

(1991) 10 BOM CK 0020

In the Bombay High Court

Case No : Writ Petition No. 2191 of 1983

Phoenix Mills Ltd. and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 03-10-1991

Acts Referred:

Payment of Bonus Act, 1965 — Section 36

Citation : (1993) 3 LLJ 844

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Advocate : C.U. Singh and R.D. Suvarna, for the Appellant; H.D. Buch and N.D. Buch for R-3, for the Respondent

Final Decision : Allowed

Judgement

Ashok Agarwal, J.—The first petitioner is the Phoenix Mills Ltd. engaged in the business of spinning yarn and weaving and processing of cloth and the second petitioner is one of its share-holders. They have filed the present petition seeking to impugn the order dated 8th June 1983 (Exhibit II to the petition) passed by the Government rejecting the petitioner's application dated 25th October 1982 (Exhibit-C) u/s 36 of the Payment of Bonus Act (21 of 19 6 5) for exemption to pay the minimum bonus to the workers, which at the rate of 8.33% works out to a sum of Rs. 26,60,000/ -. The first respondent is the State of Maharashtra. The second respondent is the Under Secretary to the Government in the Industries Energy & Labour Department and the third respondent is the Rashtriya Mill Mazdoor Sangh which represents the workmen of the petitioners. A few facts leading to the filing of the petition may be stated.

2. On 2nd September 1977 a catastrophic fire engulfed the three storied building which housed the first petitioner Mills. Apart from the damage caused to the building, only 14,500 out of the total of 96,000 spindles could be saved. On 30th October 1977 the petitioners filed their applications before the Government u/s 36 claiming exemption from payment of the bonus for the year ending 31st

March 1977. On 1st November 1977 the said application was rejected. The petitioners carried the matter to this Court by filing Writ Petition No. 1566 of 1977 which came to be summarily rejected by the learned Single Judge on 9th November 1977. The petitioners carried the matter in appeal being Appeal No. 214 of 1977 wherein the Division Bench allowed the appeal on 2nd December 1977, issued Rule on the writ petition and remanded the matter back to the learned Single Judge for disposal on its own merits and in accordance with law. Pending the aforesaid writ petition the Government, on 8th December 1977, issued a letter to the petitioners affording fresh hearing on the application for exemption. On 20th December 1977 the Government passed an order granting exemption as prayed for. In view of the relief granted, nothing now survives in the aforesaid Writ Petition No. 1566 of 1977.

3. On 12th September 1978 the petitioners filed their second application for exemption for the year ended 31st March 1978 and by an order dated 7th September 1979 (Exhibit A to the petition) the same was granted. On 4th January 1979 the first petitioner Mills was declared a relief undertaking (Exhibit B to the Petition). The said declaration has been extended up to date.

4. On 18th January 1982 there was a general textile industries strike in the city of Bombay. The strike was total for a period of three to four months and the first petitioner started limping back to work gradually thereafter. The financial condition of the first petitioner on account of the aforesaid factors suffered a severe set back for the financial year 1st April 19 81 to 31st March 1982. The petitioners, therefore, on 25th October 1982 filed the present application (Exhibit-C) u/s 36 for exemption from payment of minimum bonus for the financial year ending 31st March 1982. On 19th November 1982 the Government issued notices to the petitioners as also several other Cotton Textile Mills which had made similar applications for a meeting to be held on 22nd November 1982. On 5th February 1983 the Government informed the first petitioner that its application for exemption was rejected. The aforesaid communication stated that the detailed order of the Government in the matter will follow. On 8th March 1983 the Deputy Commissioner of Labour called upon the first petitioner to make payment of the minimum bonus. On 15th March 1983 the petitioners requested the Government to furnish them with the detailed order rejecting its prayer for exemption. On 8th June 1983 the Government communicated its reasoned order which is impugned in the present petition.

5. In order to appreciate the rival contentions advanced by the learned Counsel appearing on behalf of the contending parties, it may be convenient to reproduce the provisions of Section 36 of the Payment of Bonus Act, 1965:-

"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."

