
(1996) 09 BOM CK 0001

In the Bombay High Court

Case No : Writ Petition No. 4373 of 1991

Motor Industries Co. Ltd.

APPELLANT

Vs

Popat Muralidhar Patil and others.

RESPONDENT

Date of Decision : 19-09-1996

Acts Referred:

Payment of Bonus Act, 1965 — Section 2(21)

Citation : (1997) 75 FLR 589 : (1997) 2 LLJ 1206 : (1997) 2 MhLj 179

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : C.V. Pawaskar, for the Appellant; R.J. Kochar and Bhatta, for the Respondent

Judgement

1. This is a writ petition under Articles 226 and 227 of the Constitution of India which challenges an order dated August 31, 1991 made by the Labour Court Nasik, in Application (IDA, No. 120 of 1988 under the provisions of Section 33-C(2) of the Industrial Disputes Act, 1947.

2. The short facts relevant for deciding this writ petition are : The First Respondent was in the employment of the petitioner, a Company 1 which manufactures automobile components at its factory at Nasik from or about May 17, 1975 and was last drawing wages of Rs. 2600/- per month. The First Respondent was dismissed from service on July 24, 1986 and he has challenged the order of dismissal in his complaint (ULP) No. 47 of 1988 under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, which I am told at the Bar, is pending before the Industrial Court at Nasik.

3. The first respondent made an Application (IDA) No. 120 of 1988 before the Labour Court at Nasik u/s 33-C(2) of the Industrial Disputes Act and claimed that he was entitled to an amount of Rs. 6000/- (Rupees Six thousand only) as Bonus for the accounting year 1987 which had been wrongfully denied to him. It was the contention of the First Respondent that he was suspended from employment

with effect from August 8, 1986 and continued to be under suspension till he was dismissed from service on July 24, 1986. During the period of suspension the first respondent was paid subsistence allowance at the rates prescribed under the applicable Standing Orders. The first respondent claimed that the subsistence allowance received by him during the period of suspension amounted to 19 salary or wage" within the meaning of Section 2(21) of the Payment of Bonus Act, 1965 (hereinafter referred to as "the Act") and that he was entitled to Bonus thereupon at the rate of 25 per cent.

4. The claim of the first respondent was resisted by the petitioner Company. The petitioner Company contended, in the first place, that the Bonus declared for the accounting year 1987 was only 20 per cent and not 25 per cent as alleged by the first respondent. The petitioner Company also contended that the subsistence allowance paid to the first respondent under the applicable Standing Orders did not amount to salary or wage" within the meaning of Section 2(21) of the Act and, therefore, there was no corresponding liability to pay Bonus thereupon under the provisions of the said Act.

5. The application of the first respondent was tried by the Labour Court, Nasik, which allowed the application by the impugned order dated August 31, 1991 and directed the petitioner Company to pay to the first respondent an amount of Rs. 6000/- (Rupees six thousand only) towards Bonus for the accounting year 1987 together with Rs. 200/- (Rupees two hundred only) as costs of the proceedings. Being aggrieved, the petitioner Company is before this Court.

6. When this writ petition came up for admission and was admitted on October 14, 1991, counsel appearing for both sides agreed that the rate of payment of Bonus for the accounting year 1987 was only at 20 per cent. The Court directed that the petitioner Company shall, without prejudice to its contention, pay an amount of Rs. 3840/- (Rupees Three thousand eight hundred and forty only) being the amount of 20 percent of the subsistence allowance paid to the first respondent during the accounting year 1987 and stayed the impugned order with regard to the balance amount of Rs. 2160/- (Rupees two thousand one hundred and sixty only). When this writ petition was finally heard, Mr. Pawaskar, learned counsel appearing for the petitioner Company stated that this petition is being pressed only with a view to settle the question of law that often crops up in the cases "" the employees suspended and paid subsistence allowance and that, irrespective of the result of this writ petition, the petitioner Company would not seek refund of the sum of Rs. 3840/- (Rupees three thousand eight hundred and forty only) already paid to the first respondent under the impugned order of this Court made on October 14, 1991.

