
(1975) 09 PAT CK 0011
In the Patna High Court

B. Samanta and Others

APPELLANT

Vs

Government of India and Others

RESPONDENT

Date of Decision : 25-09-1975

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 19

Payment of Bonus Act, 1965 — Section 10, 11, 13, 15, 17

Citation : (1977) 1 LLJ 90

Hon'ble Judges : Sarwar Ali, J;Nagendra Pradesh Singh, J

Bench : Division Bench

Judgement

Nagendra Prasad Singh, J.—These writ applications have been filed by the petitioners under Articles 226 and 227 of the Constitution of India for quashing criminal proceedings launched against them for alleged contravention of certain provisions of the Payment of Bonus Act, 1965 (hereinafter referred to as the "Act" and of the Payment of Bonus Rules, 1965 (hereinafter referred to as the "Rules").

2. The Labour Enforcement Officer (Central), Kodarma (hereinafter referred to as the "Enforcement Officer" inspected different mines belonging to petitioner No. I in Cr. W.J.C. Nos. 105 and 106 of 1975 and petitioner No. 2 in Cr. W.J.C. Nos. 93, 102, 103 and 104 of 1975, on different dates between the 18th January, 1972, and the 4th February, 1972, and noticed three irregularities in the mines concerned, namely:

(i) Register in Form "A" showing computation of allowable surplus for the particular year in question was not at all maintained, which amounted to breach of Rule 4(a) of the Rules.

(ii) Register in Form "B" showing "set-on" and "set-off" for the accounting year in question was not at all maintained, which amounted to breach of Rule 4(b) of the Rules.

(iii) Profit and Loss Account and Balance Sheet for the year in question was not produced, which amounted to breach of Section 27(4) of the Act.

3. Cr. W.J.C. Nos. 93 and 102 relate to Bhuti Mica Mines for the accounting years ending on the 30th June, 1969 and 30th June, 1970. Cr. W.J.C. No. 103 relates to Kari No. 2 Mica Mines, Pit No. 2, for the accounting year ending on 30th June, 1970. Cr. W.J.C. No. 104 relates to No. 8 Mica Mines for the accounting year ending on the 30th June, 1970. Cr. W.J.C. Nos. 105 and 106 relate to Kami a Mica Mines and the relevant accounting years are years ending, respectively, on the 31st December, 1969 and the 31st December, 1970.

4. The Enforcement Officer, after his inspection, issued notices to the petitioners pointing out the aforesaid irregularities noticed by him during the course of his inspection of the different mines and asked the petitioners to show cause within ten days directly to the Regional Labour Commissioner (Central), Dhanbad (hereinafter referred to as the "Regional Labour Commissioner" endorsing a copy to him, as to why legal action should not be taken against them for the contraventions noted therein. A copy of such notice is Annexure 1 to Cr. W.J.C. No. 93 and Annexure 2 to Cr. W.J.C. Nos. 102 to 106.

5. In response to the said notice cause was shown on behalf of the petitioners refuting the allegations and asserting that there had been no contravention. In the said show cause it was pointed out that the owners of the mines were maintaining registers in Forms "A" and "B" but some of the columns had not been filled in, as the bonus under the Act was being paid at a fixed rate as per agreement with the workers' union, and, in view of the said agreement, it was not necessary to fill up all the columns of the registers. About the profit and loss account and balance sheet, it was said that it was not kept at the works spot as the payment was being made at fixed rate as per agreement with the workers' union. Copies of the show cause, dated the 21st February, 1972, are Annexure 2 in Cr. W.J.C. No. 93 and Annexure 3 in Cr. W.J.C. Nos. 102 and 101; that dated the 11th February, 1972 is Annexure 3 in Cr. W.J.C. No. 103; and those dated the 19th February, 1972 are Annexure 3 in Cr. W.J.C. Nos. 105 and 106. According to the petitioners, they did not receive any communication from the respondents as to whether or not they were satisfied from the show cause filed on behalf of the petitioners. Suddenly, in March, 1974, the petitioners learnt that prosecutions u/s 28 of the Act had been launched against them. From inspection of the records of the learned Sub-divisional Magistrate, it appeared that the respondent Enforcement Officer had filed petitions of complaint before him against the petitioners alleging therein the aforesaid three irregularities. In the complaint petitions it was also mentioned that the inspection report and show cause notice had been served on the accused-petitioners. There is no mention in the petitions of complaint about the show cause filed on behalf of the petitioners. The order of sanction by the Government of India, as required by Section 30(1) of the Act, was also enclosed with the petitions of complaint. A copy of the complaint in Cr. W.J.C. No. 93 is Annexure 3 and copies of the complaints in the other cases are

