CHAPTER V

SOCIAL SECURITY LEGISLATIONS: THEIR INTERPRETATION BY JUDICIARY

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Social Security Legislations: Their Interpretation By The Judiciary

Judiciary being the custodian of the law has been performing positive and creative functions in securing and promoting human rights to the people. It upholds the rule of law and brings about social readjustment necessary to establish coherent social economical order. Judiciary moves in consonance with the changing needs of time and requirements of the society.

The Directive Principals of State Policy enumerated in the part IV of the Constitution provides numerous social security protections to the people. There are some central as well as the state enactments on social security protection with enforcement machineries in each case. But the practical; scenario has been entirely different from the legal position. The judiciary has been making all efforts to promote and protect the social security provisions in the nation. It has brought about the change in the social security enactments for the betterment of the working class, wherever it found any legislation or provisions of it is prejudice to the interest of the people, certainly it has been rejecting it. All the inconsistent provisions are declared void or avoidable by the judiciary. So the social security legislations are supported by the judiciary for the social and economic development of the working class on the nation.

The Supreme Court, High Courts of Delhi, Calcutta, Bombay, Madras, Patna, Kerela, Karnataka, Orissa, Punjab & Haryana and other Social Security Enforcement Mechanism like ESI Courts, Workmen's Compensation Commissioners, Provident Fund Commissioners, and other competent authorities have enhanced the movement of the social security

protection. The Supreme Court especially protected the working class from exploitation, on numerous occasions. These agencies have formulated various principles of law and declared Judicial Legislation.

The Social Security legislations will have a real meaning only when the stress is laid on what is considered as remedial jurisprudence through the judicial powers. In interpreting the social security provisions the judiciary must avoid technical approach and adopt pragmatic one, being guided by social, economical values, needs of time, and requirement of the society.

5.1. The Workmen's Compensation Act, 1923

The Act provides for compensations to workers for accidents arising out of and in the course of employments. The Scheme of this Act is not only to compensate the workmen in lieu of wages but also to provide compensation for the injury caused. This Act was put into force with effect from 01 July 1924, subsequently; there were a number of amendments made according to judicial decisions of the Supreme Court and social and economical conditions. The Indian Judiciaries, time and again, expanded the scope pf the Act and tried to protect the interests of the workmen.

5.1.1 Views and Interpretation of the Supreme Court on the Act

The Constitution of India has empowered the Supreme Court to issue, any order, directives or writs whichever may be appropriate for the enforcement of the human rights specified in the Part III and IV of the

Constitution. The Supreme Court has expressed these powers in the most creative manners. It has devised new strategies, forged new tools and broadly interpreted the letter of law by upholding its spirit to ensure the protection of working class to the nation. The role of Supreme Court in protection and promotion of the social security measures for the working class in organized sectors has been commendable.

5.1.1.1 The Doctrine of Notional Extension of employer's premises:

Initially the employers liability for compensation was considered for the personal injury caused to workman, by accident arising out of and in the coursed of employment at working place only. But the Supreme Court changed this proposition in **Saurastra Salt Manufacturing Company Vs Bai Value Raja and others**[339] Where the Saurastra Salt Company employed certain workmen for salt manufacturing. The workmen employed in the company, while returning home after finishing their work had to go by public path, then through a sandy area in the open public land and finally across a creek through a ferry boat. The workmen while crossing the creek in a public ferryboat, which capsized due to bad weather, were drowned.

The Supreme Court considered the circumstances of the case and held that 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 " Notional Extension " of the employer's promises

[339] AIR, 1958, SC, 881

so as to include an area, which the workman passes and repasses in going to and in leaving to the actual place of work.

When a workman is on the public road or a public place or on a public transport he is there as any other member of the public and is not in the course of his employment unless the vary nature of his employment males it necessary for him to be there. A workman is not in the course of s employment for the movement 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 with in the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him.

It was held that it is an error to suppose that the deceased workmen in this case were still in the course of their employment which they were crossing the creek through public ferry boat. The accident, which took place resulting in the death so many workmen, was unfortunately, nut for that accident, the applicant cannot be made liable.

In another leading case of the **General Manager BEST Undertaking Vs Mrs. Agnes**[340], the Supreme Court decided. The facts of the case in short were, that the Bombay Municipal Corporation carried on a Public Utility Service in greater Bombay and for the purposes employed certain drivers. The Electricity Supply and Transport Committee managed the transport service. One of drivers on 20th July 1957 finished his work for the day at about 0745 PM at Jogeswari Bus Depot. In order to reach his residence at Santa Cruz he boarded another bus, which collided with a stationery lorry parked at an awkward angle on the road near Eral Bridge, Anedhri. Consequently he was thrown out on the road and injured. He was sent to the hospital for treatment but unfortunately expired on 26 July

[340] AIR, 1964, SC 193

1957. His widowed wife pleading that the accident has arisen out of and in the course of employment claimed the compensation. Ultimately the case came to the Supreme Court.

It was observed by the Court that under Section 3(1) of the WMC Act, 1923 injury must be caused to the workman by accident arising out of and in the course of employment. The question when does an employment begin and when does it cease, depend upon the facts of each case. But the Courts have agreed that the employment does not necessarily end when the tool down signal is given or when the workmen leaves the actual workshop, where he is working. There is a notional extension as to both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. An employment may end or may begin not only when the employee begins to work or leaves his tools, but also when he used the means of access and egress to and from the place of employment. A contractual duty or obligation on the part of an employee to use only a particular means of transport extends the area of the fields of the place of employment to the course of the said transport. Though at the beginning the expression duty was strictly interpreted, but later decisions have taken a liberal construction of the term duty. A theoretical option to take an alternative route may not detect from such a study if the accepted one is of proved necessity or practical conclusion.

After discussing the relevant rules of the BEST Undertaking and facts of the case the Supreme Court observed " the decisions relating to accidents occurring to an employee in a factory or in premises belonging to the employer providing ingress or egress to the factory are not of much relevance to a case where and employees was to operate over a large area in a bus which is in itself run integrate part of a fleet of buses operating in the entire area. Though the doctrine of reasonable or notional extension of

employment in the context to specified workshop, factories or harbors, equally applies to bus services the doctrine necessarily will have to be adopted to meet its peculiar requirement. Where in a case of factory, the premises of the employer which give ingress or egress to the factory is a limited one, in the case of a city transport service by analogy, the entire fleet of buses forming the service would be the premises. An illustration makes our point clear. Suppose in view of the long distances to be covered by the employees the corporation, as a condition of service, provides a bus for collecting all the drivers from their houses so that they may reach their depots in time and to take them back after the days work so that after the heavy work till about 7 PM, they may reach their home without further strain on their health. Can it be said facility is not given in the course of employment? It can be said that it's the that the duty of the employee in the interest of the service to utilize the said bus both for coming to the depot and going back to their homes. If that were so, what difference would it make if the employer, instead of providing a separate bus, through opens his entire fleet out of buses for giving the employees the facility? They are given that facility not as member of a public but as employee not as a grace but as of right because efficiency of the service demands it. We would therefore hold that a driver when going home from the depot or coming to the depot uses the bus; any accident that happens to him is an accident in the course of his employment.

It was further observed that as the free transport is provided in the interest of service, having regard to the long distance, a driver has to go to depot from his house and vice versa. The use of the said buses is a proved necessity-giving rise to an implied obligation on his part to travel in the said buses as a part of his duty. He is not exerting the right as a member of the public, but only as one belonging to a service. In such circumstances the court held that the accident arose in the course of the employment-giving rise to the claim of compensation.

This doctrine of notional extension applies where the employer provides means of conveyance and the employee is under duty, under the contract of service to use that facility or where use of that facility is proved necessity, giving rise to an implied obligation on the part of the employee.

These were the landmark decisions of the Supreme Court, which helped millions of workmen. It was the beginning of a new era in the claim of compensation for working class. The Supreme Court followed the same principle of the Notional extension in various cases as **Rajanna Vs Union O India,**[341], **Mackanxzie and Company private Limited Vs Ibrahim Mohammad Issak**[342].

5.1.1.2 Employment Condition: Arising out of employment and in the course of employment:

The liability of the employer to pay compensation was basically based on the principle of personal injury from an accident arising out of and in the course of his employment. Initially the condition was interpreted in narrow sense, as the workman present at the work site and injury resulted while working on the machine or equipment, otherwise no compensation was payable to them. The Supreme Court broadly interpreted the concept of the accident arising out of and in the course of employment in some cases. The Supreme Court in **Mackinnon Mackenzie and Company Private Limited Vs Ibrahim Mohammad Issak** decided on the subject matter in wider aspect. Mr. Sheikh Hussain Ibrahim was employed as seaman in Dwarka (Gujarat) on the ship. He complained of pain in the chest and consulted the doctor who examined

[341] 1995 2 LLJ, 824
[342] AIR, 1970, SC 1906

him but nothing abnormal could be detected clinically. The medical officer on ship prescribed some medicine for him, and he reported fit for work on the next day. Later on he complained of insomnia and pain in the chest for which the medical officer prescribed sedative tablets. He took the medicine. He was seen near the bridge of the ship at about 0230 AM on 16 Dec 1961, when the ship was in the Persian Gulf. He was sent back at 3 AM. Further he was seen on the Tween Deck he told a seaman on duty that he was going to bed, at 0615AM, he was found missing and a search was made, the dead body was not found. There was direct evidence of his death.

The Additional Commissioner made an inspection of the ship and found no material evidence, which could lead to the inference that the death, was caused by an accident, which arose out and in seaman's employment. No compensation was payable in this case based on the above report. The matter was brought before the Supreme Court. The Supreme Court held that in order to come within the WMC Act, the injury by accident must arise both out of and in the course of employment. The expression in the course of employment means in the course of work that the workman is employed to do and is incidental to it. The words arising of out of employment are understood to mea that during the course of employment, injury has resulted from some risk incidental to the duty owing to the master; it is reasonable to believe the workman would not otherwise have suffered. In other worked there must be a casual relationship between the accident and the employment. The expression arising out of the employment is again not confined to the mere nature of the employment. It applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors, the workman were brought within the zone of special danger, the injury would be one, which arises out of employment. To put it differently, if the accident had occurred on account of a risk, which is an

incident of the employment, the claim for compensation must succeed unless, of course the workman has exposed himself to an added peril by his own imprudent act. In the case of death caused by accident, the burden of proof rests upon the workman to prove that the accident arose out of the employment as well as in the course of employment. But this does not mean that a workman who comes to court for relief, must necessarily prove it by direct evidence.

These essentials may be inferred when the facts proved justify the inference on the other hand, the commissioner must not surmise, conjecture or guess, and from hand, he may draw an inference from the proved facts so long as it is a legitimate inference. It is of course impossible to lay down any rule as to the degree of proof which is sufficiently to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it.

The Supreme Court setting aside the decision of the Bombay High Court in this case held that the Additional Commissioner did not commit any error of law in reaching his finding and the High court was not justified in reversing it. There was no material for holding that the seaman met heath on accident of an accident, which arose out of employment. The expression out of employment refers to service of the workman and impression in the course of employment refers to the duties, which are to be performed by the workman while he is in service of employer. In order to give rise to a claim for compensation both the things must be looked into. The injury sustained by the workman must be accident which must have occurred while the workman is in the service of the employer and must have been supposed to do his duties at the time when the accident take place, and he must be supposed to be there only due to performance of his duties not otherwise. In other words, there must be a casual connection between the accident and employment. If there is no casual

relationship between the two accidents cannot be called to have arisen out of and in the curse of employment.

In another latest case of the **State of Rajasthan Vs Ram Prashad and another**[343], the Supreme Court decided on related matter. The workman died due to natural lighting while working at the site. The Supreme Court decided that in order to success in the claim for a compensation, it must be proved that the accident must have casual connection with employment and arising out of it, but if the workman is inured as a result of natural force of lightning then it is itself has no connection with employment of deceased. But the employer can still be held liable if the claimant shows that the employment exposed the deceased to such injury. In the present case the deceased was working on the site would not have been exposed to hazard of lightning has she not been working. Therefore the appellant was held liable to pay compensation.

5.1.1.3 Payment of Compensation and Penalty for default of Payment

According to the Section 4A of the Act that compensation shall be paid as soon as it becomes due.[344] In case where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accept and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right to the claim of the workman to make any further claim.

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[343] 2001 1LLJ 177 SC
[344] 8 of 1959 with effect from 1-6-1959

The Amendment Act 30 of 1995 inserted a new sub section 3 and 39 with effect from 15-9-1995, states that where any employer is in default for the payment of compensation with in one month from the date it fell due, the Commissioner is authorized to charge the interest for the delay. This interest and penalty for the delay shall be paid to the workman or dependents as case may be.[345]

The Supreme Court declared some landmarks on the subject matters covered in the Section 4A of the Act. **Pratap Narain Singh Deo Vs Srinivas Sabat and another**[346] is a leading case decided by the Supreme Court. Facts of the case in brief were, Mr. Pratap Narain Singh Deo was a proprietors of two cinema halls in Jaipur, District Koraput, Orissa, one Srinivas Sabata was working as a carpenter for doing some ornamental work in a cinema hall of the appellant on July 05, 1968, when he fell down and suffered injuries resulting in the amputation of his left arm from elbow. He served a notice on the appellant dated August 11, 1968, demanding payment of compensation as his regular employee. The appellant sent a reply dated August 21, 1968, stating that the respondent was a casual contractor, and that the accident has taken place solely because of his negligence. The respondent then made a personal approach for obtaining the compensation, but to no avail. He therefore made an application to the Commissioner for workmen's compensation, respondent no 2, stating that he was a regular employees of the appellant and his wages were Rs 120 per mensem, he had suffered the injury in course of his employment and was entitled to compensation under the WMC Act, 1923.

The Commissioner held in his order dated May 6 1969 that the injury had resulted in the amputation of left arm of the respondent above

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[345] Inserted by Amendment Act 46 of 2000, with effect from 8-12-2000
[346] AIR 1976, SC, 222, 1LLJ, SC, 235

the elbow. He further held that the respondent was a carpenter by profession and by loss of his hand above the elbow he was evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only. He therefore adjudged him to have lost 100% of his earning capacity on that basis, he calculated the amount of compensation at Rs. 9,800 and ordered payment of penalty to the extent of 50% together with interest at 06% per annum, making a total of Rs. 15,092.

The appellant felt aggrieved and filed a Writ Petition in the High Court of Orissa, but it was dismissed summarily on October 10 1969. He therefore died an appeal in the Supreme Court by Special leave. The Supreme Court held that Section 3 of the Act deals with the employer's liability for compensation. Sub section (1) of that section provides that the employer shall be liable to pay compensation, if personal injury is caused to a workman by accident arising out of and in the course of his employment. It was not the case of the employer that the right to compensation taken away Under Section 3(5) because of institution of a suit in a civil court for damages in respect of the injury, against the employer or any other person.

The Supreme Court declared that it was a case of permanent disablement. Because the amputation of the arm from 8" from the tip of acromiom to less than 4 ½"below the tip of olecranon, disabled the carpenter, who can not work with one hand disabled. The commissioner was correct and reasonable in his finding.

It was further held that it was the duty of the appellant, Under Section 4-A (1) of the act to pay the compensation at the rate provided by the section 4 as soon as the persona injury was caused to the respondent. He failed to do so what is worse, he did not even make a provisional

payment under Sub Section (2) of the section 4 –A, for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to Commissioner for setting the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement setting the claim for a sum which was so grossly inadequate that it was rejected by the commissioner. In these facts and circumstances, the Court have no doubt that the Commissioner was fully justified in making an order for the payment of interest and penalty.

The Supreme Court in another case **L R Ferror alloys Limited Vs Mahavir Prasad Mahto,**[347] decided on the delay payment with interest, and imposition of penalty on employer and Insurance Company. The Court directed the employer to pay interest on the amount due and penalty according to the instructions of the Commissioner. The Court held that payment of interest and penalty are two distinct liabilities arising under the Act. Liability to pay interest is part and parcel of legal liability to pay compensation upon default of payment of that a mount within one month under Section 4-A of the Act. Therefore the insurance company will have paid claim for compensation along with interest jointly with the insured employer. But penalty imposed on the insured employer is an amount of his personal fault. Hence insurance company cannot be made liable to reimburse penalty imposed on the employer. Hence compensation with interest payable by the insurance companies but not the penalty.

[347] 2001, 1LLj, 181, SC

5.1.1.4 The Workman and Contractor: Distinguishing

The relationship of employer and workman is established if the employer has some measure of control and could regulate the action of the employee during the time he is engaged in doing his work. But the positions of the workman employer and contractor are different from the each other. The Supreme Court has distinguished between workman and contractor in number of cases. In a case of **DC Works Limited Vs State of Saurastra**[348], the Supreme Court declared that a workman agrees himself to work and a contractor agrees to get other person to work. A workman who himself agrees to work does not cease to be a workman merely because he gets some other persons also to work along with him. The test whether a workman is an independent contractor, or a workman is whether has agreed to work personally if he has, he is a workman and the fact that he takes assistance from other person also would not effect his status.

Further a workman is a person who enters into a contract of service with the management, a contractor is one who enters into a contract of service and work independently of any control or supervision of employer.

In **Chintaman Rao Vs State of Madhya Pradesh**[349], the Supreme Court decided on the same subject matter. There was an agreement between the management of a Bidi company and an independent contractor that the contractor would receive tobacco from the management and supply them rolled in bidis for consideration. He could manufacture bidi wherever he pleased and delivering bidis in the factory discharged his liability. The contractor was not under the control of management of the factory and had not to work in the factory. The contactor was held by the

[348] AIR, 1957, 264,SC
[349] AIR, 158, 388,SC

Court not to be employed management as a workman but was independent contactors who performed his part of contract, by making bidis, and delivering them at the factory.

5.1.1.5 Substantial Question of law: Interpretation of term

Section 30 (1) of the WMC Act provides that an appeal will lie to the High Court against the order of the Commissioner only when substantial question of law is involved.

The Supreme Court in **Chunni Lal V Mehta Vs Century Spg and Mfg Company Limited**[350] laid down the five tests to determine whether a substantial question of law involved in the appeal and held that even if anyone of them were satisfied, the appeal would be entertained. The following are the five tests laid down.

