

(1982) 01 BOM CK 0045

In the Bombay High Court

Case No : Misc. Petition No. 1302 of 1978

Scindia Employees Union and others

APPELLANT

Vs

Scindia Steam Navigation Co. Ltd. and others

RESPONDENT

Date of Decision : 25-01-1982

Acts Referred:

Industrial Disputes Act, 1947 — Section 18, 2

Payment of Bonus Act, 1965 — Section 12, 15, 17, 2(13), 2(21)

Citation : (1982) 45 FLR 420 : (1983) 1 LLJ 347

Hon'ble Judges : S.K. Desai, J

Bench : Single Bench

Judgement

1. Respondents 1 and 2 this petition are The Scindia Steam Navigation Co. Ltd. v. The Scindia Workshop Ltd., the latter being a 100 per cent subsidiary of the former. The first Petitioner is a trade union. A large majority of the employees of the First Respondent Company working in Bombay are members of the said Union. Similarly, the petitioners claim that a large majority of the monthly rated workmen of the Second Respondent are also the members of the First Petitioner Union. Petitioner No. 2, 3 and 4 are employees of the First Respondent. At the time when the petition was filed Petitioners 2 and 3 were employed in the Head Office of the First Respondent Company while Petitioner No. 4 was employed as an Assistant with the Second Respondent. At the time when the petition was filed Petitioner No. 2 drew salary of more than Rs. 1,600 per month while Petitioners No. 3 and 4 drew less than the said amount. Today the position is that all the three are drawing salary (including allowances) in excess of Rs. 1,600. The Third Respondent is the Union of India and has been joined in the circumstances which will be hereinafter mentioned.

2. The petitioners claim that right from the year 1953 onwards the shore staff of Respondents 1 and 2 have been receiving bonus linked with dividend declared and paid to the share-holders of the First Respondent Company in respect of the relevant year. The other employees of the two companies viz. shore officers, floating staff and daily-rated staff have also been receiving bonus at the rate paid

to the shore-staff. The first of such agreement linking bonus to the dividend payable in a particular year was arrived at on May 8, 1953 and the relevant clause of the agreement of the said date has been set out in paragraph 2 of the petition.

3. The petitioners claim that this very formula which they have indicated in paragraph 2 of the petition was continued in the next wage settlements of 14th March, 1957 and 26th March, 1957. In the year 1958 the First Respondent Company issued bonus share and this necessitated revision of the bonus agreement. The revised formula was subsequently incorporated in the wage agreement dated 5th July, 1961. In this formula it is material to note, it has been specifically mentioned that the same scale of bonus would be applicable to the employees of the Second Respondent Company irrespective of the profits or losses of the Company. Subsequently an identical formula was incorporated in the settlements of 12th November, 1966 and 17th July, 1971.

4. In the year 1973 the First Respondent Company again issued bonus share to its share-holders and it was correspondingly agreed between the first Respondent and the Union that the scale of bonus would be raised by 20 per cent. There was a further agreement at the same time that the First Respondent Company would contribute upto 10 per cent of the annual salary towards the Pension Fund of such of the members of the Union who drew more than Rs. 400 per month as basic salary and the Union would accept reduction of a like amount in the quantum of bonus payable to these employees. This revised formula was incorporated in the periodical wage settlement arrived at between the Union and the First Respondent on December 5, 1974. The petitioners state that another Union viz. Scindia Employees Union which represents the employees of the First Respondent at Calcutta was also to be a party to the said settlement. The petitioners, however, have proceeded to make submissions in the petition ignoring the other Union and on the express footing that the settlement between Petitioner No. 1 and Respondent No. 1 Company has to be accepted as one under S. 18 read with S. 2(p) of the Industrial Disputes Act, 1947. The formula is contained in Chapter VIII and the relevant Cl. 8.1 has been fully extracted and set out in paragraph 4 of the present petition. There was a further provision that if there was any amendment to the Payment of Bonus Act, 1965, the aforesaid scales of bonus would be discussed and modified if necessary in consultation with the Unions. Under Cl. 1.1 of the said settlement the settlement was to take effect from January 1, 1974 and was to remain in force for a period of four years commencing from the said date and ending on 31st December, 1977.

