LABOUR LEGISLATION & CASE LAW

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LESSON : 1

THE FACTORIES ACT, 1948 AND A.P. FACTORIES RULES 1950

1.0 OBJECTIVE

The students are able to understand at the end of this lesson on the following

i) Objective of the Factories Act.
ii) Definitions of Factory, manufacturing process, worker, occupier, manager etc.
iii) Health provisions
iv) Safety and Hazardous process.
v) Welfare provisions and
vi) Powers of Inspectors

STRUCTURE

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1.2. Object
1.3. Application of the Act
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1.1. INTRODUCTION

The Factories Act, 1948, a labour welfare legislation, is enacted with the prime object of protecting workmen employed in factories against industrial and occupational hazards, and with that intent imposes upon the owners and occupiers certain obligations to protect the workers unwary as well as negligent and to secure for them employment conducive and safety. The object of the Act is to protect human beings from being subject to unduly long hours of bodily strain and manual labour. It provides that employees should work in healthy and safety conditions so far as the manufacturing process will allow and that precautions should be taken for their safety and for prevention of accidents. In order to ensure that the objects are carried out, the local governments are empowered to appoint inspectors to call for returns and to ensure that the prescribed registers are duly kept.

The Act provides for the health, safety, welfare and other aspects of workers in factories. It is enforced by the State Governments through their Factory Inspectorates. It also empowers the State Governments to frame rules, so that the local conditions prevailing in the State are appropriately reflected in the enforcement. Opportunity has been availed of to make the punishments provided in the Act stricter and certain other amendments found necessary in the implementation of the Act.

It should not be forgotten that the Act is sanctioning interference with the ordinary rights of the citizen and that the inquisitorial powers which are given should be used with tact and circumspection.

The object of the Legislature in enacting this Act was to regulate labour and the provisions clearly show that the said regulation was intended for the benefit and welfare of the workers.

The Act is meant to provide protection to the workers from being exploited by the greedy business establishments and it provides also for the improvement of working conditions within the factory premises. An adequate machinery of instructions and strict observance of the directions are provided in the Act, hence the Act aimed to the welfare of the workers and their protection from exploitation and unhygienic working conditions in the factory premises.

The provisions for safety, health and welfare of workers are generally found to be inadequate and unsatisfactory and even such protection as is provided by the legislation does not extend to the large mass of workers employed in work places not covered by the Act. In view of the large and growing industrial activities in the country, a radical overhauling of the factories law is called for and cannot be delayed. Although under the definition of "factory" in the Act of 1934, several undertakings are excluded from its scope but it is essential that important basic provisions relating to health, working hours, holidays, lighting and ventilation should be extended to all work places in view of dismal state of affairs now prevailing in unregulated factories. Some salient features of the Act are that the present distinction between seasonal and parennial factories which has little justification has been done away with, the minimum age of employment for children has been raised from 12 to 15 and their working hours reduced from 5 to 4 and ½ hours with powers to State Governments to prescribe a higher minimum age for employment in hazardous industry, to mention a few.

This concise treatise on the law on factories containing Factories Act, 1948 as amended by GSR 342(E) and GSR 343(e), dt: 19-4-2001 is aimed at the factory workers and occupiers concerned to have a handy up-to-date understanding about the factory laws in India.

1.2. OBJECT

The object of the Factories Act is to secure the Health, Safety and Welfare of the persons working in the factory.

1.3. APPLICATION OF THE ACT

The Act applies to every Factory in which Ten or more persons employed in case the Manufacturing process is carried on with the aid of Power or twenty or more persons are engaged in case it is carried on without the aid of power. Government has power to extend the provisions of the Act where less than 10 are employed also.

1.4. DEFINITIONS

1.4.1. Factory, Sec 2 (m)

Factory is a place where a manufacturing process takes place.

1.4.2. Manufacturing Process, sec.2 (k)

The definition of manufacturing process is very wide and any activity in which even if there is any alternations constitutes / manufacturing process. Cleaning, Washing, Pumping, Change of one article into another one etc., all comes under Manufacturing process.

1.4.3. Worker, sec.2 (1)

Any person who is employed by the Owner or Occupier directly by or through a Contractor in or in connection with the manufacturing process, with or without knowledge of the Employer whether for wages or not and found on the premises is a workman.

1.4.4. Occupier, Sec.2 (n)

Occupier is a person who has the ultimate control over the affairs of the factory. In the Case of a Company running the Factory one of the directors, in the case of Partnership, One of the

partners, in the case of an Association of Persons, one of the members of the Association alone can be nominated as Occupier. If no such nomination is made as required all directors or all partners or in the case of Association of persons all members of the Association are liable under the Act. The Authorities may proceed against any director, partner or member of the respective bodies as per their choice.

In case of Government owned Factories, the Head of the Department of the concerned Ministry or any officer nominated can be the Occupier.

Therefore one has to be careful in the matter of nominating the occupier.

1.4.5. Manager

A Factory shall have a Manager. In case no one is appointed as Manager the Occupier shall himself be the Manager. If a Manager is appointed with the responsibility of implementing the provisions of the Act, the Occupier cannot be proceeded against.

1.5. PRELIMINA RIES FOR LOCATING & STARTING A FACTORY

Selection of site, submission of plans of the site and factory giving all details required to the Chief Inspector of Factories. The required licence on payment of the fees prescribed, has to be obtained. Without obtaining approval of the site and plan no factory shall be started and without obtaining the licence manufacturing process cannot be started and without sending a notice in writing to the Chief Inspector fifteen days before the factory is occupied to start the Manufacturing process.

1.6. CERTIFICATE

Site clearance certificate and Pollution free certificates obtained from the appropriate Authorities shall be enclosed along with the site plan. Such certificates are issued by the Appropriate Authorities after inspection and proper study of the manufacturing process involved.

1.7. HEALTH PROVISIONS

The premises shall be clean. Proper provisions must be made for the disposal of waste and effluents. Proper ventilation maintaining proper temperatures, provisions against Dust fumes, prevention of over crowding, proper lighting, hygienic water for drinking, latrines, urinals, separately for Male and Female Workers, spittoons at proper places must be provided.

1.8. SAFETY

Safety provisions are : 1) to fence the machinery, 2) prohibit working on near a machinery in motion, 3) prohibition of employment of person who has not completed 14 years of age called Child., An Adolescent who has completed 15 years but not completed 18 years of age. Young person is either a Child or Adolescent. Adult is one who completes 18 years of age, 4) Precautions to be taken in the case of such machinery, 5) Prohibition of Women and Children i.e. below the age of 15 years near Cotton openers, 6) Precautions to be taken in case of hoists and lifts, lifting machines, chains, ropes, lifting tackles, revolving machinery, 7) Steps to be taken in case of

pressure plates, floors, stairs, 8) Means of access to be constructed and maintained, 9) Precautions in the case of pits, sumps, openings in floors, etc., prohibition of carrying weights more than prescribed by Adults. Women and young persons, 10) Providing protective to appliances the eyes, 11) Precautions against dangerous fumes, gases etc., 12) Precautions to be taken in the case of portable electric lights, 13) Precautions in the case of explosives or inflammable substances, 14)Precautions to be taken in the case of Fire, 15) To secure the safety of the building and machinery, 16)Maintenance measures to be taken in regard to the building and, 17) appointment of Safety Officer where the strength of the workmen is One thousand or More.

1.9. HAZARDOUS PROCESS

Hazardous process is one where special care is not taken in such Industries the raw materials used or the intermediate products, by products, wastes or effluents of such Industries affect the health of the workers engaged or connected with it or cause pollution.

Hazardous process Industries are notified in the First Schedule of the Act. Government may add to the same or delete.

The Occupier shall disclose all information regarding the dangers, the heath problem likely to be caused, the measures to overcome such hazards to the workmen to be employed therein to the Chief Inspector, the concerned local Authority and the general public in the vicinity of the Factory.

Occupier shall maintain the following

Health records / Medical records of the workers exposed to Chemical and Toxic substances which are harmful and which are manufacturing and stored.

To appoint persons with adequate qualification and experience in handling such substances.

To appoint competent Supervisors to handle such things,

Medical examination to be got done before the Worker is put on the job and even after he stops working there at intervals not exceeding 12 months,

Set up Safety committee comprising of Representatives and Workmen in equal numbers.

1.10. WELFARE PROVISIONS

The Occupier has to provide the following facilities for : 1. Washing, 2. Drying clothes, 3. Sitting, 4. First aid appliances, 5. Canteens, 6. Shelters, 7. Rest rooms, 8. Lunch rooms, 9. Creches.

To appoint Welfare Officer where 500 or more workers are employed, having the qualifications prescribed.

Canteen has to be provided in every factory where 250 or more workers are employed.

If Contract Labour is also employed through Contractor that number also has to be taken in to consideration for arriving at 250 number. Where the Canteen is run by a Contractor workmen in such a Canteen employed by the said Contractor, are to be treated as the employees of the Occupier.

1.11 HOURS OF WORK

The shift working and their hours are to be notified. No adult workers shall be allowed to work or asked to work there for more than 48 hours a week or more than 9 hrs a day.

1.12. WEEKLY DAY OF REST

Every seventh day after a workman works continuously for six days shall be treated as a day of Rest. In case Minimum Wages Act is applied to the said Factory the daily minimum wage payable takes care of the wage for the day of rest. No separate payment need be made for the seventh day, in case minimum wages act is not applicable. Payment for the day of rest is dependent upon the Contract of service or Agreement in other cases. If the daily wage payable to such workers is equivalent to a sum arrived at by dividing the monthly wage by 26 wage for the seventh day is taken care of.

No workman shall be asked to work continuously for more than five hrs in a shift of eight hrs without rest for half hour. Overlapping shifts is prohibited. The spread over in any day including the period of rest shall not exceed 10 ½ hrs in a day. A workman working in a shift shall have 24 hrs time before he is again asked to work in the next shift. No workman shall be asked or allowed to work for more than 9 hrs a day and 48 hrs in a week. No woman workers shall be asked to work before 6 AM and after 7 PM. No Child shall be allowed to work for more than 4 ½ hrs a day or asked to work in night shifts. Compensatory holiday can be given instead of weekly holiday. It is workman's right either to claim Overtime or compensatory holiday.

1.13. OVER TIME

Where the workman works on overtime i.e. beyond the normal prescribed eight hrs of work he shall be paid overtime wages calculated at twice the ordinary wages. In the case of continuous process industry requiring urgent repairs and maintenance overtime can be engaged first and inform the Inspector of Factories within 24 hrs of the commencement of the work. For this there is exemption for Adult workers from Sec.54 details of which are given in the Schedule under Rule 54.

1.14 ADULT REGISTERS, CHILD REGISTERS & TOKENS

Registers of Adult workers shall be maintained. Persons whose names are not entered in the Register shall not be allowed to work over-time.

A Register of Child Workers shall also be maintained. The working hrs of Child workers shall be displayed. Every child worker shall be given a token which he shall carry while on work. No worker below the age of 14 years of age shall be engaged and no persons between 14 and 18 years of age shall be employed unless certified to be fit by a certifying Surgeon. No person who has not completed 14 years of age shall be employed in any Factory. No Child shall be employed on the same day in different Establishments by the Parent or guardian.

1.15. ANNUAL LEAVE WITH WAGES

Every workman who has put in actual working of 240 days in a Calendar year is entitled to Annual leaves with wages at the rate of One day for every 20 days of such working in the beginning of the next Calendar year.

Workers who join duty in the middle of the year are entitled to proportionate leave proportionate to the days of working.

To avail of the leave the worker must give to the employer application for leave 15 days in advance if he has leave to his credit. When such leave is granted the worker shall be paid wages for the period of the leave granted, because he has already earned the leave with wages.

Such leave can also be availed of by a workman as sick leave on production of Medical Certificate. Annual leave cannot be availed of more than three spells in a year and no such leave can be accumulated beyond 30 days. The excess leave if any shall lapse.

Leave Registers shall be maintained showing the days worked, the leave earned, the leave to his credit, the leave availed with the dates, the leave if any lapsed.

Every workman shall be given a leave pass book showing the above details.

1.16. ACCIDENTS

Accidents resulting in death shall be intimated to the District Magistrate, the Inspector of Factories and to the local Police immediately by Telegram followed in the prescribed form.

Accidents which do not result in death but which prevent the workman by such injury from working for a period of forty eight hrs or more shall be notified immediately after 48 hrs.

1.17. AMBULANCE & FIRST AID PROVISION

Where five hundred or more workmen are employed in a Factory an ambulance Room In-charge of a Medical and nursing staff shall be provided and shall always be available during the working hrs.

In other cases for every One hundred and fifty workers employed at a time One First Aid Box with prescribed contents only shall be provided and maintained which shall be kept in charge of a separate responsible person are available all the time during the working hrs.

1.18. CRECHES

Where more than 30 women workers are ordinarily employed a suitable room or rooms shall be provided and maintained for children of such women under 6 years of age in charge of Ayahs. In such Creches, milk, biscuits etc., as prescribed to be provided to the children during the time their mothers are at work as prescribed.

1.19. TOKENS & CERTIFICATES

A Child who completes his fourteenth year can be employed under a certificate of fitness given by a Surgeon and with token. Such certificate shall be kept in the custody of the Manager of the factory.

An adult certificate can also be given by the certifying Surgeon where hi is satisfied that one has completed fifteen years of age and is fit for a day's work.

1.20. PENALTIES

PROSECUTIONS – (SEC. 92)	PUNISHMENTS
Contravention of any provisions of the Act or Rules or any order given in writing.	Occupier and Manager liable for each offence Imprisonment up to 2 years or with fine up to One lakh of Rupees or with both.
If contravention continues after conviction is subject to the following.	With further fine extending up to One thousand rupees for each day of continuation.
Where contravention is violation of the provisions regarding hazardous process or dangerous operations or any rules made there under	If results in death or serious bodily injury, fine shall not be less than twenty five thousand rupees in case of death and five thousand rupees in the case of serious bodily injury.
Where earlier convicted for similar contravention.	Imprisonment upto three years or with fine not less than Ten thousand rupees and extending upto Two lakhs of rupees or with both.
Contravention of any provisions relating to hazardous process or dangerous operation on second conviction	Resulting to death or causing serious bodily injury fine not less than thirty five thousand rupees in the case of serious bodily injury not less than Ten thousand rupees fine.
	For obstructing Inspector for willfully disclosing the results of analysis of samples taken for failure to comply with provisions relating to hazardous process industries are punishable.
	Likewise using false certificate of fitness permitting double employment of Child by the parent or guardian are also punishable.

1.21. POWERS OF INSPECTORS

Powers are vested in the Inspectors to inspect the Factories to verify whether the provisions of the Factories Act are being complied with and to direct remedial steps to betaken by the Occupier in the matter of violations / to issue notices to show cause why penal action should not be taken. Power is also vested in the government to order enquiry in case of accidents to workers suffering from occupational diseases occupational health surveys can be ordered to be made by expert Organisations like the Director General of Factory Advice Services besides the Chief Inspector of Factories.

The Occupier is the person who is responsibility for the violation. Incase he establishes that inspite of his instructions the Manager did not follow, the Manager alone will be liable (Sec.101).

1.22 DANGEROUS OPERATIONS, Sec.87

If the State Government is of the opinion that any operation on manufacturing process carried on in a factory exposes any person employed to a serious risk of bodily injury, poisoning or disease, it may make such rules relating to such factories.

1.23 POWER TO PROHIBIT EMPLOYMENT, Sec. 87-A

If it appears to the Inspector that the conditions in factory or part of the factory are such to cause serious hazard by way of injury or death to the persons employed therein or to the general public, he may by order prohibit the occupier from employing any person other than minimum number of persons necessary to attend to the minimum tasks till the hazard is removed persons who are so prohibited to work are entitled to wages and other benefits and shall be provided with alternate employment wherever possible.

Any order passed by the Inspector will have effect for three days which can be extended by the Chief Inspector.

1.24. NOTICE OF CERTAIN DISEASES, Se.89

The Manager of a Factory shall send notice to the Authorities if any worker in the Factory contacts any disease mentioned in the third schedule.

If any Medical Officer attends on such a period believes that the worker is suffering from such a disease he shall without delay send a report in writing to the Chief Inspector of Factories giving all particulars. If he fails to report he shall be punishable with fine upto One thousand rupees. The fee of the Medical Practitioner is recoverable from the occupier of the factory.

1.25 POWER TO HOLD ENQUIRY, Sec. 90

The State Government may appoint a competent person to inquire into causes of accident or into any case of disease specified in the third schedule. One or two persons with legal qualifications or special knowledge may be appointed as Assessors. They can exercise powers of Inspector and can examine witnesses compel production of documents and material objects. A report has to be sent to the Government with their findings.

1.26. POWER TO TAKE SAMPLES, Sec. 91

An Inspector has the power to ask for sufficient samples of any substance used or intended to be used in the Factory, such samples shall be sent one portion to the Government Analyst immediately and then other portion to the persons who gave the sample immediately.

1.27. SUMMARY

The Factories Act, 1948 was passed with an intention of making the work life of persons employed in factories free from hazards and injuries. The protection is afforded to all workers – men, women and children. Women and children are given special protection as they are considered more vulnerable. As the employer prepares the environment, the law seeks to regulate the same in the interests of the workmen. The law provides for scrutiny of the place and approval of plans and specifications before they are registered under the Act for the purpose of ensuring health, safety and welfare of the workers. Appropriate standards are also prescribed. Working hours of adults are made subject to regulations. Employment of children below the age of 14 is prohibited. The law regulates the employment of minors who are permitted to work. Law provides for the entitlement of annual leave with wages. Special provisions are also envisaged to meet certain eventualities.

1.28. SELF-ASSESSMENT QUESTIONS

1. What is the object of the Factories Act, 1948?
2. What is the meaning of the term “factory”? Who is the “occupier” of the factory?
3. Is it permissible to exempt any factory from the provisions of the Act?
4. What is the procedure for getting the plans of a factory approved?
5. What is the procedure for getting a factory registered under the Act?
6. What are the powers of the Inspectors appointed under the Act?
7. What are the measures to be taken by a factory in respect of health and safety of workers?
8. What are the measures required to be taken by a factory in respect of welfare of workers?
9. What are the provisions of the Act regarding appointments of Welfare Officers and Safety, Officers?
10. What are the restrictions on the employment of children in factory?
11. What are the provisions of the Act about the grant of annual leave to the workers?
12. What are the rights and obligations of the workers under the Act?

1.29. REFERENCES AND SUGGESTED BOOKS

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LESSON : 2

THE MINES ACT 1952 AND ITS RULES

2.0 OBJECTIVE

At the end of the lesson students are able to understand the following :

Objectives of the act

Administration of the Act

Health and Safety Provision

Hours of Work and Of Limitations of Employment and

Offences and Penalties.

STRUCTURE

2.1. Introduction
2.2. Objective of the Mines Act 1952
2.3. Scope and Coverage
2.4. Administration of the Act
2.5. Health and Safety
2.5.1. Drinking Water
2.5.2. Sanitation
2.5.3. Medical Appliances
2.5.4. Safety
2.6. Notice of Accident
2.7. Notice of Certain Diseases
2.8. Hours of Work and Limitation of Employment
2.9. Leave with wages
2.10. Facilities to Inspectors
2.11. Registers of Persons employed
2.12. Notice regarding Hours of Work
2.13. Abstracts of Act, Regulations etc.
2.14. Offences and Penalties (Sec. 63 to 74).
2.15. Obligation of employers
2.16. Obligations of employees
2.17. Conclusion
2.18. Self Assessment Question

2.19. Reference and Suggested Books

2.1. INTRODUCTION

The problems of health, safety and welfare of workers in mines have been engaging the attention of the Government since 1901 when the first Mines Act was passed. This Act prohibited the management of mines employing persons as supervisors or manager other than those who had passed a prescribed examination, or had a certificate to the effect that they had full charge of mine for over five years. It also provided for the appointment of inspectors, mining boards and committees, regular inspection of mines, reporting and investigation of accidents, and framing of safety rules and bylaws.

This Act was replaced by a more comprehensive Mines Act in 1923 which applied to all excavations for the extraction of minerals irrespective of their depth, and prohibited the entrance of children in mines who were below the age of 13 years. It also restricted the employment of persons in mines to six days in a week, and to 60 hours in week for surface work and 54 hours in a week for underground work. This Act was amended in 1927 and 1937 introducing shift system of working, and restricting daily hours of working first to twelve, and then to 9 and 10 for underground and surface workers respectively. Employment of women for underground work was completely stopped from October 1937 onward, and the age limit of the employment of children was also raised to 15 years. Further amendments in the Act continued in the light of the experience gained from the working of the Act till it was replaced by a new comprehensive Mines Act in 1952. This new Act was designed not only to consolidate and improve the existing provisions, but also to introduce some new measures to ensure safe and healthy working and employment conditions in mines.

2.2. OBJECTIVE OF THE ACT

The Mines Act, 1952 aims at providing for safe as well as proper working conditions in mines and certain amenities to the workers employed therein.

2.3. SCOPE AND COVERAGE

The Act extends to the whole of India and applies to all mines as defined in the Act. The Act came into force w.e.f. 1.7.1952.

The Act applies to all 'mines' which means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes.

(i) all brings, bore holes, oil wells and accessory crude conditioning plants concluding the pipeline within the oilfield,

(ii) all shafts belonging to a amine,

(iii) all levels and inclined planes,

(iv) all open cast workings,

(v) conveyors or aerial ropeways used for the removal of minerals or refuse from the mine.

(vi) workshops and stores within the precincts of a mine,

(vii) railways, tramways and siding belonging to a mine, and

(viii) the power station supplying electricity for the purpose of working the mine.

The Act shall, however, not apply to :

(a) any time or part thereof in which excavation is being made for prospecting purposes only and not for the purpose of obtaining minerals for use or sale, provided that not more than 20 persons are employed therein, on any one day, the depth of excavation nowhere exceeds six metres (15 metres in the case of coal mine), and the excavation does not extend below superjacent ground;

(b) any time engaged in the extraction of kankar, murrum, latrite, boulder, gravel, shingle, ordinary sand (excluding moulding, glass and other mineral sands), ordinary clay (excluding kaolin, china clay, white clay or fire clay, building stone, slate, road metal, earth, fullers earth, marl chalk and lime stone subject to the condition that the workings do not extend below superjacent ground, or incase of an open cast working, the depth of excavation does not exceed 6 metres, number of persons employed on any day does not exceed 50 and no explosives are used.

2.4. ADMINISTRATION OF THE ACT

The Central Government is the administrative authority under the Mines Act having the powers to make rules, regulations and bye-laws for carrying out the purposes of the Act. Mines Rules, 1955 have been accordingly made by the Government.

The Central Government has appointed the Chief Inspector of Mines and Inspectors to enforce the provisions of the Act and the regulations and rules made thereunder. The District Magistrate may also exercise the power and perform the duties of an inspector subject to the general or special orders of the Government. The Government has also appointed Certifying Surgeons and has constituted a committee to consider proposed rules and regulations, enquire into accidents, etc., and hear and decide appeals or objections against notices or orders under the Act.

The owner, agent or manager of a mine is required to give a notice in writing in the prescribed form, to the Chief Inspector of Mines, the Controller of Indian Bureau of Mines and the district magistrate of the district in which the mine is situated, at least one month before the commencement of any mining operation.

Every mine shall be under the charge of a sole manager, possessing the prescribed qualifications. The owner or agent of the mine shall appoint himself or any other person as Manager, having the requisite qualifications. The mine manager shall be responsible for the overall management, control, supervision and direction of the mine, and except in case of an emergency, any instructions by the owner or agent, to any person employed in a mine, shall be given only through the manager of the time.

2.5. HEALTH AND SAFETY

2.5.1. Drinking Water

The owner or agent of a mine shall make effective arrangements to provide and maintain, at suitable points conveniently situated, a sufficient supply of cool and wholesome drinking water

for all persons employed therein. In the case of persons employed below ground, any other effective arrangements shall be made for supply of drinking water. All such points shall be legibly marked 'Drinking Water' in a language understood by a majority of all the persons employed in the mine (Section 19).

2.5.2. Sanitation

In every mine, a sufficient number of latrines and urinals of prescribed types, separately for males and females, shall be so situated as to be convenient and accessible to persons employed in the mine at all times and shall be adequately lighted, ventilated and maintained in a clean and sanitary condition (Section 20).

2.5.3. Medical Appliances

In every mine, prescribed number of first-aid boxes or cup-boards equipped with prescribed contents shall be provided and maintained so as to be readily accessible during all working hours. Every first-aid box or cupboard shall be kept in the charge of a responsible person who is trained in first-side treatment and who shall always be readily available during the working hours of the mine.

In every mine suitable arrangements shall be made for the conveyance to hospitals or dispensaries of injured or ill persons.

In every mine wherein more than 150 persons are employed there shall be provided and maintained a first-room of the prescribed size having the prescribed equipment and staff (Section 21).

2.5.4. Safety

If in respect of the operations of a mine it appears to the Chief Inspector or any Inspector that any matter, thing or practice is dangerous to human life or safety or is defective so as to threaten bodily injury to any person employed therein, he may give written notice to the owner, agent or manager of the mine asking him to remedy the situation within the specified time and in the specified manner. If the terms of the notice are not complied with, he may prohibit the employment in or about that mine of any person after the expiry of the specified period.

Similarly, in case of urgent and immediate danger to the life or safety of any person employed in any mine or part thereof, *e.g.,* when there is flooding of a mine or emission of poisonous gas, the Chief Inspector or any authorised Inspector may prohibit, through a written order, the employment of any person therein until that danger is removed.

Every person whose employment is prohibited in or about a mine on grounds of unsafe working conditions, as discussed above, shall be entitled to payment of full wages for the period his employment is prohibited, unless such person is provided with alternatives employment at the same wages (Section 22).

2.6. NOTICE OF ACCIDENT

The owner, agent or manager of the mine shall give notice of :

(a) an accident causing loss of life or serious bodily injury, or
(b) an explosion, ignition, spontaneous heating, outbreak of fire or irruption or inrush of water or other liquid matter, or
(c) an influx of inflammable or noxious gases, or
(d) a breakage of ropes, chains or other means of conveyance in any shaft while persons or materials are being lowered or raised, or
(e) an over winding of cages or other means of conveyance in any shaft while persons or materials are being lowered or raised, or
(f) a premature collapse of any part of the working, or
(g) any other accident which may be prescribed.

To the prescribed authority in the prescribed manner, and he shall simultaneously post one copy of the notice on a special notice board in the prescribed manner at a place where it may be inspected by trade union officials, and shall ensure that the notice is kept on the board for not less than fourteen days from the date of such posting.

The owner, agent or manager of the mine shall maintain a register of accidents in the prescribed form and copies of the entries therein shall be furnished to the Chief Inspector quarterly (Section 23).

2.7. NOTICE OF CERTAIN DISEASES

Where any person employed in a mine contacts any notified disease connected with mining operations, the owner, agent or manager of the mine, as the case may be, shall send notice thereof to the Chief Inspector and to such other authorities, in such form and within such time as may be prescribed.

Besides, if any medical practitioner attends on any such person who is suffering from any notified disease, he shall without delay send a report in writing to the Chief Inspector stating :

(a) the name and address of the patient;
(b) the disease from which the patient is or is believed to be suffering, and
(c) the name and address of the mine in which the patient is or was last employed.

Where the medical practitioner's report is confirmed by a certifying surgeon, the Chief Inspector shall pay to the medical practitioner such fee as may be prescribed, which shall be recoverable from the owner, agent or manager of the mine (Section 25).

2.8. HOURS OF WORK AND LIMITATION OF EMPLOYMENT

No person shall be allowed to work in a mine for more than six days in any one week. Where any person is delivered of any of the weekly days of rest, he shall be allowed, within the month in which such days of rest were due to him or within the next two months, compensatory rest days of equal number (Section 28 and 29).

No adult employed above ground in a mine shall be required or allowed to work for more than forty –eight hours in any week or for more than nine hours in any day except to facilitate the change of shifts.

The periods of work along with his interval for rest, shall not in day spread over more than twelve hours, and no worker shall work for more than five hours continuously before he has had an interval for rest of at least half an hour. But the Chief Inspector may, however, permit the spread over to extend over a period not exceeding fourteen hours in any day (Section 30).

No adults employed below ground in a mine shall be allowed to work for more than forty-eight hours in any week or for more than eight hours in any day except to facilitate the change of shifts.

The work below ground in any mine shall be carried on by a system of shifts, each shift of not more than the daily maximum hours stipulated above.

No person employed in a mine shall be carried on by a system of shifts, each shift of not more than the daily maximum hours stipulated above.

In case of a person employed in a mine working on a night shift :

(a) the weekly rest day shall be a period of twenty – four consecutive hours beginning when his shift ends,

(b) the following day shall be the period of twenty four hours beginning when such shift ends, and the hours he has worked after midnight shall be counted in the previous day (Sec. 32).

Where in a mine a person works above ground for more than nine hours in any day, or works below ground for more than eight hours in any day or works for more than forty-eight hours in any week, whether above ground or below ground, he shall in respect of such overtime work, be entitled to wages at the rate of twice his ordinary rate of wages. The period of overtime work shall be calculated on a daily basis or weekly basis, whichever is more favourable to him.

Where any person is employed on piece-rate basis, the time-rate shall be the daily average of his full-time earnings for the days on which he actually worked during the week immediately preceding the week in which overtime work has been done, exclusive of any overtime, and such time-rate shall be deemed to be the ordinary rate of wages of such person (Section 33).

No person is allowed to work in the mine for more than ten hours in any day inclusive of overtime (Section 35). Besides, no person shall be required or allowed to work in a mine if he has already been working in any other mine within the preceding twelve hours.

No person below eighteen years of age shall be allowed to work in any mine or part thereof. But apprentices (as defined in the Apprentices Act) and other trainees, not below sixteen years of age, may be allowed to work, under proper supervision of the manager, with the prior approval of the Chief Inspector (Section 40).

No women shall be employed :

(a) in any part of a mine which is below ground ;

(b) in any time above ground except between the hours of 6 a.m. and 7 p.m

Every woman employed in a mine above ground shall be allowed an interval of not less than eleven hours between the termination of employment on any one day and the commencement of the next period of employment (Section 46).

2.9. LEAVE WITH WAGES

Every worker who has completed a calendar year's service in a mine shall be entitled to, during the subsequent calendar year, leave with wages, at the rate of:

(a) one day for every fifteen days of wok performed by him, in the case of a person employed below ground, and
(b) one day for every twenty days of work performed by him, in the case of a person

A 'calendar year's service' means :

(a) in the case of a person employed below ground not less than 190 attendance's during the calendar year; and
(b) in the case of any other person, not less than 240 attendance's during the calendar year; and
(c) in the case of any other person, not less than 240 attendance's during the calendar year.

For the purpose of competition of attendance's any days of lay-off, in the case of a female employee, maternity leave not exceeding twelve weeks, and the leave earned in the year prior to that in which the leave is enjoyed, shall be deemed to be the days on which the employee has worked in a mine, but he shall not earn leave for these days.

Any leave not taken by a person to which he is entitled in any one calendar year shall be added to the leave to be allowed to him during the succeeding calendar year provided that the total number of leave so accumulated does not exceed thirty days in all. However, a person who has applied for leave but has not been given such leave, shall be entitled to carry forward the unavailed leave without any limit (section 52).

Wages for the leave allowed to a worker, shall be paid at a rate equal to the daily average of his total full-time earnings for the days on which he has employed during the month immediately preceding his leave, exclusive of any overtime wages and bonus but inclusive of any dearness allowance and compensation in case or kind, accruing through the free issue of food grains and other articles. If no such average earnings are available, then the average shall be computed on the basis of the daily average of the total full-time earnings of all persons similarly employed for the same month (Section 53).

Where the leave rules applicable to reasons employed in any mine provide better benefits than those provided for in this Act, the central Government may, by order in writing and subject to

specified conditions, exempt the mine from all or any of the provisions regarding leave with wages (Section 56).

2.10. FACILITIES TO INSPECTORS

Every owner, agent and manager of a mine shall afford the Chief Inspector, Inspectors and every person authorised under Section 8, all reasonable facilities for making any entry, inspection, survey, measurement, examination or injury under this Act.

2.11. REGISTERS OF PERSONS EMPLOYED

For every mine there shall be kept in the prescribed form and place a register of all persons employed in the mine showing in respect of each such person.

(a) the name of the employee with the name of his father or, of her husband, as the case may be, and such other particulars as may be necessary for purposes of identification;
(b) the age and sex of the employee;
(c) the nature of employment (whether above ground or below ground, and if above ground, whether in open cast workings or otherwise) and the date of commencement thereof.

The register of persons employed below ground shall show, at any moment, the name of every person who is then present below ground in the mine (Section 48).

2.12. NOTICE REGARDING HOURS OF WORK

A notice in the prescribed form shall be posted outside the office of the mine at least 7 days in advance, stating the time of the commencement and of the end of work at the mine and, if it is proposed to work by a system of relays, the time of the commencement and of the end of work for each relay.

The notice shall also state the time of the commencement and of the intervals for rest for persons employed above ground and a copy thereof shall be sent to the Chief Inspector, if he so requires.

Where any alternation is proposed to be made is fixed for the commencements or for the end of work in the mine generally, or for any relay, or in the rest intervals fixed for persons employed above ground, an amended notice in the prescribed form shall be posted outside the office of the time, at least 7 days before the change is made, and a copy of such notice shall be sent to the Chief Inspector simultaneously.

No person shall be allowed to work in a mine otherwise than in accordance with the aforesaid notice.

2.13. ABSTRACTS OF ACT, REGULATIONS, ETC.

An abstract of the Act, regulations and rules, in the prescribed form, in English and other prescribed language(s) shall be posted at or near every mine.

2.14. OFFENCES AND PENALTIES (SECTION 63 TO 74)

Penalty Offence

1 Obstruction to Chief Inspector, or any Inspector or any other authorised person in the discharge of his duties.Imprisonment up to 3 months, or fine up to Rs. 500/- or both.

2 Refusal to produce records, registers, etc. Fine up to Rs. 300/-

3 Making a false statement in a certificate, or making, producing or using any false declaration, statement or evidence, etc.Imprisonment up to one month, or fine up to Rs. 1,000/- or both.

4 Use of a false certificate of fitness.Imprisonment up to one month, or fine up to Rs. 200/- or both.

5 Failure to furnish any plan, section, return, notice, etc.Fine up to Rs. 1,000/-

6 Contravention of provisions regarding employment of labour.
prisonment up to 3 months, or fine up to Rs. 1,000/- or both.

7 Employment of a person below 18 years of age.Fine up to Rs. 500/-

8 Failure to appoint manager Imprisonment up to 3 months, or fine up to Rs. 2,500/- or both.

9 Failure to give notice of accident or failure to display it on the Notice Board for the specified period. Imprisonment up to 3 months, or fine up to Rs. 500/- or both.

10 Contravention of any order under Sections 22 or 22A, prohibiting employment of certain persons in certain cases.Imprisonment up to 2 years, or fine up to Rs. 5,000/-

11 Contravention of any provision of the Act, rules, regulations, etc, which results in

(i) loss of lifeImprisonment up to 2 years, or fine up to Rs. 500/- or both.

(ii) serious bodily injury Imprisonment up to 1 year, or fine up to Rs. 3,000/- or both.

(iii) injury or danger to persons employed in the mine.
Imprisonment up to 3 months, or fine up to Rs. 1,000/- or both.

For subsequent convictions under 10 and 11, the punishment will be double that of the first conviction.

2.15.OBLIGATIONS OF EMPLOYERS

(1) Afford to inspectors appointed under this Act all reasonable facilities for making an entry, inspection, survey, measurement, examination or enquiry under the Act.

(2) Give notice to the Chief Inspector containing prescribed particulars about the mine before commencing of mining operations.

(3) Carry on or conduct mining operatively strictly in conformity with the provisions of this Act and regulations, rules and bylaws and orders made thereunder.

(4) Provide drinking water, latrines and urinals, first-aid boxes and rooms, canteens, creches, pitched baths and other welfare amenities, and also appoint welfare and safety officers as required under this Act and its regulations.

(5) Give within the prescribed time notice of accidents occurring in mines and of occupational disease that may be contracted by workers in course of employment, and cooperate with the authorities in investigating the same.

(6) Observe all provisions regarding daily and weekly working hours, overtime, employment of women, adolescents, children and adults, and provide rest intervals, weekly holidays, extra payment for overtime, leave with wages as required under the Act.

(7) Post notices regarding working hours outside the office of the mine and also abstracts from the Act, rules and regulations at or near every mine in English and other languages as may be prescribed.

2.16. OBLIGATIONS OF EMPLOYEES

No person employed in a mine shall :

(i) willfully interfere with or misuse of any appliance, convenience or other thing provided in a mine for the purpose of securing the health, safety or welfare of the persons employed therein,

(ii) willfully and without reasonable cause do anything likely to endanger himself or other, and

(iii) willfully neglect to make use of any appliance or other thing provided in the mine for the purpose of securing the health or safety of the person employed therein (Section 72).

2.17. SUMMARY

The Indian Mines Act which related to the regulation and inspection of mines was passed in 1923. Although it had since been amended in certain respects, the general framework had remained unchanged. Experience of the working of the Act revealed a number of defects and deficiencies which hampered effective administration. Some of these necessitated new forms of control while others required the tightening up of the existing legal provisions. Therefore, it had been considered necessary to thoroughly overhaul the existing Act, which resulted in the enactment of the Mines Act, 1952 to amend and consolidate the law relating to the regulation of labour and safety in mines.

The present Act differs from the earlier law in certain respects, the important features of which are given hereunder as per the Objects and Reasons of the Act.

At present workshops run by a mine for the maintenance of its machinery and plant in safe and efficient working order is subject to the Factories Act, 1948, which is administered by Provincial Governments. Workers in workshops, such as fitters, blacksmith, welders, electricians and others frequently work for a part of the shift underground and will, so employed, come within the scope of the Mines Act. It is inconvenient that the same personnel should be subject to two different Acts administered by two different authorities. It is now proposed to bring all personnel engaged solely on work relating to mines within the scope of the Mines Act. For similar reasons it is proposed to bring within the scope of the Mines Act power stations which generate power used wholly in connection with the mine concerned.

Provision has been made in the Bill for the issue of certificates to fitness to adolescents and the appointment of certifying surgeons.

The provisions in the existing Act regarding conservancy and sanitary, conveyances are of a general nature. The Bill provides for more definite arrangement for drinking water, latrines, urinals etc.

It has been made obligatory on the part of the owner, agent or manager of a mine to report the contraction of any of certain notified diseases. Provisions for the holding of an enquiry regarding the cause of contraction of a reported disease has also been made.

It has been laid down the first-aid appliances should be made available underground and that they should be kept in-charge of qualified personnel.

A new chapter regarding the grant of compensatory holidays and holding with pay has been included.

The existing Act does not specify the rate of payment for overtime work. In the Bill the rates for overtime have been fixed at one and a half times the ordinary rate of wages in the case of surface workers and at twice the ordinary rate for underground workers. The working hours for all workers both surface and underground have been reduced to 48 hours per week and no worker is to be allowed to work for more than nine hours a day above ground and eight hours a day below ground. The provisions in the existing Act permit workers on the surface to work for 54 hours in a week or 10 hours a day and workers underground for nine hours a day.

It is proposed to prohibit after a certain date to be notified by the Central Government the presence of children in any part of a mine where operation connected with or incidental to mining processes are being carried on. The intention is that the presence of children at mines should be prohibited as soon as arrangements for the provisions of elementary education can be made in collieries.

The age-limit of persons employed underground has been raised from 17 to 18 years.

At present the penalty for violation of the provisions of the Act is only fine. It is proposed to provide that the punishment may be imprisonment or fine or both. This will bring the penalty provisions in line with the penalties prescribed in the Factories Act, 1948.

The employment of women underground is prohibited. This prohibition will be continued. The employment of women on the surface between the hours of 7 p.m. and 6 a.m. will also be prohibited, but not so as to authorise working between ten hours of 10 p.m. and 5 a.m.

Opportunity has also been taken to include in the Bill provisions regulating labour and safety and comfort of workers somewhat on the lines of those contained in the Factories Act, 1948.

It is hoped that when the Bill is passed into law, the provisions regulating labour and safety in mines will largely be on the lines of those contained in the Factories Act, 1948.

The Act came into force with effect from 1-7-1952 vide Notification No. S.R.O. dated 27-5-1952 published in the Gazette of India, 1952, Part II, Section 3, page 869.

2.18. SELF ASSESSMENT QUESTION

1. What is the scope and coverage of the Act?
2. What are the health and safety measures laid down under the Act?
3. What are the limitations regarding hours of work and employment in a mine?
4. What are the obligations of employer and employees under the Act?

2.19. REFERENCES AND SUGGESTED BOOKS

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LESSON : 3

THE CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970 AND ITS RULES

3.0 : OBJECTIVE :

The Students are able to understand at the end of this lesson on the following:

- The objective, applicability and definitions.
- Prohibition of Contract Labour
- Registration and licensing
- Welfare of Contract Labour
- Payment of Wages
- Obligations of Principal Employer and Contractor.
- Offences and Penalties and
- Powers of Inspectors.

STRUCTURE

3.1. Introduction
3.2. Objective
3.3. Applicability
3.4. Definition
3.5. Advisory Boards
3.6. Prohibition of Contract Labour
3.7. Registration
3.8. Licensing
3.9. Welfare of Contract Labour
3.10. Payment of Wages
3.11. Records, Registers and Notices
3.12. Obligations of Principal employer
3.13. Obligations of contractor
3.14. Offences and penalties
3.15. Powers of Inspectors
3.16. Miscellaneous
3.17. Conclusion
3.18. Self-Assessment Questions
3.19. References and Suggested books

3.1. INTRODUCTION

The plight of contract labour employed in Indian industries has been a matter of public concern for a long time. Almost every committee and commission set-up by the government to

investigate into the conditions of labour has drawn pointed attention to the specific problem of contract labour. The Whitley Commission (1929-1931) recommended the abolition of contract labour by implication. A serious note on this aspect of labour was taken in the Second Five-Year Plan document, which observed that the major problem of contract labour by implication. A serious note on this aspect of labour was taken in the Second Five-Year Plan document, which observed that the major problem of contract labour related to the regulation of their working conditions and ensuring them continuous employment. The Indian Labour Conference, in its different sessions, felt the need for the abolition of the system of contract labour wherever, in its different sessions, felt the need for the abolition of the system of contract labour wherever possible and for its regulation in other cases. The National Commission on Labour (1966-69) made certain observations on the system of contract labour as was then prevalent in the country. Various judicial awards have discouraged the practice of employing contract labour. The Supreme Court, in its judgement in Stanvac V. Their Workmen (Civil Appeal No. 130 of 1959), observed that “work through contract labour should not be allowed where (a) the work is perennial and must go on from day-to-day; (b) the work is incidental and necessary for the work of the factory; (c) the work is sufficient to employ a considerable number of whole time workmen’ and (d) the work is being done in most other concerns through regular workmen”.

The Contract Labour (Regulation and Abolition) Act, 1970, is a piece of central legislation which provides for the abolition of contract labour wherever possible and for the regulation of the conditions of contract labour in establishments or employments where the abolition of contract labour system is not considered feasible for the time being.

3.2. OBJECTIVE

This act came into force with effect from 10th February 1971. The object of the Act is to regulate the employment of Contract Labour employed in certain establishments and to provide for its abolition in certain circumstances.

3.3. APPLICABILITY

The Act is applicable to :

(a) Every establishment in which 20 or more workmen are employed or were employed on any day of the preceding twelve months as contract labour; and

(b) Every contractor who employs or who employed on any day of the preceding twelve months 20 or more workmen.

The Act empowers the Central and State Governments to apply its provisions to any establishment or contractor employing less than twenty workmen (Section 1 (4). It is not applicable to establishments performing work only of an intermittent or casual nature (Section 1 (5)). The work is deemed to be of an intermittent nature.

(i) If it is of a seasonal character and is performed for not more than 60 days in a year; or

(ii) In other cases, if it was performed for not more than 120 days in the preceding twelve months (Section 1(5)).

3.4 DEFINITIONS

The term appropriate government means:

(i) In relation to an establishment in respect of which the appropriate government under the Industrial Disputes Act, 1947, is the Central Government.

(ii) In relation to any other establishment the government of the State in which that other establishment is situate (Section 1 (a)).

A workman shall be deemed to be employed as “contract labour” in, or in connection with the work of, an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer (Section 1(b)).

A “contractor”, in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor (Section 2 (c)).

i. establishment means any office or department of the government or local authority

Or

ii. any place were, any industry, trade, business, manufacturing or occupation is carried on

Principal Employer means

i. the head of the office or department or such other officer as the Government or local authority may specify in his behalf.

ii. the owner or occupier of the factory and the manager of the factory, the Factories Act 1948.

iii. the manufacturer or the owner or agent of the mine and the manager of the mine. (under Mines Act).

iv. any other establishment any person responsible for the supervision and control of the establishment.

3.5. ADVISORY BOARDS

The Central Government and the State Governments are required to set up central and state tripartite advisory boards representing various interests for advising the Central and State Government on matters arising out of the administration of the Act, and to carry out such other functions, especially the function of advising the government on the question of prohibition of contract labour in any establishment, as may be entrusted to them under the Act (Sections 3-5), The Central Board or the State Board, as the case may, may be constitute such committees and for such purposes as it may think fit (Section 5).

3.6. PROHIBITION OF CONTRACT LABOUR

The Central Government or a State Government may after consultation with the central board or as the case may be a state board prohibit employment of contract labour in any process, operation or other works in any establishment by notification in the official gazette. Before giving notification the appropriate Government has to take into consideration the following,

(a) whether the conditions of work and benefits provided for contract labour in the establishment are satisfactory or in accordance with this statue.

(b) whether the work is incidental to or necessary for the business, trade, industry, occupation of the establishment.

(c) whether it is of a parennial nature.

(d) whether it is done ordinarily through regular workmen; in that establishment or an establishment similar there to

(e) whether it is sufficient to employ a considerable number of regular workmen.

3.7. REGISTRATION

Every principal employer of an establishment to which the Act applies must get his establishment registered under the Act for the purpose of employing contract labour. With in a period as prescribed by the appropriate government by submitting an application in the prescribed form, accompanied by prescribed fee to the registering officer. After receiving the application for the registration from the principal employer. The registering officer shall issue a registration certificate in the prescribed form in case the application is complete in all aspects. (Section 7).

The Registering Officer may have powers to revoke the registration of any establishment if he is satisfied:

i) that the registration has been obtained by misrepresentation or suppression of any material fact; or

ii) that the registration has become useless or ineffective for any other reason and required to be revoked (Section 8).

The principal employer of an establishment who has not obtained the required registration under Section 7, or whose registration has been revoked under Section 8, is prohibited from employing any contract labour in his establishment (Section 9).

3.8. LICENSING

No contractor to whom this act applies shall undertake or execute any work through contract labour without obtaining a valid licence from the licensing officer under the act (Section 12)

The Act provides for the appointment of licensing officers for granting of licences (Section 11).

Every contractor to whom this act applies has to make an application in the prescribed form accompanied by prescribed fee and security deposit to the licensing officer for the grant of licence. Duly furnishing the location of the establishment.

The Licensing Officer, after making necessary investigation, may issue a licence in the prescribed form containing the conditions subject to which it is granted. The licence shall be valid for period as specified therein and shall have to be renewed from time to time (Section 13).

The Licensing Officer may revoke or suspend a licence or forfeit the security deposit if he is satisfied.

(i) that the licence has been obtained by misrepresentation or suppression of any material fact, or

(ii) that the holder of the licence has failed to comply with the conditions specified therein, or

(iii) that the holder of the licence has contravened any provision of the Act or rules made thereunder (Section 14).

Any person aggrieved by the order made under section 7 or section 8 : section 12 or section 20 of the Registering Officer or the Licensing Officer as the case may prefer an appeal to the Appellate Officer. within 30 days from the communication of such order (Section 15).

3.9. WELFARE OF CONTRACT LABOUR

Any contractor is covered by the act shall provide:

(i) a canteen in every establishment employing 100 or more contract labour and it is likely to be continued for such a period as prescribed under the rules (Section 16).

(ii) rest rooms or other suitable alternative accommodation where contract labour is required to halt at night in connection with the work of an establishment the accommodation shall be sufficiently lighted and ventilated (Section 17).

(iii) a sufficient supply of wholesome drinking water, a sufficient number of latrines and urinals of prescribed types and washing facilities (Section 18).

(iv) first-aid box equipped with the prescribed contents and it shall be readily accessible during all working hours (Section 19).

The Act imposes a liability on the principal employer to provide the above amenities to the contract labour employed in his establishment if the contractor fails to do so (Section 20).

If the contract labourers are is allowed to utilise the canteen, rest rooms, latrines and urinals provided by the principal employer to his regular workmen. Then is no need for the contractor to provide separately the above facilities.

3.10. PAYMENT OF WAGES

The Payment of Wages and deductions if any, shall be made by the contractor in accordance with the provisions of the Payment of Wages Act. The employer is required to nominate an authorised representative to be present at the time of the disbursement of wages and also to certify the amounts paid as wages by the contract. Any contractor fails to pay wages as fixed by the appropriate government to the contract labour employed by him or make short payments to the contract labour in any establishment, the principal employer of such establishment shall be liable to pay unpaid wages in full and the balance of short payments as the case may be to the contract labourers employed by the contractor in his establishment and can record the amount so paid from the contractor.

3.11. RECORDS, REGISTERS AND NOTICES

It is the duty of every principal employer and every contractor to maintain records giving particulars of contract labour employed, the nature of work performed by contract labour, and the rates of wages paid to contract labour, as prescribed under the rules framed their under.

In short, the forms, registers and notices prescribed for the purpose are:

(i) principal employer shall maintain a register of contractors in form XII.

(ii) every contractor shall maintain in respect of each registered establishment where he employs contract labour a register in form XIII.

(iii) every contractor shall issue an employment card in form XIV to each contract labour and also shall issue a service certificate on termination of employment in form XVI.

Every contractor is required to maintain in respect of the contract labours employed by him, registers such as : (i) Muster Roll, (ii) Register of Wages (iii) Register of Deductions (iv) Register of Overtime, (v) Register of Fines (vi) Register of Advances and (vii) Wage Slips etc.

The contractor is required to send half-yearly returns to the licensing authority not later than 31st July and 31st January every year.

The principal employer of a registered establishment is required to send to the Registering Officer concerned an annual return in the prescribed form. On or before 15th February following the end of the year to which it relates.

It is the duty of the principal employer as well as the contractor exhibit in the premises of the establishment where the contract labour are notices containing particulars about the hours of work, nature of duty etc., in accordance with the rules framed under the Act (Section 29).

3.12. OBLIGATIONS OF PRINCIPAL EMPLOYER

(1) Register the establishment as principal employer.

(2) Get the certificate of registration amended by intimating to the registering authority. The changes took place in form I within 15 days of the change took place.

(3) To ensure that the contractor is having obtained a valid licence under,

- (a) contract Labour (Regulation and Abolition) Act, 1970 and
- (b) inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979.

(4) To intimate to the registering authority of commencement / completion of the work undertaken by the contractor within 15 days from the commencement / completion of work by such contractor.

(5) To maintain a register of contractors with respect to each establishment.

(6) To ensure due compliance of payment of statutory wages and certify the payments may to contract labour engaged by the contractors.

(7) To ensure due compliance of all labour law applicable to contract labour. For any violation of statutory requirements by the contractor, the principal employer shall be held responsible.

(8) To submit annual return to the registering authority by 15th February of the subsequent year.

(9) Comply with the statutory requirements in case the contractor fails to do so.

(10) To frame recruitment rules and regulations for the contract labour regarding their minimum, maximum age, height, weight and medical fitness.

(11) To ensure that the agreement with the contractor is not a sham contract.

(12) To look after the grievances of contract labour.

3.13. OBLIGATIONS OF CONTRACTOR

1) Obtain a licence for employing 20 or more contract labour on any day during the preceding 12 months.

2) Inform the licensing officer regarding any change in the number of workmen or nature of work of contract labour.

3) Inform the licensing officer regarding commencement / completion of work within 15 days.

4) Renew the licence for every 12 months and an application for renewal of licence shall be made 30 days prior to the Expiry of licence.
5) Issue employment card to each contract labour on the first day of the employment of contract labour.
6) Ensure that the contract labour carries his employment card with him during the working hours.
7) Issue a service certificate to the workman whose services have been terminated.
8) Fix wage period and pay wages to contract labour in the presence of the authorised representative of the principal employer.
9) Comply with the provisions of the Inter-State Migrant Workmen Act.
10) Comply with the Payment of Wages Act and the Minimum Wages Act.
11) Comply with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act.
12) Provide services and amenities to contract labour as laid down under the Contract Labour (Regulation and Abolition) Act /Factories Act.
13) Follow the rules and regulations regarding hours of work, working conditions, safety and welfare under different statutes.
14) Obtain identity cards for the contract labour indicating (a) name of establishment (b) name of employee (c) age (d) sex (e) date of entry in to in service (f) designation / nature of work and (g) department.
15) Maintain attendance-cum-wage register and mark the attendance of the workers at the gate regularly.
16) Maintain all records and registers.
17) Display abstract of the Acts and Rules in English, Hindi, and in the language known to the majority of workers.
18) Submit returns to the Government as prescribed.

3.14. OFFENCES AND PENALTIES

The Act stipulates various offences and punishments.

(a) If any person obstructs an inspector or willfully refuses to produce any document on demand by him, he would be punished with imprisonment upto 3 months, or fine upto Rs. 500 or both.

(b) If any person contravenes any provision of the Act or of any rules made thereunder prohibiting, restricting or regulating the employment of contract labour, or contravenes any condition of a licence granted under the Act, he would be punished with imprisonment upto 3 months, or fine upto Rs. 1,000 or with both. If such contravention is continued after conviction, the fine would be upto Rs. 100 per day.

(c) If any person contravenes any other provision of the Act or of the rules made thereunder, he would be punished with imprisonment upto 3 months, or with fine upto Rs. 1000 or with both (Section 22, 23 and 24).

3.15. POWERS OF INSPECTORS

An inspector appointed under the Act shall have power to :

(a) enter any premises or place where contract labour is employed for the purpose of examining any register, record or notices;

(b) examine any workmen employed in such premises or place;

(c) require any person or workman to give information on work or wages paid;

(d) seize or take copies of any register, record or wage registers or notices (Section 28).

3.16. MISCELLANEOUS

If the provision of any law, agreement contract or service or standing orders are less favourable than those of the Contract Labour Act, they will be superseded by the provisions of the Contract Labour Act. But if such provisions are more favourable than those of the Contract Labour Act, the former will prevail over the latter (Section 30).

The Act permits the government in the case of an emergency to exempt any class of establishments or any class of contractors from the application of all or some of the provisions of the Act or the rules made thereunder for a specified period and subject to specified conditions and restrictions (Section 31).

No suit, prosecution or other legal proceedings shall lie against any Registering Officer, Licensing Officer or any other government servant, or against any member of the Central Board or the State Board, for anything which is done in good faith or intended to be done in pursuance of this Act or any rule or order made thereunder (Section 32).

The appropriate government may make rules for carrying out the purposes of this Act (Section 35). Accordingly, the Central Government has framed rules, known as the Contract Labour (Regulation and Abolition) Central Rules, 1971 and the A.P. State Government also framed roles under the act in the year 1971 called A.P. Contract Labour. (Regulation and Abolition Act- 1971).

3.17. CONCLUSION

In exercise of powers conferred under Section 35 of the Act of the Central Government framed the Contract Labour (Regulation and Abolition) Central Rules, 1971 in details dealing with the constitution of Central Board, its terms of office, resignation and cessation of membership, disqualification for membership, staff, allowances of members, disposal of business, meetings, quorum committees of Board. Chapter III of the rules deals with Registration and Licensing such as particulars of to be contained in such certificates, matters to be taken in account in granting or refusing a licence, terms and conditions of licence, fees, duration of validity of licence etc.

These rule also provide standards to be complied with regarding rest rooms, canteens, dining hall, furniture and utensils, charges of food stuffs, latrines and urinals, washing facilities, first aid boxes. There are certain rules dealing with payment of wages, prescribed forms of registers to be maintained by the contractors etc.

Any matter covered under the rules shall be required to be dealt with accordingly. It may be pointed out that Labour Laws (Exemption from Furnishing Returns and Maintenance of Registered by Certain Establishments) Act, 1988 grants exemption from formalities required under the Contract Labour (Regulation and Abolition) Act, 1970 regarding maintenance of registers etc.

3.18. SELF ASSESSMENT QUESTIONS

1. What is the object of the Contract Labour (Regulation and Abolition) Act?
2. Which establishments or contractors are covered by the Act?
3. What is the procedure for obtaining registration and licence?
4. What are the obligations of principal employer and contractor under the Act?
5. What are the statutory restrictions on the employment of contract labour?
6. What are the amenities to be provided by a contractor for the health and welfare of contract labour?
7. What are the offences under the Act and punishment for them?
8. What are the powers of the Inspectors appointed under the Act?
9. What are the registers and records to be maintained under the Act?

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LESSON-4

INDUSTRIAL DISPUTES ACT, 1947 DEFINITIONS, AUTHORITIES, NOTICE OF CHANGE AND DISPUTE SETTLEMENT UNDER THE ACT

4.0 OBJECTIVE

The reader understnads the law relating to industrial disputes, after going through this lesson the reader also learns.
- various definitions
- notice of change
- dispute settlement authority under the Industrial Disputes Act, 1947.

STRUCTURE

4.1 Introduction
4.2 Definitions
4.3 Triple Test
4.4 Legislative Change
4.5 Procedure for Dispute Settlement
4.6 Authorities under the Act
4.7 Notice of Change
4.8 Reference of Disputes to Boards, Coursts and Tribunals
4.9 Voluntary Reference of Disputes to Arbitration
4.10 Incidental Matters
4.11 Persons bond by settlements and awards
4.12 Miscellaneous Provisions
4.13 Finality of the orders Constitutions Board
4.14 Self Assessment Question
4.15 Further Readings

4.1 INTRODUCTION

The history of Industrial Disputes Legislation in India is not very old. After the end of First World War, there was a great out break of industrial unrest, which led to the passing of the Trade Disputes Act by the Government of India in the year 1929. The government exercised its power under this Act only in selected cases and the Act was seldom used and the policy of the Government of India still continued to be one of laissiz faire. It contained special provisions regarding strikes in public utility services and general strikes affecting the community as a whole. The Act made provision for only ad hoc Conciliation Board and Courts of Inquiry. This Act was amended in the year 1938, authorising the central and provincial Governments to appoint conciliation officers who would mediate in or promote the settlement of industrial disputes. Shortly thereafter, the Government

of India promulgated the Defence of India Rules to meet the emergency created by the Second World War. Rule 81-A gave powers to the appropriate government to intervene in industrial disputes, appoint industrial tribunals and enforce the award of the tribunans on both sides. The Industrial Disputes Bill was introduced in the Central Legislative Assembly on 8th October, 1946.

The Bill was passed by the Assembly in March 1947 and become law with effect from first April 1947. This Act, as amendd from time to time, is the sheet-anchor of industrial adjudication in our country. The Act contains 40 sections, 9 chapters and four schedules.

4.1.1 OBJECT OF THE ACT

The preamble to the Act reads: "An Act to make provision for the investigation and settlement of industrial disputes and for certain other purposes"
.

On the basis of various judgements given from time to time by the Supreme Court, the principal objectives of the Act may be stated as follows:

(a) to ensure social justice to both employers and employees and advance the progress of industry by bringing about harmony and a cordial relationship between the parties.
(b) to settle disputes arising between capital and labour by peaceful methods and through (works committees, court of inquiry, industrial tribunal and national tribunal) the machinery of conciliation and arbitration.
(c) to promote measures for securing and preserving good relations between the employer and workmen.
(d) to prevent illegal strikes and lockouts.
(e) to provide compensation to workmen in case of lay-off, retrenchment and closure.
(f) to protect workmen against victimisation by the employer and to ensure termination and industrial disputes in a peaceful manner.
(g) to promote collective bargaining.

4.2 DEFINITIONS

APPROPRIATE GOVERNMENT (Sec. 2(a))

The definition states that in respect of some Industries, Central Government is the appropriate Government and in respect of all others the State Governments is the appropriate Government.

INDUSTRIES IN RESPECT OF WHICH CENTRAL GOVERNMENT IS THE APPROPRIATE GOVERNMENT

1. Industry carried on by or under the authority of the Central Government.
2. Railway Company
3. Any Controlled Industry
4. Dock Labour Board
5. Industrial Finance Corporation of India.
6. Employee's State Insurance Corporation
7. Board of Trustees Constituted Under The Coal Mines Provident Fund Act
8. Central and State Board of Trustees under Employees Provident Fund Act.
9. Indian Airlines and Air India Corporation
10. L.I.C

11. Oil and Natural Gas Corporation
12. Deposit Insurance and Credit Guarantee Corporation
13. Central Warehousing Corporation
14. Unit Trust of India
15. Food Corporation of India
16. International Airport Authority of India
17. Regional Rural Banks
18. Export Credit and Guarantee Corporation Limited
19. Industrial Re-construction Bank of India
20. National Housing Bank
21. Banking Service Commission
22. Banking Company
23. Insurance Company
24. Mine
25. Oil field
26. Cantonment Board
27. Major Ports

Industries in respect of which state government is the appropriate all other industries.

AWARD: (Section 2(b))

Award means an interim or a final determination of any industrial dispute of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under Section 10 - A.

CONTROLLED INDUSTRY means any industry the control of which by the union has been declared by any Central Act to be expedient in the public interest.

EMPLOYER (Section 2(g))

Section 2 (g) of the Act defines in “employer” according to this definition

a. In relation to an industry carried on by or under the authority of any department of Central or State Government. The authority prescribed for this or the Head of the Department is the employer.

b. In relation of an industry carried on by under the authority of local authority. The Chief Executive Officer of the local authority is the employer.

Therefore, employer means either central State Government or local authority. This definition is neither exhaustive nor inclusive. The employer in relation to any other industry carried on by any on else is to be used and understood in the normal sense.

The Federal Court in “WESTERN INDIA AUTOMOBILE” ASSN. Vs. THE STATE OF BOMBAY (IR 1949 PC pIII) was of the view that employer in relation to industries as carried on by Central, State or Local authority was expressly specified in the definition because it is not easy to discover in such cases with the authority or the individual of that description.

In all other cases, the Employer has to be ascertained in the normal sense.

INDUSTRY (Section 2(j))

The ordinary meaning of any “industry” is an undertaking where capital and labour cooperation with each other for the purpose of producing wealth in the shape of goods machine tools etc., and for

making profits'. However, the legal attributed meaning to the word 'Industry' is much wider than the ordinary meaning. The legal meaning is contained in the definition of the word "industry" in the Industrial Disputes Act, 1947.

Definition:
Section 2 clause (j) of the I.D Act defines an "Industry" as "any business, trade undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen.

Business:
An enterprise which is an occupation as distinguished from pleasure. Eg: Carriage of passengers or goods.

Trade :
An exchange of goods for goods or money

Manufacture:
A kind of productive activity in which the making of article or material is by physical labour or mechanical power.

Calling:
It denotes the following of a profession or trade.

Undertaking:
Undertaking is nothing more than any work a person might engage in
Undertaking is general work of wide import. Therefore, what organisations can be called undertaking and what are not is uncertain as even the Supreme Court gave conflicting opinions.
To remove this confusion the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. Rajappa laid down in Triple Test.

4.3 TRIPLE TEST

Where there is ....
i. Systematic activity
ii. Organised by cooperation between employer and employee (direct and substantial element is commercial)
iii. For the production and or distribution of goods and services calculated to satisfy human wants and wishes, (not spiritual or religious but inclusive or material things or services geared to celestial bliss) Eg: making on a large scale Prasadas or food.

Prima Facie : There is an industry in that enterprise.
Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint private or other sector.

The true focus is functional and the decisive test is the nature of activity with emphasis on the employer, employee relations.

If the organisation is a trade or business, it does not cease to be one because of philanthropy animating the undertaking.

4.4 LEGISLATIVE CHANGE

The parliament by Act No. 46 of 1982 amended the definition of industry. This amendment shall come into force on such date as the Central Govt., may notify. The date on which the amendments shall come into force was not specified so far.

The definition of industry, as a mended subject to enforceability reads as under:
"Industry means any systematic activity carried on by cooperation between and employer an his workmen (Whether such workman are employed by such employer directly or by or through any agency, including a contractor for the production, supply or distribution of goods or services with a view to satisfy human wants or wish (not being wants or wishes which are merely spiritual on religious in nature) whether or not.....

i. any capital has been invested for the purpose of carrying on a such activity, or
ii. such activity is carried on with a motive to make any gain or profit, and includes.
  a. any activity of the Dock Labour Board established under Sec - 5A of the Dock Workers (Regulations of Employment) Act, 1948.
  b. any activity relations to the promotion of sales or business or both carried on by an establishment, but does include

1. Any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provision of this clause an such other activity is the predominant one).

Explanation :
For the purpose of this sub - clause "agricultural operation" does not include any activity earned by in a plantation as defined in clauses (f) of section of the plantations Labour Act, 1951 or

2. Hospitals or dispensaries or
3. Educational, scientific, research or training institutions
4. Institutions owned or managed by organisation wholly or substantially engaged in any charitable, social or philanthropic service, or
5. Khadi or Village industries, or
6. Any activity of the Government related to the sovereign functions of the government including all the activities carried on by the department of the Central government dealing with defence research, atomic energy and space, or
7. Any domestic service or
8. Any activity, being a profession practised by an individuals, if the number of persons employed by the individual or body of individuals in relation to such profession is less than ten, or
9. Any activity, being an activity carried on by a cooperative society or a club or any other like body of individuals, if the number of or a club or any other like body of individuals, if the number of persons employed by the cooperative society, club or other like body of individuals in relating to such activity is less than ten.

INDUSTRIAL DISPUTE (Section 2(k))

Section 2 (k) defines what is an “industrial dispute”? This definition has special significance in view of the object of the Act is to provide machinery for settlement of industrial disputes. To constitute an industrial dispute, the following conditions should be fulfilled

a. There must be any dispute or difference.

b. The dispute or difference should be between

i. employers and employers or

ii. employers and workmen, or

iii.workmen and workmen

c. The dispute must be connected with ....

i. employment or

ii. non - employment (it includes retrenchment and refusal to reinstate) or

iii. terms of employment or

iv. conditions of labour of any person.

Dispute or Difference :

Only when a demand is raised by one party and the demand is rejected by the other party it could be said that there is either a difference or dispute. More passive dissatisfaction on either party does not amount to either dispute or difference.

Parties to Dispute :

In the definition, plural form has been used. Hence individual dispute is not industrial dispute.

When individual dispute amounts to industrial dispute

When the courts were called upon to decide this issue, the courts have evolved the principle that even an individual dispute (dispute connected with only on individual) becomes and industrial dispute if it is taken up by an union or substantial number of workmen. If the workmen as a body of a considerable section of them make common cause with the individual workmen, it is an industrial dispute.

But, it must be remembered that the trade union which espouses an individual dispute must be one connected with the employer or the industry concerned. The Indian Express News Papers case (AIR 1970 SC 737) where the journalists Association in Delhi raised a dispute in respect of the non - employment of a workman in Indian Express News Papers, it was hold be an industrial dispute. Thus what is important is community of interest and it must also possess representative character.

Because of these stringent requirements, the individual workman was put to great hardship when he could not to support from a union or an appreciable number of workmen under these circumstances, the Industrial Disputes Act was amended and Sec.2-A was inserted in 1965. According to Sec.2-A the following conditions have to be fulfilled in order in individual dispute amount to an industrial workman.

a. The employer must discharge/dismiss/retrench or otherwise terminate the services of an individual workman.

b. The dispute should be in connection with such discharge etc.

c. The dispute should be between the individual workman and his employer.

d. Neither any workman nor any union need to support it.

It is of limited application if the dispute relates to some other matter other than discharge, dismissal etc., than it must satisfy the requirements laid down in judicial decisions specified above. In matters covered under this section, the espourasal of the dispute by workmen is done away.

SUBJECT MATTER OF THE DISPUTE:

The subject matter of the dispute should be either employment, non-employment, terms of employment or conditions of labour.

The expression 'any person' means that the person may not be a workman but he may be some in whose employment etc., the workmen as a class have true and substantial interest. Accordingly in 'Workman of Dimkuchi Tea Estate Vs. Management of Dimakuchi Tea Estate (AIR 1958 SC P 353), where the workmen as a whole raised a dispute regarding the services of a medical officer, whose services were terminated, it was held not be an industrial dispute because the medical officer is a person in whom the workmen as body are not interested.
Thus, when a dispute is raised in respect of a person who is not a workmen, the workmen should have substantial or community of interest so as that dispute to be transformed into an industrial dispute. Whether the workmen have substantial or community of interest or not in a question of fact.

In DAHING EAPARA case (AIR 1958 SC 1026), an industry was sold as a going concern by the vendor to the purchaser. The purchaser did not give employment to 16 clerks who were employed by the vendor. A dispute was raised by the labour and some members of the staff of the vendor in this regard to the non-employment of the 16 clerks. It was held to be clearly an industrial dispute. The Court observed as between the vendor and the discharged workmen the latter came within the definition of workmen. This fact, however did not make them workmen of the purchaser. Even then they were persons in whose employment or non - employment the actual workmen of the tea estate were directly interested"

Thus whether the body of the workmen who raised the dispute have substantial interest over the person whose dispute they are espousing in a question of fact.

INDUSTRIAL ESTABLISHMENT OR UNDERTAKING

Means an establishment or undertaking in which any industry is carried on: Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then

a. if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking

b. if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activity carried on in such establishment or undertaking or unit thereof is not severable form and is, for the purpose or carrying on, or aiding the carrying on of, such predominant activity or

activities, the entire establishments or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking.

SETTLEMENT:

Means a settlement arrived at in the course of conciliation proceeding and included a written agreement between the employer and, workmen arrived at otherwise that in the course of conciliation proceeding where such agreement has been signed by the parties there to in such manner as may be prescribed and a copy there of has been sent to (an officer authorised in this behalf by) the appropriate Government and the conciliation officer;

WAGES (Section 2 (rr))

Means all remunerations capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, by payable to a workmen inspect of his employment, or of work done in such employment and included.

i. Such allowances (including deamess allowan ;e) as the work man is for the time being entiles 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 food grains or other articles.
iii. any travelling concession.
iv. any commission payable on the promotion of sales or business of both; but does not include;

a. any bonus;
b. any contribution paid or payable by the employee to any pension fund or provident fund or for the benefit of the workmen under any law for the time being in force.
c. any gratuity payable on the termination of his services.

WORKMAN (Section 2(s))

Sec.2(s) of the Act defines a workman. The definition of workman as given in the Act may be analysed as follows:

i. The person must be employed in an industry.
ii. The employment must be for hire or reward (i.e. for some consideration). It means the relationship of master and servant must subsist-between them.
iii. The terms of employment may be express or implied.
iv. The person must be employed to do either ....

a. skilled work
b. unskilled work.
c. manual work.
d. as an apprentice
e. supervisory work
f. technical work
g. clerical work.

In relation to an industrial dispute under this Act a workman includes any person who is dismissed, discharged or retrenched as consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

The Act specifically declares that the following are not to be regarded as a workman

i. any person governed by Army Act, Air Force Act, or Navy (Discipline) Act.
ii. any person employed in police or prison
iii. any person who is employed in a managerial or administrative capacity.
iv. any person who is working in a supervisory capacity and also must not be drawing wages exceeding rupees 1600 per mensum.