The above provision empowers the Government to grant exemption on consideration of two relevant factors viz. the financial position and other relevant circumstances of the establishment

6. The Division Bench of this Court in Appeal No.214 of 1 977 in between the same parties was pleased to observe as under:-

".....the legislative intendment is to ensure that profits and prosperity of the concern is shared by the workmen also. In other words, the legislature does not contemplate arising of such liability to pay minimum bonus, when the reserves of the concern are wiped out and the capital itself is exposed to erosion and leaving no hope of any profits further exposing the concern to the danger of being closed or wiped out completely, though mere losses in successive years may not create such danger as long as such losses do not expose the capital itself to danger. That seems to be the reason why while conferring rights on the workmen to get the minimum bonus without regard to whether the business of the year results in the profit or losses, the legislature has, in Section 36, conferred power of exemption from the liability to pay such minimum bonus, having regard to the financial position of the concern and other relevant factors so justify. In other words, by providing for exemption from any or all the provisions of this Act, the legislature has cast a duty on the appropriate Government to examine the financial position and other circumstances of the establishment concerned and decide then as to whether grant or rejection of such application is in the public interest or not. This provision then thus creates right in the parties as also duty on the part of the appropriate Government to consider the application on merits and dispose it off in accordance with the scheme of the Act.

"It is obvious that grant or rejection of such application affects the rights either of the employer or the employees. Article 226 of the Constitution enables every citizen whether employer or workmen to approach this Court and insist on the Judicial review of any such decision. It is well settled that when at the instance of any citizen judicial review of any such decision is resorted to, this Court cannot sit in appeal over the judgment of the appropriate Government. It, however, is under a constitutional obligation to examine whether the decision is arrived at by the relevant and germane considerations or not and in the event of it being found that no relevant but extraneous considerations weighed with the appropriate Government, this Court has a constitutional duty to strike down the same as being bad in Law. It will be enough to refer to the judgment of the Supreme Court in this behalf in the case of State of Bombay Vs. K.P. Krishnan and Others, ."

It was further observed:-

"The learned Advocates for the respondents could not explain to us how the apprehension of closure can be dismissed as speculative or mere bluff. Requiring

the employer to pay from the capital is far from the legislative intent as indicated in Jalan's case (supra). The bonus is intended to enable the workmen to share the profits and the prosperity of the concern and not to accelerate the process of its sinking. Case of mere losses in successive year may not deprive the workmen of the bonus as long as capital is not eroded. But instance when the process of erosion of Capital has commenced is quite different..... We are also reluctant to hold that loss caused by the fire in the month of September, 1977 is an irrelevant consideration merely because the liability had accrued before that date. In our opinion, its relevancy must depend upon the extent of the damage and its effect on the liquidity as also on the stability of the concern. It cannot be irrelevant merely because it takes place after the date of accrual or the liability. It can still be relevant till the actual payment of the damage has caused wiping off all reserves and if consequently the concern is incapable of paying without disposing off its capital asset. Actual financial position also cannot be ignored merely because liability is common to all. Every concern complains of losses and inability to pay. It will be an error to assume that liability is common when Section 36 itself envisages making exception in deserving cases. Each case shall have to be examined on its merits by the State Government to discharge the statutory obligation u/s 36 of the Bonus Act. The existence of particular occasion cannot be ruled out without examining the individual cases. Section 36 itself requires the Government to make distinction between those whose financial position is found to be sound and those whose position is liable to be found otherwise. As observed in Jalan 's case, scheme of payment of compulsory bonus is closely linked with the scheme of set off and set on. This is based on the assumption that running business is not likely to suffer losses for all years to come and situation of its capital being eroded will never arise. When a situation of its capital being exposed to erosion and reserves being wiped out is shown to exist, it should be difficult to say that the said situation would be irrelevant either because accrued rights to bonus are liable to be affected or because incident after the accrual of such right has aggravated or accelerated it or because several other concerns also may fall in the same category or that workmen on whole may not acquiesce therein. Its relevancy, as the relevancy of every circumstances shall have to be determined by the object of the Act, as found by the Supreme Court in Jalan's case, namely to enable the employees to share the profits and the prosperity of the employer....No question of their sharing prosperity can arise when financial position poses a threat to its existence. Reliance by Mr. Gursahani on Jalan's case or on the Judgment of Gujrat High Court in the case of Patel Mills Co. Ltd. v. Textile Labour Association, Ahmedabad 1972 LIC 392 is misconceived. We have discussed Jalan's case in detail. Gujarat High Court only lays down that minimum Bonus cannot be avoided merely because there is a loss in the accounting year concerned. It does not deal with a case where capital is exposed to erosion. The Government cannot abandon its statutory duty u/s 36 in an anxiety to diffuse what is considered to be an explosive situation. Expediency can never be substituted for statutory considerations. There cannot be two opinions as to the need to relieve the plight

