# MUMBAI KAMGAR SABHA, BOMBAY

*v.*

# M/S ABDULBHAI FAIZULLABHAI & ORS.

*March* 10, 1976

[V. R. KRISHNA IYER AND N. L. UNTWALIA, JJ.]

*Payment of Bonus Act, 1965—Workers' Union—Not being a party to dispute if had* locus standi*—Bonus Act—If a complete code—Bonus based on custom, usage or a condition of service—If excluded by the Act.*

*Res judicata—if applicable to industrial disputes.*

A considerable number of workmen were employed by a large number of small businessmen in a locality in the city. Prior to 1965, the employers made *ex-gratia* payment to the workers by way of bonus which they stopped from that year. A Board of Arbitrators appointed under s. 10A of the Industrial Disputes Act, to which the bonus dispute was referred, rejected the workers' demand for bonus. The dispute was eventually referred to an Industrial Tribunal which *in limine* dismissed the workers' demand as being barred by *res judicata*, in view of the decision of the Arbitration Board. The Tribunal in addition, held that bonus so far paid having been founded on tradition and custom, did not fall within the four-corners of the Bonus Act which is a complete code and came to the conclusion that the workers were not entitled to bonus.

On appeal to this Court it was contended that (i) the appellant-Union not being a party to the dispute had no *locus standi*, (ii) the claim of the workmen not being profit-based bonus, which is what the Bonus Act deals with, the Act has no application to this case; and (iii) since no case of customary or contract bonus was urged before the Arbitration Board such a ground was barred by the general principles of *res judicata*.

Dismissing the appeal,

HELD : 1(a) In an industrial dispute the process of conflict resolution is informal, rough and ready and invites a liberal approach. Technically the union cannot be the appellant, the workmen being the real parties. There is a terminological lapse in the cause title, but a reading of the petition, the description of the parties, the grounds urged and grievances aired, show that the battle was between the workers and the employers and the Union represented the workers. The substance of the matter being obvious, formal defects fade away. [596H]

(b) Procedural prescriptions are handmaids, not mistresses of justice and failure of fair play is the spirit in which Courts must view processual deviances. Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances, conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. [597B; D]

*Dhabolkar* [1976] 1 S.C.R. 306 and *Nawabganj Sugar Mills* [1976] 1 S.C.C. 120 held inapplicable.

(e) In industrial law collective bargaining, union representation at conciliations, arbitrations, adjudications and appellate and other proceedings is a welcome development and an enlightened advance in industrial life. [597G]

In the instant case the union is an abbreviation for the totality of workmen involved in the dispute. The appeal is, therefore, an appeal by the workmen compendiously projected and impleaded through the union. [598D]

A 2(a) The demands referred by the State Govt. under s. 10(1)(d) of the Industrial Disputes Act, specifically speak of payment of bonus by the employers which had become *custom or usage or a condition of service* in the establishments. The subject matter of the dispute referred by the Govt. dealt with bonus based on custom or condition of service. The Tribunal was bound to investigate this question. The workers in their statements urged that the demand was not based on profits or financial results of the employer but was based on custom. [599 D—E]

B (b) The pleadings, the terms of reference and the surrounding circumstances support the only conclusion that the core of the cause of action is custom and/or term of service, not sounding in or conditioned by profits. The omission to mention the name of a festival as a matter of pleading did not detract from the claim of customary bonus. An examination of the totality of materials leads to the inevitable result that what had been claimed by the workmen was bonus based on custom and service condition, not one based on profit. [600E; 601B]

C *Messrs. Ispahani Ltd.* v. *Ispahani Employees' Union* [1960] 1 S.C.R. 24, *Bombay Co.* [1964] 7 S.C.R. 477, *Jardine Henderson* [1962] Supp. 3 S.C.R. 382, *Howrah-Amta Light Rly.* [1966] II LLJ 294, 302, *Tulsidas Khimji* [1962] I LLJ 435 and *Tilak Co.* A.I.R. 1959 Cal. 797 referred to.

(c) When industrial jurisprudence speaks of bonus it enters the area of right and claim to what is due beyond strict wages. Viewed from this angle *prima facie* one is led to the conclusion that if the Bonus Act deals wholly and solely with profit bonus it cannot operate as a bar to a different species of D claim merely because the word 'bonus' is common to both. [604G]

(d) The welfare of the working classes is not only a human problem but a case where the success of the nation's economic adventures depends on the cooperation of the working classes to make a better India. Against such a perspective of developmental jurisprudence there is not much difficulty in recognising customary bonus and contractual bonus as permissible in industrial law. [605B]

E *Churakulam Tea Estate* [1969] 1 SCR 931, *Ispahani* [1960] 1 S.C.R. 24, *Bombay Co.* [1964] 1 S.C.R. 477, *Jardine Henderson* [1962] Supp. 3 S.C.R. 382, *Howrah-Amta Light Rly.* [1966] II LLJ 294, 302 and *Tulsidas Khimji* [1962] I LLJ 435 referred to.

3(a) It is true that if the Bonus Act is a complete code and is exhaustive of the subject whatever the species of bonus, there may be a bar to grant of bonus not covered by its provisions. But it is quite conceivable that the codification may be of everything relating to profit bonus in which case other types F of bonus are left untouched. Merely calling a statute a code is not to silence the claimant for bonus under heads which have nothing to do with the subject matter of the code. [605D]

(b) The history of the Act, the Full Bench formula, the Bonus Commission Report and the statutory milieu as also the majuscule pattern of bonus prevalent in the Indian industrial world, converge to the point that the paramount purpose of the Act was to regulate *profit bonus*. If such be the design of the statute, G its scheme cannot be stretched to supersede what it never meant to touch or tackle. [607C—D]

(c) The objects and reasons of the Bonus Act indicate that the subject matter of the statute was the question of payment of bonus based on profit to employees employed in establishments. Schematically speaking, *statutory bonus is profit bonus*. To avoid an unduly heavy burden under different heads of bonus it is provided in s. 17 that where an employer has paid any *puja* bonus or other customary bonus, he would be entitled to deduct the amount of bonus so H paid from the amount of bonus payable by him under the Act. If the customary bonus is thus recognised statutorily and, if in any instance it happened to be much higher than the bonus payable under the Act, there is no provision totally cutting off the customary bonus. The provision for deduction

in s. 17 on the other hand, indicates the independent existence of customary bonus although, to some extent, its quantum is adjustable towards statutory bonus. Section 34 does not mean that there cannot be contractual bonus or other species of bonus. This provision only emphasises the importance of the obligation of the employer, in every case, to pay the statutory bonus. The other sub-sections of s. 34 also do not destroy the survival of other types of bonus than provided by the Bonus Act. The heart of the statute, plainly read, from its object and provisions, reveals that the Act has no sweep wider than profit bonus. [607E—G; 608 B—D] A B

(d) The fact that certain types of bonus which are attended with pecularities deserving all special treatment have been expressly saved from the bonus Act did not mean that whatever had not been expressly saved was by necessary implication included in the Bonus Act. [608D]

(e) The long title of the Bonus Act seeks to provide for bonus to persons employed *"in certain establishments"* not in *all* establishments. Moreover, customary bonus does not require calculation of profits, available surplus, because it is a payment founded on long usage and the Act gives no guidance to fix the quantum of festival bonus. It is, therefore, clear that the Bonus Act deals with only profit bonus and matters connected therewith and does not govern customary, traditional or contractual bonus. [608G—H] C

(f) The Bonus Act speaks and speaks as a whole code on the sole subject of profit-based bonus but is silent on and cannot therefore annihilate by implication. other distinct and different kinds of bonus such as the one oriented on custom. [609D] D

*Ghewar Chand's case* [1969] 1 S.C.R. 366 distinguished and held inapplicable.