The crux of this definition lies in the master and servant relationship (i.e., there must be a contract of service between the employer and employee is a contract for services) then the employee is only an independent contractor and not a workman at all.

Only a person who is employed under a contract of service and not a person who is employed under a contract for services is included in this definition.

The test to determine whether a person is workman or an independent contractor is to see whether the employer is having the right to supervise and control the work done by the other person, not only in directing what the other person is to do but also the manner in which the other .shall do his work. Control over the method and manner of the work is the key factor. If the employer is having such power, the other is the workman, if not the other is only an independent contractor. Whether the employer is having control over the method and manner of the work or not is a pure question of fact. All the surrounding facts including minute details have to be taken into account while adjudicating on this issue. Consideration of the following cases will make the matters more clear.

IN DHARANGDHRA CHEMICAL WORKS LTD. Vs. STATE OF SAURASHTRA (AIR 1956 SC 264)

The company took on lease certain salt works. The entire area was divided into small plots and were list out to 'AGHIARAS'. They were free to work when they like, as no hours of work was prescribed and muster roll was maintained. They were free to engage extra labour at their own cost. They were paid at certain rate per every mound of salt produced. In rainy season when they were free from this work they returned to their villages and became engaged in their agriculture work. The Management exercised supervision and control at all stages of manufacture. The question was whether they are workmen or not? It was held by the SC that if a person agrees himself to the work and does the work he is a workman, he does not cease to be a workman merely because he gets other persons to work along with him and that these persons are controlled and paid by him and hence they were workmen.

IN BIRDICHAND Vs. FIRST JUDGE (AIR 1961 SC 644)

The persons worked at the Beedi factory and were not at liberty to work at their homes. They worked within certain hours which were the factory hours, though they were not bound to work for the entire period and could go away whenever they liked. Their attendance was noted in the factory. The payment was made on piece rates according to the amount of work done by them. The management had the right to reject such bid as did not come upto standards. They were held to be workmen as the control of the manner in which the work was done was exercised at the end of the day by the method of rejecting the sub - standard. It was the right to supervise and not so much the mode in which it was exercised which was important.

IN SHANKAR BALAJI Vs. STATE OF MAHARASHTRA (AIR 1926 SC 517)

The person was not bound to attend the factory for the work for any fixed hours of work or for any fixed period. He was free to go to the factory at any time he liked and was equally free to leave the factory whenever he liked. He could also be absent on any day he liked. He was paid at fixed rates on the quantity of articles turned out. There was no condition that he should turn out minimum quantity in a day. He was not bound to roll the articles at the factory. He could do so at excise rules, it the close of the day, the articles were delivered and these not upto the standard used to be rejected. The person's attendance was not noticed. It was held that the person could not be said to be employed and hence not a workman.

IN STANDARD VACUUM REFINING CO. Vs. ITS WORKMAN (1960 2LLJ 233)

The company used to give annual contract for maintenance of the plant and premises. In the first year 67 persons were employed while the next year 40 men were employed. The contractor's men were not entitled to many privileges and there was no security of employment. The question involved was whether the contract labour are workmen are not? It was held by the court that they were workmen as the employer exercised control both on manner of the work.
Yet another condition prescribed for a workmen was that he should not be discharging functions managerial or administrative in nature.

A curious question arose in the case of BURMAN SHELL MAN AGEMENT VS. BURMAN SHELL STAFF ASSOCIATION (1970 2 LLJ 950). The question was whether junior management staff (i.e.) District Sales Representatives are workmen or not ? It was contended that as those people cannot be said to discharging the types of work specified in the definition, they are not workman. The S.C accepted the view that form the nature of duties, it a person's case does not fall under the various types of work mentioned in the definition, they are not workmen at all.
It is interesting to note that though a pilot, an engineer and other such persons are workmen, sales representatives who canvas for the promotion of the product sales are not workmen though they are not discharging duties of either managerial or administrative nature. This is a curious anomaly.

4.5 PROCEDURE FOR DISPUTE SETTLEMENT

One of the Chief objects of passing the Industrial Disputes Act is to make provision for the investigation and settlement of industrial disputes. To achieve this end, provision for constituting various authorities, which are endowed with the authority of either investigating or settling the industrial disputes is made under the Act.

Normally for settling any dispute, industrial or nonindustrial the following four different methods will be put into use :

1. **Negotiation :** In this method the parties to the dispute sit face to face, negotiate and resolve the dispute. This system of dispute settlement is not given much prominence in the Act.

2. **Arbitration :** In this method though the parties to the dispute could not arrive at an acceptable solution, they agree to be bound by the solution offered by a third party, mutually acceptable, called arbitrator. This system of dispute settlement is given a place in the Act.

3. **Conciliation :** In this method, an entirely outside agency will be using its influence and good

offices in making the parties agree for a settlement. This system of dispute settlement is given a prominent place in the Act.

4. **Adjudication :** In this method, an entirely outside agency will be judging the relative merits and demerits of the contentions of both the parties at logger - heads and gives its decision which is a final and by which both the parties are bound whether they like it or not. This system of dispute settlement is strongly emphasized in the Act.

4.6 AUTHORITIES UNDER ACT

The following are the various authorities provided under the Act for investigation and settlement of industrial disputes.

1. Works Committee (Section 3)
2. Conciliation Officer (Section 4)
3. Board of Conciliation (Section 5)
4. Court of Inquiry (Section 6)
5. Labour Courts (Section 7)
6. Industrial Tribunals (Section 7A)
7. National Industrial Tribunal (Section 7B)
8. Voluntary Arbitration (Section 10A)

The act seeks to lay down the composition, constitution, powers, privileges and limitations etc., of the various authorities under the Act.

1. Works Committee (Section - 3)

(i) To be constituted by employer if only 100 or more workmen are employed or were employed on any day in the preceding twelve months.

(ii) That too, only if the appropriate Government by general or special order requires him to do so.

(iii) It consists of representatives of employer and workmen in equal number.

(iv) The registered trade union should be consulted in choosing the representatives of workmen or they must be chosen in the prescribed manner.

(v) Duties of works Committee :

a. To promote measures for securing and preserving amity and good relations between employer and workmen.

b. To comment upon the matters of common interest.

c. To endeavour to compose any material difference.

(vi) Purely a recommendatory or advisory body.

(vii) Normally functions at shop or floor level.

2. Conciliation Officers (Section - 4)

(i) Appropriate Government may appoint such number of persons to be conciliation officers as its thinks fit, permanently or temporarily, for a specified area, industry or industries.

(ii) Official gazette notification has to be issued.

(iii) Appointed for mediating in and promoting the settlement of industrial disputes.

(iv) Powers (Section - 11):

a. Conciliation Officer can follow the procedure he thinks fit subject to rules.

b. He has the powers of a Civil Court like compelling attendance, inspection of documents issue commissions for examining witnesses.

c. He shall be deemed to be public servant.

d. Enter the premises after giving reasonable notice.

(v) Duties of Conciliation Officers (Section - 12)

a. Conciliation Officer may take note of existing and apprehended industrial dispute.

b. He must take note of dispute in a public utility service.

c. Investigate and do all that is necessary for bringing out a fair on amicable settlement.

d. If he is successful in settling the disputes, he shall send a report with memorandum of settlement to appropriate government.

e. If no settlement is arrived, he should report to the appropriate government the facts, the steps taken and the reasons which accounted for non-settlement.

f. Report should be submitted within 14 days of the commencement of conciliation proceedings. The period may be extended with the consent of the parties in writing.

(vi) On receipt of the report the appropriate government may refer the dispute to Board Court, or Tribunal. If it decides not to refer, it shall communicate the reasons to the parties.

3. Board of Conciliation (Section - 5)

(i) Appropriate Govt. may constitute Boards of Conciliation as occasion arises.
(ii) Official gazette notification has to be issued.
(iii) Constituted for promotion of settlement of industrial disputes.
(iv) Consists of Chairman and 2 or 4 members as the Govt. thinks fit.
(v) The Chairman shall be independent person.
(vi) Other members shall be in equal number representing the parties at dispute.
(vii) They shall be appointed on the recommendation of the respective parties.
(viii) If the recommendation is not forthcoming the Govt. may appoint at its discretion to represent that party.
(ix) It can act if there is prescribed quorum even if there is not chairman or other member.
(x) If the Govt. notifies the vacancy of the post of Chairman of any member. Board cannot act till the vacancy is filled.

(xi) Powers (Section - 11) :

a. It can follow the procedure it thinks fit subject to rules.

b. It has the powers of a civil court like compelling attendance inspection of documents issuing commissions for examine of witnesses.

c. Enter the premises after giving reasonable notice.

d. the members shall be deemed to be public servants.

(xii) Duties (Section - 13) :

a. It can take note of any industrial dispute on reference by appropriate Govt., according to Section - 10.

b. On reference, it shall investigate and do all that is necessary for bringing out of fair on amicable settlement.

c. If settlement is arrived at, report with memorandum should be sent to appropriate Govt.,

d. If no settlement is arrived, it should report to the appropriate Govt. the facts, the steps taken and the reasons which accounted for non-settlement. It must also send its recommendations for determination of the dispute.

e. Report should be submitted within 2 months from the date or reference of the dispute. The period may be extended by the appropriate govt. or with the consent of the parties in writing. The extension by appropriate govt., should not exceed 2 months in aggregate.

(xiii) On receipt of the report, if the appropriate Govt., does not refer the dispute to court or tribunal, it should communicate the reasons to the parties when the dispute is in a public utility service.

4. Courts of Inquiry (Section - 6)

(i) Appropriate Govt. may constitute court of inquiry as occasion arises.
(ii) Official gazette notification has to be issued.
(iii) Constituted for inquiring into any matter appearing to be connected with or relevant an industrial dispute.
(iv) It may consist of one independent persons or such number of persons as the appropriate govt. thinks fit.
(v) If it consists of more than one, of them shall be the chairman.
(vi) The court can act if there is quorum prescribed even if there is no chairman or other member.
(vii) If the Govt., notifies the vacancy of the post of chairman or any member, court cannot act till the vacancy is filled in.

(viii) Powers (Section -11)

a. It can follow the procedure it thinks fit subject to rules.

b. It has the powers of a civil Court, like compelling attendance, inspection of documents, issuing commissions for witness examination.

c. The members shall be deemed to be public servants.

d. Enter the premises after giving reasonable notice.

(ix) Duties (Section -14) :

a. It can take note of any industrial dispute only on reference by the appropriate Government, according to Sec. - 10.

b. On reference, it shall be deemed to be public servants.

c. Should report, ordinarily within 6 months from the commencement of inquiry.

(x) The report should be signed by all members. Dissent can be recorded (Sec.- 16)
(xi) This is purely an investigative authority for focusing public opinion. It helps to prevent strikes and lockouts.

5. LABOUR COURTS (Section -7) :

(i) Appropriate Govt., may constitute one or more labour Courts.
(ii) Official gazette notification has to be issued.
(iii) Constituted for adjudication of industrial disputes relating to matters in the second schedule and such other functions as may be assigned and also matters referred in third schedule provided it is not likely to affect more than 100 workmen.
(iv) Consists of one person only to be appointed by appropriate government.
(v) Only the following are qualified to be the presiding officers of labour courts.

a. Judge of High Court.

b. Has been a District of Additional District judge for 3 years.

c. Held any judicial office for atleast 7 years.

d. Presiding Officer of a labour court constituted under any provincial act for atleast 5 years.

(vi) The following are disqualified to be the presiding officers (Section - 7C) a. Who is not an independent person, b. Who has attained the age of 65 years.

(vii) Powers (Section - 11)

a. It can follow the procedure it thinks fit subject to rules.

b. It has the powers of a civil Court like compelling attendance, inspection of documents, issuing commissions for examination of witness.

c. The presiding officer shall be deemed to be a public servant d. Enter the premises after giving reasonable notice.

(viii) Duties (Section - 15)

a. It can take note of any industrial dispute only on reference by appropriate Govt., according to Sec - 10.

b. It shall hold proceedings expenditiously.

c. It should submit its award to the appropriate Govt., within the time specified in the order of reference.

(ix) The Award shall be signed by the Presiding Officer (Sec. 16)

(x) It has the power to grant appropriate relief including reinstatement. No. limits what so ever on its powers.

(xi) It must confine consideration to those matters referred only (Sec-10)

6. Tribunals (Section - 7A)

(i) Appropriate Govt. may constitute one or more Tribunals.

(ii) Official Gazette notification has to be issued.

(iii) Constituted for adjudication of industrial disputes relating to any matter specified in the Second Schedule or Third Schedule and performing such other functions as may be assigned.

(iv) Consists of one person only to be appointed by appropriate Government.

(v) Only the following are qualified to be the presiding officer Tribunal.

a. Judge of High Court b. Has been a District and Additional District Judge for 3 years.

(vi) The appropriate govt., may appoint two persons to be Assessors to advise the tribunal.

(vii) The following are disqualified to be the presiding officer (Section - &C)

a. Who is not an independent person. B. Who has attained the age of 65 years.

(viii) Powers (Section - 11)

a. It can follow the procedure it thinks fit subject to rules.

b. It has the powers of a Civil Court like compelling attendance, inspection of documents, issuing commissions for witness examination.

c. The Presiding Officer shall be deemed to be a Public Servant.

d. Enter the presiding after giving reasonalbe notice.

(ix) Duties (Section - 15)

a. It can take note of any industrial dispute only on a reference by the Central Government according to Section - 10.

b. It should hold proceedings pediculous.

c. It should submit its Award to the Central Govt., within the time specified in the order of reference.

(x) The Award shall be signed by the presiding Officer (Sec. 16)

(xi) It has the power to, grant appropriate relief including reinstatement, No limits what so ever on its power.

(xii) It must confine consideration to these matters referred only (Sec. 10) The Labour Court, Tribunal and National Tribunal according to Section -11-A set aside of adimissal or discharge and direct the reinstatement of th workamn and any other ratification it deems fit and proper.

4.7 NOTICE OF CHANGE (Section 9A & 9B)

An employer, who wants to effect any change in the conditions of service relating to wages, hours of work, rest intervals, compensatory and other allowances, leave with wages, holidays, contribution to provident fund, introduction of new rules of discipline, withdrawal of any customary concession or privilege as given in the Fourth Schedule applicable to any workmen in respect of any matter contained in the IV Schedule. The legislature has contemplated three stages in making a provision for the notice of change under section 9(A).

(i) Give a notice to the workmen likely to be affected by such change specifying the nature of the change proposed.

(ii) Should not affect any change within 21 days of giving such notice.

(iii) Notice need not be given if the change is in pursuance of any settlement or award

Where the workmen likely to be affected by such change to the persons when the fundamental and supplementary rules, Civil services rules etc., apply.

In the public interest, the appropriate government by notification in the Official Gazette direct that the above said provisions shall not apply to the class of industrial establishment or class of workmen specified therein.

4.8 REFERENCE OF DISPUTES TO BOARDS, COURTS AND TRIBUNALS

Section 10 deals with this matter according to the decision of the appropriate government, is of the opinion that any industrial dispute is existing or apprehended, it may refer the :

(i) Board of conciliation for promoting settlement, or

(ii) Court of inquiry, for Investigation, or

(iii) Labour court for adjudication if it relates to any matter in the II Schedule or a matter in III Schedule if not more than 100 worker are likely to be affected to; or

(iv) Tribunal for adjudication if it relates to any matter in the III Schedule

(v) If the dispute relates to a public utility services, the appropriate government shall make a reference even if some other proceedings have already commenced.

(vi) The Central Government Whether or not it is the appropriate Government may make a reference to National Tribunal any dispute involving questions of national importance or when industries in more than one state are likely to be affected by it. In that case no other authority will have any jurisdiction over that matter.

(vii) If the parties apply for reference of dispute to a Board on Court, the appropriate Government shall make accordingly if it is satisfied that the persons applying represent majority.

(viii) When an industrial dispute is referred to a Board on Court, the appropriate Government may

prohibit the continuance of any strike or lock-out.
(ix) In short, this section confers wide discretionary powers on the appropriate Government in the matter of referring the disputes for adjudication and conciliation.

4.9 VOLUNTARY REFERENCE OF DISPUTES OF ARBITRATION (Section - 10A)

(i) This method of settlement may be resorted to either in case of existing of apprehended industrial disputes.
(ii) The employer and workmen must agree in writing for arbitration in the manner prescribed and it should be signed.
(iii) The agreement to refer to arbitration must be reached before the dispute is referred to Labour Court, Tribunal or Natinal Tribunal.
(iv) They may agree for arbitration before a person or persons.
(v) If the arbitration is to be done by even number of persons, an other person should be appointed as umpire. The umpire's award is the arbitration awad.
(vi) Copy of the arbitration agreement should be forwarded to the appropriate Govt., and conciliation Officer.
(vii) Appropriate Government should publish it within one month of its receipt in official gazette.
(viii) If the appropriate government feels that the persons referring the dispute to arbitration represent majority, it shall notify the same.
(ix) Then opportunity of being heard shuld be given to others.
(x) The arbitrator should investigate and submit the award signed to the appropriate government.
(xi) The appropriate Government may prohibit by order the continuance fo any strike or lockout existing during of any strike or lockout exisiting during arbitraiton proceedings.
(xii) Arbitraiton Act is not applicable.
(xiii) An arbitration shall have the powers of a Civil court and all other powers like order authroiteis under the Act.

4.10 INCIDENTAL MATERS

Publicaton of Reports and Awards (Section 17)

The Reports and awards of Arbitrator, Office, Board, Court or Tribunal as the case may be should be publsihed along with the minute of dissent, by the appropriate Government within a period of 30 days from the date of their receipt.

Commencement of the Award (Section 17A)

(i) An award shall become enforceable on the expiry of 30 days from the date of publication.
(ii) If the appropriate Govrnement, in case of an award given by Labour Court and Tribunal and the Central Govt., in case of an award given by National Tribunal, as the case may be feels that it is inexpendient on public grounds affecting natioanl economy or special justice may by notification in official gazette, declare that the award shall not beocme enforceable on the expiry of th said period.
(iii) Within 90 days of such declaraiton, the concerned Govt. may make an order rejecting or modifying the award.
(iv) In such case, the award and the copy of the order should be placed before the legislature at the earliest available opportunity.

(v) If no order is made, award comes enforceable on the expiry of 90 days.

4.11 PERSONS BOUND BY SETTLEMENTS AND AWARDS

1. Settlement arrived by agreement between employer and workmen................	Parties to the Agreement
2. Arbitration awad......................	who referred the dispute to the arbitration
3. Settlement arrived on the course of conciliation proceedings or an arbitration award in case of notified arbitration or an award of labour court, tribunal. National Tribunal.	a. Parties to the dispute b. All parties summoned to appear excepting those who were summoned without proper cause c. Employer's heirs, successors or designs d. All persons employed on the date who subsequently become employed.

Nature of Dispute Resolving	Date of Operation	Period of Operation	Binding force after the expiry of the period of expiry
Settlement	1. As agreed upon	1. As agreed upon	Binds till the expiry of 2 months after notice of intention to terminate was given
	2. If no date agreed upon on the date of signing the memorandum	2. If no period is agreed upon for 6 months from signing of memorandum	
Award	Day on which the award becomes enforceable according to Sec. 17A	One year from the date of it becoming enforceable However it may be reducing by App. Government	1. Binds till the expiry of 2 months after notice of intention to terminate was given 2. It may be extended by the app. Government for a period not exceeding one year at a time. However, the total period of operation should not exceed 3 years

Note: 1. If there is any material change in the circumstances, in the opinion of appropriate Government, it may refer the award or Tribunal, as the case may be, for considering whether the period of operation should be shortened or not by that reason.

2. The notice referred above shall not have effect until and unless given by a party representing the majority.

Nature of Proceeding	Date of Commencement of proceeding	Date of Conclusion of proceeding
Conciliation Officer	The date on which the notice of strike or lock-out was received by officer	1. That date of signing the memorandum of settlement(or) 2. The date of receipt of the report of the conciliation officer by appropriate Government
Board of Conciliation	The date of the order	1. The date of signing the memorandum of settlement. 2. The date of receipt of Report of the Board of Conciliation by the appropriate Government
Arbitration court of Inquiry	Date of Reference of the dispute	1. The day on which the award becomes enforceable.
Labour Court, Tribunal, National Tribunal.	Date of Reference of the dispute.	-------------

4.12 MISCELLANEOUS PROVISIONS

FILLING OF VACANCIES (Section 8)

(i) If for any reason, a non temporary vacancy arises in the office of

a. Presiding Officer of a National Tribunal.
b. Presiding Officer of a Tribunal.
c. Presiding Officer of Labour Court.
d. Chairman of a Board of Conciliation.
e. Member of a Board of Inquiry.
f. Chairman of Court of Inquiry.
g. Member of Court of Inquiry.

(ii) The appropriate government, shall appoint any other person to fill up the vacancy expecting the vacancy in National Tribunal.

(iii) The Central Government, shall fill up the vacancy in case of National Tribunal.

(iv) The Proceedings may be continued from the stage at which the vacancy is filed.

4.13 FINALITY OF THE ORDERS CONSTITUTING BOARD ETC. (SECTION 9)

The order of Central Government of the appropriate Government in the number of constituting any board of Court of Tribunal or an act of proceedings of any Board of Court of Tribunal or a settlement arrived at in the course of conciliation proceeding shall not be called in question merely on the ground of non - fulfillment of vacancy, defect in the constitution, decision arrived absence of any of the members.

The section declares the finality of the Orders passed and does not allow them to be challenged on grounds purely technical. It seeks to completely avoid further litigation on the matters concerned.

4.14 SELF ASSESSMENT QUESTIONS

1. What is the object of Industrial Disputes Act, 1947.
2. What is meant by “industry” and “industrial dispute”?
3. Who is a “workman under I.D. Act?
4. What are the functions of the authorities under the Industrial Disputes Act, 1947.
5. Are there any restrictions on the employer in the matter of changing the service conditions of his workmen under section 9A of the I.D. Act?
6. What is meant by “adjudication” and “voluntary arbitration”?
7. What are the powers of labour courts and industrial tribunals.
8. What is the binding effect of an award or a settlement?

4.15 FURTHER READING

1. Ahmedullah Khan and Amanullah Khan, Commentary on Labour and Industrial Law Asia Law House, Hyderabad.
2. Malik, P.L., Industrial and Labour Legislation.
3. Sarma, A.M. Industrial Jurisprudence and Labour Legilsation, Himalaya Publishing House, Mumbai.
4. Srivastava, S.C., Industrial Relations and Labour Laws, Vikas Publishing House Pvt. Ltd., New Delhi.

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LESSON-5

STRIKES, LOCKOUTS, LAY OFF, RETRENCHMENT AND CLOSURE

5.0 OBJECTIVE

The reader understands the law relating to industrial disputes, concepts of strikes, lockouts, layoff, retrenchment and closure, after going through this lesson, reader also learns :

- to understand the strike and lockout
- to know the illegal strike and lockout
- application of lay off provision
- conditions for retrenchment of workmen
- procedure for retrenchment and closure
- retrenchment and closure compensation to workmen.

STRUCTURE

5.1 STRIKE
- **5.1.1 Meaning and Definition of Strike**
- **5.1.2 Kinds of Strike**
- **5.1.3 Right to Strike**

5.2 LOCKOUT
- **5.2.1 Definition of Lockout**
- **5.2.2 Prohibition of Strikes and Lockouts**
- **5.2.3 Prohibition of Strikes and Lockouts in PUS**
- **5.2.4 General Prohibition of Strikes and Lockout**
- **5.2.5 Illegal Strikes and Lockouts**

5.3. LAYOFF
- **5.3.1 Definition**
- **5.3.2 Application of lay off provisions**
- **5.3.3 Definition continuous services**
- **5.3.4 Right of Workman for lay off compensation**
- **5.3.5 Workman not entitled to compensation in certain cases**
- **5.3.6 Duty of an employer to maintain muster rolls of workman**
- **5.3.7 Prohibition of lay off**

5.4. RETRENCHMENT
- **5.4.1 Definition**
- **5.4.2 Conditions precedent to retrenchment of workman**
- **5.4.3 Procedure for retrenchment and Re - employment of retrenched workman**
- **5.4.4 Penalty for lay - off and retrenchment without previous permission.**

5.5 CLOSURE
- **5.5.1 Definition**
- **5.5.2 Procedure for closure**
- **5.5.3 Compensation in case of closure**
- **5.5.4 Compensation to workman in case of transfer of undertaking**

5.5.5 Special provisions to restarting undertaking closed before commencement Industrial Disputes (Amendment) Act, 1976.

5.5.6 Penalty for closure.

5.6 Self Assessment Questions

5.1 STRIKE

The word ‘Strike’ is derived from an old English word ‘Strican’ meaning, thereby ‘to go away’. Since in this form it industrial protests workers go away from their work called strike.

5.1.1 Meaning of Strike :

The word “Strike” generally, denotes refusal by the whole body of workmen to work in consequence of a dispute. It is an agreement among workmen not to work. It represents simultaneous stoppage of work on the part of the workmen, strike is generally resorted to induce the employer to agree the demands of the workmen, if causes detriment upon the economic position of the employer and ultimately renders the parties more and more amicable to compromise, more and more willing to procedure from various factors that have contributed to imposed. It is principal over manifestation of conflict. It is a recognised weapon of the workmen for assisting their bargaining power and for tackling their collective demands upon an unwilling employer.

Definition of Strike : Section 2(Q)

Sec. 2 (Q) of Industrial Disputes Act, 1947 defines “strike”.

(i) cessation of work by a body of persons employed in any industry acting in combination, or

(ii) a concerted refusal, or

(iii) a refusal under a common understanding, of any number of persons who are or have been so employed, to continue to work or to accept employment.

A perusal of the above three clauses denotes two points which are the key factors in a strike (a) stoppage of work and (b) stoppage of work as a result of common understanding or as a collective action on the art of the workmen. If these two features are present then it amounts to strike.

It must not, however be understood that mere absence from work amounts to strike. There must be a concerted action. It was so held in TATA IRON AND STEEL COMPANY (1963 FIR p.46), in this case, the employer altered the usual weekly holiday Sunday, one of the unions agreed for this change, but another did not some workers did not attend to the work on two Sundays, the employer applied for a declaration that it was an illegal strike. The Court held that mere cessation of work does not amount to strike.

The cessation of work must be the result of a common understanding as evidenced in the case of BUCKINGHAM & CARNATIC MILLS Vs. WORKERS OF BUCKINGHAM & CARNATIC CO. LTD (1953 SC p.47). In this case, on November 1st 1948, 85 nightshift operatives of the company stopped work some at 4.00 p.m some at 4.30 p.m and some others at 5.00 pm. The stoppage of work ended at 8.00 pm, and all workers assembled at 10.00 pm. The apparent reason for the strike was that the management failed to comply with request of the workers to declare the forenoon of 1st November as holiday for witnessing solar eclipse. The Supreme Court held that it amounted to a strike.

An interesting question whether cessation of work while working on paid over-time can be regarded as strike or not arose in the case of Jessep and Co. Ltd. Vs, 5th Industrial Tribunal (1947 lab. ICR22). The workers in this case went on strike at about 2.30 pm on a Saturday, the normal working in this case went on strike at about 2.30 pm on a Saturday, the normal working hours of which were from 8.00 AM to 1.30 PM, having agreed to do overtime till 5.00 PM. It was held by the court that while an overtime, the workmen were working in the factory and during the time of work if there was any cessation of work, it amounts to strike. Thus, 'Intention to stop work and' stoppage of work in consequence of such intention-both must there in order there to be a strike.

5.1.2 KINDS OF STRIKES

(i) GENERAL STRIKE: It is one type of general strike where the workmen join together for a common cause and stay away from work. It is generally for a longer period. It amounts to strike in the legal parlance too.

(ii) TOKEN STRIKE: It is one kind of general strike with the essential difference that in this type of strike, the duration is much shorter. Its main object is to draw the attention of the employer by demonstrating the solidarity and cooperation of the workmen. It generally proceeds a general strikes. It is also a strike legally.

(iii) STAY-IN STRIKE: It is also known as -TOOLS DOWN STRIKE' or PEN DOWN STRIKE'. In this form of strike, the workmen report to their duties occupy the premises, but do not work. The employer is this prevented from employing other labour to carry on his business. Such act on the part of the workmen amounts to strikes. It was so held by Supreme Court in the case of PUNJAB NATIONAL BANK LIMITED Vs. THEIR WORKMEN (AIR 1960) SC.

(iv) SYMPATHY STRIKE: It is reasoned to in sympathy of other striking workmen. Its aim is to engage or to extend moral support to the striking workmen. The persons resorting to such strike have no grievance either own. In KAMBALINGAM Vs. INDIAN METALLURGICAL CORPORATION (1964 ILO 81) Such act was held not to be a strike as the essential element, the intention to use it against the employer is absent.

(v) GO-SLOW: It a go-slow the workmen do not stay away from work, they do come to their work and work also, but at a slow speed in order to lower down the production and there by cause loss to the employer. 'go-slow' is not a strike.

(vi) WORK TO RULE : The workmen in case of 'work to rule' strictly and the rules which ordinary they do not observe. Thus strike observance of rules results in slowing down the tempo of work. It is not a strike.

(vii) MASS CASUAL LEAVE: In STANDARD VACUUMS OIL CO. LT. VS. GUNASEELAM. (1954 2 LO I956): the workers of a company wanted to celebrate 'MAY DAY'. They requested the employer to declare that day a holiday. They were also ready to compensate the loss of working on Sunday. On the company's failure to declare 'MAY DAY' as holiday, the workers embolic applied for leave. It was hold that there was no cessation of work and the action of employers to apply for casual leave embolic did not amounts to strike.

Thus strike as understood above, is recognised as the most deadly weapon in the armory of the workmen to fight against the employer.

5.1.3 RIGHT TO STRIKE

'The workmen' right to strike is a well recognised legal right, but it is not a fundamental right It was so held in the case of **ALL INDIA BANK EMPLOYEES ASSOCIATION** Vs. **NATIONAL** INDUSTRIAL TRIBUNAL (AIR 1962 **SC 111)** *by* the Supreme Court.

5.2 LOCK OUT

The term 'Lock-out' came later into use to denote a stoppage of work in which the employers lock their doors as an act of industrial protest against workmen willing to work. Lockout is resorted to by the employer in order to settle the state of friction.

Lockout as an anti-thesis to strike came into practice later in which the employer shut-down their doors of place of work in order to coerce the striking workers.

Definition of Lock-out (Section 2 (l) of the I.D Act defines "LOCK-OUT", it means (a) temporary closing of a place of employment or (b) suspension of work or (c) refusal by an employer to continue to employ any number of persons employed by him.
Lock-out is a weapon in the hands of the employer to coerce the workers to come down in their demands. It is the keeping of workers away from work by an employer with a view to resist their claim demands.

5.2.2 PROHIBITION OF STRIKE AND LOCK OUTS

Strikes or Lockouts, as the case may be, do not affect only employer and workmen but also affect consumer. Hence, in public interest, some regulation of strikes and lock - outs is inevitable, more so, in Public Utility Services.

PROHIBITION OF STRIKES AND LOCK-OUTS IN PUBLIC UTILITY SERVICES (PUS)

Section 22 of the I.D Act lays down the principles covering strikes and lockouts in a PUS. According to it in order there to be either a strike or lockout in PUS the following must be done:
No person employed in a public utility service shall go on strike in breach of contract -
(a) Notice of strike or lockout within six weeks before striking or lockout should be given; or
(b) It should not be commenced with in 14 days of giving such notice; or
(c) It should not be commenced before the expiry date of strike or lock-out specified in the notice; or
(d) During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.
However, the notice is not necessary if there is already existence a strike or lockout. But the employer shall send intimation to the authority specified by the appropriate Government.

If the employer receives or-gives any notice under this section he shall report to the appropriate Government with 5 days there of.
The main purpose behind this section is to prohibit "LIGHTENING STRIKES" in `Public Utility Services' in order to avoid inconvenience to the public. To achieve that purpose, time is needed for settlement of the dispute through negotiations. It is done by insisting on a notice.

The notice of strike must indicate the date on which the strike in Public Utility Services is to take place and the same must be sent inform 'L'. The life of notice is 6 weeks and any strike on the strength of that notice must commence within 6 weeks from the date of notice.

When once a strike is declared illegal by a notification issued under the Essential Services Maintenance Act. then a notice under Section 22 is not a due notice.

After giving notice, however, the strike cannot be commenced immediately. Minimum 14 days elapse between the date of notice and commencement of strike. If the notice, specified any date, it cannot be commenced before that date. All these preconditions arc imposed for declaration of strike in PUS. The same principles apply for declaration to lockout by the employer notice.
Besides the preconditions specified in section 22, a strike or lockout in a Public Utility Service must not also violate the general prohibition laid down in Section 23 of the Industrial Disputes Act, 1947.

5.2.4 GENERAL PROHIBITION OF STRIKES AND LOCKOUTS (Section 23)
The general prohibition of strikes and lockouts contained in Sec, 23 of the Act covers both public as well as non-public utility services. According to this section, strike or lock out during the
(a) pendency of conciliation proceedings before a Board and 7 days after conclusion of proceedings.
(b) pendency of proceedings before Labour Court, Tribunal or National Tribunal and two months after conclusion of proceedings;
(c) pendency of arbitration proceedings and two months after conclusion of proceedings; or
(d) any period in which a settlement or award is in operation in respect of any matters covered by the settlement or award is completely prohibited.

SPECIAL NOTE : It must always be remembered that a strike of lockout in a PUS is illegal if it constrained any of the principles contained in both Sec. 22 as well as Sec. 23. It is so because Sec. 22 is directly applicable to PUS is illegal only if it contravenes Sec. 23.

5.2.5 ILLEGAL STRIKES AND LOCKOUTS (SECTION 24)

A strike or lockout, as the case may he according to Section 24 is illegal if it contravened Sec.22 or Sec.23.
However, it must be noted, that a lockout declared inconsequence of an illegal strike declared inconsequence of an illegal lockout is not illegal
If a strike or lockout is commenced in pursuance of an industrial dispute in existence at the time of reference to Board, Arbitration, Labour Court, Tribunal or National Tribunal, the continuance of such strike or lockout is not illegal provided at the time of commencement they were not in a contravention of the Act.

CONSEQUENCES OF ILLEGAL STRIKE
Workmen who participated in an illegal strike are:
(i) Not entitled to wages during illegal strike period
(ii) The illegal strike may be treated as break in service by the employer.
(iii) The employer can impose any penalty including 'dismissal' from service. However, when drastic like 'dismissal' is resorted by the employer, the courts will see. (a) whether the workmen participated an illegal strike. (b) whether resorting to illegal strike is justified or not i.e. whether the purpose of

strike was so important, so urgent and so grave to justify the non - fulfillments of preconditions for declaration of strike i.e. whether the strike is justified or not

If the court considers the strike 'Justified' then the order of dismissal by the employer will be set aside. In such cases, the employer can impose any penalty on a workman other than dismissal. That is how, the courts have come to the assure of helpless worker and preserved the right to strike.

If the lock-out is illegal, the workmen can claim wages for lockout period, the period of lock-out is not a break in service and the workmen are entitled to all the benefits they would have got if there were to be no lock-out at all.

Prohibition of Financial aid to illegal strike and Lock-out : (Section 25)
No person shall knowingly expend or apply any money in direct furtherance or support of any illegal strike or lock-out.

Penalty in illegal strikes and Lock-outs: (Section 26)
Punishment for any way participating in any illegal strike shall be punishable for a term which may extend to one month, or with fine of Rs. 50/-, or with both. In case of an employer, the punishment with imprisonment for a term which may extend to one month, or with fine of Rs. 1,000/- or with both.

Penalty for Instigation: (Section 27)
Any person who gives, any financial aid to illegal strike or lockout may be punished with imprisonment for a term which may extend to 6 months, or with fine of Rs.1,000/- or with both.

Penalty for giving financial aid to illegal strikes and Lock-outs : (Section 28)
Any person who knowingly gives, any financial aid to illegal strike or lockout may be punished with a term which may extend to 6 months or with fine of Rs. 1,000/- or with both.

PUBLIC UTILITY SERVICES (SECTION 2n)
The following are the Public Utility Services (PUS)
(i) Railway Service.
(ii) Transport service for carriage of passenger by air.
(iii) Major Port or Docks.
(iv) Any section of the establishment on the working of which the safety of the establishment or the workmen depend.
(v) Any postal, telegraph or telegraph or telephone service.
(vi) Industry which supplies power, light or water to the public.
(vii) Public conservancy or sanitation, and
(viii) Industry specified in the first schedule declared to be a PUS by appropriate government in public interest or public emergency.
In case of (viii), it will be a PUS for six months initially, it may be extended by any period exceeding 6 months at any one time in public interest.

N.B Please refer to Schedule-1 of the ID Act to know which industries can be declared as PUS by the appropriate government.

In this lesson lay off, retrenchment and closure and it is also discussed very important part, of the Industrial Disputes Act, 1947. In this Act Chapter V, (A) and V (B) deal about the "Lay off, Retrenchment and Closure". In this lesson the important aspects related to layoff, retrenchment and closure are discussed. Since the ID Act objective is to investigate and settlement of industrial disputes, the Act clearly pronounced the conditions and compensation for lay-off, retrenchment and closure to avoid disputes which may arise in case of layoff, retrenchment and closure.

5.3 LAY-OFF

Lay off is temporary unemployment of the workmen due to some circumstances like shortage of raw materials, accumulation of stock, natural calamities etc., an employer may not be in a position to provide employment to his workmen for shorter period. In this process the employer and employees will share the losses and both of them have to follow the lay off procedure. The object of layoff is to save the establishment from further losses.

5.3.1 DEFINITION

Section 2 (kkk) defines about lay off, (with its grammatical variations and cognate expression) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or natural calamity or for any other connected reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched.

Explanation:

Every workman whose name is born on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause:

Provided that, if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during second half of the shift for the day and is given employment then, he shall be deemed to have been laid-off only for one half of that day:

Provided further that, if he is not given any such employment even after so presenting himself he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day.

Important Components in the Definitions:

(i) Employer refusal or inability to give employment in certain circumstances mentioned in the definition of lay off;

(ii) Employee has not been retrenched;

(iii) Employee's name must be there in muster –rolls;

(iv) Employee is deemed to be laid off, if he is not given employment within two hours after reporting to duty;

(v) Employer may ask the employee to present in the second half of the shift and provides employment then the employee is laid off only for the first half day;

(vi) If the employer could not provide employment to the employee, who is asked to come for second half of the shift, then the employee is entitled to full basic wages and dearness allowance

for that half day

5.3.2 APPLICATION OF LAY OFF PROVISIONS

The lay off provisions are different for different industrial establishments. The different provisions for different industrial establishments are discussed in Sec. 25-A

1. The lay off provisions of sections 25 - C to 25 - E are not applicable

a. to an industrial establishment which employed less than 50 employees.

b. to an industrial establishment which arc of seasonal character

c. To an industrial establishment to which chapter V-B applies, (if apples to industrial establishments employed more than 100 employees)

2. It implies that Sec. 25 - C to 25 - E are applicable to industrial establishments which employed 'more than 50 and less than 100 employees.

3. Industrial Establishment means

i. "Factory" definition in the Factories Act, 1948 ii. `Mine' definition in the Mines Act, 1952. "Plantation:" in the plantation Act, 1951.

5.3.3 DEFINITION OF CONTINUOUS SERVICE (SECTION 25B)

For the purpose of this chapter

1. A workman shall be said to be in continuous service, for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman.

2. Where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer:

(a) for a period of one year, if the workman, during a period of 12 calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) 190 days, in the case of workman employed below ground in a mine; and

(ii) 240 days, in any other case.

(b) for a period of six months, if the workman during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than:

(i) 95 days, in the case of workman employed below ground in a mine; and

ii. 120 days, in any other case.

Explanation: For the purpose of above calculation, the following days shall also be included.

(i) Period of lay off under an agreement or as permitted by Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment;

(ii) Period of leave with full wages, earned in the previous year;

(iii) Period of absence due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) In case of female workers, the period of maternity leave not exceeding 12 weeks.

5.3.4 RIGHT OF WORKMAN LAID OFF FOR COMPENSATION (SECTION 25C)

Gives the following rights for compensation to laid off

1. Entitlement of Rights:

A workman whose name is born on the muster rolls of an industrial establishment and who has completed not less than, one year of continuous service under the employer is laid-oft, he is entitled to the rights given in section 25-C.

2. Compensation Rights:

Compensation shall be paid, according to the following rules, for all the days, except for intervening weekly holidays.

(a) 50% of the total of the basic wages and dearness allowance shall be paid to the laid-off employee.

(b) The laid-off period is more than 55 days in any period of 12 months, for the days after 45 days the compensation need not paid, but to that effect there should be an agreement between workman and employer.

(c) It shall be lawful for the employer in any case falling within the foregoing provisions to retrench the workman in accordance with the provisions contained in Section 25 - F at any time after the expiry of the first 45 days of the lay off and when he does so, any compensation paid to the workman for having been laid-off during the preceding 12 months may be set off against the compensation payable for retrenchment.

5.3.5 LAID OFF WORKMAN NOT ENTITLED TO COMPENSATION IN CERTAIN CASES (Section 25-E)

(i) The laid off workman refuses to accept any alternative employment in the same establishment or in any other establishment belonging to the same employer situated in the same town with in a radiance of five miles;

(ii) The laid off workman does not present for work at the establishment at the appointed time during normal working hours at least once a day;

(iii) If lay off is due to a strike or slowing down of production on the part of workmen in an other part of the establishment.

5.3.6 Duty of an employer to maintain muster-rolls of workman (Section 26-D)

It shall be the duty of every employer to maintain muster-rolls for the purpose of this chapter V-A (lay off and retrenchment). The employer must also provide for the marking of entries there in by workman who present for work at the appointed time.

5.3.7 PROHIBITION OF LAY OFF (Section 25-M)

1. Section 25-M shall apply to an industrial establishment in which not less than 100 workmen were employed on an average working day for the preceding 12 months, but it shall not apply to seasonal nature of industrial establishment.
2. The workman shall not be laid off without prior permission of the specified authority unless such lay off is due to shortage of power or due to natural calamity, and in the case of mine, such layoff is also due to fire, flood, excess of inflammable gas explosion.
3. The application for permission shall be made in the prescribed manner stating clearly the reasons for the intended lay off and a copy of such application shall be sent to the workman concerned.
4. If the workman laid off in the mines due to fire, flood or explosion the employer shall take permission within 30 days of lay off for continuation of layoff.
5. The specified authority make an enquiry about the application and hear the employer and workmen concerned and grant or refuse to grant permission and a copy of such order shall be communicated to the employer and workmen.

6. After applying for permission to the specified authorities, if the employer does not receive any communication with in 60 days it is deemed to have been granted permission after the expirty of 60 days.
7. An order or specified authority is final, but it may be reviewed on its own or on the application of employer or workmen. The appropriate government may refer to a tribunal for adjudication. The tribunal shall pass an award within 30 days.
8. Without prior permission, if any employer, laid off it is illegal. The employee shall be paid all the benefits as if he has not been laid off.
9. The appropriate government may give extension to such exceptional circumstances as accident in the establishment or death of the employer, by order shall not apply the provisions of subsection for specific period.
10. The provisions of Section 25-C right of workman laid off for compensation shall apply to cases of lay-off.

5.4 RETRENCHMENT

An employer has the right to reorganise his business for economic utilisation or resources. As a part to reorganise his business, an employer may retrench some of the employees, who are not required. However, this act of retrenchment must be with in the limitations of law. Therefore retrenchment means the discharge of surplus labour or staff by the employer for any reason what so ever, other wise than as punishment unflicted by way of disciplinary action, and it has no application, where the services of all workmen have been terminated by the employer on a real and bonafide closure of business.

5.4.1 DEFINITION (Section 2(00)

Meaning: Retrenchment is the act of retrenching; a cutting down off, a reduction of expenses, and interior work which cuts off one part of a fortification form the rest. Retrenchment means the “discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bonafide closure of business”.

Scope : Chapter V-B (from 25-K to 25-S) of ID Act provide the provisions about retrenchment.
Definition : Section 2(00) defines retrenchment means the termination by the employer of the service of the workman for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action, but not include-
a. Voluntary retirement of the workman; or
b. retirement of the workman on reaching the age of superannuation if the contract of the employment between the retirement of the workman on reaching the age of superannuation if the contract of the employment between the employer and the workman concerned contains a stipulation (n that behalf; or
c. termination of the service of the workman as a result of the non - renewal between employer and employee.
d. termination of service on ground of continued ill health.

INGREDIENTS :
(i) There should be termination of service of a workman by employer
(ii) It may be for any reason whatsoever.

(iii) It should be otherwise than a punishment inflicted by the disciplinary action.

Exceptions :
(i) Voluntary retirement
(ii) Retirement on reaching the age of superannuation;
(iii) Termination of service as a result of the non renewal of the contract between employer and employee.
(iv) termination of service on ground of continuous illhealth.

OBJECT :
A desire to make more profits is natural and has been an employer has held to be lawful. If it is achieved by lawful means the right to reorganise his business in any fashion he likes, for the purpose of economy or conveniences and nobody is entitled to tell him how he should conduct his business. As a part to reorganise his business, an employer may retrench some of the employees, who are not required. However his act of retrenchment must be within the limitations. Such limitations are: (1) the employer should do it bonafide; (2) He should not misuse the right of retrenchment of the purpose of victimizing his employees and in order to get rid of their services which it would otherwise not be permissible (3) He should not violate the law in force.
Conditions precedent to retrench workman. The conditions for retrenchment of workman are different for different industrial establishments Section 25-F and 25-N explains the different conditions. Sec25-F is applicable to industrial establishment which employes more than 10 employees and less than 100 employees on an average on any day of the preceding 12 months; where as 25-N is applicable to industrial establishment which employing more than 100 employees.
Section 25-F conditions are as follows:

a. Notice : The employer shall give one month notice or in lieu of notice one month salary to the employee. In the notice the reasons should be given;

b. Compensation : The employer shall pay 15 days average of wages for every completed year of continuous service or any part there of in excess of 6 months; and

c. Notice to specified authority : The employer shall submit information by way of notice in the prescribed manner to the specified authority.

Section 25-N conditions are as follows :
1. The conditions of this sections are applicable to the employees who are in continuous service for not less than one year under an employer who retrench the employee.

(a) Notice: The employer shall gives 3 months notice to the employee by the reasons for retrenchment or in lieu of such notice, 3 months wages shall be paid.

(b) Prior permission : The employer shall obtain prior permission from the specified authority.

(c) Application : The employer shall make an application for permission in the prescribed manner stating clearly the reasons for the retrenchment and a copy shall be served to workman.

2. The specified authority make an enquiry about the application and here the employer and workman concerned and grant or refuse to grant permission and a copy of such order shall be communicated to the employer and workman.
3. After applying for permission to the specified authority if the employer does not receive any communication within 60 days, it is deemed to have been granted permission after the expiry of 60 days

4. An order of specified authority is final, but it may be reviewed on its own or on the application of employer or workmen. The appropriate government may refer to a tribunal for adjudication. The tribunal shall pass an award with in a period of 30 days.

5. Without prior permission if any employee is retrenched it is illegal. The employee shall be paid all the benefits as if he has not been retrenched.

6. The appropriate government may give exemption to such exceptional circumstances as accident in the establishment or death of employer, by order shall not apply the provisions of subsection for a specific period.

7. The employer who have been retrenched by following the conditions given in section 25-N shall be entitled to receive 15 days average pay for every completed year of continuous service or part there of 6 months.

5.4.3 Procedure for Retrenchment and re-employment (Section 25-G and 25-H)

1. Last come First go (or) First come last go

The employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman, in the absence any agreement between the employer and workman.

2. Last go first come (or) First go last come

After retrenchment of workman at any time the employer has requirement of workman the retrenched workman shall be given preferences in re-employment. The preference shall be in such manner as prescribed.

5.4.4 PENALTY FOR LAY-OFF AND RETRENCHMENT WITHOUT PREVIOUS PERMISSION

1. The employer who contravenes the provisions.
2. Sections 25-M and 25-N shall be punishable with one month imprisonment or Rs.1OOO/- or with both.

5.5 CLOSURE

If any industrial establishment is not financially viable to run then it is obviously closed. Even in our constitution. Article 19 (1) (g) the right to close an undertaking is implicit in right of an employer to carry on his business. But to check the introduction of closure, sometimes the closure may have modified intentions of victimising the workman. To avoid the victimisation some of conditions are laid down in the I.D Act, 1947. Section 25-0,25-D, 25-R explain about procedure and penalty of Closure. Section 25-0 explains the procedure for closing down an undertaking. Section 25-P provides special provision as to restarting of undertakings closed down before commencement of the Industrial Disputes (Amendment) Act 1976, Section 25-R provides the penalty for closure.

5.5.1 Definition: Section 2 (cc) “Closure” means the permanent closing down of a place of employment or part there of :

5.5.2 Procedure for closure

The procedure for closure is different for different Industrial Establish-ment. The different procedures are explained in Section. 25 FFA and 26-0. As per the provisions of the above two sections the Industrial Establishment are classified into three types.

1. The industrial establishment which employs less than 50 or less than 50 on an average per

working day in the preceding 12 months. The undertakings set up for the construction of building bridges, roads, canals, dams or for other construction work of project.
2. The industrial establishment which employs more than 50 and less than 100 employees.
3. The industrial establishment which employs more than 100 employees.
The first type need not give notice to the appropriate government where as the second type of industrial establishments which employ more than 50 employees shall serve notice of intention of closure in the prescribed manner to the appropriate government before 60 days of closure (section 25FFA).
The industrial establishment which employs more than 100 employee shall follow the procedure given in section 25-0.
1. The employer shall apply to the specified authority before 90 days of intention to closure in the prescribed manner by sating the reasons and a copy of such application shall be served to representative of the workman. This condition shall not apply to an undertakings set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.
2. After applying for permission to the specified authority of the employer does not receive any communication within 60 days, it is deemed to have been granted permission after the expiry of 60 days.
3. An order of specified authority is final, but it may be reviewed on its own or on the application of employer or workmen. The appropriate government may refer to a tribunal for adjudication. The tribunal shall pass an award within a period of 30 days.
4. Without prior permission if any employee is retrenched, it is illegal. The employee shall be paid all the benefits as if he has not been retrenched.
5. The appropriate government may give exemption to such exceptional circumstances as accident in the establishment or death of employer, by order shall not apply the provisions of subsection for a specific period.
6. The employer who have been retrenched by following the conditions given in section 25-N shall be entitled to receive 15 days average pay for eve completed year of continuous service of part there of 6 months.

5.5.3 COMPENSATION IN CASE OF CLOSURE (SECTION 25.FFF)
1. Every workman who has been in continuous service for not less than one year shall entile to notice and compensation in accordance with the provisions of sections 25-F (Retrenchment compensation)
2. If the undertaking is closed on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman shall not exceed his average pay for three months.
3. An undertaking which is closed down by reasons merely of :
(i) financial difficulties,
(ii) accumulation of undisposed stocks.
(iii) the expiry of the period of the lease or licence granted to it.
(iv) In case where the undertaking is engaged in mining operations exhaustion of the minerals less in the area in which such operation are carried on, shall not be deemed to be closed down on amount of unavoidable circumstances beyond the control of the employer.
4. In case an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area, if the employer provides alternative employment with the same service conditions, the worker shall not get closure compensation.
5. In case of undertaking setup for the construction of buildings, bridges, roads, canals, or other

construction work is closed down on account of completion of the work within two years, the employer is need not pay compensations as per section 25-P.

5.5.4 COMPENSATION TO WORKMAN IN CASE OF TRANSFER OF UNDERTAK-ING (25FF)

1. In case of change of ownership or management, the workman who has been in continuous service for not less than one year shall be entitled to notice and compensation in accordance with the provisions of Section 25-F
2. Even in change of ownership or management, if the workman service has not been interrupted, the service conditions are same and the new employer under the terms such transfer is legally liable to pay compensation in case or retrenchment, the notice and compensation need not be paid to the workman.

5.5.5 Special provision as to restarting of undertakings closed down before commencement of the I.D (Amendment) Act 1976 (Section 25-P)

The appropriate government is of opinion in respect of any undertaking of an industrial establishment closed-down before the commencements of this Act that :-
(a) Such closure was due to unavoidable circumstances beyond the control of the employer.
(b) there are possibilities of restarting the undertaking.
(c) It is necessary for rehabilitate the workmen and maintain the supplies and services essential to the life of community; and
(d) the restarting of the undertaking will not result in hardship to the employer then it may be an opportunity to such employer and workmen directed by an order to restart it within a prescribed time (not being less than one month from the date of the order) as may be specified in the order.

5.5.6 PENALTY FOR CLOSURE: (SECTION 25-R)

1. The employer closes down an undertaking without complying with the provisions of sub-section(1) of Section 25-0 (Procedure for closing down an undertaking) shall be punishable with imprisonment for a term which may extend one month, or with fine upto Rs.1000/- or with both.
2. The employer who contravenes an order refusing to grant permission to close down an undertaking under subsection (2) of Section 25-0 or a direction given under section 25–P shall be punishable with imprisonment for a term which may extend to six months or with fine upto Rs.5,000/- or with both.
3. The contravention is a continuing one with a further fine which may extend to Rs.2,000/- for every day during which the contravention continues after the conviction.

It may be noted that the provisions of Section 25-R, so far as it relates to the punishment in violating Section 25(O) are concerned, has been held as constitutionally bad and invalid and violative of Article 19(1) (g) of the constitution.

5.6 SELF ASSESSMENT QUESTIONS :

1. Define the following
a. layoff
b. lockout
c. Retrenchment
d. Closure
f. Continuous service
2. What are the provisions regarding strikes and lockouts discuss?

3. Discuss the procedure to be followed while retrenching an employee
4. What are the provisions regarding “layoff, retrenchment, and closure”?
5. Explain the provisions relating to compensation in case of lay-off
retrenchment and closure.
6. What penality under the I.D. Violated by the employer?

5.7 FURTHER READINGS

1. Ahmedullah Khan and Amanullah Khan, Commentary on Labour and Industrial Law Asia Law House, Hyderabad.
2. Malik, P.L., Industrial and Labour Legislation.
3. Sarma, A.M. Industrial Jurisprudence and Labour Legilsation, Himalaya Publishing House, Mumbai.
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LESSON - 6

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

6.0 OBJECTIVE

The reader understands the law relating to standing orders after going through this lesson, he also learns :

- the procedure for certification of standing orders
- the concept of subsistence allowance
- model standing orders in respect of industrial establishments.

STRUCTURE

6.1 Introduction
6.2 Object of the Act
6.3 Scope and application of the Act
6.4 Important definitions
6.5 Certification of draft standing orders
6.6 Appeals
6.7 Date of operation of standing orders
6.8 Posting of standing orders
6.9 Duration and modification of standing orders
6.10 Payment of subsistence allowance
6.11 Temporary application of model standing orders
6.12 Interpretation of standing orders
6.13 Power to make rules
6.14 The schedule of the Act
6.15 Self Assessment Questions
6.16 Further Readings

6.1 INTRODUCTION

There was no uniform practice in the conditions of service of workers until this Act was brought into force. The absence of standing orders, clearly defining the rights and obligations of the employer and the worker in respect of terms of employment was found to be one of the most frequent causes of friction between managements and workers in many industrial establishments.

"There is no fear which haunts an industrial woker more constantly than the fear of losing his job, as there is nothing which he prizes more than economic stability. It is a notrious fact that dismissals of worker have been the orignating cause of not a few industrial disputes and strikes. The provision of effective safeguards against unjust and wrong dismissal is, therefore, as much in the interest of the industry as of the workers".

The labour Investigation Committee (1944-46) observed thus “an industrial worker has the right to know the terms and conditions under which he is employed and the rules of discipline which

he is expected to follow. Broadly speaking, in Indian industry the rules of services are not definitely set out and, like all unwritten laws, where they exist, they have been very elastic to suit the convenience of employers..."

The matter pertaining to terms and conditions of industrial employment was first brought before the fifth Indian Labour Conference in 1943 and was subsequently deliberated in its sessions in 1944 and 1945. In order to remedy the long-standing lacuna in the Indian labour legislation, the legislature passed the Act on 23rd April, 1946. The Act came into force on 1st April, 1947.

6.2 OBJECT OF THE ACT

The object of the Act is "to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them". The Act was enacted: (a) to bring about uniformity in terms and conditions of employment; (b) to minimise industrial conflicts; (c) to foster harmonious relations between employers and employees; and (d) to provide statutory sanctity and importance to the standing orders.

Thus the purpose of the Act can be classified into two main objectives, firstly to require the employers to define the conditions of employment with sufficient precision and clarity and this object is provided by requiring the employers to get the standing orders certified. Section 3 to 8 contain procedure for certification of standing orders. Secondly the object of the act is to require employers to make such condition of employment known to the workmen. This object is incorporated in section 9 of the Act.

6.3 SCOPE AND APPLICATION OF THE ACT

The Act extends to the whole of India. It applies to every industrial establishment wherein 100 or more workmen are employed, or were employed on any day of the preceeding twelve months. Once the Act becomes applicable to an industrial establishment, it does not cease to apply on account of a fall in the number of workmen in that establishment below 100, (Balakrishna Pillali and Others vs. Anant Engineering Works Pvt. Ltd., 1975-11 LLJ. 39 I). In 1961, the Act was amended empowering the appropriate government to extend its scope to industrial establishments employing less than 100 persons after giving them not less than two months' notice of its intention to do so.

The amended Act of 1963 inter alia provides for applicability of Model Standing Orders framed by the appropriate government to all industrial establishments covered by the Act until the standing orders framed by individual establishments are certified.

The Act has 15 sections in all and a schedule. It is applicable to all workmen employed in any industrial establishment to do any skilled or unskilled, manual, supervisor, technical or clerical work. Even apprentices are covered. But persons employed mainly in a managerial or administrative capacity and those employed in a supervisory capacity and drawing wages exceeding Rs. 1,600 per month are not covered.

6.4 IMPORTANT DEFINITIONS

Appellate Authority {Section 2 (a)} means an authority appointed by the appropriate government by notification in the Official Gazette to exercise in such area as may be specified in

the notification the functions of an appellate authority under this Act.

Appropriate Government {Section 2 (b)}

"Appropriate government' means in respect of industrial establishments under the control of the Central Government or a Railway Administration or in a major port, mine or oilfield, the Central Government and in all other cases the State Government.

Certifying Officer: {Section 2(c) means a Labour Commissioner, or a Regional Labour commissioner, and includes any other Officer appointed by the appropiate government, by a notification in the Official Gazette, to perform all or any of the functions of a certifing officer under the Act.

'Wages' and 'Workmen' {Section 2(i)}

The terms 'wages' and 'workmen' have the meanings respectively assigned to them in clauses (rr) and (s) Section 2 of the Industrial Disputes Act, 1947.

6.5 CERTIFICATION OF DRAFT STANDING ORDERS

Submission of Draft Standing Orders by employers to the certifying officer.

Section 3 provides that within six months from the date on which this Act becomes applicable to an industrial establishment the employer of that establishment shall submit to the certifying officer five copies of the draft standing orders proposed by him for adoption in that establishment.

Such draft standing orders shall be in conformity with the Model Standing Orders if any or shall contain every matter set out in the schedule which may be applicable to the industrial establishment.

The draft standing orders shall be accompanied by a statement containing prescribed particulars of the workmen employed in the industrial establishment including the name ofthe trade union if any to which ever they belong.

If the industrial establishments are of similar nature a group of employers owning those industrial establishments may submit a joint draft of standing orders subject to such conditions as may be prescribed.

6.5.1 Conditions For Certification of Standing Orders

It is further provided in Sections 4 and 5 that it shall be the function of the certifying officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders.

The Act has imposed a duty on title certifying officer to consider the reasonableness and fairness of the Standing Orders before certifying the same. The certifying officer is under a legal duty to consider that the Standing Orders are in conformity with the Act. If the certifying officer finds that some provisions as proposed by the employer relate to matters which are not included in the Schedule, or if he finds some provisions are unreasonable he must refuse to certify the same. Certification of any such standing order would be without jurisdiction. The certifying officer has mandatory duty to discharge and he acts in a quasi-judicial manner. Where a matter is not included

in the Schedule and the concerned appropriate Government has not added any such item to the Schedule, neither the employer has right to frame a standing order enabling him to transfer his employees nor the certifying officer has jurisdiction to certify the same. The consent of the employees to such standing orders would not make any difference. (Air Gases Mazdoor Sangh, Varanasi V. Indian Air Gases Ltd., 1977 Lab. I.C,. 575).

Findings recorded by certifying officer that Standing Orders are fair and reasonable, are final findings if recorded on extraneous considerations or under misconception of law. High Court under Article 226, of the Constitution of India can quash those findings 'Central Workshop Kannachari Sangh, Kanpur v. Industrial Tribunal, 1978 Lab. I.C. 1560 (DB) (All).

6.5.2 Certification of Standing Orders Procedure to be followed by the Certifying Officer (Section 5)

Section 5 of the Act lays down the procedure to be followed by certifying officer. On receipt of the draft Standing Orders from employer the certifying officer shall forward a copy thereof to Trade Union of the workmen or where there is no Trade Union then to the workmen in such manner as may be prescribed together with a notice requiring objections, if any, which the workmen may desire to make in the Draft Standing Orders. These objections are required to be submitted to him within 15 days from the receipt of the notice. On receipt of such objections he shall provide an opportunity to workmen or the employer to be heard and will make amendments if any, required to be made therein and this will render the draft standing orders certifiable under the Act and he will certify the same. A copy of the certified standing orders will be sent by him to both the employer and employees association within seven days of the certification.

6.5.3 Effect of Certification

The Act is a special law in regard to matters enumerated in the Schedule and the regulations made by the employer with respect to any of those matters are of no effect unless such regulations are notified by the Government under Section 13 (b) or certified by the certifying officer under Section 5 of the Act, 1978-11 Labour Law Journal 399 (SC).

The certified Standing Orders funned in accordance with the Industrial Employment (Standing Orders) Act have the force of law like any other statutory instrument Bishwanath Das V. Ramesh Chandra Patnaik (1980-1 Labour Law Journal 35, Orissa).

After the standing Orders are certified by the statutory authority under Section 5 of the Act, it becomes part of statutory terms and conditions of services between the employer and employees and have the force of law.

6.5.4 Register of Standing Orders

Section 5 (b) empowers the certifying officer to file a certified copy of the Standing Orders so certified by him in a register maintained by him in a prescribed form, he shall furnish a copy of the same to any person applying there to on payment of the prescribed fee.

6.6 APPEALS (SECTION 6)

The order of the certifying officer can be challenged by any employer, workmen, trade union or any other prescribed representatives of the workmen who can file an appeal before the appellate authority within 30 days from the date on which copies are sent to employer and the workers

representatives. The appellate authority, whose decision shall be final has the power to confirm the Standing Orders as certified by the certifying officer or to amend them. The appellate authority is required to send copies of the Standing Orders as confirmed or modified by it to the employer or worker's representatives within 7 days of its order. The appellate authority has no power to set aside the order of Certifying Officer. It can confirm or amend the Standing Orders (Khadi Gram Udyog Sangh v. Jit Ram, 1975 -2LLJ 413).

6.7 DATE OF OPERATION OF STANDING ORDERS (Section 7)

Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where appeal has been preferred they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives under subsection (2) of the Section 6.

6.8 REGISTER OF STANDING ORDERS (SECTION 8)

The Certifing Officer is required to maintain a register in accordance with Section 8 and file a copy of the standing orders as finally certified under the Act in the prescribed form and manner. It is further provided that the certifying officer shall furnish a copy of the standing order to any person who applies for the same on payment of prescribed fee.

6.9 POSTING OF STANDING ORDERS (SECTION 9)

The text of the Standing orders as finally certified under this Act, shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for this purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed.

6.10 DURATION AND MODIFICATION OF STANDING ORDERS (SECTION 10) (SECTION 10 PROHIBTED AN EMPLOYER TO MODIFY THE STANDING ORDERS)

Standing Orders once they are confirmed under this Act except on agreement between the employer and workmen or a trade union or other representative body of the workmen. Such modification will not be affected until the expiry of 6 months from the date on which the standing Orders were last modified or certified as the case may be. This section further empowers the employer or the workmen or a trade union or other representative body of the workmen to apply to the certifying officer to have the Standing Orders modified by an application to the certifying officer. Such application should be accompanied by 5 copies of the proposed modification and where such modification proposed to be made by agreement by both employer and the workmen or a trade union or other representative body of the workmen, a certified copy of such agreement should be filed along with the application.

6.10.1 PAYMENT OF SUBSISTENCE ALLOWANCE (Section 10-A)

Statutory provision for payment of subsistence allowance has been made in Section 10-A of the Act inserted by the amending Act 1982, The newly inserted provisions as follows:

Where any workmen is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such a workman the subsistence allowance at the following rates -

a. at the rate of fifty percent of the wages which the workman was entitled to immediately preceeding the date of such suspension for the first ninety days of suspension; and.

b. at the rate of seventy five percent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

Any dispute regarding subsistence allowance may be referred by the workman or the employer to the Labour Court constituted under the Industrial Disputes Act 1947.

However, if the provisions relating to payment of subsistence allowance under any other law for the time being inforce are more beneficial than the provisions of such other law shall be applicable to the payment of subsistance allowance.

6.11 TEMPORARY APPLICATION OF MODEL STANDING ORDERS (SECTION 12-A)

Section 12-A provides that for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the Standing Orders as finally certified under this Act come into operation in that establishment. For such period the prescribed model Standing Orders shall be deemed to be adopted on that establishment and the provisions of Sections 9,13(2) and of 13-A shall apply.

6.12 INTERPRETATION, ETC, OF STANDING ORDERS (SECTION 13-A)

Section 13-A of the Act provides that the question arising to application or interpretation of a Standing orders certified under the Act by any employer or workman or a trade union or other representative body of the workman can be referred to any Labour Court constituted under the Industrial Disputes Act, 1947. The Labour Court to whom the question is referred shall decide it after giving parties an opportunity of being heard. Such decision shall be and binding on these parties.

6.13 POWER TO MAKE RULES

Section 15 empowers the appropriate Government may, after previous application, by notification in the offical gazatte to make rules to carry out the purpose of the Act. Such rules may

a. Prescribed additional matter to be included in the Schedule, and the procedure to be followed in modifying standing orders certified under this Act in accordance with any such addition;

b. Set out model standing orders for the purpose of this Act;

c. Prescribe the procedure of Certifying Officers and appellate authorities;

d. Prescribe the fee which may be charged for copies of standing orders entered in the register of standing orders;

e. Provide for any other matter which is to be or may be prescribed;

Provided that before any rules are made under clause (a) representatives of both employers and workmen shall be consulted by the appropriate Government.

6.14 THE SCHEDULE TO THE ACT (SECTION 2 (G)

Matters to be provided in Standing Orders under the Act

i. Classification of workmen, e.g. whether permanent, temporary, apprentices, probationers or badlis.

ii. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.

iii. Shift working.

iv. Attendance and late coming.

v. Conditions of procedure in applying for, and the authority which may grant leave and holidays.

vi. Requirements to earner premises by certain gates, and liability to search.

vii. Closing and reopening of sections of the industrial establishments, temporary stoppage of work and the rights and liabilities to the employer and workmen arising there from.

viii. Termination of employment and the notice thereof to be given by employer and workmen.

ix. Suspension or dismissal for misconduct and acts or omissions which constitute misconduct.

x. Means of redress for workmen against unfair treatment of wrongful actions by the employer or his agents or servants.

1. Additional matters to be provided in Standing Orders coal mines

a. Medical aid in case of accident.

b. Railway travel facilities.

c. Method of filling vacancies.

d. Transfers.

e. Liability of manager of the establishment or mine.

f. Service certificate.

g. Exhibition and supply of Standing Orders.

2. Additional matters to be provided in Standing Orders relating to all industrial establishments.

a. Service recordmatters relating to service card, token, tickets, certification of services, changed residential address of workers and record of age.

b. Confirmation,

c. Age of retirement

d. Transfer

e. Medical aid in case of accidents.

f. Medical examination.

g. Secrecy.

h. Exclusive services.

xi. Any other matter which may be prescribed.

CASE LAW :

In Bagalkot Cement Co. Ltd. Vs. R.K. Pathan (1962-ILLJ 203) the Supreme Court held that the matters which are to be covered by the standing orders, and in respect of which the employer

has to make a draft for submission to the Certifying Officer, are matters specified in the Schedule. After they are certified by the competent authority under the Act, they constitute the statutory terms of employment in industrial establishments.

In case the standing orders provide for a subject, even if there are service rules or conditions on the same subject, they get superseded by standing orders.But where they do not provided for any subject, the contract between the parties prevails. Thus, the matters not falling within the purview of any of the items enumerated in the Schedule to the Act, the terms of the contract or conditions of service shall prevail with the full force unless, of course, the adjudicating authorities or the courts find that any provision is too unjust or unconsciousable to be allowed to stand. Fixing the age of superannation at the completion of 55 years of age is reasonable and proper (Karnataka Agro Industries Corporation Vs. Krishnappa and Others, 1981-I LLJ. 473).

In Sundaram Industries Limited Vs. Secretary, Madurai Motor Labour Union (1980-II LLJ 313) it was held that under Section 10(2) of the Industrial Employment (Standing Orders) Act, the right to apply for modification of the certified standing orders is given personally to an employer or workman. The section does not authorise the representative of an employer or a workman to make an application for modification of the certified standing orders.

The Management of Machine Tools and Ancillaries Castings (P) Ltd., Madras, had dismissed 8 employees, without giving them a show-cause notice, in terms of 17 (4) (c) of the Model Standing Orders. The Labour Court had found the dismissal invalid. On a writ appeal, the Madras High Court relying on the decisions of the Supreme Court held that the order of dismissal in the instant case is invalid as no opportunity was given to the employees as contemplated in the Model Standing Orders (Machine Tools vs. Addl. Labour Court, 1981 - I LLJ. 408).

Where an employee has been appointed on probation and the period of probation was one year in the first instance which could be extended only for a further period of six months, the employee had to be confirmed or dicharged on or before expiry of extended period. If not dicahrged at or before tthe maximum period of probation, there would be an implied confirmation in service. (M.K. Agarwals vs. Gurgaon Gramin Bank 1988-72 FJR S.C.).

Even in the absence of rules and regulations providing for suspension or payment of subsistance allowance during the period of suspension, the employer was bound to pay the subsistence wages during the period of suspension (The Management, Krishnaveni Roadways, Madurai v. I.P. Punnaivam and Anr. 1991 II LLJ 1370.

Where the standing orders provides that the domestic enquiry will be held by an officers of management, the enquiry conducted by an advocate was illegal (Capstain Meters (I) Ltd. v. Labour Court Jaipur 1991 II LLJ 137).

If departmental proceeding and criminal proceeding arise out of same set of facts and circumstances, departmental enquiry should be stayed till proceedings are over before trial court. Departmental enquiry can be proceeded with after the judgement of the trial court, wheter appeal is filed or not (P.J. Sunder Rajan and Anr. v. Unit Trust and Anr. 1993 I LLJ 168 SC).

When the standing order prohibits the suspension of a workman beyond a stipulated period,

all that it enjoins is a duty cast upon the employer to pay full wages at the end of the stipulated period (Bombay Dyeing and Mfg. Co. Ltd. and Ors. v. Aditya Narayan Shyam Charan Upadhyay and Ors. 1993 I LLJ 839).

