

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DISTRICT: VADODARA

SPECIAL CIVIL APPLICATION NO. OF 2016

In the matter under Articles 14,
19(1)(g), 226 & 246 of the
Constitution of India;

AND

In the matter of Payment of Bonus
(Amendment) Act, 2015;

AND

In the matter between:

Federation of Gujarat Industries,
(Through the Secretary General),
having its office situated at:
FGI Business Centre,
Gotri-Sevasi Road, Khanpur,
Near Sevasi, Vadodara-391 101.

...Petitioner

Versus

1. Union of India,
(Notice to be served through
the Secretary),
Ministry of Labour & Employment,
Shram Shakti Bhavan,
New Delhi - 110 001.

2. The Secretary,
Ministry of Law & Justice,
Government of India,
4th Floor, A-Wing,
Shastri Bhavan,
Delhi - 110 001.

... Respondents

To,
The Hon'ble Chief Justice and the
Other Hon'ble Judges of the High
Court of Gujarat at Ahmedabad.

The humble petition of the
Petitioner above named:

MOST RESPECTFULLY SHEWETH THAT:

1. The present petitioner is registered under the provisions of the Societies Registration Act. The present petitioner federation was founded in the year 1918 in the erstwhile Baroda State under the progressive rule of Shrimant Sayajirao Gaekwad, who encouraged social reforms and industrial development to modernize Baroda. The industries which are situated within the State of Gujarat are the bonafide members of the petitioner federation. The petitioner federation aimed at promoting, protecting and

projecting the interest of industries and also catering to the needs of the community at large.

2. This petition is directed against the Payment of Bonus (Amendment) Act, 2015 (herein after referred to as "the Act, 2015" for sake of convenience) (No.6 of 2016) published in the Gazette of India, Extraordinary part-II-Section-1 dated 01.01.2016 in so far as the retrospective operation of the Amendment w.e.f. 01.04.2014 as contemplated under Section- 1(2) and the Amendment in so far as the words "or the Minimum Wage for the Schedule employment, as fixed by the Appropriate Government, Whichever is higher" as inserted in Section-12 of the Payment of Bonus Act, 1965. A copy of the Notification dated 01.01.2016 issued by the present respondent is annexed hereto and marked as **Annexure-A** to this petition.
3. The brief facts leading to the present petition are set out as under:-
4. The Parliament has enacted the Payment of Bonus Act, 1965 to provide for the Payment of Bonus to the persons

employed in certain establishments on the basis of the profit or on the basis of the production or productivity and for the matters connected therewith. The Parliament of India has enacted the Payment of Bonus (Amendment) Act, 2015 with a view to amend the provisions of the Payment of Bonus Act, 1965. The Parliament has received the assent of the President of India on 31.12.2015 and in turn, the present respondent Authority has issued the Notification dated 01.01.2016 vide Notification No.6 of 2016.

5. The petitioner respectfully states and submits that as per the Amendment Act, 2015, the Act has been applicable with retrospective effect i.e. from 01.04.2014, as contemplated under Section 1(2) of the Amendment Act, 2015. The legislature has also amended Section - 2(13) of the Payment of Bonus Act, 1965, whereby, ceiling on the salary or the wages has been enhanced from Rs.10,000/- to Rs.21,000/- for the purpose of coverage under the Payment of Bonus Act, 1965. By way of Amendment Act, 2015, the Section-12 of the Payment of Bonus Act, 1965 has been amended, whereby "an amount of Rs.3,500/-"

has been substituted by "an amount of Rs.7,000/- or the Minimum wages for the Schedule employment as fixed by the Appropriate Government, whichever is higher".