(i) Whether directly or indirectly it affects substantial rights of the parties or

(ii) The question is of general public importance or

(iii) Whether it is an open question in the sense that issue is to settled by pronouncement of the Supreme Court or Privy Council, or by the Federal Court or;

(iv) The issue in not free from difficulty and

(v) It calls for a discussion for alternative view.

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[350]AIR 1962, 1314

5.1.2 Views and Interpretation of the High Courts on the Act:

The High Courts of various states have interpreted and supported the Social Security Measures. The High courts especially from the Bombay, Karnataka, Kerala, Madras, Orissa, Rajasthan, Calcutta, Patna, Delhi, Gujarat, and the Punjab and Haryana High Courts have contributed in the fields. A brief of the cases decided by these agencies is given below.

5.1.2.1 The Doctrine of contributory Negligence

Under this doctrine, the employer may raise the defence (Under Section 3(1) b of the Act) that the accident occurred purely due to employee's negligence on his own part. Such a defense has been given no footing for denial of compensation or reduction in the rate of compensation. This doctrine is one of the safeguards against the deprivation of compensation claim in case of work injury.

The Madras High Court in **Sundaresa Mudaliar Vs Muthammal**[351] held that the doctrine has no place under the Act, because first of all mere negligence or carelessness would not be regarded as a willful disobedience and second the doctrine of contributory negligence as a good defense in common law has been abrogated in so far as the WMC Act is concerned. The reasons are said to be two fold, viz, (a) that compensation is not a remedy for negligence of the employer but is rather in the nature of an insurance of the workman against certain risks of accident, and (b) that this was made an excuse for avoiding all liability, because most negligence's are practically accidents in the nature of what

[351] 1956 2LLJ52

is called the act of God, Men who are employed to work in factories and else where are human beings a not machineries. They are subject to human imperfections.

In another case **Ranarai Zingargi Shande Vs Indian Yarn Manufacturing Company** [352] the Bombay High Court decided on the doctrine. The facts of the case were as; Ramarao was working in the respondent company. The appellant was specifically instructed to operate the machine from the northern side by the tried to operate the machine from southern side where gear exists and was injured Besides, the safeguard was also fitted with bolt to the machine and workers were instructed not to remove the safety guard. According to management appellant has in disobedience of instructions removed the safety guard, It was also displayed on the notice board that before the machine is started the worker should satisfy that safety guards are affixed and if there are no safe guards the workers should get it affixed and then start work. In spite of the above facts, it was held not to be a case of willful disobedience or negligence. It was held that no amount of negligence in doing employment job could change the workman into unemployment job. The workman to an order expressly given cannot regard mere negligence as willful disobedience. To decide whether an occurrence is an accident, it must be regarded from the point of view of the workman who suffers from it and if it is unexpected ad without design on his part; it may be an accident. In the present case the workman me with an accident while performing his duty, though not I a diligent manner but the fact remains that his two fingers have been crushed, still he is entitled to the compensation.

The Orissa High Court in **Padama Devi Vs Raghunath**[353] held that contributory negligence on the part of workman does not exonerate

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[352] 1992, LLR, 934
[353] AIR, 1950, 207,Orissa

the master from his liability to pay compensation. While disobedience of rules and safety devices etc, is a ground for exemption incases of injury, other than death, but mere negligence of a workman cannot be regarded as willful disobedience to an order expressly given. In a case where a motor driver driving with a high speed dashed with a tree and was thereby killed by accident, the employer cannot escape from his liability simply because such an accident was caused by rash and negligent driving. The driver might have been in excessive sped but dashing of the vehicle with a tree cannot be said to have been brought with any previous design. It was held that an accident means some unexpected event happening without design even though there may be negligence on the part of the workman who suffers from it. Hence the question of negligence great or small is irrelevant.

Similar views have been expressed by the Punjab and Haryana High Court in **Sampuran Singh Vs Mukhtair Singh**[354] and Madras High Court in **PC Abdulla Kutty Vs C Janaki**[355]. Now the doctrine of contributory negligence is well-established principle incase of workman compensation and majority of the High Courts support this point of view.

5.1.2.2 Disablement: Assessment and payment of Compensation

The disablement may be classified into temporary and permanent disablement. The temporary disablement is called such disablement which reduces the earning capacity of a workman in any employment in which he was engaged at the time of his accident resulting in the disablement and where the disability is of permanent nature, is called as disablement of such nature which reduces the earning capacity in every employment

[354] 1992, CLR, 704, P&H High Court
[355] AIR, 1953,83,Madras

which he was capable of undertaking at the time of accident. Brief details of the cases decided by the High Courts on the subject matters are given below.

The General Manager GRP Railways Bombay Vs Shankar[356] was decided by the High Court of Nagpur Bench, where a railway servant working on A-1 Post lost one eye and two teeth as a result of collision between two engines. He was declared by the Medical Officer as unfit for A-I and B jobs, but fit for C-3 jobs, because of his defective vision. Class C-2 job was offered to him by the railway administration. He refused the offer and claimed compensation on the basis of total disablement. It was held that the workman was entitled to compensation not on the basis of total but partial disablement. Obviously in this case there appears only reduction in earning capacity as the employer himself offered an alternative employment to the workman.

The Andhra High Court in **New India Assurance Company Limited Vs Kotam Appa Rao and another**[357] pronounced on the degree of partial or total disablement. Where a driver me with an accident and disability was assessed at 50% by the doctor, who marked it a case of partial permanent disability. He cannot drive the vehicle. It was a non scheduled injury and the compensation Commissioner held that it is a case of total disablement and estimated injury to be 90%. In appeal it was contended the Commissioner has no power to enhance the disability suo motu. It was held by the Court that from the note of the doctor, it is clear that the workman cannot work as driver of motor vehicle. The permanent partial disablement suffered by the workman is not by virtue of any injury specified in Part III of Schedule 1 to the Act. In view of the observation of

[356] AIR 1950, 201
[357] 1995, 2LLJ, 436

the doctor the Commissioner was right in holding the disablement as total in view of the definition in Clause (i) of Section 2(i).

The Calcutta High Court in **Kalidas Vs SK Mandal**[358] thoroughly examined the concept of disablement. The Court declared that if the incapacity were of such nature that a workman couldn't get employment for any work he can undertake, it would be total permanent disability. The expression incapacitates a workman for all work does not mean any every work, which he may do but means such work as is reasonably capable of being sold in the market. In other words it does not mean capacity to work or physical incapacity. In case of total disablement there must be incapacity for all work resulting in 100% loss of earning capacity. The WMC Act is not concerned with physical system of the workman as such, nor with mere effect of such injury on the physical system of the workman. It is concerned only with the effect of such or of the diminution of physical power caused thereby, on the earning capacity of the affected workman. The loss of earning capacity is not a matter for medical opinion but the extent of it is a question of fact. It has got to be determined by taking into account the diminution or destruction of physical capacity as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction could reasonably be taken to have disabled the affected workman from performing the duties which a workman of his class ordinarily performed and from earning the normal remuneration paid for such duties.

After the brief discussion and opinion of various High Courts it is observed that the court must take into consideration the nature of injury, the nature of work, which the workman was capable of under taking and its availability to him. The employer's willingness to employ him on any

[358] AIR, 1957, 660,Cal

other alternative employment may also have some relevance indetermination of the extent of disablement.

5.1.2.3 The Doctrine of Notional Extension of employer's premises

It is a general rule that the employment of a workman does not commence until he has reached the working place and does not continue after he has reached the residence. The period of going to or returning from employment are generally excluded and are not within the course of employment. But there may be reasonable extension I both the time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. This is caked the doctrine of the notion extension. A brief discussion of the cases decided by the High courts is given below.

Work Manager, Carriage and Wagon Shop East Indian Railways Vs Mahavir[359] is an important case on the subject matter decided by the Allahabad High Court. In this case a workman, who lived in a village close to a Malhar Railway Station, used to come free of charge to Lucknow Junction every morning from Malhar along with other employees in the special train provided by the railway and proceed to the Alam Baugh workshop after a mile from the Junction after crossing the railway line. This was the shorter route as compared to other routes available to reach the workshop. There this route of was used as a matter of route for going to the workshop and coming from the place of work.

[359]AIR 1954, 132

On the day of accident Mahavir after finishing his work at 5.30AM was returning as usual to the Lucknow Junction Station from the route in order to catch passenger train, when he was within a short distance of the Station platform. When he was crossing the line, he was run over by a shunting engine at about 6.30AM. As a result of the accident his legs were crushed and they had to be amputated later on.

It was held that the accident arose out of and in the course of employment within the meaning of section 3 (1) of the WMC Act. It was further held that the word employment is wider important then the work or duty. The expression in the course of employment means not only the actual work, which the workman is employed to do, but also what is incidental to it in the course of his service. It would not only include 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 for employment. This rule is subjected to the exception where the accident occurs In public place and risk faced by the workman is not due to his employment but to his being on the spot as a member of the public, the employee will be liable to pay a compensation only if the presence of workman on the spot can be found traceable to an obligation imposed upon him by the employer.

In **Steel Authority of India Limited Rourkela Plant Vs Kanchan Bala Mohanty**[360], the Orissa High Court decided about the route to working place and back. Facts of the case were as, one Basu Charan Mohanty, an employee met with an accident and died when he was on his way to a house under construction. His actual residence was in the opposite direction and at a far off place from the place of accident. It was held that the doctrine of notional extension applies when a person is either going to or coming from his residence to the place of work. In this case the employee adopted a route, which was not normal. Residence implies some

[360]1994 2LLJ 1167,Orissa

intention to remain at a place and not merely a casual visit to place. It was held that the accident occurred while the workman was on his way back from place of work to his residence by taking a different route and as such his dependents as not entitled to compensation on the basis of notional extension of employer's premised. Normal route need not be the shortest but it has to be most convenient route traveling a far distance in opposite direction and taking circuitous route cannot be said to be normal route.

In **TNCS Corporation Limited Vs S Poomalar**[361] the Madras High Court held that murder of an employee in communal riots when he was on his way to work was a case of notional extension.

It is now well settled that the theory of notional extension of the employer's premises as to include an area which the workman passes and repasses ingoing to and in leaving the actual place of work. A workman is not in the course of his employment from the moment he leaves his home and is on way to his to his work. He certainly is in the course of his employment if he reaches to place or work a point or an area, which come in the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. The Bombay High Court in **JF Pertra Vs Eastern Watch Company Limited**[362], the Andhra Pradesh High Court in **B Patel Engineering company Limited Vs the Commissioner of WMC Hydrabad**[363], and **Rani Banla Seth Vs East Indian Railways**[364] the Calcutta High Court, are the decided cased on the doctrine of the notional extension of employer's premises.

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[361] 1995. 1LLJ 378,Madras
[362] 1985, 1LLj, 472,Bom
[363] 1977 FJR, 51,AP
[364] AIR, 1951, 501,Cal

5.1.2.4 Employment Conditions: Arising out of and in the course of employment

The most important essential equipment (under Section 3 of the Act) is that an accident, which causes personal to the workman, must arise out of and in the course of employment. The expression of arising out of and in the curse of employment means that there must be a causal connection or association between the injury by accident and employment. This term was originally taken from the English Act of 1897. The High Courts of most of the States interpreted the term broadly in various cases. Detail of some of the leading cased is as follow.

RB Moondra and Company Vs Smt Bhanwari[365]was decided by the Rajasthan High Court. The Facts of the case were as. The deceased was employed as a driver on the appellant 's truck used for the purpose of carrying patrol in a tank on the previous day he had reported to his employer that the tank was leaking and so water was put in it for detecting the place from where it leaked. The next morning deceased was asked by the appellant to enter the tank to see from where it leaked. Accordingly he entered the tank, which had no patrol in it, and for the purpose of detecting the leakage he lighted a matchstick. The tank caught fire, the deceased received burn injuries, and later o succumbed to death. In this case it was contended that the workman has himself added to his peril by negligently and carelessly lighting a matchstick inside the patrol tank. It was held by the High Court that the accident arose out of and in course of employment. And the act of lighting the matchstick even if rash or negligent would not debar his widow from claiming compensation. If the act leading to the accident was one within the sphere of employment or incidental to it or in the interest of the employer, than the accident would be said to have arisen

[365] AIR 1970, 111,Raj

out of and in the course of his employment and the plea of added peril would fail. In this case the deceased did some thing in furtherance of his employer's work when the accident occurred although he was careless or negligent as he lighted the matchstick instead of using a torch to detect the leakage. Because the tank was empty and was partly filled with water on the previous night he could not have little reason to foresee the risk involved.

In **Raj Dulari Vs Superintendent Engineer Punjab State Electricity Board**[366] before the Punjab And Haryana High Court held on the subject matter. Where a work charged employee under the Punjab State electricity Board was engaged infixing electric wire on either side of the road. A bus belonging to Punjab State Road Transport corporation came to a high speed and dragged the electric were hanging on the road with the result the pole on which he was working was broken from the middle and he fell down and died instantaneously. The Commissioner dismissed the claim in view that the deceased employee worked beyond the duty hours at his own risk and therefore the death was not in course of employment. The appeal was filed in the High Court against the order of the Commissioner.

It was held that if the work had been left at the spot, as it was the result would have been that the wires would have been on the roads causing much more damage. By asking the employee to continue the work even beyond the duty hours the assistant lineman acted with responsibility. of a workman continues to work whether up to the duty hours or beyond on, job directed by his superiors he continues to be on duty and in the course of his employment the accident took place and his widow is entitled to compensation.

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[366] 1989 2 LLJ 132,P&H .

The Calcutta High Court in **Imperial Tobacco Company (India) Limited Vs Saloni Bibi**[367] pronounced it judgment on the subject. One workman who suffered from high fever was recommended two days leave by the doctor. When he returned on the third day the doctor found him suffering from malaria and brancho pneumonia. He was again granted 3 days leave. After the expiry of leave when he came in a rickshaw to report to the doctor, his condition was so serious that he had to be taken upstairs to the dispensary in a stretcher. The doctor found in an almost dying condition and therefore hastened to administer injection but he died after a few minutes. It was held by the High Court, treat as the stress and strain of the journal was responsible for causing or precipitating the workman death; there was an accident arising out of and in the course of employment.

In another case **Smt Koduri Vs Polongi A T Carnms**[368] **before** the Andhra Pradesh High Court, where one person was the employee in the lorry belonging to his employer carrying quarry material from the quarry site to the work spot of the Public Works Department. His duties were to lay the material on the lorry and to go along with the same for unloading the material at the work spot. While the lorry was moving he attempted to hit a rabbit passing on the road and in the attempt he fell down from the lorry and died. His wife claimed compensation for the loss life of her husband. It was held by the Sigh Court that she was not entitled to compensation for it, as it is not enough that injury should have sustained by the workman during the period of his employment. The act, which resulted in the accident, must have some connection with the work for which the workman is employed. The workman must have been doing which is part of his device though it need not be his actual work, it should be work naturally connected with the class of work and injury must results

[367] AIR 1956, 458.Cal
[368] 1969, L IC 1415,AP

from it. Applying this principle by no stretch of imagination can it be said that hitting a wild rabbit, which ran across the truck, was part of service of the workman for which he was employed. The mere fact that the workman was, during that particular period, traveling in the employer's truck with the quarry material from quarry site to work spot is not enough.

The Gujarat High Court in **Bai Shakri Vs New Manekckowk Mills Company Limited**[369] laid down certain principles regarding the workman compensation arising out and in the course of employment. (a) There must be a casual connection between the injury and the accident and the work done in the course of employment (b) the onus is upon the applicant to show that it was the work and the resulting strain, which contributed to or aggravated the injury. (c) It is not necessary that the workman must be actually working at the time of his death or that death must occur while he is working or had just ceased to work. (d) Where the evidence is balanced if the evidence shows a greater probability, which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed.

These principles are the base for the workman compensation in case of any accident arising out of and in course of employment. Majority of the High Courts follow this kind of consideration. Similar view are expressed by the Andhra Pradesh High Court in **Rayuri Kotayya Vs Dasari N D**[370]

5.1.2.5 Substantial Question of law: Interpretation of term

Section 30 of the WMC Act provides that a right of appeal to the High Court from the order of the Commissioner lies provided that q

[369] 1961, 1LLj, 585 Guj
[370] AIR 1962 A42 LL J 25 AP

substantial question of law is involved in the appeal. The High Courts of various States have interpreted the term substantial question of law in the following cases.

The Andhra Pradesh High Court in **Depot Manager APSRTC, Nirmal Vs Abdul Sattar**[371] observed that the employee had not stated anything in his application as regard the alleged accident or injury and he had come forward in his evidence with a new date as to occurrence of the alleged accident and that he has not raised any claim for more than 8 years and presented the application without any explanation whatsoever for the delay. He had not stated in his evidence that he had suffered any injury to his eyes on 14 Feb, 1978 or at any time prior to his retirement on 04 July 1979 or that he lost his eye sight because of the. There is material to show that engine or diesel oil affects the eyes and renders blind. Consequently it was held that the finding of Commissioner as regard the alleged accident and connection between the accident and the loss of eye sight by the employee are not supported by an evidence on record or reason or logic and are based merely on conjectures and surmised. In the light of the above no case for compensation was held to have established. It was further held that a finding based on no evidence and a finding, which is perverse, gives rise to a question of law warranting interference under Section 30(1) of the Act.

M L Burman Vs Shayam Sunder[372] The Patna High Court held that where the question is, whether a person or is a workman within the meaning of the Act, upon the finding of the nature of the work done by him it being an inference from the fact established it is a question of law with in the meaning of the first Provision of Section 30(1) and an appeal lies against the decision of the authority under Section 15 that a person is a

[371] 1995 2LLj 318
[372] AIR 1969 1LLJ 366

workman. The question, as to whether, the employees was engaged in clerical capacity or not as required by Clause (iii) of Schedule II so as to entitle him for the compensation, must be deemed to be a substantial question of law as the conclusion on the facts found would govern other employees also similar situated.