5. The petitioners state that in accordance with the formula for the year ending on June 30, 1974 Respondent 1 and 2 paid to all their employees bonus in accordance with the said formula. Employees drawing upto Rs. 400 basic salary were paid 36 per cent of the gross salary as bonus whereas employees whose basic salary exceeded Rs. 400 per month were paid 26% by way of bonus and the balance 10% was contributed by the two companies towards their pension

scheme.

6. Thereafter S. 34 of the Payment of Bonus Act, 1965 was amended by Payment of Bonus Ordinance No. 11 of 1975 (subsequently replaced by Act 23 of 1976) and relying upon the changes effected by the aforesaid Ordinance and Act, it was contended by the employers that the provision in the settlement concerning bonus stood abrogated and that Respondents 1 and 2 were obliged to comply with the restrictions and limitations prescribed by the amending Act of 1976. The petitioners claim that the First Petitioner Union under misconception of the true legal effect of the said changes accepted bonus at the rate of 20 per cent of the gross salary for the year ending June 30, 1975. According to the petitioners there was some industrial strife thereafter resulting in a strike and on March 29th, 1978 a settlement was arrived at which inter alia included some provision for bonus (under cl. 5 thereof).

7. By the aforesaid clause the following agreement was recorded :

"The company agrees to pay 20 per cent of the amount of salary earned as bonus without ceiling to all staff Members for the year 1975/76 subject, however, to the approval of S.D.F.C. (Shipping Development Fund Committee) to whom an application has already been made and reply thereto is awaited."

The proposal, however, to which the employers and the employees has agreed did not meet the approval of the Shipping Development Fund Committee and in its view the payment of bonus should be made subject to the maximum of Rs. 1,800 (in the aggregate). Accordingly the First Respondent Company did not made payment of bonus for the year 1975-76 to the employees getting salary in excess of Rs. 1,600 per month. The petitioners contended that by reason of the said non-approval the settlements (in so far as the question of bonus was concerned) had become infructuous void and/or voidable. For the remaining two years, it is the admitted position that the companies have made payment at the maximum rate provided under the said enactment and not under the settlement with the workmen. It may be mentioned that as far as Respondent No. 1 is concerned, it is found from statements prepared by the employers that as against the aggregate amounts in excess of Rs. 75 lakhs, 47 lakhs and 37 lakhs which would have been payable for the three years, under the settlement, the employer paid amounts of about Rs. 19 lakhs, Rs. 4,60,000 and Rs. 2 lakhs only under the Scheme conceived by the enactment as amended. The aggregate difference for the years between what was receivable by the employees under the settlement and what was received by them under the Act comes to over Rs. 1,34,00,000. This is only in respect of the staff of Bombay, the figures for the staff at Calcutta as also the staff of the Second Respondent both at Bombay and Calcutta which reveal a similar tale are indeed staggering. It would appear that the employees have lost the benefit under the settlement principally because of the definition of "employee" contained in S. 2(13) read with S. 12 of the Payment of Bonus Act which has been applied to deny bonus to employees drawing above the specified figure viz. Rs. 1,600.

8. Mr. Singhvi appearing on behalf of the petitioners raised two principal contentions which require to be considered. In the first place according to his submission the Bonus Act speaks as a whole Code on the sole subject of profit-based bonus but is silent on other distinct and different kinds of bonus such as traditional, customary, festival or statutory. Accordingly it was submitted that by implication the latter type of bonus cannot be deemed as "annihilated" by the Bonus Act. Reliance for this preposition was placed on *The Mumbai Kamgar Sabha, Bombay Vs. Abdulbhai Faizullabhai and Others*, and *Hukumchand Jute Mills Ltd. Vs. Second Industrial Tribunal, West Bengal and Others*,