of the working class. The question is to what extent it can be relevant u/s 36 of the Act. The above discussed financial position is pregnant with identical consequences, not only to the employer but also to employees, as it raises the possibility of the concern being closed down and the employees being turned out and rendered jobless. Neither side can be sacrificed to appease the other..... It is true that the Legislature has not given any indication as to what these "other factors" can be. However, we find ourselves in agreement with Mr. Gursahani, when he says that such other relevant circumstances can be (1) industrial peace, (2) law and order situation, (3) effect on the production of the consumer goods and (4) difficulties of the management. The extent of their relevance will be determined by the object of the Act discussed earlier.

It is difficult, however, to conceive any of these or other analogous factors not expressly referred in Section 36 having any overriding effect on the grant or refusal of exemption when financial position of any concern poses real threat to its closure. Such financial position is likely to outweigh other factors, as long as concept of bonus is based on sharing profit past, present or future, unlikely in the case of wages under Minimum Wages Act, 1948".

7. In the case of Navbharat Potteries Pvt. Ltd. v. State of Maharashtra and Ors. reported in 1986 II CLR 129 decided by this Court (Coram: Justice Pendse), it was observed:-

It was wrong on the part of the State Government to assume that the Supreme Court has held that in spite of a loss sustained by the employer exemption should not be granted because that would be against the public interest. The reference was made by the State Government to the decision of the Supreme Court reported in Jalan Trading Co. (P) Ltd. and Others Vs. D.M. Aney and Another, . The short order passed by the Supreme Court nowhere propounds such an observation. But on the other hand the Supreme Court merely observed that the provisions of the Act requiring the employer to pay minimum bonus even in the years where there has been a loss is reasonable as contemplated under Article 19(6) of the Constitution. The Supreme Court observed that what is reasonable depends on the variety of circumstances and from these observations it is clear that the Supreme Court did not wish to lay down that the State Government can refuse exemption even if the employer establishes that the financial condition of the concern was hopeless for over several years and the losses were suffered continuously and the entire capital and the assets were wiped out..... The financial condition of the petitioner could not have been ignored by the State government while exercising powers u/s 36 of the Bonus Act..... The State Government also overlooked the third important aspect and that is that the exemption was granted in respect of payment of bonus for the years 1976-77. Admittedly the financial condition of the petitioner went from bad to worse subsequent to year 1976-77 and it is difficult to appreciate how the State Government could overlook this important aspect and decline the exemption. The order granting exemption for the years 1976 and 1977 indicates

that the State Government was impressed by the fact that the petitioner was financially so weak that it was impossible to pay even the minimum bonus. In case the Government had borne this fact in mind, then the exemption for the years 1978 and 1979 would not have been refused."

8. In the case of *S.V.P. Cement Co. v. State of Bihar* reported in 1977 LIC 1692, the Patna High Court observed:-

"It is quite manifest from the said provisions read with the provisions of Section 10 of the Act that the order which the appropriate Government may pass u/s 36 will have civil consequences. If the prayer is allowed the employees will suffer pecuniary loss by being deprived of the statutory bonus payable to them u/s 10 which has to be paid irrespective of whether or not any profits has been earned by the employer. If, on the other hand the petition is rejected, the employer may be hit hard financially. In such a situation the matter has got to be considered objectively in a quasi judicial manner, strictly within the guidelines laid down by the legislature in Section 36 itself and the appropriate Government must state the reasons on the basis of which it has formed the opinion that the establishment concerned is or is not entitled to exemption so that a competent Court of law may examine whether or not the appropriate Government has acted in accordance with the provisions of the section. Section 36 provides that be-fore forming an opinion whether or not exemption should be granted the appropriate Government must take into account the financial position and other relevant circumstances of the establishment or class of establishments concerned. It does not authorise the appropriate Government to form its opinion on the basis of the circumstances, relating to other "factories and establishments similarly placed."

