

(2000) 12 AP CK 0042
In the Andhra Pradesh High Court
Case No : Writ Petition No. 26707 of 1996

APSFDC Ltd., Employees Union

APPELLANT

Vs

Govt. of A.P. and another

RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:

Companies Act, 1956 — Section 10, 11, 19, 20, 22
Constitution of India, 1950 — Article 12, 21, 226
Payment of Bonus Act, 1965 — Section 36

Citation : (2001) 1 ALD 229 : (2001) 1 ALT 99 : (2001) 1 LLJ 1002

Hon'ble Judges : B. Sudershan Reddy, J

Bench : Single Bench

Advocate : Mr. G. Ramachandra Rao, for the Appellant; Government Pleader for Forests and Mr. P. Sriramulu Naidu, for the Respondent

Final Decision : Allowed

Judgement

1. The Andhra Pradesh State Forest Development Corporation Limited Employees Union invokes the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and prays for issuance of a writ of certiorari calling for the records relating to G.O. Ms. No.135, Environment, Forests, Science and Technology (For.II) Department, dated 17-9-1996 on the file of the first respondent and quash the same duly declaring the same ultra vires, void and inoperative.

2. The first respondent herein by the impugned Governmental Order in exercise of the power u/s 36 of the Payment of Bonus Act, 1965 kept the operation of all the provisions of the said Act under suspension with an intent to "contain erosion of capital, in public interest for the year 1990-91 onwards till the company returns to the condition of having wiped out all its accumulated losses after making sufficient provision for all its bad and non-performing assets".

3. Before advertng to the question as to whether the impugned Governmental Order suffers from any legal infirmities, it would be necessary to notice the

relevant facts in detail leading to filing of this writ petition :

The petitioner is a Trade Union representing the majority of employees of the second respondent-Corporation. The second respondent-Corporation was established on 16-6-1975 by the State Government of Andhra Pradesh by incorporating it under the provisions of Indian Companies Act, 1956. It is fully owned by the State Government. There is no dispute whatsoever that it is an instrumentality of the State within the meaning of Article 12 of the Constitution of India.

4. There is also no dispute whatsoever that the provisions of the Payment of Bonus Act, 1965 (for short "the Act") are applicable to the respondent-Corporation and all its employees are entitled to payment of bonus in accordance with the provisions of the Act.

5. The petitioner-union made representations to the second respondent-Corporation to pay bonus for the years from 1984-85 to 1987-88 to all its employees under the provisions of the said Act. The petitioner-union simultaneously made representations to the Commissioner of Labour, Government of Andhra Pradesh for his intervention in the matter. The Commissioner convened a joint meeting between the representatives of the union and the second respondent-Corporation. The second respondent-Corporation seems to have taken a stand that it was awaiting the approval of the first respondent-Government in the matter. The fact remains that no bonus as such was paid to the employees by the second respondent-Corporation.

6. It is under those circumstances, the petitioner-union filed WP No.3130 of 1989 in this Court seeking an appropriate writ to direct the Corporation to pay maximum bonus under the Act for the years from 1984-85 to 1987-88 to all its employees. This Court by an order dated 3-3-1989 issued interim directions directing the Corporation to pay the statutory minimum bonus of 8.33% to all its employees for the year 1985-86 within a period of three weeks from the date of the order. The said writ petition was ultimately allowed by this Court on 16-3-1992 declaring that "the Bonus Act is applicable to the employees of the Corporation and that the Corporation is bound to pay the bonus" and accordingly directed the Corporation to pay to the petitioner-Union employees minimum bonus of 8.33% for three years - 1985-86, 1986-87 and 1987-88. The Corporation pursuant to the directions of this Court paid the minimum bonus to all its employees for the aforesaid years and also for the years 1988-89 and 1989-90.

7. It is the claim of the employees that they are entitled to payment of maximum bonus of 20% under the Act from the year 1990-91 onwards. It is claimed that the Corporation is bound to pay the bonus within eight months from the close of the Accounting year as per Section 8 read with Section 19 of the Act. The second respondent-Corporation failed to pay the same. The second respondent-Corporation did not even choose to pay the statutory minimum bonus of 8.33%

to its employees for the aforesaid years. According to the petitioner, there is absolutely no valid reason or justification on the part of the second respondent-Corporation in not paying the bonus.