If the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employees appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, then he cannot be deemed to continue in that post as probationer (Ganesh Chandar Joshi v. Union of India and Ors. 1993 I LLJ 1027).

Any act subversive of discipline committed outside the premises is also misconduct. Any Act unrelatable to the service committed outside the factory would not amount to misconduct (Palghat BPL and PSP Thozhilali Union v. BPL India Ltd. and Anr. 1995 II LLJ 335 SC).

In case of abandonment of service, employer is required to hold enquiry and then pass appropirate order. Abandonment of service is always a matter of intention. It is a question of fact (M. Ganishah Patel v. Mastanbaug Consumers Co-op. Wholesale and Retail Stores Ltd. 1998 I CLR 1205).

Chargesheet to delinquent employee was sent by registered post, but the cover was returned with postal endoresement "not found". This cannot be legally treated to have been served and consequently further enquiry stand vitiated (Union of India v. Dinanath Shantaram Karekar 1998 II CLR 849 SC).

SUMMARY :

The basic role of the standing orders is to eliminate any ambiguity in employment conditions and thereby reduce possible friction between the employer and his employees. The object of the Industrial Employment (Standing Orders) Act, 1946 is to require employers to define precisely the the conditions of service of workmen employed in the industrial establishmens; and to make such conditions known to the workmen employed therein and to regulate the conditions of recruitment, discharge, disciplinary action, holidays, shift working, of the workers.

The Act extends to the whole of India. In the Central sphere, it applies to the industrial establishments wherein 50 or more workmen are employed or were employed on any day of the preceding twelve months. As regards the establishments in state sphere, the Act empowers the appropriate Government to extend the provisions to establishments employing less than 100 workmen after giving not less than two months' notice of its intention to do so in the official gazettee.

As per Section 2 (C) of the Act, all the Regional Labour Commissioners are certifying officers in relation to industrial establishments throughout the country under the control of the Central Government. The Regional Labour certifying officers in relation to industrial establishments falling in the Central sphere and having branches in more than one state.

6.15 SELF ASSESSMENT QUESTIONS

1. State the object and scope of the Industrial Employment (Standing Orders) Act. 1946.
2. Define 'Certifying Officer' what are his duties.

3. Explain the procedure for certification of Standing Orders.
4. Whether the certified Standing Orders could be modified? Explain.
5. Which establishments are coverd by the Act?

6.16 FURTHER READINGS

Sarma, A.M; Industrial Jurisprudence and Labour Legislation, Himalya Publishing House, Mumbai, 2004.

Malik P.L, Industrial and Labour Legislations.

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LESSON - 7

THE TRADE UNIONS ACT, 1926

7.0 OBJECTIVE

The main objective of this lesson is to make the reader understand the following:
Method of registration a Trade Union
How the funds of Registered Trade Unions are to be maintained
Rights and Privileges of Registered Trade Unions.

STRUCTURE

7.1 Introduction
7.2 Objects and scope of the Act
7.3 Important Definitions
7.4 Registration of Trade Union
7.5 Funds of Registered Trade Union
7.6 Privileges of a Registered Trade Union
7.7 Certain Membership Rights
7.8 Office bearer of a Trade Union
7.9 Change in the Names and Structure
7.10 Submission of Returns
7.11 Power to Make Regulations
7.12 Offences and Penalties
7.13 Self Assessment Questions

7.1 INTRODUCTION

Trade Union movement in India traced back to 1890, when N.M. Lokhamde organized in Bombay the Bombay Mill Hands Association, organized trade unions in the modern sense started springing up only after 1918. The decision of the Madras High Court, in the Buckingham and Carnatic Mills Case, focused public attention to the necessity of giving legal recognition to workers right to organise the strike in defence of their legitimate interests. On the initiative of N.M.Joshi, the Legislative Assembly adopted a resolution on 1st March, 1921 to take steps to introduce legislation for registration of trade unions and protection of bonafide trade unions activities. The Central Government after consulting Provincial Governments drew up a Bill providing for registration of trade unions and introduced it in the Assembly on 31st August, 1925. It was passed on 25th March, 1926, and the Indian Trade. Unions Act, 1926 was brought into force on 1st June, 1927.

The Act was amended in 1947 to provide for compulsory recognition of trade unions. However, the amended Act was not forced. An effort was made to revive it by introducing another bill in the Rajya Sabha on 17th December 1957; but this, too, was withdrawn. A Trade Union Bill was introduced in Parliament on 23rd February 1950. Later, it was referred to a select committee which submitted its report on 1st December 1950; but the Bill lapsed owing owing to the dissolvution of Parliament. Further Amendments to the Act were made in 1960, 1962 and 1964. The word

"Indian" was deleted in the Amendment Act of 1964. A Comprehensive Trade Union (Amendment) Bill, 1982, was passed by Parliament and receive the assent of the President of India, but was not enforced.

The Trade Unions (Amendment) Act 2001, has come into force from January 9th, 2002. The Act is divided into 33 sections and contains 5 chapters. Certain acts do not apply to registered Trade Unions, namely: (i) The Societies Registration Act, 1869. (ii) the Cooperative Societies Act, 1912, and (iii) The Companies Act, 1956. The Act extends to the whole of India.

7.2 OBJECTS AND SCOPE OF THE ACT

The main object of the Act is to provide for the registration of trade unions and to give registered trade unions a legal and corporate status and immunity to their officers and members from civil and criminal liability for legitimate trade union activities.

Article 19(1) and (c) of our Constitution guarantees to every citizens freedom of speech and expression and right to form association and unions to ventilate their views and grievances. Any group of persons whether workers or employers, can unite themselves to protect their interests, economic or otherwise. Usually the term trade union refers to association of workers formed to protect their economic interest. But the Trade Unions Act, 1926, is very wide in scope and covers employers as well. According to its preamble, it is an Act to provide for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions. The Act lays down a detailed procedure for the registration and working of Trade Unions. In order that the union may fight for its legitimate rights fearlessly, certain immunities from criminal and civil actions are granted to the members of the registered Trade Union and their officials. Thus, provisions have been made to ensure a healthy trade union movement in India. By virtue of Section ' (3), the Act extends to whole of India.

7.3 IMPORTANT DEFINITIONS : SECTION 2

i. Appropriate Government :

In this Act, the term 'appropriate government' means, in relation to trade unions whose objects are not confined to one State, the Central Government, and in relation to other trade unions, the State Government.

ii. Executive : Section 2(a)

'Executive' means the body, by whatever name called, to which the management of the affair of a trade union is entrusted.

iii. Office-Bearer: Section 2(b)

Office bearer in the case of trade union includes any member of the executive thereof, but does not include an auditor.

iv. Registered office and Registered Trade Union : Section 2(d)

Registered office means that office of a trade union which is registered under this Act as the head office thereof and a registered trade union means a trade union registered under this Act.

V. Registrar : Section 2(f)

Registrar means:

(a) Registrar of trade union appointed by the appropriate Government under Section 3, and includes any Additional or Deputy Registrar of Trade Union, and

(b) In relation to any Trade Union, the Registrar appointed for the State in Which the head or Registered office, as the case may be, of the Trade Union is situated.

vi. Trade Dispute : Section 2(g)
Trade Dispute means any dispute between -
a. employers and workmen, or b. workmen and workmen, or
c. employers and employers,
Which is connected with -
i. the employment or non-employment, or
ii. the terms of employment, or
iii. the conditions of labour, of any person.

(Since the above definition of trade dispute' is almost similar the definition of 'Industrial Dispute' under the Industrial Disputes Act, 1947.

vii. Workman: Means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arise.

In a petition, the legality of registration of employees association as a trade union was challenged on the ground that it is purely a research and development organisation without any profit motive and therefore, even if it can be regarded as an "Industry" within the meaning of the Industrial Disputes (ID) Act, it is not a trade or industry for the purpose of the Trade Unions Act, It was held that there is no difference between the meaning of the word 'industry' as defined in Section 2(j) of the I.D. Act and the words "trade' or "industry- as used in Section 2(g) of the Trade Unions Act. Therefore, if an establishment or activity falls within the meaning of 'industry' as defined in the Industrials Disputes Act, the workmen thereof are also workman employed in a trade or industry as specified in the definition of the words 'trade dispute' contained in Section 2 (g) of the Trade Unions Act and consequently they are entitled to form a trade union.

The Words 'trade' or 'industry' under the I.D. Act are themselves sufficiently wide enough to bring the petitioner society within the definition of `trade' or 'Industry' notwithstanding the fact that it has no profit motive. The two enactments, viz., the Trade Unions Act and the Industrial Disputes Act are in part materials and it is permissible to read the definition of the word 'Industry' contained in Section 2(j) of the I.D. Act to understand the same word used in the Trade Unions Act, if so read, the definition of the word 'Industry' contained in Section 2(g) of the Trade Unions Act should carry the same meaning as the word "industry" defined in Section 2(J) of the I.D. Act, Central Machine Tool Institute, Bangalore V. Asst. Labour Commissioner, 1978 Lab 1C 1732 (Kant).

viii. Trade Union: Section 2 (h)
Trade Union means any combination, whether temporary or permanent, formed.
(i) primarily for the purpose of regulating the relations between workmen and employers, or between workmen and workmen or between employers and employers; or
(ii) for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions.

(i) The Act, however, does not affect any agreement between partners as to their own business ;
(ii) any agreement between an employer and those employed by him as to such employment; or
(iii) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade or handicraft.

In the case of Rangaswamy V, Registrar of Trade Unions. AIR 1962 Mad, 231 certain employees consisting of gardeners and domestic servants etc. employed at Raj Bhavan, Madras formed a Union with the object of securing better service conditions and to facilitate collective bargaining with employer. The Registrar refused to registrar the Trade Union. The Union contended that their service were not purely domestic services, however, on an appeal to court it was held that persons employ in Raj Bhavan for domestic and the other duties cannot form a trade union on the ground that workers are not employed in trade or business earned on by the employer. The services rendered by them purely of a personal nature. The Union of such workers would riot come within the scope of the Act as to entitle it to registration there under. Similar, the union of Civil servants engaged in the task of sovereign and legal functions of the Government cannot be held as Trade Union under the act, Tamil Nadu Non Gazetted Officer Union V. Registrar of Trade Unions. AIR 1962 Mad : 234.

Lastly, the definition not only recognised the combination of Workers but any combination employers will also come within the scope of the term 'trade union'. However, deciding factor will the purpose for which this combination is formed. Thus, a combination of employers in a jute industry, imposing restrictions on the members inrespect of prices to be charged from the customers, is covered under the definition of trade ginning and pressing factory workers union and Radhakisan Jaikisan Jammadas Nursery Ginning and Pressing Co. Ltd. AIR 1940 Nag 228.

7.4 REGISTRATION OF TRADE UNIONS

7.4.1 APPOINTMENT OF REGISTRARS (SECTION 3)

The Act provides that the appropriate Government shall appoint a person to be the Registrar Trade Unions for each state. It may appoint as many Additional and Deputy Registrars of Trade Unions as it thinks fit, for the purpose of exercising and discharging under the superintendence and direction of the Registrar, such powers and functions of the Registrar under this Act as it may, by order specify. It may define the local limits within which any such additional or deputy registrar shall exercise and discharge the powers and functions so specified.

MODE OF REGISTRATION OF TRADE UNIONS: (SECTION 4)

Any seven or more members of a trade union may, by subscribing their names to the n the trade union. And by otherwise complying with the provisions of this Act with respect to registration, apply for its registration {Sec. 4(1)},

Where an application has been made for the registration of a trade union. Such application shall not be deemed to have become invalid merely by reason of the fact, that at any time after the date of the application, but before the registration of the trade union, some of the applicants, but not exceeding half of the total number of persons who made the application, have ceased to be members of the trade union or have given notice in writing to the registrar dissociating themselves from the application.

APPLICATION FOR REGISTRATION: (SECTION 5*) :*

Every application for registration of a trade union shall be made to the registrar, and shall be accompanied by a copy of the rules of the trade union and statement of the following particulars, namely:-

(a) the names, occupations and addresses of the members making the application.

(b) the name of the trade union and the address of its head office; and
(c) the titles, names, ages, addresses and occupations of the office-bearers of the trade union.

Where a trade union has been in existence for more than one year before the making of an application for its registration, there shall be delivered to the registrar, together with application, a general statement of the assets and liabilities of the trade union prepared in such form and containing such particulars as may be prescribed.

RULES OF TRADE UNION: (SECTION 6)

A trade union is entitled to registration only if its executive is constituted in accordance with the provisions of the Act and its rules provide for the following matters, namely:-
(a) the name of the, trade union;
(b) the objects for which the trade union has been established;
(c) the purpose for which the general funds of the trade union shall be applicable;
(d) the maintenance of a list of the members of the trade union and adequate facilities for the inspection thereof by the office-bearers and members of the trade union;
(e) the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the trade union is connected, and also the admission of the number honorary or temporary office-bearers to form the executive of the trade union;
(ee) the payment of a subscription by members of the trade union which shall not be less than: (i) one rupee per annum for rural workers (ii) three rupees per annum for workers in other unorganized sectors; and (iii) twelve rupees per annum for workers in any other case;
(f) the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members;
(g) the manner in which the rules shall be amended, varied or rescinded;
(h) the manner in which the members of the executive and other office-bearer of the trade union shall be appointed and removed;
(i) the safe custody of the funds of the trade union, and annual audit of accounts thereof, and adequate facilities for the inspection of the account books by the office-bearers and members of the trade union; and
(j) the manner in which the trade union may be dissolved.

On non-payment of subscription in accordance with the by-laws of trade union, a person will cease to be its member. However, it is the duly of office-bearer not to refuse acceptance of subscription unreasonably (M.T.Chandrsenan V N. Sukumaran, 1974-1 L.L.J.81-SC.)

The provisions to be contained in the rules of a trade union are the conditions precedent for registration. These rules do not have any statutory force but only contractual and are binding on the members of the union. Any breach of such rules cannot be enforced by a writ of mandamus under Article 226 of the Constitution. The remedy of the aggrieved party is by way of a suit (TrilokNath Tripathi V. Allahabad Division Bench. AIR 1957 All. 234).

REGISTRAR OF TRADE UNION: (SECTION-7)

Under Section 7 of the Act, the Registrar may call or further information for the purpose of satisfying himself that an application complies with the above provisions or that the trade union is entitled to registration he may refuse to register the trade union until such information is supplied,

If the name under which a trade union is proposed to be registered is identical with that by which any other existing trade union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either trade union, the Registrar shall require the persons applying for registration to other the name of the trade union stated in the application and shall refuse to register the union until such alteration has been made.

REGISTRATION OF TRADE UNION: (SECTION 8)

The registrar, on being satisfied that the trade union has complied with ail the requirements of this Act in regard to registration, shall register the trade union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the trade union contained in the statement accompanying the application for registration.

Section 8 does not rule out compliance the natural justice. It requires the registrar to consider the relevant material before he is satisfied that requirements of the Act shall regard to registration has been complied with. It is only the existence of the material and not its sufficiency which can be looked into by the High Court under Article 226 (D.C.M. Chemical Mazdoor Ekta Union Vs. Registrar, Trade Unions, Delhi, 1979 Lab, IC-45).

The High Court has jurisdiction to issue a writ under Article 227 direct the registrar to perform his duty satisfactorily as imposed upon him under Sees. 7 and 8 of the Act. If the application is kept pending for a sufficient time like three months as in the present case, the Court can direct him to dispose of the application in accordance with law as promptly as possible (A.C.C Rajanka Limestone Quarries Mazdoor Union Vs. Registrar of Trade Unions, AIR 1958-Pat. 470).

The registered union can alter its rules by sending the amended rules to the registrar within 15 days from the date of amendments. They do not become effective until the registrar is satisfied that they are in accordance with the rules of the union, registers them in a register kept for that purpose; and notified that act to the union's secretary (Indian Oxygen Ltd. Vs. Their workmen, AIR 1969-SC-305).

Where there are more than one registered trade union the question as to with whom the employer should negotiate or enter into bargaining assumes importance. The question as to who should be the sole bargaining agent where more than one trade union claim their right has been a matter of discussion and some dispute. The check off system which once prevailed has lost its appeal. The methods of secret ballot is accepted. This method is so adopted and adjusted that it reflects the correct position as regard the membership of trade unions operating in one and the same industry, establishment or undertaking. (Food Corporation of India Staff Union Vs. Food Corporation of India and others, 1995-HILLJ 272.SC).

CERTIFICATION OF REGISTRATION: (SECTION 9)

The registrar on registering a trade union under Section 8, shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the trade union has been duly registered under the Act.

A registered trade union of workmen shall at all times continue to have not less than ten percent or one hundred of the workmen, which ever is less, subject to a minimum of seven, engaged or employed in an establishment or industry with which it is connected, as its members

(Section 9A).

CANCELLATION OF REGISTRATION: (SECTION 10)

A certificate of registration of a trade union may be withdrawn or cancelled by the Registrar in the following circumstances:
(i) on the application of the trade union to be verified in such manner as may be prescribed: or
(ii) if the registrar is satisfied that -
a. the certificate has been obtained by fraud or mistake, or
b. the trade union has ceased to exist: or
c. has willfully and after notice from the registrar contravened any provision of the Act, or
d. Allowed any rule to continue in force which is in consistent with any such provision; or
e. has rescinded any rule providing for any matter, provision for which is required in the rules of a trade union.
f. if the registered trade union of workmen ceases to have the requisite number of members.

If the cancellation is to be effected on account of clause (ii) above, the Registrar shall give to the trade union not less than 2 months, previous notice in writing, specifying the ground on which it is proposed to withdraw or cancel the certificate

A prior notice to the union, apart from the one for the proposed action for cancellation or withdrawal of certificate of registration, has to be given by the registrar in a case where there in any allegation or contravention of any provision of the Act by the trade union in the absence of such prior notice, any proceeding for cancellation or withdrawal of registration would be illegal and without jurisdiction (Radheshyam Singh and Other Vs. Bata Mazdhoor and Another, 1977-F, J.R. 51297}. The registrar cannot cancel the registration of the trade union without the specified notice and in violation of the rules of natural justice (M.1S.W.L. Association Vs. Labour Commissioner. 0972-Lab. I.C.699).

APPEAL: (SECTION II)

If the registration of trade union is refused or if a certificate of registration is withdrawn or cancelled, any person aggrieved or the trade union may appeal to the court. The appeal must be filed within sixty days of the date on which the Registrar passed the order against which the appeal is made (Rule 10 of the Central Trade Union Regulations, 1938).

Where the head office of a trade union is located within the limits of a presidency town. the appeal lies to the High Court. This means there is only one right of appeal against the decision of the registrar refusing registration of a trade union. There is no provision for a second appeal.

Where the head office is situated in any other area, the appeal lies to such court, not inferior to the court of an additional or assistant judge of a Principal civil court of original jurisdiction, as the appropriate Government ‘may appoint in this behalf for that area. In the event of the dismissal of an appeal by any such court, the person aggrieved shall have a right of appeal to the High Court, the person aggrieved shall have a right of appeal to me High Court. The “said Court shall, for the Purpose of such appeal, have all the powers of an appellate court. This means that a trade union having its head office in areas other than presidency town has two rights to appeal, i.e., first, to the local court exercising original jurisdiction and then to the High Court against the decision of the local court.

The Appellate Court may dismiss the appeal, or pass an order directing the Registrar to register the union and to issue a certificate of registration, or set aside the order for withdrawal or cancellation of the certificate as the case may be. The Registrar shall comply with such order of the court.

For the purpose of an appeal under Section 11(1), an appellate court shall follow the same procedure and have the same powers as if follows and has when trying a suit under Code of Civil Procedure, 1908. It may direct by whom the costs of the appeal shall be paid and such costs shall be recovered as if they have been awarded in a suit under the same code.

In Mini Kumar Goona Vs. Registrar of Trade unions 1961, LLJ 50, it was reiterated that the powers of the Appellate Court are analogous to the powers which are exercised by a Judge trying, a suit and these powers include the power to summon witnesses, compel production of documents, of making orders for discovery and inspection, directing interrogating and so on.

A trade union whose registration has been cancelled has remedies in the form of an appeal and in the form of an application for fresh registration. If the appeal succeeds the order of cancellation or withdrawal of registration could be held to be bad and interm the trade union would continue on the register as if the order of cancellation has not been passed. If fresh registration is permitted it would operate from the date thereof. Once the Registrar cancels or with draws the registration of a trade union he has no power to review it and he cannot withdraw that order because of subsequent events. Hence the order of the registrar of trade unions withdrawing the cancellation order on the ground that the union has complied with the provisions of the Act by submitting the necessary annual returns is without jurisdiction. (Mukand Iron & Steel Works Ltd. Vs. V.G. Deshpande 1986 - II LLJ 290).

NOTICES : (SECTION 12)

All communications and notices to a registered trade union may be addressed to its registered office. Notice of any change in the address of the head office shall be given within 14 days of such change to the Registrar in writing, and the changed address shall be recorded in the register.

INCORPORATION OF REGISTERED TRADE UNIONS: (SECTION 13)

A trade union, after registration, acquires the following characteristics :

(i) If becomes a body corporate by the name under which it is registered, and becomes a legal entity distinct from the members of which it is composed.
(ii) it has perpetual succession and a common seal
(iii) it has the power to acquire and hold both movable and immovable property.
(iv) it has the power to contract
(v) it can by the name under which it is registered sue and be sued.

Under the present law, registration of trade union is not compulsory. Unregistered unions are not in any way illegal. But, the benefits conferred by the law on registered unions will not be available to unregistered trade unions. An unregistered union as no corporate existence and it is neither a legal entity nor a quasi-cooperation. A registered trade union but unrecognised can represent workmen. (Sahitya Mandir Press Ltd., Vs. Govt. of U.P 1952-1 LW. 246).

7.5 FUNDS OF A REGISTERED TRADE UNION

The Act provides for two types of Funds. Viz.. (i) General Funds and (ii) Funds for political purpose.

GENERAL FUNDS: (SECTION 15)

The General funds of any registered Trade Un on can be utilised only for the following purposes:

i. The payment of salaries, allowances and expenses of office bearers of the Trade Union.

ii. The Payment of expenses relating to administration of the Trade Union including, audit of the accounts of its general funds.

iii. The prosecution or defence of any legal proceeding to which the Trade Union or any member thereof is a partly for securing and protecting any rights of the Trade Union or its members. However, such rights should arise out of the relationship of its members with the employers.

iv. The conduct of trade disputes on behalf of the Trade Union or any other member thereof

v. The compensation of members for loss arising out of trade disputes.

vi. Allowances to members or their dependants on account of death, old age. sickness, accidents or unemployment of such members.

vii. The funds can be utilised for the issue of its insurance policies or taking liability under such policy on the lives of members against sickness, accident or unemployment.

viii. Funds can be utilised for purposes like educational, social or religious benefits for members including the payment of the expenses of funeral or religious ceremonies for deceased members, etc.,

ix. For keeping of periodical published mainly for the purpose of discussing questions affecting employers or workmen as such.

x. Funds can be utilised in furtherance of any of the objects of the trade union and contribution to any cause intended to benefit workmen in general. Such expenses shall not exceed 1/4th of the total gross income which was incurred to general funds during a particulars year and the balance it the commencement of that year.

In G.S. DharaSingh V E.K. Thomas (AIR 1988 SC 1829), SC has decided that any amount received for and on behalf of members by Union, is liable to be refunded to the members on resignation from the Union.

POLITICAL FUND OF A REGISTERED TRADE UNION: (SECTION 16)

The Act, authorises a registered Trade Union to constitute a separate fund apart from the general fund, such separate fund shall be constituted from separate contributions made towards that fund by the members such fund shall be used the objects specified below for the promotion of Civil and Political interests of its members. Such objectives are:

i. the payment of any expenses incurred either directly or indirectly by a candidate or prospective candidate for election, as a member of any legislative body constituted under the constitution (or Legislature of that state of Jammu & Kashmir) or of any local authority in connection with his candidature or election before or after or during these elections as the case may be; or

ii. holding of a meeting or the distribution of any literature or documents in .support of any such or prospective candidate; or

iii. for the maintenance of any person who is a member of any legislative body constituted under the constitution (or legislature of that state in case of state of Jammu & Kashmir)or of any local authority ; or

iv. for the registration of the electors or the selection of a candidate for any legislative body constituted under the constitution or for any local authority, or

v. for the holding of political meetings of any kind or the distribution of political litera-ture or political documents of any kind.

No member can be compelled to contribute to this fund. For non-contribution of money towards political fund, a member cannot be excluded form the benefits of Trade Union or placed in any respect, either directly or indirectly, under any disability or disadvantage as compared to other members. However, a non contributory cannot claim management and control of the political funds. Further no condition can be imposed for compulsory contribution to the political funds for admis-sion to membership of the union.

7.6 PRIVILEGES OF A REGISTERED TRADE UNION

The Act protects the members and the office-bearers of Registered Trade Union from certain criminal and civil acts provided and such acts are necessary in carrying out the lawful objects of the Trade Union. These immunities may be discussed under the following heads :

(i) IMMUNITY FROM CRIMINAL PROCEEDINGS : (SECTION 17)

According to Section 17, no office-bearer or member of a Registered Trade Union shall be liable to punishment under subsection (2) of Section 120-B of the Indian Penal Code 1860 in respect of any agreement made between the members for the purpose of furthering any such objects of the Trade Union as is specified in Section 15, unless the agreement is an agreement to commit an offence.

Thus, immunity is granted in respect of any agreement made between the members for the purpose of fathering the objects of Trade Union, from punishment under Section 120-B(2) of Indian Penal Code.

(ii) IMMUNITY FROM CIVIL SUITS IN CERTAIN CASES: (SECTION 18)

No suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any office bearer or member thereof, in respect of any act done in con-templation or furtherance of a trade dispute to which right of the Trade Union is a party on the only ground that:

a. Such act induces some other person to break a contract of employment; or
b. It is in interference with the trade, business, or employment of some other person; or
c. It is in interference with the right of some other person to dispose of his capital or his labour as he wills.

Section 18(2) further provides that a registered Trade Union shall not be liable in any suit or other legal proceeding in any civil court in respect of any tortuous act done in contempla-tion or furtherance of a trade dispute by an agent of the trade union if it is proved that such person acted without the knowledge of or contrary to express instruction given by, the executive of the trade union.

Depending on facts of each case, conduct or act will be protected under Section 18.

Thus, Section 18 protects the trade union and its office bearers or members in respect of certain specified tortuous act committed in contemplation or furtherance of a trade dispute. The

law with regard to the tort of conspiracy is now well established. Conspiracy as a tort must arise from combination of two or more persons to do an act. It would be actionable if the purpose of the combination is to inflict damage to another person and there is resulting damage to that person, as distinguished from serving the bonafide and legitimate interest of those who so combine.

Following illustrative cases will further help in understanding the extent of immunity granted under section.

So long as the strike does not indulge acts unlawfully and tortious the court will not interfere with this legitimate right of the labour, Shri Rama Vilas Service Ltd. V. Simson Group of Companies Workers Union (1979), 2 LLJ.

But where documentary evidence has been placed as to the acts of violence, assault, intimidation, threat of physical assault etc., the Court can certainly interfere. Indian Express V.T.M. Nagarjan (Del. 1988CLW54).

iii. ENFORCEABILITY OF AGREEMENT : (SECTION 19)

Not withstanding anything contained in any other law for the time being in force, agreement between the members of registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade. However, nothing in this section shall enable any Civil Court to entertain any legal proceeding instituted for the express purpose of enforcing or recovering conditions on which any members of a Trade Union shall or shall not sell their goods transact, business, work, employ or be employed.

7.7 CERTAIN MEMBERSHIP RIGHTS

i. Rights of minors to membership of Trade Unions : (Section 21)

Any person who has attained the age of fifteen years may be a member of a registered trade union subject to any rules of the trade union to the contrary, and may, subject as aforesaid enjoy all the rights of a member and executive all instruments and give all acquaintances necessary to be executed or given under the rules.

7.8 OFFICE - BEARERS OF A TRADE UNION

Disqualifications of Office-bearers : Section 21 A

The following persons cannot be appointed as office-bearer or members of the Executive:

a. person who has not attained the age of eighteen years;

b. a person who has been convicted by a Court in India of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release before that date.

ii. Composition of Officer bearers : Section 22

According to Section 22, at least half of the total number of office-bearers of registered trade union should be persons actually engaged or employed in an Industry with which trade union is connected. This provision ensures that the union activities are not dominated by outsiders. However, at the same time, the provision makes it clear that outsiders can become an officer-bearer of a trade union. Even the appropriate Government has been empowered to exempt any trade union or class of trade union form compulsorily having 50% of their office-bearers from within the industry to which the union belongs.

7.9 CHANGE IN THE NAME AND STRUCTURE

i. Change of Name: (Section 23)

Any registered trade union may, with the consent of not less than two-thirds of the total number of its members, change its name.

A notice in writing, signed by the Secretary and seven members of the trade union should be sent to the Registrar of Trade Union. The Registrar shall, if he is satisfied that the provisions of this Act in respect of change of name have been complied with, register the change offline in the register referred in Section 8.

If the proposed name is identical with that by which any other existing trade union has been registered or in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either trade union, the registrar shall refuse to register the change of name.

The change in the name of a registered trade union shall not affect any rights or obliga-tions of the trade union or render defective any legal proceedings by or against the trade union. Any legal proceedings which might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

ii. Amalgamation of Trade Unions: (Section 24 & 25)

Any two or more registered trade unions may amalgamate with or without dissolution or division of the funds of such trade unions or either or any of them. For this (i) the votes of at least one-half of the members of each or every such trade union entitled to vote are recorded, and (ii) at least 60 percent of the votes recorded are in favor of the proposal; (Section 24)

A notice in writing of every amalgamation, signed by the Secretary and by seven mem-bers of each and every trade union which is a party thereto, shall be sent to the Registrar, and where the head office of party thereto, shall be sent to the Registrar, and where head office of the amal-gamated trade union is situated in a different State, to the Registrar of such State.

The Registrar of the State in which the head office of the amalgamated trade union is situated shall if he is satisfied that the provisions of this Act in respect of amalgamation have been complied with and that the trade union formed thereby is entitled to registration under Section 6, register and in the manner provided in Section 8 and the amalgamation shall have effect from the date of such registration (Section 25).

However, the Registrar shall certify under his signature at the foot of the certificate on its presentation to him by the Secretary that the new name has been registered.

An amalgamating of two or more registered trade unions shall not prejudice any right of any such trade unions or any rights of a creditor or any of them.

7.10 SUBMISSION OF RETURNS: (SECTION 28)

There shall be sent annually to the Registrar, by 31st day of July in each year, a general statement audited in the prescribed manner, of all receipts and expenditure of every registered trade union

during the year ending on the 31st day of December next preceding such prescribed date, and of the assets and liabilities of the trade union existing on such 31st day of December. The statement shall be prepared in Form 'D' and shall comprise such particulars as may be prepared in Form 'D' and shall comprise such particulars as may be prescribed (Regulation 12).

Together with the general statement, there shall be sent to the Registrar a statement showing all changes of office bearers made by the trade union during the year to which the general statements refer, together also with a copy of the rules of the trade union corrected upto the date of the despatch thereof to the Registrar.

The fee for registration of rules shall be as prescribed by Regulation 9(2) (rupee 1 at present one for each set of alterations made simultaneously.

A copy of every alternation made in the rules of a registered trade union shall be sent to The Registrar within fifteen days of the alternation. On receiving the copy of an alteration maiden the rules of a trade union, the Registrar, unless he has reasons to believe that the alteration has not been made in the manner provided by the rules of the trade union' shall register the alteration in a register to be maintained for this purpose and, shall notify this fact to the secretary of the Trade Union

The Registrar, or any officer authorised by him by general or special order, may at all reasonable time inspect the certificate of registration, accounts books, registers and other documents relating to a trade union, at the registered office may require their production at a place as he may specify in this behalf, but no such place shall be at a distance of more than ten miles from the registered office of trade union.

The annual audit of the account of a registered trade union shall be done by auditors and in a manner provided by Regulations 13 to 16.

7.11 POWER TO MAKE REGULATIONS: (SECTION 29)

The appropriate Government is empowered to make regulations for the purpose of carrying into effect the provisions of the Act. In exercise of the powers conferred by Section 29 the Central Government has made the Central Trade Unions whose objects are not confined to one State.

Under this study Regulations as contained in Central Trade Union Regulations, 1938 are referred to. However, see Regulations as framed by State Government for respective States (Refer to Section 29). Such Regulations may provide for all or any of the following matters :

a. The manner in which trade unions and the rules of trade unions shall be registered and the fees payable on registration.
b. The transfer of registration in the case of any registered trade unions which has changed its head office from one State to another.
c. The manner in which, and the qualifications of persons by whom, the accounts of registered trade unions of any class of such unions shall be audited.
d. The conditions subject to which inspection of documents kept by Registrar shall be allowed and the fees which shall be chargeable in respect of such inspections.
e. Any matter which is to be or may be prescribed.

According to Section 30, the power to make regulation subject to the conditions of the regulations being made after previous publication.

The date to be specified in accordance with .section 33(3) of the General Clauses Act, 1897, as that after which a draft of regulations proposed to be made will be taken into consideration shall not be less than three months from the date on which the draft of the proposed regulations was published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

7.12 OFFENCES AND PENALTIES

(i) FAILURE TO SUBMIT RETURNS: (SECTION 31)

If default is made on the part of any registered trade union in giving any notice or sending any statement or other document as required by or under any provision of this Act, every office-bearer or other person bound by the rules to the trade union to give or send the same, or if there is no such office-bearer or other person every member of the executive of the trade union, shall be punishable with the fine which may extend to five rupees and in the case of a continuing default, with an additional fine which may extend to five rupees for each week after the first during which the default continues. However, the aggregate fine should not exceed Rs.50

Any person who willfully makes, or causes to be made, any false entry in, or any omission from, the general statement required by section 28 or from any copy of rules or alterations of rules sent to the Registrar, shall be punishable with fine which may extend five hundred rupees.

ii. Supplying false information regarding Trade Unions: (Section 32)

Any person, who, with intent to deceive, gives to any member of a registered trade union or to any person intending or apply to become a member of such trade union, any document purporting to be a copy of the rules of the trade union or of any alterations to the same which he knows, or has reason to believe is not a correct copy of such rules shall be punishable with fine which may extend to two hundred rupees.

iii. Cognizance of offences: (Section 33)

No court inferior to that of a Metropolitan Magistrate or a Magistrate of the First Class shall try any offence under this Act. No court shall take cognizance of any offence under this Act, unless complaint thereof has been made by, or with the previous sanction of the Registrar or in the case of an offence under Section 32 (supplying false information regarding trade unions) by the person to whom the copy was given, within six months of the date on which the offence is alleged to have been committed.

7.13 SELF ASSESSMENT QUESTIONS

1. What is the object of Trade Union Act 1926?
2. Define term “Workman” and “Trade Unions” under the act.
3. Discuss in brief the procedure for registration of trade unions.
4. Slate the advantages of a registered trade unions.
5. What are the functions of the Registrar of Trade Union?
6. What immunities are provided to a Registered Trade Union from Criminal and Civil Proceedings.
7. What is the procedure for the registration and cancellation of trade union?

Dr. M. TRIMURTHI RAO

UNIT - III : WAGE LEGISLATIONS
LESSON 8

THE PAYMENT OF WAGES ACT, 1936

8.0 OBJECTIVE

After going through this lesson, the learner must be in a position to understand the following:

- to know the main purpose of the Payment of Wages Act and its importance.
- to understand the method of payment of wages
- to study how the deductions that are to be made from employees wages.

STRUCTURE

8.1 Introduction
8.2 Object and Scope
8.3 Application of the Act
8.4 Industrial or other establishments covered by the Act
8.5 Who are governed by the Act
8.6 Important Definitions
8.7 Responsibility for payment of Wages
8.8 Fixation of wage period
8.9 Time of payment of wages
8.10 Payment of wages to persons whose employment is terminated
8.11 Exemption from compliance with the time limit for payment of wages
8.12 Wages to be paid on a working day
8.13 Wages to be paid in current coins and currency notes
8.14 Payment of cheque
8.15 Deductions from wages
8.16 Extent of total deductions
8.17 Contracting out
8.18 Self Assessment Questions
8.19 Further Readings

8.1 INTRODUCTION

In the earlier days, the imposition of fine was a fairly general practice in perennial factories and railways. There used to be other deductions from the wages paid to the workers, such as for medical treatment, education, interest on advances of the workers own wages, charities, and religious purposes selected by the employer. An important feature which added to the embarrassment of the workers at various places was comparatively the longer period in respect of which wages were paid. There was no uniformity in the payment of wages. Long intervals between wage payments invariably added to the inconvenience of the workers. The earliest attempt to regulate wage payment was made in 1925 when a private Bill was introduced in the Legislative Assembly. But it was opposed generally, by the employers and the provincial Governments. In

1926, the Government of India addressed local governments with a view to ascertaining the position in regard to the delays which occurred in the payment of wages to the persons employed in industry and the practice of imposing fine on them. Investigations revealed the existence of abuses in both these respects.

The Royal Commission on Labour in its Report (1931) recommended, among other things, that legislation regarding deductions from wages and fine was necessary and desirable. The Commission examined the delays in the payment of wages and practice of deductions from the wages of an employed person. In the light of its recommendations, the Government of India introduced a Bill seeking to regulate the delays and deductions in the payment of wages to industrial and plantation labour. The Bill wassed in 1936 and the same was passed into law known as 'The payment of Wages Act. 1936". The Act came into force from 28th March, 1937.

8.2 OBJECT AND SCOPE

The main purpose of the payment of Wages Act, 1936 is to ensure regulate and timely payment of wages to the employed persons, and also to prevent unauthorised deductions being made from wages and arbitrary fines being imposed on the employed persons. The act is concerned merely with the fixation and wage periods and not with the fixation of wages. The Act extends to the whole of India.

8.3 APPLICATION OF THE ACT

The Act applies in the first instance to the payment of wages to persons employed in any factory, to persons employed (otherwise than in a factory) in any railway by a railway administration, or (further directly or through a sub-contractor) by a person fulfilling a contract with the railway administration.

The Act applies to persons employed in an industrial or other establishment" specified in sub-clauses (a) to (g) of clause (ii) of the Section 2.

8.4 INDUSTRIAL OR OTHER ESTABLISHMENTS COVERED BY THE ACT

According to Section 2 (ii), the terms industrial and other establishments means any:

a. tramway service, or motor transport service engaged in carrying passengers or goods or both by road for hire or reward.

b. air transport service other than such service belonging to, or exclusively employed in the military, naval or air force of the Union or the Civil Aviation Department of the Government of India;

c. dock, wharf or jetty;

d. inland vessel mechanically propelled;

e. mine, quarry or oil- field;

f. plantation;

g. Workshop of other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale;

h. establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation, development or maintenance of buildings, roads, bridges, or mission and distribution of electricity or any other form of power is being carried on,

i. any other establishment or class of establishments which the Central Government or a State Government may having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette.

8.5 WHO ARE GOVERNED BY THE ACT ?

According to Section (6), nothing in the ACT shall apply to wages payable in respect of a wage period which, over such wage period, average one thousand and six hundred rupees a month or more. This means that only those employed persons who are normally drawing less than one thousand and six hundred rupees a month are covered by the Act.

8.6 IMPORTANT DEFINITIONS 'EMPLOYED PERSON' {SECTION 2 (i)}

"Employed person" includes the legal representative of a deceased employed person, (This definition makes it possible for the legal representative of a deceased employed person to prefer a claim relating to non-payment of wages of any unauthorised deductions therefrom.)

'EMPLOYER' {Section 2 (i)(a)}

"Employer" includes the legal representative of a deceased employer. After the death of employer his legal representative can be held liable for the payment of wages due to employed persons. The liability of the legal representative is limited to the extent of the value of the estate inherited by him.

'FACTORY' (Section 2 (i)(b)}

"Factory" defined in clause (m) of section 2 of the Factories Act, 1948 and includes any place to which the provisions of that Act have been applied under Sub-section (1) of Section 85 thereof.

'WAGES' {Section 2(vi)}

"Wages" means all remuneration (whether by way of salary, allowance or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of this employment or work done in such employment, and includes.

(a) any remuneration payable under any award or settlement between the parties or order of a Court;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract of instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force.

but does not include -

1. any bonus whether under a scheme of profit sharing or otherwise which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;

2. the value of any house accommodation, or of the supply of light, water, medical attendance or

other amenity or of any service excluded from the computation of wages by a general or special order of the State Government;

3. any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

4. any travelling allowance, or the value of any travelling concession;

5. any sum paid to the employed person to defray special expenses entailed on him by the nature of this employment; or

6. any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).

INTERPRETATION:

I. Remuneration in terms of money or capable of being so expressed

1. The remuneration payable as above may be in the nature of salary, allowance of otherwise. It means the term "remuneration" may not only include salary but all other allowances payable to a employed person in terms of his employment.

2. Dearness Allowance is included in the words 'all remuneration' in the definition of wages and is not specifically excluded by it; 1979-11 Labour Law Journal 340 (Mad). Remuneration payable.

II. Under the terms of employment, express or implied

The remuneration payable becomes wages only if the terms of employment express or implied, were fulfilled. If the employed person has fulfilled his part of the contract, whatever is entitled to receive from the employer in respect of work done, amounts to "wages" under section 2(vi). This expression has no reference to the terms of contract to be fulfilled by the employer. Further, wages payable need not necessarily be in terms of an express contract of employment but may be implied as well. A claim payable to an employee by reason of the termination of his employment must be deemed to be an implied term of contract. Whether house rent is wage, depends upon the terms of the contract. It is so if its payment is compulsory otherwise not; Div. Engineer GIP Riy. V. Mahadeo AIR 1955-SC295.

III. On the question whether in case a worker's contractual wages along with the claim for overtime exceeded the statutory limit; will the Act ceases to apply to him in that event the Gujarat H.C. held that:

Having regard to the context, the expression "wages" employed in Section 2(vi) would relate to the contractual wages and not to overtime allowance claimable by a worker. The amount claimable by a worker by way of overtime would depend on the additional work put in beyond the specified hours of work. That can have no relation to the wage period. The scheme of the section 2(vi) is pretty clear. It only relates to the contractual wages claimable by a workman on an average per month having regard to the fact that wages may be payable daily or weekly or by some other wage period not exceeding one month. The overtime wages darned do not have be taken into account in determining the question as regard the applicability of the payment of wages Act in the context of Section 2 (vi). Baboo Tiussai V N.R. Nopany 1979-9 Labour Law Journal 103 (Buj).

IV. Remuneration under award or settlement

Wages is defined by Section 2(vi) as any remuneration payable under any award or settlement between the parties or order of a Court. It does not say that remuneration should be payable under an award, as defined in the Industrial Disputes Act. There is no reason to interpret the word "award"

in any other manner. East Coast Commercial Company Limited V.A. Prakasa Rao, 1967, Lab, 1C 929,

V. Sums payable in termination of employment under any law, contract or instrument

Where any Act provides for certain payments by an employer to an employee on the termination of his services, the employer must honor his obligations.

A retrenchment compensation payable under Section 25F of the Industrial Disputes Act, 1947, being a compulsory payment under the Act, is treated as an implied term of the contract of employment and hence it is covered under definition of 'wages'. But layoff compensation under Section 25C is not remuneration and is not payable to a worker in respect of his employment or work done in such employment and hence it is not wage (Veiyra Vs. Femandes). However, with regard to compensation payable under Section 25FFF due to the closure of the undertaking, the M.P. High Court has held that it is not wages, whereas Nagpur High Court is of the opinion that it is covered by the definition of wages. Fajala Hussian Vs. P.W.A., and Radhakrishna Somnath Vs. District Judge, Nagpur. Similar damages for wrongful termination of service under the contract of employment do not amount to wages.

VI. Bonus – when wages

The payment of bonus under the terms of employment is treated as "wages" for the purpose of this Act. The amount of bonus Act would be covered within the definition of wages as defined under Section 2(vi) of Act; 1976-1 Labour Law Journal 51 1 (FB)(M.P.). The definition of wages also includes production. Bonus which depends upon the quantum of production. But Puja Bonus paid in the past, cannot be treated as wages, because it is neither a payment under a contract nor under any customary right.

VII. Gratuity

According to Section 2(vi)6, any gratuity payable on the termination of employment is not included in their term 'wages'. But by virtue of Section 2(vi) (d), if the gratuity becomes payable under any (i) law, (ii) contract, or (iii) instrument it falls within the definition of the term "Wages".

VIII. Gratuity payable under award whether wages

The question, whether gratuity payable under the award of industrial adjudication falls within the definition of the term wages came up for judicial interpretation in number of cases. It has been held that gratuity payable under-any award is neither a sum payable under any taw nor under a contract. In Purushottam H. Jadav Vs. Poddar V.R, it was observed that where an award made by industrial adjudication framing a scheme of gratuity, becomes enforceable under sections 89 and 90 of the Industrial Disputes Act, 1957, Therefore gratuity payable under an award is not payable under any law.

Similarly, it has been held that the gratuity payable under an industrial award does not become payable under a contract. Though an industrial award part takes the character of a statutory contract, it is merely intended to emphasise the fact that the terms prescribed by the award are enforceable as though they were terms of employment evolved by industrial adjudication for the parties.

Through gratuity payable under award is neither payable under law nor under any contract, it

is held that it is payable under an 'Instrument' as referred in Section 2(vi) (d). The "instrument" includes award made by the industrial adjudication authority. Therefore, it can be safely concluded that the gratuity payable under the terms of any industrial award, will fall within the definition of the term "wages".

8.7 RESPONSIBILITY FOR PAYMENTS OF WAGES (SEC-3)

According to Section 3 of the Act, every employer is responsible for the payment to persons employed by him of all wages required to be paid under the Act. In addition, the following person shall also be responsible for the payment of wages under the Act:

i. In a factory, if a person has been named as manager of a factory under Section 7(1) (f) of the Factories Act, 1948,
ii. In industrial or other establishments, if there is a person responsible to the employer for the supervision and control of the industrial or other establishment; and
iii. Upon railway (otherwise than in factories), if the employer in the railway administration and the railway administration has nominated a person in this behalf for the local area concerned.

8.8 FIXATION OF WAGE-PERIOD (SECTION 4)

It is obligatory under Section 4, on every person responsible for the payment of wages under section 3, to fix periods (referred to in the Act as wage periods) in respect of which such wages shall be payable. No wage-period shall exceed one month (30 days). In other words, payment of wages can be made daily, weekly fortnightly or monthly.

No wage period shall exceed one month in any case. The main purpose of this provision is to ensure that inordinate delay is not caused in the payment of wages and that a long time does not elapse before wages are paid for the period for which an employee has worked.

8.9 TIME OF PAYMENT OF WAGES (SECTION 5)

Section 4 of the Act lays down that the wages of every person employed upon or in :

(a) any railway, factory or other establishments upon or in which less than one thousand persons are employed, shall be paid before the expiry of the seventh day;

(b) any other railway, factory or industrial or other establishments, shall he paid before the expiry of the tenth day after the last day of the wage period in respect of which the wages are payable.

Provided that in the case of persons employed on a dock, wharf or jetty or in a mine, the balance of wages found due on completion of a final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid before the expiry of the seventh day for the day of such completion.

8.10 PAYMENT OF WAGES TO PERSONS WHOSE EMPLOYMENT IS TERMINATED

Section 5(2) lays down that where the employment of any person is terminated by or on behalf at the employer, the wages earned by him shall be paid before expiry of the second working day from the date on which his employment is terminated. However, where the employment of any person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or their recognised holiday the wages earned by him shall be paid before the

expiry of the second day from the date on which his employment is so terminated.

8.11 EXEMPTION FROM COMPLIANCE WITH THE TIME LIMIT FOR PAYMENT OF WAGES

Section 5(3) empowers the State Government by general or special order to exempt, to such extent and subject to such condition as may be specified in the order, the person responsible for the payment of wages to persons employed upon in railways (otherwise than in a factory), or to persons employed as daily rated workers in the Public Works Department of the Central Government or the State Government from the operation of this section in respect of the wages of any such persons as aforesaid, no such order shall be made except in consultation with the Central Government.

8.12 WAGES TO BE PAID ON WORKING DAY

Section 5(4) lays down that save as otherwise provided in Section 5(2), payments of wages shall be made on a working day,

8.13 WAGES TO BE PAID IN CURRENT COINS OR CURRENCY NOTES: (Section 6)

According to section 6, all wages shall be paid in current coins or currency notes or in both.

8.14 PAYMENT BY CHEQUE (Section 7)

According to the provision under Section 7, employer may after obtaining the written authorisation of the employed person, pay him the wages either by cheque or by crediting the wages in his Bank Account.

8.15 DEDUCTIONS FROM WAGES

What is a 'deduction' and what is not?

According to Explanation 1 under Section 7(1), every payment made by the employed person to the employer or his agent shall be deemed to a deduction from wages.

Explanation II clarifies that any loss of wages resulting from the imposition, for good and sufficient cause upon a person employed, of any of the following penalties, namely :-

(i) The withholding of increment or promotion (including the stoppage of increment at an efficiency bar)'

(ii) the reduction to a lower post or time scale or to a lower stage in a time scale: or

(iii) Suspension;

Shall not be deemed to be a deduction from wages in any case where the rules framed by the employer for the imposition of any such penalty are in conformity with the requirements, if any, which may be specified in this behalf by the State Government by notification in the Official Gazette.

DEDUCTIONS WHICH MAY BE MADE FROM WAGES

Deductions authorised under the Act are enumerated in Section 7(2), any other deduction is unauthorised. Further, the authorised deductions can be made only in accordance with the provisions of the Act.

(a) Fines;

(b) deductions for absence from duty;

(c) deductions for damage to or less of goods expressly entrusted to the employed person for custody; or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default;

(d) deductions for house accommodation supplied by the employer or by government or by any housing board set up under any jaw for the time being in force (whether the government or the board is the employer or not) or any other authority engaged in the business of subsidising house accommodation which may be specified in this behalf by the state government by notification in the Official Gazette.

(e) deductions for such amenities and services supplied by the'empioyer as the state government or any officer specified by it in this behalf may, by general or special order, authorise:

Explanation: The word "services" in this clause does not include the supply of tools and raw materials required for the purposes of employment :

(f) deductions for recovery of advances or whatever nature (Including advance for travelling allowance) and the interest due in respect thereof, or for adjustment or over-payment of wages;

(ff) deductions for recovery of loans made from any fund constituted for the welfare of labour in accordance with the rules approved by the state government, and the interest due in respect thereof;

(fff) deductions for recovery of loans granted for house building or other purposes approved by the State Government, and the interest due in respect thereof;

(g) deductions of income-tax payable by the employed person:

(h) deductions required to be made by order or a court or other authority competent to make such order;

(i) deductions for subscriptions to, and for repayment of advances from any provident fund to which the provident Funds Act, 1952, applies or any recognised provident fund as defined in Section 58A of the Indian Income Tax Act, or any provident fund approved in this behalf by the State Government during the continuance of such approval;

(j) deductions for payment to cooperative societies approved by the State Government or any officer specified by it in this behalf or to a scheme of insurance maintained by the Indian Post Office; and

(k) deductions made with the written authorisation of the person employed for payment of any premium on his life insurance policy to the Life Insurance Corporation Act, 1956, or for the purchase of securities of the Government of India or of any State Government or for being deposited in any Post Office Savings Banks in furtherance of any savings scheme of any such Government;

(kk) deductions made, with the written authorisation of employed person, for the payment of his contribution to any fund constituted by the employer or a trade union registered under the Trade

Unions Act, 1926, for the welfare of the employed persons or the members of their families, or both, and approved by the State Government or any officer specified by it in this behalf, during the continuance of such approval;

(kkk) deductions made, with the written authorisation of the employed person, for payment of the fees payable by him for the membership of any trade union registered under the Trade Unions Act, 1926.

deductions for payment of insurance premia on Fidelity Guarantee Bonds;

(m) deductions for recovery of losses sustained by a railway administration on account of acceptance by the employed person of counterfeit or base coins or insulated or forged currency notes,

(n) deductions for recovery of losses sustained by a railway administration on account of the failure of the employed person to invoice, to bill, to collect or to account for the appropriate charges due to that administrations, whether in respect of fares, freight, demurrage, wharfage and change or in respect of sale of food in catering establishments or in respect of sale of commodities in grain shops or otherwise.

(o) deductions for recovery of losses sustained by a railway administration on account of any rebates or refunds incorrectly granted by the employed person where such loss is directly attributable to his neglect or default,

(p) deductions made with the written authorisation of the employed person, for contribution to the Prime Minister's National Relief Fund or to such other Fund as the Central Government may, by notification in the Official Gazette, specify;

(q) deductions for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.

LIMITS ON THE TOTAL AMOUNT OF DEDUCTION

Section 7(3) lays down that notwithstanding anything contained in the Act, the total amount of deductions which may be made under subsection 2 in any wage period from the wages of any employed person shall not exceed-

(i) in case where such deductions are wholly or partly made for payment to Co-operative Societies under clause (j) of Sub-Section (2) seventy five per cent of such wages, and

(ii) in any other case, fifty percent of such wages

Provided that where the total deductions authorised under sub-section (2) exceed seventy-five per cent or, as the case may be, fifty percent of the wages, the excess may be recovered in such manner as may be prescribed.

A) FINES : (Section 8)

1. No fine shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer, with the previous approval of the state Government or of the prescribed authority, may have specified by notice under Sub-section (2)

2. A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises which the employment is carried on or in the case of persons employed upon a railway (otherwise than in a factory), at the prescribed place or places.

3. No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.

4. The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to three percent of the wages payable to him in respect of that wage period.

5. No fine shall be imposed on any employed person who is under the age of fifteen years.

6. No fine imposed on any employed person shall be recovered from him by installments or after the expiry of sixty days from the day on which it was imposed.

7. Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed,

8. Section 3 in such form as may be prescribed and All fines and all realisations thereof shall be recorded in a register to he kept by the person responsible for the payment of wages under the same management all such realisation may be credited to a common fund maintained for the staff as a Whole, provided that the fund shall be applied to such purposes as are approved by the prescribed authority,

Explanation: When the persons employed upon or in any railway, factory on industrial or other establishment are part only of a staff employed under the same management, all such realisation may be credited to a common fund maintained for the staff as a whole, provided that the fund shall be applied to such purposes as are approved by the prescribed authority.

B) DEDUCTIONS FOR ABSENCE FROM DUTY (SECTION 9)

Where any employed persons remains absent from duty, deduction from wages on account of such absence is authorised under Section 7(2)(b). The employed person is treated absent from his duty when he remains absent from any place or places where the terms of his employment, he is required to work. This absence may be for the whole day or any part of the period during which he is required to work {Section 9(1)}.

Where an employed person is present at work place during his working hours but refuses to carry out his work due to stay in-strike or for any other cause which is not reasonable in the circumstances, he shall be deemed to be absent from his place of work,

SUSPENSION - WHETHER ABSENCE FROM DUTY

As employed person may remain absent from his duty due to suspension of his services. If a worker is suspended under Standing Order, pending enquiry into allegations of misconduct, he remains absent from his place of work and hence deductions can be made for period of his absence in fact during suspension period a person is not under an obligation to be present at place of duty

and as such for his absence, deduction in wages can be made. However, if during the period of suspension, he is not at liberty to be absent from place of d^ and henge required to report everyday, deductions from wages is not justified.

AMOUNT OF DEDUCTIONS

According to Section 9 (2), the amount of deductions for absence from duty shall not exceed a sum which bears the same relationship to the wages-payable in respect of the wage period as the period of absence does to such wage-period.

Provided that if 10 or more employed persons, acting in concert, absent themselves without due notice which is required under the terms of their contracts of employment, and without reasonable cause, such deductions, from such persons, may include such amount, not exceeding his wages for 8 days, as may by any such term be due to the employer in lieu of due notice.

C) DEDUCTIONS FOR DAMAGE TO OR LOSS (SECTION 10)

According to Section 7(2) (c) deductions from the wages can be made j) for damage to or loss of goods expressly entrusted to the employed person for custody or (ii) for loss of money for which an employed person is required to account where such damage or losses directly attributable to his neglect or default.

Before making any deduction under this head, such employed person to be given an opportunity to show cause against the deductions or if any other prescribed procedure has been laid down in this respect the same must be followed. However such deductions are subject to the following provisions laid down in Section 20.

1. The total amount of deductions under this head should not exceed the actual amount of damage or loss caused to the employer due to the negligence or default of the employed person (Section 10 (1)).
2. The person responsible for payment of wages under section 3 should record all such deductions and realisation thereof, in a register, in such form and containing such particulars as may be prescribed (Section 20(2)).

D) DEDUCTIONS FOR SERVICE RENDERED (SECTIONS 11)

According to section 7(2)(d) deduction is allowed in respect of house accommodation provided by any of the following:

(i) Employer (ii) Government (iii) Housing Board set up under any law for the time being in force (iv) Any other authority engaged in the business of subsidising house-accommodation which may be specified by the State Government by a notification in the Official Gazette. It may be noted that deductions can be made even where the Government or the Board is not employer of such employed person.

The deductions in respect of house-accommodation are subject to following conditions prescribed under Section 1.

The facility of house-accommodation has been accepted by the employed person as a term of his employment or otherwise. However, no deduction can be allowed if it is the duty of the

employer to supply the same.

House rent allowance is not the same as value of house accommodation. The value of house-accommodation in the definition of wages in Section 2(vi) denotes something which can i.e. deducted from wages In fact, value of house-accommodation and such other amenities is not included in calculating the wages payable under the Act.

The amount of deduction in respect of such accommodation should not, exceed the Value of such facility.

The employed person may be provided with, various amenities and services like transport, supply of electricity, water, etc.. The deduction can be made for such facilities subject to the provisions of Sections 7(2) (c)'and 11 :

(a) The amenity or service has been accepted by the employed person as a term of his employment or otherwise.
(b) The State Government or any officer specified by it in this behalf, has authorised the supply of such facilities.
(c) All such deductions are made subject to such conditions as the State Government may impose.
(d) The amount of deduction should not exceed an amount equivalent to the value of such amenities or services' supplied.

According to explanation to Section 7(2) (e), the word "Services" does not include the supply of tools and raw materials required for the purpose of employment.

E) DEDUCTIONS FOR RECOVERY OF ADVANCES (SECTION 12)

It is very often that money may be advanced to the employed person to meet out various types of expenses in respect of marriage, children education, death, religious functions, travelling or conveyance, etc. Section 7(2)(f) authorises the, deductions for:
(i) The recovery of advance of whatever nature.
(ii) The interest due on such advance, or
(iii) For adjustment of over-payment of wage's.

The deduction under Section 7(2) (f) are subject to the following conditions contained in Section 12:-

1. Where the money was advanced before the employment begun the deduction for the recovery of the advance should be made from the first payment of wages in respect of a complete wages period. But where the advance is given for travelling expenses no deduction as aforesaid can be made for its recovery Under Section 12(a).

2. Where the money was advanced after the employment began the deduction, to recover such advances should be in conformity with the rules laid drawn by the State Government,

3. Sometimes, the wages not already earned may be paid in advance to the employed person. Deductions for the recovery of such advances should be subject to the rules made by the State Government in this respect. Such rules may provide (i) the extent to which such advances may be given, and (ii) the installments by which they may be recovered Under Section 12(b).

F) DEDUCTIONS FOR THE RECOVERY OF LOANS (Section 12A)

i) Loans granted form welfare fund (Section 7(2) (fff)}

If a loan is made from any fund constituted for the welfare of the labour, the deductions from wages can be made for the recovery of such loan together with the interest due in respect thereof. For the application of this provision, the fund from which loans have been made, must be constituted in accordance with the rules approved by the State Government, and the interest due in respect thereof.

ii) Loans for House Building or other purposes (Section 12A)

Where the loans have been granted (i) for house / building or (ii) other purposes approved by the State Government deductions can he made for the recovery of such loan together with interest due thereon.

Section 12A empowers the State Government to make rules with regard to (i) the extent to which such loan may be granted, and (ii) the rate of interest payable thereon. Therefore, all such deductions should be according to the rules framed by the State Government.

G) DEDUCTIONS FOR INCOME-TAX {SECTIONS 7(3)(G)}

According to Income-Tax Act, payable if any, by any salary earner should be deducted at sure i.e., at the time of wages. In other words, it is the responsibility of the employer to see that deductions on account of income-tax are made before the wages are paid to any employed person. Section 7(2) (g) accordingly authorises such deductions from the wages of an employed person.

H) DEDUCTION UNDER THE ORDER OF A COURT AUTHORITY {SECTION 7(2) (h)}

According to Section 7(2) (h), deductions from wages can be made under the Order or a Court or other Authority Competent to make such order.

I) DEDUCTIONS IN RESPECT OF PROVIDENT FUND {SECTIONS 7(2)0)}

An employed person may contribute to a scheme of provident Fund. He may also be granted advances from such provident fund. Section 7(2) (i) authorises all such deductions:

i. for contribution of such provident, and

ii. for repayment of advances form such fund. However, deductions are allowed in respect of following types of provident fund schemes:

1. Schemes under the Provident Fund Act 1952,
2. Recognised Provident fund under Section 58A of the Income Tax Act, 1961.
3. Any Scheme approved by the state government.

J) DEDUCTION FOR PAYMENT TO CO-OPERATIVE SOCIETIES (SECTION 13)

Deductions for any payment to Co-operative Societies is allowed under following conditions given in Section 7(2) j and k read with Section 13 :

1. The Co-operative Society is approved by the State Government or any Official specified by it in this behalf.
2. The deductions are in conformity with rules laid down by the State Government in respect of Section 13.

K) DEDUCTIONS FOR PAYMENT TO A SCHEME OF INSURANCE OF A POST OFFICE {SECTIONS 7(3)(0)}

Deductions for payments to a scheme of insurance maintained by the Indian Post Office, is

allowed under Section 7 (2) (j), provided deductions are made subject to such conditions as the State Government may impose under Section 13.

L) DEDUCTIONS FOR PAYMENT OF LIFE INSURANCE PREMIUM {SECTION 7(2)(K)}

Deductions can be made for payment of any premium to the Life Insurance Corporation of India, on the life insurance policy of the employed person. But the deduction is subject to following conditions:

i. Deductions should be made with written authorisation of the employed person.

ii. If the State Government has imposed any condition, no conditions can be made unless these conditions are complied with (Section 33).

M) DEDUCTIONS FOR THE PURCHASES OF GOVERNMENT SECURITIES {SECTIONS 7(2) (K)}

Deduction are allowed for the purchase of securities of:

i. the Government of India, or

ii. any State Government.

Such deductions are subject to similar conditions specified in case of deductions for payment of life insurance premium.

N) DEDUCTIONS FOR PAYMENT TO POST OFFICE SAVING BANK

{Sections 7(2)(k)} authorises deduction for being deposited in any Post Office Saving Bank in furtherance of any savings scheme of Central or any State Government. But these deductions are subject to

i. the written authorisation of the employed person, and ii. such conditions as may be imposed by the state Government.

O) DEDUCTIONS FOR PAYMENT OF CONTRIBUTION TO CERTAIN FUND {SECTIONS 7(2)(K)}

Deduction can be made with the written authorisation of the employed person, for tile payment of his contribution to any fund constituted by the employees of a trade union registered under the Trade Unions Act, 1926 for the welfare of the employed persons or the members of their families or both and approved by the state Government or any officer specified by it in this behalf, during the continuance of such approval.

P) DEDUCTIONS FOR PAYMENT OF CERTAIN FEES {SECTIONS 7(2)(KKX))

Deductions can be made, with the written authorisation of the employed person, for payment of the fees payable by him for membership of any trade union registered under the Trade Unions Act, 1926.

Q) DEDUCTIONS IN RESPECT OF FIDELITY GUARANTEE BOND

Any payment of insurance premium on Fidelity guarantee Bond can be deducted from the wages of an employed person.

R) DEDUCTIONS FOR CERTAIN LOSSES IN CASE OF RAILWAY ADMINISTRATION

Deductions can be made from the wages of a person employed in a railway administration for the recovery of losses sustained by ‘a’ railway administration, due to following reasons:

i. Acceptance by the employed person of counterfeit or base coins or mutilated or forged currency notes {Section 7(2) (m)};
ii. Failure of the employed person to invoice, to bill, to collect, to account for the appropriate charges due in respect of (a) fares, freight, demurrage, wharfage and manage, or (b) Sale of food in catering establishments, or (c) sale of Commodities in grain shops or otherwise {Section 7(2)(m)}.
iii. Any rebate or refund incorrectly granted by the employed person in this respect shall not exceed the amount of the damage or loss caused to the employer by the neglect of the employed person {Section 10 (1)}.

S) OPPORTUNITY TO SHOW CAUSE AGAINST DEDUCTION

Before making any deduction in respect of aforesaid losses, an opportunity should be given to such employed person to show cause against the deduction. If any other procedure has been prescribed in this respect, the same should be strictly observed before making any such deduction (Section 10(1-A).

T) DEDUCTIONS FOR PAYMENT TO PRIME MINISTERS NATIONAL RELIEF FUND OF ANY OTHER FUND

Deductions can be made which the written authorisation of the employed person, for contribution to the prime Minister's National Relict Fund or to such other Fund as the Central Government may, by notification in the Official Gazette, specify.

U) DEDUCTIONS FOR CONTRIBUTIONS TO INSURANCE SCHEME

Deductions can be made for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.

8.16 EXTENT OF TOTAL DEDUCTIONS

The total amount of all categories of deductions from the wages of any employed person, in any wage-period, should not be exceed the following limits prescribed by Section 7(3):
1. 75% of wages payable in case where such deductions are wholly or partly made for payments to Co-operative Societies under Sections 7(2)(j) of the Act.

2. 50% of the Wages payable in any other case. Provided that where the total deductions authorised exceed seventy five percent or, as the case may be, fifty per cent of wages, the excess may be recovered in such manner as may be prescribed.

Section 7 does not bar recovery under any other law.

The provisions of Section 7 do not deprive the employer of his right to recover from the wages of employed person or otherwise, any amount payable by such person under any law for the time being enforce, other than the Indian Railway Act, 1890 (Section 7 (4)).

8.17 CONTRACTING OUT (SECTION 23)

Any contract or agreement, whether made before or after the commencement of this Act. whereby an employed person relinquishes any right conferred by this Act, Shall be null and void in so far as it purports to deprive him of .such rights. Thus, if deduction is unauthorised no agreement could give an employer to make such deduction.

8.18 SELF ASSESSMENT QUESTIONS

1. What is object of payment of Wages Act, 1936?
2. Define term “Wages” and discuss the mode of payment of wages.
3. What are the requirements of the Act respect of payment of wages?
4. Who is responsible for payment of wages?
5. What are the various deduction under the Act?
6. Explain the deduction which arc authorised under the Act.
7. What is the role of authority under Act?
8. What are the obligations of the employer under the Act?

8.19 FURTHER READINGS

Sharma, A.M. “Understanding Wage Systems”. Mumbai, Himalaya Publishing House, 2003.
Subramanian, K.N. “Wages in India”, New Delhi, Tata Mc Graw Hill Publishing Co. Ltd., 1977.

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LESSON - 9

THE MINIMUM WAGES ACT, 1948

9.0 OBJECTIVE

The reader understands the concept of minimum wage and its importance in the present day context. After going through this lesson the reader learns :

- the method of fixation of minimum wages.
- the minimum rate of wages.
- the working of the advisory boards.
- the fixation of working hours for a normal working day.

STRUCTURE

9.1 Introduction
9.2 Scope of the Act
9.3 Important Definitions
9.4 Concept of minimum wage
9.5 Relevance of paying capacity in the fixation of minimum wage
9.6 Fixation of Minimum rate of wage
9.7 Payment of minimum wage
9.8 Manner of fixation/revision of minimum wage
9.9 Minimum rate of wage
9.10 Procedure for fixing and revising minimum wage
9.11 Advisory board
9.12 Central advisory board
9.13 Minimum wages - whether to be paid in cash or kind
9.14 Payment of minimum wages is obligatory on employers
9.15 Fixing hours for a normal working day
9.16 Payament of overtime
9.17 Minimum time-rate wages for piece work
9.18 Maintenance of registers and records
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9.20 Who can apply
9.21 Time period for marking application
9.22 Contracting out
9.23 The Schedule
9.24 Self Assessment Questions
9.25 Further Readings

9.1 INTRODUCTION

The International Labour Conference adopted in 1928, a Convention (No. 26) concerning the creation of minimum wages fixing machinery. Members ratifying the Convention (India is one of them) undertake to create or maintain machinery whereby minimum wages can be fixed for workers employed in certain trades or parts of trades (and in particular in home working trades) in which no arrangements exist for the effective, regulation of wages by collective agreement or otherwise and

wages are exceptionally low.

The Royal Commission on Labour appointed in 1929 stressed the need for fixing minimum wages for workers employed in certain industries. Similarly, the Labour Investigation Committee also commented upon the low rates of wages prevailing in some of the industries and recommended immediate steps to remedy them. The question of statutory fixation of minimum rates fo wages was discussed at successive sessions of the Indian Labour Conference in 1943, 1944 and 1945. In 1945, it approved in principle the enactment of minimum wages legislation. Accordingly, the Minimum Wages Bill was introduced in the Central Legislature in 1946 and was passed in 1948. The statment of objects and reasons for the Bill states the justification for statutory fixation of minimum wagesis obvious. Such provisions which exist in more advanced countris are even more necessary in India where workers' organisaitons are yet poorly developed and the workers' bargaining power is consequently poor."

The Minimum Wages Act was passed in 1948 and it came into force on 15th M arch 1948. The National Commission on Labour has described the passing of the act as a landmark in the history of labour legislaiton in India.

"What the Minimum Wages Act purports to achieve is to prevent exploitation of labour and for that purpose authorises the appropriate government to take steps to preseribe minimum rates of wages in the scheduled industries. In an underdeveloped country which faces the problem of unemployment on a very large scale, it is not unlikely that labour may offer to work even on starvation wages. The policy of the Act is toi prevent the employment of such sweated labour in the interest of general public and so in prescribing the minimum rates, the capacity of the employer need not to be considered. What is being prescribed is minimum wage rates which a Welfare State assumes every employer must pay before he employs labour".

9.2 SCOPE OF THE ACT

According ot its preamble; the Minimum Wages Act, 1948 is an Act to provide for fixing minimum rates of wages in certain employments. The employments are those which are included in the schedule and are referred to as 'Scheduled Employment's.

The Act aims to extend the concept of social justice to the workmen employed in certain scheduled employments by statutorily providing for them minimum rates of wages. It is a pieceof social legistation whichi provides protection to workers in employments in which they are vulnerable to exploitation on account of the lack of organisation and bargaining power and where sweated labour is most prevalent. The Act contains 31 sections.

9.3 IMPORTANT DEFINITIONS

Appropriate Government {Section 2 (B)}

"Appropriate Governement" means:

i) In relation to any scheduled employment carried on by or under the authority of the Central or a Railway administration, or in relation to a mine, oilfield or major part or any corporation established by a Central Act, the Central Government and;

ii) In relation to any other scheduled employment, the State Government.

EMPLOYEE {SECTION 2 (I)}

'Employee' means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical in a scheduled employment in respect of which minimum rate or wages have benn fixed, and includes on out worked to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished repaired, adapted or otherwise processed for sale for the purpose of the trade or business of that other person where the process is to he carried out either in the home of the out-worker or in some other premises, not being premises under the control and management of that persons, and also includes an employee declared to be an employee by the appropriate government; but does not include any member of Armed Force of the Union.