9. The second plea of Mr. Singhvi is based upon a decision of a Division Bench of this High Court in *Petroleum Employees Union v. Industrial Court Maharashtra, Bombay* and another, (Special Civil Application No. 5540 of 1976 decided on 14th February, 1980). The Division Bench was considering an agreement by which the Hindustan Petroleum Corporation Ltd. had agreed to make ex gratia payment in lieu of bonus to the employees earning more than Rs. 1,600 per month. The Corporation made the necessary payment but on receipt of subsequent advice from the Central Government started deducting certain amounts from the salaries of such employees. This was attacked as an unfair labour practice and a complaint was filed. The complaint was dismissed by the Industrial Court and it was the validity of the order of the Industrial Court which was challenged in the Special Civil Application. On behalf of the employees it was contended that the amendments of the Income Tax or the Bonus Act cannot relieve the employer of his obligation to carry out the agreement. It was held by the Division Bench that employees drawing gross salary exceeding Rs. 1,600 are not employees within the definition found in S. 2(13) of the Bonus Act. It was contended on behalf of the employer that such payment was barred by S. 34 of the Bonus Act. The contention was decisively rejected by the Division Bench. The Division Bench also considered the employer's plea based on the amendment of the Income Tax Act and held that this amendment had no bearing on the question.

10. On behalf of the Company it was submitted that the reliance placed on behalf of the employees on the judgment of Mr. Justice Krishna Iyer was misconceived in as much as the judgment dealt with the provisions of the Bonus Act prior to their amendment. It was submitted further that in any case the observations in the judgment of the Supreme Court directly related to traditional, festival or customary bonuses and that the observations therein pertaining to contractual bonus were in the nature of casual observations. It was submitted that this court was not bound by the said casual observations. It was, in the further alternative, urged that bonus linked with dividend was bonus based on profit and though it was not necessarily correctable with profits earned during a particular financial year in as much as dividend could be paid, as demonstrated by the petitioners in the affidavit in rejoinder, out of past profits, it can be for distribution of further dividend either from Dividend Equalisation Fund or general reserves. It becomes necessary in this background to examine the rival submissions.

10-A. In the first place it would not be proper to disregard any observations made in Mumbai Kamgar Sabha's case (supra) as casual observations. The Court was principally considering festival or traditional bonuses, but nevertheless Krishna Iyer J. speaking for the Court considered the whole scheme of the Payment of Bonus Act, the nature and position of the parties arrayed against each other and ultimately observed that the Bonus Act dealt with only profit bonus and matters connected therewith and did not govern customary, traditional or contractual bonus. (See paragraph 35 of the report in The Mumbai Kamgar Sabha, Bombay Vs. Abdulbhai Faizullabhai and Others, Even regarded as obiter, the observation is binding on me. The crux of the matter then is whether bonus linked to dividend is profit bonus. If it is, then applying the observations of Krishna Iyer J., such agreements would be covered by the provisions of the Payment of Bonus Act. If such a bonus agreement cannot be considered to be a profit bonus or a profit-based bonus, then the same must be regarded as contractual bonus and not dealt with or provided for by the Bonus Act. In my view, if it is a profit-based bonus, merely because the same is based on an agreement, settlement or contract, would not take it out of the purview of the Bonus Act. The question, however, is : Can such a bonus be accepted to be a species or type of profit-based bonus ?

11. Now in the affidavit in rejoinder the petitioners have given cogent instances after showing in Ex. A how for various years the First Respondent Company has paid dividend to its share-holders even when the net profit available for distribution was not sufficient to justify the distribution of the said dividend or even when there was a net loss. The table Ex. A shows that even for one year when there is a large profit, for that particular year large or any dividend may not be declared in view of past losses being carried forward. On the other hand, on behalf of the Company my attention was drawn to the provision for set-on and set-off in the Payment of Bonus Act and it was submitted that bonus under the said Act was not necessarily correlated with the available surplus for a particular year and there was intrinsic provision also to bear in mind previous profits or previous losses. It was submitted further after some research was done and time taken for the same that labour tribunals and other bodies dealing with labour laws have always treated bonus linked to dividend as a species of bonus based on profits and the latter expression when utilised by Krishna Iyer, J. in the judgments on which reliance was placed by Mr. Singhvi must be understood in the sense of including bonus linked to dividend.