It is further observed: -

"While considering the vires of Section 36 of the Act, the Supreme Court has observed in the case of *Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union*, that the condition for the exercise of the power u/s 36 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 of the establishment or class of establishments and that Parliament has clearly laid down the principles and has given adequate guidance to the appropriate Government in implementing the provisions of Section 36. It was further observed that whether in a given case, power has been properly exercised by the appropriate Government or not, may be considered when occasion arises.

"The decision of the Supreme Court in the case of *Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union*, had been noticed and considered by Pathak J., on a difference of opinion between two other Judges of the Assam and Nagaland High Court who constituted a Division Bench, in the case of *Amal Kumar Chalak v. State of Assam & Nagaland* 1971 LIC 189. The following observations in the

judgment of the said case fully support the view that I have taken (at P. 3 8) :

"25. It is thus clear that the appropriate Government while exercising the power under the provisions of Section 36 must be guided by the principles and guidance provided in the section itself. In exercising this power the appropriate Government must act justly and fairly and not arbitrarily or capriciously. The provisions of Section 36 require that while forming its opinion as to the public interest, the appropriate Government must have due regard to the financial position and other relevant circumstances of any establishment or class of establishments. This would necessarily mean that the order u/s 36 should be speaking order.

26. Though the formation of opinion as to public interest by itself may be an administrative action, Section 36 requires that the Government, before forming such an opinion must have an objective view regarding the financial position and other relevant circumstances of the establishment or class of establishments concerned. The order passed u/s 36 must be passed justly and fairly and for that purpose the order should show that the Government have considered the financial position and other relevant circumstances of the establishments concerned."

"The case of Srinathpur Tea Co. Ltd. v. State of West Bengal 1971 LIC 1011 which was decision of a single Judge of the Calcutta High Court may also be noticed. It has been held in that case that the decision u/s 36 was justiciable and hence the order must be a speaking one".

The above decisions give us a sufficient guidance for determining the factors which are relevant for being considered while deciding on an application for exemption u/s 36.

9. Mr. Singh, the learned counsel appearing on behalf of the petitioners placed reliance on the aforesaid decisions and submitted that the present case was a fit one for being granted exemption by the Government. The Government while declining to grant permission has misdirected itself in not considering relevant factors which are necessary to be considered and has further erred in taking into account extraneous factors which are not germane to the decision of an application u/s 36. He pointed out that the first petitioner had suffered a devastating fire wherein its entire three storied building was practically gutted to ashes. The petitioner could salvage only 14,500 out of the 96,000 spindles. The petitioners were on two earlier occasions granted the exemption taking into account the financial status of the first petitioner. The petitioner has been declared a relief undertaking. The petitioner suffered heavily on account of the General textile Mills strike. In fact the first petitioner was the only one Mill which was not taken over by the Government under the Textile Undertaking (Taking Over of Management) Act, 1983. A total of 14 Mills had applied to the Government for exemption. 13 out of them have been taken over under the aforesaid Act and the first petitioner is the only Mill which has survived its

existence. Mr. Singh placed reliance on the balance-sheets of several years including 1977-78 to 1980-81 which were also submitted before the Government. He also relied upon the undated report for the year 1981-82 which were also submitted before the Government along with its application u/s 36. He has also relied upon the abridged profit and loss account for the year ended 31st March 1991. According to Mr. Singh the financial position of the first petitioner is such that the exemption u/s 36 as claimed ought to have been granted.

9-A. Mr. Singh next pointed out that though 14 different Mills had filed their independent applications for exemption, all the 14 mills were called for a hearing on one single day i.e. 22nd November 1982 and the applications of all the 14 Mills were disposed of by identical orders. The Hon"ble Minister hearing the application thus treated unequals as equals. The impugned order, therefore, suffers from the vice of discrimination under Article 14 of the Constitution of India.