(g) The principle that a ruling of a superior court is binding law is not of scriptural sanctity but is of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. So there is no impediment in reading *Ghewar Chand's* case as confined to profit-bonus, leaving room for non-statutory play of customary bonus. That case relates to profit bonus under the Industrial Disputes Act. The major inarticulate premise of the statute is that it deals with—*and only with*—profit-based bonus. There is no categorical provision in the Bonus Act nullifying all other kinds of bonus, nor does such a conclusion arise by necessary implication. The core question about the policy of the Parliament that was agitated in that case turned on the availability of the Industrial Disputes Act as an independent method of claiming profit bonus *de hors* the Bonus Act and the Court took the view that it would be subversive of the scheme of the Act to allow an invasion from the flank in that manner. A discerning and concrete analysis of the scheme of the Act and the reasoning of the Court leaves no doubt that the Act leaves untouched customary bonus. [609E—H; 611D—E] E F

(4) So long as *Pandurang* stands industrial litigation is no exception to the general principle underlying the doctrine of *res judicata*. But the case of *Pandurang* is distinguishable. In that case there was a binding award of the Industrial Tribunal relating to the claim which had not been put an end to and so this Court took the view that so long as that award stood the same claim under a different guise could be subversive of the rule of *res judicata*. In the present case the Arbitration Board dealt with one dispute; the Industrial Tribunal with a fresh dispute. The Board enquired into one cause of action based on profit bonus; the Tribunal was called upon to go into a different claim. [612D—F] G

[The court expressed a doubt about the extension of the sophisticated doctrine of constructive *res judicata* to industrial law which is governed by special methodology of conciliation, adjudication and considerations of peaceful industrial relations where collective bargaining and pragmatic justice claim precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues.] H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 61 of 1971.

Appeal by Special Leave from the Award dated 14-7-71 of the Industrial Tribunal Maharashtra Bombay in Reference (I.T.) No. 116 of 1970.

*V. M. Tarkunde, P. H. Parekh, H. K. Sowani* and *Manju Jetley* B for the Appellant.

*G. B. Pai, Shri Narain, O. C. Mathur* and *J. B. Dandachanji* for Respondent Nos. 27, 68, 160, 182, 226, 265, 312, 403, 522, 722 and 903.

The Judgment of the Court was delivered by

C KRISHNA IYER, J.—A narration of the skeletal facts, sufficient to get a hang of the four legal issues debated at the bar in this appeal, by special leave, will help direct the discussion along a disciplined course, although the broader social arguments addressed have spilled over the banks of the jural stream.

Nag Devi, a locality in the city of Bombay, is studded with small hardware businesses where pipes and fittings, nuts and bolts, tools and D other small products, are made and/or sold. These establishments, well over a thousand, employ a considerable number of workmen in the neighbourhood of 5,000, although each unit has (barring four), less than the statutory minimum of 20 workmen. This heavy density of undertakings and workers naturally produced an association of employers and a Union of workmen, each recognising the other, for the necessary convenience of collective bargaining. Apparently, these E hardware merchants huddled together in the small area, were getting on well in their business and in their relations with their workmen, and this goodwill manifested itself in ex-gratia payments to them of small amounts for a number of years prior to 1965, when trouble began.

Although rooted in goodness and grace, the annual repetition of F these payments ripened, in the consciousness of the workers, into a sort of right—nothing surprising when we see in our towns and temples a trek of charity-seekers claiming benevolence as of right from shop-keepers and pilgrims, especially when this kindly disposition has been kept up over long years. The compassion of yesterday crystallises as the claim of today, and legal right begins as that which is humanistically right. Anyway, the hardware merchants of Nag Devi, G made of sterner stuff, in the year 1965, abruptly declined to pay the goodwill sums of the spread-out past and the frustrated workmen frowned on this stoppage by setting up a right to bonus averring considerable profits for the Industry (if one may conveniently use that expression for a collective coverage of the conglomeration of hardware establishments). The defiant denial and the consequent dispute resulted in the appointment of a Board of Arbitrators under s. 10A of the H Industrial Disputes Act to arbitrate upon twelve demands put forward by the Mumbai Kamgar Sabha, Bombay (the Union which represents the bulk of workers employed in the tiny, but numerous, establishments). The charter of demands included, *inter alia*, claim for 4

months' wages as bonus for the year 1965. The arbitral board, however, rejected the demand for bonus. The respondents-establishments discontinued these payments thereafter and the Union's insistence on bonus led to conciliation efforts. The Deputy Commissioner of Labour mediated but since his intervention did not melt the hardened mood of the employers, formal demands for payment of bonus were made by the Union and government was persuaded to refer the dispute for adjudication to an Industrial Tribunal. The Tribunal formulated two issues as arising from the statements of the parties and rendered his award dismissing the reference.

At this stage, it may be useful to set out the terms of reference made under s. 10(1)(d) of the Industrial Disputes Act, 1947 (for short, the ID Act), for adjudication by the Tribunal :

"1. Whether the establishments (mentioned in the annexure) have been giving bonus to their workers till 1965 ? If so, how long before 1965 have the employers been giving bonus to their workmen ? And at what rate ?

2. Whether payment of bonus by the employers to their workmen has become custom or usage or condition of service in these establishments ? If so, what should be the basis on which employers should make payment of bonus to their workmen for the years ending on any date in 1966, 1967 1968 and 1969 ?

Following upon the statements of parties, the Tribunal framed two issues which ran thus :

"1. Whether Award of the Arbitration Board made in Reference (VA) No. 1 of 1967 and published in M.G.G. Part I-1 dated 31st October 1968, pages 4259—4286, operates as *res judicata* to the demands of the workmen.

2. Whether the reference in respect of the demands is tenable and legal."

He answered the first in the affirmative and the second in the negative.