12. I first propose to discuss the question on the assumption that the expression has occurred or come up for judicial consideration for the first time. In my view, the scheme underlying the Payment of Bonus Act is primarily and substantially to be made with reference to profits earned during one particular accounting year. I say so despite the provisions contained in S. 15 which are ameliorative or corrective and do not dispel the principal footing which is adverted to earlier. On the other hand, the Companies Act only requires that dividends be paid out of profits (and not out of capital) and there is no statutory provision which provides

that distribution of dividends can only be made out of the profits made in a particular financial year. If the matters were *res integra*, then I would regard bonus linked to dividend as basically somewhat different from bonus linked to or based on profits. The underlying idea of the former appears to me to be to link the bonus distributed to the employees with share of profits, present or past, distributed to the share-holders. If the share-holders are paid more by way of enhanced dividend (irrespective of whether it is justified by the current year's profits) the employees would get more by way of bonus. However, even when there are bumper profits if a company conserves its reserves and the share-holders paid a small or no dividend for such purpose, then the bonus paid to the employees, if it is linked to dividend, would be less than it would be justified by the current year's profit. The formula is based, in my opinion, on totally different considerations than one in which bonus is linked to profits of one year. The approach under the Payment of Bonus Act would appear to me to be different. The distribution made to the share-holders is kept totally out of purview and dividends paid have been made irrelevant. Had the matter rested at this, then I would have been inclined to uphold Mr. Singhvi's submission that bonus linked to dividend when created by settlement or agreement must be held to be or accepted to be contractual bonus beyond the scope or purview of the Bonus Act which deals only with profits-based bonus.

13. Counsel on behalf of the respondents, however, has drawn my attention to certain decisions of Labour Tribunals as also to Report of the Bonus Commission 1964 which appear to have expressed the view or made observations to the effect that bonus based on dividends is but a species of profit-based bonus. For example, paragraph 2.39 of the Report of the Bonus Commission 1964 makes reference to the bonus scheme for the employees of India Iron and Steel Company Ltd., for four years 1959-60 to 1962-63. The bonus provided is equivalent to 25% of the money distributed to equity share-holders or a certain specified sum whichever is greater, but also subject to a certain maximum. This was described by the Bonus Commission as a profit sharing bonus scheme. In 1953 I L.L.J. 587 the Labour Appellate Tribunal of India (at Calcutta) was considering a dispute between the Bihar Firebricks and Potteries, Ltd. v. Manbhum and Their Workmen (*supra*). Certain observations regarding the workmen's claim for profit-sharing bonus were made and the Tribunal observed as follows :

"xx xx xx As no analysis for less a detailed analysis of the account figures, was attempted to be made on behalf of either party and as the claim in this case is for a profit bonus, I would consider it expedient to link the profit bonus to the dividend declared by the company I direct that the workers in this factory be allowed two days basic wages for every 1 percent dividend declared on ordinary share capital paid up."

Although the direction for bonus given by the Tribunal was subsequently set aside by the Labour Appellate Tribunal, the fact nevertheless remains the

Tribunal awarded this formula for bonus considering the same as the proper and valid one in respect of a claim for bonus on profits.

14. A similar view has been taken by several other awards and decisions given by Industrial Tribunals. For example, I was referred to 1949 (I) L.L.J. 20 . It has been observed there that bonus paid should be linked to profits distributed, i.e. the dividend declared. In that very issue is to be found an award relating to certain demands of the workmen of The Indian Copper Corporation Ltd. (see page 809 at p. 812). Those observations need not be set out in full, but it would appear clearly established that bonus linked to dividend has been considered to be a type of profit-sharing bonus by Industrial Tribunals. It would appear that linking bonus to dividend has been one of the methods adopted for trying to ascertain the proper formula for linking bonus to profits earned by employees. This formula has found favour with certain Tribunals e.g. Madras and U.P. but not adopted by the Bombay Tribunals. We are not concerned whether the formula is right or wrong, just or unjust, proper or improper but with the more fundamental question viz. whether bonus linked with dividend or correlated with dividend can be considered as the broad type of bonus linked to profits.