Annexure 4. Orders of sanction are Annexures 4/1 in Cr. W.J.C. Nos. 102 to 106. Petitioners have also annexed copies of the orders passed by the Sub-divisional Magistrate taking cognizance u/s 28 of the Act and summoning the petitioners to stand their trial. They are Annexures 4 in Cr. W.J.C. Nos. 93 and 5 in the rests.

6. As common questions of law and fact arise in these writ applications, they have been heard together and are being disposed of by this common judgment.

7. Learned counsel for the petitioners has submitted that the prosecution of the petitioners, on the facts and in the circumstances of the case, amounts to an abuse of the process of the Court, inasmuch as there was no contravention of any of the provisions of the Act and the Rules, even if the inspection report of the Enforcement Officer be assumed to be correct. In that connection it has been submitted that the Enforcement Officer, having issued show cause notice, should have considered the show cause filed on behalf of the petitioners before launching the prosecution against them. At no stage were the petitioners informed as to why the explanation submitted on their behalf regarding the non-filling of certain columns of the registers in Forms "A" and "B" and non-availability of the profit and loss account and balance sheet at the works spot was not acceptable. It was pointed out that nothing in this connection has even been mentioned in the petitions of complaint, although there is mention about the show cause notice issued to the petitioners.

8. Sub-section (1) of Section 10 of the Act, which is relevant in this case, reads as follows:

(1) Subject to the provisions of Sections 8 and 13, every employer shall be bound to pay to every employee in an accounting year a minimum bonus which shall be four per cent of the salary or wage earned by the employee during the accounting year or forty rupees, whichever is higher, whether there are profits in the accounting year or not;

This four per cent has been subsequently raised, but we are not concerned with that at the present moment. Section 11 which also is relevant reads as follows;

(1) Where in respect of any accounting year the allocable surplus exceeds the amount of minimum bonus payable to the employees u/s 10, the employer shall, in lieu of such minimum, be bound to pay to every employee in the accounting year bonus which shall be an amount in proportion to the salary or wage earned by the employee during the accounting year subject to a maximum of twenty per cent of such salary or wage.

(2) In computing the allocable surplus under this section, the amount set-on or the amount set-off under the provisions of Section 15 shall be taken into account in accordance with the provisions of that section.

9. From a bare reference to Sub-section (1) of Section 10 and Section 11 it is obvious that Section 10 prescribes the rate of minimum bonus to be paid to an employee by his employer, whereas Section 11 prescribes the maximum rate of

the bonus payable. Section 11(1) is to apply only when in any accounting year the allocable surplus exceeds the amount of minimum bonus payable to the employee u/s 10. "Allocable surplus" has been defined in Section 2(4) of the Act in these words :

In this Act, unless the context otherwise requires ?

(4) "Allocable surplus" means?

(a) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income Tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of Section 194 of that Act, sixty-seven per cent of the available surplus in an accounting year;

(b) in any other case, sixty per cent of such available surplus and includes any amount treated as such under Sub-section (2) of Section 34.

In the aforesaid Section 2(4), while defining "allocable surplus" there is a reference to available surplus in any particular year. The procedure for computing available surplus has been prescribed in Section 5 of the Act. Available surplus in respect of any accounting year has to be computed from the gross profits for that year, after deducting there from the sums referred to in Section 6. Sub-section (2) of Section 11 prescribes that, in computing allocable surplus, the amount set-on or the amount set-off under the provisions of Section 15 shall be taken into account in accordance with the provisions of that section. Section 15 prescribes the mode of calculating the set-on and set-off of allocable surplus.

