC Online Cal 3978. In paragraph No. 10 of the said ruling, the Hon'ble Court has been pleased to observe that *"The learned Judge of the Tribunal had taken the evidence into consideration in details and examined the same in respect of their impact upon the merits of the case. He had rightly placed reliance on the case of Dunlop Rubber Company (India) Ltd. v. Its workmen, reported in 1959-II L.L.J. 826 wherein it was specifically held by a three –Judge Bench that it cannot be forgotten that industrial adjudication is based, in this country at least, on what is known as industry-cum-region basis and cases may arise where it may be necessary in following the principle to make changes even where the conditions of service of all-India concern are uniform, the tribunal cannot abstain from seeking that fair conditions of service prevail in the industry with which it is concerned. If any scheme which may be uniformly in force throughout India in the case of an all-India concern, appears to be unfair and not in accord with the prevailing conditions in such matters it would be the duty of the tribunal to make changes in the scheme to make out fair and to bring it into line with the prevailing conditions in such matters, particularly in the region in which the tribunal is functioning irrespective of the fact that the demand is made by only a small minority of the workmen employed in one place out of the many where the all-India concern carries on business."* In paragraph No. 13 of said judgement, the Hon'ble Court has been pleased to observe that *"That by itself may not be a deterrent for a Tribunal not to direct the company to introduce certain benefits merely because for an all-India company financial implication will be heavier than that of a company operating on a regional basis. It cannot be glossed over that a company having countrywide sales and offices will have a much larger annual turnover than a small company operating at a micro level. Therefore, this argument on the face of it cannot be taken beyond a certain point."*

(44). In paragraph No. 14 of the said ruling, the Hon'ble Court has been pleased to observe that *"It cannot also be disputed that this country is close to completing seven decades after its independence and industrial growth cannot be said to be in a tardy condition which it was in 1950s. Therefore,*

the conditions which weighed in the past bygone decades for ensuring an unretarded industrial progress and not allowing a certain Award to be sustained on the ground that it might halter the national economy. This shall not apply to a very different economic situation of the present day. Even in 1950s, it was accepted as a recognized thought process in the matter of industrial adjudication that industrial arbitration might involve the making of a new contract or examination of new obligations on the employer in the interest of social justice which is not a static one."

(45). In paragraph No. 15 of the said ruling, the Hon'ble Court has been pleased to observe that *"Ludwig Teller once observed in his celebrated treatise 'Labour Disputes and Collective Bargaining' that industrial arbitration may involve the making of a new agreement or creation of new obligations or modification of old ones. That had been accepted theoretically by the Supreme Court in the case of Patna Electric Supply Company Ltd. v. Patna Electric Supply Workers' Union reported in 1959-II L.L.J. 366 that in appropriate cases industrial adjudication may impose new obligations on the employer in the interest of social justice and with the object of securing peace and harmony between the employer and his workman and full cooperation between them. The observation made by Mahajan, J., in the case of Western India Automobile Association v. Industrial Tribunal, Bombay, reported in 1949 L.L.J. 245 that an award of the tribunal may contain provisions for the settlement of a dispute which no Court could order if it was bound by ordinary law, but the tribunal is not fettered in any way by these limitations. Again in the case of Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi, reported in 1950 L.L.J. 921, the Supreme Court had occasion to observe that in settling the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It was observed "It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."* And in paragraph No. 16 of the said ruling, it has been held by the Hon'ble Court that *"There is no point in multiplying the decisions on the point. As the power of the Tribunal including the scope of its interference has over the decades been fairly well settled and recognized. And this is precisely what the Tribunal in the present case had done. It has taken into consideration the conspectus of case and the points evolving therefrom to appreciate the issues in their proper legal context and to pass an Award which appeared, as it also appears to me, to be fair and just. The learned Judge of the Tribunal has also strongly relied on the Rule 22(1) of Sales Promotion Employees (Conditions of Service) Rules, 1976 which says that the letter of*

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appointment is to be furnished to a sales promotion employee under Section 5 of the Sales Promotion Employees (Conditions of Service) Act, 1976 in Form A. The learned Judge of the Tribunal had rightly observed that in the letter of appointment, it has been mentioned that there is basic pay, annual increment and other benefits. Therefore, on the basis of the Act mentioned above, each sales promotion employee is entitled to get scale of pay, annual increment and other benefits."