15. My attention was drawn by Mr. Damania appearing on behalf of the petitioners to Muir Mills Co. Ltd. Vs. Suti Mills Mazdoor Union, Kanpur, and in particular to pages 5 and 6 of the the report. The Supreme Court has therein made certain observations on the decision given by the Labour Appellate Tribunal on the respondent Union's contention that bonus should not be linked to dividend. A number of features of such formulae have been pointed which in the opinion of the Court made one unsatisfactory than another which would link the distribution of bonus to the profits earned in a particular year. But in my opinion the observations to which my attention was drawn were not germane to the point under consideration viz. whether bonus linked to dividend was a species or type of profit based or a totally different type of bonus altogether. What we are concerned is with this question and not with the question whether this is a proper, desirable or just formula.

16. In my opinion, sufficient material has been brought on record on behalf of the respondents to demonstrate conclusively that bonus linked to dividend has been accepted and always regarded by Labour Courts, Industrial Tribunals and Labour Appellate Tribunals as a type of profit-based bonus. That being so, it must be held further that when Krishna Iyer, J. used the phrase, it must have been used as taking within its compass bonus linked to the dividend. Once this step is taken, as I must take it, it follows that the bonus agreed to be given by Respondents 1 and 2 to their employees under the settlements already adverted to, were within the compass of the provisions contained in the Payment of Bonus Act and not outside. Such bonus although in pursuance of a settlement could not be accepted as traditional festival or customary bonus which is kept by Krishna Iyer, J. outside the import of S. 34 of the Payment of Bonus Act. In this view of the matter, the first plea of Mr. singhvi has to be repelled and cannot be accepted.

17. As far as the second plea is concerned I feel there is not answer to the same in view of the decision of the Division Bench in Special Civil Application No. 5540 of 1976 already adverted to earlier. I am bound by the said decision and all the submissions and arguments which can be advanced against the plea of Mr. Singhvi have been duly considered and rejected by the said Bench. In view of this decision it will have to be held that employees of the two employer companies drawing gross salary exceeding Rs. 1600/- will be entitled to receive bonus linked with dividend for the period covered by the settlement and it cannot be properly contended that they have lost the right to receive bonus under the settlement by reasons of the provisions of the Payment of Bonus Act even after the amendment thereof. It is true that this would result in a somewhat analogous situation viz. that bonus linked to dividend would be available and will have to be paid to the employees drawing higher salary and bonus at the lower rate or scale provided under the Payment of Bonus Act would be payable to employees drawing a salary below this figure. This anomaly can be removed by wise employer if he decides to pay bonus under the settlement to all employees. It is an anomaly which is the result of statutory provision and the decision of a litigation or the proper order to be passed thereon cannot be nullified or modified because of such anomaly.

18. Another anomaly which is immediately apparent is one which was also placed for consideration before the Division Bench of this Court and it is that under S. 17 of the Payment of Bonus Act adjustment of customary or interim bonus against bonus payable under the Act is provided. It was submitted that for the employees drawing gross salary in excess of Rs. 1600/- if they were to be held entitled to bonus under the settlement i.e. bonus linked to dividend distributed for a particular financial year, the company would not be entitled to any credit for bonus already paid under the Act i.e. as far as these employees are concerned, a submission which is misconceived, since such employees are not entitled to any bonus under this Act. Thus, as far as these employees are concerned, there can never be a question of payment of double bonus i.e. once under the settlement and second time under the Act. If I had accepted the plea of the employees that all employees irrespective of this ceiling are still entitled to bonus under the settlement, there would have been a question of double payment in respect of employees drawing gross salary under Rs. 1600/-. In respect of these employees, however, a settlement was made on behalf of the petitioners that they are agreeable to give credit to the employer companies in respect of bonus already paid to them under the Act. In any case, even without any such concession or statement, if it had become necessary, the equitable reliefs to be granted to the Company could have been considered by the Court at the time of issuing the mandamus or directions sought for. In the present case, however, this question does not arise for determination.

19. A faint attempt has been made by Counsel on behalf of employers to distinguish the Division Bench Judgment. With respect to him I have not been able to understand the point of distinction.