8. It is alleged that the second respondent-Corporation made huge net profits for the years 1991-92 and 1992-93 to a tune of Rs.43,83,332.82 paise and Rs.4,68,67,027.15 paise respectively. It is alleged that in similar manner, the second respondent-Corporation earned huge profits for the years 1993-94 and 1994-95 also. It is contended that even for the year 1990-91, the second respondent-Corporation shall be deemed to have earned profits in view of the reduction of lease rent payable by the second respondent-Corporation to the first respondent. It is under those circumstances, the employees claim that they are entitled for payment of maximum bonus under the provisions of the Act.

9. It is the case of the employees that the second respondent-Corporation entered into unnecessary correspondence with the first respondent-Government in the matter of payment of bonus even after the decision of this Court referred to hereinabove declaring the liability of the second respondent-Corporation atleast to pay the minimum bonus to its employees. It is contended that the second respondent-Corporation without any justification made efforts to postpone their liability in the matter.

10. It is the case of the petitioner-union employees that having left with no other remedy, WP No.4789 of 1996 was filed in this Court against the Corporation seeking a writ of mandamus directing the Corporation to pay the maximum bonus under the Act to all its employees for the years from 1990-91 to 1994-95 with interest at 12% per annum. The second respondent herein filed its counter opposing the said writ petition. In the said counter-affidavit, it is inter alia stated by the Corporation that the State Government in exercise of the power u/s 36 of the Act have suspended the operation of all the provisions of the Act in respect of the second respondent-Corporation in public interest from 1990-91 onwards for the reasons stated therein. It is contended that the second respondent-Corporation is not liable to pay any bonus from the year 1990 onwards till the respondent-Corporation returns to the conditions as mentioned in the Governmental Order.

11. It is under those circumstances, the petitioner-Union filed the present writ petition challenging the validity of the impugned Governmental Order. It is the case of the petitioner-union that the Government has no power whatsoever to suspend the operation to the provisions of the Act and that too with retrospective effect. The impugned order is not a bona fide one and issued only to defeat the legitimate claim made by the petitioner-union in WP No.4789 of 1996. The decision of the Government suffers from arbitrariness. There is no public interest involved for exercising the power u/s 36 of the Act. It is also the case of the petitioner-Union that the reason given in the impugned order that the second respondent-Corporation is running in losses is factually incorrect and the same is contrary to the material and evidence available on record. It is contrary to the

letter dated 27-1-1995 addressed by the second respondent-Corporation to the first respondent-Government, in which it is categorically admitted that it had earned profits from the year 1991-1992 onwards. The said position is clear from the balance sheet of the Corporation and audited annual accounts of the Corporation. It is also stated that the first respondent having issued the impugned Governmental Order on 17-9-1996 failed to publish the same in the Official Gazette. The second respondent-Corporation took several adjournments of hearing of WP No.4789 of 1996 for getting the notification published in the official Gazette and on failure to produce a copy of the notification published in the Gazette, this Court passed an interim order in the said writ petition directing the second respondent-Corporation to pay the petitioner-union the minimum bonus at the rate of 8.33% from the years 1990-91 to 1994-95 within a period of two months from the date of the order, subject to the publication of notification in question in the Official Gazette. It is the case of the petitioner-Union that in order to defeat and nullify the interim order granted by this Court, the impugned notification was published in the Gazette.

12. Sri G. Ramachandra Rao, learned Counsel for the petitioner contends that there is no power vested in the State Government to suspend the operation of the provisions of the Act. In appropriate cases, the State Government may grant exemption from the provisions of the Act. It is submitted that, at any rate, the Government has no authority in law to grant exemption from the provisions of the Act with retrospective effect. The impugned Governmental Order is ultra vires, as requisite conditions for granting exemption are not satisfied. It is also contended that the impugned Governmental Order suffers from incurable legal infirmity being violative of principles of natural justice as no notice and opportunity has been given to the employees before passing the impugned order. It is also contended that the reasons stated for exercising the power and suspending the provisions of the Act are factually incorrect. The impugned Governmental Order is based on incorrect factual premises.