The Bombay High Court in **Kai Khushru Ghiara Vs C P Syndicate Limited**[373] expressed the meaning of the substantial question of law Chief Justice of the High Court Mr. Justice Chhagla observed that a substantial question of law is not necessary a question which is of public importance. It must be a substantial question of law as between the parties in the case involved... what is contemplated is a not a question of law alone; it must be a substantial question. One can define it negatively. For instance if there is well established principle of law and principle of law is applied to a given set of facts that would certainly not be a substantial question of law. Where the question is not well settled or where there is some doubt as to the principle of law involved it certainly would raise a substantial question of law, which require a final adjudication by the highest court.

The High Court held that whether a workman is totally disabled is a question of facts and when any material does not support the question of fact it would be a surmise and thus a question of law. Similarly where material piece and evidence has not been taken into consideration, which if considered, would negative the finding of fact, a question of law could arise.

The Kerela High Court in **Raveendran Vs Somavally**[374] held that where on particular point there is evidence for and against and finding is

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[373] AIR, 1949 134
[374] 1996 1LL J 325,Kerela

recorded by the Commissioner, on taking a particular view of the evidence, it cannot be questioned even though it is erroneous only it cased where the Commissioner has clearly misdirected himself on a question of law or a finding is recorded without any evidence whatsoever or a reverse finding is reached which no reasonable man would reach it can be said that a question as to whether or not the workman was at the time of accident employed by the employer and whether or not the accident resulting in injury tool place during the course of employment and all question of fact as which no appeal lies under Section 30 of the Act.

5.1.2.6 Personal Injury: Interpretation of term

Section 3 of the Act provides that the compensation is payable in cased of personal injury caused to the workman by accident arising out of and in the course of employment. But the term personal injury is defined. This led various litigations on the subject matter. The High Courts have broadly interpreted the term personal injury in the following leading cases.

The Punjab High Court in **Indian News Chronicle Limited Vs Luis Lazarus**[375] decided the subject matter. In the case one workman was under duty as an electrician to go to heating room and from there to cooling room frequently, where the temperature was kept very low. Whole on duty the workman went the cooling room and there after fell ill and subsequently died of pneumonia. The court held that the word injury in the Act does not mean mere physical injury but may include a strain, which cases a chill. The death of the workman was due to personal injury. The court held that the expression personal injury is wider than bodily injury. It includes all physical injuries, which may be caused by an accident arising out of and in course of employment. It also includes all mental

[375] AIR 1951 102Punjab High Court

strains or mental tension or mental illness or psychological diseases provide such mental conditions have arisen in the course of employment.

Lipton (India) Limited Vs Gokul Chandra Mondal[376], the Calcutta High Court expressed the personal injury as any injury caused to the person of a workman affecting his efficiency of labour or reducing his earning capacity in any employment in which he was engaged at the time of the accident or in every employment in which he was capable of undertaking at the at time. Injury caused to his personality which may effect his earning capacity is personal injury and does not only mean physical injury, because personality does not only mean physical appearance or bodily appearance but personality means the sum total of traits of his behaviors including mental and psychological trait. An injury, which reduces his earning capacity to earn in personal injury includes whether it is physical or otherwise.

In a case before the Bombay High Court[377] a death from heat stroke was held to be personal injury. Now it is well established that the personal injury includes any harmful change in the body. Ii need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic nervousis, pneumonia, and paralysis.

5.1.2.7 Meaning of employment of Casual Nature

The Casual labours were not entitled for compensation. The definition of the workman did not include the casual labour and the employment other than for the purpose of the employer's trade or business. But the position has changed now. It is due to the liberal

[376] 1982 1 LLJ 255, Cal
[377] Mrs. Santa Fernandez Vs BP (India) Limited, 58 LR 148, Bom

interpretation of the term casual nature. Brief details of the High Court cased decided on the related subject.

The Allahabad High Court in **Madan Mohan Verma Vs Mohan Lal**[378] decided, Mr. Madan Mohan Verma employed Mr. Mohan Lal as mechanic for installing cotton ginning machine and chaff cutting machine on daily wages of Rs.15. While Mohan Lal was taking the trail of the chaff-cutting machine his right hand got struck into the teeth of gear roller of the machine and all fingers and thump of his right hand were cut off resulting in total disability of permanent nature affecting his future earning capacity as well. He was engaged for 03 days and accident took place on third day. He claimed compensation but the employer declined to give any compensation on the ground that Mohan Lal was not a workman because he sustained the injuries while he was cutting his own fodder and employment was of casual nature. He was merely to install the machine and his employment cased on third day when he sustained the injuries. The Commissioner rejected the case of the employer. In appeal the High Court held that fixation of machine, or taking of trail was all part of the business of the employer. The mere ground therefore they had been employed merely to install the machine could not take him out of purview of the workman. Similarly the mere fact that the workman sustained injuries only 03 days after his e employment would not be relevant for holding his employment of casual nature.

The Kerela High Court In **Kochu Velu Vs Joseph**[379] decided on the question whether a coconut climber employed periodically could be said to be a casual employee. The respondent had engaged him to pluck nuts from his trees periodically. While at work the appellant fell down and

[378] 1983 2LLJ 332,All
[379] 1980 2LLJ 220,Kerela

became permanently invalid. He claimed compensation but the Commissioner dismissed his claim. It was held by the High Court, that when a person is being regularly employed periodically it couldn't be said that he is employed casually. The employment here will not be of casual nature for there is regularity in employment. It was further held that whatever might be the concept of business at one time. Today it had come to be recognized that even carrying on the avocation of agriculture could be said to be carrying on a business of agriculture. The term business is wide enough.

The Madras High Court in **Sitharama Vs Ayyapa Swami**[380] held that it is a chance employment based on contract to employ. The conception of circumstances under, which a workman is entitled to compensation, has widened and become liberal. Now the trend of judicial decisions in construing the phase "where employment is casual nature" is that it refers to kind of service done by the employee rather that to the duration of service.

It has been emphasized that the employment would not be of a casual nature if there was such regularity or periodicity of employment as to indicate that there was such a degree of mutuality in their obligation as to regard one as the employer and the other as employer was there any obligation by express or implied contract, to employ the very same person during any season; or was there any statutory obligation to the effect[381] Now by the WMC (Amendment) Act 2000, the clause of casual nature and of the than employer's trade or business has now been omitted with effect from 08-12-2000 by Act 46 of 2000.

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[380] AIR 1956 212,Madras
[381] Kochappen Vs Krishna, 1987, 2LLJ, 174 Kerela

5.1.3 A Bird's Eye View

The Workman's Compensation Act was implemented to provide for the payment by certain classes of employers to their workman of compensation for injury by accident. It was implemented with effect from 05 March 1923(by Act No 08 of 1923). Initially there was ambiguity about the terms as not defined in the Act. The employers according to their needs interpreted the Act. So the workmen were exploited easily. But the Supreme Court of India and the High Courts of various States have played significant role in protecting the workmen's interest. These authorities not only framed guidelines on the subject but also provide liberal interpretation of various terms in the public interest.

The Supreme Court and High Courts insert a numbers of amendments in the Act after decisions. There was no provision for the compensation for the occupational diseases in the initial stage. So no compensation was given in this case. The term personal injury was expressed and interpreted as to include not only physical injuries but also mental, stress, and other job related sickness reducing the earning capacity of the workman. Then the Act No 22 of 1984 added the Schedule III with Part A and B in 1984 with effect from 1-7-1984.

The workman was broadly examined. New improvement were added to the concept of workmen, such as, crew of ships, aircraft and motor vehicle of a company whose registered office is located in India were also entitled to compensation (Act No. 30 of 1995, with effect from 15.9.95). The financial limit in respect of remuneration for considering workman was removed by the Act No 22 of 1984.Now the latest change in the Act include the removal or the term casual labour and employment other than employer's business or trade by the workmen's Compensation Amendment Act 2000 with effect from 8.12.2000. (Act No. 46 of 2000)

The term workman is described with nature of job description not from its status or its payment structure. The casual labour is considered as one who does casual or occasional job. It is referred to the kind of service done by the employees rather than the duration of the service. A casual labour is considered as workman according to the nature of job and compensation is also awarded for any personal injury during the course of employment It is vital change in the employee's field. It protected the interest of millions of casual labour or daily wages worker, who were neglected incase of any injury or sickness. It would help in the social and economic development of the working class.

The Supreme court in **Pratap Narain Singh Deo Vs Srinivas Sabata**[382] held that whole imposing penalty the Commissioner is required to issue a notice to the employer to show cause against the imposition of penalty in addition to of interest I conformity with the principles of natural justice. Accordingly the Section 4 –A (3)(b) was amended in 1995 by the Act No 30 of 1995,which provides a reasonable opportunity to the employer in this case.

The Doctrine of Notional Extension of the employer's premises developed by the Supreme Court in **Saurastra Salt Manufacturing Company Vs Bai Valu Raj**[383] was a landmark decision on the workman's compensation. The High courts in various cases followed the decision of this case. Before this case the compensation for personal injury was given for working in factory or employer's premises. Workmen were not paid any compensation for any accident outside the premises or factory. But the Supreme Court in that case pronounced the principle that, the places from home to the factory or employer's premises and back considered the workmen in the course of employment. If any personal injury is caused by

[382] 1976, 1LLJ, 235,SC
[383] AIR,1958, 881,SC

any accident during journey, will be considered as accident arising out of and in the course of his employment and the appropriate compensation is awarded. It may be expressed that this doctrine has provided a lifeline to the workmen but also to their dependents. If one earning member die the whole family depending upon him dies.

The interpretation of the term accident, arising out of and in the court of his employment, calculation of disablement, and payment of disablement have laid down some clear and unambiguous expression for the workmen's compensation. The Supreme Court in Pratap Narain Singh Deo Case up held the power of compensation Commissioner in penalizing the employer for non-payment of compensation on stipulated period.

Finally, it is observed that the Supreme Court and the High Courts of states have done much to promote and protect the interest of the working class on the workmen's compensation. But it is desirable to educate the workmen about their rights and obligations of the employers, regarding compensation incase of any personal injury in an accident. It will not only economically help them but also protect their dependents from economic loss. It is believed that awareness and alertness eliminate the chances of exploitation.

5.2 The Employees State Insurance Act, 1948

The ESI Act, 1948 is a piece of social security legislation enacted primarily with the object of providing certain benefits to employees. The Act infects tries to attain the goal of socio-economic justice enshrined in the Constitution. The benefits provided by the Act to insured persons or their dependents. The Act strives to materialize these avowed objects

though only to a limited extent only. Extensive regulation has been framed under the Act. The adjudication task is assigned to the ESI Court.

5.2.1 Views and Interpretation of the Supreme Court on the Act:

The Supreme Court and High Courts have promoted the Scheme. The interest of the workers is protected by these legal agencies. The following are some leading cases decided by the Supreme Court on various matters concerning the ESI Scheme.

5.2.1.1 The Application of the Scheme

The Act applies to all non- seasonal factories using power and employing 10 or more employees and to non-power using manufacturing units and establishments employing more than 20 employees. The employees of the factories and establishments covered under the Act carrying wages up to Rs. 6500 per month. The Act was also extended to shops, hotels, and restraints, cinemas, newspaper establishments and road motors transport undertaking.

In **International Ore and Fertilizers (India) Private Limited Vs ESIC**[384] case a limited company having central office at Secundrabad representing foreign principals in the sale of fertilizers in India, imports fertilizers which is purchased by Central Government through State Trading Minerals and Metals Trading Corporation of India. The government of Andhra Pradesh extended the provisions of the ESI Act to shops in which 20 or more persons were employed for wages on any day of the preceding 12 months. After complying with the provisions of the

[384] 1988, 1LLJ, 235, SC

Act for the periods of 04 years, the company disputed its liability under the Act on ground that its establishment at Secundrabad is not the shop. A was petition filed under Section 75 of the Act before ESI Court. Which upheld the plea of the company, was challenged before the High Court O Andhra Pradesh, which held the said establishment to be shop and hence the ESI Act was applicable. Therefore Special Leave Petition was filed in the Supreme Court.

The Supreme Court observed that the word shop is not defined in the Act or in the Notification issued by the State Government. According to shorter Oxford English Dictionary, the expression shop means a house or building where goods are made or prepared for sale and sold. It also means place of business or place where one's ordinary occupation is carried on. The establishment of the company at Secundrabad carried a commercial activity facilitating emergence of contract of sale between its foreign principles and State Trading Corporation / Minerals Metals Trading Corporation of India. In view of several such activities the premise of the company at Secundrabad is a shop where trading activity is carried on .So the Act is applicable to the company.

Regional Director, ESIC, VS M/S High Land Coffee works of PFX Saldanha and Sons[385] The question for consideration whether a coffee factory is covered with in the definition seasonal factory and its applicability it the Act. In instant case after the amendment made in 1966, which came into force with effect from 28th Jan 1968, the ESIC called upon the respondents to pay the contributions payable under the Act, and threatened to take coercive steps, to recover the arrears. The respondents challenged the order contending that the government to the definition of season factory was not learned the position of seasonal factory and

[385] AIR, 1992,129, SC

Section1 (4) of the Act would still continue such factory from the operation of the Act. The ESI Court accepted the respondent's pled and the Karnataka High agreed with the ESI Court. The Corporation appealed to the Supreme Court.

The Supreme Court observed that the view taken by the High Court seems to be justified. The statement of objects was reasons of the Bill indicates that the proposed amendment was to bring within the scope of the definition of seasonal factory, a factory which work for a period of not exceeding 07 months in a year (a) in any process of blending packing or repacking of tea or coffee; or (b) in such other manufacture process as the Central Government by notification in the Official Gazette specify. The amendment therefore was clearly in the nature of expression of the original definition of seasonal factory. The amendment is in the nature of expansion of the original definition as it is clear from these of the words including a factory. The amendment does not restrict the original definition of seasonal factory, hut males addition there to by inclusion. The appeals were consequently dismissed with costs.

In the **Osmania University Vs Regional Director, ESIC**[386] the question for consideration was whether the provisions of the ESI Act are applicable in respect of the employees working in the Department of Publications and Press of the Osmania University. A Division Bench of the High Court of Andhra Pradesh decided that said question in affirmative differing from the contrary view expressed by a learned single judge, who had allowed a writ petition filed by the university. The Supreme Court held that the said department is engaged in carrying on a manufacturing process in the printing of textbooks, journals, forms, and other items of stationery. Thus it must be held that the department in

[386] 1986, 1LLJ136 SC

question is a factory with in meaning of the Act. The ESI Act also covers it.

In the **ESIC Vs Ram Chander**[387] the respondent Ram Chander was the proprietor of M/S Commercial Tailors Jodhpur. He used to run a tailoring shop where clothes were stitched. The shop employed at the relevant time about 10 to 12 persons as tailors' and employed more than 20 persons once. The ESI Court held it to be a tailoring shop. The shop makes use of power in the shape of electric press when is used for ironing of stitched clothes for customers. In the appeal the High Court of Rajasthan set aside the order of the ESI Court .The Supreme Court granted special leave.

The Supreme Court observed that in order to answer the question whether the establishment of the respondents comes with the Miscellaneoushief of the ESI Act. It is necessary in view of the facts to determine only whether manufacturing process was carried on with the aid of power. It is a fact that the shop employed more than 10 people but less than 20 persons. It cannot also be disputed that by stitching commercially different goods are brought into existence. If by a process a different entity comes into existence then it can be said that this was manufactured. Therefore this tailoring shop comes within the purview of the Act.

A numbers of other cases were decided by the Supreme Court on the applicability of the Act, which includes **PK Mohammed Private Limited Cochin Vs ESIC**[388] on business of stevedoring, clearing, and forwarding at port, **ESIC Vs RK Swami and others etc**[389] on advertising agency and **Christian Medical Collage Vs ESIC**[390] Department of

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[387] 1988, 2LLJ, 141SC
[388] 1993, 1LLJ SC
[389] 1994 1LLJ 636, SC
[390] 2001, 1LLJ 18 SC

Equipment, X-Ray, ECG, etc, comes in purview of the Act. Scheme is a social security scheme; people should not be excluded from these benefits. It will not be helpful for thee employees but also to the factories or shops or other commercial establishments. A broad interpretation is always helpful to the society as well as the nation.

5.2.1.2 The Constitutionality of the ESI Act

The Supreme Court in its support to the Act upheld the constitutionality of various provisions challenged on some grounds. Brief detail of the cases is as follow.

M/S Hindu Jea band Jaipur Vs the Regional Director ESI etc[391], Facts of the case as follows. Where the state of Rajasthan issued a notification under Section 1(5) bringing within the purview of the ESI Act, shops in which 20 or more persons had been employed for wages on any day of the preceding 12 months. The provisions of the Act were extended to a firm carrying on business of playing music on occasion. The liability to pay contributions were challenged by the firm in a petition filed under Section 75 of the Act, on the ground that the place where it was carrying on business was not a shop and the business carried by it was intermittent and of seasonal was character. The petition was rejected by the ESI Court and appeal to High Court of Rajasthan was also dismissed. Hence the Special Leaver Petition under Article 136 of the Constitution was filed by the firm as also a writ petition challenging the validity of the Sub-Section (5) of Section 1 and notification issued by the State of Rajasthan.

The fact that the services rendered by the employees intermittently or during marriages does not entitle the partner to claim any exemption from the operation of the Act. Now a day's marriage takes place through

[391] 1987, 1LLJ, SC, 50

out year. They also provide music at several other social functions which tile place during all seasons. So the musical institution is covered by the Act.

The Supreme Court further decided on the writ petition filed under Article 32 of the Constitution questioning the validity and the notification as volatile of Article 14, 19(g) and Article 21 of the Constitution. Having carefully considered the submission made by the learned counsel for the petitioner. The Court observed that the power conferee on the state government by section 1(5) of the Act does not suffer from vice of excess delegation of essential legislative4 powers. Application of he Act to business carried on during cretins seasons only of the year is not violative of Article 14, 19(g) and of the Constitution.

The Supreme Court in **Mata Jogdokey Vs HC Bhavi**[392] upheld the power of government rested in that Act. It held that of discretionary power is not necessary a discriminatory power and abuse of power is not being easily assumed, where discretion is vested in the government and not in a minor official.