EMPLOYER {SECTION 2 (E)}

"Employer" means any person who employs, whether directly, or through another person or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes except in sub-section (3) of Section 16.

i) In a factory where the work is carried in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person named under caluse (f) of sub-section (1) of Section 7 of the Factories Act, 1948 as manager of the factory.

ii) In any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for the supervision and control of employees of where no person of authority is so appointed the head of the Department.

iii) In any scheduled employement under any local authority in repect of which minimum rate of wages have been fixed under this Act the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the Chief Executive Officer of the local authority.

iv) In any other case where the work is carried in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act any person responsible to the owner for the supervision and control of the employees or for the payment of wages.

Note : It would be seen that the definition of 'employee' and 'employer' are quite wide. It was held in Nathu Ram Shukla V. State of Madhya Pradesh, AIR 1960 M.P. 174 that if minimum wages have not been fixed for any branch of work of any scheduled employment the person employing workers in such branch is not an employer within the meaning of the Act. Similarly, in the case of Loknath Nathu Lal V. State of Madhya Pradesh AIR 1960 M.P. 181 an out-worker who prepared goods at his residence, and then supplied them to his employer was held as employee for the purpose of this Act.

SCHEDULED EMPLYMENT {SECTION 2G}

Scheduled employment' means an employment specified in the Schedule or any process or branch of work forming part of such employment.

Note : The schedule is divided into the two parts namely, part- I and II. When originally enacted

part- I of the Schedule had 12 entries. Part- II relates to employment in agriculture. It was realised that it would be necessary to fix minimum wages in many more employments to be identified in course of time. Accordingly, powers were given to the appropriate Government to add employments to the Schedule by following the procedure laid down in Section 27 of the Act. As a result, the State Governments and Central Government have made several additions to the Schedule and it differs from State to State.

WAGES {SECTION 2(H)}

"Wages" means all remuneration capable of being expressed in terms of moeny, 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 amentiy or any service excluded by genral or social order of the appropriate Government.

ii) Any contribution by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance.

iii) Any travelling allowance or the value of any travelling concession.

iv) Any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment.

v) Any gratuity payable on discharge.

9.4 CONCEPT OF MINIMUM WAGES

The Minimum Wages Act does not define the minimum wages concept. According to the Committee on Fair Wages, a minimum wage must provide not merely for the bare sustenance of life but the preservation of the efficiency of the worker. For this purpose, the minimum wage must also provide some measure of education, medical requirements and amenities.

In 1957, the Indian Labour Conference laid down the concept of need based minimum wage. the authorities fixing minimum wages under the Minimum Wages Act should keep this concept in view. However, their final decisions are influenced more by the rates of prevailing wages, cost of living, etc,.

9.5 RELEVANCE OF PAYING CAPACITY IN FIXATION OF MINIMUM WAGES

It has been held in a number of cases that a minimum wage has to be paid irrespective of the paying capacity of the industry. In this connection, reference may be made to the decision of the Supreme Court in Crown Aluminium Works. v. Their Workmen (AIR 1958 SC 30) and Express Newspapers v. Union of India (AIR 1958 SC 578). The Principle has been reiterated in a number of subsequent cases.

9.6 FIXATION OF MINIMUM RATES OF WAGES {SECTION 3(1) (A)}

Section 3 lays down that ithe "appropriate government" shall fix the minimum rates of wages, payable to employees in an employment specified in part- I and part II of the Schedule and in an employment added to either part by notification under Section 27. In case of the employments specified in part- II of the Schedule, the minimum rates of wages may not be fixed for the entire State. In the case of an employment specified in part- I, the minimum rates of wages must be fixed for the entire State, no part of the State being omitted. The rates to be fixed need not be unfirom. Different ratres can be fixed for different zones or localities: (Basti Ram v. State of A.P., AIR 1969 (AF) 227).

The constitutional validity of Sectin 3 was challenged, in Bijoy Cotton Mills v. State of Ajmer, 1995 SC 3. The Supreme Court by the fixation of minimum rate of wages, though they interefere to some extent with freedom of trade or business guaranteed under Article 19(1) (g) of the Constitution, are not unreasonalbe and being imposed in the interest of general public and with a view to carrying out one of the Directive Principle of the State Policy as embodied in Article 43 of the Constitution, are protected by the terms of Clause (6) of Article 19.

Not with standing the provisions of section 3(1) (a), the appropriate Government' may not fix minimum rates of wages in respect of any scheduled employment in which less than 1,000 employees in the whole state are engaged. But when it comes to its knowledge after a finding that this number has in creased to 1,000 or more in such employment, it shall fix minimum wage rate.

9.7 REVISION OF MINIMUM WAGES

According to Section 3 (1) (b), the "appropriate Government" may review at such intervals as it may think fit, such intervals not exceeding five years, and revise the minimum rate of wages if necessary. This means that minimum wages can be revised earlier than five years also.

9.8 PROCEDUCE FOR FIXATION / REVISION OF MINIUM WAGES

According to section 3(2), the "appropriate Government" may fix minimum rate of wages for :

a. Time work, known as a minimum time rate;

b. Piece work, known as a minimum piece rate;

c. A "Guranteed" Time Rate" for those employed in piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis; (This is intended to meet a situation where operation of minimum piece rates fixed by the appropriate government may result in a worker earing less than" the minimum wage) and;

d. A "over time rate" i.e. minimum rate whether a time rate or a piece rate to apply in substitution for the minimum rate which otherwise be applicable in respect of overtime work done by employee.

Section 3(3) provides that different minimum rates of wages may be fixed for:

i. different schedule employments;

ii. different classes of work in the smae scheduled emplyment;

iii. adults, adolescents, children and apprentices iv. different localities.

Further, minimum rates of wages may be fixed by any one or more of the following wage periods

namely: i) by the hour; ii) by the day; iii) by the month, or

iv. by such other large wage periods as may be prescribed; and where such rates are fixed by the day or by the month, the manner of calculating wages for month or for a day as the case may be indicated.

However, where wage period has been fixed in accordance with the payment of wages Act, 1986 vide Section 4 thereof, minimum wages shall be fixed in accordance therwith {Section 3(3)}.

9.9 MINIMUM RATE OF WAGES {SECTION 4}

According to Section 4 of the Act, any minimum rate of wages fixed or revised by the appropriate government under Section 3 may consist of :

i. A basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such worker (here in after referred to as the cost of living allowance); or

ii. A basic rate of wases or without cost & living allowance and the cash value of the concession in respect of supplies of essential commacities at concessional rates whore so authorised; or

iii. An all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concession, if any.

The cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates shall be computed by the competent authority at such intervals and in accordance with such directions specified or given by the appropriate government.

9.10. PROCEDURE FOR FIXING AND REVISING MINIMUM WAGES (SECTION 5)

In fixing minimum rates of wages in respect of any scheduled employment for the first time or in revising minimum rates of wages, the appropriate government can follow either of the two methods described below.

FIRST METHOD (SECTION 5(1) (A)}

This method is known as the “commitee method”. The appropriate government may appoint as many committees and sub committees as it considers necessary to hold enquires and advise it in respect of such fixaton or revision as the case may be. After considering the advise of the committee or committees., the appropriate government shall by notification in the Official Gazette fix or revise the minimum rates of wages. The wage rates shal come into force from such date as may be specified in the notificatin, if no date is specified, wage rates shall come into force on the expiry of three months from the date of the issue of the notification.

Note: It was held in Edward Mills Co. v State of Ajmer 1955 AIR SC, that Committee appointed under Section 5 is only an advisory body and that Government is not bound to accept its recommendations.

As regards composition of the committee Section 9 of the Act lays down that it shall consist of persons to be nominated by the appropriate government representing employers and employee in the scheduled employment, who shall be equal in number and independent persons not exceeding 1/3 rd of its total number of members. One of such independent persons shall be appointed as the chairman of the committee by the appropriate government.

SECOND METHOD {SECTION (1) (B)}

The method is known as the "Notification Method". When fixing minimum wages under Section 5(10) (b), the appropriate government shall by notificatioin, in the Official Gazette publish its proposals for the informaiton of persons likely to be affected thereby and specify a date not less than 2 months from the date of notification on which the proposals will be taken into consideration.

The representations received will be considered by the appropriate government. It will also consult the advisory board constituted under Section 7 and there after fix or reverse the minimum rate of wages by notification in the Official Gazette. The new wage shall come into force from such date as may be specified in the notification. However, if no date is specified, the notification shall come into force oin expiry of three months from the date of its issue.

9.11 ADVISORY BOARD

The advisory board is constituted under Section 7 of the act by the appropriate government for the purpose of co-ordinarting the Work of committees and sub-committees appointed under Section 5 of the Act and advising the appropriate government generally in the matter of fixing and revising of minimum rate of wages. According to Section 9 of the Act, the advisory board shall consist of persons to be nominated by the appropriate government representing employers and employees in the scheduled employment who shall be equal in number, and independent persons not exceeding 1/3rd of its total number of members, one of such independent persons shall be appointed as the Chairman by the appropriate government.

It is not necessary that the Board shall consist of representatives of any particular industry or of each and every scheduled employment; B.Y. Kshatriya v. SAT BIDI Karmagar Union, AIR, 1963 SC 806. An independent person in the context of Section 9 means a person who is neither an employer not an employee in the employment for which the minimum wages are to be fixed. In the case of State of Rajasthan V. Hari Ram Nathwani, 1975, SCC 356, it was held that the mere fact a person happens to be a Government servant will not divert him of the character of the independent person .

9.12 CENTRAL ADVISORY BOARD

Section 8 of the Act provides that the Central Government shall appoint a Central Advisory Board for the purpose of advising the Central Government and State Governments in the matters of fixation and revision of minimum rates of wages and other matters under the Minimum Wages Act and for co-ordinating work of the advisory boards. The Central Advisory Board shall consist of persons to be nominated by the central government representing employers and employees in the scheduled employment who shall be equal in number and independent persons not exceeding 1/3 rd of its total number of members, one of such independent persons shall be appointed as the chairman of the Board by Central Government.

9.13 MINIMUM WAGES - WHETHER TO BE PAID IN CASH OR KIND

Section 11 of the Act provides that minimum wages payable under the Act shall be paid in cash. But where it has been the custom to pay wages wholly or partly in kind, the appropriate government, on being satisfied, may approve and authorise such payments. Such government can also authorise for supply of essential commodities at concessional rates. Where payment is to be made in kind, the cash value of the wages in kind or in the shape of essential commodities on concessions shall be estimated in the prescribed manner.

9.14. PAYMENT OF MINIMUM WAGE IS OBLIGATORY ON EMPLOYER {SECTION 13}

Payment of less than the minimum rates of wages notified by the appropriate government is an offence. Section 12 clearly lays down that the employer shall pay to every employee engaged in a scheduled employment under him such wages at a rate not less than the minimum rate of wages fixed by the appropriate government under Section 5 that class of employment without any deduction except as may be authorised, within such time and subject to such conditions as may be prescribed.

9.15 FIXING HOURS FOR A NORMAL WORKING DAY {SECTION 13}

Fixing of minimum rates of wages without reference to working hours may not achieve the purpose for which wages are fixed. Thus, by virtue of Section 13 the appropriate government may;

a. fix the number of work hours which shall constitute a normal working day, inclusive of one or more specified intervals.

b. Provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such day of rest;

c. Provide for payment for work on a day of rest at a rate not less than the overtime rate.

The above stated provisions shall apply to following classes of employees only to such extent and subject to such conditions as may be prescribed.

a. Employees engaged in urgent work, or in any emergency, which could not have been foreseen or prevented;

b. Employees engaged in work in the nature of preparatory or complementary work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working in the employment concerned.

c. Employees whose employment essentially is intermittent:

d. Employees engaged in any work which for technical reasons, has to be completed before the duty is over.

e. Employees engaged in work which could not be carried on except at times dependent on the irregular action of natural forces.

For the purposes of clause (c) employment of an employee is essentially intermittent when it is decided to be so by the appropriate government on the ground that, the daily hours of the employee, or if these be no daily hours of duly as such for the employee, the hours of duty, normally include periods of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention.

There is a correlation between minimum rates of wages and hours of work. Minimum wages are to be fixed on basis of standard normal working hours, namely 48 hours a week, Benode Behari Saha v. State of W.B. 1976 Lab FC. 523 (Cal).

9.16 PAYMENT OF OVERTIME {SECTION 14}

Section 14 provides that where an employee, whose minimum rate of wages is fixed under this Act by the hours, the day or by such longer wage period as may be prescribed. Works on any day in excess of the number of hourse constituting a normal working day, the employer shall pay him for every hour or part of an hour so worked in excess at the overtime rate fixed under this Act or under any other law of the appropriate Government for the time being in force whichever is higher.

9.17 MINIMUM TIME RATE WAGES FOR WORK {SECTION 17}

Where an employee is engaged in work on piece work for which minimum time rate and not a minimum piece rate has been fixed, wages shall be paid in terms of Section 17 of the Act at minimum time rate.

9.18 MAINTENANCE OF REGISTERS AND RECORDS {SEC. 18}

A part from the payment of the minimum wages, the employer is required under Section 18 to maintain registers and records giving such particulars of employees under his employment, the work performed by them the receipts given by them and such particulars as may be prescribed. Every employee is required also to exhibit notices, in the prescribed form containing particulars in the place of work. He is also required to maintain wage books or wage slips as may be prescribed by the appropriate government and the entries made therin will have to be authenticated by the employer or his agent in the manner prescribed by the appropriate government.

9.19 AUTHORITY AND CLAIMS {SECTION 20 & 21}

Under Section - 20 (1) of the Act, the appropriate government, may appoint any of the following as an authority to hear and decide for any specified area nay claims arising out of payment of less than the minimum rate of the wages or in respect of the payment of remuneration for the days of rest or of wages at the rate of overtime work :

a. any Commissioner for Workmen’s Compensation, or

b. any officer of the Central Government exercising functions as Labour Commissioner for any region; or

c. any officer of the State Government not below the rank of Labour Commissioner; or

d. any other officer with experience as a judge of a Civil Court as the Stipendiary Magistrate.

The authority so appointed shall have jurisdiction, to hear and decide claim arising out of payment of less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days or for payment of overtime.

The Provisions of Section 20 (1) are attracted only if there exists: (i) dispute between the employer and employee as to the rates of wages. Where no such dispute exists between the employer and employee and the only question is whether a particular payment at the agreed rate in

respect of minimum wages, overtime or work off days is due to an employee or not, the appropriate remedy is provided by the Payment of Wages Act, 1936.

9.20 WHO CAN APPLY ?

According to Section 30(2) an application for any claim under this Act, may be moved by any of the following persons :

a. the employee himself; or
b. any legal Practitioner authorised in writing to act on his behalf; or
c. any official of a registered Trade Union authorised in writing to act on behalf of the employee; or
d. any inspector; or
e. any person acting with the permission of the authority.

9.21 TIME PERIOD FOR MAKING APPLICATION

The application for claim should be presented within 6 months from the date on which the minimum wages or other amount became payable. However, the authority can condone the delay if the applicant satisfied the authority that he has sufficient cause for not making the applications within the prescribed time.

9.22 CONTRACTING OUT (SECTION 25)

Any contract or agreement whether made before or after the commencement of this Act whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accuruing to him under this Act, shall be null and void in so far as it purports to reduce the minimum rate of wages fixed, under this Act.

9.23 THE SCHEDULE

The Act has incorporated a schedule (list of employments, The employments mentioned in this schedule are called scheduled employments. The provisions of the Minimum Wages Act, 1958 are applicable to these employment only. This may however be kept in mind that the schedule is modified by the approporate government from time to time. The schedule is in two parts. Both of these part are reproduced below:

Part I

- Employment in all woollen carpet-marking or shawl-weaving establishment.
- Employment in any rice mill, or dal mill.
- Employment in any tobacco (including bidi making) manufactory.
- Employment in any plantation, that is to say, any estate which is maintained for the purpose of growing cinchona, rubber, tea or coffee.
- Employment in any oil mill.
- Employment under any local authority.
- Employment on the construction or maintenance of the roads or in building operations.
- Employment in stone breaking or stone crushing.
- Employment in any lac manufactory.
- Employment in any mica works.

- Employment in public motor transport.
- Employment in tanneries and leather manufactory.
- Employment in gypsum mines.
- Employment in bauxite mines.
- Employment in manganese mines.
- Employment in the maintenance of buildings and employment in the construction and maintenance of runways.
- Employment in China clay mines.
- Employment in Kyanite mines.
- Employment in magnesite mines.
- Employment in copper mines.
- Employment in clay mines covered under the Mines Act, 1952.
- Employment in magnesite mines covered under the Mines Act, 1952.
- Employment in white clay mines.
- Employment in stone mines.
- Employment in Stealite mines (including the mines producing Soapstone and Talc) covered under the Mines Act, 1952.
- Employment in ochre mines.
- Employment in asbestos mines.
- Employment in graphite mines.
- Employment in laterite mines.
- Employment in dolomite mines.
- Employment in wolfram mines.
- Employment in iron ore mines.
- Employment in hematite mines.
- Employment in loading and unloading in Railways, good sheds, docks and ports.
- Employment in ashpit cleaning on Railways.

Part II

- Part II of the schedule covers employment in agriculture, that is to say, in any form of farming, including cultivaiton and tillage of the soil, dairy farming, the production, cultivation, growing and harvesting of any agricultural or horticultural commodity, the raising of livestock, bees or poultry, and any practice performed by a farmer or on a farm as inidental to or in conjunction with farm operations (including any forestry or timbeing operations and the preparation for market and delivery to storage or to market or to carriage for trainsportation to market of farm produce). The minimum wages for agricultural workers are fixed both by the central and state governments/union territories.

9.24 SELF ASSESSMENT QUESTIONS

1. Discuss the object and scope of the Minimum Wages Act, 1948.
2. Who is authorised to fix Minimum Wages and in what manner.
3. What points should be taken into consideration while fixing minimum rates of wages?

4. what is the procedure for fixing and revising the same.

9.25 FURTHER READINGS

Sarma, A.M; Industrial Jurisprudence and Labour Legislation, Himalya Publishing House, Mumbai, 2002.

Malik P.L, Industrial and Labour Legislations.

Sarma, A.M; Understanding Wage Systems, Himalya Publishing House, Mumbai, 2004.

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to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment and prescribing the maximum and minimum rates of bonus together with the scheme of 'set-off' and 'set on' not only secures the right of labour to share in the profits but also ensures a reasonable degree of uniformity.

On the question whether the Act deals with profit bonus, it was observed by the Supreme Court in Mtimbal Kamgar Sabha V. Abdulbhal Faizijllabhal 1976-11 LLJ 186 (SC) that 'bonus' is a word of many generous connotations and in the Lord's mansion, they are many houses. There is profit based bonus which is one specific kind of claim and perhaps the most common. There is customary or traditional bonus which has its emergence from long, continue usage leading to a promissory and expectance situation materialising in a right. There are attendance bonus and what not. The Bonus Act speak and speaks as a while code on the sole subject of profit based bonus but is silent and cannot therefore, annihilate by implication, other distinct and different kinds of bonuses such as the one oriented on custom. The Bonus Act, 1965 as it then stood does not bar claims to customary bonus or those based on conditions of service. Held a discerning and concrete analysis of the scheme of the Bonus Act and reasoning of the court leaves no doubt that the Act leaves untouched customary bonus.

The provisions of the Act have no say on customary bonus and cannot therefore, be inconsistent therewith. Conceptually, statutory bonus and customary bonus operate in two fields and do not clash with each other Hukumchand Jute Mills Limited V. Second Industrial Tribunal, West Bengal, 1979. I. Labour Law Journal 461 (S.C).

Section 1 of the Act does not bar claims to bonus outside the Act which deals with only profit bonus and matters connected therewith.

APPLICATION OF THE ACT

According to Section 1(2) the Act extends to the whole of India and as per Section 1(3) the Act shall apply to -

(a) every factory ; and

(b) every other establishment in which twenty or more, persons are employed on any day during an accounting year.

Provided that the appropriate Government may, after giving not leesthan two months notice of its intention so to do, by notification in the Official Gazette apply the provisions of this Act with effect from such accounting year as may be specified in the notification to any establishment being a factory within the meaning of sub clause (ii) of clause (m) of Section 2 of the Factories Act, 1948 employing such number of persons less than twenty as may be specified in the notification. However, that the number of persons so specified shall in no case be less than ten.

Serve as otherwise provided in this Act shall in relation to a factory or other establishment which this Act applies, have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year.

Provided that when the provisions of this Act have been made applicable at any establishment or class of establishments by the issue of a notification under the provisons to Subsection (3), the reference to the accounting year commencing on any day in the year 1964 and every subsequent accounting year, or as the case may be the reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year shall in relation to such establishment or class of establishments be constituted as a reference to the accounting year specified in such notification and every subsequent accounting year (Section 1 (4)).

An establishment to which this Act applies shall continue to be governed by the Act not with standing that the number of persons employed therein falls below twenty, or, as the case may be the number specified in this notification issued under the provison to Subsection (3).

ACT NOT TO APPLY TO CERTAIN CLASSES OF EMPLOYEES (SECTION 32)

Section 32 of this Act provides that the Act shall not apply to the following classes of employees.

(i) Employees employed in the Life Insurance Corporation of India.

(ii) Seamen as defined in clause (42) of Section 3 of the Merchant Shipping Act, 1958.

(iii) Employees registered or listed under any scheme made under the Dock Workers (Regulation of Employment) Act, 1948 and employed by registered or listed employers.

(iv) Employees employed by an establishment engaged in any industry called on by or under the authority of any department of Central Government or State Government or a local Authority.

(v) Employees employed by-

(a) Indian Red Cross Society or any other Institution of like nature including its branches.

(b) Universities and other educational institutions.

(c) Institutions (including hospitals, Chambers of Commerce and Social Welfare Institutions) established not for the purpose of profit.

(vi) Employees employed through contracts on building operations.

(vii) Employees employed by Reserve Bank of India.

(viii) Employees employed by -

(a) the Industrial Finance Corporation of India.

(b) any Financial Corporation established under State Financial Corporation Act. 1951.

(c) the Deposit Insurance Corporation.

(d) the Agricultural Refinance Corporation;

(e) the Unit Trust of India;

(f) the Industrial Development Bank of India;

(g) any other financial institution (other than Banking Company) being an establishment in public sector which the Central Government may by notification specify having regard to (1) its capital structure; (2) its objective and the nature of its activities: (3) the nature and extent of financial assistance or any concession given to it by Government; and (4) any other relevant factor,

(ix) Employees employed by inland water transport establishment operating on routes passing through any other country.

A part from the above, the appropriate Government has necessary powers under Section 36 to exempt any establishment of class of establishment having regard to its financial position and other relevant circumstances and if it is of the opinion that it will not be in

the public interest to apply all or any of the provisions of this Act thereto, train all or any of the provisions of the Act. It may impose such conditions while according such exemptions as it may consider fit.

10.3 IMPORTANT DEFINITIONS

ACCOUNTING YEAR {SECTION - 2 (10}

Accounting year means:

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

(ii) in relation to a company, the period in respect of which any profit and looss 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 account 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 subclause 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.

ALLOCABLE SURPLUS - {SECTION 2 (4)}

Allocable Surplus means :

(a) in relation to an employer, being a company (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 percent of the available surplus in an accounting year;

(b) in any other case sixty percent of such available surplus.

"Available surplus" (Section 2 (7)} means an interim or a final determination of any industrial dispute or of any question relating there to by any labour court, industrial tribunal or national tribunal constituted under the Industrial Disputes Act, 1947 or by other authority constituted under any corresponding law relating to investigation and settlement of industrial disputes in force in a State and includes an arbitration award made under Section 10-A that Act or under that law.

CORPORATION {SECTION 2(11)}

Corporation means any body corporate established by or under any Central Provincial or State Act but does not include a company or a cooperative society.

EMPLOYEE {SECTION 2(13)}

Employee means any person (other than an apprentice) employed on a salary or wages not exceeding Rs. 3600 per month in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work or hire or reward, whether the terms of employment be express or implied.

EMPLOYER {SECTION 2(14)}

Employer includes -

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, mending the agent of such owner or occupier, the legal representative or a deceased owner or occupier, and where a person has been named as a manger of the factory under clause (f) of subsection 7(1) of the Factories Act, 948 the person so named, and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

"Establishment in private sector" {Section 2 (14)} means an establishment owned, controlled or managed by

(a) a Government company as defined in Section 7(17) of the Companies Act. 1956.

(b) a Corporation is which not less than forty percent of its capital is held (whether single or taken together) by -

(i) the government, or (ii) the Reserve Bank of India, or

(iii) a Corporation owned by the Government or the Reserve Bank of India.

SALARY OR WAGE {SECTION 2(21)}

The "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, by payable to an employee in respect of this 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 of other amenity or of any service of any concessional supply of foodgrains 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 exgratia 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 wages payable to him, free food allowance or free food by his employer, such food allowance or the value of such food small, for the purpose of this clause, he deemed to form part of the salary or wage of such employee.

The definition is wide enough to cover the payment of retaining allowance and also dearness allowance paid to the workmen. It is nothing but remuneration Chalthan Vibbag Sahakari Khad Udyog V. Government Labour Officer AIR 1881 SC 905. Whatever is agreed to be paid as bonus is part of the earnings or wages of workmen and as such would fall within the exemption of section 60(I) CPC 1908. 1977 ILLJ 284 (D.B), (Ker.).

ESTABLISHMENT

Section 3 of the Act provides that the word 'establishment' shall include all its department, undertakings and branches where it has so whether situated in the same place or in different place and the same shall be treated as part of the same establishment for the purpose of Computation of bonus under this Act.

Provided that where for any accounting year separate balance-sheet and profit and loss account are prepared an maintained in respect of any such department or undertaking or branch then such department, undertaking or branch shall be treated as a separate establishment for the purpose of computation of bonus under this Act for that year unless such department, undertaking or branch was, immediately for the purpose of computation of bonus.

10.4 CALCULATION OF AMOUNT PAYABLE AS BONUS

The Act has laid down a detailed procedure for calculating the amount of bonus payable to employees. First of all Gross profit is calculated as per First or Second Schedule. From this Gross figure, the sums deductable under Section 6 are deducted. To this figure, we add the sum equal to the difference between the direct tax calculated on gross profit for the previous year and direct tax calculated on gross profit arrived at after deducting the bonus paid or payable to the employees. The figure so arrived will be 'available surplus' of this surplus, 67% Ist class of company (other than a banking company) and 60% in other Cases shall be the 'allocable surplus' which is the amount available for payment of bonus to The details of such calculations are given below.

(i) Computation of Gross Profits (Section 4)

The Gross profits derived by an employer form an establishment in respect of any counting year shall:

(a) in the case of banking company be calculated in the manner specified in the first Schedule.

(ii) Deductions from Gross Profits (Section 6)

(a) any amount by way of depreciation admissible in accordance with the provisions of Section 32(1) of the Income-tax Act, or in accordance with the provisions of the Agricultural income-tax Law, as the case may be :

Provided that where an employer has been paying bonus to his employees under a settlement or an award or agreement made before the 29th May, 1965, and subsisting on that date after deducting from the gross profits notional normal depreciation, then the amount of depreciation to be deducted under this clause shall, at the option of such employer (such option to be exercised once and within one year from the date) continue to be such notional normal depreciation.

What is deductible under Section 6(a), depreciation admissible in accordance with the provisions of Section 32(1) of the Income tax Act and not depreciation allowed by the Income-tax officer in making assessment on the employer.

(b) Any amount by way of development rebate, investment allowance, of development allowance which the employer is entitled to deduct from his income under the Income-tax Act.

(c) Subject to the provisions of Section 7 and direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year.

DEDUCTIONS SPECIFIED IN THE THIRD SCHEDULE

The following is the excretal of Third Schedule specifying further deductions under section 6(d) of the Act form gross profits for ariving at available surplus.

1. If the employer a company, further sums to be deducted are:

(i) Dividend payable on its preference share capital for the accounting year calculated at the actual rate at which such dividends are payable:

(ii) 8.5% of its paid-up equity Share capital as the commencement of the accounting year.

(iii) 7% of its reserves shown in its balance sheet at the commencement of the accounting year including any profits carried forward from the previous accounting year, provided where the employer is a foreign Company within the meaning of Section 591 of the companies Act. 1956 the total amount to be deducted from this item shall be 8.5% on the aggregate value of the net fixed assets and the current assets of the company in India after deducting the amount of its current liabilities (other than any amount shown as payable by the company to its head office whether towards any advance made by head office of otherwise or any interest paid by the Company to its head office in India).

2. If the employer a corporation, further sums to be deducted are:

(i) 8.5% of its paid-up as at the commencement of the accounting year.

(ii) 60% of its reserves if any, shown in its balance sheet as at the commencement of the accounting year.

3. If the employer a Cooperative Society, further sums to be deducted are:

(i) 9.5% of the capital, invested by such society in its establishment as evidenced from its

books of account at the commencement of the accounting year:

(ii) Such sum as has been carried forward in respect of the accounting year to a reserve fund under any law relating to cooperative societies for the time being in force.

4. If it is any other employer not falling under any of aforesaid categories further sums to be deducted would be 8.5% of the capital invested by him in his establishment as evidenced from his books of accounts at the commencement of the accounting year Provided.

(i) If the employer is an individual the annuity deposit paid by him under Chapter XXII-A of Income Tax Act during the accounting year shall also be deducted.

(ii) If the employer is a firm, an amount equal to 25% of the gross profits derives by it form the establishment in respect of the accounting year after deducting depreciation in accordance with the provisions of clause (a) of section 6 by way of remuneration to all partners taking part in the conduct of business of the establishment shall also be deducted, but where the partnership agreement whether oral or written provides for payment of remuneration to any such parties and (a) the total remuneration payable to all such parties is less than the said 25%, the amount payable. subject to a maximum of Rs. 48,000, to each such partner, or (b) the total remuneration payable to all such partners is higher than 25%, such percentage or a sum calculated at the rate of Rs. 48,000 to each such partner whichever is less, shall be deducted from this provision.

(iii) If it is individual or Hindu Undivided family (a) the amount equal to 25% of gross after deducting depreciation in accordance with Section 6(a) or (b) Rs. 48,000 whichever is less by way of remuneration to such employer, also be deducted.

5. Any employer falling under Item No. I or Item No. 2 or Item No.3 or Item No. 4 and being a licensee within the meaning of Electricity Supply Act, 1948 then further sum would be deductible in addition to the sums deductible under any of the aforesaid item.

The 'reserve' used in the case of company and corporation shall not include any amount set part for the purpose of payment of direct tax, meeting any depreciation or dividend which has been declared and shall include the amount of specific reserve set apart of direct tax and meeting depreciation in excess of the amount Admissible in accordance with Section 6(a) of the Act.

In Metal Box Co.'s case, the company had revalued its fixed assets in 1956 and credited the difference of Rs 57 lakhs between its costs and the value fixed on such, revaluation, to the capital reserves. The tribunal accepted the valuation as bonafied and allowed interest in the side reserve at the rate of 60% in terms of Section 6(d) read with clause (I) (iii) of the Third Schedule. In appeal by special leave on behalf of the workmen, a contention was urged before the Supreme Court that the revaluation of the assets was a more book adjustment fictitious and was done with the oblique motive of defeating the labour's claim for bonus and, therefore. no interest should have been allowed on the capital reserve. The Court rejected the contention holding that the Tribunal was right in accepting the figure of Rs. 57 lakhs and deducting interest there from the gross profits- In considering the claim for return on working capital two questions should be kept in view: (10) Whether the reserves were available, and if they were, (2) whether they were used as working capital and if so what is that amount Binny Ltd.

WORKMEN (1974) SECTION 2(7)

(iii) Calculation of Direct Tax payable by the Employer (Section 7)

Any direct tax payable by the employer for any accounting year shall, subject the following provision, be calculated at the rates applicable to the income of the employer for that year; namely;

(a) including such tax no account shall be taken of

(i) any loss incurred by the employer in respect of any previous accounting year and carried forward under any law for the time being in force relating to direct taxes:

(ii) any arrears of depreciation which the employer is entitled to add to the amount of the allowance for depreciation for any following accounting year or years under sub-section ((2) of Section 32 of the Income-tax Act;

(iii) any exemption conferred on the employer under Section 84 of the Income-tax Act or of any deduction to which he is entitled under sub-section (I) of section 20I of that Act, as in force immediately before the commencement of the Finance Act, 965.

(b) Where the employer is a religious or a charitable institution to which the provisions of Section 33 do not apply and the whole or any part of its income is exempt from tax under the Income-tax Act, then, with respect to the Income so exempted, such institution shall be treated as if it were a company in which the public are substantially interested with the meaning of that Act;

(c) Where the employer is an individual or a Hindu undivided family, the tax payable by such employer under the Income-tax Act shall be calculated on the basis that the income derived by him from the establishment is his only income.

(iv) Computation of Available Surplus (Section 5)

The available surplus in respect of any accounting year shall be the gross profits for that year after deducting therefrom the sums referred to in Section 6.

Provided that the available surplus in respect of the accounting year commencing on any day in the year 1968 and in respect of every subsequent accounting year shall be aggregate of.

(a) the gross profits for that accounting year after deducting therefore the sums referred to in Section 6, and

(b) an amount equal to the difference between

(i) the direct tax, calculated in accordance with the provisions of Section 7 in respect of an amount equal to the gross profits of the employer for the immediately proceeding accounting years; and

(ii) the direct tax calculated in accordance with the provisions of Section 7 in respect of an amount equal to the gross profits of the employer for such preceding accounting year after deducting therefrom the amount of bonus which the employer has paid or is liable to pay to his employees in accordance with the provisions of this Act for that year.

(v) Allocable Surplus {Section 2(4)}

It means -

(a) In relation to an employer being a company 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 Section 194 of that Ad 67% of the available surplus in an accounting year, (b) In any other case, allocable surplus shall he 60% of such available surplus.

10.5 ELIGIBILITY FOR BONUS AND ITS PAYMENT

(i) Eligibility for Bonus (Section 8)

Every employees shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, Provided he; has worked in the establishment for not less than thirty working days in an accounting year.

(ii) Disqualification for Bonus {Section 9}

Notwithstanding anything contained in his Act, an employee shall be disqualified from, receiving bonus tinder this Act, the is dismissed from service for

(a) fraud; or

(b) riotous or violent behaviors while on the premises or the establishments, or

(c) theft, misappropriation or sabotage of any property of the establishment. This provision is based on the recommendation of the Bonus Commission which observed. After all bonus can only be shared by those workers who promote the stability and well-being of the industry and those workers who positively display disruptive tendencies. Bonus certainly conies with the obligation of good behavior.

(iii) Minimum Bonus (Section 10)

Payment of Minimum Bonus (Section 10) Subject to the other provisions of this Act, every employer shall be bound to pay to every employee in respect of any accounting year a minimum bonus which shall be 8.33 per cent of the -salary or wage earned by the employee during the accounting yea: or one hundred rupees whichever is high, whether are not the employer has any allowable 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 20 of the Act is not violative of Articles 19 an<;! 301 of the Constitution. Even if employer suffers losses during the accounting year, he is bound to pay minimum bonus as prescribed by section 10: Stale V.Sardar Singh Majithis 1969 Lab, I.C.(913) (All).

(iv) Maximum Bonus (Section 11)

(1) Where in respect of any accounting year referred to in Section 10 the allocable surplus exceeds the amount of minimum bonus payable to the employees under that section, the employer shall, in lieu of such minium bonus, be bound to pay to every employee in respect of that accounting year bonus which shall be an amount in proportion to the salary or wage earned by the employee during the accounting year subject to a maximum of twenty, percent of such salary or wage.

(2) in computing the allocable sui-plus under this section, the amount set on or the amount set off under the provisions of Section 15 shall be taken into account in accordance

with the provisions of that section.

(IV-A) Calculation of bonus with respect to certain employees (Section 12)

Where the salary or wage of an employee exceeds on thousand and six hundred rupees per mensem, the bonus payable under Section 10 or 11 shall be calculated as if his salary of wage were one thousand and six hundred rupees per mensern,

(v) Proportionate reduction in Bonus in certain cases (Section 13)

Where an employee has not worked for all the working days in an accounting year. the minimum bonus of one hundred rupees or, as the case may be, of sixty rupees, if such bonus is higher than 8.33 percent of his salary or wages for the days he has worked in that accounting year. shall be proportionately reduced.

(vi) Computation of Number of working Days (Section 14)

For the purposes of Section 13, an employee shall be deemed to have worked in an establishment in any accounting year also on the day which -

(a) he has laid off under an agreement or as permitted by standing orders under the Industrial Employment (Standing Orders) Act. 1946 or under the Industrial Disputes Act, 1947 or under any other law applicable to the establishment.

(b) he has been on leave with salary or wage:

(c) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment', and

(d) the employee has been on maternity leave with salary or wage, during the accounting year.

(vii) Set on and Set off of Allocable Surplus (Section 15)

(1) Where for any accounting year, the allocable surplus exceeds the amount of maximum bonus payable to the employees in the establishment under section 11, then, the excess shall, subject to a limit of twenty percent of the total salary or wage of the employees employed in the establishment in the accounting year be carried forward for being set on in the succeeding accounting year and so on upto and inclusive of the fourth accounting year to be utilized for the purpose of payment of bonus in the manner illustrated in the Fourth Schedule.

(2) Where for any according year, there is no available surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees in the establishment under section 10 and there is not amount of sufficient amount carried forward and set on under sub-section (1) which could be utilized for the purpose of payment or the minimum bonus, then, such minimum amount or the deficiency, as the case may be, shall be carried forward for being set off in the succeeding accounting year and so on up to and inclusive of the fourth accounting year in the manner illustrated in the Fourth Schedule.

(3) The principle of section and set of as illustrated in the fourth schedule shall apply to all other cases not covered by Sub-section (I) or Sub-section 10 for the purpose of payment of bonus under this Act.'

(4) Where in any accounting year any amount has been earned forward and set on or set off under this section, then, in calculating bonus for the succeeding accounting year, the amount of set on or set off earned forward from the earliest accounting year shall first be taken into account.

Section 5(I) provides for carry forward and set on its plain terms, it comes, into operation only when, in a given accounting year, the allocable surplus exceeds the maximum bonus under the Act so that after payment of maximum bonus, there is surplus left which can be carried forward and set on. subject, of course, to the limit of 20% of total salary or wages; 1976-, Labour Law Journal 463 (SC)

Apart from the provisions contained in Section 15(1), there is no statutory obligation on an employer to set apart any part of the profits of the previous years for payment of bonus for subsequent years.

(viii) Special Provisions with aspect to certain Newly Set up Establishment (Section 16)

In case of newly set up establishments following provisions have been made for the payment of bonus:

(1) Where an establishment is newly setup, the employees of such establishment shall be entitled to be paid bonus under this Act in accordance with the provisions of subsections (I A).(1B) and (IC).

(1A) In the first five accounting years following the accounting year in which the employer sells the goods produced or manufactured by him or renders services as the case may be, form such establishment, bonus shall be payable only in respect of the accounting year in which the employer derives profit and such bonus shall be calculated in accordance with the provision of this Act in relation to that year, but without applying the provisions of Section 15.

(1B) For the sixth and seventh accounting year following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be from such establishment the provisions of section 15 shall apply subject to the following modifications namely:

(i) for the sixth accounting year -

Set on or set of, as the ease may be” shall be made in the manner illustrated in the Fourth schedule taking into account the excess or deficiency. If any as the case may be, of the allocable surplus set on or set off in respect of the fifth and sixty accounting year.

(ii) for the seventh account year -

Set on or set off, as the case may be, shall be made in the manner illustrated in the Fourth Schedule taking into account the excess or deficiency, if any, as the case may be of allocable surplus set on or set off in respect of the fifth, sixty and seventh accounting year.

(1C) From the eight accounting year following me accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be from such establishment, me provisions of Section 15 shall apply in relation to such establishment as the apply in relation to any other establishment.

Explanation - I - For me purpose of subsection (I A), an employer shall not be deemed to be newly setup merely by reason of a change in its location, management, name or

ownership.

Explanation - II - For the purpose of sub-section (I A). an employer shall not be deemed to have derived profit in accounting years unless -

(a) he has made provision for that year's depreciation to which he is entitled under the Income-tax Act or, as the case may be, under the Agriculture Income tax Law; and

(b) the arrears of such depreciation and losses incurred by him in respect of the establishment for the previous ,accounting years have been fully set off against his profits.

Explanation - III - For the purpose of sub-section (1A),(1 B,) and (1C), sale of the goods produced or manufactured during the course of the trial running of any factory or of the prospecting stage of any mine or an oil field shall not be taken into consideration and where any question arises with regard to such production or manufacture, the decision of the appropriate government, made after giving the parties a reasonable opportunity of representing the case, shall be final and shall not be called in question by any court, or other authority.

(2) The provisions of Sub-sections (I), (I A), (I B) and (I C) shall, so far as may be, apply to new departments or undertakings or branches set up by existing establishments:

Provided that if an employer in relation to an existing establishment consisting of different departments or undertakings or branches (whether or not in the same industry) set up at different periods has, before the 29th May, 1965, been paying bonus to the employees of all such departments or undertakings or branches it respective of the date on which 'such departments or undertakings or branches were set up, on the basis of the consolidated profits computed in respect of all such departments or undertakings or branches then such employer shall be liable to pay bonus in accordance with provisions of this Act to the employee of all such departments or undertakings or branches (whether set up before or after that date) on the basis of the consolidated profits computed as aforesaid.

Within the meaning of section 16 (1 -A) the word' Profit'" must obviously be constructed according to its ordinary sense. A sense which is understood in trade and industry because the reasonable, behind section 6(I-A) is that it is only when the employer starts making profits in the commercial sense that the should become liable to pay bonus under the Act.

Profit in the commercial sense can be ascentrained only after deducting depreciation and since there are several methods of computing depreciation, the one adopted by the employer, in the absence of any statutory provision to the contrary, would govern the calculation. Explanation II to section 16(1-A) says that the employer shall not be deemed to have derived profit unless he has made provision for that year's depreciation to which he: is entitled founder the Income-tax Act. This explanation embodies a clear legislative mandate that in determining for the purpose of Sub-section (I-A) of Section 26 whether the employer has made profit from the establishment in accounting year, depreciation should be provided in accordance with the provisions of the Income - tax Act.

Clearly, therefore, if depreciation is as prescribed in the Income-tax Act, there is no profit for the year in question and the d is no liability on the part of the employer to pay-bonus under the Act: The management of Central Coal Washery V. Workmen. 1968-11 Labour Law 350 (SC).

(ix) Adjustment of(Customary of interim Bonus (Section 18)

Where in any accounting year -(a) an employer has paid any puja bonus or other customary bonus to an employer or (b) an employer has paid a part c .the bonus payable under this Act to an employee before the date on which such bonus becomes payable, then, the employer shall be entitled to deduct at the amount of bonus so paid from [he amount of bonus payable by him to the employee. Under this Act in respect of that accounting year and employee shall be entitled to receive only the balance.

In Hukum Chand Jute Mills Lid. V.Sccond Industrial Tribunal. West Bengal. A.I.R. 1979 B.C. 876, the Supreme Court held that the claim for customary bonus is not affected by 1976 Amendment Act. In fact, It has left Section 17 Intact which refers to puja bonus or other customary bonus. Section 3 I A (see later) speaks about productivity bonus but says nothing about other kinds of bonuses. The contention that all agreements Inconsistent with the provisions of the Act become inoperative, has no substance Vis-a-vis customary bonus. Conceptually statutory bonus and customary bonus operate in two fields and do not clash with each other.

(x) Deductions of certain Amounts from Bonus (Sec. 18)

Where in any accounting year, an employee is found guilty of misconduct causing financial loss to the employer, then, it shall he lawful for the employer to deduct and amount of loss from the respect of that accounting year only and the employee shall be entitled to receive the balance, if any.

(xi) Time Limit for payment of Bonus (Section 19)

(a) Where there is a dispute regarding payment of bonus pending before any authority under section 22, all amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer within a month from the date from which the award becomes enforceable or the settlement comes into operation in respect of such dispute.

(b) In any other case, the bonus should be paid within a period of eight months from the close of the accounting year. However, the appropriate Government or such authority as the appropriate Government may specify in this behalf may, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of 8 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.

(xii) Recovery of Bonus from an Employer (Section 21)

Where any money is due to an employee by way of bonus from his employer under a settlement or an award or agreement, the employee himself or any other person authorised by him in writing in this behalf, or in the case of the death of the employee, his assignee or heirs may, without prejudice to any other mode of recovery, make application to be appropriate government for the recovery of the money due to him, and if the appropriate government or such authority as the appropriate government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the collect who shall proceed to recover the same in the same manner as an arrear of land re venue:

Provided that every such application shall he made within one year from the date on which the money became due to the employee from the employer:

Provided further that any such application may be entertained after the expiry of the .said period of one year, if the appropriate government is satisfied that the applicant had sufficient cause for not making the application with in the said period:

Explanation : In this section and in Sections 22, 23, 24 and 25 'employee' includes a person who is entitled to the payment of bonus under this Act but who is no longer in employment.

Mode of recovery prescribed in Section 21 would'be available only if bonus sought to be recovered is under 'Settlement of an award or an agreement'. Bonus payable under Bonus Act is not covered by Section 21 : 1976-1 Labour Law Journal 5,1 (FB) (MP)

(xiii) Application of Act of Establishment in Public Sector in Certain cases (section 20)

If in any accounting year an establishment in public section sells any goods produced or manufactured by it or renders any services, in competitions with an establishment in private sector, and the income from such sale or services or both in not less than 20% of the gross income of the establishment in public sector for that year, then, the provisions of this Act shall apply in relation to such establishment in public section as they apply in relation to a like establishment in private sector.

(xiv) Reference of Disputes under the Act (Section 22)

Where any dispute arises between an employer and his employee with respect to the bonus payable tinder this Act or with respect to the application this Act or with respect to the application of this Act to an establishment in public sector, then, such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial dispute within the meaning of the Industrial Dispute Act, 1947, or any corresponding law relating to investigation and settlement of industrial disputes in force in a state and provisions of that Act or, as the case may be, such law, shall save otherwise provided apply, accordingly.

10.6 ACCURACY OF ACCOUNTS, AUDIT AND RETURNS

(i) Presumption about Accuracy of Balance-Sheet and profit and Loss Account of Corporation and Companies (Section 23)

Where, during the course of proceedings before any arbitrator of "Tribunal under the Industrial disputes Act, 1947, or under any corresponding law relating to investigation and settlement of industrial disputes in force in a State therein after in this section and Sections 24 and 25 referred to as the 'Said authority' to which any dispute of the nature specified in Section 22 has been referred, the balance sheet and the profit and loss account of any employer, being a corporation or a company (other than a banking company), duly audited by the Controller and Auditor General of India or by auditors duly qualified to act as auditors of companies tinder Section 216(1) of the Companies Act, 1956, are produced before it, then, the said authority may presume the statements and particulars contained in such balance-sheet and profit and loss account to be accurate and it shall not be necessary for the corporation or the company to prove the accuracy of such statements and particulars by filing of an affidavit or by any other mode,

But where the said authority is satisfied that the statements and particulars contained in the balance-sheet or the profit and loss account of the corporation or the company are not accurate, it may take such steps at it thinks necessary to find out the accuracy of such statements and particulars.

(3) When an application is made to the said authority by any trade union being a party to the, dispute, or where there in no trade union, by the employees being a party to the dispute, requiring any clarification relating to any item in the balance sheet or as the profit and loss account, it may, after satisfying itself that such clarification is necessary by order, direct the corporation or, as the case may be, the company, to furnish to the trade union or the employees such clarification within such time as may be specified in the direction and the corporation or, as the case may be the company, shall company, with such direction.

In the case of Metal Box Co. of India Ltd. V. Their, Workmen, (1969) I LLJ 785 (SC) the supreme Court observed that though (here is presumption about accuracy of balance sheet and profit and loss account, but the presumption is reputable. In this case, there was disputes as to deduction by way of depreciation of Rs. 23 lakhs, The company claimed depreciation Rs. 28.64 lakhs and which was further revised to Rs. 28.82 lakhs. The company produced Auditor's Certificate which it contended should be sufficient proof of accuracy and any further quality would be time consuming and harassing. The Supreme Court observed : Under section 23 the presumption of accuracy is allowed only to the balance-sheet and the profit and loss account of companies. No such presumption is provided for the Act of auditor's certificate-especially, Mere production of auditor's Certificate especially when it is not admitted by labour, not by the auditors but by the employees of the company who admitted not to have been concerned with its preparation or the calculations on which it was based would not be conclusive. Though the Tribunal need not insist upon proof of depreciation on each and every item of the assets, it should insist on some reasonable proof of the correctness of the figure of depreciation claimed by the employer either by examining the auditors who calculated and certified it or by some other proper proof. Depreciation in some cases would be of a large amount affecting materially the available surplus. Fairness, thereof, requires that an opportunity must be given to the employees to verify such figures by cross examination of the employer or his witnesses who have calculated depreciation amount.

Similarly in working of William Jacks & Co. Ltd., V. Management of William Jacks & Co. (1971) I.LLJ 503 (S.C.) the Supreme court observed 'The presumption under Section 123 is confined to the accuracy of the balance-sheet and profit and loss account. If any item in the accounts is wrongly shown as expenditure when on the face of it is not so, the court is not bound to hold the method adopted in preparing accounts is correct simply because the auditors raised no objection. While the interest was paid on advance not made b/ the creditor to the debtor, but by the company's one office to another, money purported to be transferred as interest cannot be held to be an expenditure incurred by the Branch paying it to the other.

(ii) Audited Account of Banking Companies not to be Questioned (Section 24)

(1) Where any dispute of the nature specified in Section 22 between an employer, being a banking company, and its, employees has been referred to the said authority under that section and during the course of proceedings the account of the banking company only audited are produced before it, the said authority shall and permit any trade union or employees to question the correctness of such account, but the trade union or the employees to question the correctness of such accounts, but the trade union or the employees may be permitted to obtain from the banking company such information as is necessary for verifying the amount of bonus due under this Act.

(2) Nothing contained as above shall enable the trade union or the employees to obtain any information which the banking company is not compelled to furnish under the provisions of Section 24-A of the Banking Regulation Act. 1949.

(iii) Audit or Accounts of Employers, not being corporations or Companies (Section 29)

(1) Where any dispute of the nature specified in Section 22 between an employer, being a corporation or a company and his employees has been referred to the said authority under that section and the accounts of such employer audited by any auditor duly qualified to act as auditor of companies under Sub-section (1) of Section 225 of the Companies Act, 1956, are produced before the said authority, the provisions of Section 23, shall so far as may be apply to the accounts so audited.

(2) When said authority finds that he accounts of such employer have not been audited by any such auditor and it is of opinion that an audit of the amounts of such employer is necessary for deciding [lie question refereed lo it, then, it may he specified in the direction or within such further time as if may allow by-such auditor or auditors as it thinks fit and there upon the employer shall comply with such direction.

(3) Where an employer fails to get the accounts audited may, without prejudice under Subsection (1) the said authority to the provisions of Section 28, get the accounts audited by such auditor or auditors as it thinks fit.

(4) When the accounts are indited under Sub-section (2) or Sub-section (3) (including the remuneration of the auditor or auditors) shall be determined by the said authority (Which default of such payment shall be recoverable form the employer in the manner provided in Section 21).

10.7 BONUS LINKED WITH PRODUCE ION OR PRODUCTIVITY

(SECTION 31A)

Section 31A enables the employees and employers to evolve and operate a scheme of bonus payment linked to production or productivity in lieu of bonus based on profits under the general formula enshrined in the Act. However, bonus payments under Section 32A are also subject to the minimum (^.33 per cent) and maximum (20 per cent). In other words a minimum of 8.33 percent is payable in any case and the maximum cannot exceed 20 percent.

10.8 AGREEMENTS INCONSISTENT WITH THE ACT (SECTION 34-A)

Subject to the provisions of Section 31A and 34, the provisions of this Act shall have effect not with standing anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service.

10.9 APPLICATION OF CERTAIN LAW NOT BARRED (SECTION 49)

Save as otherwise expressly provided, the provisions of this Act, shall be in addition to and not in derogation of the Industrial disputes Act, 1947, or any corresponding law relating to investigation and settlement of industrial disputes in force in a State.

10.10 SELF ASSESSMENT QUESTIONS

1. Describe the scope and object of Payment of Bonus Act, 1965.
2. Write short notes on

(a) Allocable surplus (b) Wages & Salary

(c) Accounting year (d) Employer and Employee

3. What is the principle of set-on and set-off of allocable surplus.

4. Discuss the calculation of bonus under the Act.

10.11 FURTHER READINGS

Sharma, A.M, Understanding Wages Systems, Himalaya Publishing House, 2004.

Subramanian, K.N, Wages in India, Tata McGraw Hill Publishing Co., Ltd., 1977.

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LESSON : 11

WORKMEN'S COMPENSATION ACT, 1923

11.0 OBJECTIVE

The aim and objectives of the lesson is to familiarise the student, firstly, to know the legal rights of certain classes of workmen who can claim compensation for injury suffered by accidents against certain category of employees. Secondly, to equip with the various definitions and terms used in the Act, and the procedure to claim compensation and the remedies that are available to workmen under the act to settle the scores with their employers.

STRUCTURE

11.1 Introduction
11.2 Basic features of Compensation
11.3 Workmen's Compensation law in India
11.4 Object of the Act
11.5 Important Designations
11.6 Employer's Liability to Pay Compensation
11.7 Doctrine of National Extension of Employer's Premises
11.8 Amount of Compensation
11.9 Claim for Compensation
11.11 Power of Commissioner
11.12 Summary
11.13 Self Assessment Questions
11.14 References and Further Readings

11.1 INTRODUCTION

1. **A historical survey :** The law of workmen's compensation was introduced in India in 1923, twenty-six years after it has been introduced in England. To England it had come from Germany where it had been introduced in 1884 by the Iron Chancellor, Bismarck, who was the first among the European statement to understand fully the implications of the Marxist challenge and to take some steps towards forestalling the treated revolution of workers by a new law was a right to receive compensation from their employer for injuries suffered in the course of employment, irrespectively of any fault or breach of duty on the part of the employers. It has been rightly remarked by Hon'ble Mr. Justice Phanibhushan Chakravarti, Ex-Chief Justice, Calcutta High Court, that in England, however, the movement towards a law of workmen's compensation seems to have been caused by board consideration of justice and humanity rather than a motive of neutralising the revolutionary potentialities of the working class by seeing actively to their contentment. In its scope too, the British Act of 1897 fell short of the German precedent in one respect. While the German Act required employers to indemnify injured workmen, or in the case of fatal accidents, their families,

and it also set up an insurance system under which the employers were obligated to insure the risk, the British Act only made indemnification at prescribed rates obligatory, but left insurance of the risk to remain optional. The Workmen's Compensation Act enacted in 1923 when Britisher were the ruler of the country, the Indian Act naturally followed the British pattern which seems to have been adopted also in France and Belgium. In the case of America, it is interesting to find that the first State laws were declared unconstitutional and it was not till 1909 that the validity of a law workmen's compensation was conceded by the courts. Since then, there have been both federal and State laws.

When the Indian Act was enacted, the law in force in England, on which it is modeled was the Act of 1906 at last amended by an Act of 1923 in order to understand what exactly that law amounted to, it will be useful to recall briefly how and why a law of workmen's compensation came to be enacted in England and what purposes it was intended to serve. It is a matter of history that from an early period up to the middle of the 18th century, the political and economic philosophy holding sway over Europe was 'mercantilism', according to which it was necessary and proper to exercise a strict control over private enterprise, whether joint or individual. Thus in England, taking the sphere of employment, alone, there were laws regulating the conditions of apprenticeship and service, fixing the rates of wages and restricting the movement of labour from one part of the country to another. Gradually, however, a reaction set in. Towards the middle of the 18th century, it began to be felt that there was too much of Government which was destroying individual initiative and affecting the prosperity of the nation. the feeling led to the evolution of the doctrine of the *Laissez faire* which means "let things alone". The doctrine asserted that individual welfare was not incompatible with national prosperity but, on the other hand, welfare of the individual law at the very foundation of the property of the nation and so the nation would be best served if the individual was allowed to pursue his self-interest without restriction from outside for, in that event, he would put forth his best efforts, willingly in activities of his own choice for which he considered himself most fitted and would thus become a more productive member of the society. After it had been formulated the doctrine of *laissez faire* found a rapid and wide acceptance particularly in England, and it ushered in a period during which the agencies of production operated under conditions of complete economic freedom. In the sphere of employment the doctrine translated into terms of concrete policy, meant that every individual was free to enter any occupation or service that he might choose and that wages and other conditions of service were to be determined entirely by free bargaining between the employer and the employee. The bargain, thus concluded, would therefore rule.

The experiment with a policy of complete economic freedom was carried on for a considerable period but, in the end, *laissez faire,* in its turn, began to reveal its own defects. Taking again the sphere of employment alone, it was found that not only were the employers imposing, in the name of freedom of contract, cruelly, harsh terms on the employees who had no equal bargaining power and forcing them to work for unconsciously long hours and under appealing conditions but the employees had been even no adequate means of relief against the employers for injuries sustained in their service. For death or disablements would seek was damages at common law, but that law having been evolved at an earlier stage of industrial development to govern for simpler relations of master and servant afford little real protection in the complicated circumstances of modern industry. At common law, workmen's claim could be allowed only if he was able to establish some negligence or breach of duty on the part of the employer as the sole cause of the accident

resulting in the injury, but it was not easy to prove either of those torts, first because the courts, hesitating perhaps to construe the duties of the employer had ceased to be a human individual and come to be a limited company which it was difficult to find guilty of a tort. Apart from these hurdles in the way of proof, the workman had also to contend against the bar of contributory negligence which meant that if there was some negligence on his part which had contributory to the occurrence of the accident either wholly or to such an extent that it was not possible to determine whether his or the employer's negligence had been the decisive cause, he could not recover. There was again, the doctrine of common employment or 'the fellow-servants rule", as it is called in America. It meant that there was always an implied term in a contract of service that the servant agreed to accept the risk of injury from the negligence of a fellow servant and, consequently, when such negligence was the cause of the injury, he could not claim damages from the master. The result of these limitations was that an injured workman or, in the case of fatality, his dependants could rarely recover damages at common law, even if they were very able to carry on the expensive litigations up to the end, which again was not an easy matter. In that state of the conditions under which workmen were being compelled to work by their insensitive employers and the inadequacy of the relief available to them for injuries a reaction against the doctrine of the *laissez faire* inevitably set in and comprehensive series of labour legislation came gradually to be enacted with a view to liberating the workers from their helplessness against the power of the men who owned the factories and establishment where they worked. There was thus a reversion to control, though in modified form. First came the Factories Act which were directed at improving the conditions prevailing in the factories and compelling the employees to adopt suitable safety measures for the prevention of compulsory payment by the employer of some compensation, calculated by reference to the wages, for death or breach of duty on the part of the employer. Although contributory negligence was not wholly excluded by the Act, the rule of common employment was no bar to recovery of compensation under its provisions. When first enacted in 1897, the Act was limited to injuries caused directly by accidents and it covered only a few industries and occupations, but the list was enlarged by subsequent amendments and by a fresh Act passed in 1906, occupational diseases were added. The benefit of the Act was, however, limited, to workmen drawing remuneration up to a stated amount. Further laws of a beneficial character, such as an Act, providing for unemployment insurance soon followed, but it is not necessary to refer to them here. Nor is it necessary to refer to the various rules which the courts, keeping pace with the progressive social conscience of the people and taking increasing note of the difficulties of the workmen under the growing complexity of industrial organisations, came gradually to evolve in order to modify the rigour of the doctrine of contributory negligence and common employment.

Although the workmen's Compensation Act was enacted to make it easier and cheaper for the workmen to obtain at least some compensation, it did not rid his chance of getting compensation altogether of uncertainty and difficulty. He had still to prove that the accident causing the inquiry had not only arisen in the course of his employment but had also arisen out of it and his claim could be defeated if it could be shown, except in cases death or serious and permanent disablement, that he himself had been guilty of willful misconduct which had led to the accident, When the Act of 1906 was replaced by a new Act in 1925 those provisions continued to be a part of the new statue as well. But public opinion was soon moving towards the view that the workmen's rights to compensation for industrial injuries should be placed on a more secure basis and the actual receipt of it should be made easier than under the Workmen's Compensation Act. Effect was at last given to that view by the National Insurance (Industrial Injuries) Act, 1946, which coming into force in 1948 replaced the Workmen's Compensation Act and introduced an insurance system under which

Insurance benefits were payable to victims of the industrial accidents and to suffers from certain industrial diseases. All persons employed in Great Britain under a contract of service or apprenticeship were brought under the purview of the Act, whatever their earnings might be; and although the limitation that the accident must be one "arising out of and in the course of employment" remained the class of accidents satisfying that description was greatly enlarged by providing a number of statutory presumptions in favour of the injured workmen which were made available to him even in cases where he had disharged the revilement regulations or disobeyed his master's orders, provided certain other conditions were fulfilled. The limitation contained in the Workmen's Compensation Act in regard to cases of the workmen's own negligence or disobedience was thus practically abolished, consistency, it would appear, with the abolition of contributory negligence by a separate Act. The solarium received by workmen's was given the name of 'benefit' in the lieu of 'compensation' and it was payable out of a fund to be built up with equal contributions well employer and employees and a further contribution by the state. Lastly whereas under the workmen's compensation Act the remedies under that Act and at common law where alternatives those under the national Insurance (Industrial Injuries) Act and at common law where non current both being available to the workmen, subject to adjustment of the damages awarded under common law. Unlike the workmen's compensation Act which was administration by the ordinary courts, the new Act was to be administrated by the ministry of National Insurance.

It will thus be seen that, in England, workmen's compensation has ceased to a matter of decree by the course against the employers on proof of the necessary facts and has become an insured benefit obtainable for this state out of a special fund maintain for the purpose. From position lying between the tort and insurance, the basis of the workmen's claim has move to be liability of the state as an insurer under something like a policy of accident insurance against death, disablement or disease the caused by an industrial accident. This insurance seems to differ from accident incidence for the ordinary kind only in respect that for being it, the workmen pays only apart of the premium. While the valances paid by this employer and this state, the payment he receives in case of an accident is not large but, as already pointed out he is not limited to this particular form of relief and can both claim it and sue his employer at law for damages.

This is the short story of the history and development of workmen's compensation payable to the workers in England beautifully and critically traced by Hon'ble Mr. Justice Chakravarthi. Therefore under common law an employer was liable for industrial accidents only in cases of his negligence Employers Liability Act abolished or limited only certain defenses. Proof of the employers fault reminded the basis of liability. Thus most of the industrial accidents where not touched and workmen cradle get damages. As pointed out above Germany was the first country to solve the problem by declaring the cost of accidents as the liability on industry. Austria followed Germany in 1887. In England this satisfaction with the Act of 1880and the knowledge of the successful operation of the German Laws culminated in the introduction of a workmen's compensation Bill which was passed by parliament and become the workmen's compensation Act of 1897. There after there were certain of the developments for the benefit of the worker's as indicated above.

Similar dissatisfaction in the United States with operations of employers liability laws resulted in investigations by various government commissions. In 1910, New York became the first state to enact a workmen's compensation law sufficiently comprehensive to meet the problem effectively. By the end of the 19th century, coincidence of increasing industrial injuries decreasing remedies

and produced in the United States a situation ripe for radical change, and when, in 1893, a full amount of the German system written by John Graham Brooks was published as the fourth special report of the commissioner of Labour, legislators all over the country seized upon it as a clue to the direction which effects at reform might take. Another stimulus was provided by the enactment of the first British compensation Act in 1897, which later became the mode of state Acts in many respects.

In 1910 the first New York Act was passed with compulsory coverage of certain hazardous employments. It was held and constitutional in 1911 by the courts of appeals, on the ground that the imposition of liability without font upon the employer was a taking of property with out due process of law under the state and federal constitutions in Ives. V. south Buffalo Rly . Co.

In New York the Ives decision was answered by the adoption in 1913 by constitutional amendment permitting a compulsory law and such law was passed in the same year. In 1917 and this compulsory law together with the low elective and the Washington exclusive – state fund – type law, was held constitutional by the United States Supreme Court, and, with fears of constitution impediments virtually removed, the compensation system grew and expanded with a rapidity that probably as no parallel in any comparable field of law. By 1920 all that eight states and adopted compensation Act on January 1 1949 the last state, Mississippi, came under the system extension of coverage had taken the form, not only of adding jurisdictions, but of broad boundaries of individual Acts, as to persons, employments, and kinds of injury (particularly occupational disease) covered.

It has been nicely remarked that the Industrial Revolution brought in its train the multitude of the maimed the halt and blind. There was a rapid increase in diseases, deaths and injuries among industrial workers due to accidents. Against the soaring profits and the whirr, whirr of wheels, the dread shapes of betrayed, plundered, profaned and disinherited humanity cried for redress. The loss of human material lay where it fell on the workers themselves or their families. The voice of dolorous pitch did not reach the rich and even God seemed not to hear the cry of the children. The intoxication of swelling profits inhabited for a long time the capitalist economy in the matter of workmen's health and safety. The law sided with the prosperous employers in the booming factories against the destitution of disabled workmen or their dependents thrown upon society as more objects of charity. Such social in difference could not last long. Such law could not last long. Liberal ideas and organised labour exerted pressure. Further the commercial prosperity of a colonial empire gradually became conscious of the hens at home laying the golden eggs.

Under these circumstances in order to provide remedies to the working class the law of workmen's compensation has been developed in countries under the pressure of public opinion prevailing at the relevant times. The workmen's compensation is a mechanism for providing cash wage benefits and medical care to victims of work-connected injuries and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product.

11.2 BASIC FEATURES OF COMPENSATION

Professor Arthur Larson indicates the certain basic features of compensation such as :

(1) The basic operating principle is that an employee is automatically entitled to certain benefits whenever he suffers a "personal injury by accident arising out of and in the course of employment";

(2) Negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his right and in the sense that the employer's complete freedom from faults does not lessen his liability;

(3) Coverage is limited to persons having the status of employees as distinguished from independent contractor;

(4) Benefits to the employee includes cash wage benefits, usually around one-half to two-thirds of his average weekly wage, and hospital and medical expenses; in death cases benefits for dependents are provided; arbitrary maximum and minimum limits are ordinarily imposed;

(5) The employee and his dependents, in exchange for these modest but assured benefits give up their common law right to sue the employer for damages for any injury covered by the Act;

(6) The right to sue third persons whose negligence caused the injury remains, however, with the proceeds usually being applied first to reimbursement of the employee;

(7) Administration is typically in the hands of administrative commissions; and so far as possible, rules of procedure, evidence, and conflict of laws are relaxed to facilitate the achievement of the beneficent purposes of the legislation; and

(8) The employer is required to secure his liability through private insurance, State Fund insurance in some States. or "self-insurance" : thus the burden of compensation liability does not remain upon the employer but passes to the consumer, since compensation premiums, as part of the cost of production, will be reflected in the price of the product.

It may be pointed out that the sum total of these ingredients is a unique system which is neither a branch of tort law nor social insurance of the British or continental type, but which has some of the characteristics of each. Like tort, but unlike social insurance , its operative mechanism is unilateral employer liability, with no contribution by the employee or the State; like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory between two individuals according to their personal desires or blames.

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obligated to provide in any case in some less satisfactory form and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product. In compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power.

Workmen's Compensation law provided for payments of compensation for injuries suffered due to accidents in the course of employment of workers without proof of negligence or fault of employers. This system of workmen's compensation was first adopted in Germany in 1884. In great British the workmen's Compensation Act was first introduced in 1887, by Joseph Chamberlain. It was followed by Allowed by Acts of 1900, 1906, 1923 and 1925. In the United States of America,

the State of Maryland had an Act in 1902, New York in 1910 and by 1921, forty two States and three territories had enacted workmen's compensation laws and the Federal Government for its civil employees. In India the Act of 1923 came into operation in July, 1924.

11.3. WORKMEN'S COMPENSATION LAWS IN INDIA

It would be desired to mention the brief historical note as how the workmen's compensation law had been developed and enacted in our country. The question of granting compensation to workmen for fatal or serious accidents was first raised in India in 1884 and the need for proper legislation was emphasised by factory and mining Inspectors. But the question of framing legislation was taken up by the Government of India only in the end of 1920 and in 1921 public opinion on the subject was invited. In order to examine the question in some detail it was referred to a small committee composed of legislative Assembly members, Employer's and worker's representatives and medical and insurance experts, which met in 1922.

The committee's detailed recommendations for framing legislation were accepted and a Worker's Compensation Act was passed in 1923. The measure followed the British Act in its main principles and in some of its details, but it contained a large number of provisions designed to meet the special conditions in India. This Act was the first step towards social security in India. This was followed by legislation enacted in several states for the protection of workers. Under these enactments the responsibility for payment of compensation rested with employer, a system which led to certain hardship. The Royal Commission on Labour reviewed the subject and made a number of recommendations as regard workmen's compensation. The Commission's recommendations involved the substantial extension and enlargement of the rights the Act conferred and its revision in a number of matters of detail.

The general scheme of the Act is that the compensation should ordinarily be given to workmen who sustain personal injury by accidents arising out of and in the course of their employment. Compensation is also given in certain cases for occupational diseases as listed in the III schedule. It may not be irrelevant to point out that the International Labour Organisation has also influenced the codification of workmen's compensation law as it has been remarked that the restrictions on import during the World War I gave rise to a considerable expansion of industries in the countries. The expansion was augmented by the victorious emergence of the allies as a result of which a good deal of capital was invested in the country. The Treaty of Versailles emphasised the fact that the failure of any nation to adopt human conditions is an obstacle in the way of other nations, which desires to improve the conditions in their own countries. It was felt that universal peace based on social justice was essential. In order to achieve this end, the International Labour Organisation was formed. The first session of the ILO met at Washington in 1919 and India as an original member of the League of Nations also participated. It was due to the influence of the International Labour Organisation that the Worker's Compensation Act was passed.

Prior to the passing of the Act, compensation was payable in case of fatal accident. The Indian Fatal Accidents Act, 1855, is based on the English Act and enables certain heirs of the deceased persons to sue for damages when death is caused by an actionable wrong. This Act overrides the dictum that a personal action dies with the person injured, *"personals motiureum persona".* The defense under the doctrine of common employment, by which an employee is

presumed to have accepted a risk if it is such that he ought to have known it to be part of the risks of his occupation were, however, open to the employer. The Royal Commission on Labour regarded both the doctrine as inequitable and recommended that measure should be enacted abrogating these defenses. The result was the enactment of the Employer's Liability Act, 1938. The Act was amended by the Employers Liability (Amendment) Act, 1951 as it was found that the defense of common employment was still available to the employer due to the limited scope of Section 3(d). The defect was removed by the Amending Act of 1951.

Freedom from want and security against economic fear is one of the fundamental needs of our country. The Constitution affirms to all people of India, *inter alia,* social and economic justice, but this has yet to be secured by peaceful, social and legislation steps. It has been aptly said, " It is the functional of an ideal welfare state to give to every citizen the opportunity of earning his living and freedom from fear-fear specially of economic ruin which can involve physical and even moral ruin".

In order to provide social security to the working people various legislative steps have been taken in our country like other countries of the world. It may not be incorrect to say that the Workmen's Compensation Act, 1923 has been the first step towards social security in our country. The basic principle of this legislation is social security injustice. Under these circumstances the Act was passed to provide social justice and social security to the workers who are working under dangerous and risky conditions of work in the factories.