7. Mr. Pawaskar, learned counsel for the petitioner Company, urged two contentions for the consideration of the Court. First, he contended that u/s 8 of the Payment of Bonus Act, 1965 an employer is required to pay bonus to his employee in accordance with the provisions of the Act, provided he has worked 3C in the establishment "for not less than thirty working days in that year". Mr.

Pawaskar contended that during the entire accounting year 1987 the first respondent had not worked even for a single day since he was continuously under 35 suspension. Irrespective of any other consideration, Mr. Pawaskar contended that the first respondent would be ineligible for Bonus in the relevant accounting year, in view of Section 8 of the Act.

Mr. Pawaskar sought to further support his first contention by relying on Section 14 of the Act. He contended that Section 14 of the Act prescribes, by a fiction of law that certain days on which the employee has been unable to work on account enumerated in the to be working days for the purpose of the Act. Four such contingencies are enumerated u/s 14 of the Act : (a) when the employee has been laid off under an agreement or as permitted by the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947, (14 of 1947), or under any other law applicable to the establishment; (b) when he has been on leave with salary or wages; (c) when he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and (d) when the employee has been on maternity leave with salary or wage during the accounting year. It is contended by Mr. Pawaskar that only these four contingencies of non-working are condoned by the statute and that in all other cases the actual number of days worked by the employee during the relevant accounting year must conform to the requirement of Section 8 of the Act to earn eligibility for Bonus for the said accounting year.

8. Though, prima facie, the first contention appears attractive, it cannot be accepted in the wide manner in which it is postulated. It is possible that there may be other situations, like a wrongful dismissal order issued to an employee being set aside by an Industrial Adjudicator who directs the relief of reinstatement of the employee with full back wages and continuity of service, when the employee would be entitled to be paid an amount equivalent to wages for the period falling in any accounting year, even though he might not have worked for a single day in that accounting year. This amount is paid to the employee in order to compensate him for deprivation of an opportunity to earn his wages during the interregnum. By the same logic, it would be reasonable to take the view that all incidental benefits which the employee is deprived of in the interregnum, should also be made available to the employee. It is not disputed that Bonus payable for the accounting year would also be a benefit which the employee would be entitled to upon reinstatement. The theoretical basis for directing such payment of Bonus is that, as a result of the Award of reinstatement with continuity and back wages being, made in favour of the employee, the employee must be deemed to have worked throughout the period of his enforced unemployment. Obviously, this is not one of the contingencies referred to in Section 8 of the Act. Mr. Kochar brought to my notice the judgment of learned single Judge of the High Court of Judicature at Madras in *Superintending Engineer, Vellore Electricity System v. K. Palani and Another* 5 1972 I LLJ 15, which takes the view that Sections 13 and 14 of the Payment of

Bonus Act do not cover all cases where an employee was prevented from working by an illegal order of termination. The judgment holds that, where an employee was ready and willing to work, but for reasons beyond his control was unable to work and gain the eligibility for Bonus u/s 8 of the Act, it cannot be said that Section 14 is a bar for such a claim. The High Court is summed up and said, "On the principle that no man can be made to suffer for no fault of his, the deeming eligibility to acquire bonus contemplated in Section 14, under the circumstances mentioned therein, could not be attracted so as to negative the claim for bonus" for such period to the workman.

9. It is an established canon of interpretation of Statutes that a legal fiction cannot be carried 25 beyond what is expressly enacted by the Statute. Though full effect must be given to a legal fiction, it cannot be extended beyond the purpose for which it is created. As pointed out by Das C J., in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, "a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field". That the contingencies contemplated in Clauses (a), (b), (c) and (d) of Section 3, 1, 14 of the Act are the days on which the employee does not work is obvious. Nonetheless, by a legal fiction the Parliament has enacted in Section 14 that specified days shall be treated as if they were working days as far as the employee is concerned. I am in respectful agreement with the reasoning of the Madras High Court that, in a situation where a dismissed employee is reinstated, his claim for Bonus cannot be defeated on the ground that the employee has 4@ not worked for a number of minimum days as required u/s 14 of the Act. However, I find it difficult to subscribe to the wide proposition that the deeming provisions in Section 14 are to be considered illustrative and not exhaustive. In any event, in the present case the suspension of the first respondent has not been held to be illegal or honest by any competent Authority and, as long as it is not so, the employee must be taken to have not worked during s the period of his suspension. In a situation like the present one, the first respondent employee cannot get the benefit of Section 14 of the Act by analogy as contended by the learned counsel for the first respondent.