In **Basant Kumar Sarkar Vs Eagle Rolling Mills Limited**[393] the constitutionality validity of the ESI Act 1948 was challenged on the basis of excessive delegation of power to the central government. In the instant case, it was urged that Section 1(3) of the Act, which authorizes the Central government to appoint different dates of operation of different provisions of the Act and for different states and different parts of any one of the states, is piece of excessive delegation and therefore invalid. The argument was that the Act does not prescribed any considerations on the basis of which the Central Government can precede to act under Section

[392] AIR 1955 44,SC
[393] 1964 2LLJ, 105 SC

1(3) and, conferred on it an uncanalised power, which was not guided, by any legislative policy and direction.

In this case it was held that Section 1(3) was really not a case of delegation at all; it is what could be properly described as conditional legislation where the proper legislature exercises its judgment is to legislate conditionally as to all these things, it is a case of conditional legislation. Even assuming that there is an element of delegation, Section 1(3) cannot be said to suffer from excessive delegation or uncanalised legislation, because there is enough guidance given in the relevant provisions of the Act and by the very scheme of the Act. The policy and the objective of the Act are clearly seen from the preamble, and previsions intended to provide certain benefits to industrial employees. It is obvious that a scheme of this nature; however beneficent, cannot be adopted by stages and indifferent phases and so, invariably the question of extending the benefits of the Act to different areas has to be left to the discretion of the government. The course adopted by modern legislatures in dealing with welfare scheme has uniformly conformed to the pattern adopted under the Act, namely to leave it to the Government concerned to decide, when, how and in what manner the scheme evolved by the legislature should be introduced. It cannot be said that adopting of such a course amounts to excessive delegation; it must; therefore be held that Section 1(3) of the Act is Constitutionally valid.

5.2.1.3 Employee: Interpretation of term

Royal Talkies Hydrabad Vs ESIC[394] is an important decision of the Supreme Court explaining the meaning of the term employee under the Act. The facts of the case were as, in a theatre premises, there was a

[394] 1978 2LLJ 390,SC

canteen and cycle stand run by private contractors with their own employees. The theatre owners were charged with the liability to pay ESI contributions. They applied to ESI Court under Section 75 of the Act. The court rejected their applications and on an appeal the High Court. Finally the matter came to the Supreme Court.

The Supreme Court held that the person so employed is employee of the cinema theater. They were covered by the definition of employees under Section 2(9). It was also observed that the establishments were such that they had to cater on day-to-day basis of the needs of the persons visiting the theatre and hence the running of canteen or maintenance of a cycle stand was a feature, which has continuity. To a dispassionate view, the cycle stand canteen place re so integrated in the show business of the exhibiting pictures, that he would place the person working there along with the ushers in one and the same class of employees. The feature of continuity is the basis requirement for an employee under the Act.

The Supreme Court further held that it is not necessary that persons must be employed by the principal employer, it would be sufficient if the person are working under the supervision of the principal employer or his agent.

Regional Director ESIC Madras Vs South India Flour Mills Private Limited and others[395] where a company running flour mills for producing wheat product. The company employed workers on daily wages for construction of additional building in the compound of the existing factor as part of its expansion of existing factory buildings. The ESIC called upon the company to pay contribution in respect of such workers. The company resisted this by filing writ petition, which were allowed and

[395]1986 2LLJ 304SC

confirmed in appeal. So the corporation filed appeal by Special Leave to the Supreme Court.

The Supreme Court held that the definition of the term employee includes within its ambit any person employed on any work incidental or preliminary to or connected with the factory or establishment. It is difficult to enumerate different types of work, which may be said to be incidental or preliminary or connected with work of the factory or establishment. Any work that is conducive to the work of the factory or establishment or that is necessary for augmentation of work of the factory or establishment will be incidental or preliminary to or connected with the work of factory or establishment. The addition building has been constructed for the expression of the existing factory. It is because of the addition building in the existing factory will be expended and consequently there will increase in the production. It cannot be said that the construction work has no connection with the work or purpose of the factory. Hence it is difficult to hold that work of construction of additional factory building is not work incidental or preliminary to or connected with the work of factory. The order to hold that the workers employed for the works are not employee within the meaning of the Section 2(9) of the Act on the ground that such construction is not incidental to or preliminary to or connected with work of the factory will be agent the object of the Act. The Supreme Court ruled that in an enactment of this nature endeavor of the court should be interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made.

Hydrabad Asbestos Vs ESI Court [396] The question was whether person employed in Zonal Office and Branch Offices of a factory and concerned with establishment and administrative work of the work of canvassing sales would be covered under the Act. The Supreme Court held

[396]AIR 1968 356,SC

that employee term would include not only persons employed in a factory but also outside the factory and may be employed in administration purpose or for the purchase of raw materials or for sale of finished goods, all such employees are included in the meaning of employees.

The Supreme Court have decided a number of cases on the subject matter, some of these includes as **Calcutta Electricity Supply Corporation Vs Shubhash Chander Bose** [397] – the employees of the contractor are not employs, **Sri Nanka Saritraicshan Limited and others Vs ESIC**[398] – person employed in news paper establishment are employees. **ESIC Vs Tata Engineering and Company**[399]. Trainees and apprentices are not employees, **AP State SEB Vs ESIC**[400], **Regional +Director ESIC Vs Davangere Cotton Mills** [401] and **Chandigrah Vs Oswal woolen Mills Limited**[402] casual employees comes into purview of the employee.

5.2.1.4 Contributions under the Scheme

The contribution payable under this Act in respect of an employee shall compromise the contribution partly paid by the employer and partly by the employee (4.75% and 1.75% respectively). It was pointed out by the Supreme Court in Hydrabad Asbestos case that the contribution under Section 39 is not confined only to employees actually working in factories but extended to all who are employees with in the meaning of Section 2 (9) of the Act.

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[397] AIR 1995 SC 573
[398] 1985 1LLJ SC
[399] 1976 1LLJ 81,SC
[400] 1977 1 LLJ 54,SC
[401] 1977 1LLJ 404SC
[402] 1980 2 LLJ 1064,SC

ESIC Vs Hotel Kalpak International[403] The hotel was closed with effect from 31 Mar 1988. But in spite of a notice from the ESIC, the respondent did not pay the contribution with effect from 11 July 1985. On plea of closure of business, The High Court held that ESIC was not justified in proceeding against the establishment after it was closed. But the Supreme Court rejecting the High Court's view held that the finding of the High Court if accepted would not promote the scheme, on the contrary it would perpetuate the Miscellaneoushief. Any employer can easily avoid his liability and deny the beneficial piece of social security legislation to the employees by closing the business before recovery. It was further held that he couldn't be allowed to contend that since he has not deducted the employees' contribution paid by him from the immediate employer. It is equally fallacious to conclude that because employees had gone away, there is no liability to contribute. It has to be carefully remembered that the liability to contribute arose from the date of commencement of the establishment and is continuing a liability till the closure. The very object of establishing a common fund under Section 26 for the benefit of all the employees will again be thwarted if such a construction is put.

Indian Drugs and Pharmaceutical Limited Vs ESIC[404]**.** There have been differences of opinion of various High Courts on the point of contribution on over time. The Supreme Court has held that over time wages will be liable for deductions for the ESI contributions. Both the remuneration received during the working hours and overtime constitute a composite wages and there by wage within the meaning of Section 2(22) of the Act. The Supreme Court considered elaborately and held that the Act is welfare legislation and the definition of wages is designedly wide.

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[403] 1993 1LLJ 393 SC
[404] 1997 LLR 1SC

Regional Director ESIC Vs Popular Automobiles etc[405]. The Supreme Court decided that the ESI contribution is also admissible on the suspension allowances. All the eligible employees are entitled to get the statutory coverage of the Act, the benefits being insured employee and every person employed for wages is to be treated as an employee for the purpose of the Act. Under these circumstances an employee who admittedly covered by the Act and who is entitled to get the benefits under the Act as insured employee will not cease to be an employee covered by the Act, if he is placed under interim suspension pending domestic enquiry on any alleged misconduct.

5.2.2 Views and Interpretation of the High Courts on the Act:

The role of the High Courts in dealing with the ESI Act, 1948 is limited to the reference from the ESI Court and appeal against the order of the ESI Court in case of involvement of a question of a substantial question of law. Even after these Courts have done remarkable progress in the protecting the interest of the working class. A number of the leading cases as mentioned below have decided by the High Courts of various States.

5.2.2.1 The Application of the Scheme

M/S Modi Rubber Limited Vs The Regional Director, ESIC[406], The Andhra Pradesh High Court decided on the matter. Where the company after manufacturing the commodities out of rubber at its Mohipuram factory conveys the same to its Depot-cum sale at Hydrabad

[405] 1997, LLR 1147 SC
[406] 1988 1LLJ, 9 AP

from where it supplies the commodities to the distributors. The State Government by a notification extended the Act to Hydrabad shops, which employed more than 20 persons. Factory manufacturing rubber goods is not covered by the Act. It was held by the AP High Court that the ESI Act contemplates that whenever the main factory or establishment is covered by the Act, the branches will be covered. There is no explicit provision in the Act, that whenever the main factory is not covered under Section 1(5) of the act. There is no fetter imposed on the State Government for extending the benefits under Section 1(5) of the Act, to such other braches where in 20 or more employees are engaged even though the parent unit is not covered. Therefore the godown cum sales office at Hydrabad will be covered under Section 1(5) of the Act.

ESIC Gauhati Vs Rajsri Pictures Private Limited[407], The Guahati High court dealt the case. The main business of Rajsri Pictures Private Limited was located at Jaipur (Rajasthan) and its braches was carried on at Guahati, where in less than 20 persons were employed. It was held by the High Court that the Act is beneficial piece of legislation in the interest of labour in factories. In the present case branch at Guahati is part of the main establishment at Jaipur and is under the administration of the branch manager for the business of film distribution. The employees at Guahati branch, even though less than 20 employees, are a part of the main establishment at Jaipur and therefore branch office is covered by the Act.

Dattaram Advertising Private Limited Vs Regional Director Maharastra, ESIC, Bombay[408] The facts of the case were as, Dattaram Advertising Private Limited have been registered under the Bombay

[407] 1991 1LLJ, 109 Gauhati
[408] 1987 1LLJ, 9 Bom

Shops and Establishments Act 1948 and the employed more than 20 workers. The Regional Director ESIC held that the company is a shop with in the meaning of notification dated 18 September 1978 issued by the government of Maharastra in exercise of powers conferred by the Section 1(5) of the ESI Act, and such the Act applies to it. On the basis the Corporation claimed the employer's special contribution together with interest as envisaged by the Act. An application under Section 75 of the Act was moved but was dismissed by the ESI Court. Thus appeal was filed in the Bombay High Court. The Court observed that looking at the history of the extension of the Act Stage by stage it would appear that the intention of the legislature was to extend the scheme only to such class of employees as could be serviced by the existing infrastructure facilities.

It was held that a visual or catchy tune in an advertising agency could be a type of intellectual property for which copy right could be claimed in a like manner but it would be doing violence to the language to call the sites of such intellectual activity a shop because the general sense of the community would not accept the concept. On these lines the appellant's establishment was held outside the purview of the notification. Consequently it was held outside the coverage of the ESI Act 1948.

The Kerela High Court in **Brook Bond India Limited Vs ESIC**[409] held that the business engaged in buying and exporting of tea is covered by the Act. Various other Courts also decide on the applicability of the Act incases namely, Pondicherry State Weavers Co-operative Society Vs Regional Director ESIC Madras (1983 1LLJ 17 Mad) covers co-operative society and its employees. It was observed those High Courts that have adopted the liberal interpretation path and always tries to include more and more employees and commercial establishments under the umbrella of the social security protection.

[409] 1980 1LLJ 352,Kerela

5.2.2.2 The Constitutionality of Provisions of the Act:

Anand Kumar Vs ESIC[410], The facts were as, Section 1(3) of the ESI Act was challenged to be ultra virus of the Article 14 of the Constitution of India and for providing uncontrolled discretion vesting wide powers with the Central government without laying down any policy for its guidance for the enforcement of different provisions of the Act.

The Chief Justice Moothan of the Allahabad High Court observed that in order to attract the operation of Article it is necessary to show that the power of differentiation does not rest on any reasonable basis having regard to the object which the legislature had in view the legislature in enacting the Act intended that the benefits which it provided should as circumstances rendered it practicable available to the employees in all factories through out India excluding the State of Jammu and Kashmir. The Act is of such a nature that it is reasonable if not operative that a large measure of discretion be conferred on the Central Government with regard to the manner in which it should came into force. The discretion, which is vested in the Central Government under section 1(3), is undoubtedly very wide, but taking into the policy of the legislature and administrative difficulties of operating of the Act, the question does not evolve a contravention of provisions of Article 14 of the Constitution of India.

ESIC Vs Janardhab Rao[411]**.** The Karnataka High Court decided the case. Facts were as, the State Government extended the provisions of the Act restaurants and hotels situated in particular places in the State. The High Court held that the notification was neither violative of Section 1(5) of the Act nor Article 14 of the Constitution. The expression" any other

[410] AIR 1957 136,All
[411] AIR 1979 146 Ktk

establishment or class of establishments" in Section 1(5) to which the appropriate Government intended to extend the Act may be classified either on the basis of the nature of the establishments or on the basis of other geographical situation or on the basis of both of them.

5.2.2.3 Employee: Interpretation of term

The Term employees has a wider meaning and it covers a person who work outside that business premises but whose duties are connected with the business, paid daily basis other wise un the control and supervision of the employer. The High Courts have interpreted the term in the following cases.

DG ESIC, and another Vs the Scientific Instrument Company Limited[412] The Allahabad High Court decided on issue. A company with its head office at Allahabad has sales offices at Delhi, Bombay, Madras, and Calcutta. The employees were engaged in the sale and distribution of products of the Indian and foreign companies and the sale of the company's own products at the branch sales office are only marginal. The High Court decided on the expression employed for wages in or in connection with the work of a factory or establishment and includes any person employed for wages on any work connected with the administration of the factory or establishment or in connection with sale or distribution for the products of the factory or establishment. The provisions of the Act have to be constructed liberally. If the employment is in connection with the work of factory or establishment, the employees would within the meaning of employees under Section 2(9) of the Act, because what is important is whether the business of sale or distribution either principally or marginally of products of foreign company is being done on behalf of the respondent company.

[412] 1992 2LLJ 122 All

Mohammed Ismial Ansari Vs ESIC Bombay[413] Where the appellant claimed disablement benefit which was dismissed by the ESI Court on two grounds, first that his wages exceed Rs. 500 and secondly, that he could not claim to be an employee under the Section 2(9). Then the matter was brought to the Bombay High Court through appeal against the ESI Court. It was held by the High Court that the word wages as defined in the Section 2(22) means all remuneration paid or payable in cash to an employee, if the term of contract of employment expressed or implied were fulfilled. An employee who paid only 21 days contribution in a month due to an accident, held to be employee. So that the actual amount of wages paid to him was less that Rs 500, would be an employees as defined in the Section 2(9) as each case is to be determined by reference to the quantum of wages actually paid to the employee.

In another case **Park Bottling Company Private Limited Regional Director ESIC**[414] this was held that incase there is not contract in existence between the principal employer or the immediate employer and the workman, and the workers are on assignment occasionally, they would not be treated as employee under the Section 2(9) of the Act, where a sales man of cold drink company takes the truck carrying the crates of bottles to their customers having two permanent workers to unload the truck, but on the account of two permanent loaders not available , hires some collies, such collies cannot be treated as employees of the manufacture of the cold drinks . The reason behind that there is no contract of service between the manufacturer or its salesman and the temporarily appointed collies.

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[413] 1979, 2LLJ 168 Bom
[414] 1989(2) Cur.LR 320

Tarachand Mohan Lal Vs ESIC[415], where the labourers were working for considerable period in a factory dealing in production of mustered oil and dal. These labourers were employed through Sardars who were the immediate employer and the firm Mohan Lal was the employer. They were working under the supervision of the principal employer even if the Sardar supplied them. These labourers were held to be employees within the meaning of Section 2 (9) of the Act as the principal employer in connection with the normal work of the factory directly employed them for wages.

But the Apprentices are not considered as employee within the meaning under Section 2 (9) of the Act. The Bombay High Court in R.D.ESIC Vs Arudyog (1987,1LLJ, 292) decided the case. It has held that the apprentices under any schema are exempted from the operation of law relating to labour by virtue of Clause (3) of Section 18 of the Apprentices Act.

5.2.2.4 The Doctrine of Notional Extension of employer's premises

Regional Director, ESIC Vs Ranga Rao and others[416] The Karnataka High court decided on the case. Facts were as follows, Suidhindore Kumar was working as a refrigerator operator in M/S Mysore Breweries Limited Bangalore. One day when he was on his way to the factor to join duty he was run over by a motor vehicle causing his death on the spot. The appellant moved the ESI Court under Section 75 of the Act, claiming the benefits payable on the ground that their son died as a result of an employment injury. It was argued that employee was killed in a road accident while walking on a public road and not traveling in a vehicle

[415] AIR 1971, A &N 65
[416] 1982 2LLJ 29 Ktk

provided by the employer and therefore, his death was out of and in the course of employment. But the ESI Court did not accept the contention of the Regional Director and held that death was in course of employment, and the dependents were entitled to benefits under the Act. In appeal, the High Court, held that after amendment to Section 2(8) in 1966, it is not material where the accident occurred, whether it was inside the factory or outside. It is equally not relevant about the time of accident whether it was during the office hours or after. In view of the definition of the employment injury It may now be sufficient if it is proved that the injury to the employees was caused by an accident arising out of and in the course of his employment, and no matter when it occurred or where it occurred. There is not even geographical limitation. The Accident may occur within or outside limits of India. The place or time of the accident, however, should not be totally unrelated to his employment. There should be a nexus or casual connection between the accident and the employment.

ESIC Vs Khatoon Donawala and others[417] The Bombay High Court decide the matter; facts were as one workman standing in the queue waiting for a bus provided by the employer to reach the factory was run over by the same bus. It has held that the workman sustained employment injury and the doctrine of notional extension was applicable. It was also observed that the recovery of compensation from the owner of the motor vehicle or from the insurance company under the Motor vehicle Act would not stop the employer from making payment under the Section 52 of the Act.