(46). Regarding aforesaid ruling of the Hon'ble Calcutta High Court, Ld. Advocate of the Company has submitted that principles enunciated in said ruling are not applicable to the facts and circumstances of this case. He has referred to a portion of paragraph No. 12 of an another ruling of the Hon'ble Calcutta High Court reported in 1977 E-Juris (Cal) (8) 16. It appears that in paragraph No. 12 of the said judgment the Hon'ble Court has been pleased to observe inter alia that *"I am of the opinion that the wages, as in the words of Lord Denning, are the payment for services rendered. I am inclined to think that it is not so much a question of whether the contract is divisible or entire but of reciprocal promises as the consideration, that is to say, the employer provides the employment and pays the remuneration and the employee performs the work during the period he is supposed to do the work. Therefore, the right of the employee to get the remuneration depends upon the performance of his work during the period of employment. If there is any failure of that consideration then taking a strict view of the matter the employer is entitled to refuse any payment at all. But, as has been noticed in "The Contract of Employment" By M. R. Freedland, referred to hereinbefore, very often policy considerations enter and deduction on pro rata basis is made to avoid undue hardship in the employer- employee relationship."*

(47). It appears that in the case reported in 2017 SCC Online Cal 3978, the primary issue involved in the order of reference was whether the demand for introduction of grade, scale of pay and annual increment of pay in respect of sales promotion employees or workmen of the company was justified. But in this case, the primary issues are relating to non-payment of annual increment for the year, 2013-14 to a section of the employees and payment of annual increment for the same year at unequal and different rates to an another section of the employees of the Company. Facts and circumstances of the said case and that of this case appear to be quite different and the principles enunciated in said ruling do not appear to be applicable to the facts and circumstances of this case.

(48). It appears from the ruling of the Hon'ble Calcutta High Court reported in 1977 E-Juris (Cal) (8) 16 that the right of the employee to get the remuneration depends upon the performance of his work during the period of employment and if there is any failure of that consideration then taking a strict view of the matter the employer is entitled to refuse any

payment at all but, very often policy considerations enter and deduction on pro rata basis is made to avoid undue hardship in the employer- employee relationship."

(49). Ld. Advocate of the Company has also submitted that when there is equal work and of equal quality and all other relevant factors are fulfilled, a direction of paying equal pay may be made and in support of his submission he has referred to a portion of paragraph No. 7 of a ruling of the Hon'ble Apex Court reported in LAWS(SC) 2011 193. In paragraph No. 7 of the said ruling the Hon'ble Apex Court has been pleased to observe inter alia that *"Considering this report of the Equivalence Committee, the Respondents are not entitled to the same pay scale as that of Dietician (Gazetted) and Dietician (Non-Gazetted) in the Directorate of Research and Medical Education, Punjab, as held by the High Court in the impugned judgment and order. This Court has held in a recent case State of Madhya Pradesh and Ors. v. Ramesh Chandra Bajpai, (2009) 13 SCC 635 that the doctrine of equal pay for equal work can be invoked only when the employees are similarly situated and that similarity of the designation or nature or quantum of work is not determinative of equality in the matter of pay scales and that the Court has to consider several factors and only if there was wholesale identity between the holders of the two posts, equality clause can be invoked, not otherwise. This court has also held in State of Haryana and Ors. v. Charanjit Singh, (2006)) 9 SCC 321 that normally the applicability of principle of equal pay for equal work must be left to be evaluated and determined by an expert body and these are not matters where a writ court can lightly interfere. This Court has further held in this decision that it is only when the High Court is convinced on the basis of material placed before it that there was equal work and of equal quality and that all other relevant factors were fulfilled, it may direct payment of equal pay from the date of filing of the respective writ petition."*

(50). It appears from the aforesaid ruling of the Hon'ble Apex Court that on the basis of material placed, when it is established that there was equal work and of equal quality and that all other relevant factors were fulfilled, a direction may be made for payment of equal pay.