11.4 OBJECT OF THE ACT

The object of the Act is to provide for the payment of compensation for injury by accident to the workmen by certain classes of employers. The Act has created a new type of liability in as much as it makes an employer liable to pay compensation at a fixed rate to a workman incapacitated by an accident. The liability to pay compensation is independent of any neglect of wrongful act on the part of the employer or any of his servants. It is not a liability which springs out of the relationship of master and servant. The total amount that a workman can get is fixed by the Act, is governed by a scale and is dependant not on the suffering caused to his workman or the expenses incurred by him in his illness but on the difference between his wage earning capacity before and after the accident. This would include not only the period when he is doing the work actually allotted to him but also the time when he is at a place where he would not be out for his employment.

The Act is a Social Welfare Legislation. Before it was enacted, the only remedy available to an injured workman was approaching a Civil Court for damages against his employer for the injuries suffered by him. In civil court it would be necessary for a workman to prove negligence on the part of the employer in order to get compensation for injury. However, under the Act, it is sufficient if the workman establishes that he suffered injury out of and in the course of employment and proving negligence has been dispensed with. Further, the workman need not go to a Civil Court but can approach the Workman's Compensation Commissioner.

Thus, to provide speedy and effective remedy by way of compensation to a workman for industrial injury whether the result of negligence, or not, is the primary objective of the Act.

11.5 IMPORTANT DEFINITIONS

Compensation - Means compensation as provided for by the provisions of this Act. Compensation is a lump sum provided to the workers in cases of death, permanent disablement or temporary disablement. It may be pointed out that in case of temporary disablement the mode of payment of compensation differs as it is payable in such an event in the form or recurring half monthly payments.

Employer : 'Employer' includes a body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Wages (Sec. 2(M)): 'Wages' includes any privilege or benefit which is capable of being estimated in money other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment.

Dependent (Sec-2(D)): 'Dependent' means any of the following relatives of a deceased', workman, namely.

(i) A widow, a minor legitimate son, an unmarried legitimate daughter, or a widowed mother, and

(ii) If wholly dependent on the earnings of the workman at the time of his death a son or a daughter who has attained the age of 18 years and who is infirm.

(iii) If wholly or in part dependent on the earning of the workman at the time of his death.

- (a) a Widower
- (b) a parent other than a widowed mother
- (c) a minor illegitimate son, an unmarried illegitimate daughter legitimate or illegitimate if married and a minor or if widowed and a minor.
- (d) a minor brother or an unmarried sister of a widowed sister if a minor
- (e) a widowed daughter -in-law
- (f) a minor child of pre deceased son,
- (g) a minor child of a pre deceased daughter where no parent of the child is alive, or
- (h) a paternal grand parent if no parent of the workman is alive

TOTAL DISABLEMENT SECTION –2 (1) :

Total Disablement means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for a work, which he was capable of performing at the time of the accident resulting in such disablement (provided that permanent total disablement shall be deemed to result form, every injury specified in Part-I of Schedule 1 or form any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part-II against those injuries, amounts to one hundred percent or more).

WORKMAN-SECTION –2(N):

"Workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is

(i) a railway servant as defined in Section-3 of the Indian Railways Act 1890 (9 of 1890), not permanently employed in any administrative district of sub divisional office of a railway and not employed in any such capacity as specified in Schedule II or

(ii) Employed (…) in any such capacity as is specified in Scheduled II.

Whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing, but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, includes a reference to his descendents or any of them.

(2) The exercise and performance of the powers and duties of a local authority or of any department nothing on behalf of the Government shall, of the purposes of this Act, unless a contrary intention appears be deemed to be the trade or business of such authority or department.

(3) The State Government, after giving, by notification in the official gazette not less than three month's notice of its intention so to do, may be a like notification, add to Schedule II any class of persons employed in any occupation which it is satisfied is a hazardous occupation, and the provisions of this Act shall thereupon apply within the State to such classes of persons.

Provided that in making such addition the state government may direct that the provisions of this Act shall to such classes of persons in respect of specified injuries only.

PARTIAL DISABLEMENT SECTION-2 (G):

"Partial Disablement" means where the disablement is of a temporary nature such disablement as reduces the earning capacity of a workman in any employment in which he has engaged at the time of the accident resulting in the disablement and where the disablement is of a permanent nature, such disablements as reduces his earning capacity in every employment which he was capable of undertaking at that time, provided that every injury specified in (Part II of Schedule I) Shall be deemed to result in permanent partial disablement.

11.6 EMPLOYER'S LIABILITY TO PAY COMPENSATION

Section-3 of the Act laid down that if a personal injury is caused to a workman by accident arising out of and in the course of his employment his employer is liable to pay compensation in accordance with the provisions of the Act.

This section does not impose liability on the employer for every injury but only for those injuries which arise out of and in the course of employment, when can it be said that an accident arose out of and in the course of employment?

Arising out of and in the course of Employment

The expression out and of in the course of employment occurring in the section has been subject of interpretation in numerous cases and it has been found almost a hopeless task to give such a comprehensive or exhaustive meaning as may be applicable to all cases. It is plain that the phrase defines the time within which the accident must occur in order to saddle the employer with liability. In cases therefore which arise, in consequence of an injury caused to an employer while he is actually engaged in the work for the doing or which he is employed, there can hardly be any room for controversy on the ground of interpretation for it would clearly fail within the section. The word employment has however been given a wide meaning than the word 'work' and it has been universally accepted that a man may be in the course of employment without being actually engaged on the work for the doing of which he is engaged.

The expression 'in the course of employment' suggests the point of time; that is to say, the injury must be caused by accident taking place in the course of the employment, that is during the currency of employment. The expression arising out of employment suggests both the time as well as the place of employment, the expression out of conveys the idea that caused to a workman as a result of the accident. But the word "arising out of employment" are wide enough so as to cover the case where they may not necessarily be a direct connection between the injury caused as a result of an accident and the employment of the workman. And there may be circumstances attending the employment which would got to show that the workman received personal injury as a result of the accident arising out of employment.

The following illustrative cases would further explain the scope of the phrase 'arising out of the and in the course of employment'.

I. Death of a workman of a salt manufacturing Company during routine check, in changing some person who were tempering salt obviously caused during the course of employment. His widow is entitled to compensation. Gurunath Vs. Gannemma1980 A.L.T.91.

II. The appellant Bombay Electricity supply and Transport Committee conducts the transport service. Drivers of the Committee given free transport facilities in buses belonging to them from the Depot to their houses and vice verse. A driver met with an accident while going home on committee bus. Accident held occurred during the course of employment and therefore claimant entitled for the compensation. B.E.S.T. undertaking VS. MRS SGNES A.I.r..1964 S.c.193.

III. The Act which resulted in the injury should not be foreign to the employment . a workman was employed as a coolie on truck. While going in the truck he saw a rabbit running across the road. He attempted to hit it. In doing so he fell down and died. There was non nexus between the act which results in the injuries and the works for which he was employed . the employer is not liable to pay compensation. KODURI ATCHAYYAMMA Vs. Palangi Achamma 1969(1) An. W.R.535.

IV. An skilled worker in an oil kicked the belt of the moving pully of groundnut crushing machine to stop its working in the best interest of his employer as the supply of the groundnut was

finished, and met with an accident. The employer was found guilty of negligence in not complying with safety rules under the FACTORIES Act. It was held that the accident arose out of an in the course of employment.

M/s JAYATHILLA DHANJI AND CO. OIL MILLS Vs E.S.I. CORPN A.I.R. 1963 A.R. 210.

11.7 DOCTRINE OF NATIONAL EXTENSION OF EMPLOYER'S PREMISES

As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. It is now well settled, however, that this is subject to the theory of national extension of the employer's premises so and in leaving the actual place of work. There may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of national extension.

The following cases would illustrate the point :

I. A workman employed in a salt works while returning home after finishing his work at Mill had to go by a public ferry boat. While acrossing, the boat capsized due to bad weather, and as a result he drowned.

As a rule the employment of a workman does not commence until he has reached the place of employment, and does not when he has left the place of employment, the journey to and from the place of employment being excluded.

It was held that the accident had not arisen out of and in the course of employment 'SAURASHTRA SALT MFG Co., Vs, BAI VALU RAJU A.I.R. 1958(S.C.) 881.

Thus, whether the accident arose out of and in the course of employment or not is a question of fact depending on the facts of circumstances of each case.

11.8 AMOUNT OF COMPENSATION

The amount of compensation to be paid according to section – 4 is as follows:

(a) In case of death : The amount of compensation to be paid accord . An amount equal to 40% of the monthly wages of the deceased workmen multiplied by the relevant factor or RS. 20,000/- whichever is more.

(b) In case of permanent total disablement : 50% of monthly wages multiplied by the relevant factor or RS.24,000/- which ever is more. Relevant factor is given schedule IV with reference to the age at which the accident occurs.

(c) In the case permanent partial disablement : Injuries specified in part II of schedule I.

(I) such percentage of compensation which could have been payable in the case of permanent total disablement as is specified there in as being the percentage of the loss of earning capacity caused by that injury.

(II) In case of an injury not specified in schedule I, such percentage of the compensation payable in the case of prominent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified Medical Practitioner) permanently caused by the injury.

(d) In case of Temporary Disablement Total of Partial : A half monthly payment of the sum equivalent to 25% of monthly wages of the workman to be paid as specified. According to section- 6 this half monthly payment is periodical review on application.

According to section-4A the compensation as indicated above has to be paid by the employer as soon as it falls due. If not paid in the month from due date the commissioner may order payment of simple interest at 65 and if there is not justification for delay, as further sum not exceeding 50% of such amount by way of penalty.

Even where the employer contest his liability, he has to make provisional payment to the extent he accepts and that amount must be deposited with the commissioner.

According to section – B the employer should not make and direct payment but only deposit the amount with the commissioner. The compensation payable under this section is not assignable, attached or charged under section –9.

11.9 CLAIM FOR COMPENSATION

The claim for compensation should be made with in 2 years. Commissioner if there is sufficient cause. The notice should have details of the claimant and injury in ordinary according to section 10.

The commissioner according to section- 10 has the power to require from the employer by sending a notice statements regarding Fatal accident with in 30 days of notice.

Section – 10B imposes a duty on the employer to report to the commissioner with in 7 days of occurrence of either death or serious bodily injury of the circumstances attending the death or serious bodily injury.

According to section-12 contractual workman are also entitled for compensation in the contractor is given work which is ordinary part the trade or business of the principal the principal employer to arrange is entitled to be indemnified by the contractor.

Section – 11 ordains an employer to arrange for medical examination of the injured workman.

11.10 COMMISSIONER

Application (section – 20)

The state government may appoint any person as 'Commissioner' by giving official gazette notification. In case more than one was appointed, the area of operation and the distribution of business must also be specified. Such appointed person is a public servant.

Proceedings (section –21)

As far as possible the proceeding must be before a commissioner for the area in which the accident took place. A Commissioner can transfer a proceeding to another commissioner on the ground of convenience. The state government also has the power to transfer.

Application (section –22)

Application for compensation must be to the commissioner in the from prescribed accompanied by prescribed fee. The application must concisely state the circumstances of accident, the relief and the details of the parties.

Reference (section – 9)

All questions relating to payment of compensation must be settled by commissioner only in the absence of an agreement between the parties. No civil court has jurisdiction to deal with such questions.

11.11 POWER OF COMMISSIONER

1. Power of commissioner :

The following are the powers given to the commissioner

1. power to requirement any further deposit in case of fatal accident where sum has already been deposited (section – 22A)
2. power to determine the amount of compensation (section – 22A)
3. powers of civil court (section-23).
4. Power to submit any question of law to High Court (section-27)

2. Appearance :

The person whose presence is required for examination as a witness must appear in person and all other may appear by a legal practitioner or an official of an insurance company or an inspector or any authorized person(section –24)

3. Evidence :

Evidence shall be recorded by the commissioner in the form of a brief memorandum of substance and signed by him. The evidence of a medical witness shall be taken as nearly as possible word by word (section-28)

4. Registration of agreements :

Where the amount of and compensation has been settled by agreement shall be sent by the employer to the commissioners and he shall record and register it (section-28)

Failure to register the agreement would result in the employer being liable to pay the full amount of compensation which he is liable to pay and more than half of any amount paid to the workman under agreement or otherwise cannot be deducted by the employer (section-29)

5. Appeal :

Appeal can be preferred to high court with in 60 days; the circumstances in, which in appeal can be preferred, are specified in (section-30)

6. Power to make rules :

The state Government had been conferred with power to make rules under the Act in section –32. The rules made must be published by the state government and on publication they have effect as it enacted in the Act (section –36).

7. Penalties :

The employer shall be punishable with fine which may extend to Rs.500/- in case of:

(i) Failure to maintain a notice book in the prescribed format which shall be readily accessible to any injured workman employed on that premises and to any person acting on his behalf.

(ii) Failure to submit a statement in the prescribed form to the commissioner indicating the circumstance attending the death of the workman, inspire of the notice served by the commissioner.

(iii) Failure to submit returns to the state Government specifying the number of injuries in respect of which compensation has been paid by the employer during the previous year and to amount of such compensation.

(iv) Failure to send a report under section –108.

11.12 CONCLUSION

The enactment of the Workmen's Compensation Act, in the year 1923, opened a new phase in the lives of the workmen to achieve the ideals of social security and natural justice. The various amendments to the Act, from time to time imposed fetters on the employees misdeeds to avoid their liability to pay compensation in the event of an injury or death suffered by a workman in the course of employment. The amount of compensation payable to a worker under the Act is not dependent on the negligence of the employer, or not a remedy for the employer's negligence. It is in the interest of the workmen against the risks of an accident in the way of insurance.

This act overrides the old doctrines of assumed risks, common employment, contributory negligence, and the end of personal actions with the death of the workmen. According to the provisions of the Act, the compensation paid to a workman is independent of any negligent or wrongful act on the part of his master or his master's servant. This means the liability to compensation

under the Act is outside the purview of the law of tours. It is only a liability that arises out of the relationship o master and servant. The Act has its roots from the concept of charity, sympathy and follows the ideals of social justice in order to keep pace with the principles of mankind or human rights. However, the liberal interpretation of the act should not contravene with the fundamental law of the land. This act applies to whole of India including the State of Jammu and Kashmir. The provision of excluding the State of Jammu and Kashmir from the original enactment of the Act, was omitted in the year 1970 and also extended to it.

11.13 SELF ASSESSMENT QUESTIONS

1. Explain object of workmen's compensation Act'1923.
2. Define Total disablement and workman as per the act.
3. Explain powers of commissioner.

11.14 FURTHER READINGS

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LESSON : 12

EMPLOYEE'S STATE INSURANCE ACT, 1948

12.0 OBJECTIVE:

The objective of this lesson are to educate the reader about the historical background of the Employees' State Insurance Act; Objectives with which the Act has been enacted; Scope and coverage of the Act; Definitions of the terms used in the text; Constitution of the Employees' State Insurance Corporation and Standing Committee; Powers and duties of the Corporation and Standing Committee; Medical Benefits Council; and Constitution of Employees' State Insurance Fund.

STRUCTURE

12.1 Introduction
12.2 Objects and Application
12.3 Definitions
12.4 Employment Injury
12.5 Benefits Available under this act
- **12.5.1 Sickness Benefit**
- **12.5.2 Maternity Benefit**
- **12.5.3 Disablement Benefit**
- **12.5.4 Dependent's Benefit**
- **12.5.5 Medical Benefit**
- **12.5.6 Funeral Expenses**

12.6 General Rules concerning benefits
12.7 Adjudication of disputes and claims
12.8 Constitution of employees insurance court
12.9 Jurisdiction of the employees Insurance court
- **12.9.1 Questions or Disputes**
- **12.9.2 Claim**

12.10. Institution of proceedings
12.11. Commencement of proceedings
12.12. Powers of employees insurance court
12.13 Appearance by legal practitioners, etc. before insurance court
12.14 Reference to High court
12.15 Appeal
12.16 Stay of payment pending appeal
12.17 Punishment and punitive action

12.18 Conclusion
12.19 Self Assessment Questions
12.20 References and Further Readings

12.1. INTRODUCTION

The Employees' State Insurance Act, 1948 is a piece of social welfare legislation enacted primarily with the object of providing certain benefits to employees in case of sickness, maternity and employment injury and also to make provisions for certain other matters incidental thereto. The Act in fact tries to attain the goal of socio-economic justice enshrined in the Directive Principles of State Policy under Part IV of the Constitution, in particular articles 41, 42 and 43 which enjoin the State to make effective provision for securing the right to work, to education and public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of any undeserved want to make provision for securing just and human conditions of work, and maternity relief and to secure by suitable legislation or economic organisation or in any other way, to all workers, work, a living wage, decent standard of life and full enjoyment of leisure and social and cultural activities. The Act strives to materialise these avowed objects though only to a limited extent. Broadly, the benefits provided by the Act to insured persons or their dependants are :

(i) Periodical payment in case of sickness of the insured person, (sickness benefit); (ii) periodical payment to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy confinement premature birth of child or miscarriage (maternity benefit); (iii) periodical payment to an insured person suffering from disablement as a result of an employment injury (disablement benefit) ; (iv) periodical payment to dependents of an insured person who dies as a result of an employment injury (dependents benefit); (v) medical treatment for an attendance on insured person (medical benefit) , and (vi) payment for expenditure on the funeral of the insured person (funeral expenses). Here employment injury includes occupational diseases, and disablement may either the temporary or permanent, whether total or partial.

This Act covers a wider spectrum than the Factories Act in the sense that while the Factories Act concerns with the health, safety, welfare, leave, etc. Of the workers employed in the Factory premises only, the benefits of this Act extend to employees whether working inside the Factory or establishment or else where or they are directly employed or employed by the principal employer or through an intermediate agency, if the employment is incidental or in connection with the work in the Factory or establishment, meaning there by, and the Act it is not the place of work but the nexus between the work and the Factory or establishment to which the Act is extended is material.

Extensive regulations have been framed under the Act to identify the employees who would be entitled to the benefits. The employees are to be registered and their contribution cards and identity card are to be prepared. An employee therefore has to be identified in the records of the Employees State Insurance Corporation so that he is entitled to claim various benefits.

An elaborate machinery is provided for the effective administration of the Act, the apex body being the E.S.I. Corporation, subordinate top which of the standing committee and medical benefit

council. The corporation is a public corporation controlled and subsidized by the government for the benefits of the employees, its object being wandering service to a penurious section of the public. The funds required for functioning of the scheme are raised from contributions both of employers and employees, grants, donations and gifts from governments, local bodies, individuals or bodies whether corporate or not (ESI Fund). For adjudication of disputes and claims employees Insurance courts are being created. Provision for recovery of contribution, penalty and damages for the fault, prosecution and punishment, etc, have also been provided.

The ever – expanding industrial horizon and reciprocal uprising of labour consciousness necessitate the employer and employee to the conversant with the current labour legislation that govern their relationship, rights and obligations. This part, comprising the ESI Act, 1948 with short comments .

12.2. OBJECTS AND APPLICATION

The object of this Act is to provide for certain benefits to employees in cases of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto as the preamble to this Act reflects. The object of the Act is to evolve a scheme of socio-economic welfare, making elaborate provisions in respect of it.

The provisions of this Act apply, in the first instance to all factories including belonging to the Government other than seasonal factories. Wide powers have been conferred upon the appropriate Governments to extend the provisions of this Act or any of them, to any other establishments, industrial, commercial, agricultural or otherwise after giving six months notice of its intention of so doing by notification in the Official Gazette.

12.3. DEFINITIONS

In this Act, unless there is anything repugnant in the subject or context,

"appropriate Government" means, in respect of establishments under the control of the Central Government or (a railway administration) or a major port or a mine or oilfield, the Central Government, and in all other cases, the State Government.

"Confinement" means labour resulting in the issue of a living child or labour after twenty six weeks of pregnancy resulting in the issue of a child whether alive or dead;

"Contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act;

"Corporation" means the Employees' State Insurance Corporation set up under this Act;

"Dependant" means any of the following relatives of a deceased insured person, namely:

(i) A widow, a minor legitimate or adopted son, an unmarried legitimate or adopted.

(ii) If wholly dependant on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of eighteen years and is infirm.

(iii) If wholly or in part dependant on the earnings of the insured person at the time of his death.

a) a parent other than a widowed mother

b) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor.

c) a minor brother or an unmarried sister or a widowed sister of a minor.

d) a widowed daughter in-law

e) a minor child of a pre-deceased son,

f) a minor child of a pre-deceased daughter where no parent of the child is alive, or

g) A paternal grand-parent, if no parent of the insured person is alive;

“Employment injury’ means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

“Employee” means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and

(i) Who is directly or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) Who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) Whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire as entered into a contract of service;

(and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment. Or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include.

(a) Any member of (the Indian) naval, military or air forces; or

(b) Any person so employed whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) a month.

Provided that an employee whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of the period;

"Exempted employee" means an employee who is not liable under this Act to pay the employee's contribution;

"family" means all or any of the following relatives of an insured person, namely.

(i) A spouse

(ii) A Minor legitimate or adopted child dependant upon the insured person.

(iii) A child who is wholly dependant on the earnings of the insured person and who is

 (a) receiving education, till he or she attains the age of twenty-one years.

 (b) An unmarried daughter;

(iv) A child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependant on the earnings of the insured person, so long as the infirmity continues;

(v) Dependant parents;

"Immediate employer", in relation to employees employed by or through him means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer (and includes a contractor).

"Insurable employment" means an employment in a factory or establishment to which this Act applies.

"Insured person" means a person who is or was an employee in respect of whom contributions are on were payable under this Act and who is by reason thereof, entitled to any of the benefits provided by this Act.

"Occupier: of the factory shall have the meaning assigned to it in the Factories Act.

Permanent partial disablement" means such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

"Permanent total disablement" means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident in such disablement,

Principle employer means

(i) In a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under (the factories Act, 1948 (63 to 1948_, the person so named;

(ii) In any establishment under the control of any department of any Government in India, the authority appointed by Such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) In any other establishment, any person responsible for the supervision and control of the establishment;

"Sickness" means a condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds;

"Temporary disablement" means a condition resulting from an employment injury which requires medical treatment and renders an employee as a result of such injury, temporarily incapable of (doing the work which he was doing prior to or at the time of the injury).

"Wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes (any payment to an employee in respect of any period of authorised leave, lock-out , strike which is not illegal or lay-off and) other additional remuneration, if any, (paid at intervals not exceeding two months), but does not include.

(a) Any contribution paid by the employer to any pension fund or provident fund, or under this Act.
(b) Any travelling allowance or the value of any travelling concession;
(c) Any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
(d) Any gratuity payable on discharge.

"wage period" in relation to an employee means the period in respect of which wages are ordinarily payable to him whether in terms of the contract of employment, express or implied or otherwise.

All other words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947 (14 of 1947) shall have the meanings respectively assigned to them in that Act.

12.4. EMPLOYMENT INJURY

The term employment injury covers both industrial accidents and occupational diseases. The accidents may result in total and partial disablement or even in death. Section 2 (8) which comes under definition of employment, injury provides that employment injury means a personal injury to an empty caused by accident or an occupational disease arising out of and in the course of his employment being an insurable employment whether the accident occurs or the occupational disease is contract within or outside the territorial limits of India.

12.5. BENEFITS AVAILABLE UNDER THIS ACT

Benefits available under this Act.- The E.S.I. Act, one of the most important social legislation had been enacted to provide for various benefits in different contingencies such as employment injury, sickness and maternity. The scheme contained under E.S.I. Act makes provisions for the following benefits :

(1) Sickness benefit;
(2) Maternity benefit;
(3) Disablement benefit;
(4) Dependent's benefit;
(5) Medical benefit ; and
(6) Funeral expenses.

12.5.1. Sickness benefit - A periodical payment to any insured person in case of his sickness certified by a duly appointed medical practitioner or by any person possessing such qualifications and experience as the Corporation may, by regulations, specify in this behalf, is sickness benefit and hereinafter it is referred to as such.

As indicated earlier, sickness means a condition which requires medical treatment and attendance and necessities abstention from work on medical grounds. Thus sickness for the purpose of this Act requires, first that employee must be in such a condition which requires medical treatment. Secondly, he requires that someone should attend him and thirdly it is necessary that he must abstain from doing work on medical grounds. Thus any person who does not require any assistance and treatment and who is not advised to take rest cannot claim sickness benefit under the Act. It excludes very short illness lasting less than two days for which usually no sickness benefits is paid.

It may be noted that the Section 47 dealing with eligibility for sickness benefit has been omitted by amendment made in 1989 and Section 49 has been substituted providing that qualification of a person to claim sickness benefit, conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government. It may also be noted that the First Schedule prescribing the rates of benefits available under the Act has also been omitted. Now the rates are to be prescribed by the Central Government.

A claim for sickness must be supported with a medical certificate given by an Insurance Medical Officer. However, the Corporation may accept any other evidence of sickness if in its

opinion the circumstances of any particular case so to justify. If he fails to submit medical certificate within the period of 3 days from the date of its issue, he shall not be eligible for that benefit, unless the relaxation is granted by the appropriate authority.

During the sickness benefit the recipient must observe the following conditions :

(1) A person who is in receipt of sickness benefit shall remain under medical treatment at a dispensary, hospital, clinic or other institution provided under this Act and shall carry out the instructions given by the Medical Officer or Medical Attendant Incharge thereof;

(2) Recipient shall not, while under treatment, do anything which might retard or prejudice his chances of recovery;

(3) The recipient shall not leave the area in which medical treatment provided by this Act is being given, without the permission of Medical Officer, Medical Attendant or such other authority as may be specified in this behalf by the Regulations; and

(4) He shall allow himself to be examined by any duly appointed Medical Officer or any other person authorised by the Corporation in this behalf. It may be pointed out that one who is recipient of sickness benefit has to observe these conditions otherwise this benefit may be suspended. Such suspension shall be for such number of days as may be decided by the authority authorised by Director General in this behalf.

12.5.2. Maternity Benefit- *(i) Concept and Justification-* Maternity is regarded now all over the civilized world as a natural function of woman of far-reaching social significance. It is also treated as a contingency and insecurity requiring proportion. In the social security systems of the different countries maternity benefits have been given conspicuous place. Generally the provision for maternity is made under sickness benefits but some countries have separate schemes for it. Maternity coverage is more extensive than sickness coverage.

The importance of this branch of social security has been internationally recognised just after the inception of International Organisation (I.L.O). I.L.O. adopted a convention in 1919 concerning the employment of women before and after child birth. The main provisions of this convention are as follows:

(1) Maternity Benefits Scheme should cover all the women employed in Industrial and Commercial undertakings irrespective of their maternity and status and child birth should enable the mother to maternity benefit whether the child is legitimate or illegitimate. A woman employee should have a right to a maternity leave of 12 weeks which should include compulsory leave of six weeks following her confinement. She should have a right to leave her work if she produces a medical certificate stating that her confinement will probably take place within six weeks.

During the 12 weeks of maternity leave she would be paid benefit sufficient for the full and healthy maintenance for herself and child, the exact amount of which shall be determined by the competent authority in each country.

(2) When a woman is entitled to a maternity benefit she should also be entitled to medical benefit comprising of free attendance of a doctor or a certified midwife. The maternity and medical benefit should be provided out of public funds or by means of a system of insurance, that is the responsibility of providing the benefits should not be left to rest with the employer.

(3) If a woman is nursing her child she should be allowed to half an hour recess twice a day during her working hours for feeding the child and these intervals should be regarded as period of work.

(4) There should be security of employment during pregnancy, confinement, illness arising out of pregnancy or confinement.

(5) Where a woman is absent from her work in accordance with above rules or remains absent from her work for a longer period as a result of illness medically certified to arise out of pregnancy or confinement and rendering her unfit for work, it shall not be lawful, until her absence shall have exceeded a maximum period for her employer to give her notice of dismissal during such absence.

In the year 1921, I.L.O. adopted a recommendation to the effect that each member should take measure to ensure to woman wage-earner employed in agricultural undertakings protection before and after child birth, similar to that provided by the Maternity Protection Convention, 1919.

The Income Security recommendation adopted by the I.L.O. in 1944 made some further recommendations regarding maternity benefits. It provided that if absence from work for a period becomes necessary on medical grounds having regard to the physical conditions of the beneficiary and exigencies of her work sickness benefit should be payable to her. This recommendation made a more emphatic recognition of the need for medical care by providing that the payment of maternity benefit may be made conditional on the utilization by the beneficiary of health services provided for her and her child. It also lays down that maternity benefit should not be less than 100% of the current net wage for female unskilled workers or 75% of previous net earning of the beneficiary whichever is greater, but may be reduced by the amount of any child allowance payable for any child. It also provided that extra benefit should be paid in respect of extraordinary expenses incurred in case of sickness, maternity and invalidity and death. The Regional Conference of I.L.O. also has adopted a resolution in 1939 which lays down that besides various provisions as indicated above a pregnant woman should be allowed every possible facility for changing her work if the usual work performed by her is prejudicial to her health, terminate her contract of employment at any time without notice, etc.

The Government of India was not in a position to ratify the Maternity Protection Convention of I.L.O. in 1919, chiefly owing to the impossibility of enforcing the compulsory periods of absence from work, the shortage of medical woman who would be necessary for issuing medical certificates, the impracticability of compulsory contribution schemes to provide benefits and the absence of need for provision regarding nursing periods and for the protection of women from loss of employment during pregnancy.

In spite of this attitude of the Central Government, the Provisional Governments, however, passed Maternity Benefits Acts starting with Bombay lead in 1920. The Central Government also passed the Mines maternity Benefit in 1941 for the women employed in Mines. The E.S.I. act, 1948, also provides for maternity benefit. Legislation of the State concerned ceases to be operative further.

The Employees' State Insurance Scheme provides benefits against maternity, insecurity of danger to life and death of the mother and child arising out of miscarriage, confinement, still and premature birth and sickness or disease due to pregnancy.

The justification for maternity benefit is two-fold :-

(1) To protect the health of mother and her child; and
(2) To alleviate part of the financial hardship caused by the birth of a child.

Statutory Definition of Maternity Benefit - Periodical payments to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement, premature birth of a child or miscarriage, such women being certified to be eligible for such payments by an authority specified in this behalf by the regulations is hereinafter referred to as Maternity Benefit. So far as qualifying conditions for the entitlement to Maternity Benefit are concerned they are same as in case of sickness benefit. Maternity Benefit becomes due on the date of issue of certificate of pregnancy or if no certificate of pregnancy is issued on the date of confinement or on the day 6 weeks preceding the expected day of confinement. The benefit is payable from the date from which it is claimed provided that such date does not precede the expected date of confinement by more than 42 days. Benefit is paid subject to the condition that the beneficiary does not take any work for remuneration. Disqualification to maternity benefit may also arise if the insured woman failed to attend or submit herself to medical examination without sufficient reason.

However, it may be noted that Section 50 which contained all these provisions has been substituted in 1989. Section 50 as it now stands provides that the qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government .

(iii) Contingencies under which it is payable – As indicated above, the maternity benefit is payable for (a) confinement, (b) miscarriage, (c) sickness arising out of pregnancy confinement, premature birth of child, or miscarriage, and (d) death.

It would be desirable to discuss these situations which she is entitled to maternity benefit.

(a) Confinement. – The term 'confinement' has been defined under Section 2(3) of this Act. According to it, confinement means labour resulting in the issue of a living child, or labour after 26 weeks of pregnancy resulting in the issue of a child whether alive or dead. This definition clearly indicates that labour resulting in the issue of a living child is covered under confinement and labour resulting in the issue of child-whether alive or dead-is covered under confinement only when such delivery takes place after 26 weeks of pregnancy.

(b) Miscarriage. – According to Section 2(14-B) of E.S.I. Act, miscarriage means the expulsion of the contents of a pregnant uterus at any period to or during the 26th week of pregnancy but does not include any miscarriage, the causing of which is punishable under the Indian Penal Code. If the definitions of 'miscarriage' and 'confinement' are read together it becomes clear that if expulsion of contents of the uterus takes place after 26 weeks, labour resulting therein is known as confinement and if it occurs at any period prior to or during the 26th week of pregnancy it is known as miscarriage. An insured woman who is qualified to claim maternity benefit in accordance with Section 50 shall in case of miscarriage be entitled to maternity benefit at the rates and for such duration and subject to such conditions as may be specified by the Central Government in this behalf.

Really speaking the incidence of miscarriage and abortion is higher for woman employed in Industries than other woman. Such occasions, besides causing economic loss and physical sufferings, like that of normal confinement also upset the woman emotionally. In most of the countries the contingency of maternity, besides pregnancy and confinement also includes their probable consequences. In India only U.P. and Punjab Maternity Benefit Acts make a provision in this respect. The U.P. Maternity Benefit Act provides for three weeks' leave with pay from the day of miscarriage and in Punjab a woman is entitled to maternity benefit for a period of 43 days in case of miscarriage or abortion provided that she has at least six months service at her credit.

It would be worth mentioning that no woman can claim Maternity Benefit for miscarriage causing of which is punishable under Indian Penal Code because an intentional miscarriage amounts to an offence punishable under the provisions of the Indian Penal Code.

(c) Sickness arising out of pregnancy, confinement, premature birth of child or miscarriage. - E.S.I. Scheme provides special protection to working women in industrial establishments to which the provisions of this Act apply for maintenance of their health and newly-born child. The sickness arising out of pregnancy, confinement, premature birth of child or miscarriage entitles to an insured woman, in addition to maternity benefit payable to her under any provisions of this Act, for all days on which she does not work for remuneration to maternity benefit at the rates specified.

As a matter of fact, confinement as defined by the provisions of this Act covers contingencies of premature birth as well. If a child is born alive after full period of pregnancy it is mature birth, and if the child is born after 26 weeks of pregnancy it is premature birth-whether alive or dead-and an insured woman is entitled to claim maternity benefit in all such contingencies.

(d) Death. – Some times it so happens that an insured woman dies during her delivery or during the period immediately following the date of her delivery for which she is entitled to maternity benefit. It may happen that she may expire leaving behind the surviving child and sometimes the unfortunate event of death of both child and mother may occur. In all such contingencies an insured woman is entitled to maternity benefit. The maternity benefit shall be paid for the whole of that period as indicated above, but in the latter event, i.e., if the child also dies during the said period then maternity benefit shall be paid for the days upto and including the day of the death of the child. It means that if the mother dies on the date of the delivery of the child and the child survives for 30 weeks, the maternity benefit shall be paid up to the date of child's death. In such an event maternity benefits are to be paid by the

authorities concerned to the person nominated by the insured woman in such a manner as may be specified in the regulations and if there is no such nominee such benefits are paid to her legal representative.

These provisions were contained in Section 50 which has been substituted in 1989, thus now sanction of the Central Government is required for their operation for which substituted Section 50 authorities the Central Government to lay down qualifying conditions, duration and rates, etc. for the purpose.

In 1996 ESI (Central) 1950 have been amended and now Rule 56-A has been inserted which provides that medical bonus to an insured woman and an insured person in respect of his wife shall be paid a sum of Rs.250/- per case as medical bonus on account of confinement expenses : provided that the confinement occurs at a place where necessary medical facilities under the ESI Scheme are not available.

There are special safeguards and protections provided to working women in the industrial establishments to which the provisions of this Act apply. However, in all such events the claimant certificate is required for such contingencies in the form and manner as laid down in the regulations.

(iv) Disqualifications for Maternity Benefit – An insured woman may be disqualified from receiving maternity if (1) she fails without good cause to attend for; or (2) to submit herself to medical examination when so required and such disqualification shall be for such number of days as may be decided by the authority authorised by the Corporation in this behalf. However, she may refuse to be examined by other than a female doctor or midwife.

12.5.3. *Disablement Benefit.* – An accident is an unfortunate occurrence resulting in cessation of work by worker or a group of worker. More often than not, every accident also inflicts on worker. The E.S.I. Scheme provides for benefits to be paid to persons who are covered under this scheme. The workers who sustain employment injury as defined under the provisions of this Act and discussed earlier, are entitled to claim benefits. Periodical payment to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act, certified to be eligible for such payments by an authority specified in this behalf by regulations, is referred to as the disablement benefit.

Section 51 of E.S.I. Act provides for disablement benefit in case of temporary and permanent disablement. The disablement benefit shall be payable to an insured person. The amended Section 51 makes provisions for the disablement benefit in two contingencies :

(1) Where a person sustains temporary disablement for not less than three days excluding the day of accident ;

(2) Where a person sustains permanent disablement, whether total or partial.

The rate and the conditions of eligibility were governed by first Schedule before amendment made in 1989 but now the First Schedule and some provisions of old Section 51 have been omitted.

In place of these provisions now the Central Government has been empowered to prescribe rates, periods and conditions subject to which such benefit shall be payable.

The claimants of disablement benefit have to observe certain conditions laid down for recipient of sickness benefit regarding treatment and rest as directed by the physician. However, such conditions are not to be observed by the persons who are entitled to benefit on account of permanent disablement.

It would be desirable to discuss the definition and requirements of permanent total disablement and permanent partial disablement since the disablement benefit is payable under these situations.

(i) *Permanent total disablement.* – Permanent total disablement means such disablement of a permanent at the time of the accident resulting in such disablement. Thus when an employee sustains injury and becomes incapable permanently to perform duties which he was capable to perform at the time of the accident, he is said to be in the condition of permanent total disablement.

Thus the essence of permanent total disablement is first, that the employees becomes permanently incapable to perform duties and secondly there is loss of earning capacity totally, that is, loss of earning amounts to one hundred percent or more.

Thirdly, it reduces the earning of an employee in every employment which he was capable of undertaking at the time of accident Fourthly, the accident by which such an injury has been sustained by an employee has arisen out of and in the course of this employment

It would be worth mentioning that the injuries specified in Part I of Second Schedule are deemed to result into permanent total disablement. Some of the specified injuries therein are for example,(a) loss of both hands, (b) loss of hand and a foot, (c) very severe facial disfigurement, (d) absolute deafness.

Any combination of injures specified in Part II of the Second Schedule are deemed to result into permanent total disablement where aggregate percentage of loss or earning capacity amounts to one hundred per cent or more, for example.

1. Loss of a hand or of the thumb and four fingers of one hand or amputation from 11.43 c.m. below tip of olecranon –loss of earning capacity 60%
2. Amputation through shoulder joint, loss of earning capacity 90%

Total loss of earning capacity 150%

It makes clear that in such a case these injures result into permanent total disablement.

(ii) ***Permanent Partial Disablement.*** – It means such disablement of permanent nature, as reduces earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement. It is further provided that every injury specified in Part II of the Second Schedule shall be deemed to result in

permanent partial disablement. However, if due to injures more than one, it reduces the earning capacity up to 100% or more the disablement becomes Permanent Total Disablement. The point of distinction between them is that in permanent total disablement there is total loss of earning capacity that is loss of earning capacity up to 100% or more whereas in Permanent Partial Disablement there is loss of earning capacity below one hundred per cent. In other words, in Permanent Partial Disablement the earning capacity is reduced only and it does not turn into capacity. Thus percentage of loss of earning capacity is the distinctive feature on the basis of which both of which both types of disablement may be distinguished.

(iii) Temporary Disablement. - It means a condition resulting from an employment injury which requires medical treatment and reduces an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of injury. It makes clear that in temporary disablement employee becomes incapable to work or perform his duties of a limited period which he was doing before such injury. After treatment the person becomes fit for doing his work. The E.S.I. Act does not specify conditions of temporary disablement because the affected person due to injury becomes fit for work after proper treatment.

12.5.4. Dependent's Benefit. – The individualistic character of the family and the want of income yielding property or family occupation causes economic insecurity for the members of a worker's family in case he dies a premature death. With human life there is an asset value; the life of bread-winner is the biggest asset often the only asset of the average family of the industrial workers. The death of its bread-winner is the greatest calamity that can befall. The family at once sinks below the poverty line and hence flows a train of evils. It is this that is largely responsible for putting women in factories when they should have been in homes and the children on the streets when they should have been at school.

The only rational way to compensate the survivors for the death of their bread-winner is to pay them a pension. In the case of dependent young persons, it should continue till they are able to support themselves and the widow should be given a pension for life or till she remarries. The E.S.I. Act provides for dependent's benefit which is in the form of pension payable to the dependents of the deceased workers at the specified periodical intervals. Periodical payments to such dependents of an insured person, is hereafter referred to as dependent's benefit.

(1) Section 52 (1) of E.S.I. Act, 1948, provides that if an insured person dies as a result of an employment injury sustained as an employee under this Act, whether or not he was in receipt of any periodical payment for temporary disablement in respect of the injury dependent's benefit shall be payable at such rates and for such periods and subject to such conditions as may be prescribed by the Central Government to his dependents specified in Section 2(6-A) of the Act.

(2) In case the injured person dies without leaving behind him the dependents as aforesaid, the dependent's benefit shall be paid to the other dependents of the deceased as prescribed by the Central Government. In view of the above provisions, it may be pointed out that dependent's benefit is payable to the dependents of the deceased workers in case he dies

on account of employment injury which includes not only accidents but also occupational diseases arising out of and in course of his employment.

For the purposes of this section, dependent means any of the following relatives of a deceased insured person, namely :

(i) a widow, minor legitimate or adopted son, an unmarried legitimate or adopted daughter ;
(ii) a widowed mother;
(iii) if wholly dependent on the earning of the insured person at the time of his death, a legitimate or a adopted son or daughter who has attained the age of 14 years and is infirm;
(iv) if wholly or in part dependent on the earnings of the insured person at the time of his death;

    (a) a parent other than a widowed mother,
    (b) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor,
    (c) a minor brother or an unmarried sister or a widowed sister if a minor,
    (d) a widowed daughter-in-law,
    (e) a minor child of a pre-deceased son,
    (f) a minor child of a pre-deceased daughter where no parent of the child is alive, or
    (g) a paternal grandparent if no parent of the insured person is alive.

These are the personal who are considered to be dependents of an insured deceased worker. In case of the death of the insured person, the dependent's benefit shall be payable to them as prescribed by the Central Government. The First Schedule in which rules governing rates and proportion of the amount of this benefit payable to different categories of the dependents were contained, has been omitted, now all such matters shall be governed as may be prescribed by the Central Government in this behalf.

Conditions for dependent's benefit

In view of the above discussion and on the basis of analysis of the provisions of Section 52, the following conditions are necessary for application of Section 52 :

(1) The person whose dependents are entitled to get benefit must be insured ;
(2) His death must have occurred as a result of employment injury sustained as an employee under this Act. However, it is immaterial whether or not he was in receipt of any periodical payment for temporary disablement;
(3) The person must prove beyond doubt that he is one of the dependents of the deceased worker as specified in Section 2 (6-A);
(4) The employment injury on account of which the worker dies must have arisen out of and in the course of his employment.

Review of Dependent's Benefit. – Any decision awarding dependent's benefit may be reviewed at any time by the Corporate if it is satisfied by fresh evidence that the decision was given in consequence of non-disclosure or misrepresentation by the claimant or any other person of a material fact whether the non-disclosure or misrepresentation was not or was fraudulent or that the decision is no longer in accordance with this Act due to any birth or death or due to the marriage, remarriage or Caesar of infirmity of, or attainment of the age of 14 years by, a claimant.

Subject to the provisions of E.S.I. Act, the Corporate may, on such review as aforesaid direct that the dependents' benefit be continued, increased, reduced or discontinued. The Corporation has been empowered to review the decisions taken earlier for award of dependent's benefit in order to provide relief in cases where decision has been taken in consequence of non-disclosure of material fact or misrepresentation of material fact, secondly, if the circumstances have changed due to birth or death or marriage or re-marriage of infirmity or attainment of majority.

12.5.5. Medical benefit. – The first need of a sick or injured person is the alleviation of his physical suffering by proper medical care. He must be cured of his ailment and restores to his normal health as rapidly as possible. Health is the most precious asset of the wage earner. No amount of cash payment can adequately compensate for its loss. Ill-health is a permanent drain on the meager earnings of an individual; medical benefit; therefore, forms an integral part of insurance benefit and is more important than the cash payment made to compensate the loss of earnings. In fact, the pecuniary compensation which aims at shielding the patient from the most material cases only submits as a supplementary factor side by side with medical assistance. The maintenance of a healthy and vigorous labour supply is of capital importance not only for the workers themselves, but also for communities which desires to develop their productive capacity.

The medical care recommendation of I.L.O. provides that a medical care service should meet the need of the individual for care by the members of the medical and allied professions and for such other facilities as are provided at medical institutions.

(A) With a view to restoring the individual's health, preventing the further development of diseases and alleviating suffering when he is afflicted by ill-health (curative care);

(B) With a view to protecting and improving his death (preventing care).

The Universal Declaration of Human Rights adopted in 1948 by United Nations General Assembly proclaimed the right of every one to medical care and so it recognised medical care principles contained in I.L.O. recommendations.

The provision for medical benefit has been made under E.S.I. Act, 1948 in accordance with the above I.L.O. Medical recommendations. The responsibility to provide medical benefit to the insured person is placed on the State Government which have to make arrangements for medical assistance etc. in consultation with the E.S.I. Corporation and according to the standards laid down by it. The State Government are not to bear the whole cost of medical care since the Corporate reimburses each State for a part of the expenditure incurred in providing medical care to the insured person under the Act. Medical treatment for an attendance on insured persons is hereinafter referred to as medical benefit.

(1) Section 56 of the E.S.I. Act, 1948 deals with the medical benefit and provides that an insured person or (where such medical benefit is extended to his family) a member of his family whose condition requires medical treatment and attendance shall be entitled to receive medical benefit.

(2) Such medical benefit may be given either in the form of out-patient treatment attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as in-patient in a hospital or other institutions.

(3) A person shall be entitled to medical benefit during any period for which contributions are payable in respect of him or in which he is qualified to claim sickness benefit or maternity benefit, or is in respect of such disablement benefit as does not disentitle him to medical benefit under the regulations.

Where a person in respect of whom contribution ceases to be payable under this Act may be allowed medical benefit for such period and of such nature as may be provided under these regulations :

Provided further that an insured person who ceases to be in insurable employment on account of permanent disablement shall continue, subject to payment of contribution and account of permanent disablement shall continue, subject to payment of contribution and such other conditions as may be prescribed by the Central Government, to receive medical benefit till the date on which he would have vacated the employment on attaining the age of superannuation had not sustained such permanent disablement :

Provided also that an insured person, who has attained the age of superannuation and his spouse shall be eligible to receive medical benefit subject to payment of contribution and such other conditions as may be prescribed by the Central Government.

Superannuation under this clause means the attainment of such age as is fixed in the contract or conditions of service as the age on the attainment of which the person concerned shall vacate the insurable employment or the age of 60 years where no such age is fixed and the person is no more in the insurable employment.

Conditions for Medical benefit. – Following are the conditions for application of Section 56 of the E.S.I. Act :-

(1) The claimant must be an insured person.

(2) The claimant must be in such a condition which requires medical treatment and attendance.

(3) The claimant must have paid his contribution for the period for which he requires medical benefit then and then only he shall be entitled to medical benefit during such a period; or he is qualified to claim sickness benefit; or she is entitled to claim maternity benefit or he is in receipt of such disablement benefit as does not disentitle him to medical benefit under the regulations.

(4) Medical benefit is given to the insured person and to his family, where it has been extended to cover family of an insured person.

Family means all or any of the following relatives of an insured person, namely-

(i) a spouse;

(ii) a minor legitimate or adopted child dependent upon the insured person;

(iii) a child who is wholly dependent on the earnings of the insured person and who is-

(a) receiving education. Till he or she attains the age of 21 years;

(b) an unmarried daughter;

(iv) a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues;

(v) dependent parents.

There is also no condition of a waiting period for medical benefit which an insured person is entitled to avail of as soon as he needs it. This mitigates to a great extent the hardships which might be caused to an insured person in case of sickness because of a condition of qualifying period and a waiting period, for a cash benefit. The imposition of a waiting period for medical benefit would, of course, be highly irrational because a sick person cannot be asked to wait and suffer for some time before he is qualified to receive medical care.

(5) A period intending to claim medical benefit and who is otherwise entitled to such benefit should produce his identify card or such other document as may have issued in lieu there at the time of claiming such benefit if demanded by the insurance medical officer and if he fails to do so, the medical benefit may be refused to him.

It may be pointed out that medical benefit may be extended to the families of the insured persons from such date as the Corporation may, in consultation with the State Government, notify. The nature and scale of medical benefit to which the family of an insured person shall be entitled shall be such as may be specified by the State Government in consultation with the Corporation from time to time.

The appropriate office shall arrange to prepare a family identify card for each insured person who is entitled to medical benefit for his family in Form 4-A, and shall send all such Identify Cards to his employer. Such employer shall obtain the signature or thumb-impression of the employee on the Family Identify card and shall deliver the same to the employee and obtain a receipt therefore. The family Identify Card shall not be transferable.

Scale of Medical Benefit. - According to Section 57 of the E.S.I. Act an insured person and (where such medical benefit is extended to his family) his family shall be entitled to receive medical benefit only of such kind and on such scale as may be provided by the State Government or by the Corporation, and an insured person or his family shall not have a right to claim any medical treatment except such as is provided by the dispensary, hospital, clinic or other institution to which he or his family is allotted or as may be provided by the Regulations.

But the patient is entitled to receive medical treatment and attendance in the form of out-patient treatment and attendance in a hospital or dispensary or clinic or other institution or by domiciliary visit or treatment as an in-patient in a hospital or other institution. Medical treatment is

also given to an employee who is in receipt of disablement benefit so long as he is in receipt of such benefit provided that after the disablement has been declared as a permanent disablement, the person shall not be entitled to medical benefit, except in respect of any medical treatment which may be rendered necessary on account of employment injury from which the disablement has resulted.

However, if a person suffering from any of the following diseases has been in conditions employment, before the commencement of the spell in which such disease was diagnosed for a period of two years or more, he shall be entitled to medical' benefit for two consecutive benefit periods in respect of diseases specified in Category 'A', such as T.B., Leprosy, mental diseases, malignant diseases, etc. and he shall be entitled to medical benefit for one consecutive benefit period in respect of diseases specified in category 'B', such as bronchitis and lung abscess, myocardial infraction, a plastic anaemia, etc. following the date on which he would otherwise cease to be entitled to medical benefit. However, it has been provided that nothing in this Act shall entitle an insured person and (where such medical benefit is extended to his family) his family to claim reimbursement from the Corporation of any expenses incurred in respect of any medical treatment, except as may be provided by the regulations.

The scale of benefit to be given to the patient under the scheme is laid down by the State Government.

There are various provisions under this Act pertaining to medical treatment by the State Government, establishment and maintenance of hospitals, etc. by Corporation, and in certain other conditions provisions for medical benefit by the Corporation in lieu of State Government.

The functioning of the medical arrangement under the scheme is neither satisfactory nor adequate. The medical benefit council which is the highest policy-making body in so far as medical benefits are concerned should review its policies and take necessary and proper steps to root out functional cancers from the scheme.

12.5.6. Funeral Expenses **-** besides benefits indicated earlier, E.S.I. Scheme provides for funeral expenses also under certain circumstances. Section 46(f) provides that payment to the eldest surviving member of the family of an insured person who has died, towards the expenditure on the funeral of the deceased insured person, or, where the injured person did not have a family or was not living with his family at the time of his death, to the person who actually incurs the expenditure on the funeral of the deceased insured person to be known as funeral expenses. Rule 59 of the ESI (Central) Rules, 1950 provides that the amount of funeral expenses shall be one thousand rupees.

For the application of Section 46(f), the following conditions must be fulfilled-

(1) the insured person must have died;

(2) the claimant must have incurred expenditure on the funeral of the deceased insured person;

(3) the claim for such payment shall be made within three months of the death of the insured person.

However, the period may be extended by the Corporation or any officer or authority authorized by it in this behalf. Generally speaking the eldest surviving member of the family is entitled to the funeral expenses; he has incurred expenditure on the funeral of the insured person otherwise the person, who has actually incurred expenditure on the funeral of the deceased insured person becomes entitled to such expenses.

The rules regarding funeral expenses have been substituted with effect from 15-6-1991, which provide in respect of issue of death certificate, submission of claims for funeral expenses, etc.

12.6. GENERAL RULES CONCERNING BENEFITS

(1) Benefits not assignable or attachable :

According to section 60 of the Act, the right to receive any payment of any benefit under this Act shall not be transferable or assignable. No cash benefit payable under this Act shall be liable to attachment or sale in execution of any decree or order of any court.

(2) Bar of Benefit under other enactments :

According to Section 61, when a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment

(3) Persons not to commute cash benefits :

Save as may be provided in the regulations, no person shall be entitled to commute for a lumpsum and disablement benefit admissible under this Act.

(4) Persons not entitled to receive payments in certain cases :

No persons shall be entitled to sickness benefit or maternity benefit or disablement benefit for temporary disablement on any day on which he works or remains on leave or on a holiday in a respect of which he receives wages or any day on which he remains on strike.

(5) Recipient of sickness or disablement benefit to observe conditions :

As indicated earlier the person concerned must observe conditions specified in Section 64 of the Act, regarding medical treatment.

(6) Benefits not to be combined :

An insured person shall not be entitled to receive for the same period:

(a) both sickness and maternity benefit; or
(b) both sickness and disablement benefit for temporary disablement, or
(c) both maternity benefit and disablement benefit for temporary disablement.

However, where a person is entitled to more than one of the benefits mentioned above, he shall be entitled to choose which benefit he shall receive.

12.7 . ADJUDICATION OF DISPUTES AND CLAIMS

In order to provide speedy remedy to the employees governed by the provisions of this Act. A provision has been made to establish independent court for the purposes of a adjudication of disputes and claims. The court constituted under the provisions of this Act is known as Employee's Insurance Court.

12.8. CONSTITUTION OF EMPLOYEES' INSURANCE COURT

The State Government has been empowered under section 74 of the Act to constitute Employees' Insurance Court by notification in the official gazette for such local area as may be specified in the notification. The court shall consist of such number of judges as the state Government may think fit. Any person who is or has been a judicial officer or is a legal practitioner of five years standing is qualified to be a judge of this court. It is discretion of the State Government to appoint the same court for two or more local areas or two or more courts for the same local area. However, where more than one courts are constituted for one and the same local area, the distribution of business between them may be regulated by the State Government by its general or special order.

The State Government has not only been authorised to constitute insurance courts under Section 74 but also to make rules in respect of such courts under section 96 of the Act after consultation with the Employees' State Insurance Corporation on matters specified therein such as the constitution of Employees' Insurance Courts, the qualifications of persons who may be appointed judges there of, the conditions of service of such judges, procedure to be followed in proceedings before such courts and the execution of orders made have such court and fee payable etc., The E.S.I.(Amendment) Act,1948 has amended section 96 inserting sub-section (3) namely, "Every ryle made under this section shall be laid as soon as may be after it is made introduced before each House of the State Legislature where it consists of two Houses, or, where such Legislature consists of one House, before that House".

12.9. JURISDICTION OF THE EMPLOYEES INSURANCE COURT

Section 75 deals with the jurisdiction of the Insurance Court. It provisions clearly indicates two categories of matters within the jurisdiction of this court, first category comprises of any question or dispute and second category consists of claim.

12.9.1. Questions or disputes

Any question or dispute relating to the following matters subject to provisions of Section 75(2-A) shall be within the jurisdiction of employees' Insurance Court and shall be decided in accordance with the provisions of the Act.-

(a) Whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee' contribution.

(b) The rate of wages or average daily wages of an employee for the purposes of this Act : or

(c) The rate of contribution payable by a principal employer in respect of any employee ; or

(d) The person who is or was the principal employer in respect of any employee;

(e) The right of any person any benefit and as to amount and the duration thereof; or

(ee) any direction issued by the Corporation under section 55-a on a review of any payment of dependents' benefit; or

(f) Committed by Act 44 of 1966].

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable on recoverable under this Act or any other matter required to be decided by the Employees' Insurance Court under this Act.

12.9.2. Claim

Subject to the provisions of Section 75(2-A) the following claims shall be decided by the Employees' Insurance Court namely :

(a) claim for the recovery of contribution from the principal employer;

(b) claim by a principal employer to recover contributions, from any immediate employer;

(c) claim against a principal employer under section 68;

(d) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(e) claim for the recovery of any benefit admissible under this Act.

12.10. INSTITUTION OF PROCEEDINGS

Section 76 of the Act makes following provisions in regard to institution of proceedings in the Employees' Insurance Court :

(1) Subject to provisions of this Act and any rules made by the State Government all proceedings before the Employees' Insurance Court shall be instituted in the Court appointed for the local area in which the insured person was working at the time the question or dispute arose.

(2) In the Court is satisfied that any matter arising out of any proceeding pending before it can be more conveniently dealt with by any other Employees' Insurance Court in the same State it may, subject to any rules made by the State Government in this behalf, order such matter to be transferred to such other Court for disposal and shall forth with transmit to such other Court the records connected with that matter.

(3) If State Government may transfer any matter pending before an Employees' Insurance Court in the State to any such Court in another State with the consent of the State Government of that State.

(4) The Court to which any matter is transferred under subsection (2) or sub-section (3) shall continue the proceedings as if they had been originally instituted in it.

Thus all proceedings are instituted in the Employees' Insurance Court specified for that purpose for that area. However the State Government may transfer any such proceedings so instituted to some other insurance court established in another State with the consent of the State. The Insurance Court may also transfer any matter pending before it to some other insurance court established in another local area on the grounds of convenience but in the same State.

12.11. COMMENCEMENT OF PROCEEDINGS

Section 77 of the Act provides that proceedings before an Employees' Insurance Court shall be commenced by way of an application. So far as the period of limitation is concerned it has been provided that every such application shall be made within a period of three years from the date of cause of action. However, the cause of action in respect of a claim for benefit shall not be deemed to have arisen unless the insured person of in the case of dependent's benefit, the dependents of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim had become due. So the period of limitation for claiming benefit by an insured person or defendants of an insured persons is twelve months which may be extended by the insurance court on reasonable grounds.

The cause of action in respect of a claim by the corporation for recovery of contributions from the principal employer or a claim by the principal employer for recovery of contributions from an immediate employer shall not be deemed to have arisen till the date by which the evidence of contributions having been paid is due to be received by the corporation under the regulations.

12.12. POWERS OF EMPLOYEES INSURANCE COURT

The Employees' Insurance Court possesses all the civil court for the purposes of :

(a) summoning and enforcing the attendance of witness

(b) compelling the discovery and production of documents and material objects; and

(c) administrating oath and recording evidence.

The employees insurance court constituted under the provisions of section 74 of the Act shall be deemed to be a civil court within the meaning of section 195 and Chapter XXVI of the Code of Criminal Procedure 1973 (2of1974) Such Court shall follow such procedures as may be prescribed by the rules made by the State Government.

All costs incidental to any proceedings before an employees insurance court shall subject to such rule as may be made in this behalf by the State Government, be in the discretion of the court. An order passed by an Employees Insurance Court shall be enforceable like a decree passed in suit by a civil court.

12.13. APPEARANCE BY LEGAL PRACTITIONERS, ETC., BEFORE INSURANCE COURT

A legal practitioner, or an officer of a registered trade union authorised in writing or with the permission of the insurance court or any other person so authorised is allowed to make an application, appear or act on behalf of any person before the employees insurance court. But if the person is required to be examined as a witness, he has to appear personally before the insurance court and in all other cases he may be represented through any party as mentioned above.

12.14. REFERENCE TO HIGH COURT

The Employees' Insurance Court has been given power to submit any question of law for the decision of the High Court. In such an event the employees' Insurance Court is bound to decide the question before it in accordance with decision of the High Court so obtained.

12.15. APPEAL

Normally no appeal shall life from an order of an Employees' Insurance Court. But where a substantial question of law is involve the appeal shall to the High Court within sixty days from order of an Employees' Insurance Court. In cases of such appeals the provisions of sections 5 and 12 of the Indian Limitation Act, 1963, shall apply.

12.16. STAY OF PAYMENT PENDING APPEAL

It has been provided that where the corporation files an appeal against an order of the Employees' Insurance Court, the court may withhold the payment of any sum directed to be paid by the order against which an appeal has been filed. It is within the discretion of court to withhold the payment pending the decision of appeal but where the High Court directs the court to withhold the payment, the court is bound to withhold the payment pending the decision of the appeal.

12.17. PUNISHMENT AND PUNITIVE ACTION

Section 85 of the ESI Act deals with punishment and punitive action for failure of an employer to pay contribution *inter alia* providing that if any person-

(a) fails to pay any contribution which under this Act he is liable to pay, or

(b) deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution ,or

(c) in contravention of section 72 of the Act, reduces the wages or any privileges or benefits admissible to an employee, or

(d) in contravention of section 73 of the Act, or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or

(e) fails or refuses to submit any return required by the regulations, or makes a false return, or

(f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or

(g) is guilty of any contravention of non-compliance with any of the requirement of this Act or the rules or the regulations in respect of which no special penalty is provided,

he shall be punishable-

(i) where he commits an offence under clause (a), with imprisonment for a term which may extend to three years but-

(a) which shall not be less than one year, in case of failure to pay the employees' contribution which has been deducted by him from the employee's wages and shall also be liable to fine of ten thousand rupees;

(b) which shall not be less than six months in any other case and shall also be liable to fine of five thousand rupees:

Provided that the Court may, for any adequate and special reasons to be recorded in the judgement, impose a sentence of imprisonment for a lesser term;

(v) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may extend to four thousand rupees, or with both.

Section 85A of they ESI Act provides that whoever, having been convicted by a court of an offence punishable under this Act, commits the same offence shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to two years and with fine of five thousand rupees.

Provided that where such subsequent offence is for failure by the employer to pay any contribution which under this Act he is liable to pay, he shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to five years but which shall not be less than two years and shall also be liable to fine of twenty-five thousand rupees.

Besides these provisions, action also be taken under sections 406/409 of the Indian Penal Code in cases where an employer deducts contributions from the wages of his employees but does not play the same to the Corporation which amounts to criminal breach of trust.

Prosecution of Managing Director under section 85 for non-submission of contribution cards as required under section 44 of the Act without specifying the capacity in the complaint will not be sustainable, more particularly when as establishment has already appointed a Manager as its Occupier under the Factories Act, 1948. It was further held that the complaint must specify the capacity of the accused. A director of a Company cannot be made personally liable *ipso facto* in absence of material to show who is the principal employer.

The Managing Director/Director of a company are liable to be prosecuted for violating the provisions of ESI Act. Also, the Chairman and Director of a company being employer cannot escape prosecution for non-payment of ESI contributions since they have been paying areas of EPF contributions in the capacity of employer.

12.18. CONCLUSION

Sections 38 of the Act provides that all the employees in establishments to which this Act applies shall be insured. As the Scheme of Employee's State Insurance is contributory, both the employers and employees have to pay their contributions in accordance with the provisions of the Act. The contributions in accordance with the provisions of the Act. The contributions are to be paid to the Corporation. Employers contribute at the rate of 4 per cent of the wages. Employees getting whose average daily wage is less than Rs. 15 are exempted from paying the contribution.

Section 45 governs machinery for recovery of arrears of contribution from the employer. Recovery Officers are appointed and the arrears of contribution would be recovered by selling the property belonging to establishment. If the properties of establishment are not sufficient, then the personal properties of the principal employer or immediate employer are sold to recover the arrears.

The benefits provided by the E.S.I. Act are available to the insured employees' Insurance Court to decide any dispute arising under the provisions of the Act. The number of judges in such courts is decided by the State Government. Section 75, lays down the matters which are to be decided by the Employees' Insurance court.

Sections 84 and 85 contain penalty provisions for making false statement and failure to pay contributions. Section 86 contains provisions regarding prosecution.

12.19. SELF ASSESSMENT QUESTIONS

1. Explain the object of Employee State Insurance Act, 1948.
2. What are the various benefits available under ESI Act, 1948.
3. Explain general rules concerning various benefits.

12.20. REFERNECE AND FURTHER READINGS

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Dr. NAGARAJU BATTU

LESSON : 13

EMPLOYEE'S PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952 (Act No.19 of 1952, dated 4.3.1952)

13.0 OBJECTIVE

This Act provides for the institution of Provident Funds (family pension fund and deposit-linked insurance fund) for employees in features and other establishments.

STRUCTURE

13.1 Introduction
13.2 Section 1, Short title, extent and application
13.3 Definitions
13.4 Establishment to include all departments and branches
13.5 Power to apply act to an establishment which has a common provident fund with an other establishment
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13.7.1 Central Board
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13.9.8. Staff of tribunal

13.9.9. Appeal of Tribunals

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13.11 Fund to be recognised under Act XI of 1922

13.12 Production against attachment

13.13 Priority of payment of contributions over other debts.

13.14 Employer not to reduce wages etc.

13.15 Inspectors

13.16 Penalties

13.16.1 Offences by companies

13.16.2 Enhanced punishment in certain cases after previous conviction

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13.16.4 Cognizance and trail of offences

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13.16.6 Power of court to make orders

13.17 Special provisions relating to existing provident fund

13.18 Act not to apply to certain establishments.

13.18.1 Authorising certain employers to maintain Provident Fund accounts

13.19 Power to exempt

13.19.1 Transfer to accounts

13.19.2 Liability in case of establishment

13.20 Production of Action taken in good faith

13.20.1 Proceeding officer and other officer to be public servants

13.21 Delegation of power

13.22 Power of Central Government to give directions

13.23 Power to make rules

13.24 Power to remove difficulties

13.25 Summary

13.26 Self Assessment questions

13.27 References and Further Readings

13.1 INTRODUCTION

The Employees Provident Funds and Miscellaneous Provisions Act, 1952 is a piece of social welfare legislation, a beneficent measure, enacted for the purpose of institution of provident fund for employees in factories and other establishments. The provisions are intended for the better future of the industrial worker on his retirement and also for his dependants in the event of his death in the course of employment. The Act provided for the institution of Compulsory Provident Fund, Family Pension Fund and Deposit Linked Insurance Fund for the benefit of the employees. The object of the Act and the scheme framed thereunder is to ensure that all industries to which the Act has been made applicable establish compulsory provident fund for employees with effect from the date when the scheme has been declared applicable to them.

Provident fund is an effective old-age and survivorship benefit; but when the employee happens to die prematurely, the accumulations in the provident fund have been felt too slender to render adequate and long-term protection to his family. With a view to providing long-term financial security to the families of industrial employees in the event of their premature death, the legislature has provided for a Family Pension Scheme for the employees covered by the Act and a Family Pension Fund created there under for the purpose by diverting a portion of both employer's and employees contribution to the provident fund to which would be added a contribution by the Central Government. Out of the fund so set up, family pension was to be paid at prescribed scales to the survivors of employees who die while in service before reaching the age of superannuation. Besides family pension, a compulsory life insurance benefit would also be payable to the survivors of the employees in the event of death in service. In case of retirement, a lump sum payment up to a prescribed maximum would be made to the employee depending upon the length of his service.

A recent significant development in this line is the introduction of a pension scheme as the present social security measures available to the employees have been found inadequate, for

they do not provide for monthly pension to members on superannuation, widow pension on death of employee after superannuation, children pension, or disablement benefits. To fill these lacunae in the existing system, the Employees Provident Funds and Miscellaneous Provisions (Amendment) Ordinance, 1995 was promulgated by the President of India, dated 5-1-1996, amending the Act with effect from 16-11-1995 conferring power upon the Central Government to frame a suitable pension scheme incorporating provisions for superannuation pension, retiring pension or permanent disablement pension to employees to which the Act applies, and widow or widower's pension, children pension or orphan pension pension payable to the beneficiaries of such employees in the event of death. In exercise of this power, the Central Government framed the Employees Pension Scheme, 1995 providing for the aforesaid benefits effective from the date on which the Ordinance commenced, repealing and replacing the family Pension Scheme, 1971 framed under the existing provisions. As the parliament was not in session to enact the said Ordinance, the same was replaced by the Employees Provident Funds and Miscellaneous Provisions (Amendment) Second Ordinance of 1996, dated 27-3-1996, with effect from 16-1-1995 which was again replaced by the Third Ordinance of 1996. This Ordinance has been replaced by the present Employee Provident Funds and Miscellaneous Provisions (Amendment) Act, 1996 with retrospective effect from 16-11-1995. The new pension scheme thereunder shall apply to all employees who were covered by the Family Pension Scheme and also to new members.

This part, comprising the Employees Pension Scheme, 1995 as amended upto Employees Pension (Amendment) Scheme, 2003 vide GSR 430(E), dt. 19-5-2003, w.e.f. 23-5-2003 has been given for the proper understanding of the subject.

13.2 SECTION 1 SHORT TITLE EXTENT AND APPLICATION

(1) This Act is called "The Employees" provident Funds and Miscellaneous provisions Act, 1952.

(2) It extends to whole of India, except the state of Jammu and kashmir.

(3) The provisions of the Act applies to

  (a) Every establishment which is a factory as specified in Schedule I and employs 20 or more persons.

  (b) To other establishments employing 20 or more persons, which are specified by the central government after giving not less than 2 months notice of its intention, applies to any establishment employing such number of person less than 20 as specified in the notification.

(4) The provisions of the Act are applicable to the establishment where the employer and the majority of employees have agreed on the provisions and made an applicable to the central provident fund commissioner.

The provisions of this Act are applicable to that establishment on and from the date of such agreement made.

(5) Once the establishment falls within the purview of the Act, it snail continue to be governed by this Act even when the number of persons employed falls below 20.

13.3 DEFINITIONS

In this Act, unless the context otherwise requires,

(a) "appropriate government" means-

(i) in relation to an establishment belonging to, or under the control of, the Central Government or in relation to an establishment connected with a railway company, a major port, a mine or an oilfield or a controlled industry, or in relation to an establishment having departments or branches in more than one State, the Central Government; and

(ii) in relation to any other establishment, the State Government

(aa) "authorised officer" means the Central Provident Fund Commissioner, Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette.

(ia) "Insurance Fund" means the Deposit-linked Insurance Fund established under sub-section (2) of section 6C.

(kb) "Recovery Officer" means any officer of the Central government, State Government or the Board of Trustees constituted under section 5A, who may be authorised by the Central Government, by notification in the Official gazette, to exercise the powers of a Recovery Officer under this Act.

(l) "scheme" means the Employees Provident Fund Scheme framed under section 5.

(ll) "superannuation", in relation to an employee, who is the member of the Pension Scheme means the attainment, by the said employee, of the age of fifty-eight years.

(m) "Tribunal" means the Employees Provident Funds Appellate Tribunal constituted under section 7D.

13.4 ESTABLISHMENT TO INCLUDE ALL DEPARTMENTS AND BRANCHES

Where an establishment consists of different departments or branches situated is the same place or in different places, all such departments or branches are treated as parts of the same establishments.

To decide the relationship between the employer and the workman what is relevant to consider is whether the workman attends the place of work of the employer and works there and whether ha can be removed if the work is not satisfactory. In the determination of the employer-employee relationship, control is obviously an important factor, and in any cases , it may be decisive factor. The question is not whether in practice the work is done subject to the direction and control exercised by actual supervision but whether the ultimate authority over the man in the performance of his work, resides in the employer so that he was subject to letter's order and direction. Silver Jubilee Tailoring House V. Chief Inspector, Shops & Establishment AIR 1974 SC 7, New Street Textiles V. Union of India 1975 KLT 426.

For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment.

13.5 POWER TO APPLY ACT TO AN ESTABLISHMENT WHICH HAS A COMMON PROVIDENT FUND WITH AN OTHER ESTABLISHMENT

When this act becomes applicable to an establishment where, there is in existence a provident fund common to employees employed in that establishment and employees in any other establishment the central Government. May direct the provisions of this Act to apply to such other establishments.

13.6 POWER TO ADD TO SCHEDULE

(i) The central government by notification in official gazette, add to schedule I any other industry and shall be deemed to be an industry specified in schedule I for the purposes of this Act.