Regional Director ESIC Vs Batlu bibi[418] The Gujrat High Court pronounced it judgment in the case. The workman of Textile Mills dies of Mio-Cardiac infraction at the mill's canteen, during short recess. The

[417] 1995, 1LLJ, 173 Bom
[418] 1988 2LLJ, 29Gujrat

widow and son of the deceased successfully claimed the benefit under the ESI Act before the ESI Court. Aggrieved by the decision the ESIC went in appeal mainly on the round that the death did not arise out of and in the course of employment. The High Court held that the workman joined the duty and he was still on duty when died at the canteen. He had gone at canteen during the short recess to take tea but that period is not so long as to disrupt the continuity of the employment. The appeal was dismissed holding that the death has arisen out of and in the course of his employment.

It cannot be that the theory of notional extension is reduced to a mathematical formula of distance and time. Where an employees is injured outside the premised of employer if the factory or notional extension would apply is dependent upon the facts and circumstances of each case where the employee attended the factory, signed the lay-off register, passed out of gate and stopped in public road for reaching his house when she was hit by a scooter, keeping in view both the time and distance, there the theory of notional can well be applied and the injury sustained must be taken as employment injury within the meaning of section 2(8) of the Act

5.2.2.5 Substantial Question of Law: Interpretation of term

Section 82 of the ESI Act provides that an appeal lies to the High Court from any decision of the ESI Court if it evolves a substantial question of law. No appeal can be entertained under Section 82(2) on a pure question f fact. The expression of question of substantial question of law have been explained by various high courts in the following cased.

Orient Paper Mills Vs Regional Director, ESIC[419] where the appellant mill is a factory engaged in manufacturing paper and paperboard and is covered by the Act. It was held that the employees engaged for cleaning, gardening and repairing of the buildings are engaged in the work of the appellant and re therefore employee under Section 2(9) of the Act. Since the question was, whether certain employees are covered under the definition of employee is pure question of fact, no appeal was held to lie under Section 82 of the Act. There was no question of Substantial law was involved.

Kaikushroo Ghiara Vs CP Syndicate Limited[420] The Bombay High Court through Mr. Justice MC Chhagla has expressed the meaning of the substantial question of law. He has observed that to support a right of appeal under this section there must not only be a question of law involved but a question of law as between the parties in the case involved. He has further observed that if there is a will established principle of law and the principle of law is applied to a given set of facts that would certainly be a substantial; question of law. Where the question of law not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law, which would require a final adjudication buy the highest court.

It is now well-established interpretation that when the question is whether certain facts gives rise to a legal right or liability, the inference is a question of law. The interpretation of a particular order is a question of fact or a question of law, or a mixed from facts would be question of fact or of law according as the point for determination is one of pure fact or mixed question f law and fact. It is also seen that the question of substantial law involves such matter, which is not decided or concluded,

[419] 1995 1LLJ, 115, Orissa
[420] AIR 1949, 134, Bom

require fresh interpretation of the question. That should give rise to any right or obligation on desire interpretation and decision from the higher adjudication machinery.

5.2.3 A Bird's Eye View

The ESI Scheme is one of pioneering schemes of the social security measures. It provides majority of the benefits to the employees and their dependents inform of cash benefits and medical benefits. This scheme was introduced in 1948, since then this scheme have been progressing and hindrances and the ambiguity in the subject matters are removed by the judiciary, especially the Supreme Court High Courts. The Doctrine of negligence, added peril and the notional extension of employer's premises have protected the employee's interest. A number of cases are decided by the Supreme Court and High Courts and based on that amendment were inserted in the ESI Act 1948. The Notional extension of the employer's premises is now well established in the field of compensation claim incase of personal injury. A few well-known cases as the Saurastra Salt Manufacturing Company and other BEST Undertaking case decide by the Supreme Court in the field. Subsequently Section 51A to D were inserted by the amendment act 44 of 1966 with effect from 28.1.1968.

The Supreme Court and High Courts up held the provisions of the Act like Section 1(3), which was challenged in various cases for the excess powers of Central Government and extension of the scheme at different time scale. But the judiciary interpreted this provision in broader sense and held not violative of the Article 14 of the Constitution of Indian. Because this legislation was held to be a social-economical enactment and considered for the upliftment of the working

class. The employees should not be separated from the benefits of the scheme, by marrow interpretation of the applicability term

The term of employee was given wider meaning as to include casual prime worker. Due to that more shops and commercial establishments were covered under various risks and benefits subsistence allowances overtime payment, were also considered for the payment of contribution in the scheme. Terms like employer's liability to the act, accident, substantial question of law, notional extension, shopped et are liberally interpreted in favour of the working class to enable them to gain the benefits of the scheme. The disablement compensation was increased or enhanced by the courts after considering the circumstances and facts of the case.

The ESI Scheme is the biggest scheme according to the membership and the benefit scale. The credit to promote and protect the interest of the workers may be given to the Supreme Courts, High Courts, and the ESI Court, which not only supported the scheme in this expansion and growth but also create a suitable atmosphere for the awareness of workers. It is observed that benefit liked unemployment allowance to e included and monetary limit of payment may be removed to include more persons and ultimate increase in the resources of the scheme as well.

5.3 The Employees Provident Fund and Miscellaneousellaneous Provisions Act, 1952:

The EPF and MP Act was implemented with effect from 04 March 1952[421], to provide for the institution of Provident funds, pension fund and deposit linked insurance fund for employees in the factories and other establishments, where 10 or more persons are employed. It covers the employees getting salary less then Rs. 6500. Basically these schemes are retired benefits, paid to the retired or disabled person or to the dependents of the employee in case of death of employee. It is a contributory scheme for the employees and employers. The employees are pay to 10 or 12% of the basic wage and employer to pay same percentage of the total wage bill of the employees in to the fund.

5.3.1 Views and Interpretation of the Supreme Court on the Act:

These Schemes have been performing well since its enforcement. The Supreme Court and High Courts have been contributing to the success. A numbers of changes are introduced in the schemes and its provisions for better and smooth function, on the basis of the decided cases of the Supreme Court and High Courts. The Provident Fund Commissioner is the enforcement mechanism for these scheme, could have not effective without the legal support of these adjudicatories. The following are the main cases decided by the Supreme Court and the High Courts on the related subject matter.

[421] Act No 19 of 1952

5.3.1.1 The Constitutionality of Provisions of the Act:

The validity of the provisions of the Act was challenged on the grounds of violation of the Constitutional provisions. Some of the leading cases on the subject are as follows.

Mohammed Ali and others Vs Union of India and another[422]
The Constitutional validity of the Act was challenged that Section 1(3)(b), under which the Notification was issued and restaurants and hotels were brought the operation of the Act, is invalid because it confers uncontrolled and uncanalised power on the government that the Act was intended to apply to mere wage earners and not salaried people, and that, therefore the two notification as a result of which the petitioner's employees have been brought within the purview of the Act are bad inasmuch as they re salaried employees not mere wage earned .It was further contended that the scheme is had under the Article 14 of the Constitution because it is discretionary.

The Supreme Court observed that there is no substance in any one of the above contentions. The whole Act is directed to provide funds for the benefits of the employees in factories and other establishments. The institution of the provident fund for employees is too well established to admit of any about its utility as measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees with in its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishment.

It was further observed that the court repeatedly laid it down that where the discretion to apply the privations of a particular statute is left

[422] AIR 1963, 980, SC

with government, it will be presumed that the discretion is so vested in such a high authority will not be abused. The government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. The power given to the appropriate government under the Section 17 is not uncanalised because both clauses (a) and (b) of that Section postulate that the exemption would be granted on the ground that the employees of those establishments are already in the employment of benefits to the nature of provident fund, pension, or gratuity not less favorite than under the Act.

The Supreme Court on the question of excessive powers held that whether or not particular piece of legislation suffers from the vice of excessive delegation must be determined with reference to the facts and circumstances in the background of which the provisions of the statute impugned had been enacted. If on a review of all the facts and circumstances of the relevant provisions of the statute, the court is to say that the legislature had clearly indicated the underlying principle of the legislation and laid down criteria and proper standards but had left the application of these principles and standards to individual cases in the hands of the executive. It cannot be said that there was excessive delegation of power by legislature. Finally it was held that the EPF (third Amendment) Scheme 1961 does not suffer from the vice of discrimination and don not infringes Article 14 of the Constitution of India.

Organo Chemical Industries Vs Union of India and others[423], the Supreme Court Decided the case, where the constitutionality of the Section 14-B of the Act was challenged that powers conferred Under Section 14-B on the Provident Fund Commissioner to impose damages on

[423] AIR 1979, 1803,SC

a employer defaulting in payment for contributions. It was held by the Supreme Court that to pay provident fund is neither unguided nor arbitrary and hence is not violative of Article 14 of the Constitution of India. The power under the Section permits of damages, and that word has a wealth of implications and limitations, sufficient to serve as guideline in fixing the import.

But in one case of **M/S Orissa Cement Limited Vs Union of India**[424], the Supreme Court held the provisions of the Provident fund Act were violative of the Article of 19(g) of the Constitution. Facts were as, in exercise of the powers conferred by the Section 5 of the Act. The central government published an EPF scheme, Para 2f(iii) of the scheme defined excluded employees under the scheme all employees other than excluded employee became members of the fund after completing one year's continuous service. Para 2f (iii) of the scheme was amended in 1958 where by all employees employed by a contractor who were directly connected with any manufacturing process carried on in a factory were made entitled to the benefit provided under the act. The constitutionality of the two amendments was challenged in a writ petition under Article 32 of the Constitution. Declaring the two amendments as unconstitutional and void the Supreme Court held that Section 6 (1) of the Act is to make the employer liable only for money of the Provident Fund and while the Scheme of 1952 is well designed to carry out this intension in its application to workman directly employed by reasons of combined operation of Para 30 to 32, it breaks down, in its expansion to contract labour by reasons of the inapplicability if Para 32. It operated unfairly and harshly on persons who employee contract labour and those who employee direct labour. The Scheme therefore cannot be said to be reasonable and must be struck down as not falling within the protection afforded by the Article 19(6) of the constitution of India.

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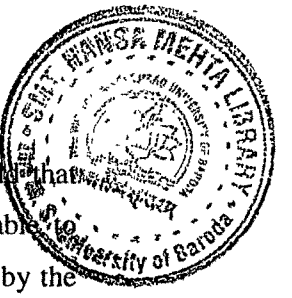
[424] AIR, 1962, 140,SC

5.3.1.2 Applicability of the Act

Cemendia Company limited Vs BN Raval[425] The question before the Supreme Court for determination was whether the Notification issued under Section 1(3) extending the application of the Act to establishment of engineers and engineering contractor not exclusively engaged in building and construction industry includes the company setting up workshop for carrying out work ancillary to the building and construction industry. It was held by the Supreme Court that from the provisions of the Notification issued it follows that any establishment carrying on the business of engineers and engineering contractors which is exclusively engaged in building construction industry does not fall within the scope of Notification and hence the Act would not be applicable to such an establishment. Any such establishment which carries or an activity which forms part of the building and construction industry would naturally be exempted form the operation of the Act because the expression building and construction industry refers collectively to all activities which have to be performed in connection with building and activities which have to be performed in connection with building and construction industry.

ESS DEE Carpet Enterprises Vs Union of India and others[426], where the industry manufacturing carpet used wool for the purpose which is one of the materials mentioned in the schedule, namely, textile made wholly or in part of cotton or wool or jute or silk whether natural or artificial. Activity of manufacturing carpet would come within the expression textiles mentioned in Schedule in view of Clause (d) to the explanation to the Schedule in the activity of the making carpet through it involves knitting, in substances, amounts to weaving and the carpet is a

[425] 1988 1LLJ 138,SC
[426] AIR 1990, 455,SC



fabric, which is woven. On the reasoning the Supreme Court held that [illegible] industry to be covered within the Act and the appellant was liable to comply with the requirements of the Act I all respects as directed by the Regional Provident Fund Commissioner.

PM Patel and Sons Vs Union of India and others[427] where the question for decision was whether the workers who prepare bidies at home after obtaining raw materials were entitled to benefit of the Act. The Central government issued Notification dated 17 May 1977 adding bedi industry to Schedule of the Act and also bringing the Bidi industry within the provision of the scheme. It was challenged on the ground that it placed unreasonable restriction the Fundamental Rights to carry on the trade or business and that the home workers are not employees and hence the Act can not be make applicable to home workers inasmuch as there is no prescription of age of superannuating to the category of home workers. Rejecting the contentions it was held that the Act and scheme applied to home workers as is clear from the definition of the employee in Clause (f) of Section 2 of the Act. The terms of definitions are wide enough to include persons employed directly by the employer as also through a contactor and they include persons employed in the factory and person employed in connection with the work of the factory. a home worker who rolls bidies is involved in an activity connected with the work of factory and the expression in connection with in the factory alone. Non-prescription of age of retirement in the case of home workers does to mean that the Act cannot be implemented in respect of them and the law does not envisage the fixation of retirement age before the provisions of the Act can be applied.

[427] 1986, 1LLJ, 88,SC

Noor Niwas Nursery Public School Vs Regional Provident Fund Commissioner and other[428] In that case the appellant intuition was run by Baptist Union North India, a society registers under the Registration of Societies Act, 1860. The said society runs two schools at 17 Daryagunj Delhi, namely Francis Girls Higher Secondary School and the appellant school, which run only nursery classes. The appellant claims that the two schools are two different institutions having separate and independent accounts and managed by two different managing committees. The appellant has four employees and the EPF Act, 1952, does not cover it being separate establishment. It was held that the two schools are run by the same society adjacent to each other. It nearly points out that these two units constitute one single establishment. The two units together have more than 20 employees. Since they are located in one and the same address they establish geographical proximity. These facts point out that the two units constitute one single establishment. The appellant school caters to nursery classes while the higher classes are provided in Francis Girls High secondary School. Thus the link between the two cannot be ruled out. Thus the Act applies to it. It was further observed that the two establishments have more than 20 employees and exemption granted under Section 17 of the Act is subjected to the condition that such exclusion will not apply to appellant unit because the same would not be covered un another scheme for subscription to the Provident Fund.

5.3.1.3 Infancy Period. Interpretation of term

Syaji Mills Limited Vs Regional Provident Fund Commissioner[429] Facts of the case were as, Prior to December 1954 the company called Hijri Mills Limited was carrying on the business of manufacturing and sale of textile goods in its factory situated at

[428] 2001, 1LLJ 446 SC
[429] 1985, 1LLJ, 238,SC

Fergussion Road, Lower Parel Bombay. That company was ordered to be wound-up by the High Court of Bombay and its assets were ordered to be sold by the official liquidator. At the sale held by the official liquidator, the appellant company purchased the above said factory and restated it employing about 70% of the workman previously working in that factory on fresh contracts after investing fresh capital, removing the machinery and after obtaining a new license to produce new types of goods.

The Supreme Court has held that criterion for earning exemption under the Section 16(1)(d) of the Act is that a period of three years has not yet elapsed from the date of establishment of the factory in question. It has not reference to the date on which the employer, who is liable to make contributions, acquires title to the factory. The Act also does not state that any kind of stoppage of working the factory would give rise to a fresh period of exemption. The work in a factory which is once established may be interrupted on account of a factory holidays, strikes lockouts, temporary break down of machinery, periodic repairs, non availability of raw materials, paucity of finance etc. It ma also be interrupted in on the account of the order of the court as in the case of instant case. Interruption in the running of the factory, which is governed by the Act, brought about any of the reasons mentioned above, without which it cannot be constructed as resulting in factory ceasing to be a factory governed by the Act and its restarting can not be held that the new factory is or has been established. On the resumption of manufacturing work in the factory it would continue to be governed by the Act. Mere investment of additional capital or effecting reopens to the existing machinery before it was restarted, the diversification of limits of production or change of ownership would not amount to the establishment of anew factory attracting exemption under Section 16(1) (d) of the Act for a fresh period of three years.

The Supreme Court in the **Provident Fund Commissioner Trivendrum Vs the Secretary NSS Co-operative Society**[430] considered the effect of transfer of ownership on the application of Section 16(1). In this case a printing press established in 1946 was sold in 1961. The machinery of the press was altered, persons previously in service not continued, instead a fresh recruitment was made and the work in press was started after a gap of three months, compensation was paid to the workman at the time of previous owner. It was held that the old establishment was completely closed when the transfer ownership took place and an entirely new establishment was set up three months later so that the benefit of non applicability of Section 16(1) (d) for the period of three years available to the respondent. The NSS Society got the benefit of exemption under the section 16(1)(d) from the date when it was set up on the grounds that there was, change in ownership, stoppage of work and restarting after break of three months, alteration in machinery, fresh recruitment of employees and payment of compensation to employees at the time closer.

The Act 10 of 1998 omitted the benefit of Infancy period of three years with effect from 22.9. 97. So three is no such benefits for the new factory or commercial organization. It is now the matter of history.

5.3.1.4 Interpretation of Wages under the Scheme:

Basic wages includes all emoluments which are earned by an employee while on duty or (on leave or on holidays with wages in either case) in accordance with the term of contract of employment and which are paid or payable in cash to him, but does not include, the cash value of any food concession DA, any presents made by the employer. The

[430] AIR 1971, 82,SC

Supreme Court has decided some questions relating the wages under the Act, as mentioned below.

Bridge and roof Company Vs Union of India [431] the Supreme Court had to decide whether production bonus is part of wages as denied in the Section 2(b) of the EPF Act? The company had two production bonus schemes one for the benefit of the hourly rated workers and the other of the rest.

The Supreme Court held that clause (1) of Section 2(b) excludes amongst other allowances, bonus payable to the employees in respect of his employment or of work done in such employment form the definition of basic wages. The exception suggests that even though the main part of the definition includes all employments. Certain payments, which are infect the price of labour and are earned in accordance with the terms of the contract of employment, are excluded from the main part of the definition of basic wages. The word bonus has been used in this clause without any question. Therefore it would not be improper to infer that when the word bonus was used without any qualification the clause, the legislature had in mind every kind of bonus that may be payable to an employee. The legislature could not have been unaware that different kinds of bonus were being paid by different concerns in different industries when it passed the Act in 1952. Where the word bonus is used without any qualification it does not only mean profit bonus. On the other hand the use of the word bonus without any qualifying word before it or without any limitation as to year after it, must refer to bonus of all kinds to industrial law and industrial adjudication before 1952 including the production bonus. The production bonus as out side the purview of the basic wages in Section2 (b).