6. The petitioner respectfully states and submits that the State of Gujarat as fixed the minimum wages from time to time. As per the provisions of the Minimum Wages Act, 1948, in respect of the employees working in the establishment/ industries within the territory of Gujarat. The State of Gujarat, Labour & Employment Department, Sachivalaya, Gandhinagar has issued the Notification dated 26.12.2014, whereby, the State Government has classified the employees in three category namely skilled, semi-skilled and unskilled and the rate of payable of Minimum wages has been fixed on the basis of zone in which the establishment is situated. A copy of the Notification dated 26.12.2014 is annexed hereto and marked as **Annexure-B** to this petition.

7. The petitioner respectfully states and submits that the United Planter's Association of Southern India and other have challenged the Payment of Bonus (Amendment) Act, 2015 before the Hon'ble Kerala High Court by way of filing

the Writ Petition (C) No.3025 of 2016. The Hon'ble Kerala High Court have been pleased to pass an order dated 26.01.2016 in Writ Petition (C) No.3025 of 2016, whereby, the retrospective effect from 01.04.2014 of the Amendment, 2015 has been stayed. A copy of the order dated 27.01.2016 passed in Writ Petition(C) No.3025 of 2016 by the Hon'ble Kerala High Court is annexed hereto and marked as **Annexure-C** to this petition.

8. The petitioner respectfully states and submits that the Karnataka Employees Association and others have challenged the Payment of Bonus (Amendment) Act, 2015 before the Hon'ble Karnataka High Court by way of filing the Writ Petition No.5272 of 2016 and Writ Petition No.5311 of 2016. The Hon'ble Karnataka High Court have been pleased to pass an order dated 02.02.2016 in Writ Petition No.5272 of 2016 and Writ Petition No.5311 of 2016, whereby, the retrospective effect from 01.04.2014 of the Amendment Act, 2015 has been stayed. A copy of the order dated 02.02.2016 passed in Writ Petition No.5272 of 2016 and Writ Petition No.5311 of 2016 by the Hon'ble Karnataka High Court is annexed hereto and marked as **Annexure-D** to this petition.

9. The petitioner respectfully states and submits that the Benara Udyog Ltd. has challenged the Payment of Bonus (Amendment) Act, 2015 before the Hon'ble Allahabad High Court by way of filing the Writ - C No.6098 of 2016. The Hon'ble Allahabad High Court have been pleased to pass an order dated 12.02.2016 in Writ-C No.6098 of 2016, whereby, the retrospective effect from 01.04.2014 of the Amendment Act, 2015 has been stayed. A copy of the order dated 12.02.2016 passed in Writ-C No.6098 of 2016 by the Hon'ble Allahabad High Court is annexed hereto and marked as **Annexure-E** to this petition.

10. The petitioner respectfully states and submits that Section-2(1) of the Payment of Bonus Act, 1965 is defines the term "Accounting Year" which is reproduced as under:

"Section-2 (1) "accounting year" means-

(i) in relation to a corporation, the year ending on the day on which the books and accounts of the corporation are to be closed and balanced;

(ii) in relation to a company, the period in respect of which any profit and loss account of the company laid before it in annual general meeting is made up, whether that period is a year or not;

(iii) In any other case-

*(a) the year commencing on the 1st day of April;
or*

(b) if the accounts of an establishment maintained by the employer thereof are closed and balanced on any day other than the 31st day of March, then, at the option of the employer, the year ending on the day on which its accounts are so closed and balanced:

Provided that an option once exercised by the employer under paragraph (b) of this sub-clause shall not again be exercised except with the previous permission in writing of the prescribed authority and upon such conditions as that authority may think fit; "

The Section-2(4) of the Payment of Bonus Act, 1965 defines the term "Allocable surplus" which is reproduced as under:

"Section -2(4) "allocable surplus" means-

(a) in relation to an employer, being a company 6 [(other than a banking company)] which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of section 194 of that Act, sixty-seven per cent of the available surplus in an accounting year ;

(b) in any other case, sixty per cent of such available surplus; "

The Section-2(13) of the Payment of Bonus Act, 1965 defines the term "Employees" which is prior to Amendment read as under:

"Section-2(13) "employee" means any person (other than an apprentice) employed on a salary or wage not exceeding 10 [ten thousand rupees] per mensem in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied;"

The Section-2(13) of the Payment of Bonus Act, 1965 defines the term "Employees" which is after the Amendment read as under:

"Section-2(13) "employee" means any person (other than an apprentice) employed on a salary or wage not exceeding 21 [twenty-one thousand rupees] per mensem in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied;"

The Section-2(21) of the Payment of Bonus Act, 1965 defines the term "Salary of Wage" which is reproduced as under:

"Section-2(21) "salary or wage" means all remuneration (other than remuneration in respect of overtime work) capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living), but does not include-

(i) any other allowance which the employee is for the time being entitled to;

(ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles ;

(iii) any travelling concession ;

(iv) any bonus (including incentive, production and attendance bonus);

(v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force ;

(vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex gratia payment made to him;

(vii) any commission payable to the employee.

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

deemed to form part of the salary or wage of such employee;"

Section-10 of the Payment of Bonus Act, 1965 is reproduced as under:

"SECTION 10 : Payment of minimum bonus

Subject to the other provisions of this Act, every employer shall be bound to pay to every employee in respect of the accounting year commencing on any day in the year 1979 and in respect of every subsequent accounting year, a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher, whether or not the employer has any allocable surplus in the accounting year:

Provided that where an employee has not completed fifteen years of age at the beginning of the accounting year, the provisions of this section shall have effect in relation to such employee as if for the words "one hundred rupees", the words "sixty rupees" were substituted."

Section-12 of the Payment of Bonus Act, 1965 prior to Amendment is read as under:

"SECTION 12 : Calculation of bonus with respect to certain employees

Where the salary or wage of an employee exceeds [three thousand and five hundred rupees] rupees per mensem, the bonus payable to such employee under section 10 or, as the case may be, under section 11, shall be calculated as if his salary or wages were [three thousand and five hundred rupees] rupees per mensem.

Section-12 of the Payment of Bonus Act, 1965, after Amendment is read as under:

"SECTION 12: Calculation of bonus with respect to certain employees

Where the salary or wage of an employee exceeds [seven thousand rupees or the minimum wage for scheduled employment, as fixed by the appropriate Government, whichever is higher] per mensem, the bonus payable to such employee under section 10 or, as the case may be, under section 11, shall be calculated as if his salary or wages were [Seven thousand rupees or the minimum wage for scheduled employment, as fixed by the appropriate Government, whichever is higher] rupees per mensem.

‘Explanation.—For the purposes of this section, the expression “scheduled employment” shall have the same meaning as assigned to it in clause (g) of section 2 of the Minimum Wages Act, 1948.’

Section-19 of the Payment of Bonus Act, 1965 is reproduced as under:

"SECTION-19:Time-limit for payment of bonus

[All amounts] payable to an employee by way of bonus under this Act shall be paid in cash by his employer-

(a) where there is a dispute regarding payment of bonus pending before any authority under section 22, within a month from the date on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute ;

(b) in any other case, within a period of eight months from the close of the accounting year:

Provided that the appropriate Government or such authority as the appropriate Government may specify in his behalf may, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of eight months to such further period or periods as it thinks fit, so, however, that the total period so extended shall not in any case exceed two years."

Section-2(g) of the Minimum Wages Act, 1948 defines the term "Scheduled Employment" and Section-2(h) of the Minimum Wages Act, 1948 defines the term "Wages", which are reproduced as under:

"Section-2(g) "scheduled employment" means an employment specified in the Schedule, or any process or branch of work forming part of such employment;"

"Section-2(h) "wages" means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house-rent allowance, but does not include,-

(i) the value of-

(a) any house accommodation, supply of light, water, medical attendance, or

(b) any other amenity or any service excluded by general or special order of the appropriate Government;

(ii) any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;