10. From the provisions referred to above, it appears that for payment of minimum bonus only a formula on percentage basis has been prescribed in Sub-section (1) of Section 10, which has to be calculated on the basis of the salary or wage earned by an employee during the accounting year ; and, in the alternative, a fixed sum has been prescribed. But, if the bonus is to be paid in accordance with Section 11 of the Act, then allocable surplus of any accounting year has to be ascertained to find out as to whether it exceeds the amount of minimum bonus payable to the employee concerned u/s 10. I have already pointed out that the Act prescribes the mode of ascertainment of such allocable surplus and it is related to the gross profit of the employer. In computing the allocable surplus the amount set-on or the amount set-off under the provisions of Section 15 of the Act has to be taken into account.

11. According to the petitioners, on the 4th September, 1966, a settlement was arrived at in a conciliation proceeding held by the Regional Labour Commissioner wherein it was agreed that bonus for the accounting years, 1964, 1965, 1966 and 1967 shall be paid at 4% of the total salary wage or Rs. 40, whichever is higher. The said settlement continued to be in force till the 7th February, 1972, when another settlement was mutually arrived at between the workmen through their union and the employer. A copy of the settlement dated the 7th February,

1972 is Annexure I to Cr. W.J.C. Nos. 102 to 106. It has been pointed out that the settlement arrived at in accordance with the provisions of the Industrial Disputes Act on the 4th September, 1966 also covered the period in question in these writ applications, that is, from the accounting year ending on the 30th June, 1969 to the accounting year ending on the 31st December, 1970. This fact has been reiterated even in the settlement arrived at on the 7th February, 1972, wherein it was clearly mentioned that the rate of payment of bonus from 4% to 6% or Rs. 60, whichever is higher, was being raised by the employers for the accounting year commencing in 1971; but it had been agreed by the representatives of the union that the workmen shall not demand any higher rate of bonus, that is, more than 4%, for the accounting years commencing from 1968.1969 and 1970, for which payment of bonus at the rate of 44 had already been made. Learned counsel submitted that, in view of this settlement to pay bonus at percentage basis, which was related to the salary or the wage of the employee concerned or, in the alternative, at a fixed rate, there was no question of filling up the columns of the register in Form "A" showing computation of allocable surplus and the columns in the register in Form "B" showing set-on or set-off for the accounting years in question. According to the learned Counsel, the question of computation of allocable surplus or of the amount of set-on or set-off could arise only if the bonus was to be paid in accordance with Section 11 but, in view of the settlement aforesaid arrived at between the employers and their workmen, the provisions of the Act, including the provisions of Section 11, were not applicable, because of the provisions of Section 34(3), read with Section 32(vii)(b), of the Act. Section 34(3) is in these words :

(3) Nothing contained in this Act shall be construed to preclude employees in any establishment or class of establishments from entering into agreements with their employer from granting them an amount of bonus under a formula which is different from that under this Act.

Provided that any such agreement whereby the employees relinquish the minimum bonus u/s 10 shall be null and void in so far as it purports to deprive them of such rights.

Per se this Sub-section permits employees of any establishment to enter into an agreement with their employer for granting them an amount of bonus on a formula which is different from the Act, subject to this limitation that it shall not be permissible for the employees concerned to relinquish the amount of minimum bonus provided u/s 10. Section 32(vii) runs as follows :

(vii) Nothing in this Act shall apply to employees ?

(a) who have entered before the 29th May, 1965 into any agreement or settlement with their employers for payment of an annual bomu linked with production or productivity in lieu of the bonus on profits; or

(b) who have entered or may enter after that date into any agreement or settlement with their employers for payment of such annual bonus in lieu of the

bonus payable under this Act, for the period for which such agreement or settlement is in operation.

12. In view of the aforesaid provisions, the provisions of the Act are not to apply to employees who have entered into any agreement or settlement with their employers for payment of annual bonus in lieu of bonus payable under the Act after the 29th May, 1965, for the period during which such agreement or settlement was in operation. According to learned Counsel for the petitioners, the settlement of 1966 is not in contravention of the provisions of Section 10, and, as such, it shall exclude the applicability of the provisions of the Act, including Section 11, so far as the employees and the employers are concerned. The employers had to maintain the register only in Form "C" showing what amount of bonus had been paid to such employees, and they had not to fill up the columns of the registers in Forms "A" and "B".