13. Neither the State Government nor the Forest Development Corporation filed any counter in this writ petition. However, the Forest Development Corporation filed counter-affidavit in WP No.4789 of 1996 and the learned Standing Counsel seeks leave of this Court to adopt the said counter affidavit and requests the Court to treat the said counter-affidavit as counter-affidavit in both the writ petitions. The learned Government Pleader for Forests made available the records for the perusal of this Court.

14. The learned Government Pleader contends that the impugned Governmental Order does not suffer from any legal infirmity. It does not suffer from any arbitrariness. It is submitted that the impugned decision has been taken by the State Government in exercise of its power u/s 36 of the Act and the same is in public interest. In view of the precarious financial position of the Corporation, there is no other option left with the State Government, but to pass the impugned order. The learned Standing Counsel for the Corporation adopts the

submissions made by the learned Government Pleader. The learned Standing Counsel, however, relies upon the averments made in the counter-affidavit and submits that the respondent-Corporation is not making any profits as alleged by the petitioner-Union.

15. It would be appropriate to advert to the contention relating to the profits alleged to have been made by the respondent-Corporation from the year 1990-91 onwards a little later. The question relating to the power of the appropriate Government u/s 36 of the Payment of Bonus Act, 1965 and its content and scope thereof.

16. It may be necessary to briefly notice the scheme of the Act: The Payment of Bonus Act is an Act to provide for the payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity. The object of the Act is to maintain peace and harmony between the labour and capital by allowing the employees to share the prosperity of the establishment reflected by the profits earned by the contributions made by capital, management and Labour (See: *Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union*, . Under the Act, the liability to pay the bonus has become a statutory obligation imposed upon employers and establishments covered by the provisions of the Act. It is a comprehensive piece of Legislation dealing with entire subject of bonus and the persons to whom it should apply. It is observed by the Supreme Court in *Jalan Trading Company* (supra) that the scheme of the Payment of Bonus Act, broadly stated, is four dimensional:

- (1) to impose statutory liability upon an employer of every establishment covered by the Act to pay bonus to employees in the establishment;
- (2) to define the principle of payment of bonus according to the prescribed Formula;
- (3) to provide for payment of minimum and maximum bonus and linking the payment of bonus with the scheme of "set-off and set-on"; and
- (4) to provide machinery for enforcement of the liability for payment of bonus.

It is well settled that the background and the circumstances in which the Act was enacted, the object of the Act and its scheme, is to be kept in mind in interpreting the provisions of the Act. After all, no statute is passed in a vacuum but in a framework of circumstances so as to give a remedy for a known state of affairs. (See: *Escoigne Properties, Ltd. v. IR Commissioners* (1958) 1 All.ER 406).

17. Section 8 of the Act declares that every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of the Act, provided such an employee has worked in the establishment for not less than thirty working days in that year. It confers right on an employee to claim bonus from the employer under certain conditions. It is not an act of grace or charity on the part of the employer but a right conferred upon the employees to claim legitimate share in the profits of the establishment. Section 10 of the Act

mandates that every employer shall be bound to pay to every employee in respect of the accounting year commencing on any day in the year 1979 and in respect of every subsequent accounting year, a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher, whether or not the employer has any allocable surplus in the accounting year. Section 11 deals with payment of maximum bonus of 20 per cent of the salary or wage of the employee depending upon allocable surplus in that accounting year. Section 19 of the Act mandates that all amounts payable to an employee by way of bonus under the Act shall be paid in cash by his employer- where there is a dispute regarding payment of bonus pending before any authority u/s 22, within a month from the date on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute and in all other cases within a period of eight months from the close of the accounting year. However, in appropriate cases, the Government or such other authority upon an application made by the employer and for sufficient reasons, by order, extend the said period of eight months to such further period or periods as it thinks fit. However, the total period so extended shall not exceed in any case two years. Section 20 of the Act provides for the application of the bonus formula to those public sector undertakings, which fulfil the twenty per cent competition test.

18. It is well settled that the provisions in statute of liberal import, such social welfare Legislations, which are remedial in nature should be construed in the context of colour and content of such statutes. It may be true that all Legislations in a welfare State is enacted with the object of promoting general welfare; but certain types of enactments are more responsive to some urgent social demands and also have more immediate and visible impact on social vices by operating more directly to achieve social reforms. Such enactments demand an interpretation liberal enough to achieve the legislative purpose. (See : The Works Manager, Central Railway Workshop, Jhansi Vs. Vishwanath and Others, .