The Union, representing the workers in the mass, has assailed the findings of the Tribunal, the reasonings he has adopted and the misdirection he has allegedly committed. The Tribunal did not enter the merits of the claim but dismissed it *in limine* on the score that the demand for bonus was barred by *res judicata* the arbitral board's decision negativing the bonus for 1965 being the basis of this holding. The second ground for reaching the same conclusion was that the Bonus Act was a comprehensive and exhaustive law dealing with the entire subject of bonus and its beneficiaries. In short, in his view, the Bonus Act was a complete Code and no species of bonus could survive outside the contours of that statute. Admittedly, here the claim for bonus for the relevant four years was founded on tradition or custom or

A condition of service and in that light, the Tribunal made short shrift of the workmen's plea in these words :

> "In my opinion, the demand pertaining to the practice or custom prevailing in the establishments before 1965 is not such a matter as has to be adjudicated and it also does not fall under the provisions of Bonus Act. I, therefore, find that the reference
B in that respect also is not tenable and legal."

The submissions of counsel may be itemised into four contentions which may be considered seriatim. They are :

(a) Was the Industrial Tribunal competent to entertain the dispute at all ?

C

(b) Was the claim for bonus for the years 1966-69 barred by *res judicata* ?

(c) Was there, apart from profit-based bonus, customary bonus or bonus as a condition of service ?

D (d) If answer to (c) is in favour of the workmen, does the Bonus Act interdict such a demand since it does not provide for those categories of bonus and confines itself to profit-based bonus, or does the Bonus Act speak on the topic of bonus of all species and, therefore, stands four square between a claim for bonus and its grant, unless it finds statutory expression in the provisions of that Act ?

E The first contention which, curiously enough, has appealed to the Industrial Tribunal, need not be investigated as it is devoid of merit and has rightly been given up by counsel for the respondent. A casual perusal of the provisions bearing on the jurisdiction of the Labour Court and the Industrial Tribunal as well as the relevant schedules will convince anyone that this industrial dispute comes within the wider ambit of the Industrial Tribunal's powers. It is unfortunate
F that the Tribunal has made this palpable error. It is right to give plausible reasons for one's verdict and not mar it by bad, perfunctory supplementaries.

Fairness to respondent's counsel constrains us to consider *in limine* a flawsome plea forcibly urged that the Union figured as the appellant before us but being no party to the dispute (which was between the
G workers on the one hand and the establishments on the other) had no *locus standi*. No right of the Union *qua* Union was involved and the real disputants were the workers. Surely, there is terminological lapse in the cause-title because, in fact, the aggrieved appellants are the workers collectively, not the Union. But a bare reading of the petition, the description of parties, the grounds urged and grievances
H aired, leave us in no doubt that the battle is between the workers and employers and the Union represents, as a collective noun, as it were, the numerous humans whose presence is indubitable in the contest, though formally invisible on the party array. The substance of the

matter is obvious and formal defects, in such circumstances, fade away. We are not dealing with a civil litigation governed by the Civil Procedure Code but with an industrial dispute where the process of conflict resolution is informal, rough-and-ready and invites a liberal approach. Procedural prescriptions are handmaids, not mistresses of justice and failure of fair play is the spirit in which Courts must view processual deviances. Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical mis-descriptions and deficiencies in drafting pleadings and setting out the cause-title create a secret weapon to non-suit a party. Where foul play is absent, and fairness is not faulted, latitude is a grace of processual justice. Test litigations, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural short-comings. Even Art. 226, viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law. Therefore, the decisions cited before us founded on the jurisdiction under Art. 226 are inept and themselves somewhat out of tune with the modern requirements of jurisprudence calculated to benefit the community. Two rulings of this Court more or less endorse this general approach : *Dhabolkar*(1) and *Newabganj Sugar Mills*(2).

All this apart, we are dealing with an industrial dispute which, in some respects, lends itself to more informality especially in the matter of Union representation. Technically, the Union cannot be the appellant, the workmen being the real parties. But the infelicity of drafting notwithstanding, the Union's role as merely representing the workers is made clear in the description of the parties. Learned counsel took us through s. 36(1) and (4) of the Act, rr. 29 and 36 of the Central Rules under that Act, s. 15(2) of the Payment of Wages Act and some rulings throwing dim light on the rule regarding representation in industrial litigation. We deem it needless to go deeper into this question, for in industrial law, collective bargaining, union representation at conciliations, arbitrations, adjudications and appellate and other proceedings is a welcome development and an enlightened advance in industrial life.

Organised labour, inevitably involves unionisation. Welfare of workers being a primary concern of our Constitution (Part IV), we

(1) [1976] 1 S.C.R. 306. (2) [1976] 1 S.C.C. 120.

A have to understand and interpret the new norms of procedure at the pre-litigative and litigative stages, conceptually recognising the representative capacity of labour unions. Of course, complications may arise where inter-union rivalries and kilkenny cat competitions impair the peace and solidarity of the working class. It is admitted, in this case, that there is only one union and so we are not called upon to visualize the difficult situations counsel for the respondents invited us to B do, where a plurality of unions pollute workers' unity and create situations calling for investigation into the representative credentials of the party appearing before the Tribunal or court. It is enough, on the facts of this case, for us to take the Union as an abbreviation for the totality of workmen involved in the dispute, a convenient label which, for reasons of expediency, converts a lengthy party array into a short and meaningful one, group representation through unions being C familiar in collective bargaining and later litigation. We do not expect the rigid insistence on each workman having to be a party *eo nomine*. The whole body of workers, without their names being set out, is, in any case, sufficient, according to the counsel for the respondents, although strictly speaking, even there an amount of vagueness exists. For these reasons, we decline to frustrate this appeal by acceptance of a subversive technicality. We regard this appeal as one by the work- D men compendiously projected and impleaded through the Union.

Next we come upon the plea of *res judicata*, as a roadblock in the way of the appellant. But we will deal with it last, as was done by counsel, and so straight to the *piece de resistance* of this lis. Points (b) and (c) bearing on bonus therefore claim our first attention and, E in a sense, are integrated and amenable to common discussion.

Shri G. B. Pai, appearing for the respondents, contended that the claim put forward by the appellant before the Tribunal was, on the face of it, unsustainable on the short ground that what was pleaded was profit-based bonus only and, therefore, fell squarely within the Bonus Act. That Act being a complete Code, it expressly excluded F by s. 1(3) all establishments employing less than 20 workmen and all but four of the respondents were admittedly such small undertakings, with the result that the death knell to the plea of bonus was tolled by the Act itself. Therefore, the conclusion was irresistible, argued counsel for the respondents, that the plea for a profit-based bonus, being negatived by the statute, stands self-condemned.

G This argument drives us into an enquiry as to whether the claim before the Tribunal was for profit-based bonus. "Yes", was his holding and so he said 'no' to the workmen. The answer is the same, if the claim is founded on a similar basis.