(iii) any traveling allowance or the value of any traveling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(v) any gratuity payable on discharge;"

11. The petitioner respectfully states and submits that on bare perusal of the above referred provision of the Payment of Bonus Act, 1965, it reveals that prior to the date of the amendment, the statutes provided the uniform quantum of bonus to the employees working in the establishment/ Industries. As per the Amendment Act, 2015, the different amount of Bonus depending upon the Minimum Wages prescribed by the State Government from time to time as per the provisions of the Minimum Wages Act, 1948. This will lead to gross anomaly that has emerged due to insertion of words to Minimum Wages to Section-12 of the Payment of Bonus Act, 1965. This will create Industrial Relation problems and discrimination amongst the employees working in the establishment/ industries.
12. Being aggrieved and dissatisfied, by the retrospective application/ operations of the Payment of Bonus (Amendment) Act, 2015 and also the Amendment in so far

as the words "or the Minimum Wage for the Schedule employment, as fixed by the Appropriate Government, Whichever is higher" as inserted in Section-12 of the Payment of Bonus Act, 1965, and also challenging the constitutional validity of the Payment of Bonus (Amendment) Act, 2015, the present petition has been preferred under Article-14, 19(1)(g) and 226 of the Constitution of India on the following ground amongst the other without prejudice to each other.

GROUND

- (A) The Amendment in the Payment of Bonus Act, 1965 is ex-facie illegal, unjust, unfair, unconstitutional, ultra-virus, arbitrary, discriminatory and contrary to settled principle of law.
- (B) The Amendment in the Payment of Bonus Act, 1965, by the Notification dated 01.01.2016 will create the anomaly amongst the workers/ employees working in the establishment/ industries and also create the huge financial burden on the industries.

(C) It is respectfully submitted that as per the Amendment Act, 2015, the effect of the amendment has been applicable retrospectively i.e. 01.04.2014. The "Accounting Year" has been defined in the Section-2(1) of the Payment of Bonus Act, 1965. As per Section - 2(1)(iii)(a) & (b) the accounting years commencing of 1st day of April and 31st day of March is the closing date for the accounting year. As per Section-19(b) of the Payment of Bonus Act, 1965, the time limit for the payment of bonus is eight months from the closing of the accounting year. On bare perusal of the provisions of the Payment of Bonus Act, 1965, the amount of bonus for the accounting year which ended on 31st March 2015 would be paid on or before the 30 November 2015. The accounts for the financial year 2014 -2015 have already been closed so far as the members of the present petitioner federation. The Bonus payable in accordance with the provisions of the Payment of Bonus Act, 1965, as it stood on 01st April 2015 had also been paid by the concerned industries/ factories, after determined the profits and calculating the allocable surplus for the

payment of bonus. The retrospective amendment of the Payment of Bonus Act, 1965 as amended by the Amendment Act, 2015 would reopen the issue and thus, pave way to unsettle and settle issue and the employer- employee relationship are very likely to be embittered. The establishment / industry which required to publish their balance sheet, and submit to the statutory authorities prescribed under the provisions of the Companies Act, 1956, SEBI Guidelines etc., the concerned industries/ establishments those who are members of the present petitioners have already submitted to the Statutory Authorities. The members of the present petitioner federation - Industries/ Establishments have already decelerated the dividend and paid to the shareholder in many of the cases. The concerned establishment/ industries have already file the Returns with the Income Tax Authorities and Tax payments have already been made on the basis of the Profit and Loss Account for the year 2014-2015. The retrospective effect of the Amendment Act, 2015 will cast huge financial burden on the Industries / Establishments

for the financial year 2014-2015, which is already closed. In view of the Amendment Act, 2015, the Profit & Loss Account shall have to be recalculated having regard to quantum of additional bonus payable to employees. The tax liability would also vary on account of the additional payment made to the employees. The dividend declared by the concerned Company / Industry may also be affected resulting in reopening of several issues by creating multiple problems and inconvenience to the Establishment / Industry / Company. The retrospective implementation of the amendment will put an additional burden on the Industry / Company / Establishment, which was neither planned nor budgeted. Therefore, the retrospective effected given to the Payment of Bonus (Amendment) Act, 2015 w.e.f. 01.04.2014, as contemplated under Section 1(2) of the Amended Act, 2015 is unconstitutional and ultra virus, illegal, contrary to the provisions of law.