13. Rule 4(a) prescribes that every employer shall prepare and maintain a register showing the computation of the allocable surplus referred to in Clause (4) of Section 2 in Form "A", Rule 4(b) prescribes that every employer shall prepare and maintain a register showing the set-on and set-off of the allocable surplus u/s 15 in Form "B". Rule 4(c), however, prescribes that every employer shall prepare and maintain a register showing the details of the paramount of bonus due to such of the employees, the deductions under Sections 17 and 15 and the amount actually disbursed, in Form "C". In Form "A" there is a column meant for gross profit for the accounting year, depreciation, development rebate, etc, Similarly, in Form "B" the columns to be filled in relate to the amount of allocable surplus and the amount of set-on and/or set-off carried forward, etc. The Enforcement Officer, either in his inspection report or in the petitions of complaint, has not pointed out that the register in Form "C" was also not being maintained. Learned counsel for the petitioners has asserted that the employers were maintaining the register in Form "C" showing what bonus had been paid to which of the employees for the accounting years in question, as required by Rule 4(c). This was not challenged on behalf of the respondents. If the contention on behalf of the petitioners that, in view of the settlement arrived at in the year "1966, the provisions of the Act, including Section 11, were not applicable to the employees of the petitioners, then, in my opinion there was no question or occasion for filling up the columns of the aforesaid registers in Forms "A" and "B", because the bonus had to be paid at fixed percentage or, in the alternative, at a fixed rate, in accordance with the settlement arrived at,

14. The petitioners have asserted in the writ applications that, on the 4th September, 1966, a settlement was arrived at in a conciliation proceeding held by the Regional Labour Commissioner, wherein it was agreed that bonus for the accounting years commencing from 1964, 1965, 1966 and 1967 will be paid at 4% the total salary/wage or Rupees 40/- whichever is higher, as per Section 10 of the Act. There is no denial of this fact in the counter affidavits filed on behalf of respondent No. 1, which have been sworn by the Enforcement Officer. The

settlement of the 7th February, 1972 has also not been denied, except that in respect of that settlement it has been stated that it was arrived at between the employers and the employees on the 7th February, 1972 to Government the default under end the violation of the Act and the Rules. Learned counsel for the petitioners has submitted that, although the settlement which was arrived at in the year 1966 mentioned the years 1964, 1965, 1966 and 1967 yet, by virtue of Section 19(2) of the Industrial Disputes Act, it will be subsisting and binding on the parties till the 7th February, 1972, when it was substituted by Knottier settlement.

15. Sub-section (2) of Section 19 of the Industrial Disputes Act reads as follows:

(2) Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.

This provision, to keep alive any settlement even after the expiry of the period mentioned therein, is for the purpose of maintaining industrial peace; otherwise, if no settlement is arrived at between the parties afresh before the expiry of the period mentioned in the earlier settlement, it is bound to create a vacuum leading to unrest in the industry. This aspect of the matter has been considered by the Calcutta High Court in *National Carbon Co. (India) Ltd. Vs. M.N. Gan, Judge, Labour Appellate Tribunal and Others*, . Sinha, J., while construing the scope of Section 19(2) of the Industrial Disputes Act, pointed out as follows:

A plain reading of Section 19(2) of the said Act shows that where a period is agreed upon during which a settlement shall be binding, then also, upon the expiry of that period, the agreement continues until notice in writing is given of an intention to terminate the settlement and two months thereafter have expired. It will be observed that where no period is fixed still by operation of statute the period is fixed for six months during which the settlement was to be binding. If the period is fixed either by contrast or statute, then it amounts to the same thing, and there is no reason why the provision as to notice and extension of the period during which the settlement would subsist, should refer only to the one and not to the other. We must remember that the Industrial Disputes Act is based on principles of Industrial harmony. It is quite in keeping with this object that a provision should be made maintaining a settlement as long as possible and until on or the other party expressly repudiates the same...