(51). This Tribunal has to see whether the process of granting of increment to the wages on the basis of performance of the employees concerned is fair and reasonable or not. It is claimed by the Union that the Company is doing discrimination in granting increment to the wages of the concerned sales promotion employees which is unfair. Contrary to the said claim, it is claimed on behalf of the Company that the quantum of merit increment is correlated with the performance of the employees concerned and there is nothing unfair in granting said increment.

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(52). In order to substantiate its allegation of unfairness in granting increment to the wages of the workmen, the Union has filed some documents in this case. Exhibit-1 is a photocopy of the representation dated 18.05.2013 of the Union given to the Sales Manager of the Company, Exhibit-2 is a photocopy of a written reply of the Company given to the Secretary of the Union. Exhibit-3 is a photocopy of a letter given by the Secretary of the Union to the Labour Commissioner, Exhibit-4 is a photocopy of a list of the workmen of the Company who are members of the Union concerned. Exhibit-5 is a photocopy of a letter of the Assistant Labour Commissioner addressed to the Company and Exhibit-6 is a photocopy of a letter given on behalf of the Company to the P.W.-1, Mr. Sangram Bhattacharya. Exhibit-8 is a photocopy of a resolution of the State Committee of the Union, Exhibit-9 is a photocopy of a letter given on behalf of the Union to the Assistant Labour Commissioner. Exhibits 10, 14, 16 and 17 are copies of four letters given on behalf of the Company to Mr. Sandip Kumar Chandra, Mr. Indrajit Nan, Mr. Niren Nundy and Mr. Sandip Banerjee showing sanction of increment to their salary, Exhibits 11, 12, 13 and 15 are copies of the pay slips of the workmen Sandip Kumar Chandra, Koushik Roy Choudhury, Indrajit Sen and Niren Nundy and Exhibit 18 is a copy of a data sheet signed by the Secretary of the Union showing description of the salary of the workmen.

(53). In respect of aforesaid claim of the Union, the P.W.-1 Shri Sangram Bhattacharya has stated in his deposition that as various amount of increment is paid to the sales promotion employees the Union wants uniformity in payment of increment to the salaries of all the sales promotion employees. It is also stated by him that the appointment letter which he has received from the Company does not contain any assertion as to how increment to the salary will be made. By his deposition he has substantially corroborated the case of the Union. P.W.-2 Shri Sandip Banerjee also has deposed in the tenor of the P.W.-1 Shri Sangram Bhattacharya.

(54). On the other hand, the O.P.W-1, Shri Sandeep Nath has admitted that the persons named in the Annexures A and B to the order of reference are sales promotion employees of the Company. It is also stated by him that increment to salary is co-related with the performance of the employee concerned and that Sales Flash Reports are known to everyone. It is further stated by him that the employees named in the order of reference are fully aware that the increment is based on performance. He has identified the documents filed on behalf of the Company. Exhibits A and A/1 are copies of internal policy circular dated 01.04.2013 of the Company, exhibit-B is a copy of year wise sales data of the North Kolkata head quarter for the period from 2008-09 to 2012-13, exhibit-C is copy of the documents containing sales target fixed by the Company for the years 2008-09 to

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2012-13, exhibit-D is copy of the cumulative performance reports for the years 2008-09 to 2012-13, exhibit-E is copy of Sales Flash Reports, exhibits-F & G are copies of email communications and exhibit-H is copy of several communications made to the employees through email. Exhibits-I and J are copies of data sheets showing increments granted to the employees of the Company. Exhibit-K is a copy of an authorization letter issued by a director of the Company in favour of Mr. Sandeep Nath (O.P.W.-1). Exhibit-L series are copies of several letters of the Company, exhibit-M series are the copies of the documents regarding review of the increment and exhibit-N is photocopy of lists containing head quarter wise names of the medical representative for the period from April, 2008 to March, 2013.