(D) It is respectfully submitted that the Parliament by amending Section 2(13) of the Payment of Bonus Act, 1965, raised the salaries or wage limit from Rs.10,000/- P.M. to Rs.21,000/- P.M.. By amending Section 2(13) of the Payment of Bonus Act, 1965, by way of the Amendment Act, 2015, by which the number of beneficiaries have been gone up. As a result of which the huge financial burden cast upon the concerned Industries / Companies / Establishments. While amending the Section 2(13) of the Payment of Bonus Act, 1965, the Parliament ought to have taken into consideration the financial repercussion on the concerned Industry / Company. The amendment in Section 2(13) of the Payment Bonus Act, 1965, amended by the Amendment Act, 2015 by raising the ceiling of salary / wages from Rs.10,000/- to Rs.21,000/- is unconstitutional and ultra virus and same be held to be illegal, unjust, unfair & contrary to the provisions of law.

(E) It is respectfully states and submits that on 31.12.2015, the President given the assent for the

amendment in the Payment of Bonus Act, 1965. In turn, the present respondent has issued the Notification in the Public Gazette ON 01.01.2016. As per the Payment of Bonus (Amendment) Act, 2015, the ceiling of wage / salary for determining the applicability of the Act has been raised from Rs.10,000/- to Rs.21,000/- per month. and the wage ceiling for calculation of the bonus has been increased from Rs.3,500/- to Rs.7,500/-per month or the Minimum Wage for the Scheduled employment as fixed by the Appropriate Government, which ever is higher. As a result of which the liability on the employer to pay the amount of bonus is double. The Parliament while amending the Section 12 of the Payment of Bonus Act, 1965, has overlooked the difference in the definition of "salary or wages" as defined by Section 2 (21) of the Payment of Bonus Act, 1965 which excludes all the allowances. Whereas, the "Wages" as defined under Section 2 (h) of the Minimum Wage Act, 1948 which includes the other allowances including the House Rent Allowance also. Therefore, the amendment in Section 12 of the

Payment of Bonus Act, 1965 is unrealistic and illegal. The Payment of Bonus (Amendment) Act, 2015 is against the spirit and background of the Payment of Bonus Act, 1965. Without properly taking into consideration, the definition of "Salary or Wage" as defined under Section 2(21) of the Payment of Bonus Act, 1965 and the definition of "Wage" as defined under Section 2(h) of the Minimum Wage Act, 1948, the Parliament has amended Section 12 of the Payment of Bonus Act, 1965. The Payment of Bonus (Amendment) Act, 2015 is unconstitutional and ultra virus and therefore, the same be struck down as illegal, unjust, unfair, arbitrary and beyond the legislative competence.

- (F) It is respectfully submitted that in view of the amendment in the Payment of Bonus Act, 1965, the uniform ceiling becomes inactive even for the same establishment working in the different States. In different States, there are different rates of Minimum Wages in respect of different type of employment. In the State of Gujarat, in view of the Notification dated

26.12.2014, uniform Minimum Wages made applicable to all scheduled employment. The said minimum wages have different rate irrespective of urban area and rural area i.e. Zone-I & Zone-II. The establishment/ Industry/ Company situated in urban area gets higher amount of bonus in comparison to the rural area. The employees in different categories like Skilled, Semi-Skilled and Unskilled gets bonus on the different rates. Such rates are also revised periodically in month of April and October in each of the financial year. As a result of which the employee/ worker, in a financial year may get bonus of different rate on the basis of the revisions of Minimum wages. This will create burden on the administrative staff of the establishment/ company in calculating the bonus. It will also create anomaly, complications amongst the workers working in the same establishment, as they will get bonus on different wage/ salary, which lead unrest amongst the employees. As a result of which multiplicity of the legal proceedings will also increase before the Court of Law for payment of bonus.