Shri Tarkunde, for the appellant, countered this seemingly fatal submission by urging that whatever might have been the species of H bonus demanded in 1965, the present dispute referred by the State Government related to a totally different type of bonus, namely, customary bonus or one which was a term of the employment itself. Even

if this be true, Shri G. B. Pai has his case that the Bonus Act is all-comprehensive and no kind of bonus can gain legal recognition if it falls outside the sweep and scope of the Bonus Act itself. No brand of bonus has life left if it does not find a place in the oxygen tent of the complete Code called the Bonus Act. A

What thus first falls for our examination is the reference by the State Government to the Tribunal, the pleading of the workmen before the Tribunal and the counter statement by the employers before the Tribunal with a view to ascertain the character of the bonus demanded by the workers and covered by the dispute. It must be remembered that the award has rejected the claim not substantively but on the ground of two legal bars and care must be taken not to mix up maintainability with merits. A short cut is a wrong cut often times and the Tribunal's easy recourse to dismissal on preliminary grounds may well lead—and it has, as will be presently perceived—to a re-opening of the case many years later if the higher Court reverses the legal findings. Be that as it may, let us test the validity of the plea that only a profit-based bonus has been claimed by the workers. B C

The demands referred by the State Government under s. 10(1)(d) specifiacly speak of payment of bonus by the employers which 'has become *custom or usage or a condition* of service in the establishments'. The subsidiary or rather consequential point covered by the reference is 'if so, what should be the basis on which employers should make payment of bonus to their workmen for the years...'. It is plain that the subject matter of the dispute, as referred by the Government, deals with bonus based on custom or condition of service. The Tribunal is therefore bound to investigate this question, the terms of reference being the operational basis of its jurisdiction. D E

The workmen, in their statement, have asserted that bonus had been paid for several years and what transpired at the conciliation stages is clear from the letter of the Commissioner of Labour who adverts to the 'usual' custom and practice of payment of bonus'. The colour of the workers' claim has been clarified further in paragraphs 10 to 12 of their statement before the Tribunal. While they do mention that the hardware merchants of Nag Devi have been making large profits during the years in question and, therefore, can afford to pay bonus according to the standards and criteria applicable to large and prosperous industrial establishments, the real foundation of their claim is set out in indubitable language as attributable to 'custom, usage and condition of service'. Surely, they have no case of bonus dependent upon the quantum of profits of the establishments nor uniformity region-wise. On the other hand, the amount of bonus, the time of payment, etc., vary from establishment to establishment. The constant factor, however, is allegedly that there is 'consistency, predictability and uniformity', continuity and payment 'without reference to the fluctuations in the financial performance and profits of each firm'. The Sabha does not mince words when, in praying for relief, it states that the Tribunal 'be pleased to restore the custom, usage and conditions of service represented by the payment of bonus in these firms. In short, the bedrock of the bonus claim of the workers is custom and F G H

usage and/or implied condition of service. Nor have the establishments, who are the respondents before the Tribunal and before us, made any mistake about the nature of the demand. In their statement before the Tribunal they have urged that a scrutiny of the accounts of the firms is unnecessary 'since *the demand is not based on the profits* or the financial results of the employers *but is based on custom*' :

> "The contentions of the Sabha that the conditions of service under all these employers should be governed by one standard and one criteria is, not tenable. Since all the shops are not owned by one person and since every shop is a different entity there is no question of uniformity of service conditions. Moreover, there is no law which lays down that the service conditions of the employees under all these employers should be uniform. It is submitted that the reference to the capital-turnover ratio in this paragraph is irrelevant. It is also submitted that the Sabha's demand that a sample scrutiny of the Accounts of the firms should be made by the Tribunal is irrelevant in this respect since the demand is not based on the profits or the financial results of the employers but is based on custom."

More over the *ex gratia* payments for the pre-Bonus Act period are admitted by the respondents. They seek sanctuary on the counter-plea that free acts of grace, even if repeated, can neither amount to a custom, usage or condition of service. In sum, a study of the pleadings, the terms of reference and the surrounding circumstances supports the only conclusion that, peripheral reference to the profits of the establishments notwithstanding, the core of the cause of action or the kernel of the claim for bonus is custom and/or term of service, not sounding in or conditioned by profits.

Shri G. B. Pai did urge that the precedents of this Court have linked custom-based bonus with some festival or other and that bonus founded on custom *de hors* some festival is virtually unknown to case-law on the point. From this he argues that since the bonus has not been related by reference to any festival by the workmen in their pleadings (reference to Diwali as the relevant festival in the statement of the case in this Court is an ingenious innovation to fit into the judge-made law according to Shri Pai) the claim must fail. Legal life is breathed into customary bonus only by nexus with Puja or other festival. We are unable to agree with this rather meretricious submission. Surely, communal festivals are occasions of rejoicing and spending and employers make bonus payments to employees to help them meet the extra expenses their families have to incur. Ours is a festival-ridden society with many religions contributing to their plurality. That is why our primitive practice of linking payment of bonus with some distinctive festival has sprouted. As we progress on the secular road, maybe the Republic Day or the Independence Day or the Founder's Day may well become the occasion for customary bonus. The crucial question is not whether there is a festival which buckles the bonus and the custom. What is legally telling is whether by an unbroken flow

of annual payments a custom or usage has flowered, so that a right to bonus based thereon can be predicated. The custom itself precipitates from and is proved by the periodic payments induced by the sentiment of the pleasing occasion, creating a mutual consciousness, after a ripening passage of time, of an obligation to pay and a legitimate expectation to receive. We are, therefore, satisfied that the omission to mention the name of a festival, as a matter of pleading, does not detract from the claim of customary bonus. The impact of this omission on proof of such custom is a different matter with which we are not concerned at this stage since the Tribunal has not yet enquired into the merits.

Shri Pai urged that the custom, even if true, stood broken in 1965 and, therefore, during the post-1965 period, customary bonus stood extinguished. The effect of the arbitral board's negation of the profit-based bonus claim in 1965 on custom-based bonus for the subsequent period is again relevant, if at all, as evidence, which falls outside our consideration at present. In the event of the Tribunal having to adjudicate upon the question, maybe this rather anaemic circumstance will be urged by the employer and explained by the employees.

There is hardly any doubt that custom has been recognised in the past as a source of the right to bonus as the several decisions cited before us by Shri Tarkunde make out and s. 17(a) of the Bonus Act, in a way, recognizes such a root of title. In *Churakulam Tea Estate*(1) this Court surveyed the relevant case law at some length. *Ispahani*(2) implied as a term of the contract the payment of bonus from an unbroken, long spell. Vaidialingam J., in *Churakulam*(1) referring to some of the precedents, observed :

> "In *Ispahani's case*(2) this Court had to consider a claim for Puja bonus, in Bengal, and the essential ingredients, for sustaining such a claim when it is based on an implied agreement. After stating that the claim, for Puja Bonus, can be based either as a matter of implied agreement between the employers and employees, creating a term of employment for payment of Puja bonus, or that even where no implied agreement can be inferred, it may be payable as a customary bonus, this Court, in the said decision, specifically dealt with a claim for payment of bonus as an implied condition of services. This Court further accepted as correct the tests laid down by the Appellate Tribunal in *Mahalaxmi Cotton Mills Ltd., Calcutta* v. *Mahalaxmi Cotton Mills Workers' Union* (1952 L.A.C. 370) for inferring that there is an implied agreement for grant of such bonus. The three circumstances, laid down by the Appellate Tribunal, were : (1) that the payment must be unbroken; (2) that it must be for a sufficiently long period; and (3) that the circumstances, in which payment was made should be such as to exclude that it was paid out of bounty.....