19. In Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar Vs. Associated Rubber Industry Ltd., Bhavnagar and Another, , the Supreme Court observed that "it is the duty of the Court, in every case where ingenuity is expended to avoid taxing and welfare Legislations, to get behind the smoke-screen and discover the true state of affairs. The Court is not to be satisfied with form and leave well alone the substance of a transaction".

20. It may be appropriate to look at Section 36 of the Act, since the whole issue revolves around the interpretation of the same:

36. Power of exemption :--If the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in public interest to apply all or any of the provisions of this Act thereto, it may, by notification in the Official Gazette, exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose, such establishment or class of

establishments from all or any of the provisions of this Act.

21. The Supreme Court in *Jalan Trading Company* (supra) held:

"By Section 36 the appropriate Government is invested with power to exempt an establishment or a class of establishments from the operation of the Act, provided the Government is of the opinion that having regard to the financial position and other relevant circumstances of the establishment, it would not be in the public interest to apply all or any of the provisions of the Act. Condition for exercise of that power is that the Government holds the opinion that it is not in the public interest to apply all or any of the provisions of the Act to an establishment or class of establishments, and that opinion is founded on a consideration of the financial position and other relevant circumstances. Parliament has clearly laid down principles and has given adequate guidance to the appropriate Government in implementing the provisions of Section 36. The power so conferred does not amount to delegation of legislative authority. Section 36 amounts to conditional Legislation, and is not void."

22. From a plain reading of Section 36 of the Act, it is clear that the Government is bound to exercise its power whenever an application is made by an establishment for exemption and pass such order as it thinks fit giving reasons for the same. It is obligatory on the part of the Government to exercise its power only having regard to the financial position and other "relevant circumstances" of the concerned establishment. The Government has no unlimited discretion either to refuse or grant exemption. A duty is cast on the Government to carefully examine the financial position and other relevant circumstances of the establishment concerned and decide as to whether the grant or refusal thereof is in the public interest or not. The Government is bound to record reasons for its decision. The Government is bound to decide the matter only on consideration of facts relevant to the provisions of the statute itself. It is bound to make a bona fide and pragmatic assessment of all the relevant factors before taking the decision of the matter. It is demonstrably clear from the provisions of Section 36 of the Act that any order, the Government may pass u/s 36 of the Act will result in serious civil consequences. Therefore, the matter has got to be considered objectively, strictly within the guidelines laid down by the Parliament in Section 36 itself. The reasons, on the basis of which the Government has formed its opinion, are required to be disclosed.

23. The expression "having regard to" used in Section 36 of the Act is of definite importance. Likewise, the expressions, "is of opinion" and "public interest" are also significant. The meaning of expression "having regard to" is well settled. It indicates that in exercising the power, regard must be had to the facts enumerated together with all factors relevant for exercise of that power. The Government is obliged to consider the relevant data material to which it must have regard. (See: *Saraswati Industrial Syndicate Ltd. v. Union of India* (1974) 2 SCC 630 and *State of U.P. and Others Vs. Renusagar Power Co. and Others*, .

24. The opinion of the Government is required to be formed on relevant facts within the limits and within the restraints of the statute itself. May be the satisfaction of the Government is subjective one. The order passed in exercise of the power u/s 36 of the Act cannot be challenged on the ground of propriety or sufficiency. But it can always be tested by the Court as to whether the authority acted in accordance with and within the limits of the Legislation.

25. The Supreme Court in *State of Tamil Nadu v. K. Sabanayagam* AIR 1998 SC 344, while interpreting Section 36 of the Act observed:

"A mere look at the said section shows that before an appropriate Government can form its opinion regarding grant of partial or full exemption to any establishment or class of establishments which are otherwise already covered by the sweep of the Act the following factual conditions must be found to have existed at the relevant time to enable the delegate to exercise its powers under the Act:

1. The financial position of the establishment or class of establishments, as the case may be, must be such that it would not be in public interest to apply all or any of the provisions of the Act to such establishment or establishments.
2. There may be other relevant circumstances pertaining to such establishment or establishments, which would require exercise of such power of exemption.
3. Such exercise must be in public interest as a whole and not confined to the personal or private interest of the establishment or establishments concerned.