(55). It is not disputed that for the employees of the Company the system of granting two types of increment – one fixed and another variable based on the performance of the employees concerned, is in vogue. The Union claims that there should not be any variable increment and that taking the advantage of system of granting variable increment the management of the Company is doing discrimination in granting the same to the employees concerned. Contrary to the said claim, the Company has asserted that the employee who performs well gets higher amount of increment and there is no discrimination in the said system. It is highly profitable to mention here that the Union has nowhere claimed that performances of all concerned employees were at par. In my humble view, the granting of merit increment may be treated as an unscheduled pay rise given to an employee on the basis of his satisfactory performance. In fact, it is a way to reward an employee for delivering above – average results and it can go to a long way in building loyalty, retaining talents in the industry and boosting morale of the high performing employees. In my opinion, the idea behind merit increment is to reward the most productive and high performing employees, which in turn incentivises others to do better. But system of granting merit increment based on performance should have been communicated to the employees concerned in time for making them aware of the same. In my humble opinion, any direction for payment of increment to the wages of all sales promotion employees at an equal rate irrespective of their performance would end a fair competition amongst them and thereby the sustenance of the industry would be at risk and its development would be put to a grinding halt which would not be beneficial for the Company and its employees.

(56). It is claimed on behalf of the Union that no document showing procedure for granting increment based on performance was communicated by the management of the Company to the employees concerned. In this regard, P.W.-1 Shri Sangram Bhattacharya, in his

examination in chief, has stated that he does not know as to whether there is any circular or regulation of the Company regarding payment of increment to the sales promotion employees. He has also stated that the Company has not conveyed the procedure which is adopted for making increment to the salaries of its employees. He has stated further that the Company fixed targets for the sales promotion employees working under it in the specific area. During his cross-examination, once he has stated that there is a system of publication of Sales Flash Report in the Company. But immediately thereafter with a view to mitigate the effect of said statement he has stated that they are not provided with the same. Fortunately, the truth has been surfaced from his further cross-examination dated 15.03.2016 when he has clearly admitted that the Company sends 'sales flash' by e-reporting system to all the sales employees and that it also sends letters on de-growth of performance to all sales employees by e-reporting system. P.W.-2, Shri Sandip Banerjee also has admitted the said matter in his deposition. In respect of the present matter, the evidence of O.P.W-1, Shri Sandeep Nath who is the Sales Manager of the Company is of much significance. He has clearly stated that the Company publishes sales flash reports wherefrom the monthly sales figures are evident and that the sales flash reports are known to everyone and they were individually served through email. During cross-examination, he has clearly stated about the employees concerned that they are aware of the procedure of reviewing increment and that increment was being reviewed after verbal discussion with the employees as per practice prevalent in the Company and that after annual meeting discussion takes place between the management of the Company and the employees. It is also stated by him that the policy of granting increment is within the knowledge of the employees.

(57). From the depositions of P.W-1, Shri Sangram Bhattacharya, P.W.-2, Shri Sandip Banerjee and O.P.W-1, Shri Sandeep Nath it has become crystal clear that the management of the Company used to fix targets for the sales promotion employees working in the specific area and it also used to send sales flash reports and letter on de-growth of performance to the sales promotion employees concerned. Said communications were obviously made with certain reasons and objectives by the management of the Company. Aforesaid matter highly suggests that the Company wanted to make the concerned employees aware of the fate of their performance and the employees concerned also knew it. It also depicts that the review of increment used to take place after verbal discussion between the management of the Company and the employees.

(58). As regards the procedure for assessment of the performance of the employees concerned, Ld. Advocate of the Company has drawn my attention to the exhibit-A and emphatically submitted that said document

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contains the policy of the Company for assessment of the performance of the employees concerned and copies of said document were given to all of them on good faith without obtaining any receipt thereof. Ld. Advocate of the Union has seriously refuted the said claim and submitted that as no copy of said document was served to the employees concerned the Company could not file any receipt thereof. In respect of the said matter the evidence of O.P.W.-1, Shri Sandeep Nath is highly important. During cross-examination, he identified the exhibits A and A/1 as copies of the circular which was served directly to the sales representatives. He has stated clearly that copy of said circular was served to all sales representatives of the Company who are connected with this case and that no signature of the sales representatives was taken at the time of serving circular to them.