10. Mr. Singh further relied upon the averments contained in paragraphs 12 and 13 of the petition which recite as under :

12. The accumulated losses of Rs. 6,56,82,622/- have not only wiped out the share capital and reserves of the First Petitioner Company, but have put the said Mills in a dismal financial condition. The petitioners crave leave to refer to and rely on their Balance Sheets and Profit and Loss Accounts for the years mentioned above. Though their Mills started operative partially from 11.3.1982 onwards despite the General Strike, the first petitioners are functioning to only 20 per cent of their capacity.

If the first petitioners were to pay bonus at the rate of 8.33 per cent under the provisions of Section 10 of the said Act for the accounting year 1981-82 their losses had increased by a further Rs. 26,60,000/-. Apart from their liability to pay bonus, the first petitioners have the following outstanding liabilities to be fulfilled as on 31st March 1982:

(i)

Fixed Deposit received from the public and to be returned.

Rs. 29,33,500/-

Interest thereon Rs. 19,88,432/-

Rs. 49,21,932/-

(ii)

Employees' Provident Fund (being cleared in monthly Instalments spread over 36 months).

Rs. 51,11,250/-

(iii)

Employees' State Insurance (being cleared in monthly instalments spread over 36 months).

Rs. 34,70,096/-

(iv)

Gratuity payable to workers who have retired.

Rs. 17,09,231/-

(v)

Textile Committee Fees (the Textile Committee is a body formed by the Government of India to ensure quality of textiles for export).

Rs. 2,40,338/-

(vi)

Water charges and property taxes payable to the Municipal Corporation of Greater Bombay.

Rs. 27,70,000/-

(vii)

The First Petitioners' Income Tax arrears in respect of earlier years.

Rs. 95,50,000/- (Approx.)

The petitioners say that the fixed deposit mentioned above are from various creditors, most of whom are small depositors earnestly awaiting return of their loans to the first petitioner company. If the first petitioners are unable to honour their monthly instalments for Employees' Provident Fund and Employees' State Insurance, they will be visited by heavy damages under the provisions of the respective statutes. Further, if they are unable to effect payment of water charges and property taxes payable to the Bombay Municipal Corporation, it is likely that the first petitioner's water connection will be severed resulting in a complete stoppage of operations in the Mills. The first petitioners are also faced with the prospect of forcible recovery of Income Tax arrears by attachment and sale of the Company's assets. If the first petitioners are required to make payment of the sum of Rs. 26,60,000/- as minimum bonus for 1981-82 to their employees, the already deteriorated financial condition of their Mills will be worsened, making their economic survival impossible. The first petitioners will be incapable of paying their liabilities without disposing of their capital assets and the said Mills would almost certainly have to be closed down resulting in unemployment to its workmen and other staff. In these circumstances, the petitioners submit that the financial position of their Mills is such that the disbursement of as large a sum as Rs. 26,60,000/- by way of minimum bonus to its employees for the year ended 31st March 1982 will not be in the public

interest".

Mr. Singh submitted that neither of the respondents have filed any affidavit refuting the averments regarding the financial stringency faced by the petitioners. The aforesaid averments being unrebutted are liable to be accepted.

11. Mr. Singh further relied upon grounds (c) and (n) of the petition which are as under:-

"(c) That the said orders have been passed mechanically and without proper application of mind to the individual merits of the first petitioners" application is amply demon started by the fact that the first respondent has passed a uniform and identical orders in the case of all the Textile Mills which had asked for exemption u/s 36 of the said Act for the year ending 31st March, 1982. The petitioners crave leave to refer to and rely upon Orders passed by the first respondent in the cases of the Mukesh Textile Mills, Shree madhusudhan Mills Ltd., the Tata Mills Ltd., Shree Sitaram Mills Ltd. and the Kohinoor Mills Ltd. and other Mills when produced. The petitioners say that in each case, the financial position of the Mills concerned was never considered individually by the first respondent and a policy decision to refuse exemption was taken for motives which were collateral and impermissible under the provisions of Section 36 of the said Act. The petitioners submit that the orders refusing bonus exemption to the first petitioners are arbitrary and mala fide and have been passed in a colourable exercise of powers under the said Act".