10. The second, and the more substantial contention advanced by the learned counsel for the petitioner Company is that subsistence allowance paid to the first respondent workman is not "salary or wage" within the meaning of Section 2(21) of the Act and, therefore, there cannot be any Bonus payable thereupon. An appraisal of the merit of this contention requires a look at the statutory scheme.

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The liability to pay Bonus arises under Sections 10 and 11 of the Act. The quantum of Bonus minimum, maximum or intermediate-is made dependent on the "salary or wage" 25 earned by the employee during the accounting year. The expression "salary or wage" is defined in Section 2(21) of the Act as under :"

""Salary or wage" means all remuneration 30 (other than remuneration in

respect of overtime work) capable of being expressed in terms of money, which would, if the terms of employment, express or implied were fulfilled be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowances (that is to say, all cash payments, by whatever name called, paid to an employee, on account of a rise in the cost of living) but does not include :

- (i) any other allowance which the employee is for the time being entitled to; 45
- (ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any confessional supply of food grain or other articles; so
- (iii) any travelling concession;
- (iv) any bonus including incentive, production and attendance bonus;
- (v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force;
- (vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex-gratia payment made to him;
- (vii) any commission payable to the employee;

Explanation - Where an employee is given in lieu of the whole or part of the salary or wage payable to him, free food allowance or free food by his employer, such food allowance or the value of such food shall for the purpose of this clause, be deemed to form part of the salary or wage of such employee."

Section 2(21) defines the expression "salary or wage" in the main body, extends the definition to include Dearness Allowance and excludes from the definitions seven benefits admissible to an employee. I may, here and now, dispose of a half heard contention of the 31 petitioner Company that subsistence allowance would fall within exclusion (i) enumerated in the definition of "salary or wage". It is contended by the learned counsel for the petitioner Company that subsistence allowance is "any other allowance which the employee is for the time being entitled to" and, therefore, excluded from the definition of "salary" or "wage". I am unable to accept this contention. A convenient label or nomenclature used by the employer to describe cash payment to an employee cannot be determinative of its legal character, or else a dishonest employer would be tempted to christen it conveniently in an attempt to diminish his statutory liability. Despite the description of the amount of payment made to the employee during the suspension as "subsistence allowance", I am of the view that it is not an "allowance", in stricto sensu, in the sense in which the said expression is used in Clause (i) of the exclusionary portion of the definition. Apart from being paid a basic wage and dearness allowance, the workmen are also paid several "allowances" to cover specific contingencies. For instance, there

may be canteen allowance, cycle allowance, washing allowance, cash handling allowance, acting allowance and so on. These are cash payments made to a workman over and above his contractual basic wages in order to meet certain specific contingencies like being required to handle specific responsibilities or to compensate for deprivation of lunch or expenditure on account of conveyance and so on. Basically, these are payments which are made to an employee when employee undertakes a specific obligation in the performance of his employment contract or suffers an expenditure in the performance thereof. I am unable to accept the contention that subsistence allowance belongs to this genre.