16. The scope of Section 19(2) of the Industrial Disputes Act regarding continuance of a settlement, unless it is terminated by notice, was also considered by the Supreme Court in *Cochin State Power, Light Corporation Ltd. v. Its Workmen* [1964 II L.L.U OO] In that case the settlement had been arrived at

between the appellant before the Supreme Court and its workmen on the 25th November, 1954. It was to remain in force for a period of five years from 1st October, 1954, As such, it was to expire on the 30th September, 1959. The charter of demands was presented to the appellant by the union of its workmen on the 14th October, 1959. The question falling for consideration was as to whether or not by merely presenting the charter of demands saying that the union had terminated the existing settlement, it amounted to a notice u/s 19(2) of the Industrial Disputes Act, Their Lordships observed:

The settlement was thus to expire on 30th September, 1959 but it would continue in force thereafter by virtue of Section 19(2) of the Industrial Disputes Act XIV of 1947 (hereinafter referred to as the Act, unless it was terminated by notice in writing.

They further held that, on the facts of that case, the charter of demands itself showed that the union had terminated the existing settlement and it amounted to sufficient compliance with the provisions of Section 19(2) terminating the earlier settlement. There is nothing on the records of the cases in hand that at any stage prior to the 7th February, 1972 the said settlement was terminated by giving notice "n accordance with Section 19(2) of the Industrial Disputes Act or by presenting any charter of demands, which could amount to a notice u/s 19(2) , Learned counsel for the respondents, however, pointed out that in the agreement dated the 7th February, 1972 there is a mention that there was discussion between the management and the union of the workmen on the question of payment of bonus in the years after 1967 and that the representatives of the union had demanded a rise in the rate of payment of bonus for the accounting years commencing in 1968 and onwards. According to the respondents, this amounted to termination of the settlement of 1966 in accordance with Section 19(2) of the Industrial Disputes Act and once the settlement of 1966 itself was terminated, then there was no settlement during the relevant years and, as such, during those years the provisions of the Act applied. It is difficult to accept the submission made on behalf of the respondents. Any discussion between the employers and the employees or demand on behalf of their union would not amount to termination of the settlement in accordance with Section 19(2). As was pointed out in the aforesaid Supreme Court case, the termination has to be either in accordance with Section 19(2) by giving notice in terms thereof, or there has to be a substantial compliance thereof. One of the parties to the agreement can terminate it only by expressing the same in clear terms, and not merely by agitation.

17. In *Employers of Thungabhadra Industries Ltd. v. Workmen* (supra), it was pointed out as follows:

The Division Bench missed the important circumstance that the union must establish the point of time when the previous award has been terminated. Therefore, the question that should have been tackled was whether on March 8, 1968, when the charter of demands was submitted, there has been a proper

termination of the previous award, as required u/s 19(6). The fact that the workmen went on a strike subsequently may indicate that they are dissatisfied with the refusal of the management to accede to their demands. But that will not satisfy the requirement u/s 19(6). The fact that the appellant parties participated in the conciliation proceedings held by the Conciliation Officer, which is also on a subsequent date, is also of no importance.

It was further observed:

...regarding the termination of an award, it must be fixed with reference to a particular date so as to enable a Court to come to the conclusion that the party giving that intimation has expressed its intention to terminate the award. Such certainty regarding the date is quite essential because the period of two months, after the expiry of which the award ceases to be binding on the parties, will have to be reckoned from the date of such clear intimation regarding the termination of the award.

The aforesaid observations were made in connection with the provisions of Section 19(6), which relates to termination of an award; but the language of Section 19(2) and 19(6) of the Industrial Disputes Act is more or less similar and the same consideration will arise so far as termination of a settlement is concerned. Similar view was expressed in *Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. Workmen* ATR 1268 S.C. 585 In view of Section 31 of the Act, it has not been disputed that the provisions of the Industrial Disputes Act are applicable to settlements referred to in the Act.