"(a) The petitioners submit that the orders passed against the first petitioners are discriminatory and violative of Article 14 of the Constitution of India. The petitioners have been unfairly bracketed in the same category as several other Mills and have been subjected to uniform treatment, whereas their case differs in circumstances and on merits from that of the other Mills. The first respondent has thus refused exemption to the first petitioners with procrustean equality which is neither warranted nor justified in the present case. The petitioners submit that the impugned orders are arbitrary and unreasonable and are violative of Article 14 of the Constitution of India"".

The said averments have also not been refuted by any of the respondents. Mr. Singh, therefore, submitted that the petitioners are entitled to the relief u/s 36 of the Act.

12. Mr. Dixit, the learned Government Pleader appearing on behalf of respondent Nos. 1 and 2 placed reliance on the case of Jalan Trading Co. (P) Ltd. and Others Vs. D.M. Aney and Another, and contended that mere losses suffered by the petitioners was not a sufficient consideration for grant of relief u/s 36. According to him, it is only when the financial condition has been hopeless for several years and losses are suffered continuously and the entire capital and the assets are wiped out that the exemption u/s 36 can be granted.

13. Mr. Buch, the learned Counsel appearing on behalf of the third respondent

submitted that the financial condition of the first petitioner for a period preceding and following the relevant period of 1981 -82 was not much different but the petitioners have claimed exemption only for the year 1981-82. If the petitioners could pay the minimum bonus for a period prior and subsequent to the relevant period of 1981-82, there is no justifiable reason why the petitioners can claim exemption for the year 1981-82. The petitioners filed the said application soon after the General Textile strike. The present application for exemption is, therefore, penalising the workers possibly for participating in the said strike. Mr. Buch relied upon a case of Associated Publishers Ltd. v. Government of Tamil Nadu and Anr. decided by the Madras High Court and reported in 1985 I LLJ 63, wherein it has been observed: -

"In the facts and circumstances, it is beyond doubt that any amount of exemption from any or all provisions of the Act by the Government in exercise of their powers u/s 36, will not revive the Company. If so, the grant of exemption will not promote public interest".

It has further been observed :-

"The growth in this branch of law is in embryo stage, because the only decision which had in a way construed the power of the Government u/s 36 is the decision of the Division Bench of the Bombay High Court in Appeal No. 214 of 1977 against miscellaneous petition 1566 of 1977. The said judgment was furnished to us and the authenticity is not disputed by all the counsel.

"The constitutional validity of Section 36 is no more open to challenge - see the decision of the Constitutional Bench of the Supreme Court in Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union, . Both Sections 10 and 36 are contemporaneous provisions in the Act. Section 36 enables the Government to exempt any establishment or class of establishments from the purview of all or any of the provisions of the Act. Thus, it is patent that the Government has the competence to exempt any establishment or class of establishments even from Section 10 notwithstanding that Section 10 is mandatory so far as the employer's liability to the workmen and notwithstanding the said provision is an ameliorative one from the point of view of the workmen. Therefore, we are unable to accede to the argument, because bonus is a deferred wage, under no circumstances can the Government in exercise of their power u/s 36 relieve any establishment or class of establishments from the clutches of Section 10... At the outset, we have to point to that the power exercised by this Court under Article 226 of the constitution of India in interfering with the order passed by the Government u/s 36 of the Act is almost the same as the power of interference by this Court with the order of the Government passed u/s 10 of the Industrial Disputes Act. In other words, if extraneous considerations had weighed with the Government, the order is liable to be struck down. If the order is borne out of malice, it is bad. If the order failed to take into consideration all relevant considerations, it suffers from legal infirmity. Besides in a case where the Government exercised its powers u/s 36 of the Act, it is bound to take into

consideration whether such exercise will foster the public interest. A careful reading of Section 36 of the Act will show that the appropriate Government is bound to have regard to (a) financial position and (b) other relevant circumstances of any establishment or class of establishments. The other mandate on the Government is that it shall be satisfied that it would not be in public interest to apply all or any of the provisions of the Act to such establishment or class of establishments. Thus not only has the appropriate Government a duty to consider the financial position and other relevant circumstances of an establishment, but also has to be satisfied that it would not be in public interest to apply all or any of the provisions of the Act. The following manner in which Section 36 is couched, "it will not be in public interest to apply all or any of the provisions of this Act thereto", has its own significance. In our view, the Government must be of the opinion that it will not advance public interest to apply all or any of the provisions of the Act and if such opinion is formed, the Government is bound to grant exemption. It follows therefore that in a converse case, the Government is justified in refusing exemption.