20. It was strenuously urged that the writ jurisdiction of the High Court ought not to be utilised for giving such relief directly to the employees when the employees had failed to avail of the ordinary remedy under labour law. In this case as already stated, a complaint was filed by the employees which complaint was subsequently withdrawn. Now there is a good reason why employees or the petitioners representing the employees took the decision to withdraw the said complaint. In the present writ proceedings the vires of certain provisions had been assailed and it might not have been open to the employees to successfully challenge these provisions in the proceedings under the ordinary labour law. It is true that ultimately these points have not been urged, but that is a different matter altogether.

21. In connection with this submission viz. that the writ jurisdiction should not be utilised for the purpose of directly giving to the employees relief which they have sought against private employers (who are admittedly not a State within the meaning of the Constitution.) Mr. Singhvi drew my attention to the decision of the Supreme Court in *Rohtas Industries Ltd. and Another Vs. Rohtas Industries Staff Union and Others*, . It has been observed by the Supreme Court that the extensive and extra-ordinary power of the High Courts under Art. 226 of the Constitution is as wide as the amplitude of the language used indicates and so can affect any person even a private individual and be available for any (other) purpose even one for which another remedy may exist. It has been observed further that the mentor of law is justice and a potent drug should be judiciously administered. Undoubtedly power does exist in the High Courts. I have not been able to understand the propriety of the submission that at this juncture the employees should be asked to go back to the Labour Courts or the ordinary labour tribunals. Indeed it is difficult to say whether employees drawing salary in excess of Rs. 1,600/- in whose favour I propose to give the necessary direction the employees were entitled to come to the Court when the vires of certain provisions was assailed and the matter indeed was one in which the petitioners were entitled to move the High Court in its writ jurisdiction under Art. 226 of the Constitution of India. Nearly four years after the admission of the matter it would in my opinion, not at all be proper for the Court to deny to the petitioners exercise of its writ jurisdiction on the ground that this was not a fit case in which to use it. Indeed it is one of the few cases in which it would be improper not to exercise writ jurisdiction if otherwise the petitioners had made out a good case for the exercise thereof.

22. This discussion covers the principal points urged at the Bar. In my opinion although I have my personal doubts the employees drawing gross salary below Rs. 1,600/- would not be entitled to bonus as provided under their settlement with the employers. This is by reason of the Payment of Bonus Act as amended at the relevant date. No such limitation or restriction of their contractual bonus is available as against other employees i.e. those drawing a gross salary in excess of Rs. 1,600/-. It was then contended that by reason of the settlement with the Union arrived at on 29th March, 1978 such employees must be deemed to have

given up their right to dividend linked bonus. Reliance was placed on Cl. 5 of the said settlement. A copy of the settlement is annexed to the affidavit of the respondents. The said Cl. 5 reads as follows :

"The Company agrees to pay twenty per cent of the amount of salary earned as bonus without any ceiling to all staff members for the year 1975/76, subject, however to the approval of S.D.F.C. to whom an application has already been made and reply thereto is awaited."

It is the admitted position that what was agreed to between the employer and the employees (through the Union) was expressly made subject to the approval of the S.D.F.C. which approval was not given. Thus, one of the important conditions of the agreement failed. When such a condition fails, the agreement itself must be deemed to have failed qua this clause. In any case even apart from this clause pertains to the year 1975-76 and would have no application for the later two years. It is, therefore, not possible to accept the contention raised on behalf of the employers that by reason of Cl. 5 of the settlement the petitioners or the employees have lost their right under the earlier settlement by which bonus was linked to dividend.

23. I may make it clear that in the petition fairly substantial constitutional points were raised. However, Mr. Singhvi has chosen not to argue them in this Court but reserve right to do so at a higher level if necessary. The clarification is made to protect the interests of the petitioner in the higher Courts.