(1) [1969] 1 S.C.R. 931.

(2) [1960] 1 S.C.R. 24.

A This Court, again, had to consider the essential ingredients to be established when payment of bonus, as customary or traditional, is claimed—again related to a festival—in *The Graham Trading Co. (India) Ltd.* v. *Its Workmen* (1960 1 SCR 107, 111) and dealt with the question as follows :

B

"In dealing with puja bonus based on an implied term of employment, it was pointed out by us in *Messrs. Ispahani Ltd.* v. *Ispahani Employees' Union* that a term may be implied, even though the payment may not have been at a uniform rate throughout and the Industrial C Tribunal would be justified in deciding what should be the quantum of payment in a particular year taking into account the varying payments made in previous years. But when the question of customary and traditional bonus arises for adjudication, the considerations may be somewhat different. In such a case, the Tribunal will have to consider : (i) whether the payment has been over an D unbroken series of years; (ii) whether it has been for a sufficiently long period though the length of the period might depend on the circumstances of each case; even so the period may normally have to be longer to justify an inference of traditional and customary puja bonus than may be the case with puja bonus based on an implied term of employment; (iii) the circumstance that the payment E depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss. In dealing with the question of custom, the fact that the payment was called *ex gratia* by the employer when it was made, would, however, make no difference in this regard because the proof of custom depends upon the effect of the relevant factors enumerated F by us; and it would not be materially affected by unilateral declarations of one party when the said declarations are inconsistent with the course of conduct adopted by it; and (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern. It will be seen that these tests G are in substance more stringent than the tests applied for proof of puja bonus as an implied term of employment.

It will be seen from the above extract that an additional circumstance has also been insisted upon, in the case of customary or traditional bonus, that the payment must have H been at a uniform rate throughout to justify an inference that the payment at such and such a rate had become customary and traditional in the particular concern."

(pp. 936-937)

In *Bombay Co.*(1) this Court, after pointing out the distinction in the ingredients of customary and contractual bonus, affirmed the existence of categories like customary bonus which are different from and unconnected with profit-based bonus. The learned Judge discussed *Jardine Henderson*(2) and other rulings, but the judicial chorus of legally claimable customary or contractual bonus is not marred by any discordant note.

It may be otiose to refer to holdings of High Courts when this Court has laid down the law. Even so, two decisions, one of Patna and the other of Calcutta, deserve mention. One of us, (Untwalia J., as he then was) speaking for the Division Bench, observed in *Howrah-Amta Light Rly.*(3) thus :

> "Apart from the profit bonus, the sense of social justice has led to the recognition in law of the right of the workmen to get other kinds of bonus which do not depend upon nor are necessarily connected with the earnings of profits by the industrial concern. One such kind of bonus is that which is paid on the occasion of special festival well celebrated in particular parts of India, as for example, puja bonus in Bengal and Divali bonus in Western India."

The Court, referring to *Tulsidas Khimji*(4), restated the tests for the claim of customary bonus and rightly held that these tests are but circumstances and not conditions precedent, that it is not necessary to show that such bonus has been paid even in years of loss. The grounds to be made out for customary, as distinguished from contractual, bonus overlap in many respects but differ in some aspects.

P. B. Mukherji, J as he then was, in *Tilak Co.* (5) observed :

> "Akin to this conception of bonus is the case of a bonus annexed to the employment by custom or social practices such as Customary bonus and Puja or Festivity bonus. In case of such customary and traditional bonus, the question of profit may or may not arise at all and such customary and traditional bonus will depend on the content and terms of that custom or the tradition on which the claim for bonus is made.
>
> "Each claim for bonus must depend on the facts of such claim. No doctrinaire view about bonus is possible or desirable. This much however is judicially settled that bonus is not deferred wages. It is a narrow and static view that considers bonus as always an *ex gratia* payment or a glorified tip or 'Bakshish' or a mere cash patronage payable at the pleasure of the employer. In the industrial jurisprudence of a modern economic society, it is a legal claim and a legal category, whose potentialities are not as yet fully conceived, but whose types and boundaries the Courts in

(1) [1964] 7 S.C.R. 477. (2) [1962] Supp. 3 S.C.R. 382.
(3) [(1966] II LLJ 295, 302. (4) [1962] I LLJ 435.
(5) AIR. 1959 Col. 797.

A India are struggling to formulate. It is a vital instrument of industrial peace and progress, dynamic in its implication and operation."

Since we are not called upon to investigate the veracity of the claim we stop with stating that the employers' awareness of social justice, which fertilises the right of his employees for bonus, blooms in many B ways of which, profit-based bonus is but one—not the only one. All this is the indirect bonanza of Part IV of the Constitution which bespeaks the conscience of the nation, including the community of employers. Law is not petrified by the past, but responds to the call of the changing times. So too the social consciousness of employers. Of course, Labour has its legal-moral duty to the community of a disciplined contribution to the health and wealth of the Industry. Law C is not always an organiser of one-way traffic.

This general survey of the case-law conclusively makes out that Labour's claim for bonus is not inflexibly and solely pegged to profit as the one and only right. Bonus is a word of many generous connotations and, in the Lord's mansion there are many houses. There is profit-based bonus which is one specific kind of claim and perhaps the D most common. There is customary or traditional bonus which has its emergence from long, continued, usage leading to a promissory-and-exceptancy situation materialising in a right. There is attendance bonus, production bonus and what not. An examination of the totality of pertinent materials drives us to the inevitable result that what has been claimed by the workmen in the present case is bonus based on custom and service condition—not one based on profit. But the E critical question pops up : Is the Bonus Act a killer of every other kind of bonus not provided for by it ?

We have thus to move on to a study of the scheme of the Bonus Act in order to ascertain whether it extinguishes claims founded on customary bonus or contractual bonus. In one sense, a bonus may be a mere gift or gratuity as a gesture of goodwill or it may be something F which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. Any extra consideration given for what is received, or something given in addition to what is ordinarily received by, or strictly due to the recipient is a bonus (Black's Legal Dictionery). But when industrial jurisprudence speaks of 'bonus', it enters the area of right and claim to what is due beyond strict wages. Viewed from this angle, *prima facie* G one is led to the conclusion that if the Bonus Act deals wholly and solely with profit bonus, it cannot operate as a bar to a different species of claim merely because the word bonus is common to both. Of course, if the statute has spoken so comprehensively, as it can, effect must be given to it.