Now it is obvious that but for the exercise of power of exemption u/s 36 of the employees of an institution governed by the sweep of the Act would be entitled to minimum statutory bonus as per Section 10 of the Act. It has also to be kept in view that Bonus Act is a piece of welfare Legislation enacted for the benefit of a large category of workmen seeking a living wage to make their lives more meaningful and for fructifying the benevolent guarantee of Article 21 of the Constitution of India. Bonus is treated as deferred wage. When the Parliament in its wisdom has enacted such a beneficial piece of social Legislation which already guarantees minimum statutory bonus to employees governed by it, if their employers are to be allowed to earn exemption from the sweep of such a beneficial Legislation which would ipso facto adversely affect entire class of their employees, the conditions for exercise of such power of exemption have to be strictly and objectively fulfilled by the repository of such a drastic power. A statutory right already accrues to employees under the Act. If the establishment employing such workmen or employees is desirous of depriving the statutory right of minimum bonus to its employees it may move the appropriate Government for exemption u/s 36 of the Act as has been done in the present case by the Housing Board obviously confining its request to the accounting years in question. It is obvious that when such an establishment moves the appropriate Government invoking its power of exemption it has to submit relevant factual data about its financial position and other relevant circumstances

in which it is placed during the relevant year which would necessitate the appropriate Government in public interest and not necessarily only in the private interest of such employer or establishment to get satisfied that it should be exempted and insulated from the rigours of the provisions of the Act guaranteeing statutory minimum bonus to its employees. Such establishment, therefore, would naturally point out that its financial position and other relevant circumstances are such that it may be that if it is required to pay the minimum bonus to its employees it would not only be a catastrophe for such establishment or class of establishments but a situation might arise when in public interest such establishments in order that they may effectively exist and may not be wiped off, may be given a statutory, protection by way of exemption from the operation of the relevant provisions of the Act by the appropriate Government u/s 36 of the Act. It is obvious that when such a case is tried to be made out by the establishment concerned invoking powers of the State u/s 36, the State would not act merely as a post office and accept as a gospel truth what the establishment states. It will have to apply its objective mind on the relevant date before it can legitimately exercise its power of exemption u/s 36 of the Act qua such an establishment or a class of them. While exercising that power the data which would be available from the establishment would obviously be one-sided data in support of its claim for exemption. The employees who are likely to be deprived of their minimum statutory bonus as per the Act would be the rival class of persons who are necessarily likely to be adversely affected if such exemption is granted to the establishment on the basis of the one-sided data in support of its claim. Therefore, in the absence of any rebuttal data furnished by the other side which is likely to be affected by such an exercise, namely, the employees the opinion arrived at by the appropriate Government, purely based on the one sided version and data submitted by the establishment or a class of establishments for claiming exemption, would be a truncated opinion which would necessarily not amount to an opinion on all relevant facts placed before it for and against the exercise of such power of exemption qua a given establishment or a class of establishments. If such data in rebuttal is not allowed to be furnished to the appropriate Government before it decides to exercise its power of exemption u/s 36 of the Act qua the establishment or a class of establishments its decision would always remain a truncated or a lopsided one and would be liable to be voided on the ground of non-application of mind on relevant facts and data. It would remain a still born decision and the moment it is challenged in a competent Court it would be liable to be struck down immediately and for consideration of such a challenge the competent Court seized of the matter would naturally require the other side, which is likely to be affected by such an exercise of power of exemption, to furnish its data by way of rebuttal and once such material is furnished the truncated and one-sided decision of the appropriate Government would be required either to be reconsidered by the Government itself or the Court may be required to perform that task which was left incomplete by the appropriate Government while arriving at its opinion for exempting the claimant-establishment from the rigours of the

Act".

26. It is further observed by the Supreme Court that "the relevant circumstances as mentioned in Section 36 will have to be read with the financial position of the claimant-establishment and its other circumstances have to be seen on the touchstone of public interest to enable the appropriate Government to form its opinion u/s 36 qua the claims of such existing establishments".