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[431] 1963 AIR 1474,SC

Jay Engineering works Vs Union of India[432] The peculiar feature of the production bonus scheme in force in Jay engineering works was that it had two basic namely the quota, and the norm, the quota being much lower than norm and in view of the agreement between the parties and the workmen were expected to give the norm as the minimum production and if there was any deliberate deviation the form they were liable to be charged with misconduct in the shape of go slow and be dismissed for such misconduct. The minimum wages and DA fixed by the major engineering awards were payable for production up to the quota and thereafter extra payments were made on piece rates basis up to the norm and even beyond it where the workman produced beyond the norm. The workers that in a scheme of the kind prevalent in the company production bonus as understood in industry only started after the norm and that payment for production between the quota and norm were nothing more the basic wages defined in the Act contended it.

The Supreme Court held that in a typical production scheme the worker is not bound to produce more that the base or standard, though he may do so in order that his earnings may go up. In the scheme in force in the employer company however, the worker could not stop at the quota he must produce up to the norm on pain of being charged with misconduct in the shape of go slow and being liable to be dismissed. Therefore the real base of standard, which is the core of a typical production bonus scheme, was in the case of the company, the norm and any payment for production above the norm would be real production bonus under the scheme. The production up to the norm being the standard which was expected of workman in the, payment up to that production must be basic wages as defined in the Act.

[432] AIR 1963 1480,SC

It was further observed that the payment for work done between the quota and norm could not be treated as any other similar allowance, within Section 2 (b) (ii) as the allowance mentioned in the clause were DA, house rent allowance, overtime allowance, bonus, and commission, and any other similar allowance must be of the same kind, there mere fact that part of the basic wages as defined in the Act was paid in one form as a time wage and part in another form as a piece rate wage would make no difference to the whole being basic wages within the meaning of the Act.

5.3.2 Views and Interpretation of the High Courts on the Act:

The High Courts have promoted the Scheme. The interest of the workers is protected by these legal agencies. Various High Courts have interpreted terms like applicability, constitutionality of some provisions and Infancy period. The following are some leading cases decided by the High Courts on various matters concerning the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

5.3.2.1 Applicability of the Act

Eddy Current Controls (India) Vs RPFC and another[433] **the** petitioner is a company registered under the Companies Act 1956 and having its registered office at Chalakedy in Kerala. It owns two factories one at Chalakudy in Kerela and the other at Coimbatore in Tamil Nadu. Both have been registered separately and use having separate licenses. The Coimbatore factory has 16 employees. Both factories were engaged in manufacturing same product. The EPF Act was made applicable to the

[433] 1994 1 LLJ 522, Kerela

factory in Kerela with effect from 31 December 1976. It was held that since both factories were owned by the petitioner, product manufactured in both the factories is the same, the registered office is the same, and the balance sheet and profit and loss account, income and expenditure account are all common, there is inter transferability of funds from Coimbatore to head office and vice versa. There has been transfer of raw materials as well and the same persons operate same account of the both factories, therefore Coimbatore factory is only a branch of the establishment and not an independent unit. There is a unity of ownership, management, supervision, and control and general unity of purpose and production. The mere facts that separate license were obtained under the Factories Act for two factories is not a relevant consideration at all.

RPFC Vs M/S Ratan Enterprises[434] There were two cinema theaters, one called Rupvani and the other New Chitra Talkies. The PF Scheme was made applicable to them in 1963. In 1969 the properties, Smt Ratna Bai constituted a partner ship wither children and continued to manage both theaters. In 1973 the partnership was dissolved, and the assets and liabilities were divided equally among the parties. Consequently two partnerships were formed each, each getting one theater. The applicability of the Act and the scheme was challenged, as the number of employees was now less than 20 in each case Cinema houses. It was held that the Scheme should continue to apply to each one of them because subsequent reduction in the number of employees below 20, for whatsoever reasons will not make any difference. Even if two theaters which originally constitute one and subsequent went under different owners and consequently the number of employees in each of the theater happens to be less than 20 no exception of the Act can be made in view and the Section 1 (5) of the Act.

[434] 1986 2LLJ 137 Ktk

Venketramana Dispensary and Ayurvedic Collage Vs union Of India[435] The petitioner establishment is a dispensary mainly run to impart practical training in regular Allopathetic medicine, where in the course of practical training, medicines are prepared under the advice and guidance of doctors teaching in the course and that such medicines are given to patients who come to the dispensary for treatment either free or on charge to those who can afford to pay for it. It was held that it is an establishment attracting the provisions of Section 1(3) (b) of the Act. The First Schedule to the Act clearly taken in the Ayurvedic Medicines prepared by the establishment. The question as to whether an establishment is a charitable or a commercial institution is totally out side the purview of discussion while deciding the applicability of the EPF Act.

RPFC Vs Amarnath[436] The Delhi High Court held that in view of clear provisions under sub Section (5) of Section 1 of the Act, an establishment to which this Act applies should continue to be governed by this Act, even if the number of employees falls below 20. However the position was different till 1971, when the provision to Sub section (5) of Section 1 has been omitted. In view of that provision if the number of persons employed has been below 15 for a continuous period of not less than one year than the employer could case to apply the provisions of the Act and the scheme. The Court further decided that where init has been held that if number employees continues to be below 15 for not less than a year the employer can opt out of the Act and scheme and no permission was required from Regional Provident Fund Commissioner, has no relevance now after thee amending act of 1971, where by the proviso to Sub Section (5) of the Section 1 has been omitted.

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[435] 1986 2LLJ 411 Mad
[436] 1984 1LLJ 146 Delhi

The Rajasthan High Court in **Raghunath Prasad and Company Vs Union f India** [437] was to decide on the question whether the provision in the EPF Act making it applicable it to saw mills is restricted to wood cutting saw mills alone or whether it extends to mills cutting marbles stones also. It was held that the petitioner's establishment comes under the provisions of the Act.

5.3.2.2 The Constitutionality of Provisions of the Act:

Wire Netting Stores Vs RPFC New Delhi and others[438] Where the Constitutionality of the Section 7 –A had been challenged, the High court observed that apart form the question of applicability of the Act, and scheme, even the quantum may be determined under Section 7-A in proceeding like one contemplated by the Act without disclosing the criteria. This would be n clear violation of the rules of natural justice. The least that is required when right s are likely to be affected in that there is legislative provision for some procedural safeguards Article 17 ensures fairness and justice in state action. This is only possible if there is provision of judicial or quasi-judicial review or its law initially of a judicial or quasi-judicial determination after effective hearing. The Commissioner has no power to determine whether the fact prove establishment is covered under the Act. If he proceeds to do so it may be regarded as ultra virus to his powers. The hearing postulates under Section 7A(3) is relatable to determining the amount due from an employer, so section 7A (4) of the Act is unconstitutional because it violated the principle of natural justice

[437] 1989 2LLJ 42 Raj
[438] 1982 1LLJ Delhi 7

Haji Nadir Ali Khan Vs Union of India[439], The Punjab High Court decided the case. A demand made by the RPFC to the employer to contribute his share from a backdate in respect of those employees who have completed one year's service on the date was held to be neither illegal nor offending the provisions of the Articled 31 of the Constitution of India.

Further in **Hindustan Electric Company Limited Vs RPFC**[440] Where the Constitutionality of the provision of Section 5 of the Act was challenged and was contended that the provisions are unconstitutional an ultra virus. It was held that the principle and the policy that have to guide the description of the executive have been indicated in the stat6ute itself. Section 5 of the Act cannot be struck down on ground that it sis an unreasonable restriction of the Fundamental Right to carry on the business to the company. This section is not unconstitutional or ultra virus, as it does not violate Article 14 of the Constitution. There is a proper classification pf the factories and employees and it does not violate the provisions of the Article 19(g) of the Constitution of India.

Unni Mohammed Shafi Vs State of Kerala[441] It was held by the High Court of Kerela that Motor Transport workers Welfare Fund Act 1985, passed by the Kerela Legislature is not repugnant to the EPF Act 1952. Therefore both the Acts can simultaneously apply to the respective areas of operation. On the question of constitutionality it was held that the provision regarding employer's contribution of 8%of the wages towards Provident Fund is not an unreasonable restriction on the right to carry on trade guaranteed in Article 19(1)(g) of the Constitution. Minimum period of one year of service to earn gratuity prescribed under the scheme is not unreasonable.

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[439] AIR 1958 177 Pun
[440] AIR 1954 27,All
[441] 1989 2LLJ 493 Kerela

5.3.2.3 Infancy Period. Meaning and Conditions

D Appavoo Prop Chandra Bus Service Vs RPFC[442], Where the transport business was partitioned between father and his two sons. In spite of partition the buses were operated with the same employees. Sons' claimed the Regional PF Commissioner rejected infancy protection under Section 16(1) (d) of the Act but the claim. A Writ having been dismissed the appeal was filed. It was held by the Madras High Court that if partition and allotment of share in a business is to be taken as amounting to a closure of the old business, and starting of new business establishment, in the hands of the sharers, then the provision of the Act may easily be defeated by bringing about a partition once in three years, thus depriving the employees of the benefit of the Act. Therefore the infancy protection under Section 16(1)(d) was held not available.

M/S Wippro Limited Tumkur, Vs RPFC Karnataka[443] The petitioner is company-incorporated under the companies Act with its registered head office at Bombay. The company established its unit Wippro Consumer Products at Tumkur in Karnataka and started production with effect from 13 April 1988. The Company purchased all the plants, machinery and other assets including the premises of M/S Margarine and Refined Oil Company Private Limited at Tumkur. Old used machinery was transferred to Tumkur from company's unit at Amelnar and financial assistance for Rs. 2.42 Crore was also given. The question was whether M/S Wippro Limited Tumkur is a branch of Bombay establishment. The respondent in its order stated that the petitioner company is a juristic person, which can always provide funds to individual unit from out of its own resources keeping at the same; the separate

[442] 1986, 1LLj 534 Mad
[443] 1995 1LLJ 120 Ktk

identity of each unit, and secondhand machinery was transferred from Amelnar unit to Tumkur. We cannot draw a firm conclusion that the two are one and the same factory. In spite of this the respondent treated both units at Amelnar unit and Tumkur as one. But the petitioner claimed the Tumkur unit as a new one also claimed infancy protection under the Section 16(1) (d) of the Act. It was held that in absence of functional; integrality between the two units it is not possible to hold that Wippro consumer Products at Tumkur is a branch of Wippro Limited Bombay. The petitioner is entitled to claim infancy protection under the Section 16(1)(d). It was further held that to determine whether different unit6s of an employer constitute one establishment or separate establishment various tests such as unity of ownership, management and control, unity of employment, functional integrality and general unity of purchase will have to be applied. But it is not possible to lay down any one test as absolute and invariable test for all cases. It depends on facts and circumstances of each case.

Bajaj Food Products Vs Central Board of Trustee and other[444]

Where a business concern started a new business in the same premises under a new name after dissolution of the old firm, the machinery was disposed of. The employees were retrenched, benefits admissible under law were given to them and sales tax registration number was surrendered. It was held that new establishment is not a continuation of old one because except that the new business was started in the same premises. There was no connection between the business carried only the dissolved firm and the business carried the new firm as they have raised their own spatial from their own resources. There fore the new firm was entitled to infancy protection under the relevant Section.

[444] 1991 1LLJ 52 Delhi

Aditya Synthetics Private Limited Vs Union of India and another[445] Where two companies are separately registered under the Companies Act and their directors are also neither common nor interested persons. It was held that the two are different establishments as they are separately incorporated, each pays taxes separately the nature of goods manufactured are different and they are owned by the different companies. Simply because one company was manufacturing the goods for another, It cannot be held that it is a branch or department of other. So infancy benefit is available to the petitioner company.

5.3.3 A Bird's Eye View

The EPF and MP Act 1952 was implemented with effect from 04 March 1952. Since then a number of improvement and development have been implemented. The Supreme Court and the High Courts have also contributed in success story of the promotion of the Act. The Supreme Court declared the amendment made in Section 2 (f) in 1958 and 1960 as unconstitutional because there is no provision enabling the employer to recover the amount of contributions from the employees employed by or through contractors. Accordingly the Act 28 of 1963 amended the Act with effect from 31.11.1963, to extend the benefit to the employees employed by or through a contractor as well as to enable the employer to recover the contribution from the contractor. A suitable amendment was inserted in the Section 2(f) of the Act.

The Supreme Court in Syaji Mills Limited Case[446] and NSS Co-operative Society Case[447] discussed the benefits of the infancy under

[445] 1994 2LLJ 76 Raj
[446] 1985 1LLJ, 238,SC
[447] AIR 1971, 82,SC

Section 16(1)(d). It also laid down certain principles relating to the calculation of the infancy benefit. It is observed that business organization changed the name of companies, machineries, labourers, managing staff etc, in order to show it as new identity and consequently protection of the infancy for first three years after establishment of the business organization under the Act. But now the Amendment Act 10 of 1998 has removed the infancy benefit under Section 16(1) (d) with effect from 22.9.1997.

The High Court of Delhi in **Wire netting Stores VS RPFC**[448] held that Section 7A of the Act is violative of Article 14 of the Constitution because it did not provide any provisions of the appeal and bars the jurisdiction of the civil courts. The Act No. 33 of 1988 with effect from 1.8.1988, to include the provisions of appeal under sub section 4 of the said section, amended the said Section in 1988. Similarly MP High Court in **Gunvantria Vs Registrar of Companies**[449] held that the Section 7A is a violative of natural justice on the ground that it denied opportunity to represent the case. The same section was amended in 1988 by the Act no. 33 with effect from 1.8.1988 and the Sub Section 3 of the said section included the employer's words for giving reasonable opportunity for representing the case.

The Powers of Commissioner under Section 14B of the Act, to recover the damage was challenged and held the violative of Constitutional provision. It did not follow the principle of natural justice. A new provision was added by the Amendment Act 40 of 1973, with effect from 1.11 1973 and a suitable insertion in Section 14B which reads as under the heading of power to recover damage, provided that before

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[448] 1982 1LLJ, Delhi 7
[449] 1970 AIR 221,MP

levying and revering such damages, the employer shall be given a reasonable opportunity of being heard.

5.4 The Maternity Benefit Act, 1961

The Maternity Benefit Act is a piece of social legislation enacted to promote the welfare of working women. The Act prohibits the working of pregnant women for specified period before and after delivery. It also provides for maternity leave and payment of certain benefits for women workers during the period when they are out of employment on account of their pregnancy. Further the Services of a woman worker cannot be terminated during the period of her absence on account of pregnancy except for gross misconduct.

5.4.1 Views and Interpretation of the Supreme Court on the Act:

The Supreme Court has decided a few related cases on the subject matters. Brief details of the cases are given below.

5.4.1.1 Employment Conditions of payment of the under the Scheme:

B Shah Vs Labour Court Coimbatore[450], the Supreme Court was to decide on the question whether Sunday is to be counted in calculating the amount of maternity. The Court held that in the context of Sub section (1) and (3) of section 5, the term week has to be taken to justify a cycle of

[450] AIR, 1978,12,SC

7 days including Sundays. The legislature intended that computation of maternity benefit is to be made for entire period of the women workers actual absence i.e. for all the days, including within that period and not only for intermittent period of 6 days there by excluding Sundays falling within that period. Again the word period occurring in Section 5(1) seems to emphasize the continuous running of time and recurrence of the cycle of 7 days. This computation ensures that the women working sets for the said period not only the amount equaling 100% of the wages which she was previously earning in terms of Section3 (n) of the Act, but also the benefit of the wages for all Sundays and rest days falling with the aforesaid period which would ultimately be conducive to the interest of both the women workers and her employer.

The Court further held that the maternity benefit Act is intended to achieve the object of doing social justice to women workers. Therefore in interpreting the provisions of this Act beneficial rule of construction, which would enable the women worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output, has to be adopted by the Courts.

The Supreme Court held that the Maternity Benefit Act is inconformity with maternity benefit Protection (revised) Convention adopted by the ILO in1952. Further, the Court struck down the decision of the Full Bench of the Kerela High Court in **Malayalam Plantations Limited Vs Inspector of plantation**[451]

[451] AIR, 1975, 86,Ker

Municipal Corporation of Delhi Vs Female workers (muster roll)[452] The Supreme Court held that the Corporation, which had employed more than thousand women employees, it should have been brought within the purview of the Act. So that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. The Court further held that there is nothing in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual bases or on the muster roll on daily wages basis.

5.4.2 Views and Interpretation of the High Courts:

The Kerela High Court has decided the following leading cases pertaining to the maternity benefits.

5.4.2.1 Issues related to Benefits under the Scheme:

Tata Tea Limited Vs Inspector of Plantation[453], The question for consideration was whether an employee entitled to the benefits of maternity benefits Act, 1961 is eligible to claim the benefit under Section 5(1) of the Kerela Industrial Establishments (National and Festival Holidays) act, 1958. Under the Section 4 of this Act, an employer could require any employee to work on any such holidays and such employee was under Section 5(2) entitled to twice the wages for working on that day. Under the Section 4 of the Maternity Benefit Act, 1961, an employee is entitled to certain benefits including maternity leave during the period mentioned in that section. It was held that during the period mentioned in

[452] AIR, 2000, SC, 1274
[453] 1992,1LLJ, 603, Kerela

Sub Section (1) and (2) of the Section 4 of the Maternity Benefits Act, the employer can not en exercise of his right under Section4-AS of the Kerela Act, call up a woman employee to come and do the work on the national and festival holidays, allowed under the Section 3 of the said Act. The said right of the employer as regards the period made mentioned of in Section 4 of the Maternity Benefit Act, however subject to restrictions imposed by the Sub Section (3), there of considered in this back ground the claim of the employees for the wages under the National and Festival Holidays Act is not sustainable.