The cosmos of bonus is expanding as working class contentment and prosperity become integral components of industrial peace and H progress. The bone of contention between the parties before us is as to whether the Bonus Act is the *alpha* and *omega* of all extra claims, outside wages and salaries, labelled bonus with separate adjectives

demarcating the identity of each species. But this issue has to be sized up not in vacuo but against the backdrop of the progressive change around us. A

Today it is accepted doctrine that Labour is the backbone of the nation, particularly in the area of economic self-reliance. This means the welfare of the working classes is not only a human problem but a case where the success of the nation's economic adventures depends on the cooperation of the working classes to make a better India. Indeed, on the national agenda is the question of Labour participation in Management. Against such a perspective of developmental jurisprudence there is not much difficulty in recognising customary bonus and contractual bonus as permissible in Industrial Law, given proper averments and sufficient proof. B

Shri G. B. Pai has raised what he regards as a lethal infirmity in the claim of the Sabha. In his submission the Bonus Act is a complete Code and what is not covered by its provisions cannot be awarded by the Tribunal. It is true that if the Bonus Act is a complete Code and is exhaustive of the subject, whatever the species of bonus, there may be a bar, but it is quite conceivable that the codification may be of everything relating to profit bonus in which case other types of bonus are left untouched. Merely calling a statute a Code is not to silence the claimant for bonus under heads which have nothing to do with the subject matter of the Code. On listening to the intricate argument about implicit codification of the law of bonus by this Act, one is reminded of Professor Gilmore who put the case against codification thus : (1) C D

> "The law, codified, has proved to be quite as unstable, unpredictable, and uncertain—quite as mulishly unruly—as the common law, uncodified, had ever been. The rules of law, purified, have remained the exclusive preserve of the lawyers; the people are still very much in our toils and clutches as they ever were—if not more so." E

The argument of the Bonus Act being an all-inclusive Code is based on the anatomy of the Act and the ruling in *Ghewar Chand*(2). So the judicial task is to ascertain the history and object of the Act, the relevant surrounding circumstances leading up to it, its scheme and the prohibitions, exclusions, exemptions and savings which reveal the intent and ambit of the enactment. Long ago, Plowden, with sibylline instinct, pointed out that the best way to construe the scope of an Act of Parliament is not to stop with the words of the sections. 'Every law consists of two parts viz., of body and soul. The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law'. The 'social conscience' of the judge hesitates to deprive the working class, for whom Part IV of the Constitution has shown concern, of such rights as they currently enjoy by mere implication from a statute unless there are compulsive provisions constraining the court to the conclusion. From this perspective, let us F G H

(1) Aspects of Comparative Commercial Law, 1969 Edn. Siegel & Foster at pp. 449-450-Mod. Law Rev. 1975 Jany Part P. 30.

(2) [1969] 1 S.C.R. 366

A examine exclusionary contention based on the body and soul of the Bonus Act. If the Bonus Act is a complete Code, on a true decoding of its scheme and spirit, the industrial Court cannot take off the ground with any other forms of bonus—yes, that is the implication of 'a complete Code'.

Bonus has varying conceptual contents in different branches of B law and life. We are here concerned with its range of meanings in industrial law but, as expatiated earlier, there is enough legal room for plural patterns of bonus, going by lexicographic or judicial learning. It implies no disrespect to legal dictionaries if we say that precedents notwithstanding, the critical word 'bonus' is so multiform that the judges have further to refine it and contextually define it. Humpty Dumpty's famous words in 'Through the Looking Glass'—'When I use C a word ... it means just what I choose it to mean ... neither more nor less'—is an exaggerated cynicism. We have to bring in some legal philosophy into this linguistic problem as it incidentally involves doctrinal issues where the Constitution is not altogether non-aligned. Statutory interpretation, in the creative Indian context, may look for light to the lodestar of Part IV of the Constitution e.g., Arts. 39(a) and (c) and Art. 43. Where two judicial choices are available, the D construction in conformity with the social philosophy of Part IV has preference.

In *Jalan Trading Co.*(1) Shah J. (as he then was) gave a synopsis of the development of the branch of industrial law relating to bonus from the days of the First World War to the Report of the Bonus Commission culminating in the Bonus Act, 1965. The story of 'war E bonus', the Full Bench formula and this Court's view that 'bonus is not a gratuitous payment made by the employer to his workmen, nor a deferred wage, and that where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus may be legitimately made by the workmen' are set out in that decision. The Full Bench formula was based on profits and the terms of reference to the Commission put *profit* in F the forefront as the foundation of the Scheme—'to define the concept of bonus, to consider in relation to industrial employments the question of payment of bonus *based on profits* and to recommend principles for computation of such bonus and methods of payment ...'. A glance at the various Chapters of the Report brings home the point that bonus based on profits is its central theme. The conclusions and recommendations revolve round the concept of profit bonus. Little argu- G ment is needed to hold that the bonus formula suggested by the Commission was profit-oriented. Indeed, that was its only concern. The Act, substantially modelled on these proposals, has adopted a blueprint essentially worked out on profit. The presiding idea being a simplified version of bonus linked to profits over a period, shedding the complex calculations in the Full Bench Formula, the statute did not cover other independent species like customary or contractual H bonus which had become an economic reality and received judicial recognition. There were marginal references to and accommodation

(1) [1967] 1 S.C.R. 15.

of other brands of bonus but they were for better effectuating the spirit and subtance of profit-based bonus. A

The question then is : Was the Bonus Act only a simpler reincarnation of the Full Bench formula, as argued by Sri Tarkunde, or was it, going by the provisions and precedents, a full codification of multiform bonuses, thus giving a knock-down blow to any customary but illegitimate demand for bonus falling outside the statute, as contended by Sri Pai? Indeed, we were taken through the well-known categories of bonus *vis a vis* the statutory provisions with impressive and knowledgeable thoroughness by Shri Pai with a view to strengthen his perspective that the Act encompassed the whole law and left nothing outside its scope. B

To begin with, the history of the Act, the Full Bench formula which was its judicial ancestor, the Commission Report which was its immediate progenitor and the statutory milieu as also the majuscule pattern of bonus prevalent in the Indian industrial world, converge to the point that the paramount purpose of the Payment of Bonus Act was to regulate *profit bonus,* with incidental incursions into other allied claims like customary or attendance bonus. If such be the design of the statute, its scheme cannot be stretched to supersede what it never meant to touch or tackle. C D

The objects and reasons of the Bonus Act indicate that the subject matter of the statute is 'the question of payment of bonus based on profit to employees employed in establishments'. The Report of the Commission is also referred to in the objects and reasons and the tenor is the same. The long title of the Act is non-committal, but the concept of 'profit' as the basis for bonus oozes through the various provisions. For instance, the idea of accounting year, gross profit and the computation thereof, the methodology of arriving at the available surplus and the items deductible from gross profits, have intimate relevance to profit bonus—and may even be irrelevant to customary or traditional bonus or contractual bonus. Similarly, the provision for *set on* and *set off* of allocable surplus and the like are pertinent to profit-based bonus. Schematically speaking, *statutory bonus is profit bonus.* Nevertheless, there is provision for avoidance of unduly heavy burden under different heads of bonus. For this reason it is provided in s. 17 that where an employer has paid any puja bonus or other customary bonus, he will be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him under the Act. Of course, if the customary bonus is thus recognised statutorily and, if in any instance it happens to be much higher than the bonus payable under the Act, there is no provision totally cutting off the customary bonus. The provision for deduction in s. 17, on the other hand, indicates the independent existence of customary bonus although, to some extent, its quantum is adjustable towards statutory bonus. Again, s. 34 provides for giving affect to the Bonus Act thus : E F G H

> "Notwithstanding anything inconsistent therewith contained in any other law . . . or in the terms of any award,

A agreement, settlement or contract of service made before 29th May, 1965".