11. The next contention, and to my mind, very substantial one, advanced on behalf of the petitioner, is that subsistence allowance does not amount to "salary or wage" even within the main body of the defining section. In order to be "salary or wage", the payment made to an employee must be a remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied were fulfilled, be payable to an employee in respect of his employment or of work done in such employment. Subsistence allowance is payable to the employee under the Certified Standing Orders when an employee is put under suspension pending a domestic enquiry. During such suspension the contract of employment becomes suspended and the employee is neither required to work, nor his employer required to pay. On the other hand, it is a situation where the employer invokes his right to suspend the *vinculum juris* pending a certain contingency. Normally, therefore, upon suspension of the contract of employment, there would have been no liability to make payment of wages at all. However, this would result in harsh consequences to a suspended employee. In order to mitigate the rigour of such harshness, the Statute and Standing Orders require the employer to make certain payment to the employee even during the period of suspension of the contract of employment. The quantum of this payment depends on the exact provisions of the Statute or the Standing Orders and may vary between 1/3rd to the full amount of monthly wages payable to an employee. The moot question is whether the amount paid to an employee for mitigating the harshness of consequences entailing the suspension of the contract of employment can legitimately be described as "remuneration in respect of the employment or work done in the employment." Unless it is essentially a "remuneration", the payment would not fall within the main body of the defining section.

The expression remuneration has not been defined in the Act. The overtones of this expression must, therefore, be ascertained from common parlance as well as legal parlance. The Oxford English Reference Dictionary defines the expression "remunerate" as under :

- "1. reward, pay for service rendered.
2. serve as or recompense for (toil etc.) "or to (a person)."

The shorter Oxford English Dictionary (Third Edition) defines it as :

"To recompense, reward; to pay for something done".

In Jowitt's Dictionary of English Law (1959 Edn.) the term is explained thus :

"a recompense or consideration generally periodically made to a person for his service in another person's business, also wages, stipend, or an annual allowance".

In Stroud's Judicial Dictionary (4th Edn.) 4 the expression "salary" is explained at item (2) thus :

"Where the engagement is for a period, is permanent or substantially permanent in 4 character and is for other than manual or relatively unskilled labour, the remuneration is generally called a salary".

12. Conceptually, remuneration would involve recompense for service rendered by an employee. To take the simplest case, where an employee works and is paid recompense for labour put in by him, it is undoubtedly "remuneration" for his labour. There may, however, be several contracts of employment under which an employee may be entitled to be recompensed even during a period when he is not actually working for the employer. If such be the term in the contract of employment, then the amount to paid to the employee during the period of nonworking would also be "remuneration" payable to the employee in respect "of his employment", though not be "in respect of the work done". In either case, the conceptual underpinning is that the amount paid in terms of money must be "recompense". Analysed thus, subsistence allowance does not bear the stamp of "remuneration" at all. Conceptually, subsistence allowance is a payment of money to the employee during the period of suspension so that the employee and his family must "subsist". By definition, it is made payable only during the period when the contract of employment itself is suspended. In other words, without the employee having a right to work or employer having an obligation to provide work during the period of suspension of the contract of employment, the employer is put under an obligation to ensure that some money is paid to the employee so that he may "subsist" during the period of his suspension. That subsistence allowance is not paid for work done, is thus obvious. In my view, it is not an amount paid by way of "remuneration" to the employee during the period of 3s suspension of contract of employment, nor is it quid pro quo for anything done by the employee. Conceptually, therefore, it is difficult for me to accept the contention of the first respondent's counsel that subsistence allowance go would amount to "remuneration" payable to the employee "in respect of his employment",

13. A number of judgements were cited at the Bar on both sides. All of them, except one is which has not been made available to me, consider and deal with the definition of the expression "wages" as defined in several cognate Statutes like the Payment of Wages Act, the Employees' State Insurance Act and the Industrial Disputes Act. Keeping aside the exclusionary and exclusionary provisions, the expression "Wages" in Section 2(rr) of the Industrial Disputes Act,

1947 is defined to mean all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment. The expression is defined in Section 2(22) of the Employees' State Insurance Act, 1948 (omitting the exclusionary and exclusionary portion) as all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied were fulfilled. The Payment of Wages Act, 1936 defines the expression "wages" in Section 2(vi) (omitting the exclusionary and exclusionary provisions) as all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment. It appears to me that the definition of the expression "wages" in Section 2(22) of the Employees' State Insurance Act is the closest to the one u/s 2(21) of the Payment of Bonus Act. Now, to draw inspiration from the authorities cited at the bar. 3C