"We therefore find that there are two stages in Section 36. The first stage is that the Government shall consider financial position and other relevant circumstances of an establishment or class of establishment. The second stage is that it should be of the opinion that it would not be in the public interest to apply all or any of the provisions in the Act. To put it differently, the order of Government passed at either stage individually or collectively is open to challenge We had carefully considered the import of Section 36 of the Act and our approach is as follows : Neither recurring loss by itself nor mere wiping out of reserves is a decisive factor. The expression employed is the "financial position of the establishment". Financial position is comprehensive enough to include loss as also various other factors, the totality of which would picture the economic condition of the establishment. It is not possible to exhaust what are the other relevant circumstances. According to the Division Bench of the High Court, the other relevant circumstances are industrial peace, law and order situation, effect on the production of consumer goods and difficulties in the management. We would like to add few more and they are : (a) the workmen principally being responsible for the financial setback of the company and (b) the extent of bonus liability relatable to the loss for the concerned year. Let us now explain. If the workmen had principally contributed to the financial loss of the company, it might be that in order to preserve industrial harmony, the Government may exercise their power u/s 36 and grant exemption. If the bonus liability of the establishment is very negligible compared to the loss suffered by the company, it is not advisable that the power should be exercised by the Government. For when the company were to shoulder all other liabilities, there is no justification whatever to relieve the company of this statutory liability. In other words notwithstanding the exemption, the company cannot save itself from its financial reverses".

Mr. Buch submitted that the liability of payment of minimum bonus is negligible

as compared to the total accumulated losses of the first petitioner. If that be the case, grant of exemption u/s 36 is not likely to give any substantial relief to the first petitioner. The Government, in the circumstances, was justified in refusing the exemption.

14. Having considered the rival contentions raised by the contending parties and keeping in mind the ratio of the decisions of the Supreme Court, of this Court as also the High Courts of Patna and Madras, in my view the petitioners have made out good and sufficient cause for grant of the reliefs u/s 36 of the Payment of Bonus Act 1965. The first petitioner had suffered a devastating fire which must have crippled its very existence. The Government has on two earlier occasions granted exemption to the petitioner. These are relevant factors which ought to have been taken into account while considering the present application for exemption. The first petitioner has continuously suffered financial losses and the same are reflected in the audited accounts which were submitted to the Government. The petitioner has been declared a relief undertaking. Even in the financial year ended 31st March 1990 the first petitioner has suffered and has carried forward losses. The accumulated loss for the year ended 31st March 1990 was Rs. 15,67,47,145/-. If one has regard to the above relevant factors, in my view, it will have to be held that the petitioners have made out a just and sufficient ground for grant of the reliefs u/s 36 of the Act.

15. The impugned order passed by the Government on 8th June 1983 recites asunder:

"The bonus, which is required to be paid by the Management to the employees of the Mills, is for the accounting year 1981-82, which accounting year was not an abnormal year. The period of this accounting year is not covered by the period of the general strike in the Cotton Textile Industry in Greater Bombay which has commenced only in January 1982 and for which accounting year the Management is required to pay bonus to its employees at only the minimum, i.e. 8.33% of their total earnings during the said accounting year, as a statutory liability. The Mill has now re-started working partially. Besides the Management has not proved that the Mill is not a viable Unit. Finally, as pointed out by the representative of the Rashtriya Mill Mazdoor Sangh, the exemption sought for by the Management is not on any grounds of natural calamity.

"In the circumstances, and for the reasons stated above, the application of the Management for exemption from payment of bonus to its employees for the accounting year 1981-82 (i.e. the year ending on 31st March 1982) made u/s 36 of the said Act, 1965 is hereby rejected.

"By order and in the name of the Governor of Maharashtra.