18. I am, therefore, of the opinion that the settlement arrived at on the 4th September, 1966 was in force during the relevant period and the employers had to pay bonus according to the rate agreed to by and between the parties, and, in view of Section 32(vii)(b) of the Act, nothing in the said Act was applicable to the employees of the petitioners. As such, the employers had not to prepare and maintain registers in Forms "A" and "B"1, as required by Rules 4(a) and 4(b) of the Rules. Once it is so held, it has to be further held that there has been no contravention on the part of the employers in not filling up the columns of the registers in Forms "A" and "B," as pointed out by the Enforcement Officer.

19. So far as the third alleged contravention regarding non-availability of the profit and loss account and balance sheet at the works spot is concerned, learned Counsel appearing for the petitioners has pointed out that, if the payment was being made in accordance with the settlement at a fixed percentage, or, in the alternative, at a fixed rate, there was no question of keeping profit and loss account or Balance Sheet at the works spot. These registers are kept at the registered office of the employers. Apart from that, there is nothing in the report of the Enforcement Officer, or in the petitions of complaint, from which it could be inferred that he asked for the Profit and Loss account or the Balance Sheet. In the Inspection report, he has simply mentioned as follows :

Profit and Loss Account and Balance Sheet for the year ending on 30-6-1970 has

not been produced? Breach of Section 27(4)." Similarly, in the petitions of complaint he has said that the employer failed to produce Profit and Loss Account and Balance Sheet for the accounting years mentioned therein. Learned counsel for the petitioners point-ed out that the contravention alleged in respect of this item is u/s 27(4) of the Act, which prescribes that any person required to produce any accounts, books, register or other documents or to give information by an Inspector under Sub-section (1) shall be legally bound to do so. Sub-section (2)(b) of Section 27 prescribes that an Inspector may enter any establishment and require any one found in charge thereof "to produce before him for examination any accounts, books, registers and other documents relating to the employment of persons or the payment of salary or wage or bonus in the establishment.

Learned counsel submitted that, if he had demanded the same and given an opportunity, the petitioners could have produced the same by getting it from their registered office. In this connection learned Counsel has also urged that, in view of Section 32(vii)(b), nothing under the Act is applicable to the employees of such establishments which have entered into a settlement, and, then, by necessary implication, even the provisions of Section 27 would not apply to the petitioners and, as such, there could not be any contravention of Section 274. In my opinion, there is no necessity to decide as to whether, when Section 32 prescribes that nothing in the Act shall reapply to the nature of the employees referred to in Section 32(vii)(b), all the provisions of the Act are inapplicable to the establishments in which such employees are employed. In my view, in the present cases, even if it be assumed that it was open to the Enforcement Officer to go and inspect the mines of the petitioners, there has been no contravention of the provisions of Section 274, merely because the Profit and Loss account and the Balance Sheet of the years in question were not at the works spot. The petitioners, in their show cause, clearly stated that the profit and loss account and balance sheet for the different years in question were not kept at the works spot as the payment was being made at fixed rate as per agreement with the workers' union. If the Enforcement Officer was not satisfied with the said reply, which he himself had asked for, he could have directed the petitioners specifically to produce the same at a place desired by him. These provisions have been made for carrying out the objects of the Act that bonus is paid to the employees either in accordance with the provisions of the Act or according to any settlement arrived at between the management and its workmen. In the instant cases there is no allegation that the workmen concerned had not been paid bonus for the years in question in accordance with the settlement arrived at. In that situation, in my opinion, to prosecute the petitioners for the alleged contraventions does amount to an abuse of the process of the Court.

20. Learned counsel appearing for the respondents have strenuously urged that these matters could have been examined even by the trial Court and the power under Articles 226 and 227 of the Constitution should not be invoked by this Court for quashing the prosecutions launched against the petitioners. It is true

that generally this Court insists that the trial Court should first apply its mind to the contentions dried on behalf of the parties regarding contravention of any provision of law ; but in the instant cases no question of fact is in dispute, and, the writ applications having been admitted and the parties having been heard at length, it would be an empty formality to direct the petitioners to face the trial, when, accepting the factum of the alleged contraventions on their face value, there has been no contra, vention of the provisions of the Act or of the Rules calling for the petitioners to be put on trial,

21. In the result, the applications are allowed and the prosecutions launched against the petitioners are quashed.

Sarwar Ali, J.

22. I agree.