In *Anusuyabai Vithal Vs. Mehta J.H.*, a Division Bench of this Court was required to consider the question whether the compensation payable to the employee under the provisions of the Industrial Disputes Act, 1947, is "wages" within the meaning of the Payment of Wages Act. The Division Bench of this Court noted that the first requirement of the definition was that it must be remuneration, second, that it must be payable if the terms of employment are fulfilled and third, that it must be payable in respect of employment or work done in such employment. In my view, these are the very three requirements which are spelt out by Section 2(21) of the Payment of Bonus Act. The Division Bench noticed that the word "remuneration" ordinarily means any consideration which a person receives for giving his services and, therefore, it is a so payment made for services rendered. Even in a situation like lay-off, the Division Bench of this Court held at pp 745-746 :

"When no services are rendered and when in fact there is no obligation to render services and when the amount becomes payable owing to the failure of the employer to provide work, it would be difficult to hold that it is remuneration

Compensation, which is payable for lay off, that is, on account of the failure or inability of the employer to provide work, cannot therefore be said to be remuneration. The payment is made not as consideration for work done or services rendered, but as compensation for temporary loss of employment. "The Division Bench also ruled out the possibility of lay-off compensation being a payment in "respect of employment or work done in such employment" by observing :

"The compensation for lay-off is, therefore, paid in respect of a period when no work is done and when in fact there is no liability on the employer to provide work and on the employee to do work. It is not paid as additional remuneration

for work done previously. It cannot, therefore, be said to be attributable to the employment of a worker or to the work done by him. It is made payable in order to mitigate or reduce the hardship caused by reason of unemployment or temporary loss of employment. Consequently, it cannot be said to be a payment "in respect of employment or work done in such employment."

As, therefore, compensation payable for lay-off is not remuneration and is also not payable to worker in respect of his employment or work done in such employment, it is not "wages", within the meaning of this term given in the main part of definition."

In my view, the observations of the Division Bench in *Anusuyabai (Supra)* are equally applicable to the situation on hand. I have already pointed out that subsistence allowance is not a remuneration nor is it payment made for work done in employment, nor is it remuneration payable to an employee in respect of his employment. In my judgment, the conceptual analysis of the expression "remuneration" made by the Division Bench of this Court applies with force while interpreting the expression "salary or wage" defined in Section 2(21) of the Payment of Bonus Act, since the definitions are *para materia*, at least as far as the main body of the Section is concerned.

In *Employees' State Insurance Corporation Nagpur v. Model Mills Ltd. Nagpur* and another 1974 (45) FJR 538, another Division Bench of our High Court dealt with the definition of "wages" u/s 2(22) of the Employees' State Insurance Act, 1948, prior to amendment and considered the question whether the amount of "wages" paid to the employee while on leave, could be considered to be wages within the meaning of Section 2(22) of the Employees' State Insurance Act so as to attract liability for employer's contribution under the said Act. Though the Court was cognizant of the fact that payment of wages to the employee during the leave period was a liability arising under Sections 79 and 81 of the Factories Act, 1948, the Court rejected the contention that thereby it would amount to "remuneration" as contemplated by the main body of the defining Section of the Act. The Division Bench of this Court held that such a payment would not amount to remuneration within the meaning of the defining Section.

In *Employees' State Insurance Corporation v. Smt. Leela Karunakaran* 1993 1 LLJ 870 the question before the Kerala High Court was whether the subsistence allowance paid to the employee under the provisions of Section 3 of the Payment of Subsistence Allowance Act, 1973 (local Act), would amount to "wages" within the meaning of the definition u/s 2(22) of the Employees' State Insurance Act, 1948. After considering the provisions of the Employees' State Insurance Act as well as the Payment of Subsistence Allowance Act, 1973, the Kerala High Court placed reliance upon the judgment of the Division Bench of this Court in *Model Mills case (supra)* and observed at p 872 :

".... Any how, in this case, obviously, subsistence allowance is not paid for any services rendered. Whatever be the position, for good reasons, which are legally

sustainable, the employee is restrained from rendering any service to the employer. In such circumstances, it is not possible to say that he is rendering service and so he is receiving remuneration. If he is not receiving remuneration, he is not receiving wages within the meaning of Section 2(22) of the Employees' State Insurance Act."