24. The petitioners gave for the sake of quick calculation indicated the number of employees who would have been entitled had the petitioners succeeded in full. Fresh calculations, however, will have to be made inasmuch as the relief sought for is under this judgment granted to the employees drawing gross salary in excess of Rs. 1,600/- Accordingly the rule is made absolute against the respondents i.e. Respondents 1 and 2 in terms of prayer (d) but restricted only to these employees of theirs drawing gross salary in excess of Rs. 1,600/- during three years under consideration. Some difficulty is likely to be caused in respect of the employees of Respondents 1 and 2 who crossed this figure of Rs. 1,600/- (gross salary) during a particular financial year. In their case I would like the petitioners and Respondents 1 and 2 to ascertain the position i.e. whether for part of the year when they were drawing salary below Rs. 1,600/- they have been paid proportionate bonus under the Bonus Act. As I want to give clarification regarding these persons I give to the Respondents 1 and 2 time upto 6th February, 1982 to inform the petitioners" advocate about the names and positions in respect of such employees. The petitioners also to make necessary inquiries forthwith thereafter and the petition to be placed on my board on 15th February, 1982 for final directions regarding these employees as also regarding costs. (16th February, 1982)

25. In continuation of my judgment, the first question to be considered is what happens to an employee if he crosses the figure of Rs. 1,600/- during the middle

of an accounting year. I have seen the definition of "employee" under S. 2(13) of the Payment of Bonus Act and "salary" or "wage" under S. 2(21). The practice followed by the employers who are concerned in this petition appears to be that for the purpose of consideration whether a particular employee is or is not covered by the Payment of Bonus Act, the Company considers the entire salary or wage for the accounting year and if the same exceeds Rs. 19,200/- i.e., Rs. 1,600/- x 12 then he would not be covered by the definition of "employee". The Act does not indicate whether the method of averaging is to be employed or not or whether employees have to be considered month-wise. For the purposes of this petition I think the method of averaging can be employed. Prima facie it is fair or at any rate not so unfair that it needs to be rejected particularly in view of the practice of the employers. Accordingly, for the purposes of giving benefit under this judgment the method of aggregating the year's salary or wage and thereafter dividing it by 12 will have to be followed. The benefit will go to such of the employees who after following this method get salary or wage exceeding Rs. 1,600/- per month.

26. The next question concerns four allowances which are payable to the employees of this Company. These are under the settlement of 5th December, 1974. The four allowances are (i) ad hoc allowance at the rate of Rs. 40/- p.m. (ii) family allowance at the rate of Rs. 30/- p.m. (iii) house rent allowance at the rate of Rs. 60/- p.m. and (iv) tiffin allowance at the rate of Rs. 25/- p.m. According to Mr. Singhvi house rent allowance would be excluded by the reason of the specific provision in S. 2(21)(ii) of the Bonus Act and the other three are required to be considered as part of salary or wage.

27. On behalf of the employers it has been urged that it has been the practice of the employer even after the Bonus Act only to consider the salary plus dearness allowance and to exclude all four allowances. This statement must be put on date and in addition the employer must indicate giving specific names as to which of the employees have been given the benefits of bonus under the Payment of Bonus Act on this footing viz. after excluding from consideration of their salary or wage these four allowances. This need not be an exhaustive list but a representative list of any of ten workmen from Bombay and five from Calcutta, Copy of the necessary affidavit to be furnished to the petitioners" advocate on or before Tuesday 23rd day of February, 1982. The matter to stand over till 26th February, 1982, for further orders.

Friday, 26th February, 1982

Appearances as before.

28. This matter has been placed today for final directions and we are principally called upon to consider whether the four allowances referred to in paragraph 25 of the judgment are to be included in the concept of salary or wage as defined by S. 2(21) of the Payment of Bonus Act, 1965. The definition includes within the ambit of "salary" or "wage" dearness allowance (that is to say, all cash payment

by whatever name called, paid to an employee on account of a rise in the cost of living), but does not include any other allowance which the employee is for the time being entitled to.

29. The first of the four allowances under consideration is an ad hoc allowance at the rate of Rs. 40/- p.m. This is being paid to all employees from 1971 onwards and the payment was also confirmed in the settlement of 1974. No reason could be offered by the Company why the ad hoc allowance was decided upon in 1971. Although it is not called dearness allowance, the definition includes all cash payments made to employees on account of rise in the cost of living and in my opinion such ad hoc allowances would ordinarily be included in the concept of dearness allowance unless it could be shown by the party contending that it ought not to be included that it was paid to the employees or some of the employees for a specific purpose or a specific reason.