(ii) All notifications are laid before parliament after they are issued.

13.7 EMPLOYEES' PROVIDENT FUND SCHEMES

(1) The central Govt. frame a scheme to be called the Employees' Provident Fund scheme for the employees and specify the establishments to which this scheme shall apply and a Fund is established in a accordance with the provisions of the Act and the scheme.

(1A) The fund is administrated by the central board constituted under Sec., 5A.

(1B) The scheme provides for the matters specified in schedule II.

(2) The scheme framed shall take effect on the date as specified in the scheme.

13.7.1 Central Board

(1) This provides for the administration of the Fund, the central Govt. by notification in the official gazettes constitute a board of trustees, consisting of the following persons.

(a) A chairman and a vice-chairman, appointed by the central govt.

(b) The central provident fund commissioner, ex-official.

(c) Not more than 15 persons appointed by the central govt., amongst its officials.

(d) Ten persons representing employees of the establishment appointed by central govt.

(e) Not more than 15 persons representing govt. of such states as central govt. specifies.

(f) Ten persons representing employees in the establishment appointed by the central govt.

(2) The terms and conditions subject to which a member of central board is appointed and procedure of meetings are provided in the scheme.

(3) The scheme lays down the manners in which the board shall administer the funds.

(4) The central board performs the functions required under the family pension scheme and the Insurance Scheme.

(5) The central board shall maintain proper accounts of its income and expenditure.

(6) The accounts of central board are to be audited annually by the comptroller and auditor-General of India.

(7) It is the duty of central board to submit the Central Govt. an annual report of its work and activities.

13.7.2 Executive committee

(1) The Central Govt. constitutions an executive committee to assist the central board.

(2) The executive committee consists of the following members.

  (a) Chairman appointed by central govt. from amongst the members of central board.

  (b) (2) Two persons appointed by central govt. amongst the central govt. representatives.

  (c) (3) Three persons appointed by central govt. amongst the state govt. representatives.

  (d) (3) Three persons representing the employers.

  (e) (3) Three persons representing the employers elected by central board from amongst the persons of central board employees.

  (f) And the central provident fund commissioner ex-officio.

(3) The terms and condition of the members of executive committee are provided in the scheme.

13.7.3 State Board

(1) The Central Govt. after conclusion with any state government constitute a state board of trustees in the manner as provided for the scheme.

(2) The powers and duties of the state board are assigned from time to time by the central govt.

(3) The terms and conditions of the members of a state board are provided in the scheme.

13.7.4 Board of trustees to be a body corporate

The travel of trustees constituted (Section 5A&5b) shall be a body corporate under the name specified in the notification and have a perpetual succession and a common seal and by the said name will sure or be sued.

13.7.5 Appointments of officers

This provides for appointment of officers for carrying out the objectives of the Act.

(1) The Central Government appoints a central provident fund commissioner as the chief executive officer of the central board.

(2) The Central Govt., appoints a financial adviser and chief accounts to assist central PF commissioner in the duties-

(3) The Central Govt., appoints, as many Additional Central a provident Fund Commissioners, Deputy PF Commissioners. Regional PF Commissioners, Asst., PF commissioners and other officers and employees.

(4) The appointments of Central PF Commissioners, Additional Central PF commissioner. Financial Adviser and Chief Accounts Officer shall be made only after consultation with the Union Public Service Commission.

But such consultation, is not required in case of appointment :

(1) for a period of not exceeding 1 year.

(2) If the person appointed at the time of appointment
   - (i) a member of Indian Admn. Service
   - (ii) in the service of Central Government or a State Government or the Central Board.

(5) The state board with State Govt. approval appoint the staff necessary.

(6) The method of requirement, salary, allowances discipline, etc., of the Central PF Commissioner, the Financial Adviser and Chief Accounts Officer are specified by central govt. the salaries and allowances are paid out of the Fund.

(7) The method of requirement, salary etc., of other personnel like Addl. Central PF Commissioner etc., are paid as specified by the central board in accordance with central Government.

(8) In case of state boards, they are decided by the state govt.

13.7.6. Acts and proceedings of the Central Board of its Executive Committee or the State Board not be invalidated on certain grounds

No act done or proceeding taken by the Central Board or the Executive Committee constituted under section 5AA or the State Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Central Board or the Executive Committee or the State Board, as the case may be.

13.7.7 Delegation

The Central Board may delegate to the Executive Committee or to the Chairman of the Board or to any of its officers and a State Board may delegate to its Chairman or to any of its officers, subject to such conditions and limitations, if any, as it may specify, such of its powers and functions under this Act it may deem necessary for the efficient administration of the Scheme, the pension Scheme and the Insurance Scheme.

13.8 CONTRIBUTION AND MATTERS WHICH MAY BE PROVIDED FOR IN SCHEMES

This section provides for the contribution to be paid by the employer to the Fund shall be of the basic wages. DA and retaining allowance payable to the employees. The employees contribution shall be equal to the contribution payable by the employer.

a Each contribution shall be calculated to the nearest rupee. 50 paise more to be counted as the next higher rupee and a fraction of a rupee less than 50 paise to be ignored.

b Deamess allowance shall include the cash value of any food concessions allowed to an employee.

c Retaining allowance is the sum to be paid to an employee for retaining his services, when the factory is not working.

13.8.1. Employees' family pension scheme

(1) By an amendment of the Act in 1971, central Government framed a scheme called Employees' Family Pension Scheme for the purpose of providing family pension and life insurance benefit to the employees to which this Act applies to the establishments.

(2) The contributions payable by the employer and employee in each month shall not exceed ¼ of the amount payable under sec. 76.

(3) The family Pension Fund is administrated by the Central Board.

(4) The Family Pension Scheme provide, all or any other specified in Schedule III.

(5) The provisions of the Family Pension Scheme with effect from the date as specified on behalf of the scheme.

13.8.2. Special grant by central Government

The Central Government after due to appropriation made by the parliament by law pay further sums determined by Family Pension Fund to meet all the express towards the cost of benefits provided by the scheme.

13.8.3 Employees' Deposit – Linked Insurance Scheme

(1) The Act was amended in 1976, the Central Government to frame a new scheme called Employees' deposit linked Insurance Scheme for the purpose of providing Life Insurance benefit to the Employees.

All members/ employers of Provident Funds is both exempted and the unexempted establishments are covered under the scheme.

(2) The employees are not required to contribute to the Insurance Fund. The employers are required to pay at the rate of 0.5% of the total emoluments.

(3) The Central Govt. also contributes to the Insurance Fund at the rate of 2.5% of the total emoluments.

(4) The Insurance Fund is administrated by the Central Board.

(5) The Insurance Scheme provides matters specified in Schedule IV.

13.8.4 Laying of scheme before parliament

Every Scheme framed under section5, section 6A and Section 6C shall be laid, as soon as may be after it is framed, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and

if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree that the scheme should not be framed, the Scheme shall thereafter have effect only in such modified form or be of effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Scheme.

13.9 MODIFICATION OF SCHEME

(1) The central Govt. by notification in official gazette, adds to the scheme.

(2) Every notification issued shall be laid before both Houses of parliament for a period of 30 days.

13.9.1. Determination of money from employers

(1) The Central Provident Fund Commissioner, and Add, PF Commissioner, any Deputy PF Commissioner, by order

  (a) decide disputes arising out of applicability of the act to the establishments.

  (b) Determine the amount due from an employer and conduct inquiring if necessary.

(2) The officer conducting inquiry shall have same powers as that of a civil court.

(3) The employer is given opportunity for representing his case.

(4) The order passed to the employer against him shall apply to the officer the show cause notice within 3 months from the date of communication of such order and shall appoint a date for proceeding with the inquiry.

(5) One order passed shall not be set aside on any application unless a notice is served on the opposite party.

13.9.2. Review of orders passed under Section 7A

(1) It provides for the review of orders where no appeal has been preferred under the Act, on the group of discovery of new and important matters or evidences.

(2) Every application for review shall be filed in the form and manner as specified.

(3) The officer receiving an application for review, if there is no sufficient group preview shall reject the application.

(4) No appeal shall be against the order of the officer rejecting an application for review.

13.9.3. Determination of escaped amount :

It provides for the determination of escaped amount due from employee within a period of 5 years from the date of the communication or order under Sec.7A or 7B and to reopen the case and pass necessary orders redetermining the amount due from the employer.

13.9.4. Employees' provident funds appellate tribunal

(1) The Central Govt. by notification constitute one or more Appellate Tribunals.

(2) The tribunal shall consist of one person only to be appointed by the Central Govt.
(3) The presiding officer shall he qualified to be a High Court Judge.

13.9.5. Term of Office

The presiding officer shall hold the office of the tribunal for a term of 5 years from the date on which he enters his office until he attains the age of 62 years.

13.9.6. Resignation

The presiding officer may by notice in writing under his hand addressed to the central government to resign his office.

13.9.7. Salary and Allowances and other terms and conditions of service of presiding officer

13.9.8. Staff of tribunal

(1) The central govt. determines the officers and other employees required to assist a tribunal.
(2) The officers and other employees shall function under general superintendence of presiding officer.

13.9.9. Appeal to tribunals

(1) Any person aggrieved by a notification issued by the central govt. prefer an appeal to a tribunal against such notification.

13.9.10. Procedure of tribunals

(1) A tribunal shall have power to regulate its own procedure in all matters.
(2) The tribunals shall be decreed to be a civil court for all purposes of criminal procedure.

13.9.11. Right of appellant to take assistance of legal practitioner and of government etc, to appoint presenting officers :

13.9.12. Orders of tribunal :

(1) A tribunal after giving parties as opportunity to be heard, pass orders for modifying or confirming the order appealed.
(2) A tribunal, at any time within 5 years from the date of its order to rectify any mistake from the sued.
(3) A tribunal shall send a copy of order passed to the parties to the appeal.

(4) Any order made by Tribunal shall not be questioned in any court of law.

13.9.13. Filling up of vacancies

If any vacancy occurs in office of the presiding officer, the central govt. shall appoint another person to fill the vacancy.

13.9.14. Final or orders constituting a tribunal

No order of Central Govt. appointing any person as the presiding order shall be called in for question in any manner.

13.9.15. Deposit of amount due on filing appeal

The appeal by the employer shall not be entertained by the Tribunal unless he has deposited 75% of amount due from him as determined by an officer.

13.9.16. Transfer of certain applications to tribunals

All applications which are pending before central govt. shall be transferred to a tribunal exercising jurisdiction.

13.9.17 Interest payable by the employer

The employer shall be liable to pay simple interest at the rate of 12 % annum or higher rate as specified in the scheme, but shall not exceed the lending rate of interest charged by any scheduled bank.

13.10. MODE OF RECOVERY OF MONEY DUE FROM EMPLOYERS

The amount due from the employer recoverable

(1) in relation to an establishment to which any scheme applies in respect of any contribution payable to damages recoverable, accumulations required to be transferred.

(2) Any amount due from the employer to an establishment of any damages recoverable, any charges payable by him to the appropriate Govt. under any provision of this Act.

13.10.1. Recovery of money by employers and contractors

(1) This lays down the amount of contribution employers' as well as employees' contribution and any charges for meeting the cost of administrating the fund paid may be recovered by the employer from the contractor either by deduction from as a debt payable by the contractor.

(2) The amount may be recovered from the employees' contribution by deduction from the basic wages, DA and retaining allowance.

13.10.2. Issue of certificate to the recovery officer

(1) The authorised officer issues a certificate to the Recovery Officer specifying the amount of arrears.

(2) The Recovery Officer has got the powers to attach the sell property of employer, call for arrest and detention of employer etc., for effecting recovery.

13.10.3. Recovery officer to whom certificate is to be forwarded

(1) The authorised officer may forward the certificate to the Recovery Officer.

(2) Where an establishment or the employer has property within the jurisdiction of more than one recovery officer and the recovery officer to whom a certificate is sent by the authorised officer shall recover the amount due under the section a copy of certificate is sent to him by the authorised officer.

13.10.4. Validity of certificate and amendment thereof

(1) When authorised officer issues a certificate to a Recovery Officer, it shall not be open to the employment to dispute.

(2) The Authorised Officer shall have power to withdraw, the certificate or correct any mistake in the certificate by sending an intimation to the Recovery Officer.

13.10.5. Stay of proceeding under certificate and amendment and withdrawal thereof

(1) The Authorised Officer may grant time for the payment of the amount and the Recovery Officer shall stay the proceedings until the expiry of the time so granted.

13.10.6. Other modes of recovery

The central PF commissioner or any other Official authorised by the Central Board may recover the amount by any one or more of the modes provided.

13.10.7. Application of certain provisions of income-tax etc. :

The provisions of Schedule II and III of the Income-Tax in, force shall apply with necessary modification.

13.11 FUND TO BE RECOGNISED UNDER ACT XI OF 1922

For the purpose of the Indian Income Tax Act, 1922(XI of 1922), the fund is deemed to be recognised provident fund.

13.12. PRODUCTION AGAINST ATTACHMENT

(1) The amount standing to the credit of any member in the Fund shall not be attached under any decree or order of any court in case of any debt or liability incurred by the member.

13.13. PRIORITY OF PAYMENT OF CONTRIBUTIONS OVER OTHER DEBTS

If any amount is due from the employer whether in employees’ contribution (deducted from the wages of an employee) or the employers’ contribution, the due amount shall be the first charge on the assets of the establishment and paid in priority to all other debts.

13.14. EMPLOYER NOT TO REDUCE WAGES ETC.

No employer shall reduce the wages of an employee directly or indirectly to whom the scheme/Insurance scheme applies or the total benefits which the employee getting shall not be permitted to be reduced.

13.15. INSPECTORS

(1) The appropriate govt. by notification appoint Inspector for the purpose of this Act.

(2) Inspectors are appointed for the purpose of inquiring into correctness of any information furnished and for the purpose of ascertaining the provisions of the Act.

(3) The provisions of code criminal procedure shall apply to search and seizure.

13.16. PENALTIES

(1) For the purpose of avoiding any payment or enabling other persons to avoid such payment, shall be punished with imprisonment for a term of one year or with fine of Rs.5,000 or with both.

(2) An employer who contravenes or makes default of compliance of payment of administration of wages shall be punished with 3 years imprisonment and not less than one year and a fine of Rs.10,000.

13.16.1. Offences by Companies

(1) If any person committing an of fence under the Act, shall be deemed to be guilty of the offence and be punished. And if he proves that the offence was committed without his knowledge, he shall be exempted from punishment.

13.16.2. Enhanced punishment in certain cases after previous conviction

The person punished for offence, commits the same offence shall be punished with imprisonment for a term not less than 2 years and which may extend to 5 years and a fine of Rs. 25,000.

13.16.3. Certain offences to be cognizable

An offence relating to default in payment of contribution by the employer punishable shall be cognizable, not within anything contained in code of criminal procedure.

13.16.4. Cognizance and trail of offences

(1) No court shall take cognizance of any of fence punishable under this Act, except on a report in writing constituting such offence.

(2) The court not inferior to presidency magistrate/magistrate of 1st class shall try any offence.

13.16.5. Power to recover damages

Where an employer make default in payment of any contribution or in transfer of accumulations or payment of any charges, may recover penalty for such damages not exceeding the amount of arrears, as specified in the scheme.

1 Before levying and recovering such damages, the employer is given an opportunity of being heard.
2 Central Govt. may reduce the damages levied to an establishment, which is a sick industry.

13.16.6. Power of court to make orders

Where an employer is convicted of an offence of making default payments of any contribution to the Fund, the Court may extend the time for the payment of the contribution amount to transfer the accumulations.

13.17. SPECIAL PROVISIONS RELATING TO EXISTING PROVIDENT FUNDS

(1) Every employee who is a subscriber of any provident fund of an establishment to which the Act applies, subject to the power to exempt shall be entitled to the benefits accruing to him under the Provident Fund and it shall be maintained in the same manner and same conditions.

(2) The accumulations in any PF which is standing credit to the employees shall be transferred to the Employees' Provident Fund.

13.18 ACT NOT TO APPLY TO CERTAIN ESTABLISHMENTS

(1) This act shall not apply to-

(a) any establishment registered under co-operative societies act, 1912 or to state relating to co-operative societies in any establishment employing less than 50 persons and working with out the aid to power.

(b) To any establishment belonging to a 'under the control of the central Govt.'. or state govt. and whose employees are entitled to contributory PF Funds benefits.

(c) To any other establishments set up under any central, provincial or State Act and whose employers are entitled to the benefits of the contributory PF.

(d) To any other establishment newly setup, for the period of expiry of 3 years and it shall not include the reason of a change of its location.

(2) The Central Government may exempt certain establishments regarding their financial position or other circumstances by notification in the official gazette.

13.18.1. Authorising certain employers to maintain provident fund accounts

(1) If the employer and majority of employees of an establishment employing 100 or more persons make an application, the central government may authorise the employer, by an order in writing to maintain a Provident fund account. But such authorisation shall not be made to the employer if he had committed default in the payment of PF contribution or any other offence.

(2) The employer authorised to maintain a PF amount shall maintain such accounts, submit returns, deposit the contribution, and provide facilities for inspection Pay administrative charges as specified in the scheme.

(3) Any authorisation made can be cancelled by the central government, if the employer fails to comply with any terms and conditions of authorisation.

13.19. POWER TO EXEMPT

(1) This section authorises the appropriate government to grant exemption to certain establishments or persons from the operation of the provisions of the scheme, granted by notification in the official gazette subject to

(a) Any establishment of its PF, where the rates of contribution are nor less favourable than those benefits provided under this act or any scheme in relation to the employees in any other establishment.

(b) If the employees of such establishments are enjoying benefits in the nature of Provident Fund, Pension or gratuity and the app, government holds these benefits separately or jointly not less favourable to such employees than the benefits provided under this Act.

(1A) This sub-section empowers the central government to exempt, by notification in official gazette, the operation of the provisions of the Family Pensions Scheme, any establishment if the employees are enjoying benefits in nature of family pension and the central government holds those benefits as not less favourable to employees than the benefits provided under this Act on the family Pension Scheme.

(2) This provides that any scheme may make provisions for exemption of any persons/ class of persons employed in any establishment to which this scheme applies from the operation of all provisions of the scheme,

But such class of persons are exempted if the app. Government holds that majority of persons constituting such class desire to continue to be entitled to such benefits.

(2A) The employees may request the Central PF commissioner to exempt any scheme by notification in the official gazette.

(2B) The insurance scheme may provide for exemption of any person or class of persons, employed in an establishment and covered by the scheme.

(3) This provides for any person or class of persons employed in an establishment are granted exemption from the operations of any provisions of any scheme in relation to such establishment the employer.

(1) PF, pension and gratuity, maintain records, submit relevant etc.,
(2) With out the leave of central government reduces the total quantity of benefits.
(3) Any person leaves his employment and obtains employment to which this Act applies, transfer with in the specified time.

(3A) Same as sub-section 3, but it provides for exemption of provisions of the Insurance Scheme.

(4) It provides for cancellation of the exemption by the authority which granted it, if the employer fails to comply the following :
   a) in case of exemption granted under S.S.(1) with any provisions of S.S.(3)
   b) in case of exemption granted under S.S. (1A)
   c) under SS (2) any exemption
   d) Exemption under SS(2A) and (3A)
   e) Exemption under SS(2B) and (3A) provisions

(5) It further provides that on cancellation of the exemption under sub-section (1),(1A), (2A) or (2B) the amount of accumulations to the credit of every employee to whom exemption ‘applied in PF, ePF and insurance Fund of the establishment in which he is employed shall be transferred within such time and manner as specified in the scheme.

(6) It provides that subject to the provisions of SS (1A) the employer of an exempted establishment or an exempted employee of an establishment to which the provision of FPS apply not with standing any exemption granted under SS (1),(2) pay to family Pension fund such portion of the employees contribution as well as PF contribution as specified in the FPS in such manner and with in such time.

17.19.1. Transfer of accounts

(1) If an employee employed in an establishment to which the Act applies leaves his employment and obtain reemployment in another establishment to which this Act does not apply, the amount of accumulations to the credit of such employee in Fund shall be transferred within such time specified by the central government.

(2) Where an employee employed in an establishment to which the act does not apply leaves his employment and obtains reemployment in another establishment to which this Act applies, the amount of accumulations to the credit of such employee in the Provident Fund of the establishment left by him be transferred to the credit of his Account in the Fund of the establishment, in which he is re-employed. 14AA Act to have effect not with standing anything contained in Act 31 to 1956.

The provisions of this Act shall have effect not with standing any thing in consistent there with contained Life Insurance Corporation Act, 1956.

13.19.2. Liability in case of transfer of establishment

Where an employer, transfers that establishment in whole or in part, by sale or gift, lease or liecence or in any other manner, the employer and the person to whom the establishment was so transferred shall jointly & severally be liable to pay contribution and other sums due from the employer under any provisions of the Act or scheme.

But such liability of transference shall be limited to the value of the assets obtained by him by such transfers.

13.20. PROTECTION OF ACTION TAKEN IN GOOD FAITH

No suit, prosecution or other legal proceedings shall the central government, state government, the presiding offices of tribunal, or any authority for anything which is in good faith, done in pursuance of this Act.

13.20.1. Presiding officer and other officers to be public servants

The presiding officer of a tribunal, officers and other employees, and authorities and inspector are deemed to be public servants with in the meaning of Section 21 of IPC (45 of 1860).

13.21. DELEGATION OF POWER

The appropriate government directs any power of authority or jurisdiction in relation to the matters and conditions specified in the direction, be exercisable also.

(a) Where app. government is central government, by such officer or authority subordinate to central government.

(b) Where app. government is state government, by such officer or authority subordinate to state government as specified in the notification.

13.22. POWER OF CENTRAL GOVERNMENT TO GIVE DIRECTIONS

The central government gives directions to the central board for efficient administration from time to time.

13.23. POWER TO MAKE RULES

(1) The central government by notification in official gazette make rules to carry out the provisions of this Act.

(2) Such rules provide for without prejudice the generality of the foregoing power-

- (a) Salary and allowances and terms and conditions of service of presiding officer, and employees of a tribunal.
- (b) Form and manner and time, for appeal to the field and fees payable for filing such an appeal before a tribunal.
- (c) The manner of certifying the copy of certificate to be forwarded to the recovery officer.
- (d) Any rule matter, prescribed by rules under the Act.

(3) Every rule made has shall be laid before both the houses of parliament atleast for a period of 30 days.

13.24. POWER TO REMOVE DIFFICULTIES

(1) It contains provisions relating to the removal of any difficult that may arise in giving effect to the provisions of this Act, as amended by the Employees' Provident fund and miscellaneous Provisions (Amendment) Act, 1988

The central government, by order published in official gazette make provisions for the removal of the difficulty.

(2) Every order made under this section, shall, as soon as may be after it is made, be laid before each House of Parliament.

13.25. CONCLUSION

The Employee's Provident Funds and Miscellaneous Act, 1952 aims at providing retirement benefits to the employees working in industrial establishments. The Act provides for institution of Provident Funds, Family Pension Scheme and Deposit-linked Insurance Schemes for the employees covered.

The act applies to all establishments employing 20 or more persons. The Central Government has the powers to include or exclude establishments from the purview of the Act by a notification in Official Gazette.

Section 5 of the Act empowers the Central Government to frame Employees' Provident Scheme for employees and a fund known as Employees' Provident Fund in accordance with the provisions of the Act. Both employers and employees contribute to this fund. Section 6-A of the Act empowers the Central Government to frame Employees' Family Pension Scheme for the purpose of providing Fund would be established for the purpose of providing above said benefits and is administered by the Central Board.

Section 6-C empowers the Central Government to frame Employees' Deposit –linked Insurance Scheme and constitution of Deposit-linked Insurance Fund. Both the employer and the Central Government contribute to the fund.

All the Schemes are administered by the Central Board, Executive Committee and State Boards. Both Executive Committee and State Board assist the Central Board in the administration of the Schemes.

Inspectors are appointed by the appropriate Government to supervision the implementation of the schemes and the Central Governments in empowered under the Act to constitute Appellate Tribunals known as Provident Funds Appellate Tribunals to settle the disputes.

Section 14 provides for penalties for the offences committed by he employers.

13.26. SELF ASSESSMENT QUESTIONS

1. Explain the object and purpose of employee provident fund act.
2. What are the various family pension scheme. Explain.

13.27. REFERENCE AND FURTHER READINGS

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LESSON : 14 & 15

MATERNITY BENEFIT ACT 1961 AND PAYMENT OF GRANTING ACT 1972

14&15.0 OBJECTIVE

The objective of this lesson are to educate the readers about the historical background of the maternity benefit act 1961 and payment of gratuity act 1972: Objectives with which these acts has been an enacted; scope and coverage of these acts a definitions of the terms used in the texts benefits of the employees as per the provisions laid down in these acts.

STRUCTURE

14&15.1 Introduction about Maternity Benefit Act 1961
14&15.2 Objects and Scope
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- **14&15.5.1. Introduction**
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- **14&15.5.18 Act to override Other enactment, etc**
- **14&15.5.19 Power to Make rules**

14&15.6 Conclusion
14&15.7. Self Assessment Questions
14&15.8 Further Readings

14&15.1 INTRODUCTION ABOUT THE MATERNITY BENEFIT ACT, 1961

The Maternity Benefit Act, 1961 is an Act to regulate the employment of women in certain establishments for certain period before and after child-birth and to provide for maternity benefit and certain other benefits. It is a social welfare legislation under which every woman employee shall be entitled to, and her employer shall be liable for, the payment of maternity at the rate of the average daily wages for the period of her actual day of her delivery and any period immediately following that day. The average daily wages mean the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, the minimum rate of wages fixed or revised under the Minimum Wages Act, 1948 or ten rupees, whichever is the highest.

When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.

The discharge or dismissal of a woman at any time during her pregnancy, if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus shall not have the effect of depriving her of the maternity benefit or medical bonus provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman, deprive her of the maternity benefit or medical bonus or both. Any woman deprived of maternity benefit or medical bonus, or both, or discharged or dismissed during or on account of her absence from work in accordance with the provisions of this Act, may dismissal is communicated to her, appeal to such authority as may be prescribed and the decision of that authority on such appeal whether the woman should or should not be deprived of maternity benefit or medical bonus, or both, or discharged or dismissed shall be final.

In case of miscarriage or medical termination of pregnancy, a woman shall, on production of such proof as may be prescribed, be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage or, as the case may be, her medical termination of pregnancy.

In the modern era, the number of women employees are increasing day by day and hence maternity leave and benefit are a common phenomenon. But there was no beneficial legislation in this direction, hence the enactment of the Maternity Benefit Act, 1961, which applies to women employed in factories, mines and plantations including those belonging to the government and any establishment engaged in the exhibition of equestrian, acrobatic and other performances irrespective of the number of employees, and to every shop or establishment wherein ten or more persons are employed or were employed on any day of the preceding twelve months. The State Government is competent to extend all or any of the provisions of this Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise. But the Act has no application to any such factory or other establishment to which the provisions of the Employees' State Insurance Act are applicable for the time being but, where the factory or establishment is governed under the Employees' State Insurance Act, and

the woman employees is not qualified to claim maternity benefit under section 2(9) of the Employees' State Insurance Act, or for any other reason, then such woman employee is entitled to claim maternity benefit under this Act till she becomes qualified to claim maternity benefit under the Employees' State Insurance Act.

This comprehensive write-up comprising the Maternity Benefit Act, 1961 with short comments and excerpts from recent case law would serve the purpose of a ready reference on the subject.

14&15.2 OBJECTS AND SCOPE

In order to reduce the disparities relating to maternity provisions under the various States and Central Act, referred to above central government enacted act a called Maternity Benefit Act was passed in 1961. By the end of the year 1972, the Act has been extended to the whole of the Indian Union. It applies to every establishment which is a factory, mine or plantation including any such establishment which is a factory, mine or plantation including any such establishment belonging to government except those factories or establishments to which provisions of the Employees State Insurance Act, 1948, are applicable. It applies to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performance. It repealed the Mines maternity Benefit act, 1941, and the Bombay Maternity Benefit, Act 1929. The Sate Government have been empowered to extend all or any of the provisions of this Act to any other establishment or class of establishments, industries, commerce, agricultural or otherwise with the approval of the Central Government by giving not less than two months notice of its intention of so doing.

The Maternity Benefit Act, 1961, has been passed to regulate the employment of women in certain establishments for certain periods before and after child-birth to provide for maternity benefit and certain other benefits.

Section 2 of the Act contains definitions of certain terms and expression used in the various provisions of the Act, such as child, delivery, employer, establishment, factory, mine, plantation, wages etc.

It has been drastically amended by Act 61 of 1988, provisions of which have been enforced with effect from January 10, 1989. Some new provisions have been substituted to make the Act more effective and beneficial.

Section 2 dealing with application of the Act has been substituted in 1989 with a view to extend coverage of the Act. It provides that –(1) It applies in the first instance-

(a) to every establishment being a factory, mine or plantation including any such establishment belonging to government and to every establishment where in persons are employed for the exhibition of equestrian, acrobatic and other performances;

(b) to every shop establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more

persons are employed or were employed, on any day of the preceding twelve months:

Provided that the State Government may, with the approval of the Central Government, after giving not less than two months notice of its intention of so doing, by notification in the Official gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

(2) Save as otherwise provided in Section 5-A and 5-B, nothing contained in this Act shall apply to any factory or other establishment to which the provisions of the Employees State Insurance Act, 1948, apply for the time being.

This Act was brought into force in Mines with effect from 1.11.1973 after repealing the Mines maternity Benefit Act, 1941. In regard to establishments other than Mines all the Sate Governments/Union Territories, Jammu Kashmir, Nagaland, U.P. and Delhi have adopted the central Act after repealing their State Acts. Those States/ Union Territories which have not adopted the Central Act had their own Acts.

The Act was again amended by the Maternity Benefit (Amendment) Act, 1995 to come in force on such date as the Central Government may, by notification in the Official Gazette, appoint. In Section 3 of the Maternity Benefit Act, 1961 a new clause namely, (ha) defining ‘medical termination of pregnancy’ to mean the termination of pregnancy permissible under the provisions of the Medical Termination of Pregnancy Act, 1971 has been inserted.

In Sections 4 (1) and (2) for the words, “or her miscarriage” the words, “miscarriage or medical termination of pregnancy” have been substituted. A new section dealing with leave for miscarriage , etc., has been substituted for section 9 of the Act and a new section, namely, Section 9-A providing leave with wages for tubectomy operation has been inserted. Lastly in Section 10 of the Act for the words, “or miscarriage” the words, “miscarriage, medical termination of pregnancy or tubectomy operation” have been substituted. The amendment seeks to provide more facilities to working women. These amendments have come into force from 1-2-1996.

The maternity Benefit Act, 1961, has been passed to regulate the employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity benefit and certain other benefits. This is very significant piece of labour legislation exclusively devoted to the working women in factories, mines, plantations and establishments wherein persons are employed for the exhibition of equestrian, acrobatic and other performance. Some of the important provisions of this Act are being given here briefly. Section 3 of the Act contains definitions of certain terms and expressions used in the various provisions of the Act, such as child, delivery, employer, establishment, factory, mine plantation, wages, etc.

14&15.3 RESTRICTIONS ON EMPLOYMENTS OR WORK BY WOMEN

Section 4 of this Act prohibits employment or work by women under certain circumstances. It provides that:

1. no employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery or miscarriage.
2. no woman shall work in any establishment during the six weeks immediately following the day of her delivery or miscarriage.
3. no pregnant woman shall, on a request being made by her in this behalf; be required by her employer to do during the period as specified in Section 4 (4) any work which is of an arduous nature or which involves long hours of standing or which in any way is likely to interfere with her pregnancy or the normal development of the foetus or is likely to cause her miscarriage or otherwise to adversely affect her health;
4. the period referred to above shall be: (a) the period of one month immediately preceding the period of six weeks, before that date of her expected delivery, (b) any period during the said period of six weeks for which the pregnant women does not avail of leave of absence under section 6 of this Act.

14&15.4 RIGHT TO PAYMENT OF MATERNITY BENEFIT

1. Subject to the provision of this Act every woman shall be entitled to, and her employer shall be liable for the payment of maternity benefit at the rate of the average daily wages for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day.

2. The maternity benefit the average daily wages for the period of her actual absence immediately preceding and including the day of her delivery and for six weeks immediately following that day.

3. For the purpose of maternity benefit the average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately, preceding the date from which she absent herself on account of maternity, or one rupee a day whichever is higher. However, no man can be entitled to maternity benefit unless she has actually worked in establishment of the employer from whom she claims maternity benefit, for a period of at least 160 days in the twelve months, immediately preceding the date of her expected delivery; provided that the qualifying period of 150days is not applicable to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration. For calculation of 160 days, the days for which she has been laid off during the period of such twelve months immediately preceding the date of her expected delivery shall be taken into account. It may be further pointed out that she is entitled to maternity benefit for the maximum period; it will be paid only for the days upto and including the day of the death and the period of six weeks immediately following the date of her delivery leaving behind the child, the employer shall be liable for maternity benefit for the entire period of six weeks. However, if the child also dies during the said period the employer is liable to pay maternity benefit for the days upto and including the day of the death of the child.

4. Continuance of payment of Maternity Benefit in certain cases-Section-5-A lays down that every woman entitled to payment of maternity benefit under this act shall notwithstanding establishment in which she is employed, continue to be so entitled until she becomes qualified to claim maternity. Benefits under section 50 of the Act.

5. Payment of Maternity Benefit in certain cases-Section 5-B provides that every woman shall be entitled to the payment of maternity benefit under this Act-

(a) Who is employed in a factory or other establishment to which the provisions of the Employees Stale Insurance Act, 1948 apply ;

(b) Whose wages excluding remuneration for overtime work for a month exceed the amount specified in sub-clause (b) of clause (9) of section 2 of that Act and (c) who fulfils the conditions specified in sub-section (2) of Section 5.

6. Forfeiture of Maternity Benefit - It may be pointed out that if a woman works in any establishment after she has been permitted by her employer to absent herself under the provisions of section 6 for any period during such authorized absence, she shall forfeit her claim to the maternity for such period.

7. Notice of Claim for Maternity Benefit and Payment thereof Section 6 of the Maternity Benefit Act deals with the rule regarding notice of a claim for maternity benefit and payments thereof. These rules may be summarised as under:

1. Any woman entitled to maternity benefit under the provisions of this Act may give notice in writing in such form as may be prescribed to her employer, stating that the maternity benefit and any other amount to which she may be entitled under the provisions of this Act may be paid to her or to her nominee indicated in the notice and that she will network in any establishment during the period for which she receives maternity benefit.

2. In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than 6 weeks from the date of her expected delivery.

3. Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after the delivery.

4. On receipt of the notice, the employer shall permit such woman to absent her self from the establishment until the expiry of 6 weeks after the day of her delivery.

5. So far as the payment of maternity benefit is concerned it has been provided that the amount of maternity benefit for the period preceding the date of her expected delivery shall be paid in advance by the employer to the woman on production of such proof as may be prescribed that the woman is pregnant, and the amount due for subsequent period shall be paid by the employer to the woman within 48 hours of production of such proof as may be prescribed that a woman has been delivered of a child.

6. The failure to give notice under the Section shall not disentitle a woman to maternity benefit or any other amount under the provisions of the Act if she is other wise entitled to such benefit or amount and in any such case as inspector may either of his own motion or application made to him by the woman order the payment of such benefit or amount within such period as may be specified in the order.

7. The aforementioned rules make it clear that any woman who is entitled to maternity benefit has to give notice in order to receive the benefit. However, if she fails to give notice as required under the provisions of this Act she does not become disentitled to

maternity benefit but in such a case she has to make an application to the Inspector for the purpose. The Inspector is authorised to pass orders for the payment of maternity benefit or any other amount to which she is entitled on such application or he may pass orders of his own motion.

8. Payment of Maternity Benefit in case of death of a woman - it has been provided under section 7 of this Act that if a woman entitled to maternity benefit or any other amount under this Act, dies before receiving such maternity benefit or amount, it shall be paid to her nominees indicated in the notice given by her under section 6 of the Act and in case there is no such nominee it shall be paid to her legal representative.

9. Payment of Medical Bonus - Every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of twenty-five rupees, if no prenatal confinement and post-natal care is provided for by the employer free of charge.

10 Leave for miscarriage - In case of miscarriage, a woman shall, on production of each proof as may be prescribed, be entitled to leave with wage at the rate of maternity benefit, for a period of 6 weeks immediately following the day of her miscarriage.

11 Leave for illness arising out of pregnancy, etc. - Section 10 of this Act provides that a woman suffering from illness arising out of pregnancy, delivery, premature birth of child or miscarriage shall, on production of prescribed proof, be entitled, in addition to the period of absence allowed to her under section 6 of this Act, or as the case may be under section 8, to leave with wages at the rate of maternity benefit for a maximum period of one month. Thus, under section 9 leave for one month is available in cases indicated above

12 Nursing Breaks - Section 11 of the Maternity Benefit Act, 1961, provides that every woman delivered of a child who returns to duty after such delivery shall in addition to the interval for rest allowed to her, be allowed in the course of her daily work, two breaks of the prescribed duration for nursing the child until the child attainstheage15months.

13 Prohibition of dismissal during absence or pregnancy - Section 12 of the Maternity Benefit Act, 1961, provides that:

(1) When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge of dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service :

(2) The discharge or dismissal of a woman at any time during her pregnancy, if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus referred to insection8, shall not have the effect of depriving her of the maternity benefit or medical bonus, provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman deprive her of the maternity benefit or medical bonus or both, However, in these cases she is entitled to appeal to such authority as may be prescribed against the order of deprivation of maternity benefit or medical bonus within 60 days from the date of communication of such order to

her, and the decision of that authority on such appeal whether the woman should or should not be deprived of maternity benefit or medical bonus or both shall be final.

However the provisions of section 12(2) shall not affect the provisions of section 12(1) of the Act.

Thus the employers, are prohibited from discharging or dismissing a woman worker in the above mentioned circumstances. This is a special protection provided to woman workers under provisions of this Act.

14. No deduction of wages - Section 13 of this Act provides that no deduction from the normal and usual daily wages of a woman entitled to maternity benefit under provision of this Act shall be made by reasons only of: (a) the nature of work assigned to her the virtue of the provisions contained in section 4(3) concerning prohibition of assignment of work of arduous nature, or (b) breaks for nursing in the child allowed to her under the. Provisions of section 11.

This provision make it clear that the employer cannot play any mischief by allowing her light work during pregnancy and breaks for nursing the child when she returns to duty after delivery and making deductions from her wages in lieu of such statutory concessions.

15. Effect of Laws and Agreements inconsistent with this Act - It has been provided that the provisions of this Act shall have effect notwithstanding any thing inconsistent there with contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act.

It may be pointed out that if under any such award, agreement or contract of service or otherwise, a woman is entitled to more favourable benefits than those provided under this Act, she shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under the provisions of this Act. Any woman may enter into an agreement with her employer, whereby more favourable rights or privileges in respect of any matter may be granted to her than those provided by this Act.

16. Administration, Enforcement and Penalties - This Act makes provision for appointment of inspectors and penalty for contravention of the Act by the employer. The appropriate Government has been authorised here also to make rules for carrying out the purposes of this Act.

It is social welfare enactment requiring beneficial construction of its provisions to enable the woman worker not only to subsist but also to make of her dissipated energy, nurse nor child, preserve her efficiency as a good worker and restore and maintain the level of efficiency of work as it stood prior to the delivery of the child.

17. Cognizance of Offence - Section 23 of the Act prohibits institution of prosecution for an offence under this act or any rule made there under after the expiry of one year from the date on which the offence is alleged to have been committed. It is further provided that no

such prosecution shall be instituted except by or the previous sanction of the inspector, provided that the computing the period of one year, the time if any, taken or the purpose of obtaining such previous sanction shall be excluded. No court inferior to that of a Presidency Magistrate or a Magistrate of the First Class shall try any such offence.

18. Protection of action taken in good faith - Section 24 lays down that no sub prosecution or other legal proceeding shall lie against any person for any thing which is done in good faith or intended to be done in pursuance of this Act or any rule or order made there under.

19. Power of Central Government to give direction - Section 25 authorises the Central Government to give directions as it may deem necessary to a State Government regarding the carrying into execution of the provisions of this Act and the State Government shall comply with such directions.

20. Power to exempt establishments - if the Appropriate Government is satisfied that having regard to an establishment or a class of establishments providing for the grant of benefits which are not less favourable than those provided in this Act, it is necessary so to do, it may, by notification in the Official gazette, exempt, subject to such conditions and restrictions, if any, as may be specified in the Notification, the establishment or class of establishments from the operation of all or any of the provisions of this Act or any rule made there under. The provisions are intended to give better benefits than those which are available to working women under the provisions of Maternity benefit Act.

21. Power to make rules-The appropriate Government has been empowered subject to the condition of previous publication and by Notification in the Official Gazette, to make rules for carrying out the purpose of this Act. Such rules may provide for the preparation and maintenance of registers, records and muster-rolls, exercise of powers and performance of duties by inspectors for the purposes of this Act, the method of payment of maternity benefit and other benefits, form on notices under section 6, the duration of nursing breaks referred to in section 11, the act which may constitute gross misconduct for ht purpose of section 12, the authority to which an appeal may be made and the procedure to be followed in disposal of the appeal, the authority to which an appeal shall lie against the decision of the Inspector, from and manner in which complaint may be made to the inspectors and the procedure to be followed by them in making enquiries or any other matter which is to be or may be prescribed.

I.L.O. has evolved several conventions to provide protection to employed woman. “Ironically enough, the relatively high cost employed women has provided a hurdle to the growth of woman employment. Employees are reluctant to employ women and also unwilling to pay them equal wages. A number of I.L.O Conventions have been ratified by India and some of these though not ratified have been ratified by Convention No.111 regarding discrimination in Employment and Occupation, 1958, has been ratified. The principle has also been incorporated in the Constitution of India. The equally, have the right to an adequate means of livelihood. Not only this, but it can be claimed as a fundamental right as the right to equality as per Article 16 (2) makes a specific mention that “no citizen shall on grounds only of ….. sex….. be ineligible for, or discriminated against in respect of any employment or office under State.” In pursuance of this, after independence, special training institutes have been started for women.

Despite all these efforts discrimination continues in some form or other all over India. Discrimination in Employment and wags is an universal phenomenon. Even in an industrially advanced country like America, equal employment Commission had to be appointed to study the problem of discrimination. Far more serious is the discrimination in wages. The I.L.O. adopted a convention (equal pay for work of equal value in 1951). Many countries have ratified it. There has also been practical application of the equal pay principle since then.

The I.L.O. Convention NO. 100 of equal remuneration was adopted in 1951. it was ratified by India in 1958. the principle is also enshrined in the Constitution of India as Directive Principle of State Policy, Article 39(d), "that there is equal pay for equal work for both men and women." The Legislative provisions of the Minimum Wages Act, 1948 do not permit differentiation in minimum rates of wages on the ground of sex. However, in almost all the industries, such as, weeding, transplanting, agricultural operations, coal mining industry, plantation, etc., there is discrimination in wages.

All the world over the demand for equal remuneration against all types of discrimination is voiced by various organizations of women and by the I.L.O., I.C.T.U. It is appreciable that in England in 1970 the Equal pay Act was passed giving right to individual women to claim equal pay for similar work[45]. In United States of America, the Equal Pay Act has been passed which came into force in June 1963 which has helped in erasing wage discrepancies based on sex.

"Equality of remuneration has proved a difficult target to achieve. The fight for equal pay started hundred years ago and it has still not been won", says Nell Telegar of Netherlands, a Trade Unionist. There are no ready-ways solutions to the problem. Even by providing facilities for training and guidance vocations and careers, by implementation by effective enforcement of labour laws and industrial awards, by undertaking job-evaluation or job-appraisal programmes and by discarding traditional attitudes, the women can be assured of justice. There is a need to fight against discrimination regarding equal pay, equal employment opportunities, for promotions, for occupying higher positions and for leadership of trade union movement. Then, only women would provide proper leadership to society as was visualized by Mahatma Gandhi.

14&15.5 PAYMENT OF GRATUITY ACT, 1972

"Gratuity" imports an idea of a "gift' or a "present" in return for favour of services generally, but the Payment of Gratuity Act reverses this norm. The payment of Gratuity Act, 1972, a social security enactment, provides a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. To fulfil a long-felt need of the statute as a measure of social security to workmen, the Parliament has enacted in the twenty-third year of the Republic of India to provide for the claim for payment of gratuity to employees engaged in the aforesaid concerns. It fulfilled the universally recognised need of compensation for loss of income due to unemployment arising either out of incapacity to work due to invalidity, old age, etc. or otherwise, the desire that workmen employed in different parts of the country by government by a common law.

The Act has been made applicable by section 1(3) thereof, to every factory, mine, oilfield, plantation, port and railway company, every shop or establishment within the meaning of

any law for the time being in force relation to shops and establishments in a State, in which ten or more persons are employed or were employed on any day of the preceding twelve months, and such other establishments or class of establishments in which ten or more employees are employed or were employed on any day of the preceding twelve months, as the Central Government may, by notifications, specify in that behalf. The Act was amended in 1984 for making its provisions more effective and beneficial. Persons employed in administrative or managerial capacity were made eligible for gratuity. The employees of seasonal establishments have been brought on par with similar employees of non-seasonal establishments and shall be entitled to gratuity at the rate of seven day's wages for each season.

Under s.10 (10)(iii) of the Income Tax Act, 1961, lays. Down that any gratuity received by an employee on his retirement or on his becoming incapacitated prior to such retirement or on termination of his employment, or any gratuity received by his widow, children or dependants on his death, to the extent it does not, in either case, exceed one-half month's salary for each year of completed service, calculated on the basis of the average salary for the ten months immediately preceding the month in which any such event occurs, subject to such limit as the Central Government may, by notification in the Official Gazette, specify in this behalf having regard to the limit applicable in this behalf to the employees of that Government; provided that where any gratuities referred to in this clause are received by an employee from more than one employer in the same previous year, the aggregate amount exempt from income-tax under this clause shall not exceed the limit so specified; provided further that where any such gratuity or gratuities was or were received in any one or more earlier previous years also and the whole or any part of the amount of such gratuity or gratuities was not included in the total income of the assessee of such previous year or years, the amount exempt from income-tax under this clause shall not exceed the limit so specified as reduced by the amount or, as the case may be, the aggregate amount not included in the total income of any such previous year or years. In this clause, and in cl. (10AA), salary shall have the meaning assigned to it in cl. (h) of r. 2 of Part A of Schedule IV.

Section 4(3)of the Principal Act has been recently amended by the Payment of Gratuity (Amendment) Act, 1998 enhancing the ceiling of gratuity payable from Rs. 2.5 lakhs to 3.5 lakhs.

Welfare measures such as pension, provident fund, gratuity etc are in conformity with the directive principles of State Policy as adumbrated in Part IV of the Constitution of India.

Protection against loss of income due to invalidity or incapacity to work, old age, etc. is a generally accepted social norm. Gratuity is salutary benefaction statutorily generated independently. This significance of the Payment of Gratuity Act, is as a compulsory statutory retiral benefit.

This comprehensive write-upon the law of Gratuity in India, Comprising the Payment of Gratuity Act, 1972 as amended by the Payment of Gratuity (Amendment) Act, 1998 would serve the purpose of having an overall view of the subject in issue.

14&15.5.1. Introduction

Initially, Gratuity Schemes were introduced in some establishments either by voluntary attain of the employers or under agreements between the employers and workers. These

schemes were confined to particular establishments, to certain categories of staff and there was no general legislation requiring payment of gratuity to the industrial workers. In the course of timeout was recognized that workers had a right to receive gratuity in return for long and unblemished services. The disputes on the subject were dealt with the Industrial Tribunal and their awards resulted in the reduction of a medication in gratuity schemes in some establishments.

First, the provisions were made in the Working Journalists conditions of service and miscellaneous provisions) Act, 1952 requiring the newspaper establishments to pay gratuity to the working journalist employed by them. Later, after few years, the Government of kerala enacted the kerala Industrial Employee's payment of gratuity act, 1970, making Gratuity a statutory right of the employees covered by the Act. Then the Government of West Bengal enacted the West Bengal Employees payment of Gratuity Act, 1971. The other states were also in terms of enacting similar laws but they felt that instead of each state having its own law on gratuity, it is advantageous to have uniform central law for the whole country. Thus the matters were discussed in the labor minister's conference and then in the Indian Labor conference, in 1970 and thus a central legislation on payment of gratuity was agreed and enacted a central Act, namely the payment of gratuity Act, 1972. This was modeled on the West Bengal legislation.

It thus came into force on the 16th September 1972.

14&15.5.2. Short Title, Extent and Commencement

(1) This Act is called as payment of Gratuity Act, 1972.

(2) It extends to whole of India.

But except Jammu and kashmir, in case of the Plantations.

(3) This Act applies to –

- (a) Every factory, oilfield plantation port railway and mine company.
- (b) Every shop and establishment in which (10) ten or more persons are employed on any day of the preceding twelve months.
- (c) Other establishment or class of establishments, as notified by the central government, in which ten or more employees is employed in the preceding 12 months.

A shop or establishment to which the Act has become applicable once continues to be governed by it. Even if the number of persons employed there in at any time after it has become so applicable falls below ten (10). This has been added through the Amendment of 3A.

(4) This Act has become into force from 16th September 1972.

14&15.5.3. Definitions

(a) "Appropriate Government" means

(i) in relation to an establishment-

- (a) Belonging to, or under the control of the central government.
- (b) Having branches in more than one state.

(c) Of a factory belonging to, or under the control of the central government.
(d) Of a major port, oil field railway or mine company the central government.

(ii) In other case the state government is the appropriate government.

“**COMPLETED YEAR OF SERVICE” :**

q. “Retirement” means termination of the service of the employee other wise than supernnuation.

r. “Superannuating” means in relation to an employee, means the attainment by the employees of such age as is fixed in the contract or conditions of service as the age on the attainment of which employee shall vacate the employment.

s. “Wages” means all emoluments which are earned by an employee while on duty or one leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowances but does not include any bonus, commission, houserent, overtime wages and other allowances.

Continuous Service:

(1) An employees shall be said to be in continuos service for any period if he has, for that period been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave, lay off, strike or a lockout or cessation of work not due to any fault of the employee.

(2) Where an employee is not in continuous service for any of one year or six months, he is deemed to be in continuous service.

a. For the said period of 1 year, if the employee works for not less than 190 days in case of an employee employed below the ground in a mine and for 240 days in any other case.
b. For the said period of 6 months, if he had actually worked under one employer for not less than–96 days in case of a mine (below ground) and 116 days in other cases

(3) If an employee is employed in a seasonal establishment he shall be deemed to have worked continuously under the employer, if he has actually worked for not less then 75% of the Number of days on which the establishment was in operation.

14&15.5.4. Controlling Authority

The appropriate government by notification appoints any officer as controlling authority who is responsible for the administration of this Act.

14&15.5.5. Payment of Gratuity

(1) Gratuity is payable to the employee on the termination of his employment after he has rendered continuous service for not less than 5 years.

(a) on his superannuating;

(b) on his retirement or resignation; or

(c) On his death or disablement due to accident or disease.

The completion of continuous service of 5 years is not necessary in case of termination of employment of an employee, which is due to death or disablement.

In the case of death of the employee, it shall be paid to the nominee or to the heir if no nomination is made. In case of heirs or nominees are minor, the amount shall be deposited with the controlling authority, until the minor attains majority.

(2) For every completed year of service, the employer shall pay gratuity to the employee at the rate of 15 days' wages based on the rate of wages last drawn.

In case of piece-rated employee, wages will be computed on average of total wages for a period of 3 months. It is not considered in case of seasonal establishments, the gratuity is paid at the rate of 7 day's wages for each season.

(3) The amount of gratuity shall not exceed (Rs.1 lakh w.e.f. 1994, 24th may) Rs.3.5 lakhs [w.e.f. 22nd June,1998 Amendment Act]

(4) The gratuity payable to the disabled workman is computed as

(a) for the period preceding the disablement – gratuity is calculated on the basis of wages last drawn at time of disablement.

(b) For the period subsequent to the disablement – gratuity is calculated on the basis of reduced wages as drawn at the time of termination of his service.

The total of the gratuity for these two periods will be the amount of gratuity payable to the disabled employee,

(5) The right of an employee to receive better terms of gratuity under any award, or agreement or contact with the employer is protected.

(6) (a) This provides for the gratuity of an employee whose services have been terminated for any act of willful omission or negligence causing any damage or loss to, or destruction to properly belonging to the employer.

(c) This deals with the case for payable of gratuity where the services of an employee have been terminated door moieties and disorderly conduct or constituting an offence involving moral turpitude

14&15.5.6. A Compulsory Insurance

(1) The payment of gratuity, prescribed provisions for compulsory insurance for employer's liability for payment towards the gratuity under Act from the Life Insurance Corporation of India established under the Life Insurance Corporation of India Act, 1956. But the employer of an establishment belonging to or under the control of central or state government is exempted from the operation of these provisions.

(2) The appropriate government exempts the
   (i) Employers who have already established an approved gratuity fund in respect of this employees and who desires to continue such arrangement.
   (ii) Employers employing 500 0r more employees, who established an approved gratuity fund in the prescribed manner.
(3) Every employer shall get his establishment registered within a prescribed time with the controlling authority and only those employer who have taken insurance or established an approved gratuity fund shall be registered.
(4) To give effect to the provisions, the app. Government makes rules for the composition of Board of trustees of the approved gratuity fund and for the recovery of amount of gratuity payable to the employees by the controlling authority.
(5) If there is any default on the part of the employer, payment of premium to the insurance or to contribution of gratuity fund, he shall be liable to pay the amount of gratuity due in the Act including interest, for the delayed payments.
(6) When any contravention of the provisions is punishable with a fine of RS. 1,000 for each day during which the offence continues.

14&15.5.7 Power to Exempt

The payment of gratuity Act; appropriate government to grant exemption.

(1) The appropriate government exempts any factory, mine, port, oilfield, plantation, railway company or shop to which the Act applies, if the employees of such establishments are in receipt of gratuity or pensioner benefit not less than the benefits conferred under this Act.
(2) The appropriate government may exempt any employee or class of employee or class of employees employed in any establishment who are in receipt of better benefits.
(3) A notification may be issued to the person who shall not effect the interest of any person.

14&15.5.8 Nomination

(1) Every employee who has complete one year of service shall be nominated for the purpose of the payment of gratuity in the event of his death in the prescribed manner.
(2) The employee may in his nomination distribute the amount of gratuity payable to him amongst more than one nominee.
(3) If the employee has a family at the time of nomination, the nomination shall be made in favor of one or all the members of his family. Any nomination made in favor of a person who is not a member of the family shall be void.
(4) At the time of nomination making, if the employee has no family and is in favour of other person, the employee subsequently acquires a family, such nomination will become invalid. And the employee has to make a fresh nomination in favor of persons of the family.
(5) The employee can modify a nomination at any time after giving a written notice in prescribed form to the employer.
(6) If the nominee preceded the employee, then the employee make a fresh nomination.
(7) The employer shall keep the nomination made by the employee in safe custody.

14&15.5.9. Determination of the Amount of Gratuity

(1) A person who is eligible for payment of gratuity, who shall send a written application to the employer, within such from as may be in the prescribed for the payment of gratuity.

(2) When the gratuity becomes payable, the employer has to determine the amount of gratuity and give notice to the employee to whom the gratuity is payable and also to the controlling authority, whether the application has been made or not.

(3) The employer, shall arrange to pay the amount of gratuity with 30 days from the date it becomes payable to the person.

(3A) If the employer, does not pay the amount of gratuity within the period specified, he shall pay from the date on which gratuity becomes payable to the date on which it is paid, simple interest at the rate 10% per annum.

No interest shall be payable if the delay in the payment is due to the fault of the employer.

(4)(a) If the dispute arises due to the amount of gratuity payable, the employer shall deposit the amount with the controlling authority.

(b) If there is a dispute regarding the payment of gratuity, the employer or employee shall make an application to the authority to the controlling authority for deciding the dispute.

(c) The controlling authority shall after inquiry direct the employer to pay such amount or reduce the amount deposited by him.

(4) For the purpose of conducting an inquiry the controlling authority have some powers as are like the courts.

(5) The inquiry carried shall be judicially proceeding within the meaning. Of IPC.

(6) Any person aggrieved by the order may appeal to the appropriate government or any other authority specified by the appropriate government within60 days from the date of receipt of the order.

(7) The appropriate government or appellate authority provides an opportunity to both the parties to be heard.

14&15.5.10 Inspectors

(1) The appropriate government by notification appoints inspectors.

(2) The appropriate government defines the area to which the authority of the Inspector appointed shall extend.

(3) Every Inspector shall be deemed to be a public servant.

14&15.5.11 Powers of Inspectors

(1) The inspectors appointed, exercise the following powers:

(a) Require the employer to furnish information.

(b) Enter and inspect at all reasonable hours with his assistants.

(c) Examine relevant matters.
(d) Make copies or take extracts from any registers, records, notice, or other documents.
(e) Exercise other powers as may be prescribed.

(2) Any person required to produce any register, record, notice or document are legally bound to do so.
(3) They also have power to search or seizure under the authority of warrant issued.

14&15.5.12. Recovery of Gratuity

If the gratuity payable is not paid by the employer in the specified time., controlling authority shall issue a certification for the amount to the collector who shall collect and recover with the compound interest at the rate notified by the central government.

But the controlling authority before issuing a certificate gives the employer an opportunity of showing cause.

The amount of interest payable shall not exceed the amount of gratuity payable under the Act.

14&15.5.13 Penalties

(1) For the avoidance of payment of false statement or false representation, shall be punishable of 6 months or a fine of Rs.10, 000 or with both.

14&15.5.14 Exemption of Employer from Liability in Certain Cases

Where an employer is charged with an offence punishable, is Entitled with 3 days notice in writing of the complaint so that the actual offender can be brought before the court at the time of hearing the charge.

In case the person charged as actual offender by the employer, the court can adjourn for a period not exceeding 3 months.

14&15.5.15 Cognizance of Offences

No court will take cognizance of any offence punishable on a complaint made by the authority of the appropriate government.

In the case the amount of gratuity is not paid or recovered within 6 months from the expiry of prescribed time, appropriate government may authorize the controlling authority, with in 15 days to make complaint to a magistrate.

(1) No court inferior to the presidency Magistrate or a Magistrate of 1st class shall try the offence.

14&15.5.16 Protection of Action Taken in Good Faith

No suit on legal proceedings shall be against the controlling authority or any person, which is done in good faith under the act.

14&15.5.17 Protection of Gratuity

The gratuity payable under this Act shall not be in execution of any decree or order of any will, revenue or court. This relief is aimed at providing a payment of gratuity to the persons entitled without being effected by any order of attachment by any decree of any court.

14&15.5.18 Act to override other enactment, etc.,

The provisions of this Act's shall not effect anything contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

14&15.5.19 Power to Make Rules

The appropriate government, by ratification makes rules for this Act.

(1) Every rule made by the central Government shall be laid before each house of parliament while in the sessions for a total period of 30 days.

14&15.6 CONCLUSION

Maternity disables a woman worker from undertaking any work during the few weeks immediately proceeding and following child-birth. In order to protect the health of the mother and the child, it is necessary that she be freed from being engaged in work during this period. With the emergence of the system of wage labour in industrial undertakings, many employers tended to terminate the services of the women workers when they found that maternity interfered with the performance of normal duties by women workers. Many women workers, therefore, had to go on leave without pay during this period in order to retain their employment; many others had to bear a heavy strain to keep their efficiency during the periods of pregnancy, which was injurious to the health of both the mother and the child.

Maternity benefit legislation was undertaken in order to enable the women workers to carry on the social function of child-bearing without undue strain on their health, and loss of wages. Therefore, maternity benefit legislations, in general, aim at providing payment of cash maternity benefit for a certain period before and after confinement, grant of leave, and certain other related facilities.

Originally initiated by the States, Maternity Benefit Laws subsequently became both the Central and State Measures. The first Maternity Benefit Act was adopted in Bombay in 1929. Subsequently, other States passed similar Acts e.g. Madras in 1934. U.P. in 1938, Punjab in 1943, Assam in 1944, Bihar in 1947, Orissa in 1953, Rajasthan in 1953, Kerala in 1957, M.P. in 1958, and Mysore in 1959. The application of the Acts has been reviewed from time to time and necessary modifications introduced.

The first central measure in the sphere was the Mines Maternity Benefit Act, 1941. Later, the Employees' State Insurance Act, 1948 and the Plantation Labour Act, 1951 also provided

for payment of maternity benefit. In 1961, the Central Maternity Benefit Act was passed aiming at a uniform maternity benefit all over the country. The Central Act is now in operation all over the country. It has replaced other State and Central Legislations.

Gratuity legislation is also intended to provide some protection to persons against their old age. Prior to the enactment of Central Payment of Gratuity Act, 1972 two State laws were in operation in the country, namely, the Kerala Industrial Employees' Payment of Gratuity Act, 1970 and the West Bengal Employees' Payment of Gratuity Act, 1971. Proposals for Central legislation were discussed in the Labour Ministers Conference held in August 1971 and also the Indian Labour Conference at its session held in October the same year. The need for a Central legislation on gratuity was emphasized in both the conferences. Accordingly, the Payment of Gratuity Act, 1972 was passed by the Central legislature. The Central legislation is essentially patterned on the West Bengal legislation.

14&15.7 SELF ASSESSMENT QUESTIONS

1. What is the object of maternity Benefit Act, 1961
2. What are the various restrictions on employments or work by women.
3. Explain the right to payment of maternity benefit.
4. Explain the object and purpose of payment of gravity.
5. How do the employee determine the amount of gravity.
6. Explain the functions of inspectors.

14&15.8. FURTHER READINGS

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Dr. NAGARAJU BATTU

LESSON - 16

CASE LAW NO - 1

FACTORIES ACT, 1948

1990 LAB I.C. 1213

SUPREME COURT

(From : Madras)

A.M. AHMADI AND

M. FATHIMA BEEVI, JJ.

Civil Appeal No. 1929 of 1990, Dt : 20-4-1990.

The Clothing Factory, National Workers' Union, Avadi, Madras. Appellant v. Union of India and others, Respondents.

Factories Act (63 of 1948), S.59(1) - Over-time wages - Rate - Section applies only to cases of over-time work done beyond 9 hours a day and 48 hours a week - Piece-rated workers of Ordinance Clothing Factory - Normal working hours 44 3/4 per week - Claim for twice the ordinary wages for work done beyond normal hours and up to 48 hours a week - Governed by Departmental Rules and not by S. 59 - Piece rate workers not entitled to overt-time wages for disputed period under Departmental Rules.

Ministry of Defence letter No. 8(5).56/D (Civ.II) dated 1st September, 1959 and Dt: 13th February, 1963.

Wages - Over-time Wage - Rate. (Para 7)

Cases Referred : Chronological Paras 1984 Lab IC 663 : 1984 Supp SCC 196 : AIR 1984 SC 1022 (Paras 5,6,7)

The Clothing Factory, National Workers Union, Avadi, Madras
Vs.
Union Of India By Its Secretary And Others, (1990) 3 Sec. 50 (57), Air 1990 Sc P.1383

Section 59(1)-Piece rated workers - Grant of overtime wages - Not permissible - Such wages are taken care of in the calculation of piece rate.

In the present case the grant of overtime wages for the period in excess of the normal working hours of 44-3/4 per week and upto 48 hours is governed by the relevant departmental rules and Section 59(1) of the Factories Act, 1948 comes into play only if a piece worker has worked beyond 9 hours in a day or 48 hours kin a week and not otherwise. Further, piece workers

are denied overtime wage for these 3-1/4 hours of work in a week because this factory is taken care of in the calculation of the piece rate. The Supreme Court, therefore, is of the opinion that the ratio of Kokil case (From the Judgement and Order dated 31st March, 1980 of the A.P. Administrative Tribunal in R.P.No.7329 of 1988) has no application to the facts of the present case.

Clothing Factory, National Workers' Union, Avadi, Madras Vs. Union of India by its Secretary and others, (1990) 3, SCC, 500 (57); AIR 1990 SC 1383.

Overtime wages cannot be claimed under Section 59(1) for work done outside the factory - 1973 (1) LLJ 166.

Normal Working Day : The hours of work cannot be more than nine in a day and taken with the intervals for rest these nine hours may be spread over 10-1/2 hours. Average duration of actual work payable at ordinary rate of wages per day thus comes to eight-hours. 1966(1) LLJ 709 (SC)

A workman before transfer was working only 42 hours in a week. But after transfer he worked 48 hours in the week. It was held that he is not entitled for overtime wages for these six hours-1971(1) LLJ 350

EXTRA WAGES FOR OVERTIME : Where a workman is absent on tour on duty from the headquarters his absence on tour on duty does not amount to overtime work. He is therefore not entitled to extra wages under Sec.59. When a workman goes out on tour on duty he is entitled to daily allowance and travelling allowance. 1978 Lab.I.C.390.

In view of non obstante clause in Section 62 of the M.P. Shops and Establishments Act, 1958, Section 59 of Factories Act gets attracted to the workmen of the Dewas Bank Note Press to entitle them to payment of overtime wages at twice the ordinary rate of wages. G.M., Bank Note Press Dewas Vs. Chhattar Singh, 1993 (III) LLJ Supp 903 (M.P.) D.B.

Dispensary located in security press, Nasik - is an integral part of the press - Employees entitled for payment of overtime at double the rate of their normal wages. H.H.Datar Vs.P.S.Shivram, 1995(III) LLJ Supp.44(Bom.)

"Ordinary rate of Wages" - Do not include notional house rent allowance (HRA) - Employees of Government mint occupying Government accommodation cannot claim computation of overtime allowance by including notional HRA in their emoluments, Union of India Vs. S.C.Baskey, 1996(1) LLJ 1094 (SC) 1996(72) FLR 124(S.C.).

Claim for overtime wages is a vested and statutory right - it is an implied term of contract of employment - Workers not obliged to utilise compensatory holidays only in lieu of overtime work - Petition under Section 33-C(2) of the Industrial Disputes Act maintainable to enforce payment of overtime wages Rajendra Nagar Municipality Vs. B.V. Perraju, 1995(2) ALT 320.

AHMADI, J. :- Special leave granted.

2. The workmen of the Ordnance Clothing Factory, Avadi, Madras are represented by the petitioner/appellant Union. The workers of the factory are divided into two categories, namely, (i) day workers and (ii) piece-rate workers. The day workers are paid wages in the time scale of Rs.260-400 on the basis of their actual attendance whereas the piece-rated workers are paid on actual out-put or production calculated on the basis of time required for making the item by multiplying the same by the hourly rate worked out by dividing the mean of the time scale by monthly working hours e.g., Rs.330 + 195 hours = Rs.1.69 (Rs. 330/- being the mean of the time scale of Rs.260-

400 and 195 hours being the total monthly hours).

3. The appellant-Union contents that the daily normal working hours of the workmen are 8 during the week except on Saturday when the working hours are 4-3/4 only. Thus the total working hours during the week come to 44-3/4 hours. If the piece-rated workers are required to work beyond the aforesaid normal working hours they are entitled to overtime wages under section 59 of the Factories Act,1948. That section, in so far as is relevant, reads as under :

"Section 59(1) - Where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages".

This sub-section postulates payment of extra wages at twice the ordinary rate of wages for those workers of the factory who are required to work for more than 9 hours in a day or for more than 48 hours in a week. The appellant union filed a Writ Petition No. 2356 of 1985 in the High Court of Madras praying for an appropriate writ or direction to the respondents to pay the piece-rated workers extra or overtime wages at the rate prescribed by Section 59(1) if the total working hours of any workman exceeded 44-3/4 hours in a week. The appellant-union contended that the piece-rate system was introduced sometime in 1963 and since then the piece-rate workers were paid overtime wages accordingly for work done beyond the normal working hours but the same was abruptly discontinued from 1983, so much so that they were even denied the wages at the normal rate for work done beyond 44-3/4 hours and upto 48 hours. i.e. 3-1/4 hours. It is, however, admitted that if the workmen are required to work beyond 48 hours in a week, they are paid extra wages in accordance with Section 59(1) of the Factories Act. Thus the controversy is in respect of the rate at which piece-rate workers should be paid wages for the work put in between 44-3/4 and 48 hours in a week. The workers they are entitled to extra wages for these 3-1/4 hours at double the normal rate in accordance with Section 59(1) of the Factories Act. In support reliance is placed on the Ministry of Defence letter No. F.8(5)/56/D(Civ.II) dated 1st September, 1959 which interalia provides that in all cases where overtime pay is admissible to civilian personnel, both under the provisions of the Factories Act and Departmental Rules, the overtime pay should be calculated as under :

(1) For work in excess of normal working hours and up to 9 hours on any day or 48 hours in week, overtime will be paid at the rate prescribed in the departmental rules. For calculation of overtime pay under this item only basic pay and dearness allowance shall be taken into account.

(2) For work in excess of 9 hours on any day or 48 hours in a week overtime will be paid at the rates prescribed in the Factories Act. For calculating overtime pay under this item total pay including allowances will be taken into account.

By a subsequent communication dated 13th February, 1963 the Ministry clarified that having regard to the revision of piece work rates effected in the Ordinance Factories correlating them to the monthly scales of pay sanctioned by the Ministry's letter dated 16th January, 1954, the distinction between High Paid and Low Paid piece workers stood abolished and keeping in mind the Ministry's letter dated 1st September, 1959, the President was pleased to sanction the following methods of calculation and payment of overtime to piece-rate workers :

(a) No overtime will be admissible for working overtime in the day shift. But for the purposes of distribution of P.W. profits, the time wages element in respect of overtime up to 9 hours per day or 48 hours a week will be determined at the rate of P/200 per hour, where 'P' represents the monthly basic pay and dearness pay where admissible.

(b) An extra ½ hour pay calculated at the hourly rate of 1/200 of the monthly basic pay or the monthly basic pay and dearness pay, where admissible, for every hour of systematic overtime worked on the night shifts in addition to their piece work earnings.

(ii) Piece workers under the Factories Act for each hour of overtime in excess of 9 hours on any day or 48 hours in a week a piece worker will be 1/200 of the monthly basic pay plus 25% of basic pay plus twice all allowances. In other words, if 'P' represents the monthly basic pay and 'D' stands for all allowances such as dearness allowance, house rent allowance, compensatory (city) allowance, overtime for each hour will be P/200 + ¼P/200 + 2D/200.

This order was directed to take effect from 1st March, 1954 . Thereafter, by a corigendum issued on 21st October, 1965, sub-paragraph (1) of the Ministry's letter of 1st September 1959 was directed to be substituted w.e.f. 2nd July, 1965 by the following:

"For work in excess of normal working hours and up to 9 hours on any day or 48 hours in a week, overtime will be paid at the rate prescribed in the departmental rules. For calculating overtime pay under this item, basic pay, dearness allowance, special pay, personal pay, pension (to the extent taken into account for he fixation of pay) in the case of re-employed pensioner and city compensatory allowance shall be taken into account. House Rent Allowance, conveyance allowance, travelling and daily allowances, permanent travelling allowance, clothing allowance, uniform allowance, washing allowance and children education allowance shall not be included".