27. In the instant case, there is no justification offered by the State Government as to how and in what circumstances it had formed its opinion in the matter. No counter-affidavit has been filed. In the counter-affidavit filed by the respondent-Corporation, it is conceded that the Corporation has made payments at 8.33% of the wages for the years 1981-82 and 1982-83 as Bonus and for the year 1983-84 as ad hoc payment. It is stated that the Government observed that the payments made for those years were irregular in view of the non-applicability of the provisions of the Payment of Bonus Act to the respondent-Corporation and the matter was accordingly referred to the Government for necessary orders. However, after receiving the orders from the Government, the payment has been made accordingly for the year 1984-85 also. The respondent-Corporation made payments for the years 1985-86, 1986-1987 and 1987-88 as per the orders of this Court in WP No.3130 of 1989. Subsequently, the respondent-Corporation made payment of bonus for the years 1988-89 and 1989-90 as per the orders of the Government.

28. It is contended by the respondent-Corporation that proposals have been submitted to the Government for its prior approval for payment of bonus for the years 1990-91, 1991-92, 1992-93 and 1993-94. Such proposals seeking prior approval were submitted in the light of the orders issued by the Government in G.O. Ms. No.366, dated 29-10-1993 directing the State Level Public Enterprises and Cooperative Organisations not to sanction any bonus until further orders. Subsequently, the Government is stated to have directed all its public sector organisations directing the concerned administration to issue specific orders in the matter of payment of bonus etc., taking into consideration the profitability of the public enterprises and the financial soundness of the organisation and applicability of the provisions of the Payment of Bonus Act.

29. It is stated that over all performance of the respondent-Corporation is not satisfactory, as it has failed to achieve the projected yields under various projects.

30. It is further stated that though an amount of Rs.20.20 crores was invested by the Government as share capital over a period of time on the basis of requirement of investment, no dividend has been declared so far on the share capital of the Government despite the profitability shown in the accounts of the respondent-Corporation.

31. In the counter-affidavit, it is further stated that the profit in the year 1992-93 is only due to reduction in lease rent from that of Rs.100/- to Rs.10/- per hectare and not due to any other factors governing production or

productivity. It is contended that it is clear from 1993-94 and 1994-95 accounts that there is no available surplus even though the Corporation accounts show a profit of Rs.81.03 lakhs and Rs.186.73 lakhs respectively. In nutshell, it is the case of the respondent-Corporation that it is not earning any profits. It is also stated that no bonus could be paid by the Corporation in the light of the directions of the Government "suspending the operation of all the provisions of the Act in respect of the respondent-Corporation".

32. The respondent-Corporation appears to be under the impression that even the minimum bonus is liable to be paid by the Corporation only if it makes some profits. The plea taken in this regard by the Corporation is totally contrary to the mandatory provisions of the Act.

33. In the counter-affidavit filed by the respondent-Corporation, it is not stated that any application has been filed as such requesting the State Government to exempt the organisation from the provisions of the Act. On the other hand, the record made available for the perusal of this Court by the Government would disclose that the respondent-Corporation through its letter dated 27-1-1995 requested the Government to accord permission to make the payment of bonus to the eligible employees of the Corporation for the years 1990-91, 1991-92, 1992-93 and 1993-94. In the said letter, it is inter alia stated that as per the financial results, the financial position of the Corporation for the respective years for which payment is due is as follows:

Rupees in lakhs

1990-91 58.64-Loss (Audited)

1991-92 43.83-Profit (Audited)

1992-93 38.10-Profit (Unaudited)

1993-94 76.36-Profit (Unaudited)

The Corporation reiterated its request to accord permission to make payment of bonus to eligible employees through its letter dated 25-5-1995.

34. The record reveals the continuous correspondence between the second respondent-Corporation and the Government. Some or how, the issue relating to payment of bonus to the employees of the Corporation got linked up to payment of bonus by the public enterprises in general.

35. It is shocking to realise the procedure and method adopted by the first respondent-Government for keeping the operation of the provisions of the Act "under suspension" in purported exercise of the power u/s 36 of the Act. The record contains a DO letter addressed by the Finance Department to the Principal Secretary to Government, Environment, Forest, Science and Technology Department, in which it is inter alia stated:

"Inspite of these instructions and efforts, it has been observed that many

departments of the Secretariat have not pursued action to fulfil the intent behind the G.O. by issuing orders u/s 36 of the Payment of Bonus Act. As a consequence, not only have we not been able to protect public interest but are also confronted with lengthy and vexatious litigation.