(G) It is respectfully submitted that the present respondent authority is trying to justify the application of the amendment with retrospective effect on the ground that the amendment could not be made because the legislature could not take up this important business for various reasons, therefore, the workers / employees should not be made suffer for inability of the legislature in carrying out the amendment. While amending the provisions of the Payment of Bonus Act, the legislature ought to have taken into consideration the aim, object and effect of the retrospective operation of the Act. Therefore, the Payment of Bonus (Amendment) Act, 2015 is unconstitutional and ultra virus and same be stuck down as illegal, unjust, unfair and contrary to provisions of law.

(H) Even, on the other grounds which may be urged at the time of the hearing of this petition.

13. The petitioner has no other alternative efficacious remedy except to approach this Hon'ble Court by way of filing

this petition under Article 14, 19(1)(g) & 226 of the Constitution of India

14. The petitioner has not filed any other petition except the present writ petition before this Hon'ble Court or before any other Court of Law including the Hon'ble Supreme Court of India on the subject matter of this petition except the proceedings initiated before the Hon'ble Apex Court as narrated hereinabove.
15. The petitioner craves leave to add, alter, amend, rescind and/or modify any of the foregoing grounds in the interest of justice.
16. The petitioner, therefore, humbly prays to this Hon'ble Court that:
 - (A) YOUR LORDSHIPS may kindly be pleased to issue Writ of Mandamus and/or any other appropriate Writ, direction or Order to hold and declare that the retrospective operation of the Payment of Bonus (Amendment) Act, 2015 and also insertion of words to Section-12 pertaining to the scheduled employment as assign to it under Section-2(g) of the

Minimum Wages Act, 1948, as illegal, arbitrary, discriminatory, unconstitutional, ultra-virus and contrary to the provisions of law.

- (B) YOUR LORDSHIPS may kindly be pleased to issue Writ of Prohibition and/or any other appropriate Writ, direction or Order to restrain the respondents from implementing/ enforcing the Payment of Bonus (Amendment) Act, 2015, for any period prior to the financial year 2015-2016 and also computation of bonus in respect of the Schedule Employment under the provisions of Minimum Wages Act, 1948 by virtue of insertion to the Amended provision of the Section-12 in respect of the present petitioner of the Payment of Bonus Act, 1965.
- (C) YOUR LORDSHIPS may kindly be pleased to issue Writ of Certiorari and/or any other appropriate Writ, direction or Order to quash and set aside the insertion of explanation clause to Section-12 of the Amended provisions of the Payment of Bonus Act, 1965 pertaining to the Scheduled employment and further be pleased to quash and set aside the

insertion of the employment as contemplated under Section-2(g) of the Minimum Wages Act, 1948.

- (D) Pending hearing and final disposal of this petition, YOUR LORDSHIPS may kindly be pleased to restrain the respondents from implementing/ enforcing the Payment of Bonus (Amendment) Act, 2015 for any period prior to the Financial year 2015-2016 in respect of the present petitioner and further be pleased to restrain the respondent to enforcing the Payment of Bonus (Amendment) Act, 2015, inserting the explanation clause pertaining to the scheduled employment as contemplated under Section-2(g) of the Minimum Wages Act, 1948.
- (E) To pass such other and further order/s necessary in the interest of justice.

AND FOR THIS ACT OF KINDNESS AND JUSTICE, THE PETITIONER, AS IN DUTY BOUND, SHALL PRAY FOR EVER.

Place: Ahmedabad
Date : .03.2016

(Prabhakar Upadhyay)
Advocate for the Petitioner