30. The fourth allowance is a tiffin allowance which also is being paid to all the employees from 1971. It is made clear that the agreement was entered into in 1971 but was made effective from 1st January, 1970. As I read the exclusions contained in clauses (i) and (ii) I would include this allowance also for the reasons earlier indicated in the concept of dearness allowance. It cannot be included in (i) nor could it be comprised in the category indicated in (ii) because it would not amount to concessional supply of foodgrains or other articles or value of any amenity given to the employees.

31. The other two allowances are family allowance at the rate of Rs. 30/- p.m. and house rent allowance at the rate of Rs. 60/- p.m. House rent allowance at a fixed rate cannot be deemed to be equivalent to value of any house accommodation given to the employees. Mr. Singhvi had on the earlier occasion accepted that they would be outside dearness allowance but today he has submitted that the said statement made on the earlier occasion was made on a misimpression of the legal position and indeed the Supreme Court has held to the contrary.

32. These two allowances have been paid to the employees since 1965 and in my opinion the position as regards these two would be even stronger than the ad hoc allowance and the tiffin allowance. These are payment made for the purpose of ameliorating the conditions of the employees and the principal amelioration required is against low wages and high cost of living. Actually lowness in wages is a relative concept since the adequacy or inadequacy of a wage can only be tested against the cost of living and what items would be considered to be fair and proper in the living scale applicable to a particular sector of employees.

33. In my opinion all the four allowances really would have to be comprised in the concept of dearness allowance. There are cash payments introduced from time to time by the employer for the purposes of meeting the rise of cost of living which has been an endemic feature of the Indian economy right from 1961 onwards. The timings of these allowances are also important as they proclaim

the real basis on which the allowances have been introduced.

34. In the result, for the purposes of calculating the salary or wage of Rs. 1,600/- all the four allowances would be included. This is despite the practice of the employer to the contrary for not including these allowances for payment of bonus under the Payment of Bonus Act, 1965.

35. There remains only the final directions in the writ petition. On the basis that I have held, there must be an order in terms of prayer (d) for the two years period from 1st July, 1975 to 30th June, 1977. The question, however is whether there should be an order in these terms for the first year in view of the acceptance by the Union of the legal positions as understood by the employer. In my opinion there cannot be any such estoppel. If the further agreement had been sanctioned by the Shipping Development Fund Committee and had become effective, then there could have been a deemed variation of the settlement which might have disentitled the petitioner from relief. Accordingly, relief in terms of prayer (d) will have to be granted even for the first year i.e. from 1st July, 1974 to 30th June, 1975.

36. Reading prayer (d) it is found that the same is restricted to the employees of Respondents 1 and 2 who are members of Petitioner No. 1 Union. That is strictly the legal view as only these members are bound by and entitled to take advantage of the settlement. It would be a most unwise employer who would discriminate between two sections of the employees. I am also told that effectively almost all the employees are members of the first respondent Union so that in practice there is unlikely to be any serious difficulty. Accordingly rule is made absolute in terms of prayer (d) but restricted to employees drawing the annual salary or wage in the amount of Rs. 19,200/-. For calculation of this amount all the four allowances mentioned in paragraph 25 are to be included in the salary or wage. In other words salary or wage would include the basic salary or wage plus dearness allowance plus all the four allowances viz. ad hoc allowance, tiffin allowance, house rent allowance and family allowance.

37. Some protection will have to be given to the employer inasmuch as it appears to be the practice of the employer, as borne out by the affidavit dated 25th February, 1982 which is filed, to give bonus under the Payment of Bonus Act to certain employees ignoring these allowances. The result would be that if these allowances are to be calculated for payment under the settlement, then there may be a set of employees on the border-line who may be entitled to bonus under the settlement under my judgment who might also have received bonus under the Payment of Bonus Act on the footing that their salary was less than Rs. 1,600/-. It is made clear that the employer will be liable to pay such employees only the difference between the two bonuses. In other words the employer will have credit for any bonus paid to such employees (under the Payment of Bonus Act) who are liable to receive benefit under my order.

38. This is matter in which the fair order as to costs would be to direct each

party to bear its own costs. Order accordingly.