(59). As a matter of prudence and caution, before believing the evidence of O.P.W.-1, Shri Sandeep Nath that the policy circular in respect of granting increment was served to the sales representatives concerned without obtaining any receipt or signature from them, I find it just and appropriate to see as to whether any other document was served to the employees of the Company without obtaining any receipt / signature from them or not. In this regard, the P.W.-1, Shri Sangram Bhattacharya has clearly admitted that 'when the Company distributes the letters of increment, the Company serves them to us without taking any signature from us'. From the above evidence it has become crystal clear that the management of the Company used to serve relevant documents to its employees without obtaining any receipt or signature from them. Therefore, the aforesaid evidence of O.P.W-1, Shri Sandeep Nath has become quite believable and I have no hesitation to hold that the circular stating the policy of granting increment based on performance was served upon the employees concerned. In my opinion, communication made by the Company regarding sales target, sales flash reports and policy circular strongly show a transparency in the system. In fact, I do not find any unfairness or infirmity in granting merit increment based on the performance of the employees concerned.

(60). Ld. Advocate of the Union has submitted emphatically that the increment which also includes the merit increment should be granted to all sales promotion employees at an equal rate irrespective of their performance because outcome of their performance also depends upon various factors like demand of product in market, competitiveness in the area of work, procurement of order, supply of products in time to the distributors and retailers in the market and acceptability of the product among the doctors etc.

(61). It is true that performance of an employee depends not only upon his capability and hard work but also upon some other factors. Actual

performance of an employee is a result of function of several forces, internal as well as external to the organization- some of choice and some of chance. Generally, in no field, there can be any performance without influence of the external factors. But that does not make the system of granting increment based on performance faulty. It is pertinent to mention here that the Union has not filed any document to show that it or any sales promotion employee asked the management of the Company to provide any help or more infrastructure to increase sales. In this case, the sales targets are being fixed for the sales promotion employees posted at different head quarters of the Company at different rates and sales promotion employees have to perform in their respective areas. Here, I am to see whether the process of fixing sales targets is fair enough or not.

(62). In respect of the above matter, Ld. Advocate of the Company submitted that sales targets were/ are being fixed after considering all relevant aspects like population of the concerned area, availability of doctors, purchase capacity of the people there etc. and that no difficulty was reported by the employees concerned to the management of the Company. In connection with this matter, O.P.W.-1 Shri Sandeep Nath has clearly stated in his deposition that previous performance coupled with anticipated growth is the basic criteria for fixation of the sales target and that said target is fixed after having discussion with the concerned sales representatives. I have carefully perused the exhibit-C i.e. copy of documents showing sales targets fixed by the Company. Aforesaid evidences and materials on record does not suggest any thing improper or unfair. Considering the facts and circumstances of the case, evidences both oral and documentary available on record, it can not be said that the Company is doing any discrimination in granting increment to the wages of its sales promotion employees working at different head quarters within the State of West Bengal, without assigning any reason thereof or that there is no order / rule or regulation of the Company for granting increment or that the company has done any nepotism or favoritism in paying increment based on the performance to the concerned sales promotion employees.

(63). Ld. Advocate of the Union has urged that the performance of the employees concerned should have been assessed on the basis of their individual performance only and not on the basis of their team work. On careful perusal of the evidences and materials on record and considering the facts and circumstances of the case I do not find any flaw in the system of assessing the performance of the employees on the basis of their team work especially when no employee has urged to the management of the Company that he has done better than his other teammates.

(64). In the light of my aforesaid discussion, observations and regard being had to the settled principles of law, I do not find any acceptability in the argument of the Ld. Advocate of the union that as nature of work of all

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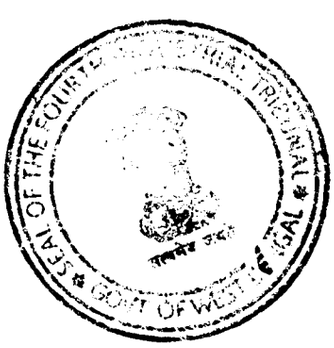
the sales promotion employees is same the management of the Company has to pay increment to them at an equal rate irrespective of their performance or that the performance of the employees concerned should have been assessed on the basis of their individual performance only and not on the basis of their team work.