But by a Circular No. 1823/LB dated 2nd February, 1983 it as stated that orders has since been received from the Ordinance Factory Board to stop payment of Departmental Overtime when piece workers work beyond normal working hours and up to 9 hours a day or 48 hours a week'. It was further clarified that they would be entitled to piece work earnings only for the period they work extra hours. Thus the payment of departmental overtime for January, 1983 in February, 1983 was stopped. However, with regard to workmen of the Ordnance Factories and other industrial establishments under the Defence Ministry governed by the Factories Act, it was laid down by the communication dated 11th September, 1987 that such workmen shall be entitled to overtime allowance at time rate for work done in excess of prescribed hours and up to 48 hours a week, in accordance with Ministry's. O.M. dated 25th June, 1983, but it was clarified that the time rate of wages will be calculated with reference to pay in the revised, scale w.e.f. the date the wonder has been brought on the revised scale introduced from 1st January, 1986. In the light of the above, the appellant-union' contends that as the prescribed hours of work were 44-3/4 hours per week, the workmen were entitled to overtime wage or allowance for work done beyond 44-3/4 hours and up to 48 hours a week at double the ordinary rates, which has been wrongly and illegally discontinued.

4. The case set up by the respondents is that the workers of the petitioner/appellant union are mostly doing tailoring work stitching uniforms, tents, parachutes, covers, etc., in the Ordnance Clothing Factory, a Govt. of India Undertaking, and are paid wages on piece-rate basis. It is submitted that while fixing the piece work rare the labour involved in the production of each article is analysed in detail and the basic time is determined to which 25% incentive is added and the wage is paid on the basis of time so calculated by taking the arithmetic mean of the scale to same by the figure 195 representing the number of standard hours for a month. Thus if a piece worker completes his job allotted to him he would earn his basic time wage plus an extra 25% as incentive. It is further stated that the payment of overtime wages for the work done beyond the normal working hours of 44-3/4 and up to 48 hours in a week is regulated by the Departmental Rules and for the period exceeding 48 hours in a week or 9 hours on a single day is regulated as per the requirements of the Factories Act. According to the respondents the Defence Ministry letter of 1st September, 1959 as a amended

by the corrigendum of 21st October, 1965 does not apply to piece workers but their case in regard to the grant of overtime payment is governed by the Defence Ministry letter dated 13th February, 1983 as amended by the corrigendum of 18th January, 1970. In fact the former letters apply to day workers who are paid wages on the basis of attendance. Thus according to the respondents piece workers are not entitled to overtime wages at double the rate for work done in excess of 44-3/4 hours up ot 48 hours in a week because they are entitled to piece work profit in the form of earnings which is included in their wage structure itself to compensate them for the extra working hours up to 48 hours in a week. Yet on a account of a mistake such payment was made till December, 1982 but when it came to light the same was discontinued by the circular letter dated 2nd February, 1983. This discontinuance was challenged in Writ Petition No. 10095/83 in the Madras High Court which was repelled by Mohan, J. was still pending in the High Court when the proceedings giving rise to this appeal were initiated by this Union. Lastly it is pointed out that according to the terms of Section 59 of the Factories Act, the question of payment of overtime at double the rate can arise only if the piece worker has worked for more than 9 hours per day or 48 hours per week and not to cases of the present type. The respondents, therefore, pay that the present appeal is not maintainable and deserves to be dismissed.

5. In the rejoinder filed on behalf of the appellant-union it is contended that the 25% incentive is not to compensate for overtime work beyond 44-3/4 hours and up to 48 hours in a week but is a measure to provide for rest intervals, minor mechanical break downs, tools sharpening or grinding or hold-ups for want of raw-materials, etc., to arrive at the operation that the letters dated 1st September, 1959 and 12th October, 1969 applied only to to the monthly-rated day workers in misconceived. This is apparent from the subsequent letter dated 13th February, 1963 as amended by the corrigendum of 18th January, 1970. Therefore, according to the appellants, the contention that piece-work profit is incorporated in the wage structure applicable to piece rated workers is not correct and clearly manifests that the discontinuance of overtime is based on a wrong understanding of the relevant orders. In support strong reliance is placed on this Court's decision in Union of India v. G.H. Kokil, (1984) Supl SCC 196 : (1984 Lab IC 663). Lastly it is contended that the respondents were not justified in abruptly discontinuing the grant of overtime wages on the pretext of a so-called 'mistake' and their action in so doing is clearly high-handed amounting to unfair labour practice not expected from a governmental undertaking. It is also contended that the circular letter of 2nd February, 1983 is a document of doubtful origin and cannot in any case override the prior orders contained in the letters of the Ministry of Defence earlier referred to. The appellants, therefore contend that the impugned decision needs to be set aside and the overtime payments which have been unilaterally and aribirarily discontinued restored.

JUDGEMENT :

6. From the above re'sume' it is clear that the controversy is limited to the question of non-payment of overtime wages for work done beyond the normal hours of 44-3/4 hours and up to 48 hours in a week i.e., 3-1/4 hours in a week. There is no dispute that the workers are paid overtime wages for work done in excess of 9 hours on any day or 48 hours in any week in accordance with Section 59 of the Factories Act. This section does not provide for overtime wages for work done in excess of the normal working hours and up to 48 hours. In Kokil's case (supra) the point for consideration was whether the employees working in the factory of the Indian Security Press, Nasik, were entitled to overtime wages under Section 59 of the Factories Act read with Section 70 of the Bombay Shops & Establishments Act, 1948, for the work done beyond the normal working hours. According to them their normal working hours were 44 per week, they were required to work in excess thereof but they were paid overtime wages for the extra hours of work at the basic rates

though they were entitled to overtime wages at double the normal rate. In that case there contentions were raised, viz., (i) since none of the respondents was a 'worker' under Section 2(1) of the Factories Act, their case was not governed by Section 59 of the said Act read with Section 70 of the Bombay Shops & Establishments Act; (ii) since none of the respondents was a 'workman' under Section 2(s) of the Industrial Disputes Act, 1947, the application under Section 33C(2) thereof was not maintainable. This Court, on a true interpretation of Section 70 of the Bombay Shops & Establishments Act, came to the conclusion that the non-obtain clause found therein made it clear that Section 59 would apply and the same non-obstance clause kept out the application of Section 64 read with Rule 100. On the third question this Court confirmed the Labour Court's finding that the respondents were workmen under the Industrial Disputes Act. In this view of the matter this Court held that the employees were entitled to overtime wages under Section 59 of the Factories Act.

7. Now under the Presidential order of 1st September, 1959 overtime wage was payable for work in excess of normal working hours and up to 9 hours on any day or 48 hours in a week's at the rate prescribed in the departmental rules. By the subsequent Presidential order of 13th February, 1963 the method of calculation and payment of overtime wage to piece workers was outlined. Under these orders the day workers are allowed overtime wages for working beyond the normal working hours whereas piece workers are allowed piece work profits as may be earned by them for working beyond normal working hours and up to 48 hours in a week. This is clear from clause (i) of the letter dated 13th February, 1963. Even the Manual of Cost Accounting (1986) mean form Ordinance and Ordnance Equipment Factories indicates that in the case of piece workers no separate payment for overtime is permissible under the departmental rules for day shift workers but they are entitled to piece work earnings only. That is way in the earlier Writ Petition No. 10095 of 1983 filed in the Madras High Court a contention was based on Article 14 of the Constitution that the management was guilty of discrimination inasmuch as day workers of day shifts were entitled to overtime wages whereas piece workers were denied the same. The contention was turned down by Mohan, J. whose decision was challenged in appeal before the High Court which appeal has since been dismissed for default. It is indeed surprising why another Writ Petition No. 2356 of 1985 was filed in the same High Court, notwithstanding the pendency of the said appeal, which writ petition on transfer to the Central Administrative Tribunal came to be disposed of by the impugned judgment and order. In fact it is doubtful if this second Writ Petition would have been entertained in view of the earlier decision on Mohan, J. rendered several years back soon after the discontinuance of grant of overtime by the circular letter of 2nd February, 1983 merely because a different union was espousing the cause, since the cause was identical. The decision of this Court in Kokil's case is clearly distinguishable on facts. In that there was no dispute that if Section 59 of the Factories Act Applied the workers were entitled to overtime wages for work done beyond the normal hours and up to 48 hours. That would naturally depend on the relevant service rules since section 59 stricto sensu applies to case of overtime work done beyond 9 hours a day or 48 hours a week. In the present case the grant of overtime wages for the period in excess of the normal working hours 44-3/4 per week and up to 48 hours is governed by the relevant departmental rues and Section 59(1) of the Factories Act comes into play only if a piece worker has worked beyond 9 hours in a day or 48 hours in a week and not otherwise. Further, piece workers are denied overtime wage for these 3-1/4 sours of work in a week because this factor is taken care of in the calculation of the piece rate. We are, therefore, of the opinion that the ratio of Kokil's case (1984 Lab IC 663) has no application to the facts of the present case.

Dr. G.B.V.L. NARASIMHA RAO

LESSON - 17

CASE LAW NO - 2

Contract Labour (Regulation and Abolition) Act 1970

IN THE SUPREME COURT OF INDIA

(C.A.Nos. 6009-6010/2001 dated August 30, 2001)

PRESENT

MR. JUSTICE B.N. KIRPAL

MR. JUSTICE SYED SHAH MOHAMMED QUADRI

MR. JUSTICE M.B. SHAH

MS. JUSTICE RUMA PAL

MR. JUSTIC K.G. BALAKRISHNAN

Between

Steel Authority of India Ltd. and Others

And

National Union Water Front Workers and Others

Contract Labour (Regulation and Abolition) Act, 1970, Section 21 (a) as substituted with effect from January 28, 1986 - Appropriate Government - Determination of - Industry must be carried on by or under authority of Central Government to hold that Central Government is appropriate Government - Such authority may be conferred by Statute or by virtue of relationship of principal or agent or delegation of power - Question of conferment of authority on Government Company / Undertaking by Central Government question of fact to be decided on facts and circumstances of each case - Mere fact that Company or Undertaking instrumentality or agency of Central Government for purpose of Article 12 of Constitution of India not relevant criteria to determine that Central Government is Appropriate Government - Central Government Companies cannot be equated to Central Government through they may be State for purpose of Constitution of India, Industry carried on under authority of Central Government implies industry which is carried on by virtue of pursuant to, conferment of grant of or delegation of power or permission by Central Government to Central Government Company or other government company / undertaking - Real test is if there is lack of conferment of power or permission by Central Government to Central Government Company or Undertaking it would disable such Company or Undertaking to carry on industry in question - Definition of appropriate Government combines three alternatives (a) any industry carried on by Central Government (b) any industry carried on under authority of Central Government and (c) any industry carried on by Railway Company - definition of Appropriate Government both before and after amendment uses common phrase “any industry carried on by or under Authority of Central Government”.

The Central Government Company is engaged in the manufacture and sale of various types of Iron and Steel materials in its plants located in various States of India. Robustness includes

import and export of several products and bye-products through Central Marketing Organisations, marketing unit of the Company having its network of branches in different parts of India. The work of handling the goods in the stock yards of the company was being entrusted to Contractors after calling for Tenders in that behalf. The Government of West Bengal issued a Notification dated July 13, 1989 under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970 prohibiting the employment of contract labour in four specified stockyards of the company at Calcutta. On the representation made by the Company, the Government of West Bengal kept in abeyance the said Notification initially for a period of six months by Notification dated August 28, 1989 and thereafter, extended that period from time to time. However, the period was not extended beyond August 31, 1994.

The Trade Union representing the cause of 353 Contract Labourers field Writ Petition in the Calcutta High Court for absorption of the contract labour in their regular establishment in view of the Prohibition Notification dated July 15, 1989 of the State of West Bengal. The Union further prayed that the Notification dated August 28, 1989 keeping the prohibition notification in abeyance, be quashed. The single Judge of the High Court set aside the Notification keeping the prohibition of contract labour in abeyance and all subsequent notifications extending the period and directed that the contract labour be absorbed and regularised from the date of Prohibition Notification dated July 15, 1989. Aggrieved by the Order of the learned single Judge, writ appeals were field and writ petition was also field challenging the Prohibition Notification dated July 15, 1989.

During the pendency of the writ petition, the Hon'ble Supreme Court of India delivered the judgement in Air India Statutory Corporation & Ors. v. United Labour Union & on 1997-1-LLJ. 1113 holding that in case Central Government Companies the appropriate Government is the Central Government and upheld the validity of the Notification dated December 9, 1976 issued by the Central Government under Section 10(1) of the Contract Labour (Regulation and Abolition Act, 1970 prohibition employment of contract labour in all establishments of the Central Government Companies. On July 3, 19980, the Division Bench of the Calcutta High Court dismissed the writ appeals as well as writ petition filed by the Steel Authority of India taking the view that on the relevant date "the appropriate Government" was the Central Government. Hence the Civil Appeal by Special Leave.

HELD : A plain reading of the unamended delinition shows that the Central Government will be the appropriate Government if the establishment in question answers the description given in sub-clauses (i) to (iii) of section 2(1)(a) of the Contract Labour (Regulation and Abolition) Act, 1970. And in relation to any other establishment in question, the Government of the State, in which the establishment in question is situated, will be the appropriate Government. Sub-clause (i) has two limbs - the first limb takes in an establishment pertaining to "any industry carried on by or under the authority of the Central Government and the second limb embraces such controlled industries as may be specified in that behalf by the Central Government.

Both unamended and amended definition of expression "appropriate Government" uses the phrase "an industry carried on by or under the authority of the Central Government". The amended definition combined three alternatives i.e. (a) any industry carried on by the Central Government (b) any industry carried as under the authority of the Central Government and (c) any industry carried of by a Railway Company. Alternatives (a) and (c) indicate case of any industry carried on directly by the Central Government or a Railway Company. They are too clear to admit of any polemic. In

regard to alternative (b), surely, an industry being carried on under the Authority of the Central Government cannot be equated with any industry carried on by the Central Government itself. Therefore, it is necessary to construe the words “under the authority of the Central Government”. The key word in them in “Authority”.

The phrase “any industry carried on under the authority of the Central Government” implies an industry which is carried on my virtue of, pursuant to conferment of, grant of or delegation of power or permission by the Central Government to a Central Government Company or other Government Company/undertaking. To put it differently, if there is lack of conferment of power or permission by the Central Government to a Government Company or Undertaking, it would disable a company/undertaking to carry on the industry in question.

For the purpose of enforcement of Fundamental Rights guaranteed in Part III of the Constitution the question whether a Government Company or Undertaking is “State” within the meaning of Article 12 is germane. It is important to notice that in these cases the pertinent question is the appropriateness of the Government within the meaning of Contract Labour (Regulation and Abolition) Act, whether the Central or the State Government is the appropriate Government with regard to the industry carried on by the Central/State Government Company or any undertaking and not whether such Central/State Government Company or undertaking comes within the meaning of Article 12 of the Constitution.

The fact of being instrumentality of a Central / State Government or being “State” within the meaning of Article 12 of the Constitution of India cannot be determinative of question as to whether an industry carried on by a company Corporation or an instrumentality of the Government is by or under the authority of the Central Government for the purpose of or within the meaning of the definition of “appropriate Government” in the Contract Labour (Regulation and Abolition) Act. Take the case of a State Government Corporation/Company/Undertaking set up and owned by the State Government which is an instrumentality or Agency of the State Government and is engaged in carrying on an industry, can it be assumed that the industry is carried on under the authority of Central Government and in relation to any industrial dispute concerning the industry can it be said that the appropriate Government is the Central Government? The answer must be in the negative. In the above example, it as a fact, any industry is carried on by the State Government Undertaking under the authority of the Central Government, then in relation to any industrial dispute concerning that industry, the appropriate Government will be the Central Government This is not because it is an Agency or instrumentality of the Central Government bus because the industry is carried on by the state Government/Company/Corporation/Undertaking under the authority of the Central Government. The same reasoning applies to a Central Government Undertaking as well. Further, the definition of “Establishment” in Contract Labour (Regulation and Abolition) Act takes in its fold purely private undertakings which cannot be brought with in the meaning of Article 12 of the Constitution. In such a case how is “appropriate Government” determined for the purpose of Contract Labour (Regulation and Abolition) Act or Industrial Disputes Act? The test which is determinative is whether the industry carried on by the establishment in question is under the authority of the Central Government? Obviously there cannot be one test for one part of the definition of “establishment” and another test for another part. Thus it is clear that the criterion is whether an undertaking/instrumentality of Government is carrying on an industry under the authority of the Central Government and not whether the undertaking is instrumentality or agency of the Government for the purposes of Article 12 of the Constitution of India, be it of Central Government or State Government.

All the Central Government Companies which are parties in this mater cannot be equated to Central Government through they may be "State" within the meaning of Article 12 of the Constitution of India. Being the instrumentality of the Agency of the Central Government would not by itself amount to having the authority of the Central Government would not by itself amount to having the authority of the Central Government to carry on that particular industry. Therefore, it will be incorrect to say that in relation to any establishment of a Central Government Company / Undertaking, the appropriate Government will be the Central Government. To hold that the Central Government is "the appropriate Government" in relation to an establishment, the Court must be satisfied that the particular industry in question is carried on by or under the authority of the Central Government. If this aspect is kept in mind it would be clear that the Central Government will be clear that the Central Government will be the "appropriate Government" under the Contract Labour (Regulation and Abolition) Act and the Industrial Disputes Act provided the industry in question is carried on by a Central Government Company / an Undertaking under the Authority of the Central Government. Such an authority may be conferred, either by a Statute or by virtue of relationship of principal and agent of delegation of power. Where the authority to carry on any industry for or on behalf of the Central Government Company / any Undertaking by the Statute under which it is created, no further question arises. But, if it is not so, the question that arises is whether there is any conferment of authority on the Government Company / any undertaking by the Central Government to carry on the industry in question. This is a question of fact and has to be ascertained on the facts and in the circumstances of each case.

In the case of a Central Government Company / Undertaking an instrumentality of the Government, carrying on an industry, the criteria to determine whether the Central Government is the appropriate Government within the meaning of Contract Labour (regulation and Abolition) Act is that the industry must be carried on by or under the authority of the Central Government and not that the company / undertaking is an instrumentality or an agency of the Central Government for purposes of Article 12 of the Constitution, such as authority may be conferred either by a Statute or by virtue of relationship of principal and agent or delegation of power and this fact has to be ascertained on the facts and in the circumstances of each case. The view expressed by the learned Judge is on the interpretation of expression "Appropriate Government" in the case of Air India Statutory Corporation & Ors. V United Labour Union & Ors. Reported in 1997-ILLJ-1113 (SC).

HELD :

A reading of Section 10 makes it evident that sub-section (1) commences with a non obstante clause and overrides the other provisions of the Contract Labour (Regulation and Abolition) Act in empowering the appropriate Government to prohibit by Notification in the Official Gazette, after consultation with the Central Advisory Board / State Advisory Board, as the case may be, employment of contract labour in any process, operation or other work in any establishment. Before issuing Notification under sub-section (1) in respect of an establishment the appropriate Government is enjoined to have regard to (i) the conditions of work; (ii) the benefits provided for the contract labour; and (iii) the relevant factors like those specified in clause (a) to (d) of sub-section (2) Under Clause (a), the appropriate Government has to ascertain whether the process, operations or other work proposed to be prohibited is incidental to or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment; Clause (b) requires the appropriate Government to determine whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture of occupation carried on in that establishment; Clause (c) contemplates a verification by the appropriate Government as to

whether that type of work is done ordinarily through regular workmen in that establishment or an establishment similar there to and clause (d) requires verification as to whether the work in that establishment is sufficient to employ considerable number of whole time workmen. The list is not exhaustive. The appropriate Government may also take into consideration other relevant factors of the nature enumerated in sub-section (2) of Section 10 before issuing Notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970.

A reading of the definition of "Establishment" in Section 10 would show that the position that emerges is that before issuing notification under sub-section (1) an appropriate Government is required to (i) consult the Central / State Board (ii) consider the conditions of work and benefits provided for the contract labour and (iii) take note of the factors such as mentioned in Clause (a) to (d) of sub-section (2) of section 10 referred to above, with reference to any office or department of the Government or local authority or any place where any industry, trade or business manufacture or occupation is carried on.

The impugned Notification dated December 9, 1976 makes it manifest that with effect from March 1, 1977, it prohibits employment of contract labour for sweeping, cleaning, dusting and watching of buildings owned or occupied by establishments in respect of which the appropriate Government under the said Act is the Central Government. This clearly indicates that the Central Government had not adverted to any of the essentials, referred to above, except the requirement of consultation with the Central Advisory Board. Consideration of the factors mentioned above has to be in respect of each establishment whether individually or collectively, in respect of which Notification under sub-section (1) of Section 10 is proposed to be issued. The notification apart from being an omnibus notification does not reveal compliance of sub-section (2) of Section 10 of the Act. This is ex facie contrary to the postulates of Section 10 of the Act. Besides it also exhibits non-application of mind by the Central Government. Hence the impugned Notification dated December 9, 1976 issued by the Central Government cannot be sustained.

Contract Labour (Regulation and Abolition) act, 1970 - Section 10 (1) Issuance of Notification prohibiting Contract Labour in concerned establishment - Automatic absorption of contract labour as regular employees - Workman if hired in connection with work of establishment by contractor and if contract mere camouflage workman will be in fact employee of principal employer and if contractor is not camouflage workman will be contract labour - Concept of automatic absorption is not camouflage workman will be contract labour - Concept of automatic absorption is not alluded to any Statement of objects and reasons of Contract Labour (Regulation and Abolition) Act - Consequences of "abolition of contract labour" is not spelt out in Contract Labour (Regulation and Abolition) Act - Contract Labour (Regulation and Abolition) Act creates barrier on engaging contract labour in establishment covered by Prohibition Notification by principal employer except as regular employees directly - No specific provision made for automatic absorption of contract labour by principal employer in concerned establishment on issuance of notification prohibiting employment of contract labour - Absorption of contract labour not concomitant to abolition Notification issued by appropriate Government under Section 10 of Contract Labour (Regulation and Abolition) Act - Parliament did not intend absorption of Contract labour on issuance of notification Prohibiting employment of contract labour - Absorption of contract labour not concomitant to abolition Notification issued by appropriate Government under Section 10 of Contract Labour (Regulation and Abolition) Act - Parliament did not intend absorption of Contract labour on issue of Prohibition Notification - By virtue of engagement of causal labour by contractor in connection with work of establishment

relationship of master and servant is not created between principal employer and casual labour - Provisions of Contract Labour (Regulation and Abolition) Act do not contemplate creation of direct relationship of master and servant between principal employer and casual labour nor such relationship be implied Principal employer cannot be required to order absorption of casual labour - Provisions of Contract Labour (regulation and Abolition) Act do not contemplate creation of direction relationship be implied Principal employer cannot be required to order absorption of casual labour working in concerned establishment on issuance of notification prohibiting employment of casual labour in any process operation or work - Case of Air India Statutory Corporation & Ors v. United Labour Union & Ors. 1997-I-LLJ-1113 (SC) prospectively overruled and any direction issued by Industrial Court or High Court for absorption of direct labour following such decision shall hold good and same shall into be sat aside where such direction has been given effect to and is final - Issuance of Notification prohibiting casual labour under industrial dispute brought before Industrial Court by Contract Labour, Court to consider whether contract has been interposed in genuine contract or mere camouflage - If contract not genuine but mere camouflage, contract labour will have to be treated as employee of principal employer and should be directed to realize services of contract labour subject to conditions that should be satisfied - If contract labour found to be genuine and on issuance of notification prohibiting engagement of contract labour. Contract labour shall be given preference if principal employer intends to employ regular workmen provided such casual labour found to be suitable and if necessary, by relaxing conditions as to maximum age.

HELD : Consequence of Prohibition Notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act prohibiting employment of contract labour, is neither spelt out in Section 10 nor indicated anywhere in the Act. Consequences of issuance of Notification are (1) Contract labour working in the concerned establishment at the time of issuance of Notification will cease to function; (2) the contract of principal employer with the contractor in regard to the contract labour comes to an end; (3) no contract labour can be employed by the principal employer in any process, operation or other work in the establishment to which the Notification relates at any time thereafter; (4) the contract labour is not rendered unemployed as is generally as summed but continues in the employment of the contractor as the Notification does not severe the relationship of master and servant between the contractor and the contract labour (5) the contractor can utilise the services of the contract labour in any other establishment in respect of which no Notification under Section 10 (1) has been issued where all the benefits under the Contract Labour (Regulation and Abolition) Act which were being enjoyed by it will be available; (6) if a contractor intends to retrench his contract labour he can do so only in conformity with the provisions of the Industrial Disputes Act.

The contract labour is a species of workmen. A workmen shall be so deemed when he is hired in or in connection with the work of an establishment by or through a contractor, with or without the knowledge of the principal employer. A workman may be hired (1) in an establishment by the principal employer or by his agent with or without the knowledge of the principal employer or (2) in connection with the work of an establishment by the principal employer through a contractor or by a contractor with or without the knowledge of the principal employer. Where a workman is hired in or in connection with the work of an establishment by the principal employer through a contractor, he merely acts as an agent so there will be master and servant relationship between the principal employer and the workman. But where a workman is hired in or in connection with the work of an establishment by a contractor, either because he has undertaken to produce a given result for the establishment or because he supplies workman for any work of the establishment a question might arise whether the contractor is a mere camouflage as in the case of Hussainbhai,

Calicut v. Alath Factory Thozhilali Union, Kozhikode & Ors. Reported in 1978-II-LLJ-397 (SC) and in the case of Indian Petrochemicals Corporation & Anr. v. Shramik Sena & Ors. Reported in 1999-II-LLJ-696 (SC) if the answer is in the affirmative, the workman will be in fact an employee of the principal employer, but if the answer is in the negative, the workman will be a contract labour.

A reading of the Joint Committee of the Parliament on the Contract Labour (Regulation and Abolition) Bill 1967 would show that neither in the main report nor in the dissent not there is any reference to the automatic absorption of the contract labour. This may perhaps be for the reason that on abolition of contract labour system in an establishment the contract labour nonetheless remains as the work force of the contractors who get contracts in various establishments where the contract labour could be engaged and where they would be extended the same statutory benefits as they were enjoying before. It was clear to the Joint Committee that by abolition of contract labour, the principal employer would be compelled to employ permanent workers for all types of work which would result incurring high cost by him, which implied creation of employment opportunities on regular basis for the contract labour. This could as well be yet another reason for not providing automatic absorption.

The Statement of Objects and Reasons of the Contract Labour (Regulation and Abolition) Act does not allude to the concept of automatic absorption of the contract labour on issuance of the notification for prohibition of employment of the contract labour.

The eloquence of the Contract Labour (Regulation and Abolition) Act in not spelling out the consequence of abolition of Contract Labour system discerned in the light of various reports of the Commissions and the Committees and the Statement of and the Committees and the Statement of Objects and Reasons of the Act, appears to be that the Parliament intended to create a bar on engaging contract labour in the establishment covered by the Prohibition Notification by a principal employer so as to leave no option with him except to employ the workers as regular employees directly Section 10 is intended to work as a permanent solution to the problem rather than to provide a one-time measure by departmentalising the existing contract labour who may, by a fortuitous circumstance be in a given establishment for a very short time as on the date of the Prohibition Notification. It could as well be that a contractor and his contract labour who were with an establishment for a number of years were changed just before the issuance of the Prohibition Notification. In such a case there could be no justification to prefer the contract labour engaged on the relevant date over the contract labour employed for longer period earlier. These may be some of the reasons as to why no specific provision is made for automatic absorption of contract labour under the Contract Labour (Regulation and Abolition) Act.

There is no implicit requirement of automatic absorption of contract labour by the principal employer in the concerned establishment on issuance of notification by the appropriate Government under Section 10 (1) prohibiting employment of contract labour in a given establishment.

A beneficial legislation needs to be construed liberally in favour of the class for whose benefit it is intended, does not extend to reading in the provisions of the Act what the Legislature has not provided whether expressly or by necessary implication or substituting remedy or benefits for that provided by the Legislature. When the concept of automatic absorption of contract labour as a consequence of issuing notification under Section 10 (1) by the appropriate Government is not alluded to either in Section 10 or at any other place in the Act and the consequence of violation of

Sections 7 and 12 of the Contract Labour (Regulation and Abolition) Act is explicitly provided in Section 23 and 25 of the Contract Labour (Regulation and Abolition) Act, it is not for the High Courts or this Court to read in some unspecified remedy in Section 10 or substitute for penal consequence specified in Sections 23 and 25 a different sequel, be it absorption of contract labour in the establishment of principal employer or a lesser of the statute will be far beyond the principle of ironing out the creases and the scope of interpretative legislation and as such clearly impermissible. It is difficult to accept that Parliament intended absorption of contract labour on issue of abolition notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act.

A workman, who is not an out-worker, must be treated as a regular employee of the principal employer. A person who is not an out-worker but satisfies the requirement of the first limb of the definition of “workman” would, by the very definition fall within the meaning of the term “workman”. Even so, if such a workman is within the ambit of the contract labour unless he falls within the aforementioned classes, he falls within the aforementioned classes, he cannot be treated as a regular employee of the principal employer.

On exhaustive consideration of the provisions of the Contract Labour (Regulation and Abolition) Act it is seen that neither they contemplate creation of direct relationship of master and servant between the principal employer and the contract labour nor can such relationship be implied from the provisions of the Act on issuing notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act a fortiori much less can such a relationship be found to exist from the rules and the forms made thereunder.

The upshot of the above discussion is outlined thus :

1(a). Before January 28, 1986, the determination of the question where the Central Government or the State Government is the appropriate Government in relation to an establishment will depend, in view of the definition of the expression “appropriate Government” as stood in the Contract Labour (Regulation and Abolition) Act, on the answer to a further question, is the industry under consideration carried on by or under the authority of the Central Government or does it pertain to any specified controlled industry; or the establishment of any railway, cantonment board, major port, mine or oil-field or the establishment of Banking or Insurance Company? If the answer is in the affirmative, the Central Government will be the appropriate Government; otherwise in relation to any other establishment the Government of the State in which the establishment was situated would be the appropriate Government.

1(b). After the said date in view of the new definition of that expression, the answer to the question referred to above, has to be found in clause (a) of Section 2 of the Industrial Disputes Act, if (i) the concerned Central Government Company / Undertaking or any undertaking is included therein no nominee or (ii) any industry is carried on (a) by railway company or (b) by specified controlled industry, then the Central Government will be the appropriate Government otherwise in relation to any other establishment, the Government of the State in which that other establishment is situated, will be the appropriate Government.

2(a). A Notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act prohibiting employment of contract labour in any process, operation or other work in any establishment has to be issued by the appropriate Government.

(1) after consulting with the Central Advisory Board or the State Advisory Board, as the case may be and

2. Having regard to (i) conditions of work and benefits provided for the contract labour in the establishment in question and (ii) other relevant factors including those mentioned in sub-section (2) of Section 10; 2(b) inasmuch as the impugned notification issued by the Central Government on December 9, 1976 does not satisfy the aforesaid requirements of Section 10. It is quashed but prospectively i.e. from the date of this judgment and subject to the clarification that on the basis of this judgment no order passed or no action taken giving effect to the said Notification on or before the date of this judgment, shall be called in question in any Tribunal or Court including a High Court if it has otherwise attained finality and/or it has been implemented;

3. Neither Section 10 of the Contract Labour (Regulation and Abolition) act nor any other provision in the Act, whether expressly or by necessary implication, provide for automatic absorption of contract labour on issuing a Notification by appropriate Government under sub-section (1) of Section 10, prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently, the principal employer cannot be required to order absorption of the contract labour working in the concerned establishment.

4. We overrule the judgment of this Court in Air India's case prospectively and declare that any direction issued by an industrial adjudicator / any Court including High Court, for absorption of contract labour following the judgment in Air India's case shall hold good and that the same shall not be set aside, altered or modified on the basis of this judgment in cases where such a direction has been given effect to and has become final.

5. On issuance of Prohibition Notification under Section 19 (1) of the Contract Labour (Regulation and Abolition) Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse / camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefits thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

6. If the contract is found to be genuine and Prohibition Notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act in respect of the concerned establishment has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen he shall give preference to erstwhile contract labour, if otherwise found suitable and if necessary, by relaxing the condition as to maximum age appropriately taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications.

JUDGEMENT :

The facts involved in this case are that the central government is prohibited for the employment of contract labour with effect from 1-3-1977 in the operations such as sweeping, cleaning, testing and washing of buildings owned (or) occupied by the establishments in respect of which the appropriate government under the Contract Labour (Regulation & Abolition) Act, 1970 is the central government under notification dated 9th December, 1976. The appellant company is engaged in manufacture of steel materials in its plants (factory) located in various states of India. The notification issued by the central government is an omnibus notification (a general notification) covering all the central government offices, departments, establishments covering all manufacturing units in public sector companies. But not individual units (or) departments (or) offices. The issue before the constitution bench of the apex court is for giving decision related to the legality of notification dated 9-12-1976 issued by the Central Government prohibiting employ of contract labour. The various appellants (principal employees) including Steel Authority of India Ltd., have challenged this omnibus notification on the following grounds.

(1) The notification dated 9th December, 1976 issue by the Central Government is not in accordance with the provisions of the Contract Labour (Regulation & Abolition) Act, 1970.

(2) There is no legislative intent any where in the Contract Labour (Regulation & Abolition) Act to provide for automatic absorption of contract labour as regular employees of the principal employer on assurance of prohibition of notification under the Section 10 of the act.

The Supreme Court has analysed the meaning and legislative intent of Section (10) of the Contract Labour (Regulation & Abolition) Act and stated that before issuing any notification under Sub-section(1) in relation to establishment the appropriate government shall regard to the conditions of work, benefits provided for the contract labour. In that establishment and other relevant factories such as:

(1) Whether the process, operation or other work is incidental to (or) necessary for the industry, trade, business, manufacture (or) occupation i.e. carried on in that establishment.

(2) Whether it is of perennial nature, i.e. to say it is of sufficient duration having regard to the nature of industry, trade, business, manufacture (or) occupation carried on in that establishment.

(3) Whether it is done ordinarily through regular workmen in that establishment (or) on establishment similar there to.

(4) Whether it is sufficient to employ considerable No. of whole time workmen.

The Supreme Court further held that the Central Government which is the appropriate government as issued a notification with effect from 1-3-1977 publishing the employment of contract labour sweeping, cleaning, dusting and washing of building owned or occupied by the establishment with out adverting to any of the essentials refer to above except the requirement of consultation with the central advisory board. Consideration of the factories mentioned above has to be in respect of each establishment whether individually (or) collectively. The notification referred above, apart

from being an omnibus notification does not reveal compliance of Sub Sec.(2) of Sec(10) . This is exofficio contrary to the postulates primary (apparent) of the Sec.(10) of the act. Besides it also exhibits non application of mind by the S.C. This notification was quashed prospectively with effect from 30-08-2001.

The S.C. has at length considered the various provisions such as Sections 7,10,12,23 & 25 of the Contract Labour (Regulation & Abolition) Act, 1970 and held that there is no implicit requirement of automatic absorption of contract labour by the principal employer in the concern establishment on issuance of notification by the appropriate government under Section 10(1) prohibiting employment of Contract Labour in a given act.

The Supreme Court has further held that the contract is found to be not genuine but a mere, so called contract labour will have to be treated as employees of principal employer who has be directly regularised the services of Contract Labour in the concerned establishment subject to the conditions as may be specified by it for the purpose it is further held that if the contract is found to be genuine and prohibition notification under Sec.10(1) of the Contract Labour (Regulation & Abolition) Act, 1970 in respect of the concerned establishment has been issued by the appropriate government, prohibiting employment of contract labour in any process, operation (or) other work of any establishment and where in such process of operation (or) other work of the establishment. The Principal employer intents to employ regular workmen; he shall give preference to the contract labour, if otherwise relaxing the conditions as to maximum age approximately taking in to account the age of the workers at the time of their initial employment by the contract and also relaxing the condition as to the economic qualifications other than technical qualifications.

Dr. G.B.V.L. NARASIMHA RAO

Lesson 18 :

Case Law No- 3

1990 LAB I.C. 1481

(SUPREME COURT)

(From : Delhi)

A.M. AHMADI AND K. RAMASWAMY. JJ

Civil Appeal Nos 930 and 931 of 1990D/17-71990

Barauni Refinery Pragatisheel Shramik Parishad, (Appellant) V. Indian Oil Corporation Ltd. And Others (Respondents)

WITH

General Secretary, Barauni Telshodhak Mazdoor Union, Appellant V. Joint Chief Labour Commissioner (Central) and others, Respondents.

Industrial Employment (Standing Orders) Act (20 of 1946), S.5 – Standing Orders of Indian Oil Corporation concerning Barauni Refinery, Standing Order No.20 Settlement between Employees Union and Management –Binding nature of –Clause of settlement keeping service conditions not changed by settlement, Infact – No Specific mention about age of retirement in settlement Employees cannot approach authorities seeking modification of standing order for fixation of age of retirement.

Industrial Disputes Act (14 of 1947) S.18

A Settlement arrived at in the course of conciliation proceedings with a recognized majority union will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. To that extent it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlements reached with the active assistance of the Conciliation Officer and to discourage an individual employee or a minority union from cutting the settlement. There is an underlying assumption that a settlement reached with the help of the Conciliation Officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the Union signing the settlement but also on others. That is why a settlement arrived at in the course of conciliation proceedings is put on par with an award made by an adjudicatory authority.

Where the charter of demands by the employers contained several matters concerning the service conditions including the one concerning the upward revision of the age of retirement and one of the clauses of the settlement arrived at during the conciliation proceedings which can still in operation, provided that the service conditions of the employee which were not changed by

the settlement, will remain unchanged, the employees could not approach the authorities under the Order with regard to the fixation of the age of superannuation of the workmen, when the settlement did not make any specific mention about the age of retirement , meaning thereby that the demand in respect of revision the age of retirement was not acceded to. It was more so when, by another clause of the settlement the Union agreed that during the period of the operation of the settlement they shall not raise any demand which would throw an additional financial burden on the management, other than bonus. Workmen who remain in service for a longer period have to be paid a larger amount by way of salary, bonus and gratuity than workmen who may newly join in place of retiring men, thereby throwing additional financial burden on the management.

AMHADI, J : These two appeals by two different Trade Unions of Barauni Refinery are directed against the decision of the High Court of Delhi which set aside the modification of Clause 20 of the Standing Orders certified under S.5 of the Industrial Employment (Standing Orders Act, 1946 (hereinafter called the Standing Orders Act'). The brief facts fiving rise to these two appeals are as Under :

Two companies, namely the Indian Refinery, Limited Oil Company, Limited Amalgamated in 1964 and a new Company known as Indian Oil Corporation, Limited (IOCL) was incorporated. This newly formed company comprised essentially of two divisions, namely, (L) Marketing Division, representing the staff assets and business of Indian Oil Company, Limited and 2. Refinery and Pipe Lines Division, representing the staff, assets and oil refinery manufacturing of petroleum products of Indian Refinery, Limited. The age of superannuation of the staff in the Marketing Division was 60 years whereas the age of superannuation for the superannuation for the Refinery and Pipe Lines Division was fixed at 58 years under Clause 20 of the Standing Orders concerning Barauni Refinery. The IOCL has refineries in different parts of the Country including one at Barauni. The Standing Orders concerning the Barauni Refinery came into force on 5th December, 1964 as provided by S.7 of the Standing Orders Act and apply to all workmen employed in the said industrial establishment Clause 20 of the Standing Orders reads as under.

“Every employee shall retire from service on completing the age of 58 years. Extension for a maximum period of 5 years but not for more than one year at a time may be given at the discretion of the company provided the employee is certified to be fit by the Company’s Medical Officer and provided further that the employee concerned also consents to such extension.

By a joint letter dated 15th December, 1981, 14 recognised Unions representing the employees of the IOCL working in different refineries and pipe lines divisions submitted a charter of demands in terms of clauses 2, 1,3 of the long term settlement dated 3rd December, 1979. By clause, 18 of this charter of demands was forwarded by the Barauni Telshodhak Mazdoor Union to the General Manager, IOCL, Barauni refinery on 23rd December 1981. Pursuant to the presentation of this Charter of demands, meetings were held between the Management of IOCL (R & P Division) and the recognized Unions of the said division from time to time. As a result of discussions held at the said meetings a settlement was mutually arrived

by the between the parties on May 24, 1983, clauses 19 and 21 of this general settlement concerning all the Refineries and the Pipe Lines Divisions, inter alia provided as under.

Sec : 19 The Corporation agrees that such terms and conditions of service as well as amenities and allowances as are not changed under this settlement shall remain unchanged and operative during the period of the settlement.

Sec : 20. The Unions agree that during the period of operation of this settlement , they shall not raise any demand having financial burden on the Corporation other than bonus provided that this clause shall not affect the rights and obligations of the parties in regard to matters covered under S.9A of the Industrial Disputes Act, 1947.

This general settlement was to remain in force from 1st May, 1982 to 30th April, 1986. After this general settlement was signed by the Management and the Union representatives, a separate memorandum of Settlement dated 4th August, 1983 was signed between the IOCL (R&P Division). Barauni Refinery and their workmen represented by Barauni Telshodhak Mazdoor Union. Barauni Refinery, under S 12 (3) and 18 (3) of the Industrial Disputes Act, 947 in conciliation proceedings initiated by the Assistant Labour Commissioner and Conciliation Officer, Barauni. This settlement too was to remain in force from 1st May, 1982 to 30th April 1986. Clauses 19 and 21 of this settlement were verbatim reproduction of those in the general settlement dated 24th May, 1983 extracted hereinabove. It may hereby mentioned that despite the specific demand made in the charter of demands for the upward revision of the age of superannuation , no specific provision was made in that behalf either in the general settlement or in the special settlement concerning Barauni Refinery. On the contrary clause 19 of both the settlements provides that the terms and conditions of service which are not changed under the settlement shall remain unchanged and operative during the period of settlement.

The Petroleum and Chemical Mazdoor Union through its General Secretary, Ram Vinod Singh, served notice on the Regional Labour Commissioner (Central) under S, 10(2) of the Standing Orders Act for modification of Clause 20 of the certified Standing Orders of Barauni refinery for raising the age of superannuation from 58 years to 60 years mainly on the found that the staff members working in the Marketing Division superannuated on completing the age of 60 years. It was also contended by the said Union that the demand for the upward revision of the age of superannuation could not be pressed at the time of the settlement arrived at pursuant to the charter of demands because the age of retirement was fixed at 58 years under the relevant certified standing orders. It was therefore, felt necessary that clause 20 of the certified standing orders applicable to Barauni refinery of the IOCL should be got suitably modified to raised the age of retirement to 60 years. This demand was based on the averment the averment that the nature of work performed by the workmen in the Refinery and Pipe Lines Division was identical to that performed by the staff members of the Marketing Division. The pay-scales of the employees Refinery Division and Marketing Division were also identical. It was therefore, contended that there was no valid reason for fixing different ages for retirement for the staff members working in the said two divisions of IOCL.

The Regional Labour Commissioner after hearing the rival parties allowed the application for modification of clause 20 of the certified Standing Orders. By his order the directed that clause 20 shall be modified as under.

"Normally the age of retirement of workman of the corporation is fixed at 60 years. No notice is required to be given by a workman of his intention to retire on superannuation or by the Management to the workman that he is due to reach the age of superannuation on certain date. The workman should not, however, leave his place of duty without being relieved."

Against this order of 11th October,1 984 the IOCL preferred an appeal to the Appellate Authority under S.6 read with S.10 (3) of the Standing Orders Act. The Appellate Authority while dismissing the appeal directed a slight modification in clause 20 of the Standing Orders, clause 20 as modified by the Appellate Authority was worded as under.

"Every workman shall generally retire on attaining the age of 58 years. Between the 57th and 58th year Company's Medial Officer would conduct the medical test and if the workman is found to be medically fit he shall be retained in service for a period of two more years beyond the age of 58 years i.e., up to 60 years.

Feeling aggrieved by this order of the Appellate Authority the IOCL preferred a writ petition No. CWP No. 1717/87 in the High Court at Delhi for quashing the impugned order of the Certifying Officer dated 11th October, 1984 and the impugned order of the Appellate Authority dated 4th May, 1987. The Union which had initiated the proceedings for modification of clause 20 of the certified standing orders also felt aggrieved by the said order of the Appellate Authority and preferred a writ petition No. CWP 347187 in the High Court of Delhi. Both these writ petitions were heard by a Division Bench and were disposed of by a common judgement. The writ petition filed by the IOCL was allowed while the other writ petition was dismissed.

While hearing these two writ petitions the High Court formulated two points for consideration, namely (1)" Whether the Certifying Authority under the Standing Orders Act has the Jurisdiction to entertain an application for amendment of a Standing Order which fixes the age of retirement of the workmen as 58 years which is in consonance with the model Standing Order V. Indian oil Corporation Limited Lab.I.C. and enhances the age of retirement to 60 years without first giving any finding whether it is practicable or give effect to the model Standing Order" and (ii) "Whether the settlement arrived at under S.18 (3) and Section 19 (2) of the Industrial Disputes Act 1947, between the petitioner and the workmen represented by their recognized majority union and which settlement was in force when impugned orders were made, had put any bar on the rights of the workmen to approach the authorities under the said Act for seeking modification of the Standing Orders with regard to the fixation of the age of superannuation of the workmen". The High Court answered the first question in the affirmative holding that it was open to the Certifying Authority to entertain an application for modification of the clause fixing the date of superannuation, the provisions in the model standing orders notwithstanding. On the second point the High Court came to the conclusion that resettlement arrived at in conciliation proceedings was binding on the workmen and as clause 19 of the settlement kept the service conditions which were not changed in fact and clause 21 of the settlement did not permit raising of any demand throwing an additional financial burden on the

IOCL, it was not permissible to modify the certified Standing Orders by an amendment as that would alter the service condition and increase the financial burden on the Management. In this view that the High Court took it quashed the orders passed by the two authorities below and made the rule in CWP No. 1717/87 absolute while dismissing CWP No. 3417/87 with no order as to costs. It is against this order that the Trade Union have approached this Court.

The Standing Orders Act was enacted to define with sufficient precision the conditions of employment for workers employed in industrial establishment and to make the same known to them. The object of the Act was to have uniform standing Orders in respect of the matters enumerated in the schedule to the Act regardless of the time of their appointment. With this in view the Act was enacted to apply to all industrial establishments wherein 100 or more workmen were employed on any date of the preceding 12 months. Within six months from the date of which this enactment becomes applicable to an industrial establishment, the employer is obliged by S.3 to submit to the Certifying Officer draft Standing Orders proposed by him for adoption in his industrial establishment. Sub-section (2) of S.3 lays down that in such draft Standing Orders provision shall be made for every matters set out in the schedule which may be applicable to the industrial establishment and where model Standing Orders have been prescribed shall be, so far as practicable in conformity with such model. Section 4 provides that the Standing Orders shall be certifiable if (a) provision is made therein for every matter set out in the schedule which is applicable to the industrial establishment and (b) the Standing Orders otherwise in conformity with the provisions of the Act. It further casts a duty on the Certifying Officer or Appellate Authority to adjudicate upon the fairness and reasonableness of the provisions of any Standing Orders. On receipt of the draft Standing Orders, S.5 requires the Certifying Officer to forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, to the workmen in such manner as may be prescribed, together with a notice in the prescribed from requiring objections, if any, which the workmen desire to make to the draft Standing Orders. Thereafter the Certifying Officer must hear the concerned authorities and decide whether or not any modification of or addition to the draft submitted by the employers is necessary to render the draft Standing Orders certifiable under the Act. He is then expected to certify the draft Standing Orders with modifications, if any, and send authenticated copies thereof in the prescribed manner to the employer, to the trade union or other prescribed representatives of the workmen within 7 days. Section 6 provides for an appeal against the orders of the Certifying Officer. The Appellate Authority has to communicate its decision to the Certifying Officer, to the employer and the trade union or other prescribed representative of the workmen within 7 days from the date of it s order. Section 7 provides that the Standing Orders shall, unless an appeal is preferred come into operation on the expiry of 30 days from the date on which authenticated copies thereof are sent under S.5 (3) or where an appeal is preferred, on the expiry of 7 days from the date on which copies of the orders of the Appellate Authority are sent under S. 6(2). Standing Orders duly certified as above for the Barauni refinery came into operation on 5th December, 1964 as provided by S.7. We then come to S.10 which provides for modification of Certified standing Orders. Sub-Section (1) thereof states that the Standing Orders finally certified shall not, except an agreement between the employer and the workmen or a trade union or other representative body of the workmen be

liable to modification until the expiry of six months from the date on which the Standing Orders or the last modification thereof came into operation on 5th December, 1964 as provided by S.7. We then come to S.10 which provides for modification of certified Standing Orders. Sub-section (1) thereof states that the Standing Orders finally certified shall not, except on agreement between the employer and the workmen or a trade union or other representative body of the workmen be liable to modification until the expiry of six months from the date on which the Standing Orders or the last modification thereof came into operation. Sub-section (2) of S.10 as under.

"Subject to the provisions of sub-section (1) an employer or workman or a trade union or other representative body of the workman may apply to the Certifying Officer to have the standing orders modified, and such application shall be accompanied by five copies of the modification proposed to be made and where such modifications are proposed to be made be agreement between the employer and the workmen or a trade union or other representative body of the workmen, a certified copy of that agreement shall be filled along with the application.

It was under this provision that clause 20 of the certified Standing Orders was sought to be modified.

Since the High Court has answered the first point in the affirmative i.e., in favour of the workmen, we do not consider it necessary to deal with that aspect of the matter and would confine ourselves to the second aspect which concerns the binding character of the settlement, section 2 (P) of the Industrial Disputes Act, 1947 defines a settlement arrived at in the course of conciliation proceedings and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to the officer authorized in this behalf by the appropriate Government and the Conciliation Officer. Section 4 provides for the appointment of Conciliation Officers by the appropriate Government and the Conciliation Officer. Section 12 (1) says that where any industrial dispute exists or is apprehended the Conciliation Officer may or where the dispute relates to a public utility service and a notice under S.22 has been given, shall hold conciliation proceedings in the prescribed manner. Sub-section (2) of S. 12 casts a duty on the Conciliation Officer to investigate the dispute and all matters connected there with a view to inducing the parties to arrive at a fair and amicable settlement of the dispute. If such a settlement is arrived at in the course of conciliation proceedings, sub-section (3) requires the Conciliation Officer to send a report thereof to the appropriate Government together with the memorandum of settlement signed by the parties to the dispute Section 18 (1) says that a settlement arrived at by agreement between the employer and the workmen otherwise than in the course of the conciliation proceedings shall be binding on the parties to the agreement. Sub-section (3) of S.18 next provides as under.

"A settlement arrived at in the course of conciliation proceedings under this act or an arbitration award in a case where a notification has been issued under sub-section (3-A) of

Section 10-A or award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on."

a. All parties to the industrial dispute
b. All other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, Arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause
c. Where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates.
d. Where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

JUDGEMENT :

It may be seen on a plain reading of sub-sections (1) and (3) of S.18 that settlement s are divided into two categories, namely (i) those arrived at outside the conciliation proceedings and (ii) those arrived at in the course of conciliation proceedings. A settlement which belongs to the first category has limited application in that it merely binds the parties to the agreement but the settlement belonging to the second category has extended application since it is binding on all parties to the industrial dispute, to all other who were summoned to appear in the conciliation proceedings and to all persons employed in the establishment or part of the establishment as the case may be, to which the dispute related on the date of the dispute and to all others who joined the establishment thereafter. Therefore, a settlement arrived at in the course of conciliation proceedings with a recognized majority union will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. To that extend it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlements reached with the active assistance of the Conciliation Officer and to discourage an individual employee or a minority union from scuttling the settlement. There is an underlying assumption that a settlement reached with the help of the conciliation officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the union signing the settlement but also on others. That is why a settlement arrived at in the course of conciliation proceedings is out on par with an award made by an adjudicatory authority. The High Court was, therefore, right in coming to the conclusion that the settlement dated 4th August, 1983 was binding on all the workmen of the Barauni Refinery including the members of Petroleum and Chemical Mazdoor Union

The settlement does not make any specific mention about the age of retirement. Clause 19 of the settlement, however, provides that such terms and conditions of service as are not changed under this settlement shall remain unchanged and operative for the period of the settlement. The age of retirement prescribed by clause 20 of the Certified Standing Orders was undoubtedly a condition of service which was kept intact by clause 19 of the settlement. The provisions of the Standing Orders Act to which we have adverted earlier clearly show that the

purpose of the certified Standing Orders is to define with sufficient precision the conditions of employment of workman and to acquaint them with the same. The Charter of demands contained several matters touching the conditions of service including the one concerning the upward revision of the age of retirement. After deliberation certain conditions were altered while in respect of others no change was considered necessary. In the case of the latter clause 19 was introduced making it clear that the conditions of service which have not been changed shall remain unchanged i.e., they will continue as they are. That means that in the demand in respect of revision of the age of retirement was not acceded to.

By clause 21 of the settlement extracted earlier the Union agreed that during the period of the operation of the settlement they shall not raise any demand which would throw an additional financial burden on the management , other than bonus. Of course the provision to that clause exempted matters covered under S.9A of the Industrial Disputes Act from the application of the said clause. However, S.9A is not attracted in the present case. The High Court was therefore, right in observing : when the settlement had been arrived at between the workmen and the company and which is still in force, the parties are to remain bound by the terms of the said settlement. It is only after the settlement is terminated that the parties can raise any dispute for fresh adjudication. The argument that the upward revision of the age of superannuation will not entail any financial burden cannot be accepted. The High Court rightly points out "workmen who remain in service for a longer period have to be paid a larger amount by way of salary, bonus and gratuity than workmen who may newly join in place of retiring men. "The High Court was, therefore, right in concluding that the upward revision of the age of superannuation would throw an additional financial burden on the management in violation of clause 21 of the settlement. Therefore during the operation of the settlement is was not open to the workmen to demand a change in clause 20 of the certified Standing Orders because any upward revision of the age of superannuation would come in conflict with clauses 19 and 21 of the settlement. We are, therefore, of the opinion that the conclusion reached by the High Court is unassailable

In view of the above we see no merit in these appeals and dismiss them with not order as to costs.

Interim orders in each appeal will stand dissolved.

Dr. G.B.V.L. NARASIMHA RAO

LESSON - 19

Case Law No - 4

A.M.AHMADI.C.J.I

SUHAS C.SEN AND

Mrs. SUJATA V.MANOHAR, JJ.

1996 LAB I.C. 2720

(SUPREME COURT)

(From : Kerala)

Civil Appeal No.1174 of 1979, Dt. 11-9-1996

Regional Director, E.S.I.Corporation and another, Appellants V. Francis DeCosta and another, Respondents.

Employees' State Insurance Act (34 of 1948), Ss.2(8),51-Employment injury - Compensation - Employee on his way to factory, a place of employment - Met with accident one kilometer away from said place - Injuries sustained by employee - Cannot be said to be caused by accident arising out of and in the course of his employment.

A.S.No.638 of 1974, D/-25-11-1977 (Kerala) Reversed,

Workmen's Compensation Act (8 of 1923), S.3(1).

Torts - Master and servant.

Words and Phrases - Phrase "in the course of employment".

In the instant case the employee while on his way to the factory where he was employed met with an accident which took place one kilometer away from the place of employment. The injuries suffered by him in said accident could not be said to have been caused by an accident arising out of and in the course of his employment.

A.S. No.638 of 1974, D.25-11-1977 (Kerala) Reversed

Unless an employee can establish that the injury was caused or had its origin in the employment, he cannot succeed in a claim based on S.2(8) of the Act. The words "accident arising out of his employment" indicate that any accident which occurred while going to the place of employment or for the purpose of employment, cannot be said to have arisen out of his employment. There is no causal connection between the acident and the employment.

The other words of limiation in Sub-section (8) of S-2 is "in the course of his employment". The directionary meaning of "in the course of" is "during (in the course of time, as time goes by), while doing" (The Concise Oxford Dictionary, New Seventh Edition). The dictionary meaning indicates, that the accident must take place within or during the period of employment. If the

employee's work shift kbegins at 4-30p.m. any accident before that time will not be "in the course of his employment". The journey to the factory may have been undertaken for working at the factory at 4-30p.m. But this journey was certainly not in course of employment. If "emplyment" begins from the moment the employee sets out from his house for the factory, then even if the employee stumbles and falls down at the door-step of his house, the accident will have to be treated as to have taken place in the course of his employment. This interpretatioin leads to absurdity and has to be avoided.

The fact that the bicycle was bought by employee by taking a loan from the employer, would be of no relevance. He might have borrowed money from his company or from some where else for purchasing the bicycle. But the fact remains that the bicycle belonged to him and not the employer. If he meets with an accident while riding his own bicycle on the way to his place of work, it cannot be said that the accident was reasonably incidental to the employment and was in the course of his employment. The deeming provision of S. 51-C, while came into force by way of an amendment effected by Employees' Life Insurance (Amendment) Act of 1966 (Act No.44 of 1966), enlarged the scope of the phrase "In the course of employment" to include travelling as a passenger by the employer's vehicle to or from the place of work. The legal fiction contained in S.51-C, however, does not come into play in this case because the employee wasnot travelling as a passenger in any vehicle owned or operated by or on behalf of the employer or by some other person in pursuance of the arrangement made by the employer.

Cases Referred : Chronological Paras 1981 Lab IC 1653 (Guj)

(1977) I WLR 109 : (1977) 2 AIIER 420 Regaani National Insurance Commissioner Ex. Michael. (1965) 13 Law Ed, 895

US 350, O Keerte Deputy Commissioner V Smith Minchman & Gryll, Associates Inc. et.al AIR 964 SC 1932 (1964) 3, SCR 930, AIR 1958 SC 881 AIR 1955 Bombay 105 : (1954)2 Lab LJ 403 (1950) 95 Law Ed 483 : 340 US 504 J.J. O' Leary, Deputy Commissioner Fourteenth Compensation District V.Brown-Pacific-Maxon. Inc.et.al. 1940 AC 190 : (1939) 4 All ER 558 : 162 LT 223, Dover Navigation Co. Ltd. v. Isabella Craig. 67 CLR 496, South Maitland Railways Pty. Ltd. V. James.

V.V.Vaze, Sr.Advocate. Ms.Suvira Lal (Chava Badri Nath Babu) Advocate, for C.V.S.Rao advocates with him for Appellants; Romy Chacko and N.Sudhakaran, Advocates, for Respondents.

1. SEN,J : Francis DeCosta, the first respondent herein, met with an accident on June 26, 1971 while he was on his way to his place of employment, a factory at Koratty. The accident occurred at a place which was about one kilometer away to the north of the factory. The time of occurrence was 4-15 p.m. It has been stated that the duty shift of the respondent would have commenced at 4-30 p.m. The respondent was going to his place of work on bicycle. He was hit by a lorry belonging to his employer. M/s.J & P Coats (P) Ltd.

2. The respondent's collar-bone was fractured as a result of the accident and ahe had to remain in hospital for 12 days. His claim for disablement benefit was allowed by the Employees' State Insurance Court. The appeal filed against that order was dismissed by the Kerala High Court which also dismissed an application for a certificate of fitness to appeal to the Supreme Court. The petitioner filed an application for Special Leave to appeal to this Court on 16-4-1979. Special leave was given by this Court, but the Employees' State Insurance Corporation was directed to pay the

first respondent the compensation due to him in terms of the order of the Employees' State Insurance Court and also the costs of this appeal in any event. It has been stated that the compensation money has already been paid to the first respondent.

3. Since there was difference of opinion between the two Judges who heard the appeal, the matter was directed to be placed before a larger Bench for deciding the controversy.

4. In order to operate the scope of the controversy, it will be necessary to set out the relevant provisions of the Employees' State Insurance Act, 1948.

"2(8) "employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contractged within or outside the territorial limits of India.

Sec : 51. Disablement benefit - Subject to the provisions of this Act -

(a) a person who sustains temporary disablement for not less than three days (excluding the day of accident), shall be entitled to periodical payment at such rates and for such period and subject to such conditions as may be prescribed by the Central Governemnt.

(b) a person who sustains permanent disablement, whether total or partial, shall be entitled to periodical payment at such rates and for such period and subject to such conditions as may be prescribed by the Central Government.

Sec : 51-C Accidents happening while travelling in employer's transport - (1) An accidnt happening while an insured person is with the express or implied permission of his employer, travelling as a passenger by any vehicle to or from his place of work shall, not withstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of and in the course of his employment, if --

(a) The accident would have been deemed so to have arisen had he been under such obligation; and

(b) at the time of the acident, the vehicle. (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer, and (ii) is not being operated in the ordinary course of public transport service.

(2) In this section "vehicle" includes a vessel and an aircraft.

5. That the first repondent has suffered a personal injury is not in dispute. The only dispute is whether the injury will amount to "employment injury" within the meaning of S 2(8). so as to enable the respondent to claim benefit under the Act. The definition given to "employment injury" in sub-section (8) of S. 2 envisages a personal injury to an employee caused by an accident or an occupational disease "arising out of and in the course of his employment". Therefore, the employee, in order to succeed in this case, will have to prove that the injury that he had suffered arose out of and was in the course of his employment. Both the conditions will have to be fulfilled before he could claim any benefit under the Act. It does not appear that the injury suffered by the employee

was on his way to the factory where he was employed. The accident took place one kilometer away from the place of employment. Unless it can be said that his employment began as soon as he sets out for the factory from his home, it cannot be said that the injury was caused by an accident "arising out of .... his employment". A road accident may happen any where at any time. But such accident cannot be said to have arisen out of employment, unless it can be shown that the employee was doing something incidental to his employment.

6. In our judgement by using the words "arising out of .... his employment", the Legislature gave a restrictive meaning to "employment injury". The injury must be of such an extent as can be attributed to an accident or an occupational disease arising out of his employment. "Out of", in this context, must mean caused by employment. Of course, the phrase "out of" has an exclusive menaing also. If a man is described to be out of his employment, it means he is without a job. The other meaning of the phrase "out of" is "influenced, inspired, or caused by: out of pity; out of respect for him". (Webster Comprehensive Directionery-International Edition-1984). In the context of S.2(8), the words "out of" indicate that the injury must be caused by an accident which had its origin in the empl;oyment. A mere road accident while an employee is on his way to his place of employment cannot be said to have its origin in his employment in the factory. The phrase "out of the employment" was construed in the case of South Maitland Railways Pty. Ltd. v. James, 67 CLR 496. where construing the phrase "out sof require that the injury had its origin in the employment".

7. Unless an employee can establish that the injury was caused or had its origin in the employment. He cannot succeed in a claim based on S.2(8) of the Act. The words "accident .... arising out of .... his employment" indicate that any accident which occurred while going to the place of employment or for the purpose of employment, cnanot be said to have arisen out of his employment. There is no causal connection between the accident and the employment.

8. The other words of limitation in sub-section (8) of S.2 is "in the course of his employment". The dictionary meaning if "in the course of" is "during (in the course of time, as time goes by), while doing" (The Concise Oxford Dictonary. New Seventh Edition). The dictionary meaning indicates that the accident must take place within ;or during the period of employment. If the employee's work shift begins at 4-30 p.m., any accident before that time will not be "in the course of his employment". The journey to the factory may have been undertaken for working at the factory at 4-30 p.m. But this journey was certainly not in course of employment. If "employment" begins from the moment the employee sets out from his house for the factory, then even if the employee stumbles and falls down at the door-step of hjis house, the accident will have to be treated as to have taken place in the course of his employment. This interpretation leads to absurdity and has to be avoided.

9. We were referred to a number of cases on this point. In the case of Regina v.National Insurance Commissioner. Ex.Parte. Michael (1977) 1 Weekly Law Reports 109, the Court of Appeal in England had to construe a phrase "caused by accident arising out of and in the course of his empl;oyment" in S.5(1) of the National Insurance (Industrial Injuries) Act, 1965. Lord Denning M.R.started his judgement with the observation:

"So we come back, once again, to those all too familiar words 'arising out of and in the course of his employment". They have been worth-to lawyers- a King's ransom. The reason is because, although so simple, they have to be applied to facts which very infinitely. Quite often the primary facts are not in dispute; or they are proved beyond question. But the inference from them

is matter of law. And matters of law can be taken higher. In the old days they went up to the House of Lords. Nowadays they have to be determined not by the Courts, but by the hierachy of tribunals set up under the National Insurance Acts."

10. Under the Employees' State Insurance Act, 1948, a tribunal has been set up to decide. inter alia any claim for recovery of a benefit admissible in this Act. A reference lies to the High Court on a question of Law. In other words, the decision of the Insurance Court set up under the statue is final and binding so far as the findings of fact are concerned. But if any error of law has been committed, the Courts are expected to correct it and to give guidance to the Insurance Court.

11. Construing the meaning of the phrase in the course of his employment, it was noted by Lord Denning that the meaning of the phrase had gradually been widened over the last 30 years to include doing something which was reasonably incidental to the employee's employment. The test of reasonably incidental" was applied in a large number of English decisions. But, Lord Denning pointed out that in all those cases the workman was at the premises where he or she worked and was injured while ob a visit to the canteen or other place for a break. Lord Denning, however, cautioned that the words "reasonably incidental" should be read in that context and should be limited to the cases of that kind. Lord Denning observed.

"Take a case where a man is going to or from his place of work on his own bicycle or in his own car. He might be said to be doing something "reasonably incidental" to his employment. But if he has an accident on the way, it is well settled that it does not "arise out of and in the course of his employment". Even if his employer provides the transport. So that he is going to work as a passenger is his employer's vehicle (which is surely "reasonably incidental" to his employment) nevertheless. If he is injured in an accident, it does not arise out of and in the course of his employment. If needed a special "deeming" provision in a statute to make it "deemed" to arise out of and in the course of his employment."

12. This is precisely the case before us. Here also, we have a case of a person going from his home to his place of work. But he suffers injury in an accident on the way. It cannot be said that the accident arose out of and in the course of his employment. It was faintly suggested by Mr.Chacko, appearing on behalf of the respondent, that the bicycle was bought by taking a loan from the employer. That, however is of no relevance. He might have borrowed money from his company or from somewhere else for purchasing the bicycle. But the fact remains that the bicycle belonged to him and not the employer. If he meets with an accident while riding his own bicycle on the way to his place of work, it cannot be said that the accident was reasonably incidental to the employment and was in the course of his employment. The deeming provision of S. 51-C which came into force by way of an amendment effected by Employees. Life Insurance (Amendement)Act of 1966 (Act No.44 of 1966) enlarged the scope of the phrase "in the course of employment" to include travelling as a passenger by the employeer's vehicle to or from the place of work. The legal fiction confamed in S-51C. However, does not come into play in this case because the employee was not travelling as a passenger in any vehicle owned or operated by or on behalf of the employer or by some other person in pursuance of an arrangement made by the employer.

13. The meaning of the words "in the course of his employment" appearing in S.3(10) Workmen's Compensation Act, 1923 was examined by this Court in the case of Saurastra Salt Manufacturing Co. V. Bai Valu Raja, AIR 1958 SC 881. There the appellant, a salt manufacturing company, employed

workmen both temporary and permanent. The salt works was situated near a creek opposite to the town of porbandar. The salt works could be reached by atleast two ways from the town one an over-land route nearly 6 to 7 miles long and the other via a creek which had to be crosed by a boat. In the evening 12-6-1952 a boat carrying some of the workmen, capsized due to bad weather and over loading. As a result of this some of the workmen were drowned. One of the questions that came up for consideration was whether the accident had taken place 'in the course of the employment' of the workers S.Jafer Imam J. speaking for the Court held "as a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. "After laying down the principle broadly S.Jafer Imam J.went on to observe that there might be some reasonable extension in both time and place to this principle. A workman might be regarded as in the couse of his employment even though he had not reached or had left his employer's premises in some special cases. The facts and circumstances of each case would have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension. But, examining the facts of trhe case, in particular, after noticing the fact that the workman used a boal, which was also used as public ferry for which they had to pay the boatman's dues. S.Jafer Imam J.observed (at p.883)

"It is well settled that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there is the course of his employment unless the very nature of his empl;oyment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notional extension extends up to point D. the theory cannot be extended beyond it. The menent a workman left point B in a boat or left point A, but had not yet reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two points could not be said to have arisen out of and in the course of his employment. Both the Commissioner for Workmen's Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appeallant cannot be made liable".

14. The point raised before us can be answered on the basis of the principle laid down in the aforesaid two cases. But Mr.Chacko, appealing on behalf of the respondent has contended that proximity of time and place is a factor to be borne in mind. The employee was to report for duty at 4-30 p.m. The accident took place at 4-15 p.m. only one kilometer away from the factory. In our view, this cannot be a ground for departing from the principle laid down by the aforementioned cases that the employment of the workman does not commence until he has reached the place of employment. What happens before that is not in course of employment. It was also pointed out by Lord Denning in the aforesaid case of Regina v. National Insurance Commissioner, Exparte, Michael (1977) (1) WLR 109) (supra) that the extension of the meaning of the phrase "in the course of his employment" has taken place in some cases but in all othose cases, the workman was at the premises where he or she worked and was injured while on a visit to the canteen or some other place for a break. The test of what was "reasonably incidental" to employment, may be extended

even to cases while an employee is sent on an errand by the employer outside the factory premises. But in such cases, it must be shown that he was doing something incidental to his employment. There may also be cases where an employee has to go out of his work place in the usual course of his employment. Latham. C.J. in South Maitland Railways Proprietary Limited V. James, 67 CLR 496, observed that when the workmen on a hot day in course of their employment had to go for a short time to get some cool water to drink in enabale them to continue to work without which they could not have otherwise continued, they were in such cases doing something in the course ;of their employment when they went out for water. But the case before us does not fall within the exceptions mentioned by Lord Donning for Latham, C.J. The case squarely comes within the proposition of law propounded by S.Jafer Imam.J.

15. Strong reliance was placed by Shri Chacko on a decision of this Court in General Manager. B.E.S.T. undertaking, Bombay v.Mrs.Agnes, (1964) 3 SCR 930 : (AIR 1964 SC 193). In this case one bus driver of the appellant - Corporation after finishing the day's work left for home in a bus belonging to employer's Undertaking which met with an accident as a result of which he died. His widow claimed compensation under the Workmen's Compensation Act and the question was whether the accident had arisen out of and in course of employment. It was held by Subba Rao and Mudholkar. JJ.(Raghubar Dayal, J.Dissenting) that the bus driver was given facility by the management to travel in any bus belonging to the Undertaking. It was given because efficiency of the service demanded it. Therefore, the right of the bus driver to travel in the bus was to discharge his duty punctually and efficiently. This was a condition of service and there was an obligation to travel in the said buses as a part of his duty. It was held that in the case of a factory, the premises of an employer was a limited one but in the case of a City Transport Service, the entire fleet of ;buses forming the service would be "premises". This decision in our view, does not come to the assitance of the employee' a case. An employee of a transport undertaking was travelling in a vehicle provided by the employer. Having regard to the obligation on the part of the employee to travel in the said buses as a part of his duty the Court came to the conclusion that this journey was in the course of his employment because the entire fleet of buses formed the premises within which he worked.

16. But in the case before us, the facts are entirely different. The employee was not obliged to travel in any particular way under the terms of employment nor can it be said that he was travelling in a transport provided by the employer.