In order to standardize the procedure under the GO, a draft proforma order to be issued by the Government Departments u/s 36 of the Act is enclosed for your kind consideration and follow up action".

The proforma reads as follows:

Whereas it has been brought to the notice of the Government that Company Ltd., has accumulated a loss of Rs. as on consequently eroding its capital base and jeopardising its operation and prospects for which the company has been set up.

And whereas the company has not been servicing its capital regularly which has resulted in inadequate flow of capital to manage and improve its affairs.

And whereas the company being a Public Sector enterprise where public money is invested necessitating protection of public interest Government hereby, u/s 36 of the Payment of Bonus Act, 1965 suspends the operation of all the provisions of the said Act to contain further erosion of capital in public interest for 5 years w.e.f. or till the company returns to the condition of having wiped out all its accumulated losses after making sufficient provision for all its bad and non-performing assets, paying back all its overdues to various institutions and agencies including the Government from which money has been borrowed for its use and starting servicing of its equity capital with a minimum return of 15% p.a., whichever is earlier.

36. The second respondent-Corporation through its letter dated 26-12-1995 reiterated its view that payment of minimum bonus at the rate of 8.33% is statutory as per Section 10 of the Payment of Bonus Act, 1965 and "any examination regarding the applicability of the Act at this point of time constitutes violation of the ruling of the Hon'ble A.P. High Court and amounts to contempt". Accordingly, necessary permission was sought for payment of bonus for the years 1990-91, 1991-92, 1992-93, 1993-94 and 1994-95. Suffice it to notice that not only the Corporation never made any request to the Government for granting exemption from the operation of the provisions of the Act, but also on the other hand went on requesting the Government to accord permission for payment of bonus to its employees. The record would disclose that all of a sudden, the Government approved the draft and accordingly issued the impugned order vide G.O. Ms. No.135, dated 17-9-1996. The blanks in the proforma referred to hereinabove are filled and the same is approved for its publication.

37. The record does not disclose that the Government went deep into the financial position of the respondent-Corporation at any point of time. The letters written by the Vice-Chairman and Managing Director of the Corporation in clear

terms would reveal that the Corporation wanted to discharge its statutory obligation by paying the minimum bonus to its employees. The letters would further disclose that the financial position of the Corporation, according to the Corporation, permitted payment of minimum bonus to its employees. The Government instead of considering the request of the respondent-Corporation and according its approval, got the issue linked up to the payment of bonus to other public sector enterprises. There is no material available on record based on which the Government could have arrived at a decision to exercise its power u/s 36 of the Act. Standardised proforma evolved during the course of discussions and correspondence between one department and the other department is approved and ultimately it had taken shape of an order u/s 36 of the Act. It is a clear case of non-application of mind by the Government. The record would suggest as if the Government pre-determined the whole issue regarding the payment of bonus by the public sector enterprises and accordingly applied its pre-determined decision in the matter of payment of bonus by the respondent-Corporation to its employees. It is the finance department of the State Government, which appears to have prevailed upon everybody in the matter and requested to issue notification for exemption from payment of bonus u/s 36 of the Act by all public sector enterprises. Pursuant to the said decision, the present Governmental Order has been issued without taking and adverting to the material available on record. The material available on record including the letters of the Vice-Chairman and Managing Director of the Corporation would clearly make out a case for payment of minimum bonus by the Corporation to its employees.

38. Then on what basis, the opinion is formed by the Government in the matter. Section 36 of the Act opens with the words "if the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion....." The power conferred upon the Government is not an absolute power to be exercised by the Government. The condition is the formation of satisfaction - subjective, no doubt that a situation of the type concede by Section 36 had arisen. The existence of relevant material is a pre-condition to the formation of the opinion.

39. In *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, , the Supreme Court pointed out on a consideration of several English and Indian authorities that the expressions "is satisfied", "is of opinion" or "has reason to believe" or "indicative of subjective satisfaction" though the nature of the power has to be determined on a totality of consideration of relevant problems, it is observed by the Supreme Court that "the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard If it is shown that the circumstances do not

exist or that they are such that it is impossible for any one to form an opinion there from suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute".