The Judgment of the Full Bench of the Kerala High Court in *Employees State Insurance Corpn. Vs. Malabar Cashewnut and Allied Products and Others*, was referred to and relied upon. In this case, the Full Bench was required to consider the question as to whether the wages paid for certain holidays under the Kerala Industrial Establishments (National and Festival Holidays) Act, 1958, would amount to "wages" as defined in the Employees' State Insurance Act, 1948. The Full Bench of the Kerala High Court cited and respectfully followed the judgment of this Court in *Model Mills*, (supra) and took the view that the amount payable in respect of the leave period, as provided under the Kerala Statute, did not amount to "remuneration" nor "wages" within the meaning of Section 2(22) of the Employees' State Insurance Act. In fact, I may mention here that the judgment of the Division Bench of this Court in *Model Mills* (supra) was confirmed by the Supreme Court in its decision in *Employees' State Insurance Corporation v. Model Mills Nagpur Ltd.* 1992 (80) FJR 81.

Mr. Pawaskar, learned counsel for the petitioner, cited a judgment of the Supreme Court in *Gestetner Duplicators Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal*, . In my view, this judgment is not of much assistance since the question urged therein was whether the expression "salary as defined in Rule 2(h) of Part A of the Fourth Schedule to the Income Tax Act, 1961 included commission payable by an assessee to its employees in terms of their contracts of employment, and if it did whether the proportionate provident fund contribution paid by the employer pertaining to the commission paid by the employer to the salesmen was an allowable deduction u/s 36(i)(iv) of the Income Tax Act, 1961. The Supreme Court was of the view that the commission paid by the employer in the said case to the salesmen clearly fell within the expression "salary" as defined in Rule 2 (h) of Part A of the Fourth Schedule to the said Act and, therefore, the proportionate contributions appertaining to the commission paid by the employer to its salesmen were deductible u/s 26(1)(iv) of the Income Tax Act, 1961. In my view, this judgment is no assistance in our search for the light of wisdom.

14. Mr. Kochar, learned counsel for the first respondent, contends (a) that the amount of subsistence allowance payable to an employee under the contract of employment is "remuneration" (b) that it is paid in respect of his employment and (c) that it is undisputedly a cash payment. All these three vital facets of the definition "salary or wage" in Section 2(21) of the Payment of Bonus Act, 1965, are fulfilled and, therefore, Bonus is payable on the subsistence allowance paid to the, first respondent during the period of his suspension. Mr. Kochar placed reliance on the judgment in the case of *K. Palani* (supra) and contended that

eligibility requirement u/s 8 of the Act could not debar the claim for bonus, since the deeming provision of Section 14 of the Act is merely illustrative and not exhaustive. In the submission of the learned counsel, a contingency of suspension pending enquiry is one of the contingencies which must be subsumed u/s 14, since the contingencies prescribed therein are merely illustrative. As I have already said, it is difficult to accept this submission. The Statute introduces a legal fiction. In my view, it is not open to the Court to extend a statutory fiction by analogy. In other words, the fiction must be applied only in situations expressly enumerated by the Statute and not in situations which appear to be of parallel or equal import. I am, therefore, unable to accept the contention of Mr. Kochar that, the fact that the first respondent workman did not work even for a single day during the concerned accounting year because he was on suspension during the entire period, can be mitigated by an analogical reference to Section 14 of the Act. In my view barring the contingency of an order of termination being declared non est resulting in payment of back wages, it would not be possible to apply the fictional situation contemplated u/s 14 of the Act to others by analogy.

In my view, therefore, the first respondent's claim for Bonus is liable to fail on the very ground that the first respondent was not eligible to receive Bonus in view of his not having fulfilled the eligibility criterion prescribed under the Act.