17. In the case of Sadgunaben Amrutal v. Employees' State Insurance Corporation, Ahmedabad 1981 Lab IC 1653, it was held by the Division Bench of the Gujarat High Court that thought as a rule employment of a workman did not commence until he reached the place of employment and did not continue after he has left the place of employment, the proposition was subject to the theory of notional extension of the employer's premises. The notional extension theory could not be related to the place of employment only. It could also be taken recourse to in order to extend the time in a reasonable manner. The Court took the view in the case, where an employee on his way to the factory died of acute cardiac arrest, that it was caused by accident arising out of and in the course of employment. The employee was employed as a jobber in the Wrapping Department of the mill. He worked in the premises from 8 a.m to 4---30 p.m. On December 22, 1974, while he was on duty in the Mill, he fell unwell. He took medical treatment on the next day (December 23, 1974) while he was on duty in the Mill he fell unwell. He took medical treatment on the next day (December 23, 1974) which was an off-day for him. On Decemebr 24, 1974, he left his residence at about 7.20 a.m. i.e. 40 minutes before the reporting time. He walked a short distance from his house to the

nearest bus stop and was waiting for a bus to take him to the Mill. While waiting for the bus, he felt unwell. He complained to an ex-employee of the Mill who was also waiting to board the bus that it was due to the excessive and strenuous nature of work which he was required to do at the Mill that he was feeling unwell. When the bus arrived. Amrut Lal, the employee was about to step into the bus when he collapsed and became unconscious. He was taken to a hospital where he was pronounced dead. The post-mortem revealed that he died of cardiac failure. Both the Employees' Insurance Court and the single Judge of the High Court held that the employee had not died as a result of an accident in the course of employment. On appeal, the Division Bench held that both the Employees' Insurance Court and the single Judge were in error in holding that the death was not in course of employment.

18. It is doubtful whether this decision can be reconciled with the principle laid down by S.Jafer Imam. J. in the case of Saurashtra Salt Manufacturing Co. (AIR 1999958 SC 881) (supra). It is also to be noted that the death was not caused by an acident". The death was due to acute cardiac failure. The casual connection between the death and employment had not been established. Moreover, walking to the bus stop from the employee's residence and boarding the bus for going to the place of work cannot be acts in course of employment.

19. In the cae of Bhagubai v. Central Railway, Bombayu (1954) 2 Lab I.J 403 (AIR 1955) Bombay 105) a Division Bench of Bombay High Court dealt with a case where a workman on his way to work was murdered. There was no evidence to show that the murder was due to any motive against the deceased workman. It was held that the death took place because of an accident arising out of employment Chagla. C.J.emphasised that there must be a causal connection between the accident and the death bofore it could be said that the accident arose out of employment of the concerned workman. It that case, the deceased was employed by Central Railway at Kurla Station and he lived in the railway quartersd adjoining the station. It was found as a fact that the only access for the deceased from his quarters to the Kurla Railway Station was through the compound of the railway quarters. On December 20, 1952 the deceased left his quarters a few minutes before midnight in order to join duty. While on his way he was stabbed by some unknown persons. It is not disputred by the railway company that the deceased died as a result of an accident nor was it disputed that the accident arose in the course of his employment. The dispute was limsited to the question whether the accident arose out of the employment of the deceased.

20. It is of significance that the deceased used to live lin the railway quarters adjoining the railway station and the compound through which he had to go to the place of work belonged to the railway company. In other words, he died on the premises beloning to the railway. It was found as a fact that the stabbing which led to the death was not due to any personal enmity. That means it was an occupational bazard of the empl;oyee who went tojoin work at midnight form the railway quarters to the railway station through the railway compound. The facts of the case before us are quite dissimilar to the facts on the basis of which the case of Bhagubai (AIR 1955 Bombay 105 (supra) was decided.

21. We were also referred to two American decisions. The first case is J.J.O'Leary, Deputy Commissioner Fourteenth Compensation District etc. v. Brown-Pacific-Maxon.Inc.,et.al.(919950)95 ed., 483:340 US 504-510. In this case, an employee of a Government contractor was at a recreation center maintianed by his employer near an ocean shore along which ran a channel so dangerous for swimmers that its use was forbidden and signs to that effect erewctred. On perceiving that two men standing on a reef beyond the channel were signalling for help he undertook with others to swim the channel and was drowned. The Administrative Tribunal found that the employee's death

arose “out of and in the course of his employment” Six members of US Supreme Court concurred witht he opinion of Frankle that the administrative decision was supported by substantial evidence” and therefore was beyond the scope of permissible judicial review. Minton J.withwhom Jackson and Burton JJ agreed was of the opinion that the administrative finding was withosut any evidence.

22. This case really is an authority on the scope and extent of power of judicial review of an administrative order. The important fact which was noted in that case was that the deceased along with other employees had discovered that third persons who were in danger were in a recretation area maintained by his employer for the benefit of the employees. This finding was held to be based on substantial evidence. Frankfurter, J.observed that “We do not mean that the evidence compelled this inference; we do not suggest that when the Deputy Commissioner had decided against the claim, the Court had been justified in disturbing his conclusions. We hold only that on this record, the decision of the District Court that the award should not be set aside should be sustained”. In other words, Frankfurter, J. was of the view that from the evidence on record either of the two conclusions could have been drawn. It is well settled that the Court will not disturb a finding of an Administrative Tribunal merely because it could have taken a contrary view had it heard the case on evidence, when the view taken by the Tribunal is also a plausible view.

23. The other American decision is in the case of O Keeffe, Deputy Commissioner v. Smith, Minchman & Grylls Associates, Inc. et.al (1965) 13 L ed ed 2d 895. In that case. a private engineering concern’s employee hired to work in South KOrea on a 365-day basis was drowned while boating on a South Korean lake. The Deputy Workmen’sCompensation Commissioner determined that the employee’ death arose out of and in course of employment so as to entitle his widow and minor child to death benefits. The decision being challenged by a writ, a panel of the Court of Appeals for the Fifth Circuit reversed the award. The Supreme Court held that there was no scope for reviewing the decision of the Deputy Commissioner. The Court of Appeals erred in summarily reversing the judgement. It was observed that “while this Court may not have reached the same conclusion as the Deputy Commissioner, it cannot be said that his holding that the decedent’s death, in a zone of danger, arose out of and in the course of his employment is irrational or without substantial evidence on the record as a whole.”

24. Here again, the U.S.Supreme Court declined to intervene with the decision reached by the Deputy Commisisoner on evidence and reversed the decision of the Court of Appeal for doing what it should not have done by adopting what appeared to the Court to be a better view.

25. We fail to understand how these two American decisions which really dealt with the scope and extent of judicial review of a decision based essentially on finding of fact can come to the and of the employee in this case.

26. It has to be borne in mind that this is not a case of judicial review. The Employees’ State Insurance Act, 1948 provides for reference to the High Court by the statutory Courts set up under the Act, any question of law arising out of its decision (section 81). There is also a provision for appeal in certain cases on a substantial question of law (S-82).

27. We are of the view that in the facts of this case, it cannot be said that the injury suffered by the workman one kilometer away from the factory while he was on his way to the factory was caused by an accident arising out of and in the course of his employment.

28. In the case of Dover Navigation Company Limited v. Isabella Craig. 1940 AC 190, it was observed by Lord Wright that ---

"Nothing could be simpler than the words "arising out of and in the course of employment". It is clear that there are two conditions to be fulfilled. What arise "in the course of" the employment is to be distinguished from what arises "out of the employment" Th4e former words relate to time conditioned by reference to the man's service, the latter to casuality. Not every accident which occurs to a man during the time when he is no his employment, that is directly or indirectly engaged on what Ihe is employed to do gives a claim to compensation unless it also arises out of the employment. Hence, the section imports a distinction which it does not define. The language is simple and unqualified.

29. Although the facts of this case are quite dissimilar, the principles laid down in the case are instructive and should be brone in mind. In order to succeed it has to be proved by the employee that)1_ there was an accident (2) the accident had a causal connection with the employment and (3) the accident must have been suffered in coiurse of employment in the facts of this case, we are of the view that the employee was unable to Iprove that the accident had Iany causal connection with the work he was doing at tghe factory and in the event, it was not suffered in the course of employment.

30. The appeal, therefore, succeeds. The judgtement dated 25-11-1977 passed by the High Court is set aside. However in terms of the order passed by this Court on 16-4-1979. the appellants will have to heart the costs of this appeal in any event. The costs are assessed at Rs.3,000/- and will be paid by the appellant to the first respondent with in a period of four weeks from date. The first respondent will also be enttled to retain the money paid to him by the Regional Director Employees State Insurance Corporation pursistant to the order of this court passed on 16-4-1979.

Dr. G.B.V.L. NARASIMHA RAO

LESSON-20

CASE LAW NO. 5

Payment of Gratuity Act, 1972

IN THE SUPREME COURT OF INDIA

(Civil Application Nos. 3599 and 3600/1984 dated October 11, 1993)

PRESENT

MR. JUSTICE P.B. SAWANT

MR. JUSTICE YOGESWAR DAYAL

Between

(1) Bakshish Singh

(2) Union of India

And

M/s. Darshan Engineering Works and others

Constitution of India - Arts. 19(1)(g) and 19(6) - Payment of Gratuity Act, 1972 - Sec. 4(1)(b) - Provision of a period of 5 years service as qualifying period in Sec. 4(1)(b) is one of minimum service conditions made available to employees notwithstanding financial capacity of employer to bear its burden and it is reasonable restriction on the right of the employer to carry on business and is constitutionally valid.

An employee joined the service as a Fitter on March 2, 1968 and resigned from service on December 10, 1978. At the time of his joining in the employment, the employee's age was 54 years 3 months. The employee claimed gratuity under Sec. 4(1)(b) of the Payment of Gratuity Act. This claim was resisted by the employer on the ground that the employee was entitled to gratuity only till the date he reached his superannuation age which was 58 years, and since he had not completed 5 years of service by the time he attained 58 years of age, he was not entitled to gratuity. The Controlling Authority rejected his contention. The Appellate Authority dismissed the appeal filed by the employer. On the writ petition field by the employer, the High Court confirmed the orders of the Controlling Authority as well as the Appellate Authority. However, the High Court held that the provisions of Sec. 4(1)(b) which entitled an employee to gratuity on his retirement or resignation after continuous service of 5 years was an unreasonable restriction on the employer and violation of Art, 19(1)(g) of Constitution. Hence appeal by the aggrieved employee as well as the Union of India in so far as the High Court struck down Section 4(1)(b) of the Act as violative of Art. 19(1)(b) of the Constitution of India.

HELD : Even assuming that the presumption that a longer period of service for entitlement to gratuity on voluntary retirement or resignation is necessary to prevent labour form changing employment frequently, that consideration has no bearing on the question whether a short period of qualifying service is violative of Art. 19(1)(g) of the Constitution. That Article comes into picture only if, among others, (a) it is shown that the short qualifying period of service throws on any particular employer such financial burden as would force him to close his establishment and (b) the provision

is not one of the minimum service conditions, which must be made available to the employees. Hence the provision for a short qualifying period per se is not invalid and cannot be struck down generally as being violative of Art. 19(1)(g) of the Constitution as is done by the High Court in the present case. The High Court's reliance on the decision referred to by it for the purpose of holding that the provision of a period of service of 5 years is violative of Art. 19(1)(g) is misplaced, for, the court has failed to notice that the view taken by this court was in a different factual context. In the first instance, at the time, gratuity had not come to be accepted as one of the minimum service conditions, much less any particular scheme of gratuity. Secondly, the courts in those cases were concerned with establishments of differing financial capacity in a particular industry and with evolving uniform service conditions for the industry as a whole for the maintenance of Industrial peace. (Para 18)

The provisions of the Act were meant for laying down gratuity as one of the minimum service conditions available to all employees covered by the Act. There is no provision in the Act for exempting any factory, shop etc., from the purview of the Act covered by it except those where, as pointed out above, the employees are in receipt of gratuity or pensionary benefits which are no less favourable than the benefit conferred under the Act. The payment of gratuity under the Act is thus obligatory being one of the minimum conditions of service. The establishments which have no capacity to give to their workmen the minimum conditions of service prescribed by the statute have no right to exist. (Para 27)

Payment of Gratuity Act is on the genre of statutes like the Minimum Wages Act, ESI Act etc, which lay down the minimum relevant benefits which must be made available to the employees. (Para 30)

Payment of Gratuity Act is a welfare measure introduced in the interest of the general public to secure social and economic justice to workmen to assist them in old age and to ensure them a decent standard of life on their retirement. Therefore the Act imposed a reasonable restriction on the employer in exercise of the fundamental right under Art. 19(1)(g). (Para 31)

The provision for payment of gratuity contained in Sec. 4(1)(b) of the Act is one of the minimum service conditions which must be made available to the employees not withstanding the financial capacity of the employer to bear its burden and the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Art. 19(6) of the Constitution. Hence Sec. 4(1)(b) of the Act is valid and legal. (Paras 32,33)

Appeal allowed.

For Appellant V.C. Mahajan with Jitendra Sharma, Ms. Gunwant Dara and Ors.

For Respondents Raj Birbal with Ashok Lawania

Cases referred to	**Paras**
1977-I-LLJ-463	(15,17,21)
1969-II-LLJ-755 at 767, 768	(13,20)
1966-I-LLJ-407	(5,6,12,15,21)
1963 Supp (2) SCR 862	(11,12,19)
1961-I-LLJ-631 at 637, 638	(22)
1961-I-LLJ-513	(10,12)

1961-I-LLJ-339 at 396	(7,10,12,18,22,23,26)
1960-I-LLJ-21	(13)
1958-I-LLJ-1 at 6	(27, 29)
1956-I-LLJ-435 at 436	(8)
1956 LIC 265 at 267	(8)
1955-I-LLJ-355	(8)
1955-I-LLJ-129 at 130-131,27,28	
1955 LIC 155 at 158	(7,8)
1954-I-LLJ-8	(28)

1. These two appeals-one by the Union of India and the other by the aggrieved employee-are directed against the decision dated March 24, 1983 of the Punjab & Haryana High Court has struck down Section 4(1)(b) of the Payment of Gratuity Act, 1972 (hereinafter referred to as the 'Act') as being violative of Article 19(1)(g) of the Constitution of India.

2. The admitted factual matrix of the case is in a narrow compass. Bakshish Singh, the appellant-employee joined the services of the respondent-M/s. Darshan Engineering Works as a Fitter on March 2, 1968 and resigned from service on December 10, 1978 after a total period of continuous service of more than 10 years. His last drawn wages were Rs. 335/- per month. It is not disputed that at the time he joined the employment on March 2, 1968, his age was 54 years 3 months, his date of birth being December 17, 1913. This was known to the respondent-employer.

3. The Act came into force w.e.f. September 21, 1972. On the employee's resignation w.e.f. December 10, 1978 which was accepted by the respondent employer, he claimed gratuity under Section 4(1) (b) of the Act. His claim not having been accepted, he approached the Controlling Authority under Section 7 of the Act. The claim was resisted by the employer on the ground firstly that the employee was entitled to gratuity only till the date he reached his superannuation age which was 58 years and since he had not completed 5 years of service by the time he attained 58 years of age, he was not entitled to gratuity under Section 4(1) of the Act. Secondly, it was contended that in any case the amount of gratuity payable to the employee was only for the period upto the superannuation age and since he was drawing wages of Rs.230/- per month on the day he attained the superannuation age, he was entitled to a sum of Rs.460/- only, being the gratuity calculated at the rate of 14 days' salary per year of service till the date of superannuation.

4. Both the contentions were negatived by the Controlling Authority by pointing out that Sections 4(1) provided for payment of gratuity to the employee on the termination of his employment after he has rendered continuous service of not less than five years on the occurrence of any of the three events viz., (a) on the employee reaching his superannuation age, of (b) on his retirement or resignation, or (c) on his death or disablement due to a accident or disease. In case of the third event, the qualifying continuous service of five years is not necessary. The 'retirement' is defined by Section 2(q) of the Act to mean termination of the service of an employee otherwise than on superannuation. The first two events are independent of each other. Since in the present case the employee had not chosen to superannuate the employee on his attaining 58 years of age and had continued him in service till the employee himself resigned on December 10, 1978 by which date

he had completed more than 10 years of service, the employee was entitled to the gratuity for the period of his entire service up to the date of his resignation. The Controlling Authority, therefore, calculated the amount of gratuity due to the employee as Rs. 1782/- at the rate of 15 days' wages per year of service for all the 10 years taking the last drawn wages of Rs. 335/- per month as the basis of the said calculation. This order was challenged by the employer before the Appellate Authority under the Act. The Appellate Authority confirmed the finding of the Controlling Authority and dismissed the appeal. In the writ petition filed before the High Court under Articles 226 and 227 of the Constitution, the High Court confirmed the interpretation placed on Section 4(1) of the Act by the Controlling as well as the Appellate Authority and also held that the age of superannuation is irrelevant when the gratuity is payable under clause (b) of Section 4(1) on retirement or registration, the said clause being independent of clause (a) of that section which provided for payment of gratuity on attaining the age of superannuation. However, the Court held that the provisions of Section 4(1)(b) of the Act which entitles an employee to gratuity on his retirement or resignation after a continuous service of only 5 years was an unreasonable restriction on the employer to carry on his business and, therefore, violative of Article 19(1)(g) of the Constitution. We should have thought that on the facts of the present case the Court was not called upon to decide the alleged unreasonableness of the qualifying period of 5 years of service for entitlement to gratuity on retirement or resignation, since as pointed out above the employee had put in more than 10 years of service. The Court further not only went into the said question and struck down the provisions of Section 4(1)(b) but for reasons which are not apparent to us, also denied the gratuity awarded to the employee by the lower authorities even after accepting the finding of the lower authorities that the employee had put in more than 10 years of service. It does not appear from the judgement of the High Court whether, although it found that the five years' qualifying service was unreasonable, ten years' qualifying service would also be similarly unreasonable according to it. In fact, the High Court has not thought it necessary to indicate what according to it would be a reasonable qualifying period of service for entitlement to the gratuity in case of retirement or resignation by the employee. Further, if the alleged short period of 5 years was the reason for holding that the provision in question cast an unbearable burden on the employer so as to violate his fundamental right under Article 19 (1)(g) of the Constitution, by the same reasoning the provision of Section 4(1) (a) of the Act, which lays down the same qualifying period to entitle the employee to the receipt of gratuity on superannuation, also had to be struck down.

5. We may now turn to the reasons given by the High Court in its own words for holding the said provision unconstitutional. The Court has held that:

"A gratuity is essentially a retiring benefit payable to a workman which under the statute (Section 4 (1)(b) of the Act) has been made payable on voluntary resignation as well. Gratuity is a reward for good, efficient and faithful service rendered for a considerable period. It is necessary that a long minimum period for earning gratuity in the case of voluntary resignation should be prescribed to curb the tendency on the part of the workman to change employment frequently after putting in minimum service qualifying for gratuity. A workman gains experience during his tenure of employment. An experienced workman is capable of securing another employment with better emoluments. He can also be tempted by other employers with more lucrative salary. The exit of an experienced workman would surely be a loss for his employer. It has been aptly observed by their Lordships of the Supreme Court in Messrs. British Paints (India) Limited's case 1966-I-LLJ-407 that 'a longer minimum in the case of voluntary retirement or resignation makes it proback that the workmen would stick to the company where they are working. That is why gratuity schemes usually provide for a longer minimum in the case of Voluntary retirement or resignation.'

Keeping in view the intrinsic object for making provision for payment of gratuity to a workman on his voluntary resignation and the ratio of the decisions of the Supreme Court detailed above, there is no escape from the conclusion that the minimum period of qualifying service for five years by a workman for being eligible for gratuity on voluntary resignation under Section 4(1)(b) of the Act cannot be stamped sufficient long minimum in the context of making him stick to his existing employer and it does impose an unreasonable restriction on the fundamental right of the employer to carry on business and is, therefore, violative of Article 19(1)(g) of the Constitution".

6. Besides the decision of this Court in M/s. British Paints (India) Ltd. v. Its Workmen, (supra) the Court has also relied on other decisions of this Court. We may now discuss them here briefly.

7. In Express Newspapers (Private) Ltd. & another V. The Union of India & others. 1961-I-LLJ-339 what was questioned was the constitutional validity of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 and the legality of the decision of the Wage Board constituted thereunder. The impugned Act was passed in order to implement the recommendations of the Press Commission and had for its object the regulation of the conditions of service of working journalists and other persons employed in newspaper establishments. Among other things, the Act provided for the payment of gratuity to a working journalist who had been in continuous service for not less than 3 years, even when he voluntarily resigned from service. It is with reference to the said minimum period of qualifying service laid down in the Act that this Court observed that the said provision was not at all reasonable. The Court observed that a gratuity is a scheme of retirement benefit and the conditions for its being awarded had been laid down in the Labour Courts' decisions in this country. The Court then referred to the Labor Appellate Tribunal's decision in Ahmedabad Municipal Corporation case (1955) LAC 155, 158) where it was observed as under: (p. 396)

"The fundamental principle in allowing gratuity is that it is a retirement benefit for long services, a provision for old age and the trend of the recent authorities as borne out from various awards as well as the decisions of this Tribunal is in favour of double benefit.... We are, therefore, of the considered opinion that Provident Fund provides a certain measure of relief only and a portion of that consists of the employee's wages, that he or his family would ultimately receive, and that this provision in the present day conditions is wholly insufficient relief and two retirement benefits when the finances of the concern permit ought to be followed."

8. The Court then observed that Ahmedabad Municipal Corporation case (supra) as well as the Nundydroog Mines Ltd. case (1956 IAC 265, 267) were cases where gratuity was to be allowed to the employees on their retirement. The Court then found that the Labour Courts' decisions have, however, awarded gratuity to benefits on the resignation of an employee also. It then referred to the Cipla Ltd. case (1955-11-LLJ-355, 358) and pointed out that the Court there took into consideration the capacity of the concern and other factors referred to therein and directed gratuity on full scale which included gratuity on voluntary retirement or resignation by an employee after 15 years' continuous service. The Court also referred to the decision in Indian Oxygen & Actylene Co. Ltd. case 1956-I-LLJ-435 at 436 where the Court had observed as follows:

"It is now well-settled by a series of decisions of the Appellate Tribunal that where an employer company has the financial capacity the workmen would be entitled to the benefit of gratuity in addition to the benefits of the Provident Fund. In considering the financial capacity of the concern what has to be seen is the general financial stability of the concern. The factors to be considered before granting a scheme of gratuity are the broad aspects of the financial condition of tile concern,

its profit earning capacity, the profit earned in the past, its reserves and the possibility of replenishing the reserves, the claim of capital put having regard to the risk involved, in short the financial stability of the concern.

9. The Court then observed that in the cases cited by it though the gratuity was awarded on the employee's resignation from service, it was granted only after the completion of 15 years and not merely on a minimum of 3 years of service as in that case. The Court further observed that gratuity being a reward for good, long and faithful service rendered for a considerable period (Vide Indian Railway Establishment Code, Vol. 5 at p. 614-Ch. XV, para 1503), there would be no justification for awarding the same when an employee voluntarily resigns and brings about a termination of his service, except in exceptional circumstances. One such exception is the operation of the" conscience clause" , the other exception being that the employee is in continuous service of the employer for a period of more than 15 years. The Court then went on to say that where, however, an employee voluntarily resigns from service after a period of only 3 years, there will be no justification whatsoever for awarding him gratuity and any such provision is certainly unreasonable. The Court also held that the provision in question imposes an unreasonable restriction on the employer's right to carry on business and was liable to be struck down as unconstitutional.

10. In The Gannent Cleaning Works v. Its Workmen 1961-I-LLJ-513 the Industrial Tribunal had on a reference under the Industrial Disputes Act framed a gratuity scheme providing, among others, that on retirement or resignation of a workman after 10 years service, 10 days' consolidated wages for each year's service should be awarded as gratuity. It was assailed on the ground that the said provision violated the fundamental rights of the employers under Article 19 of the Constitution. It was also contended there that no gratuity should be admissible in case of voluntary retirement or resignation until and unless 15 years' service had been put in by the employee. In support of the attack against the said provision, reliance was placed on the decision in the Express Newspaper case (supra). This Court explained that the observations made in the Express Newspaper case (supra) that the employee should be entitled to gratuity on resigning his post where he had been in continuous service for a period of more than 15 years were not meant to lay down a rule of universal application in regard to all gratuity schemes. The court negatived the attack and upheld the minimum qualifying period of service of 10 years prescribed by the Tribunal for entitlement of gratuity on resignation. The second attack in that case was against the provision in the scheme that if the workman was dismissed or discharged for misconduct causing financial loss he should be deprived of gratuity only to the extent of the said loss. It was contended that the payment of any amount as gratuity to such a workman was against the very principle on which gratuity schemes were generally based. Gratuity being in the nature of a retrial benefit for long and meritorious service. The misconduct is itself a blot on the character of the employee's service and that disqualifies him from any claim of gratuity, repelling the said contention. The Court observed that on principle. gratuity is earned by an employee for long and meritorious service. It is difficult to understand why the benefit thus earned by long and meritorious service should not be available to him even though at the end of such service, he may have been found guilty of misconduct which entails dismissal. The Court further observed that gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the services rendered by him and when it is once earned it is difficult to understand why it should necessarily be denied to him whatever may be the nature of misconduct resulting in his dismissal in this connection. The Court pointed out that even the concerned rule of Provident Fund Scheme shows that the whole Provident Fund is not denied to the employee even if he is dismissed. It only authorised certain deductions to be made and the deductions thus made did not revert to the employer either. The Court did not accept the analogy which was sought to be drawn

between the definition of 'retrenchment' contained in Section 2(00) of the Industrial Disputes Act, 1947 and the retrenchment compensation payable on account of the retrenchment and the 'gratuity' payable under the scheme. It pointed out that the two stood on different footings in regard to the effect of misconduct on the rights of workmen.

11. In Management of Wenger & Co. v. Their Workmen (1963 Supp. (2) SCR 862) an industrial dispute arising out of various demands between various hotel establishments and their workmen was referred for adjudication to the Industrial Tribunal. The Tribunal framed a gratuity scheme which, among others, granted gratuity' to an employee voluntarily resigning from service after completion of 10 years of service or more. The first objection to the gratuity scheme in general, was that in view of the Provident Fund Scheme already introduced in the establishments, it was not right to burden the employer with the additional liability. The Court pointed out that this argument had been considered by it on several occasions earlier and consistently rejected. In this connection, the Court stated that the object intended to be achieved by the Provident Fund Scheme is not the same as the object of the gratuity scheme and in any case where the financial position of the employer permits the introduction of both benefits there was no reason why the employee should not get the said two benefits. The Court then also pointed out that in dealing with the financial obligation involved on account of the introduction of a gratuity scheme, it was necessary to bear in mind that the magnitude of the theoretical impact did not matter so much. As the extent of the actual impact of the scheme. There were two ways of looking at the problem of the burden imposed by the gratuity scheme. One was to capitalise the burden on actuarial basis and that would only show theoretically that burden would be very heavy. The other was to look at the scheme in its practical aspect and this would show that broadly no more than 3 to 4 per cent of the employees retire every year. It was, therefore, desirable that in assessing the financial burden the practical approach should be taken into account The Court, however, modified the gratuity scheme by substituting the minimum qualifying period of 5 years for 2 years contained in the scheme when the termination of service was caused by the employer and also added a clause that in case of termination as a result of the misconduct which had caused financial loss to the employer, that loss should first be compensated from the gratuity payable to the employee and the balance, if any, should be paid to him. As regards the gratuity payable on resignation of the employee, the Court enhanced the minimum qualifying service from 5 years to 10 years while maintaining the rate as well as the ceiling prescribed by the Tribunal which was 15 days' basic pay for every completed year of service subject to a maximum of 12 months' basic pay.

12. In M/s. British Paints (India) Ltd. v.Its workmen (supra) the Industrial Tribunal had framed a gratuity scheme under which, among others, it had fixed 5 years' minimum service in order to enable a workman to earn gratuity. It also fixed 21 days' basic wage or salary as the quantum of gratuity for each completed year of service and included dearness allowance in the definition of the words "basic wage or salary". The Court pointing out the reason for providing a long minimum period of service for earning gratuity in the case of voluntary retirement or resignation is to see that the workmen did not leave one concern after another after putting the 25 short minimum service qualifying them for gratuity. A longer minimum service in the case of voluntary retirement or resignation makes it more probable that the workmen would stick to the company where they are working. That is why gratuity schemes usually provide for a longer minimum service in the case of voluntary retirement or resignation. In this connection, the Court referred to the decision in the Express Newspapers case (supra) where a short minimum service of 3 years for voluntary retirement or resignation was struck down and to the decision in Garment Cleaning Works case (supra) and Wenger & Co. case (supra) where 10 years minimum service was prescribed to enable the

employee to claim gratuity if he resigned. The Court then modified the gratuity scheme in that regard and ordered that in the case of voluntary retirement or resignation, the minimum qualifying service for entitlement to gratuity should be 10 years. The Court also restricted the wage for calculating the gratuity to basic wage and modified the definition of 'basic wage' as given by the Tribunal on the ground that generally the gratuity is calculated only on basic wage and secondly the gratuity scheme was being introduced in the company for the first time and the employees were already in receipt of another reliable benefit, viz., Provident Fund.

13. In Delhi Cloth & General Mills Co. Lid. v. Workmen & Ors. etc. (1969-U-LU-755) the Industrial Tribunal framed two schemes relating to the payment of gratuity. One related to the DCM and SBM which were under the same management and the other relating to BCM and ATM which were under different managements. The Court pointed out as under (at pp. 767-768):

"gratuity is not in its present day concept merely a gift made by the employer in his own discretion. The workmen have in course of time acquired a right to gratuity on determination of employment provided the employer can afford having regard to his financial condition, to pay to. There is undoubtedly no statutory direction for payment of gratuity as it is in respect of provident fund and retrenchment compensation. The conditions for the grant of gratuity are, as observed in Bharatkhand Textile Mfg. Co. Ltd's case (1960-U-LLJ-21) (i) financial capacity of the employer; (ii) his profit making capacity; (iii) the profits earned by him in the past; (iv) the extent of his reserves; (v) the chances of his replenishing them; and (vi) the claim for capital invested by him. But these are not exhaustive and there may be other material considerations which may have to be borne in mind in determining the terms and conditions of the gratuity scheme. Existence of other retiring benefits such as provident fund and retrenchment compensation or other benefits do not destroy the claim to gratuity: its quantum may however have to be adjusted in the light of the other benefits.

We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the Tribunal or the Courts may be determined and often precedents of cases determined ad hoc are utilised to build up claims or to resist them. It would in the circumstances be futile to attempt to reduce the grounds of the decisions given by the Industrial Tribunals, the Labour Appellate Tribunals and the High Courts to the dimensions of any recognised principle.

14. The Court then referred to some precedents relating to the grant of gratuity and by pointing out that the Tribunal in that case had failed to take into account the prevailing pattern in the textile industry all over the country, modified the gratuity scheme framed for DCM and SBM by restricting the payment of gratuity on the basis of basic wages as against the consolidated wages as was granted by the Tribunal. The Court also accepted that the gratuity should not be forfeited in all cases of misconduct. In cases of misconduct where is occasioned, the monetary value of the loss only should be deducted from the gratuity payable to the employee. The Court further reduced the minimum qualifying service for voluntary retirement to 10 years from 15 years. It must, however, be stated here that the counsel for the employer had also accepted that the length of the qualifying service should be reduced accordingly.

15. In Straw Board Mfg.Co. Ltd. v. Their Workmen 1977-I-LLJ-463 on a reference, on October 31, 1969, the Industrial Tribunal had made an award framing a gratuity scheme. While the appeal against the award was pending in the Court, the present Act came into operation. This Court upheld the 5 years' minimum qualifying period of service for entitlement to gratuity to workmen who

had voluntarily retired or registered by pointing out that in cases like M/s. British Paints case supra) the qualifying period of 10 years was laid down so that the workmen should not leave one concern for another after putting in short minimum service qualifying for gratuity. The Court observed that the current conditions must control the Tribunal's conscience in finalising the terms of the gratuity scheme. Taking things as they are in our country presently, there is unemployment at the level of workers. Colossal unemployment means that the worker will not leave his employment merely because he has qualified himself for gratuity. In an economic situation where there is a glut of 51% of labour in the market and unemployment stares the working class in the face, it is theoretical to contend that employees will hop from industry to industry unless the qualifying period for earning gratuity is raised to 10 years. The Court also pointed out that sense of national consciousness 10 this field is reflected in the present Act which fixed the period of 5 years as the qualifying period for earning gratuity.

16. The aforesaid survey of the relevant authorities shows that in labour jurisprudence the concept of "gratuity" has undergone a metamorphosis over the years. The dictionary meaning may suggest that gratuity is a gratuitous payment, a gift or a boon made by the employer to the employee as per his sweet will. It necessarily means that it is in the discretion of the employer whether to make the payment or not and also to choose the payee as well as the quantum of payment. However, in the industrial adjudication it was considered as a reward for a long and meritorious service and its payment, therefore, depended upon the duration and the quality of the service rendered by the employee. At a later state, it came to be recognised as a retiral benefit taking into consideration of the service rendered and the employees could raise an industrial dispute for introducing it as a condition of service. The industrial adjudicators recognised it as such and granted it either in lieu of or in addition to other retiral benefit/s such as pension or provident fund depending mainly upon the financial stability and capacity of the employer. The other factors which were taken into consideration while introducing gratuity scheme were the service conditions prevalent in the other units in the industry and the region, the availability or otherwise of the other retiral benefits, the standard of other service conditions etc. The quantum of gratuity was also determined by the said factors. The recognition of gratuity as a retiral benefit brought in its wake further modifications of the concept. It could be paid even if the employee resigned or voluntarily retired from service. The minimum qualifying service for entitlement to it, rate at which it was to be paid and the maximum amount payable was determined likewise on the basis of the said factors. It had also to be acknowledged that it could not be denied to the employee on account of his misconduct. He could be denied gratuity only to the extent of the caused by his misconduct, and no newer. Thus even before the present Act was placed on the statute book, the courts had recognised gratuity as a legitimate retiral benefit earned by the employee on account of the service rendered by him. It became a service condition wherever it was introduced whether in lieu of or in addition to the other retiral benefits. The employees could also legitimately demand its introduction as such reliral benefit by raising an industrial dispute in that behalf, if necessary. The industria adjudicators granted or rejected the demand on the basis of the factors indicated above.

17. It is true that while doing so, the industrial adjudicators insisted upon certain minimum years of qualifying service before an employee 'could claim it whether on superannuation or resignation or voluntary retirement. This was undoubtedly inconsistent with the concept of the gratuity being an earning for the services rendered. What is, however, necessary to remember in this connection is that there is no fixed concept of gratuity or of the method of its payment. Like all other service conditions, gratuity schemes may differ from establishment to establishment depending upon the various factors mentioned above, the prominent among them being the financial capacity

of the employer to bear the burden. There has commonly been one distinction between a reliral benefit like provident fund and gratuity, viz., the former generally consists of the contribution from the employee as well. It is, however, not a necessary ingredient and where the employee is required to make his contribution, there is no uniformity in the proportion of his share of contribution. Likewise, the gratuity schemes may also provide differing qualifying service for entitlement to gratuity. It is true that in the case of gratuity an additional factor weighed with the industrial adjudicators and courts, viz., that being entirely a payment made by the employer without there being a corresponding contribution from the employee, the gratuity scheme should not be so liberal as would induce the employees to change employment-after employment after putting in the minimum service qualifying them to earn it. But as has been pointed out by this court in the Straw Board Mfg. Co. Ltd. case (supra), in view of the instantly growing unemployment, the surplus labour and meager opportunities for employment, the premise on which a longer qualifying period of service was prescribed for entitlement to gratuity on voluntary retirement or resignation, was unsupported by reality. In the face of the dire prospects of unemployment, it was facile to assume that the labour would change or keep changing employment to) secure the paltry benefit of gratuity.

18. Even assuming the presumption that a longer period of service for entitlement to gratuity on voluntary retirement or resignation is necessary to prevent labour from changing employment frequently, that consideration has no bearing on the question whether a short period of qualifying service is violative of Article 19(1)(g) of the Constitution. That Article comes into picture only if" among others, (a) it is shown that the short qualifying period of service throws on any particular employer such financial burden as would force him to close his establishment and (b) the provision is not one of the minimum service conditions which must be made available to the employees. Hence, the provision for a short qualifying period per se is not invalid and cannot be struck down generally as being violative of Article 19(1)(g) of the Constitution as is done by the High Court in the present case. The High Court's reliance on the decisions referred to by it, for the purpose of holding that the provision of a period of service of five years is violative of Article 19 (1Xg) of the Constitution, is misplaced for the Court has failed to notice that the view taken by this Court was in a different factual context. In the first instance, at that time, gratuity had not come to be accepted as one of the minimum service conditions, much less any particular scheme of gratuity. Secondly, the courts in those cases were concerned with establishments of differing financial capacity in a particular industry and with evolving uniform service conditions for the industry as a whole for the ,maintenance of industrial peace. Further, except the decision of this Court in Express Newspaper case (supra), the other decisions which have laid down more than five years' qualifying service, have not based their conclusion on the vulnerability of the shorter qualifying service on the anvil of Article 19(1)(g) of the Constitution.

19. On the other hand, in Wenger & Co. case (supra), this Court pointed out that in dealing with the financial obligations involved on account of the introduction of the gratuity scheme, it was necessary to bear in mind the actual rather than the theoretical impact of the Scheme. Since not more than 3 to 4 per cent of the employees retired every year, the financial burden caused by the gratuity scheme was much less than what its theoretical enunciation would indicate. The Court there also held that the minimum qualifying period of five years' service was reasonable.

20. In Delhi Cloth & General Mills Co. Ltd. case (supra), the Court was at pains to point out that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there were no fixed principles on the application of which the problems arising before the tribunals or the courts could be determined and often precedents of

cases determined ad hoc were utilised to win the claims or to resist them. It was, therefore, futile to attempt to reduce the grounds of the decisions given by the Courts to the dimensions of any recognised principle.

21. In Straw Board Mfg. Co. Ltd. case (supra), which was decided after the present statute came into operation, as pointed out above, the Court upheld the five years' minimum qualifying period of service for entitlement to gratuity on voluntary retirement or resignation, by stating that the qualifying period of ten years' service prescribed in British Paints case (supra) was not meant to be laid down as a uniform standard to be followed in all cases. This is apart from the fact that the Court also stated there that the premise underlying the reasons which impelled the said higher qualifying service was not in conformity with the current reality.

22. As regards the decision of this Court in Express Newspaper case (supra), this Court has explained the view taken there in a later decision viz., U. Unichoyi and Others v. The State of Kerala 1961-I-LLJ-631. The Court has stated there as follows: pp 637-638

"...for appreciating the nature and effect the observations made in that case, it was necessary to recall that in that case, the Court was dealing with the problem of fixation of wages in regard to Working Journalists as prescribed by Section 9 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955). Section 9 of the said Act required that in fixing rates of wages in respect of working journalists the Board had to have regard to the cost of living, the prevalent rates of wages for comparable employments, the circumstances relating to newspaper industry in different regions of the country and to any other circumstances which the Board may deem relevant. It was held that the wage structure contemplated by S.9 was not the structure of minimum wage rates, it was a wage structure permitted to be prescribed by that statute after taking into account several relevant facts and the scheme of that Act showed that the wage structure thus contemplated was very much beyond the minimum wage rates and was nearer the concept of a fair wage. That is why the Court took the view that the expression "any other circumstance" specified by S. 9 defined included the circumstance, namely, the capacity of the industry to bear the burden and so the Board was bound to take that factor into account in fixing the wage structure. It appeared to the Court that this important element had not been considered by the Board at all and that introduced a fatal infirmity in the decisions of the Board. Thus, the wage structure with which the Court was concerned in that case was not the minimum wage structure at all. It is essential to remember this aspect of the matter in appreciating the argument urged by Mr.Nambiar on the strength of certain observations made by this Court in the course of its judgment."

23. What is observed by this Court in relation the award of the Wage Board with regard to wage-structure in the Express Newspaper case (supra) applies equally to the gratuity scheme framed by the Wage Board under the said Act. This is apart from the act that in that else the gratuity scheme which was held to be violative of Article 19(1)(g) was fixed not by any statute laying down minimum condition of service but by a Wage Board, constituted under an Act.

JUDGEMENT :

24. Coming now to the provisions of the present Act, it will be seen that the Act extends to the whole of India except to plantations and ports in the State of Jammu & Kashmir. The provisions of the Act apply uniformly to "(a) every factory, mine, oil field, plantation, port and railway company; (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months; and (c) such other establishments or class

of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf" as provided in sub-section (3) of Section 1 of the Act. It defines "retirement" under Section 2(q) to mean "termination of the service of an employee otherwise than on superannuation". Section 2(s) defines "wages" to mean "all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance". The relevant provisions of Section 4 under which an employee becomes entitled to gratuity, are as follows:

"4. Payment of Gratuity:- (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned.

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the toll wages received by him for a period of three months immediately preceding the termination of his employment and for this purpose. The wages paid for any overtime work shall not be taken into account.

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation. - In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed fifty thousand rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to he the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award of agreement or contract with the employer.

(6) Now withstanding anything contained in sub-sector (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes and offence involving moral turpitude, provided that such offence is committed by him in the course of his employment".

25. Section 5 then makes provision for exemption of those establishments, factories etc. and those employees or class of employees employed in any establishment, factory etc., who in the opinion of the appropriate Government are in receipt of gratuity or pensionary benefit which are not less favourable than the benefits conferred under the Act. Section 9 provides for penalties for those who avoid payment of gratuity to their employees, or contravene or make default in compliance with any other provision of the Act. Section 13 protects the amount of gratuity payable to the employee from attachment in execution of any decree order of any civil, revenue or criminal court. Section 14 states that the provisions of the Act or any rule made thereunder shall have effect not withstanding anything inconsistent therewith contained in any other enactment or any instrument or contract having effect by virtue of any other enactment.

26. As the object of the statute shows, it was enacted because there was no Central Act to regulate the payment of gratuity to industrial workers except the working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 which had come up for consideration in the Express Newspaper case (supra). The Government of Kerala and West Bengal had enacted their own statutes for payment of gratuity to workers employed in establishments in their states. Since the enactment of the Kerala and West Bengal Act, some other State Governments had also voiced their intention to enact similar legislations in their states. It had, therefore, become necessary to have a Central law on the subject so as to ensure a uniform pattern on payment of gratuity to the employees throughout the country. The enactment of a Central law was also necessary to avoid different treatment to the employees of establishments having branches in more than one State particularly when under the conditions of their service, the employees were liable to be transferred from one State to another. The proposal for Central legislation on gratuity was discussed in the Labour Ministers' Conference and also in the Indian Labour Conference. There was general agreement in these conferences that the legislation on payment of gratuity be enacted as early as possible. While enacting the statue for West Bengal in August 1971, care had been taken to so design its provisions that they could serve, as far as possible, as norms for the Central law. The bill had, therefor, been drafted on the lines of the West Bengal statue on the subject with some modifications which had been made in the light of the views expressed at the Indian Labour Conference. Hence, the present statue, which was also amended twice-once in 1984 to correct the definition of 'continuous service' under Section 2(c) of the Act and second time in 1987 to provide, amount other things, for a time limit for the payment of gratuity and for recovery of interest in cases where the payment was not made in time. The second amendment also made certain other changes in the Act including extension of its coverage to employees drawing salary upto Rs.2500/- per month.

27. It would thus be apparent both from its object as well as its provisions that the Act was placed on the statue book as a welfare measure to improve the service conditions of the Act.

LESSON - 21

Case Law No. 6

1996 LAB I.C. 1809

(SUPREME COURT)

(From : Punjab and Haryana)

K.RAMASWAMY AND G.B.PATTANAIK .JJ.

Civil Appeal No.7114 of 1996 (arising out of S.L. P.(C) No.2984 of 1993), D/-12-4-1996

Haryana Unrecognised Schools Association, Appellant v. State of Haryana, Respondent.

Minimum Wages Act (11 of 1948), Ss 2(i), 5 (2), 27, Part I, Sch.Item 40 - 'Employees' - Teachers of educational institutions - Cannot be brought within purview of definition of 'employee' under Act by State Government - Governemnt notification fixing minimum wages of such teachers - Liable to be quashed.

Decision of Punjab & Haryana High Court, Reversed.

1. A combined reading of Ss.2(i) and 27 make it explicitly, clear that the State Government can add to either Part of the Schedule any employment where persons are employed for hire or reward to do any work skilled or unskilled, manual or clearical. If the persons employed do not do the work of any skilled or unskilled or of a manual or clerical nature then it would not be possible for the State Government to include such an employment in the Schedule in exercise of power under Section 27 of the Act. Since the teachers of an educational institution are not employed to do any skilled or unskilled or manual or clerical work and therefore could not be held to be an employee under Section 2(i) of the Act. it is beyond the competence of the State Govenment to bring them under the purview of the Act by adding the employment in educational institution in the Schedule in exercise of lpower under Section 27 of the Act. The State Government in exercise of powers under the Act is not entitled to fix the minimum wage of such teachers.

Decision of Punj. & Har. High Court Reversed (Paras 10,11)

Cases Referred : Chronological Paras AIR 1988 SC 1700 (1988) 4 SCC 42 : 1989 Lab IC 1317

AIR 1985 SC 1391 : (1985) 3 SCC 594 : 1985 Lab IC 1634

AIR 1963 SC 806 : (1963) 2 SCC 242

PATTANAIK, J :- Leave granted.

2. This appeal by special leave is directed against the Judgment of the Punjab and Haryana High Court in Civil Writ Petiton No.33599 of 1983 dismissing the writ petition filed by the appellants.

3. The short question that arises for consideration is whether teachers of an educational

institution can be held to be employee under Sectin 2 (i) of the Minimum Wages Act (hereinafter referred to as 'the Act') to enable the Governemnt to fix their minimum wages. The Government of Haryana in exercise of power conferred under section 27 of the Act added in Part 1 of the Schedule Item No.40 describing "Employment in private coaching classes, schools including Nursery Schools and technical institutions", for the purpose of fixing minimum rate of wages for the employees therein. By Notification dated 30th of April, 1983 the State Government in exercise of power conferred under sub-section (2) of Section 5 of the Act fixed the minimum rate of wages in respect ;of the different categories of employees serving in such schools. Challenging these notifications the writ petitions were filed essentially on the ground that the teachers of educational institutions cannot come within the purview of the Act since they are not workmen within the meaning of Industrial Disputes Act nor would they be employee under Section 2(i) of the Act. The High Court, however, dismissed the writ petition on the ground that the power of the State Government to add any employment to the Schedule under Section 27 of the Act is without any fetter and further the appropriate Government has tried to mitigate the sufferings and explotation of the educated trained/ untrained teachers at the hands of the management/employers of the private education institions and Section 5 of the Act gives large powers to the appropriate Government. With regard to the allegation of the writ petitioners that the views of the representatives of the educational institutions were not taken into consideration, the High Court repelled the same relying upon the decision of this Court in Ministry of Labour and Rehabilitation v. Tiffin's Barytes Asbestos & Paints lLtd. (19185) 3 SCC 594 : (AIR 1985 SC 1391) wherein this Court had observed that a notification fixing minimum wages, in a country where wages and already minimal should not be interfered withn under Article 226 of the Consititution except on the most substantial grounds and the legislatioin is a social welfare legislation undertaken to further the Directive Principles of State Policies and action taken pursuant to it cannot be struck down on mere technicalities.

4. Assailing the correctness of the decision of the High Court the learned counsel for the appellant contended that the object of the Act being to prevent lexploitation of the workers and for that purpose of aims at fixation of minimum wages which the employers must pay the teachers of an educational institutioin cannot be brought within the purview of the Act. The learned counsel also contended that the definition nof employee under Section 2(i) of the Act even if is given a liberal interpre;tation, will no;t bring within its sweep a teacher of an educational institution since the duty discharged by a teacher can neither be termed as manual or clerical nor can it be held to be skilled or unskilled. Accordingly it is contended that the State Government has no power to fix the minimum wage of a teacher of an educational institution in exercise of power under Section 5(2) read with Section 27 of the Act. The learned counsel appearing for the respondent on the other hand contended that it was open for the State Government to add a particular category of employment to the Schedule in exercise of power under Section 27 of the Act and since the Management of the schools are exploiting the teachers the State Government to mitigate the grievances of the teachers has fixed minimum wage under Section 5(2) of the Act and therefore the same should not be interfered with. It may be noted that the counsel appearing for the appellant in course of his argument has submitted that the association which filed the writ petition and which is appellant before us consist of teachers and if teacher themselves do not urge to be brought within the purview of the Act there was no need for the Governemnt to bring them within the purview of the Act.

5. In view of rival submissions at the Bar the only question that crops up for consideration is whether the teachers of an educational institution can be brought within the purview of the Act and the appropriate Government can fix the minimum wage of such teachers by issuing notification under the Act.

6. The Statements of Objects and Reasons of the Act justifying the statutory fixation of minimum wage states thus:

"The justification for statutory fixation of minimum wages is obvious. Such provisions which exist in more advanced countries are even more necessary in India, where workers' organizations are yet poorly developed and the workers' bargaining power is consequently poor.

7. In introducing the Bill it had been stated that the items in the Schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour. The Act had been passed for the welfare of labour deriving legislative competence from Item 27 of the Concurrent List in the Seventh Schedule to the Government of India Act, 1935. The object of the Act is to prevent exploitation of the workers and for that purpose it aims at fixation of minimum watges which the employers must pay. The court in the constitution Bench decision in the case of M/s.Bhiksa Yamasa Kshatriya v. Sangamner Akola Taluka Bidi Kamgar Union (1963) 2 SCC 242 : (AIR 1963 SC 806 at p.810 para 5) held that:

"The object of the Act is to prevent exploitation of the workers, and for that purpose it aims at fixation of minimum wages which the employers must pay. The Legislature undoubtedly intended to apply the Act to those industries or localities in which by reason of causes such as unorganised labour or absence of machinery for regulation of wages, the wages paid to workers were in the light of the general level of wages and subsistence level, inadequate. Conditions of labour vary in different industries and from locality to locality and the expediency of fixing minimum waages, and the rates thereof depends largely upon diverse factors which in their very nature are variable ajnd can properly be ascertained by the Government which is in charge of the administration of the State. It is to carry out effectively the purpose of theis enactment that power has been given to the appropriate Government to decide with reference to local conditions, whether it is desirable that minimum wages should be fixed in regard to any scheduled trade or industry, in any locality, and if it be deemed expedient to do so, the rates at which the wages should be fixed in respect of that industry in the locality.

8. There cannot be any dispute with the proposition that while construcing the provisions of a statute like minimum Wages Act a beneficial interpretation has to be preferred which advances the object of the Act. But nevertheless it has to be borne in mind that the beneficial interpretation should relate only to those employment which are intended to be covered by the Act and not to others. Seciton 3 of the Act provides that the appropriate Government shall, in the manner hereinafter provided fix theminimum rates of waes payable to employees employed in an employment specified in Part I or Part II of the Schedule and in an employment added to either Part by notification under Section 27. The expression 'employee' has been defined in Section 2(i) of the Act thus:

"employee" means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed and includes an outworker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises notbeing premises under the control and management of that other person; and also includes an employee declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union.

9. Secion 27 enables the State Government to add to either part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under the Act, Section 27 reads thus:

"The appropriate Government, after giving by notification in the Official Gazette not less than three months' notice of its intention so to do, may, by notification, add to either Part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under this Act, and there upon the Schedule shall in its application to the State be deemed to be amended accordingly".

10. A combined reading of the aforesaid provisions as well as the object of the legislation as indicated earlier make it explicitly clear that the State Government can add to either part of the Schedule any employment where persons are employed for hire or reward to do any work skilled or unskilled, manual or clerical. If the persons employed do not do the work of any skilled or unskilled or of a manual or clerical nature then it would not be possible for the State Government to include such an employment in the Schedule in exercise of power under Section 27 of the Act. Since the teachers of an educational institutionb are not employed to do any skilled or unskilled or manual of clerical work and therefore could not be held to be an employee under Section 2 (i) of the Act, it is beyond the competence of the State Government to bring them under the purview of the Act by adding the employment in educational instituion in the Schedule in exercise of power under Section 27 of the Act. This Court while examining the question whether the teachers employed in a school is workmen under Industrial Disputes Act had observed in Miss A.Sundarambal v. Govt. of Goa. Daman & Diu (1988) 4 SSC 42 (AIR 1988 SC 1700 para 10).

"We are of the view that the teachers employed by educational institutions where the said instituions are imparting primary, secondary, graduate or post graduate education cannot be dcalled as workmen within the meaning of Section 2 (s) of the Act Imparting of education which is the main function of teachers cannot be construed as skilled or unskilled manual work or clerical work. Imparting of education is in the nature of a mission or a noble vocation. A teacher educates children, he moulds their character, builds up their personality and makes them fit to become responsible citizens. Children grow under care of teachers. The clerical work, if any they may do is only incidental to their principal work of teaching.

11. Applying the aforesaid dictum to the definition of employee under Section 2(i) of the Act if may be held that a teacher would not come within the said definition. In the aforesaid premises we are of the considered opinion that the teachers of an educational institution cannot be brought within the purview of the Act and the State Government in exercise of powers under the Act is not entitled to fix the minimum wage of such teachers. The impugned notifications so far as the teachers of the educational institution concerned are accordingly quashed. This appeal is allowed. Writ petition filed succeeds to the extent mentioned above. There will be no order as to costs.

Dr. G.B.V.L. NARASIMHA RAO

LESSON - 17

Case Law No - 3

1990 LAB I.C. 1481
(SUPREME COURT)
(From : Delhi)
A.M.AHMADI AND
K.RAMASWAMY, JJ.

Civil Appeal Nos.930 and 931 of 1990 D/17-7-1990

Barauni Refinery Pragatisheel Shramik Parishad, (Appellant) V. Indian Oil Corporation Ltd. and others, (Respondents).

WITH

General Secretary, Barauni Telshodhak Mazdoor Union, Appellant V. Joint Chief Labour Commissioner (Central) and others, Respondents.

Industrial Employment (Standing Orders) Act (20 of 1946), S.5 - Standing Orders of Indian Oil Corporation concerning Barauni Refinery, Standing Order No.20 Settlement between Employes' Union and Management - Binding nature of - Clause of settlement keeping service conditions not changed by settlement, Infact - No specific mention about age of retirement in settlement Employees cannot approach authorities seeking modification of standing order for fixation of age of retirement.
Industrial Disputes Act (14 of 1947), S.18.

A settlement arrived at in the course of conciliation proceedings with a recognised majority union will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. To that extent it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlements reached with the active assistance of the Conciliation Officer and to discourage an individual employee or a minority union from cutting the settlement. There is an underlying assumption that a settlement reached with the help of the conciliation Officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the Union signing the settlement but also on others. That is why a settlement arrived at in the course of conciliation proceedings is put on par with an award made by an adjudicatory authority.

Where the charter of demands by the employers contained several matters concerning the service conditions including the one concerning the upward revision of the age of retirement, and one of the clauses of the settlement arrived at during the conciliation proceedings which was still in operation, provided that the service conditions of the employee which were not changed by the settlement, will remain unchanged, the employees could not approach the authorities under the Industrial Disputes Act during the operation of settlement, seeking modification of the Standing Order with regard to the fixation of the age of superannuation of the workmen, when the settlement did not make any specific mention about the age of retirement, meaning thereby that the demand in respect of revision the age of retirement was not acceded to. It was more so when, by another clause of the settlement the Union agreed that during the period of the operation of the settlement they shall not raise any demand which would throw an additional financial burden on the management,

other than bonus. Workmen who remain in service for a longer period have to be paid a larger amount by way of salary, bonus and gratuity than workmen who may newly join in place of retiring men, thereby throwing additional financial burden on the management.

AHMADI, J. :- These two appeals by two different Trade Unions of Barauni Refinery are directed against the decision of the High Court of Delhi which set aside the modification of Clause 20 of the Standing Orders certified under S. 5 of the Industrial Employment (Standing Orders) Act, 1946 (hereinafter called the Standing Orders Act'), The brief facts giving rise to these two appeals are as under :

Two companies, namely, the Indian Refinery, Limited Oil Company, Limited amalgamated in 1964 and a new Company know as Indian Oil Corporation, Limited (IOCL) was incorporated. This newly formed company comprised essentially of two divisions, namely, (L) Marketing Division, representing the staff, assets and business of Indian Oil Company, Limited and (2) Refinery and Pipe Lines Division, representing the staff, assets and oil refinery manufacturing of petroleum products of Indian Refinery, Limited. The age of superannuation of the staff in the Marketing Division was 60 years whereas the age of superannuation for the Refinery and Pipe Lines Division was fixed at 58 years under Clause 20 of the Standing orders concerning Barauni Refinery. The IOCL has refineries in different parts of the country including one at Barauni The Standing Orders concerning the Barauni Refinery came into force on 5th December, 1964 as provided by S. 7 of the Standing Orders Act and apply to all workmen employed in the said industrial establishment Clause 20 of the Standing Orders reads as under :

“Every employee shall retire from service on completing the age of 58 years. Extension for a maximum period of 5 years but not for more than one ;year at a time may be given at the discretion of the company provided the employee is certified to be fit by the Company’s Medical Officer and provided further that the employee concerned also consents to such extension.”

2. By a joint letter dated 15th December, 1981, 14 recognised Unions representing the employees of the IOCL working in different refineries and pipe lines divisions submitted a charter of demands in terms of clauses 2,1,3 of the long term settlement dated 3rd December, 1979. By clause 18 of this charter of demands the superannuation age was sought to be enhanced to 60 years. A similar charter of demands was forwarded by the Barauni Telshodhak Mazdoor Union to the General Manager, IOCL, Barauni Refinery on 23rd December, 1981. Pursuant to the presentation of this charter of demands, meetings were held between the Management of IOCL (R & P Division) and the recognised Unions of the said Division from time to time. As a result of discussions held at the said meetings a settlement was mutually arrived at by the between the parties on May 24, 1983. Clauses 19 and 21 of this general settlement concerning all the Refineries and Pipe Lines Divisions, inter alia provided as under:

Sec : 19. The Corporation agrees that such terms and conditions of service as well as amenities and allowances as are not changed under this settlement shall remain unchanged and operative during the period of the settlement.”

Sec : 20. The Unions agree that during the period of operation of this settlement, they shall not raise any demand having financial burden on the Corporation other than bonus provided that this Clause shall not affect the rights and obligations of the parties in regard to matters covered under S.9A of the Industrial Disputes Act, 1947.

This general settlement was to remain in force from 1st May, 1982 to 30th April, 1986. After this general settlement was signed by the Management and the Union representatives, a separate memorandum of Settlement dated 4th August, 1983 was signed between the IOCL (R & P Division). Barauni Refinery and their workmen represented by Barauni Telshodhak Mazdoor Union. Barauni Refinery, under Ss 12(3) and 18(3) of the Industrial Disputes Act, 1947 in conciliation proceedings ;initiated by the Assistant Labour Commissioner and Conciliation Officer, Baurani. This settlement too was to remain in force from 1st May, 1982 to 30th April 1986. Clauses 19 and 21 of this settlement were verbatim reproduction of those in the general settlement dated 24th May, 1983 extracted hereinabove. It may hereby mentioned that despite the specific demand made in the charter of demands for the upward revision of the age of superannuation, no specific provision was made in that behalf either in the general settlement or in the special settlement concerning. Barauni Refinery. On the contrary clause 19 of both the settlements provides that the terms and conditions of service which are not changed under the Settlement shall remain unchanged and operative during the period of settlement.

3. The Petroleum and Chemical Mazdoor Union through its General Secretary, Ram Vinod Singh, served notice on the Regional Labour Commissioner (Central) under S. 10(2) of the Standing Orders Act for modification of clause 20 of the certified Standing Orders of Barauni Refinery for raising the age of superannuation from 58 years to 60 years mainly on the ground that the staff members working in the Marketing Division superannuated on completing the age of 60 years. It was also contended by the said Union that the demand for the upward revision of the age of superannuation could not be pressed at the time of the settlement arrived at pursuant to the charter of demands because the age of retirement was fixed at 58 years under the relevant certified standing orders. It was, therefore, felt necessary that clause 20 of the certified Standing Orders applicable to Barauni Refinery of the IOCL should be got suitably modified to raise the age of retirement to 60 years. This demand was based on the averment that the nature of work performed by the workmen in the Refinery and Pipe Lines Division was identical to that performed by the staff members of the Marketing Division. The pay-scales of the employees of the Refinery Division and Marketing Division were also identical. It was, therefore, contended that there was no valid reason for fixing different ages for retirement for the staff members working in the said two Divisions of IOCL.

4. The Regional Labour Commissioner after hearing the rival parties allowed the application for modification of clause 20 of the certified Standing Orders. By his order the directed that clause 20 should be modified as under:

“Normally the age of retirement of workman of the Corporation is fixed at 60 years. No notice is required to be given by a workman of his intention to retire on superannuation or by the Management to the workman that he is due to reach the age of superannuation on certain date. The workman should not, however, leave his place of duty without being relieved.”

5. Against this order of 11th October, 1984, the IOCL preferred an appeal tot he Appellate Authority under S.6 read with S.10(3) of the Standing Orders Act. The Appellate Authority while dismissing the appeal directed a slight modification in clause 20 of the Standing Orders. Clause 20 as modified by the Appellate Authority was worded as under:

“Every workman shall generally retire on attaining the age of 58 years. Between the 57th and 58th year Company’s Medical Officer would conduct the medical test and if the workman is

found to be medically fit he shall be retained in service for a period of two more years beyond the age of 58 years i.e. up to 60 years."

Feeling aggrieved by this order of the Appellate Authority the IOCL preferred a writ petition No.CWP No.1717/87 in the High Court at Delhi for quashing the impugned order of the Certifying Officer dated 11th October, 1984 and the impugned order of the Appellate Authority dated 4th May, 1987. The Union which had initiated the proceedings for modification of Clause 20 of the certified Standing Orders also felt aggrieved by the said order of the Appellate Authority and preferred a writ petition No.CWP 3417I87 in the High Court of Delhi. Both these writ petitions were heard by a Division Bench and were disposed of by a common judgement. The writ petition filed by the IOCL was allowed while the other writ petition was dismissed.

6. While hearing these two writ petitions the High Court formulated two points for consideration, namely (i) "Whether the Certifying Authority under the Standing Orders Act has the jurisdiction to entertain an application for amendment of a Standing Order which fixes the age of retirement of the workmen as 58 years which is in consconance with the model Standing Order v. Indian Oil Corpn. Ltd. Lab.I.C. and enhances the age of retirement to 60 years without first giving any finding whether it is practicable or give effect to the model Standing Order" and (ii) "Whether the settlement arrived at under S.18(3) and Section 19(2) of the Industrial Disputes Act 1947, between the petitioner and the workmen represented by their recognised majority union and which settlement was in force when impugned orders were made, had put any bar on the rights of the workmen to approach the authorities under the said Act for seeking modification of the Standing Orders with regard to the fixation of the age of superannuation of the workmen". The High Court answered the first question in the affirmative holding that it was open to the Certifying Authority to entertain an application for modification of the clause fixing the date of superannuation, the provisions in the model standing orders notwithstanding. On the second point the High Court came to the conclusion that resettlement arrived at in conciliation proceedings was binding on the workmen and as clause 19 of the settlement kept the service conditions which were not changed in-fact and clause 21 of the settlement did not permit raising of any demand throwing an additional financial burden on the IOCL, it was not permissible to modify the certified Standing Orders by an amendment as that would alter the service condition and increase the financial burden on the Management. In this view that the High Court took it quashed the orders passed by the two authorities below and made the rule in CWP No.1717/87 absolute while dismissing CWP No.3417/87 with no order as to costs. It is against this order that the Trade Union have approached this Court.

7. The Standing Orders Act was enacted to define with sufficient precision the conditions of employment for workers employed in industrial establishment and to make the same known to them. The object of the Act was to have uniform Standing Orders in respect of the matters enumerated in the schedule to the Act regardless of the time of their appointment. With this in view the Act was enacted to apply to all industrial establishments wherein 100 or more workmen were employed on any date of the preceding 12 months. Within six months from the date of which this enactment becomes applicable to an industrial establishment, the employer is obliged by S.3 to submit to the Certifying Officer draft Standing Orders proposed by him for adoption in his industrial establishment. Sub-section (2) of S.3 lays down that in such draft Standing Orders provision shall be made for every matters set out in the schedule which may be applicable to the industrial establishment and where model Standing Orders have been prescribed shall be, so far as practicable, in conformity with such model. Section 4 provides that the Standing Orders shall be certifiable if (a) provision is made therein for every matter set out in the schedule which is applicable

to the industrial establishment and (b) the Standing Orders otherwise in conformity with the provisions of the Act. It further casts a duty on the Certifying Officer or Appellate Authority to adjudicate upon the fairness and reasonable ness of the provisions of any Standing Orders. On receipt of the draft Standing Orders, S. 5 requires the Certifying Officer to forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, to the workmen in such manner as may be prescribed, together with a notice in the prescribed from requiring objections, if any , which the workmen desire to make to the draft Standing Orders. Thereafter the Certifying Officer must hear the concerned authorities and decide whether or not any modification of or addition to the draft submitted by the employers is necessary to render the draft Standing Orders certifiable under the Act. He is then expected to certify the draft Standing Orders with modifications, if any, and send authenticated copies thereof in the prescribed manner to the employer, to the trade union or other prescribed representatives of the workmen within 7 days. Section 6 provides for an appeal against the orders of the Certifying Officer. The Appellate Authority has to communicate its decision to the Certifying Officer, to the employer and the trade union or other prescribed representative of the workmen within 7 days from the date of its order. Section 7 provides that the Standing Orders shall, unless an appeal is preferred, come into operation on the expiry of 30 days from the date on which authenticated copies thereof are sent under S.5(3) or where an appeal is preferred, on the expiry of 7 days from the date on which copies of the orders of the Appellate Authority are sent under S, 6(2). Standing Orders duly certified as above for the Barauni Refinery came into operation on 5th December, 1964 as provided by S. 7. We then come to S. 10 which provides for modification of certified standing Orders. Sub-section (1) thereof states that the Standing Orders finally certified shall not, except on agreement between the employer and the workmen or a trade union or other representative body of the workmen be liable to modification until the expiry of six months from the date on which the Standing Orders or the last modification thereof came into operation on 5th December, 1964 as provided by S.7. We then come to S. 10 which provides for modification of certified Standing Orders. Sub-section (1) thereof states that the Standing Orders finally certified shall not, except on agreement between the employer and the workmen or a trade union or other representative body of the workmen be liable to modification until the expiry of six months from the date on which the Standing Orders or the last modification thereof came into operation. Sub-section (2) of S.10 reads as under:

"Subject to the provisions of sub-section (1) an employer or workman or a trade union or other representative body of the workman may apply to the Certifying Officer to have the standing orders modified, and such application shall be accompanied by five copies of the modifications proposed to be made and where such modifications are proposed to be made by agreement between the employer and the workmen or a trade union or other representative body of the workmen, a certified copy of that agreement shall be filed along with the application."

It was under this provision that clause 20 of the certified Standing Orders was sought to be modified.

8. Since the High Court has answered the first point in the affirmative i.e. in favour of the workmen, we do not consider it necessary to deal with that aspect of the matter and would confine ourselves to the second aspect which concerns the binding character of the settlement, section 2 (P) of the Industrial Disputes Act, 1947 defines a settlement as a settlement arrived at in the course of conciliation proceedings and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been

sent to the officer authorised in this behalf by the appropriate Government and the Conciliation Officer. Section 4 provides for the appointment of Conciliation Officers by the appropriate Government and the Conciliation Officer. Section 4 provides for the appointment of Conciliation Officers by the appropriate Government. Section 12(1) says that where any industrial dispute exists or is apprehended the Conciliation Officer may, or where the dispute relates to a public utility service and a notice under S. 22 has been given, shall hold conciliation proceedings in the prescribed manner. Sub-section (2) of S. 12 casts a duty on the Conciliation Officer to investigate the dispute and all matters connected there with a view to inducing the parties to arrive at a fair and amicable settlement of the dispute. If such a settlement is arrived at in the course of conciliation proceedings, sub-section (3) requires the Conciliation Officer to send a report thereof to the appropriate Government together with the memorandum of settlement signed by the parties to the dispute. Section 18(1) says that a settlement arrived at by agreement between the employer and the workmen otherwise than in the course of the conciliation proceedings shall be binding on the parties to the agreement. Sub-section (3) of S.18 next provides as under :

"A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a case where a notification has been issued under sub-section (3-A) of Section 10-A or award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on -

(a) all parties to the industrial dispute.

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause :

(c) Where a party-referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) Where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part".

JUDGEMENT :

It may be seen on a plain reading of sub-sections (1) and (3) of S. 18 that settlements are divided into two categories, namely (i) those arrived at outside the conciliation proceedings and (ii) those arrived at in the course of conciliation proceedings. A settlement which belongs to the first category has limited application in that it merely binds the parties to the agreement but the settlement belonging to the second category has extended application since it is binding on all parties to the industrial dispute, to all other who were summoned to appear in the conciliation proceedings and to all persons employed in the establishment or part of the establishment as the case may be, to which the dispute related on the date of the dispute and to all others who joined the establishment thereafter. Therefore, a settlement arrived at in the course of conciliation proceedings with a recognised majority union will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. To that extent it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlements reached with the active assistance of the Conciliation Office and to miscourage an individual employee or a

minority union from scuttling the settlement. There is an underlying assumption that a settlement reached with the help of the conciliation Officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the union signing the settlement but also on others. That is why a settlement arrived at in the course of conciliation proceedings is out on par with an award made by an adjudicatory authority. The High Court was, therefore, right in coming to the conclusion that the settlement dated 4th August, 1983 was binding on all the workmen of the Barauni refinery including the members of Petroleum and chemical Mazdoor Union.

9. The settlement does not make any specific mention about the age of retirement. Clause 19 of the settlement, however, provides that such terms and conditions of service as are not changed under this settlement shall remain unchanged and operative for the period of the settlement. The age of retirement prescribed by clause 20 of the certified Standing Orders was undoubtedly a condition of service which was kept intact by clause 19 of the settlement. The provisions of the Standing Orders Act to which we have adverted earlier clearly show that the purpose of the certified Standing Orders is to define with sufficient precision the conditions of employment of workman and to acquaint them with the same. The charter of demands contained several matters touching the conditions of service including the one concerning the upward revision of the age of retirement. After deliberation certain conditions were altered while in respect of others no change was considered necessary. In the case of the latter clause 19 was introduced making it clear that the conditions of service which have not been changed shall remain unchanged. i.e. they will continue as they are. That means that the demand in respect of revision of the age of retirement was not acceded to.

10. By clause 21 of the settlement extracted earlier the Union agreed that during the period of the operation of the settlement they shall not raise any demand which would throw an additional financial burden on the management, other than bonus. Of course the proviso to that clause exempted matters covered under S.9A of the Industrial Disputes Act from the application of the said clause. However, S.9A is not attracted in the present case. The High Court was therefore, right in observing: when the settlement had been arrived at between the workmen and the company and which is still in force, the parties are to remain bound by the terms of the said settlement. It is only after the settlement is terminated that the parties can raise any dispute for fresh adjudication. The argument that the upward revision of the age of superannuation will not entail any financial burden cannot be accepted. The High Court rightly points out “workmen who remain in service for a longer period have to be paid a larger amount by way of salary, bonus and gratuity than workmen who may newly join in place of retiring men. “The High Court was, therefore, right in concluding that the upward revision of the age of superannuation would throw an additional financial burden on the management in violation of clause 21 of the settlement. Therefore during the operation of the settlement is was not open to the workmen to demand a change in clause 20 of the certified Standing Orders because any upward revision of the age of superannuation would come in conflict with clauses 19 and 21 of the settlement. We are, therefore, of the opinion that the conclusion reached by the High Court is unassailable.

11. In view of the above we see no merit in these appeals and dismiss them with no order as to costs.

12. Interim orders in each appeal will stand dissolved.

Dr. G.B.V.L. NARASIMHA RAO