Sd/- Under Secretary to Government".

16. In my view, the aforesaid order does not take into account the relevant factors which I have noted above. It has taken into account irrelevant factors

which are not germane to the case of the first petitioner. According to the impugned order, the accounting year 1981-82 was not an abnormal year. The petitioners have pointed out that they had suffered a devastating fire and had also been declared a relief undertaking. They had suffered constant financial losses. It is, therefore, difficult to appreciate as to how the Government arrived at a finding that the aforesaid period was not an abnormal year. The order further recites that the period of the said accounting year is not covered by the period of the general strike in the cotton textile industries which commenced in January 1982. The exemption which was claimed was for the financial year ending 31st March, 1982. It is, therefore, difficult to subscribe to the view that the general strike in the cotton textile industries which commenced in January 1982 was not covered during the relevant period 1st April 1981 to 31st March 1982. The order makes a note of the fact that the Mills has now re-started working partially. It further holds that the management has not proved that the Mill is not a viable unit. If one has regard to the balance-sheets filed, it is difficult to subscribe to the view that the Mill is a viable unit. Whether the unit is viable or other-wise would not ordinarily be a relevant factor. Whether the financial position of a unit is such as would entitle it to an exemption, whether grant of an exemption from payment of minimum bonus is in the interest of the Mill as also its workers and also in public interest are the relevant factors which have to be taken into account. The same unfortunately have not been taken into account. I find myself unable to subscribe to the view that the exemption sought by the management is not on any ground of natural calamity. The first petitioner had sustained heavy losses in a devastating fire and was adversely affected by the general textile industries strike. In my view the impugned finding that exemption is not sought on ground of natural calamity cannot be sustained. The petitioner has been declared a relief undertaking since the year 1979 and continues as such up-to-date. The first petitioner is the only textile Mill who had applied for exemption u/s 36 and was not taken over by the Government under the Textile Undertaking (Taking over of Management) Act, 1983. The petitioner was accorded exemption by the Government on two previous occasions. The averments contained in paragraphs 12 and 13 and grounds (c) and (n) of the petition which I have reproduced have not been controverted by the respondents. I find that the petitioners have made the instant application u/s 36 bonafide. It has not mechanically made similar applications year after year merely in order to avoid the liability to pay the minimum bonus. Though the relevant period of payment of the minimum bonus relates to the year 1981-82 the petitioners have not been required to pay the same on account of interim orders passed in the present petition. If the said permission were to be refused the petitioners' liability to pay would now arise and if one has regard to the present losses which have been sustained by the first petitioner, this is undoubtedly not a case where the petitioners should be saddled with the said liability. The petitioners have been striving to survive its existence and this has given benefit and has afforded employment to its workers. The effect of fastening of the liability upon the petitioners would be to further deteriorate the financial

condition of the first petitioner. The same will not be in the interest of the workers for, ought one knows, the same may result in the closure of the first petitioner Mill or the same may result in taking over of the Mill by the Government as was done in respect of the thirteen other Mills. Hence grant of exemption as prayed will also be in public interest.

17. In the present case, the Hon''ble Minister decided the applications of 14 Mills by giving a hearing to all the fourteen Mills one single day. Deciding the fate of each of the Mills by passing practically identical orders has in my view contravened the principles of natural justice. Each of these fourteen Mills is bound to have had distinct facts and separate grounds for claiming exemption. It is difficult to envisage how the Hon''ble Minister could have heard the individual cases of each of the fourteen Mills on one single day and have decided the fate of each of the said Mills by passing identical orders. The fact that the Hon''ble Minister has passed practically identical orders in respect of Mills which undoubtedly had distinct facts reflects his non-application of mind. The impugned order is, therefore, liable to be struck down on this ground also.

18. For the foregoing reasons the petition succeeds. The impugned order dated 8th June 1983 (Exhibit-H to the petition) is set aside and the petitioners'' application u/s 36 of the Payment of Bonus Act, 1965 (21 of 1965) is granted.

Rule absolute.

In the facts and circumstances of the case, there shall be no order as to costs.

On the application of Mr. Buch for the third respondent, the issue of the certified copy is expedited.