(65). I find it appropriate to mention here that according to the Company, it gives merit increment to its sales promotion employees on the basis of their performance which is being assessed as per performance of their respective team and that the sales promotion employees posted at one head quarter are considered as one team and on the basis of performance of the said team the merit increment is given to all members of it at an equal rate and as such there is no discrimination in granting increment to the employees concerned. On careful perusal of the Annexure-B to the order of reference it depicts that out of thirty employees two namely Animesh Hazra and Debajyoti Chatterjee were posted at Burdwan head quarter but in the year 2013-14, increment to their wages was granted at a different rate. The amount of increment given to the wage of Animesh Hazra was Rs. 500/- whereas the amount of increment given to the wage of Debajyoti Chatterjee was Rs. 800/-. In respect of said variation in granting increment to the employees Animesh Hazra and Debajyoti Chatterjee, Ld. Advocate of the Company has candidly submitted that due to bona fide clerical mistake said variation has taken place. He also submitted that earlier this mistake was not brought to the notice of the management of the Company and that had it been brought to the notice of management of the Company it would have corrected the mistake at the earliest. He has further submitted that the Company is ready and willing to correct the said mistake and the Tribunal may pass necessary direction in the matter. He has referred to a portion of paragraph No.16 of a ruling of the Hon'ble Apex Court reported in LAWS (SC) 2014 616 and a portion of paragraph No.8 of an another ruling of the Hon'ble Apex Court reported in LAWS (SC) 2007 971. In paragraph No.16 of the ruling reported in LAWS (SC) 2014 616, the Hon'ble Apex Court has observed inter alia that *"We do not intend to go into the question whether respondent no. 1 manipulated and inserted the word promoted in the letter of appointment. Admittedly, the appointment order has been issued pursuant to the notification of direct recruitment, therefore, it should be treated as direct recruitment. Mistake if any committed by clerical staff or any other authority in mentioning the word 'promoted and appointed' in place of 'appointed' and showing higher scale of pay of Rs. 3000-100-3500-125-4500, it is always open to the competent authority to correct the mistake."* In paragraph No.8 of an another ruling reported in LAWS (SC) 2007 971, the the Hon'ble Apex Court has been pleased to observe inter alia that *"Reliance by the High Court on the order passed in Sanjay Kumars case (supra) was thoroughly misconceived. It is to be noted that LPA was dismissed on the ground of delay. Even otherwise,*



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merely because mistake had been committed in one case, there is no rational for perpetuating that mistake, even when the same is illegally impermissible."

(66). It depicts from the aforesaid observations of the Hon'ble Apex Court that it is always open to the competent authority to correct the mistake and that no mistake should be allowed to be perpetuated.

(67). On careful perusal of the evidences and materials on record I do not find any other similar mistake. It can not be disputed that even a most intelligent and careful man may commit a mistake. So, a clerical mistake may happen in any matter but it should not be deliberate one. Considering the facts and circumstances of the case, it appears to me that said mistake is a result of human error and it cannot be termed as deliberate or mala fide one. Therefore, I find it just to accept the submission of the Ld. Advocate of the Company that due to bona fide clerical mistake said variation has taken place. In view of above, the Company Should be directed to grant increment for the year 2013-14 to its employee Shri Animesh Hazra at par to that of granted to Shri Debajyoti Chatterjee i.e. Rs. 800/-.

(68). Ld. Advocate of the Union has submitted that showing favoritism towards one section of employees is a glaring instance of unfair labour practice, as specified in item No. 9 of the first part of the 5th Schedule of the Industrial Disputes Act, 1947 and it is clearly barred under the provisions of Section–25T of the said Act.

(69). It is true that as per item No. 9 of the first part of the 5th Schedule of the Industrial Disputes Act, 1947 showing favoritism or partiality to one set of workers regardless of merit is an unfair labour practice and as per provisions of Section 25T of the Act any unfair labour practice is prohibited, but in view of the findings already arrived at it cannot be said that the Company has done any nepotism or favoritism in paying increment based on the performance to the concerned sales promotion employees. Therefore, the above submission of the Ld. Advocate of the Union has no application in this case.