40. In the instant case, the record would disclose that the opinion was formed on collateral grounds. A draft proforma is prepared meant for adoption by the public sector enterprises without even advertent to the question as to whether it is a fit case for granting any exemption u/s 36 of the Act exempting the Corporation from the operation of all or any of the provisions of the Act.

41. The Supreme Court in *Jalan Trading Company* (supra) held that "the power conferred upon the Government u/s 36 of the Act does not amount to delegation of legislative authority, but amounts to conditional Legislation". It is further observed by the Supreme Court that "whether in a give case, power has been properly exercised by the appropriate Government would have to be considered when that occasion arises".

42. In *K. Sabanayagam* (supra), the Supreme Court having observed that the conditional Legislation can be broadly classified into three categories, held:

"But there may be a third category of cases wherein the exercise of conditional Legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of exercise of such a power by the delegate. In such type of cases the satisfaction of the delegate has necessarily to be based on objective consideration of the relevant data for and against the exercise of such power. May be such an exercise may not amount to any judicial or quasi-judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed in service by one side and which could be tried to be rebutted by the other side who would be adversely affected if such exercise of power is undertaken by the delegate. In such a third category of cases of conditional Legislation the Legislature fixes up objective conditions for the exercise of power by the delegate to be applied to past or existing facts and for deciding whether the rights or liabilities created by the Act are to be denied or extended to particular areas, persons or groups. This exercise is not left to his subjective, satisfaction nor it is a mere ministerial exercise. Section 36 of the Act with which we are concerned falls in this third category of conditional legislative functions".

43. The expression "public interest" used in Section 36 of the Act is a definite concept. As observed by the Supreme Court in *K. Sabanayagam* (supra) the decision to exempt from the operation of the provisions of the Act must be in public interest as a whole and not confined to such establishment or establishments, which require the Government to exercise its power to grant exemption. In the instant case, public interest parameters have not been taken

into consideration by the Government. In what manner, the public interest is sought to be protected by the impugned Governmental Order depriving the workmen of their legitimate right to get minimum bonus is not even spelled out by the Government. Neither there is any material nor any application of mind by the Government about the public interest consideration.

44. In the circumstances, the Court is of the opinion that the decision of the Government is based on collateral considerations. No factual conditions exist at the relevant time to enable the Government to exercise its power u/s 36 of the Act. The opinion, if any, reached by the Government is not an opinion on any relevant facts placed before it. There is absolutely no basis or justification for granting exemption to the second respondent-establishment, which is admittedly covered by the provisions of the Act. The right to get minimum statutory bonus already accrued to the workmen is sought to be taken away without any justification whatsoever. There are no grounds and much less valid grounds for granting exemption.

45. The impugned notification makes an interesting reading. It says "the Government hereby u/s 36 of the Payment of Bonus Act, 1965 suspends the operation of all the provisions of the aforesaid Act" Suspension of the provisions of the Act! Obviously, it is a case of non-application of mind. Suspension of operation of an enactment of Parliament by Executive is not permissible in a society governed by rule of law, and constitutionalism.

Applicability of principles of natural justice:

46. The Supreme Court in *K. Sabanayagam* (supra) held that "the employees likely to be affected by the exercise of the power by the Government u/s 36 must be given atleast an opportunity to put forward their rebuttal evidence or material against the material furnished by the claimant-establishment so that the appropriate Government can have an objective assessment of the relevant data with a view to arriving at a rational, well-informed and reasonable opinion on a comprehensive consideration of pros and cons of the fact situations concerned calling for such an exercise of power on its part". However, it is held that there is no necessity of granting any personal hearing to the employees. It is observed:

"..... the legislation has prescribed objective standards and has permitted the delegate to grant exemption and to withdraw the benefit of the statute which is being enjoyed by the persons and in our opinion, in such a situation, principles of fair play or consultation or natural justice cannot be totally excluded".

47. In the instant case the Government had not issued any notice whatsoever to the employees of the Corporation soliciting their views. No opportunity has been provided to the employees in the matter.

48. Thus, viewed from any angle, the impugned Governmental Order suffers from incurable legal infirmities. The same is held to be ultra vires. It is accordingly set aside. Let a writ of mandamus be accordingly issued.

49. The writ petition is accordingly allowed with costs, quantified at Rs.2,000/- (Rupees two thousand only).