Ram Bahadur Thakur Private Limited Vs Chief Inspector of Plantation[454]**.** The Kerela High Court decides the case. Where the point of termination by the Court was whether in calculating 160 days period which will entitle a woman employee to get maternity benefit, the work of an half days can be included or not. It was held by the High Court that according to the Explanation to Section 5(2) of the Act, the period during which a woman worker laid off should also the taken into consideration for ascertain the eligibility. During the lay off period a worker cannot be expected to have actually worked in the establishment. Therefore, actual work of 160 days cannot be insisted as a condition precedent for claiming the maternity benefit.

Thomas Eapen Vs Asst Labour Officer[455] If any woman of registered trade on or o registered voluntary organization has been denied or any of the benefits of the Act, then she has the right file a complaint in any court of competent jurisdiction. But this right is subject to applicability of the Act to that establishment under which she works. Availability of the remedy i.e. appeal to prescribed authority will not bar the aggrieved person to file a suit against the decision of inspector in any court or competent jurisdiction

[454] 1989,2LLJ, 20 Kerela
[455] 1993, LL R, 800, Kerela

5.4.3 A Bird's Eye View:

The Maternity Benefit Act 1961 was implemented to provide certain maternity benefits for certain period before and after the childbirth. It is a very small Act on the subject. These are same kinds of benefits as provided under the ESI Act, 1948.But the provisions of the Section 5(A) and 5(B) contained in the maternity Benefit Act 1961, not applicable to any factory or other establishment to which the provisions of the ESI Act, 1948 apply. On the subject of Maternity benefit these two Acts have the similar kinds of maternity benefits. Basic difference may be the applicability, the Maternity Benefit Act covers the plantations, contractions, and other kinds of commercial establishments in unorganized employees where as the ESI Act covers the factory and other industries in the organized sector. These Acts provides provisions on the same subject matters. Once the ESI Act has been providing these maternity benefits then there would have been no need of the Maternity Benefit Act. The provisions are overlapping on each other. It may be called a complexity of the matter.

There are very few decided cases on the subject matter, because the women employees are not organized to defend their cases or the employers at local level locally manipulate matters. Subsequently majority of the employer intends not to employ woman employee. Because these have to be provided with all maternity benefits therefore loss of work and manpower in the organization. But the scenario is gradually changing more women are employed in sectors like education, information technology, medical etc. The awareness of their rights and obligations among the women workers has increased. It seems to be a good beginning but much more need to done.

5.5 The Payment of Gratuity Act, 1972

The Act provides for a Scheme of compulsory payment of gratuity to employees engaged in factories, mines, oilfields, ports, railways companies, shops or other establishments and for matters connected therewith or incidental thereto, employed ten or more person on any day preceding twelve months. The Act extends to whole of India except Sikkim and Plantations in the state of Jammu and Kashmir. On completion of five years of service the employees are entitled to payment of gratuity at the rate of 15 days wages for every completed year of service or part thereof in excess six months subject to the maximum of Rs. 3.50 lakh.

5.5.1 Views and Interpretation of the Supreme Court on the Act:

The right of industrial workers to receive gratuity has long been recognized by tribunals, yet the law relating to payment of gratuity was very vague and uncertain. There was a good deal of disparity in the various schemes for the payment of gratuity The Supreme Court had made efforts to regulate through judicial decisions by lying down principles for grant of gratuity. The Supreme Court in **Delhi Cloth and General Mills Company Limited Vs their workman**[456] held that the object of providing a gratuity scheme is to provide retiring benefit to the workmen who have rendered a long and unblemished service to employer and there by contributed to the prosperity of the employer. The Supreme Court had laid down certain broad principles to serve as guidelines for the framing of the gratuity scheme. These principles are given below

[456] 1968, 36 FJR 247,SC

(a) The general financial stability of the concern. (b) Its profit earning capacity. (c) Profits earned in the past, (d) Reserve and the possibility of replenishing the reserves; (e) Return on capital, regard being had to the risk involved. Based on these guidelines the Act was formed and implemented with effect from 16 September 1972. Consequently all the disparities and conflict regarding various gratuity schemes were settled down.

The Supreme Court has been promoting the Act, since its inception. A brief detail of the leading cases decided by the Court is given below.

5.5.1.1 Conditions for Payment of Gratuity under the Scheme:

Indian Ex-Servicemen League and others Vs Union of India and others[457] Writ petitions were field by some Commissioned and Non Commissioned Ex- Servicemen. Gratuity was payable at enhanced rate to persons retiring on a later date, therefore those who had retired earlier to the specified date also claimed enhancement and payment of gratuity at rates payable to retirees after the specified date on the ground of one rank one pension rule. It was held that the claim for gratuity could be made only on the date of retirement of the basis of salary drawn on the date of retirement and being already paid on that footing, the transaction was complied and closed. It could then not be reopened as a result of enhancement made at a later date for persons retiring subsequently. The concept of payment of gratuity for persons retiring on a later date cannot be accepted. They are not subjects to enhanced rate scheme.

[457] 1992 1LLJ 765, SC

EID Parry (India) Limited Vs Omkar Murthy and others[458]
The respondent companies were in the employment of the appellant between 1958 and 19884. On October 1 1984 voluntary retirement scheme was introduced and the respondents availed of that benefit and left the service after obtaining the benefits as provided the Payment of Gratuity Act, 1972. The employees thereafter claimed the difference between the gratuity received by them and the gratuity payable under the Section40 (3) of the Andhra Pradesh Shops Establishments Act 1966. The Supreme Court observed that at the relevant time when the respondents voluntarily retired from service the Payment of Gratuity Act 1972 could not apply to them as they were getting wages of more than Rs. 1,600PM by virtue of Section 2(e) of the Central Act. More ever the finding was that the gratuity under the State Act was more beneficial than Central Act. Hence the other contention of repugnancy of State Act would not arise at all.

Digvijay Woolen Mills Limited Vs Sri Mahendera Prasad Prataprai Buch[459] There was conflicting judgments of different High Courts regarding mode of calculation of gratuity. The Supreme Court decided the question as how to calculate 15 days wages for the purpose of Payment of Gratuity Act. In this case the appellant company calculated the amount of gratuity on the basis of the 15 days were held of the monthly wages last drawn. The respondent demanded an additional sum as gratuity on the ground tat their monthly wages should be taken as what they got for 26 working days and their daily wages should be ascertained on that basis, but not by just taking half of the wages for a month of 30 days by dividing monthly wages by 30. According to the Supreme Court the pattern followed by the period of 26 working days appears to be legitimate and reasonable, ordinarily of course, a month is understood to mean 30 days but the manner of calculating gratuity payable under the Act

[458] 2001 1LLJ 1414 SC
[459] 1980 2LLJ, 252SC

to the employee, who work for 26 days a month cannot be called perverse. Treating monthly wages as wages for 26 working days is not anything unique or unknown as is evident from its decision in DCM Mills Limited Vs Workmen.

Jeewan Lal Limited Vs Appellate Authority and other[460] The question whether for the purpose of computation of 15 days wages of a monthly rated employee under Sub Section (2) of Section 4 of the Act, the monthly wages last drawn by him should be treated as wages for 26 working days and his daily wages should be ascertained on the basis of or it should be taken as the wages for a month of 30 days and this while fixing his daily wages should be divided by 30. The Supreme Court held that the amount of gratuity does not depend on the number of days in a calendar month nor it refers to 26 working days in a month. Instead the whole object is to ensure payment of gratuity at the rate of 15 days wages for 365 days in a year of service. If the determination of the amount of gratuity payable under the Section 4(2) depends on the number of calendar days in a month in which the services employee concerned terminate, the quantum of gratuity would vary between an employee and employee belonging to the same class, drawing the same scale of wages with like service for the same number of years. Total amount of gratuity payable has to be arrived at by multiplying the 15 days wages so arrived by the number of years of service rendered by an employee subject to the ceiling imposed by the Section 4(3), viz, the amount should not exceed 20 months wages.

Shitla Sharan Srivastva and others Vs Government of India and other[461], employees of the State Bank of India who had retired prior to September 24 1997 made the claim for increased gratuity amount.

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[460] 1986 2LLJ, 464 SC
[461] 2001, 2LLJ 822 SC

Ceiling limit on gratuity amount was increased from same date. The employee claimed that they are entitled gratuity of Rs. 2.5 Lakh with effect from April 1 1995 and Rs.3.5 Lakh with effect from January 1, 1996. The basis of their claim was the recommendations of the Fifth Pay Commission and the speech of the Union Finance Minister presenting Central Government Budget 1997-98. It was held by the Supreme Court that the Bank had its own service rules/schemes. The service rules governing employees of RBI/IDBI and the Central Government were different. Neither the Fifth Pay Commission nor the speech of the Finance Minister was help to petitioner without further steps to give benefit of enhanced gratuity incase of Bank. Even the example of companionate gratuity could not be sought in aid of petitioners, as it was under a separate scheme different from the gratuity payable under the Act. Therefore employees of the SBI, who retired before 24 September 1997, were held not entitled for enriched gratuity under the Act.

5.5.1.2 Forfeiture of the Payment of Gratuity:

The Payment of Gratuity may be forfeited partially or wholly depending upon the kind of misconducts moral turpitudes, or riots or disorderly conduct of the employee. The Supreme Court has decided some cases related to forfeiture of payment of gratuity, as follows.

Journamulla Estate Vs Workman[462], The Supreme Court held that the object of having a gratuity scheme is to provide a retiring benefit to the workman who have rendered long and unblemished service and there by contributed to the prosperity of the employer. It is therefore, not correct to say that no misconduct however, grave May not be vested with forfeiture of gratuity. Misconduct could be of three kinds; (a) technical misconduct, which leaves no trial of indiscipline, (b) misconduct resulting

[462] 1973, 43 FJR 403 SC

in damage to the employer's property which might be compensated by the forfeiture of gratuity or part there of; (c) serious misconduct such as acts of violence against the management or other employees or riotous or disorderly behavior in or near the place of employment; who so not directly causing damage, is conducive to grave indiscipline. The first should involve no forfeiture, the second may involve forfeiture of the amount equal to the loss directly suffered by the employer, and the third will entail forfeiture of gratuity due to the loss directly suffered. The principle, which is incorporated in the Payment of Gratuity Act, is conducive to industrial harmony and is in consonance with public policy.

The Supreme Court in **Hussein Bhai Vs Atath Factory Tezhelal Union**[463] expressed the scope and meaning of the moral turpitude, which is one of the grounds for forfeiture of payment of the gratuity. The Court held that in order to come within the scope of the phrase **Moral Turpitude,** there must be an element of baseness and depravity in the act for which a particular individual has bee punished. The act must be vile or harmful to society in general or contrary to accepted rules, or rights and duties. It has also been held that mere violation of a particular statute cannot amount to commission of an act involving moral turpitude. The Expression moral turpitude means anything done contrary to justice, honesty, principle, or good morals, and act of baseness, violence or depravity in the private and social duties, which a man owes to his fellow manor to his society in general contrary to the accepted and customary rule of right and duty man and man. What constitutes moral turpitude or what will be held such is not entirely clear. A contract to promote public wrong, short of crime, may or may not involve it. If parties intend such wrong, as where they conspire against the public interest by agreeing to violate the law or some rule of public policy, the act doubtless involves moral turpitude when no wrong is contemplated but is unintentionally

[463] 1978,AIR 1410 SC

committed though error of judgment, it is otherwise, everything done contrary to justice, honesty, modesty or good moral is done with turpitude, so that embezzlement involves moral turpitude. The test, which should ordinarily be supplied, for judging whether a certain offence does or does not involve moral turpitude are; whether the act was such as could sock the moral conscience of society in general; whether there was intention or base motive in doing the Act.

5.5.2 Views and Interpretation by the High Courts on the Act:

The High Courts of the Gujarat, Kerela, Bombay, Gauhati, Karnataka, Andhra Pradesh, and Calcutta have decided matter related term employee, payment of gratuity and forfeiture of the benefits under the Payment of Gratuity Scheme. The approaches of these Courts have been sympathetic and liberal in interpreting related aspect. Following are some leading cases decided by the High Courts.

5.5.2.1 Employee: Interpretation of term

Section 2(e) of the Payment of Gratuity Act 1972 defined the term employee in broad term as any person employed on wages in any establishment factory, mines oil field, plantations, port, railway company or shop to any skilled, semi skilled or unskilled, manual, supervision, technical or clerical work. The expression of the employee was also interpreted by the High Courts in the following case.

United India Insurance Company Vs H K Khatau and others[464], It was held by the Bombay High Court that workers employed by the General Insurance Company are employee with in the meaning of Section 2(e) of the Act. These field workers were performing manual work and the clerical work of the insurance company. They were held entitled for the benefits of the provisions of the Payment of Gratuity Act. It is impossible to assume that the scheme for payment of gratuity, which provides for payment to other three categories of employees on the development side deliberately, intended to exclude workers at the bottom from the advantage of gratuity.

Eastern Motors Private Limited Vs State of Assam[465] A employee who was doing mainly clerical work as typing, keeping of accounts, correspondence and was also doing some managerial work such as operating bank account and taking legal actions against defaulter was held an employee within the meaning of Section 2(e), because management work was only incidental as against his substantive clerical work.

Patel Hiralal Ramlal and Company Vs Smt Chandbibi Pirubhai.[466] **The** Gujarat High Court held that the workmen carrying raw materials from employer's premises to their house and rolling up bidis at their house for manufacturing are employee under the meaning of Section 2(e). They are also entitled to payment of the gratuity. The Karnataka High court in **Bagi Bidi Factory Vs Appellant Authority and others** [467] held the similar view on the bidi workers.

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[464] 1984 1LLJ, 448, Bom
[465] 1981, Lab IC 230, Guahati,
[466] 1981 Lab IC 790 Guj,
[467] 1998 LLR 23,Ktk

The Kerela High Court in **Velukutty Achhary Vs Harrisons Malaylam Limited**[468] held that all employees are not entitled for the payment of the gratuity under the Act. Only specified employee under Section 2(e) is eligible for it. Where a person is called whenever there is work and paid wages for the work done, he will not be an employee within the meaning of the said section. An employee should be regular one. It has also been held that a person who is not employee engaged by way of contact of employment to work continuously from day to day but is offered work whenever available and paid wages, he will not be treated as an employee.

5.5.2.2 Payment of the Gratuity under the Scheme:

Duncan Agro Industries Limited Vs Subanna B[469] The question involved for determination was whether the workmen were entitled for gratuity for the period of service rendered before coming into force of this Act. It was held that gratuity is payable to an employee who has rendered continuous service in view of provisions of the Sectiuon2 (e) which defines continuous service as service whether rendered prior or after the commencement of the Act. Workmen would be entitled for gratuity for the period of service rendered prior to or after the commencement of the Act.

Consolidated Coffee Limited Vs Ulhaman[470], the High Court of Kerela was to decide a question of calculation of gratuity for full time employee engaged in a seasonal establishment. It was held that seasonal establishment is not defined in the act, or, in the ESI Act, or in EPF Act. The meaning of expression has, therefore to be under stood in the popular sense. Any factor, which only works during seasons of the year, not

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[468] 1992 2CLR 989,Kerela
[469] 1984, 1LLJ 96 AP
[470] 1980 1LLJ 83,Kerela

through out the year, is a seasonal establishment. The rate of gratuity ha to be determined with reference to the period of employment of an employee in a particular establishment. In this case it was found 36 employees work through out the year while 160 works only during seasons. The factory is a seasonal establishment in respect of those parsons who work seasonally and it is non-seasonal establishment in respect of others who are engaged through out the year.

The 15 days wages have been interpreted differently by different High Courts. The AP High Court in ACC Case has held that while calculating gratuity of an employee on daily wages basis 15 days wages would mean half a months wages, that is the wages he would have earned in a consecutive period of 15 days but not 15 times the daily wages. The interpretation would mean that daily rated employee would earn gratuity at the rate of 31 days wages because with in a span of 15 days there will be two weekly off days.

The Calcutta High Court in **Hukum Chand Sugar Mills Limited Vs State of West Bengal**[471] held that In order to determine the 15 days wages, it was necessary to determine one-day wage. It is not necessary in order to find out 15 days wages, to find out what one would have4 earned during 15 days or in the course of 15 days. Furthermore, it is a beneficial piece of social legislation and should be construed, if possible, in favour of those for whose benefit it is intended.

The Bombay High Court in **Laksmi Vishnu Textile Mills Vs P S Mavlankar**[472] considered the mode of calculating gratuity payable to daily rated workmen who work for 26days in a month. The Court held that in common parlance, a month is understood to mean 30 days. The rate of

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[471] 1970, 2LLJ, 285,Cal
[472] 1979, 1LLJ, 443,Bom

15 days wages in Section4 (2) of the Act could not have been construed to 13 working days wages. Similarly, the wages of 20 months covering 600 days also cannot be reduced to 520 days wages. There is no reason or basis to pay gratuity at different rates for daily rated workmen from that of the monthly paid workmen.

The Gujarat High Court in **Akbar Hussain Vs Appellant Authority**[473] has held that even in seasonal establishments employees working through out the year in jobs like maintenance would be entitled for gratuity at the rate of 15 days wages. But the employees who work only during seasons would be entitled for gratuity at the rate of 7 days wages.

5.5.2.3 Forfeiture of the Payment of Gratuity

Section 4(6) (b)(i) of the Act lays down certain grounds for forfeiture (Partial or whole) of gratuity like, misconduct, moral turpitude, violent behavior etc. the High Courts have decided the following cases on the subject matters.

DK Srivastva Vs Ananpur District Co-operative Central Bank and another[474] The AP High Court decided the case. Facts of the case were as; an enquiry was initiated against an employee on the basis of audit report. During the pendency of enquiry the employee died and the report enquiry was made after his death. The management had given notice to the employee. The wife claimed gratuity, bonus and reimbursement of medical benefit under Section 33 (2) of the Industrial Disputes Act, 1947. The Tribunal held that an implication for gratuity is not maintainable under the Industrial Disputes Act; instead remedy is available under the

[473] 1979, 38 FLR, 196,Guj
[474] 1991,2LLJ, 350,AP,

Payment of Gratuity Act. It was also directed the management to give notice of enquiry to the claimant and hold an enquiry with regard to amount misappropriated by the employee. If on enquiry the amount is found misappropriated the management can reduce appropriate gratuity under the Said Section of the Act. It is against this orders that a petition was moved.