(70). In the light of my aforesaid discussion, findings and regard being had to the principles of law, I am to hold that the management of M/s. DWD Pharmaceuticals Ltd. is justified in granting annual increment at unequal and different rates to the wages the employees named in the Annexure-B to the order of reference for the year, 2013-2014.

(71). This Tribunal has to deal with an another primary question raised in the issue no.1 mentioned in the order of reference i.e. whether the management of M/s. DWD Pharmaceuticals Limited is justified in not granting annual increment to the Wages of Sri Indrajit Nan and eleven others (as per Annexure-A) for the year, 2013-2014. Regarding this matter,

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it is claimed by the Union that in the course of conciliation proceedings, after realizing the justification of demand, the Company released increment amounting to a sum of Rs. 500/- to twelve concerned workmen i.e. Sri Indrajit Nan & eleven others whose names are mentioned in the Annexure-A to the order of reference, for the period from October, 2013 without any arrear from April, 2013 though the financial year of the Company starts from the month of April and ends with the month of March of the following year. It is also urged by the Union that the sales promotion employees whose names are appearing in Annexure–A to the order of reference are working since long under the Company.

(72). The Company appears to have admitted the fact of paying increment to employees whose names are mentioned in the Annexure-A to the order of reference, for the period from October, 2013 without any arrear from the month of April, 2013.

(73). P.W.-1, Shri Sangram Bhattacharya and P.W.-2, Shri Sandeep Banerjee who are members of the Union and P.W.-3, Shri Sasanka Mouli Roy who is the Secretary of the Union have clearly supported said claim of the Union by their evidences.

(74). It is not disputed that the financial year of the Company starts from the month of April and ends with the month of March of the following year. Although, the Company has paid increment @ Rs. 500/- to the sales promotion employees named in the Annexure-A to the order of reference, with effect from October, 2013 but I do not find any cogent evidence to show the reason for not granting increment to them with effect from 01.04.2013 i.e. from beginning of the said financial year. In my considered opinion, the Company has to prove the acceptable reason for non-granting of increment from the month of April, 2013 to its said employees, by producing cogent and convincing evidence but it has failed to do so. In fact, there is no convincing evidence on record to justify non-granting of said increment of Rs. 500/- from the month of April, 2013 to its said employees. I find it appropriate to mention here that it is clearly averred in pleading of the Union that two employees namely Prahllad Ghosh and Dipak Adhikary, whose names are appearing in serial Nos. 11 and 12 of Annexure-A to the order of reference, joined the Company on 18.02.2013 and 09.02.2013 respectively and said matter is not disputed by the Company. It is clear that before 01.04.2013, said two employees worked under the Company for a very small period. So, in my considered opinion, they are not entitled to get increment from 01.04.2013. But other employees named in the Annexure-A to the order of reference are entitled to get increment from 01.04.2013. Therefore, the Company should be directed to grant increment to the employees named in the Annexure-A to the order of reference, excepting Prahllad Ghosh and Dipak Adhikary, with effect from 01.04.2013 @ Rs. 500/- which was grated to them from the

month of the October, 2013. Under the Circumstances I am to hold that the management of M/s. DWD Pharmaceuticals Limited is not justified in not granting annual increment to the Wages of the employees named in the Annexure-A to the order of reference, excepting Prahllad Ghosh and Dipak Adhikary, from 01.04.2013.

(75). Ld. Advocate of the Union argued emphatically that from the exhibit-7 i.e. a copy of the letter of appointment dated 28.04.2014 issued on behalf of the Company for a sales promotion employee namely Mr. Sandip Kumar Chandra it depicts that the Company is not giving any D.A. to the employees concerned. He has drawn my attention to paragraph No.8 of the Form A prescribed under Rule 22 (1) of the Sales Promotion Employees (Conditions of Services) Rules, 1976 and submitted that in view of specific provision contained in the statutory form the Company is bound to give D.A. to its sales promotion employees.

Paragraph No. 8 of said 'Form A' runs as follows: –

8. He/She will draw a total wages of .....*(insert here the amount)*.....

per .....*(insert here the period)*.... Composed of the following, namely : –

(i) Basic Pay ....*(insert here the amount)*..... Dearness

Allowance .....*(insert here the amount)*.....

(ii) Other allowances .....*(insert here the particulars)*.....