Mr. Kochar relied on the Judgment of the Supreme Court in *Managing Director, Chalthan Vibhag Sahakari Khand Udyog, Chalthan, District Surat Vs. Government Labour Officer and Others*, and strenuously contended that the judgment, one under the provisions of the Payment of Bonus Act itself, dealing with the definition of "salary or wage" in Section 2(21) of the Act, must be taken to have finally concluded the present controversy. A review of the factual background of the Supreme Court judgment is necessary to appreciate the contention. The Supreme Court was concerned with a claim of an industrial employee in sugar industry, a seasonal industry. In a seasonal industry like the sugar industry, manufacturing activity is carried on during the crushing season and no activities are carried on in the off-season. On the recommendations of the Second Central Industrial Wage Board on the Sugar Industry, as subsequently implemented by the Award of the Industrial Court, Gujarat, the seasonal workmen employed in the sugar factory of the Appellant company were entitled to an allowance known as "retaining allowance". Retaining allowance was paid to the workmen who had to suffer forced idleness during the off-season. During the off-season the services of the seasonal workmen were terminated and such of the workmen who reported for work upon the commencement of the fresh crushing season and worked for at least 40 days in the next ensuing season became eligible for the payment of retaining allowance" which was paid to different categories of workmen at different rates. Retaining allowance was a sort of incentive offered to the workmen to attract them to return to the factory after the expiry of the off-season, since most of the workmen were agriculture based. The question which arose before the Supreme Court was whether the retaining allowance paid to the

workmen amounted to "salary or wage" within the meaning of Section 2(21) of the Payment of Bonus Act and whether Bonus was payable thereupon. Answering the issue in the affirmative and holding that retaining allowance" fell within the expression "salary or wage" and, therefore, must be taken into account for the purpose of calculation of Bonus, the Supreme Court observed at pp 451-452 :

"There can be no doubt that the "retaining allowance" paid to the workmen during the off seasons falls within the substantive part 1! of the definition of the expression "salary or wages". It undoubtedly is remuneration which would, if the terms of employment, express or implied, were fulfilled, be payable to any employee in respect of his employment. The retaining allowance is a remuneration on a lower scale which is paid to the workmen by the management during the off-season for their forced idleness. The payment of such allowance by the management to its workmen during the off-season when there is no work and when the factory is not working is indicative of the fact that it wants to retain their services for the next crushing season. The very fact that retaining allowance is paid to the workmen clearly shows that their services are retained and, therefore, the jural relationship of employer and the employee continues. It is true that a workman may not return to work and may 3.4 take up some other job or employment. In that event, he forfeits the right of payment of the retaining allowance. But when the workman returns to work when the next crushing season starts, the payment of retaining allowance during the off-season, partakes the nature of basic wages on a diminished scale. The definition of the expression "salary or wage" in Section 2(21) of the Act is wide enough to cover the payment of 4, retaining allowance to the workmen. It is nothing but remuneration correlated to service and it would be a misnomer to call it an allowance. The retaining allowance does not fall within the purview of Clause 51 (1) of the exclusionary clause of Section 2(21), but comes within the substantive part of the definition of "salary or wage" in Section 2(21) of the Act. The retaining allowance cannot be construed to be any other allowance which the employee is, for the time being, entitled. The High Court was, therefore, justified in holding that the retaining allowance paid to the seasonal employees was a part of their "salary or wage" within the meaning of Section 2(21) of the Act and, therefore, must be taken into account for the purpose of calculation of bonus payable under the Payment of Bonus Act, 1965". (vide paragraph 6).

Relying heavily on the above observations of the Supreme Court, Mr. Kochar contends that what the Supreme Court postulated about retaining allowance, is equally applicable to subsistence allowance. It is difficult to accept the contention. The Supreme Court pointed out in its judgment that "retaining allowance" was paid as an incentive under the contract of employment so that the workman may return to work 25 when the fresh crushing season commences. It was also paid in order to retain the services of the workmen during the off-season and further that it partook of basic wage on a diminished scale. In my view, none of these considerations 30 would a ply to subsistence

allowance. Subsistence allowance is paid only for the reason that the employee may be able to subsist during the pendency of the domestic enquiry when he is put under suspension. It is not as an incentive at 3,5 all, much less, does not partake the nature of basic wage.