It was held by the AP High Court that the effect of the proceeding initiated after retirement or dismissal of an employee is different from the proceedings that have been initiated for misconduct during the lifetime of the employee before his retirement. Since the proceedings have already been initiated in the case before the death of the employee while he was in service, the Bank is at liberty to conduct enquiry after issuing notice to the legal representatives and complete the enquiry in the presence of legal representatives. In the event of giving a direction to pay the gratuity and pension immediately the possibility of recovering the amount found to have been misappropriated by the employee would be nil, as the petitioner has no other property. By virtue of the death of employee the court is expected to convert the misfortune into one of the windfall and the court has to strike out suitable balance. So that either of the parties may not suffer. In the event of death or termination of an employee and if the charges of the misconduct from out of the gratuity claimable and the employee or his legal representatives are entitled only for the remaining amount. If the amount due on account of gratuity as per rules has to be payable immediately with out setting the amount misappropriated it amounts to causing prejudice to the employer in recovering the amount found to have been misappropriated.

Bombay Gas Public Limited Company Vs Papa Akbar and another[475] the Bombay High court that the provisions of Section 4(6) (a)

[475] 1990, 2LLJ, 220, Bom

of the Act, do not come into operation unless there is termination on grounds set out therein held it. The statutory provisions for forfeiture of gratuity must are construed strictly. In this case there was no material to show that the services of the employees were terminated for any act, willful omission or negligence causing damage, loss or destruction to employer's property. The extent of such damage attributable to the employee is not quantified. Merely stating that employee went on illegal strike and there by caused a heavy loss to the company is not a ground for denying gratuity.

Bharat Gold Mines Limited Vs Regional Labour Commissioner [476]where one workman was guilty of theft committed in the course of employment. In the opinion of the management the offence amounted to an offence involving moral turpitude, the workman was dismissed on this ground, and hence the gratuity was forfeited. It was held by the Karnataka High Court that after amendment of the year 1984, notice to show cause against the forfeiture of gratuity was mandatory and its non-compliance renders the forfeiture as illegal.

K Jaya Chandran Vs Canara Bank[477]the Claim for gratuity by an employee of the Bank who had been dismissed from service, was refused by the balk on the ground that under the service regulations gratuity was payable only on retirement, death, disablement and resignation, etc. On a writ petition by the aggrieved employee, the High Court held that gratuity is not paid to an employee gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer and when once it has been earned, dismissal will not disqualify and misconduct will not entail its forfeiture. Dismissal and removal from the service also fall within the scope of retirement in service regulations.

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[476] 1986, 53 FLR, Ktk
[477] 1983, 63FJR, 287, Kerela

The employee was, therefore entitled to gratuity notwithstanding that he was dismissed from the service. As the misconduct alleged against him, did not cause any loss to the bank, he is entitled to gratuity at the rates mentioned in the bank's service regulations.

5.5.3 A Bird's Eye View

The Supreme Court may be considered as the founder of the Payment of Gratuity Act, 1972. Based on its principles and guidelines in the DCM Mills case, the said law was formulated. Before this Act there were other Acts like, working Journalist (Conditions of service) and Miscellaneous Provisions 1955, Kerela gratuity Act, 1971, west Bengal Employees Payment of Compulsory Gratuity Act, 1971 etc in operation. But there were no uniformity in the provisions, conflict in the provisions of the Acts and uneven scope of the existing gratuity schemes. So the Supreme Court in the above said Case felt the need of such a gratuity scheme apply to all areas with uniform benefits.

The Scheme of payment of gratuity have been enhancing since its implementation. The Supreme Court and High Courts have contributed to this effectiveness. There are some provisions, which were not present in the initial stage of the Act, but subsequently inserted after the decisions of these Courts.

There was no provision in the Act for payment of interest initially. But the Amendment Act 22 of 1987 removed this lacuna with effect from 1.10.1987, with insertion of Sub section (3-A) of Section 7. The Supreme Court in **Charan Singh Vs Birla Textile**[478]discussed on the matter of interest and held that the provisions under Section 7(3A) has prospective

[478] AIR 1988, 2022, SC

application for their recovery of the gratuity along with interest in case of delay for the payment of gratuity.

The Supreme Court in the DCM Case lays down the principles of calculation of 15 days wages and the liberal interpretation of the average of the monthly basic wages. There were ambiguity and differences of opinion of various High Courts like AP High Court (ACC case) Bombay High Court (**Laksmi Vishnu Mills case,**[479]) and the Calcutta High Court **(Hukum Chand Sugar Mills case**[480]**,**) regarding the calculation of 15 days wages for the payment of gratuity. The Supreme Court in another case **Digvijay woolen Mills Limited Vs Sri Manohar Prtaprai Buch**[481] laid down the method of calculating of 15 days wages from 26 days working days basis. It is now well settled principle on the subject matter. The provisions of the Payment of Gratuity Act under Section 4(2) was amended in 1987 by the Act No 22 of 1987 with effect from 1.10.1987 and an explanation in said section was inserted which read as" in case of monthly rated employee, the 15 days wages shall be calculated by dividing the monthly rate of wages last drawn by him by 26 and multiplying the quotients by 15".

The Kerela High Court in **Consolidated Coffee Limited Vs Uthaman Case**[482] and the Gujrat High Court in **Akbar Hussian Vs Appellant Authority**[483] case decided on the matter related to the seasonal establishment employees and their entitlement of the payment of gratuity. The Gujrat High Court held that the seasonal employees would be entitled for gratuity at the rate of 7 days wages. Consequently in 1987, the Section 4(2) was amended by the Act 22 of the 1987 and included the employee who is employed in a seasonal establishment and who is not so employed

[479] 1979, 1LLJ 443,Bom
[480] 1976, 2LLJ, 285,Cal
[481] 1980, 2LLJ, 252,SC
[482] 1980, 1LLJ, 83,Guj
[483] 1979,38,FLR, 196,Guj

through out the year for the payment of the gratuity under the Payment of Gratuity Act, 1972.

The Supreme Court in **Hussain Bhai Vs Atathy Factory Tehela Union**[484] thoroughly examined the concept of moral turpitude and formulated certain principles for deducting or for forfeiting of the gratuity on the moral turpitude grounds. The court also broadly explained the meaning of the term misconduct in **Journamulla Estate Vs Workmen**[485]. These explanations have become guidelines and principles in dealing with of misconduct, moral turpitude under Section (6) (b) of the Payment of Gratuity Act.

Finally the Supreme Court and High Courts contributions in the promotional and development of the subject matter is significant. Majority of the improvement and development in the Act was possible due to the pronouncement of these judiciaries. Based principles and guidelines will help the Judicial Authorities but also the employers as well as the employees in claim of the benefits of the gratuity payment.

5.6 The Role Of Public Interest Litigation in promoting Social Security

Justice was only a remote and even, theoretical proposition for the mass of illiterate, underprivileged, and exploited person in the Country. The Concept of the Public Interest Litigation (PIL) was adopted as a part of our Constitutional Jurisprudences. There were unaware of the law or even their legal rights, unacquainted with the niceties of procedure involved and too impoverished to engage lawyers, file papers and bear

[484] 1978, Lab, IC 1246,SC
[485] 1973, FJR, 43, 403,SC

heavy expenditure on dilatory litigation. This vast underprivileged section of society found them utterly helpless. Nor could anyone else take up their cases for the lack of locus standi or any direct interest in the matter. The activist judges expended the concept of locus standi to community orientation of PIL and thus relaxed the formalities of procedure.

The concept procedure of the PIL in India has been fashioned by the Supreme Court of India. They are still in the process of formulation and concretization. The PIL is concerned not with the rights of one individual but the interest of a class or group of persons who are either victims of exploitation or oppression or denied their Constitutional or legal rights and who are not in position to approach the court for redressal of their grievances. It seeks to help the victims of governmental lawlessness or repression.

Human Rights are part and parcel of human dignity, which is adequately secured by various provisions of the Constitution of India. The importance of the concept of human rights is well exemplified by its inclusion in the national and international legal texts. Right to life under the Article 21 of the Constitution mean right to live with human dignity and free from all kinds of exploitation. Article 23 specifically prohibits traffic inhuman beings and beggars and similar other forms of forced labours. The Article 24 of the Constitution prohibits employment of children in hazardous employment. But in spite of the clear mandates of Constitution, there has been exploitation of the people in various parts of Country and they have been living the life, which is below human dignity. However the judiciary has shown its deep concern for such people.

During the recent years, the judiciary, particularly the Apex Court has played an important role in making right to live with human dignity a reality for millions of Indian and has protected them from exploitation.

The Supreme Court has not only given the widest possible meaning to the Fundamental Rights enshrined in Articles, 21, 23, and 24, but also look into consideration the various factors which were responsible for the failure of various other social welfare laws.

5.6.1 The Public Interest Litigation on the Social Security Protection Cases:

The Supreme Court has decided a number of leading cases through this instrument of social justice. Majority of these related to exploit, child, and bonded labours. Brief of these cases are discussed as under:

People's Union for Democratic Rights Vs Union of India[486] This case is popularly know as **Asiad Workers Case.** In this case, the writ Petition was filed by way of PIL concerning the working conditions of workmen employed in the construction work of the various projects connected with the Asiad Games. In petition, it was pointed out that the workers did not get the minimum wages a prescribed under the Minimum Wages Act, 1936. The violation of various other laws, such as Employment of Children Act, 1938, Contract Labour (Regulation and Abolition) Act, 1970, the Inter-State Migrant workmen (Regulation of Employment and Conditions of Services) Act, 1979, and the Equal remuneration Act 1976, etc was also alleged.

Defending the PIL **Justice PB Bhagwati** (as he was than) pointed out that the PIL is intended to bring justice within the reach of the poor masses, who constitute the low visibility are of humanity and is totally different from the ordinary traditional litigation which is essential an adversary in character. The rule of law, which is a part of just, fair, and

[486]AIR, 1982,1473,SC

reasonable procedure under the Article 21 of the Constitution, does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the Status Quo, Under the guise of enforcement of their civil and political rights. It was farther pointed out that so far as the courts have been used only for the purpose of vindicating the rights of wealthy and affluent. It is only the moneyed that have so far had the golden key to unlock the doors of justice. But now for the first time the portals of the courts are being thrown open to the poor and the down trodden the ignorant and the illiterate.

Dwelling the scope of the Article 23 of the Constitution, Justice PN Bhagwati, speaking for the Court observed that Article 23 is clearly designed to protect the individual not only against the State but also against other private citizens. Article is not limited in its application ..... The sweep of Article is wide and unlimited and it strikes at traffic in human beings and begar and other similar forms of forced labour wherever they are found.

Another important question, which arose before the Court for consideration, was whether there was any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wages for it. It was observed by the Court that where a person provides labour or services to another for remuneration, which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words forced labour under the Article. The word force must therefore be construed to include not only physical or legal force but also force arising from compulsion of economic circumstances, which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wages.

Hence the Union of India, Delhi Administration and Delhi Development Authority being principal employer are under obligation to ensure observance of various labour laws in relation to workmen employed in the construction of the Asiad Games 1982.

Sajit Roy Vs State of Rajasthan[487] The Supreme Court relied on the Asiad Worker's Case and held that the payment of wages less than the minimum wages amounts to force labour and hence violates Article 23 of the Constitution. The Court pointed out that no work of utility and value can be allowed to construct on the blood and sweat of persons who are reduced to state of helplessness on account of drought and scarcity conditions. The State could not under the guise of helping persons extract work of utility and value without paying them the minimum wage. The trend of judiciary has been to make sincere efforts for achieving a coherent socio-economic order based on social justice and basic human values.

Salal Hydro Project Vs State of Jammu and Kashmir[488]. The Supreme Court treated a letter addressed by Peoples Union for Democratic Rights and based on a news/report as Writ Petition. In the letter it was alleged that the labourers coming from the different parts of the country to the site of Salal Hydro Project in the State of Jammu and Kashmir were being exploited and they were being denied the right to live with human dignity. The Supreme Court directed the observance of the various labourers and also pointed out that the minimum wages must be paid to the workmen directly without any deduction, same and except those authorized by the State.

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[487] AIR, 1983, 326,SC
[488] AIR, 1984,177, SC

Bandhua Mukti Morcha Vs Union of India[489], It is another landmark judgment of the Supreme Court where the bonded labourers have been protected from the exploitation. In this case the petitioner was an organization decided to the course of release of bonded labourers in the country. **Justice PN Bhagwati** (as he was than), while describing the true conditions of bonded labourers remarked that they are non-beings, exiles of civilization, living a life worst than that of animals, for animals are at least free to roam but as they like and they can plunder or grab food whenever they are hungry. But these outcastes of society are held in bondage, robbed of their freedom and they are consigned to an existence where they have to live either in hovels or under the open sky and be satisfied wit whatever little whole some food they can manage to get inadequate though it be till their hungry stomachs. No having any choice, they are driven by poverty and hunger into a life of bondage, a dark bottomless pit from which, in a cruel exploitation society, they cannot help to be rescued.

The Supreme Court observed that causes of failure of Bonded Labour System (Abolition) 1976. In the present case, the State tried to escape the liability by saying that they were no bonded labourers in the State of Haryana. The petitioner made a survey of some of the stone quarries in Faridabad District and found that there were large number of labourers from different states of the country, who were working under inhuman and intolerable conditions and many of them were bonded labourers. The petitioner described in the letter, which was treated by the Supreme Court as Writ Petition, that there was violation of the various Constitutional provisions and the statutes which wee not being implemented or observed in regard to labourers working in those stone quarries. The Supreme Court also found that there was violation of the various socio-economic welfare laws by the State and the workers being

[489] AIR 1984. 802,SC

denied to their right to have just and humane conditions of work. One of major handicap, which impedes the identification of bonded force, is the reluctance of the administration to admit the existence of bonded labour, even where it is relevant. It is therefore necessary to impress upon the administration that it does not help to ostrich like bury its head in the sand and ignore the prevalence of bonded labour which is slur on the administration but its failure to eradicate it and moreover, not taking the necessary steps for the purpose of wiping out this blot on the fair name of the State is a breach of Constitutional obligation.

Mere obligation of the labourers from bondage without making arrangements for their rehabilitation will serve no useful purpose and may even create a vary real problem as to live hood to the labourers so set free. There is a specific provision for the rehabilitation of the bonded labourers.

The Supreme Court has decided a lot of case on the bonded labourers and their rehabilitation. Some of the leading cases on the subject are, **Neeraja Choudhary Vs State of M P**[490] **Mukesh Advani Vs State of MP**[491], **P Sivaswami Vs State of A P**[492] **Balram Vs State of A P**[493] and **Public Union for Civil Liberties Vs State of Tamil Nadu**[494]. The Calcutta High Court in **Shanker Vs Durgapur Project Limited**[495] held that the State couldn't deprive a worker of decent standard of life, which under Article 43 of the Constitution, the State should endeavour to secure. To do an act contrary to Article 43 i.e. to deprive a person of decent standard of life would be violative of Article 21 of the Constitution. The Court pointed out that compelling a person to live to sub human conditions also amounts to the taking away of his life not by execution of a death

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[490] AIR 1984 1099,SC
[491] AIR, 1985 1363,SC
[492] AIR 1988, 1863,SC
[493] AIR 1990, 64,SC
[494] 1994,5,SCC, 116
[495] AIR 1988, 136,Cal

sentence but by a slow and gradual process of robbing him of all human qualities and graces, a process, which is more cruel than sending a man to gallows. To convert human existence into animal existence no doubt amounts to taking away human right to life, because a man lives no by his mere physical existence or bread alone but by human existence.

M C Mehta Vs State of Tamil Nadu[496] The Supreme Court while keeping the interest of child labourers as also the Constitutional mandate in view held that the employment connected with manufacturing process in the match factory is not to be given to children. They can however, be employed in packing process and the packing must be done in area away from the place of manufacture. The Court also directed that at least 60% of the prescribed minimum wages for adult employee doing the same job, to be given to child in view of special adoptability of child's tender hand to such work. Keeping in view the basic human rights of the children, The Court directed that all such children should be provided with facilities for recreation and medical attention and that they should be provided basic diet during the working period. Protection of children against moral and material abandonment is yet another Constitutional goal.

5.6.2 A Bird's Eye View

The Public Interest Litigation has been helping the poor and helpless labourers, who cannot approach any judicial machinery for the protection of their interest. Majority of the labourers, whether in rural or urban area are illiterate and unaware of their rights under various labour welfare enactments. Even few of them know the little bit of procedure, but they do not possess adequate resources to approach any court for enforcement of their rights. So the PIL has proved Sanjivani Booty for the

[496] AIR 1991, 417,SC

poor and uneducated labour class as well for the other class of society. The **Asiad Workers Case**[497] 1982 was the beginning of the era for working class protection. The PIL has been proving effective in all the matters related to the human rights and human dignity field for labours. But the contributions of the **Public Union for Democratic Rights** (PUDR), **Peoples Union for Civil Liberties** (PUCL) and **Mr. M C Mehta** cannot be ignored. These Agencies have done remarkable work in bringing out the irregularities related to the working labourers. Subsequently the support of the PIL enhanced the protection mechanism.

The Judiciary especially the Supreme Court has shown deep concern for the basic human rights of the working class, poor labourers, bonded labourers, child labourers and issued the suitable directions for ensuring the protection and promotion of their human rights, to live with human dignity. There are protections for labourers under Articles 21, 23, 24, 39, and 43 of the Constitution of India. But the practical position is entirely different from the theoretical legal position. The labourers are still exploited at majority of rural areas. It is mainly due to the social and economical conditions of the working class. They are under compulsion to work for whatever amount, for their survival. If they work then only they feed, other wise hard to survive. So the Contractors as well the employers easily exploit the situation for their benefits.

But in spite of the clear mandate of the Constitution, there has been exploitation of the people in various parts of country and they have been living the life, which is below human dignity. However the Judiciary has shown its deep concern for such people. Though judicial activism, it has given contents and meaning to the letter of law. It is further observed that the Judiciary has been performing well, which can not denied, but the ground realties are quite different. The progress is slow, but gradually will

[497] AIR, 1982,1473,SC

pick up the memento at the later state. It may be done with help of other agencies like NGOs, Social Activists, Gram Panchayat and other rural as well urban agencies who looks after the interest of workers.