(76). Refuting the aforesaid argument advanced on behalf of the Union, Ld. Advocate of the Company has argued that this tribunal cannot enlarge the scope of the reference and it should confine its decision to the issues specifically mentioned in the order of reference and anything which is strictly incidental thereto. In support of his said submission he has referred to Paragraph No. 25 of a judgement of the Hon'ble Supreme Court reported in Laws (SC) 2015 24. In paragraph No. 25 of the said judgement it has been observed by the Hon'ble Apex Court that *"It is thus clear that the appropriate Government is empowered to make a reference under Section 10 of the Act only when "Industrial dispute exists" or "is apprehended between the parties". Similarly, it is also clear that the Tribunal while answering the reference has to confine its inquiry to the question(s) referred and has no jurisdiction to travel beyond the question(s) or/and the terms of the reference while answering the reference. A fortiori, no inquiry can be made on those questions, which are not specifically referred to the Tribunal while answering the reference."*

(77). From the aforesaid observation of the Hon'ble Apex Court it has become palpably clear that the Tribunal while answering the reference has to confine its inquiry to the question(s) referred and has no jurisdiction to travel beyond the question(s) and/or the terms of the reference while answering the reference. The Union appears to have made no claim

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regarding D.A. in its written statement. Even the order of reference is also silent about D.A. It is clearly provided in sub-section (4) of Section 10 of the Industrial Disputes Act,1947 that where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto. From the above principles of law it can be said that the Tribunal should confine its adjudication to the points of dispute referred and matters incidental thereto. Although, it is open to the parties to bring out before the tribunal the ramifications of the dispute but no such ramification of the dispute is brought before this Tribunal. That apart, in my view, the matter of D.A. as highlighted by the Ld. Advocate of the Union can not be treated as a matter incidental to the issues specified by the appropriate Government in the order of reference for adjudication. In view of above I find it appropriate not to travel to the question of D. A. raised by the Ld. Advocate of the Union.

(78). Before parting with the Judgement, I find it just to mention here that Ld. Advocate of the Union has referred to a ruling of the Hon'ble Apex Court reported in (1984) 4 Supreme Court Cases 324 and a ruling of the Hon'ble Calcutta High Court reported in 2018 SCC OnLine Cal 8831 and Ld. Advocate of the Company has referred to a judgement of the Hon'ble Apex Court reported in Laws (SC) 2004 865 and a judgement of the Hon'ble Calcutta High Court reported in Laws (Cal) 2011 259. But the principles enunciated in said judgements do not appear to be applicable to the facts and circumstances of this case.

(79). In the light of the foregoing discussion, observations, findings and settled principles of law, it is

ordered

that the management of M/s. DWD Pharmaceuticals Limited is not justified in not granting annual increment to the Wages of the employees named in the Annexure-A to the order of reference, excepting Prahllad Ghosh and Dipak Adhikary, from 01.04.2013. The management of the Company is directed to grant increment @ Rs. 500/- to the employees named in the Annexure-A to the order of reference, excepting Prahllad Ghosh and Dipak Adhikary, with effect from 01.04.2013 within 60 days and pay arrears to them within 90 days of this day.

(80). It is also ordered that the management of M/s. DWD Pharmaceuticals Ltd. is justified in granting annual increment at unequal

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and different rates to the wages of the employees named in the Annexure-B to the order of reference for the year, 2013-2014.

(81). In view of the observations and findings arrived at the body of the judgement, the management of the Company is directed to grant increment for the year 2013-14 to its employee Shri Animesh Hazra @ Rs. 800/- instead of Rs. 500/- within 60 days and pay arrears to him within 90 days of this day.

This is my Award.

Sd/- Gr. K. Dalmia

Judge

Fourth Industrial Tribunal

Kolkata

31.12.2019

Judge
Fourth Industrial Tribunal W.B

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Sd/- Gr. K. Dalmia

Judge

NO. DT.

Copy forwarded to the Additional Chief Secretary, Labour Department, Government of West Bengal, N.S. Buildings, 12th floor, Kolkata-1 for information.

06-01-2020.

Judge
Fourth Industrial Tribunal, W.B