Mr. Kochar urged that the judgment of the Supreme Court in Chalthan Vibhag case (supra) 40 as having impliedly overruled the judgment of our High Court in Anusuyabai case (supra). I am afraid, it is not possible for me to read the judgement in Chalthan Vibhag, (supra) as the learned counsel desires. Anusuyabai (supra) 45 elaborates on the conceptual basis of the expression "remuneration" used both in Section 2(21) of the Payment of; Bonus Act as well as in Section 2(22) of the Employees' State Insurance Act. Chalthan Vibhag, (supra) does not say a so word contrary to the postulations of the Division Bench of our High Court. All that the Supreme Court judgment does is to hold retaining allowance to be "remuneration" arising out of the contract of employment and, therefore, falling within the definition of expression "salary or wage" as defined in Section 2(21) of the Payment of Bonus Art. I am unable to accept that the Judgment in Anusuyabai (supra) is in any way impliedly over-ruled by Chalthan Vibhag (supra).

Mr. Kochar then relied on the judgment of the Kerala High Court in Mohankumar v. Deputy Labour Commissioner 1991 (62) FIR 902, and contended that the judgment supports the contentions canvassed by him. The question which arose for consideration (if the Division Bench of the Kerala High Court in Mohankumar, (supra) was regarding the expression "remuneration" used in the definition of the expression "salary or wage" in Section 2(21) of 1 the Payment of Bonus Act. Doubtless the Kerala Division Bench referred to the expression remuneration" defined in Black's Law Directory as "Reward, recompense, salary, compensation" and that Stroud's Judicial Dictionary, shows "remuneration" as a wider term than "salary" as a quid pro quo and thus the Division Bench held that whatever consideration a person gets for his services is "remuneration" for him The Kerala Division Bench also noticed that another Division Bench of the Kerala High Court had declined to include subsistence allowance given to a suspended employee within "wages" as defined in the Employees' State Insurance Act on the ground that there must be inter-relation between the payment and the service rendered and since the subsistence allowance is a payment made purely by reason of a statutory obligation, it would not amount to "remuneration" or "wages" within the meaning 4 of Section 2(21) of the Payment of Bonus Act. There are two difficulties in accepting Mr. Kochar's arguments. The First is that I am bound by the observations of the Division Bench of our case of Anusuyabai (supra) and Model Mills (supra) which was affirmed by the Supreme Court. To the extent the judgment of the Division Bench of the Kerala High Court in Mohankumar (supra) deviates from the view adopted by the Division Bench of our High Court, I must respectfully differ from it. The second difficulty is that as the Division Bench of Kerala High Court pointed out in Mohankumar (supra) another Division Bench of the Kerala High Court had itself taken the view that subsistence allowance

wouldn't amount to "remuneration" or "wages" within the meaning of Section 2(21) of the Payment of Bonus Act, which is precisely the issue that is canvassed before me. (Unfortunately, neither counsel has been able to produce the said judgment for perusal, but I take it that the extract from the said judgment as contained in paragraph 11 of the judgment in Mohankumar, (supra) is correct and I proceed accordingly). For both reasons, I am unable to accept the contention of learned counsel, Mr. Kochar that the payment made by way of subsistence allowance amounts to "salary" or "wages" within the meaning of the Section 2(21) of the Payment of Bonus Act, 1965. In my view, the claim of the first respondent workman before the Labour Court was entirely misconceived and untenable. The Labour Court erred in granting the claim which ought to have been dismissed.

15. In the result, the writ petition is allowed and the impugned order of the Labour Court, Nasik, dated August 31, 1991 in Application (IDA) No. 120 of 1988 is hereby quashed and set aside. Application (IDA) No. 120 of 1988 is dismissed. It is, however, made clear that the amount of Rs. 3840 (Rupees Three thousand eight hundred forty only), already paid to the first respondent workman under the interim order of this Court dated October 14, 1991 shall not be recovered from him.

Rule accordingly made absolute with no order as to costs.

16. At the request of Mr. Kochar, it is clarified that this judgment decides only the question of eligibility of Bonus on subsistence allowance paid to the first respondent workman and not the question as to whether Bonus is payable on back wages.