This does not mean that there cannot be contractual bonus or other species of bonus. This provision only emphasises the importance of the obligation of the employer, in every case, to pay the statutory bonus. The other sub-sections of s. 34 also do not destroy the survival of other types of bonus than provided by the Bonus Act. Shri G. B. Pai used the provisions of the Coal Mines Provident Fund and Bonus Scheme Act, 1948, referred to in s. 35 of the Bonus Act, for the purpose of making good his thesis that the Bonus Act has comprehensive coverage except where it expressly saves any other scheme of bonus. Our understanding of s. 35 is different. Coal mines are extremely hazardous undertakings and they are largely located in agrarian areas where the agricultural workers absent themselves for long periods to attend to agricultural work and do not report themselves for mining work. Coal mines have many peculiarities and the workmen employed there have to be treated separately from the point of view of incentive for attendance. Therefore, attendance bonus for a miner is a separate subject attended with peculiarities deserving of special treatment and has been expressly saved from the Bonus Act. This does not mean that whatever has not been expressly saved is, by necessary implication, included in the Bonus Act. Of course, there are provisions for exemptions and exclusions in the Bonus Act itself, particularly, *vis-a-vis* small establishments and public sector undertakings. There is also marginal reference in s. 2(21) to s. 2(21)(iv) to other kinds of bonus, including incentive, production and attendance bonus. The heart of the statute, painly read from its object and provisions, reveals that Act has no sweep wider than profit bonus.

There was reference to the payment of Bonus (Amendment) Ordinance, 1975 by counsel on both sides. We find that the long title has been expanded and now covers bonus

> "on the basis of profit or *on the basis of production* or productivity".

This amendment itself implies that formerly a narrower species of bonus, namely, that based on profit had alone been dealt with. The limits on contractual bonus also tends to feed our conclusions. The implications of the ceiling set by the recent amendment to the law falls outside our scope and we keep away from determining it. Sufficient unto the day is the evil thereof.

It is clear further from the long title of the Bonus Act of 1965 that it seeks to provide for bonus to persons employed 'in *certain establishments*'—not in *all* establishments. Moreover, customary bonus does not require calculation of profits, available surplus, because it is a payment founded on long usage and justified often by spending on festivals and the Act gives no guidance to fix the quantum of festival bonus; nor does it expressly wish such a usage. The conclusion seems to be fairly clear, unless we strain judicial sympathy contrarywise, that the Bonus Act dealt with only profit bonus and matters connected therewith and did not govern customary, traditional or contractual bonus.

The end product of our study of the anatomy and other related factors is that the Bonus Act spreads the canvas wide to exhaust profit-based bonus but beyond its frontiers is not void but other cousin claims bearing the caste name 'bonus' flourish—miniatures of other colours! The Act is neither proscriptive nor predicative of other existences. A

The trump card of Sri G. B. Pai is the ruling in *Ghewar Chand.*(1) If the ratio there is understood the way Shri Pai would have it the workmen have no case to present. For, establishments employing less than 20 workers are excluded from the benignant campus of the Act and the appellants fall outside the grace of the statute for that reason alone. Does the decision exhaust the branch of jurisprudence on every kind of bonus or merely lays down that profit-based bonus—the most common one and complicated in working out on the mathematics of the full Bench Formula—has been picked out for total statutory treatment and for that pattern of bonus the Act operates as a complete Code? The Tribunal understood the former way and followed it up with a rejection, on the ground of a legal bar, of the admittedly non-profit-based claim for bonus. Shri Tarkunde argues the reasoning to be a misunderstanding of the meaning of the ruling. We hold that the Bonus Act speaks, and speaks as a whole Code, on the sole subject of profit-based bonus but is silent on, and cannot therefore annihilate by implication, other distinct and different kinds of bonus such as the one oriented on custom. We confess that the gravitational pull on judicial construction of Part IV of the Constitution has, to some extent, influenced our choice. B C D

It is trite, going by Anglophonic principles, that a ruling of a superior court is binding law. It is not of scriptural sanctity but is an of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and *de hors* the milieu we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prison-house of bigotry; regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of subordinate courts' casual observations, generalisations and *sub silentio* determinations must be judiciously read by courts of coordinate jurisdiction and, so viewed, we are able to discern no impediment in reading *Ghewar Chand*(1) as confined to profit-bonus, leaving room for non-statutory play of customary bonus. The case dealt with a bonus claim by two sets of workmen, based on profit of the business but the workmen fell outside the ambit of the legislation by express exclusion or exemption. Nothing relating to any other type of bonus arose and cannot be impliedly held to have been decided. The governing principle we have to appreciate as a key to the understanding of *Ghewar Chand*(1) is that it relates to a case of profit bonus urged under the Industrial Disputes Act by two sets of workmen, employed by establishments which are either excluded or exempted from the Bonus Act. The major inarticulate premise of the statute is that it deals with—*and only* E F G H

(1) [1969] 1 S.C.R. 366.

A *with*—profit-based bonus as has been explained at some length earlier. There is no categorical provision in the Bonus Act nullifying all other kinds of bonus, nor does such a conclusion arise by necessary implication. The ruling undoubtedly lays down the law thus :

> "Considering the history of the legislation, the background and the circumstances in which the Act was enacted, the object of the Act and its scheme, it is not possible to accept the construction suggested on behalf of the respondents that the Act is not an exhaustive Act dealing comprehensively with the subject-matter of bonus in all its aspects or that Parliament still left it open to those to whom the Act does not apply by reason of its provisions either as to exclusion or exemption to raise a dispute with regard to bonus through industrial adjudication under the Industrial Disputes Act or other corresponding law."

But this statement, contextually construed, means that profit-bonus not founded on the provisions of the Bonus Act and by resort to an adventure in industrial dispute under the Industrial Disputes Act is no longer permissible. When Parliament has expressly excluded or exempted certain categories from the Bonus Act, they are bowled out so far as profit-based bonus is concerned. You cannot resurrect profit-bonus by a back-door method, viz. resort to the machinery of the Industrial Disputes Act. The pertinence of the following observations of Shelat J., becomes self-evident, understood in this setting :

> "We are not impressed by the argument that Parliament in excluding such petty establishments could not have intended that employees therein who were getting bonus under the full Bench formula should lose that benefit. As aforesaid, Parliament was evolving for the first time a statutory formula in regard to bonus and laying down a legislative policy in regard thereto as to the classes of persons who would be entitled to bonus thereunder. It laid down the definition of an 'employee' far more wider than the definition of a 'workman' in the Industrial Disputes Act and the other corresponding Acts. If, while doing so, it expressly excluded as a matter of policy certain petty establishments in view of the recommendation of the Commission in that regard, viz., that the application of the Act would lead to harassment of petty proprietors and disharmony between them and their employees, it cannot be said that Parliament did not intend or was not aware of the result of exclusion of employees of such petty establishments."

Likewise, reference to agreements and settlements providing for bonus being exempted from the applicability of the Act does not militate against the survival of contractual bonus (we are not referring to the impact of the latest amendment by Ordinance of 1975). Viewed thus and in the light of the observations earlier extracted, the following passage fits into the perspective we have outlined :

> "Section 32(vii) exempts from the applicability of the Act (the Bonus Act) those employees who have entered

before May 29, 1965 into an agreement or settlement with their employers for payment of bonus linked with production or productivity in lieu of bonus based on profits and who may enter after that date into such agreement or settlement for the period for which such agreement or settlement is in operation. Can it be said that in cases where there is such an agreement or settlement in operation, though this clause expressly excludes such employees from claiming bonus under the Act during such period, the employees in such cases can still resort to the Industrial Disputes Act and claim bonus on the basis of the Full Bench Formula? The answer is obviously in the negative for the object in enacting cl. (vii) is to let the parties work out such an agreement or settlement. It cannot be that despite this position, Parliament intended that those employees had still the option of throwing aside such an agreement or settlement, raise a dispute under the Industrial Disputes Act and claim bonus under the Full Bench Formula. The contention, therefore, that the exemption under s. 32 excludes those employees from claiming bonus under the Act only and not from claiming bonus under the Industrial Disputes Act or such other Act is not correct."

The core question about the policy of the Parliament that was agitated in that case turned on the availability of the Industrial Disputes Act as an independent method of claiming profit bonus *de hors* the Bonus Act and the Court took the view that it would be subversive of the scheme of the Act to allow an invasion from the flank in that manner. The following observations strengthen this approach :

"Surely, Parliament could not have intended to exempt these establishments from the burden of bonus payable under the Act and yet have left the door open for their employees to raise industrial disputes and get bonus under the Full Bench formula which it has rejected by laying down a different statutory formula in the Act. For instance, is it to be contemplated that though the Act by s. 32 exempts institutions such as the Universities or the Indian Red Cross Society or hospitals, or any of the establishments set out in cl. (ix) of that section, they would still be liable to pay bonus if the employees of those institutions were to raise a dispute under the Industrial Disputes Act and claim bonus in accordance with the Full Bench Formula. The legislature would in that case be giving exemption by one hand and taking it away by the other, thus frustrating the very object of s. 32. Where, on the other hand, Parliament intended to retain a previous provision of law under which bonus was payable, or was being paid it has expressly saved such provision. Thus, under s. 35 the Coal Mines Provident Fund and Bonus Schemes Act, 1946 and any scheme made thereunder are saved. If, therefore, Parliament wanted to retain the right to claim bonus by way of industrial adjudication for those who are either excluded or exempted from the Act, it would have made an express

A saving provision to that effect as it has done for employees in Coal Mines."

A discerning and concrete analysis of the scheme of the Act and the reasoning of the Court leaves us in no doubt that it leaves untouched customary bonus.

B The plea of constructive *res judicata* is based on the 'might and ought' doctrine. Shri Pai's argument is that before the Arbitration Board no case of customary or contract bonus was urged for the year 1965 and so, in later years, such a ground is barred by the general principles of *res judicata.* Sections 10A, 18 and 19(3) of the Industrial Disputes Act were pressed before us to demonstrate the prior award was binding on the workers and reading it in the light C of *Pandurang*(1) the bar was spelt out. It is clear law, so long as the above ruling stands, that industrial litigation is no exception to the general principle underlying the doctrine of *res judicata.* We do entertain doubt about the extension of the sophisticated doctrine of constructive *res judicata* to industrial law which is governed by special methodology of conciliation, adjudication and considerations of peaceful industrial relations, where collective bargaining and pragmatic D justice claim precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues, but we are convinced that *Pandurang*(1) does not apply at all to our case. There overtime wages were claimed earlier under the Factories Act and the case was rejected by the Tribunal. After this rebuff, a like claim was repeated but sustaining it on the Bombay Shops and Establishments Act. This new ground to support the same E claim was held to be barred because the workmen could and ought to have raised the issue that the Factories Act failing, the Shops Act was available to them to back up their demand. The fallacy in invoking this decision lies in the fact that as early as 1950 there was a binding award of the Industrial Tribunal relating to the claim, which had not been put an end to, and so this Court took the view that so long as that award stood, the same claim under a different guise (the F Shops Act) could be subversive of the rule of *res judicata.* The decisive circumstance which distinguishes that case is contained in the observation :

> "If the workers are dissatisfied with any of the items in respect of which their claim has been rejected it is open to them to raise a fresh industrial dispute."

G That is to say, if a fresh dispute had been raised, after terminating the prior award, no bar of *res judicata* could have been urged. Here, the Arbitration Board dealt with one dispute; the Industrial Tribunal, with a fresh dispute. The Board enquired into one cause of action based on profit bonus; the Tribunal was called upon, by the terms of reference, to go into a different claim. This basic difference was lost sight of by the Tribunal and so he slipped into an error. The H dangers of constructive *res judicata* in the area of suits *vis a vis* writ petitions under Art. 226 and as between proceedings under Art, 226 and Art. 32 are such as to warrant a closer study. To an extent the

(1) [1975] II LLJ. 345.

Law Commission of India in its Report(1) has touched on this topic. Industrial disputes are an *a fortiori* case. A

Dispute-processing is not by Court litigation alone. Industrial peace best flourishes where non-litigative mechanisms come into cheerful play before tensions develop or disputes brew. Speaking generally, alternatives to the longish litigative process is a joyous challenge to the Indian *activist* jurist and no field is in need of the role B of avoidance as a means of ending or pre-empting disputes as industrial life. Litigation, whoever wins or loses, is often the funeral of both. We are a developing country and need techniques of maximising mediatory methodology as potent processes even where litigation has erupted. This socially compulsive impulse prompted the setting in motion of a statesman-like effort by the senior counsel on both sides, with helpful promptings from the Bench, to advise their C clients into a conciliatory mood. Should we have at all hinted to the advocates to resolve by negotiation or stick to our traditional function of litigative adjudication? In certain spheres, 'judicious irreverence' to judicialised argumentation is a better homage to justice! Regrettably, the exercise proved futile and we have to follow up our conclusions with necessary directions.

D

The findings we have reached may now be formally set down. We hold that the Bonus Act (as it stood in 1965) does not bar claims to customary bonus or those based on conditions of service. Secondly we repel the plea of *res judicata.* There is no merit in the view that the Industrial Tribunal has no jurisdiction to try the dispute referred to it. We set aside the award and direct the Tribunal to decide on the merits the subject-matter of the dispute referred to it by the State E Government. The appeal is hereby allowed but, having regard to the over-all circumstances, the parties will bear their costs.

P.B.R. *Appeal allowed.*

(1) 54th Report. Code of Civil Procedure, 1908 pp. 20-21.