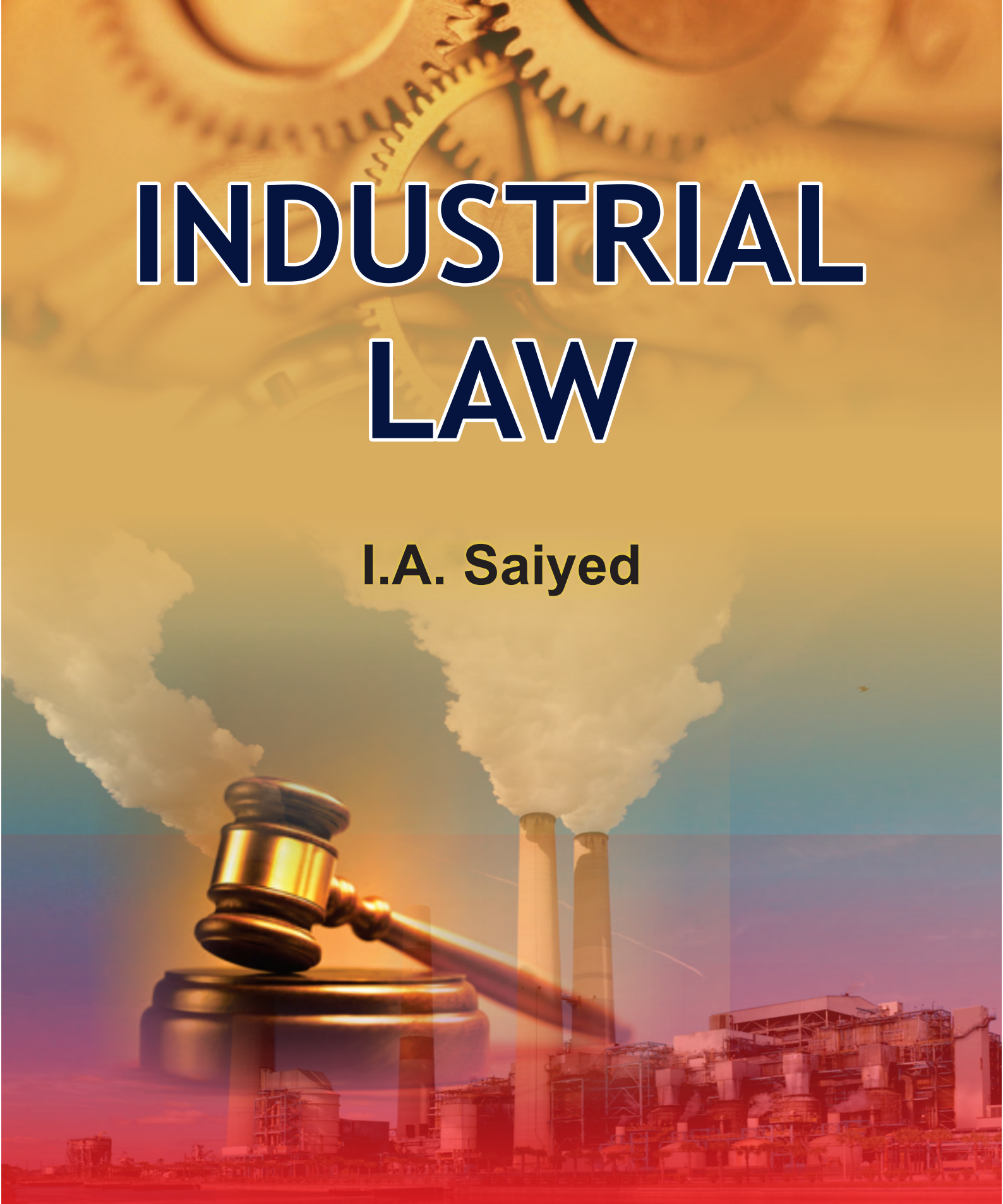
INDUSTRIAL LAW

I.A. Saiyed



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INDUSTRIAL LAW

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Dr. Tushar Desai
M.Sc., Ph. D.
Principal

Foreword

The fourth revised edition of ***Industrial Law*** by Prof. I.A. Saiyed shall prove to be of great use to students of Management Studies. The book is structured as per the revised syllabus of the University of Mumbai for BMS. It offers precise and relevant information for students preparing for examinations. In lucid prose, Prof. Saiyed has explained the Nine Enactments of Industrial Law, thereby providing a basic introduction to industrial law for students and laypersons alike. The apt use of relevant examples enables readers to understand not only the law itself but also its practical applications. The systematic and learner-friendly layout of the book is commendable. Prof. Saiyed's deep knowledge of the subject and his vast teaching experience is evident in the fact that he has managed to render fairly technical subject matter accessible to students. Apart from students of Management Studies, the book will serve as a valuable resource for any reader desirous of basic knowledge about industrial law and industrial relations.

Principal Dr. Tushar Desai

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Preface

No doubt any author, worth his salt, will be most happy if new edition of his book is released in the market. So also, I am very happy when new fourth edition of my book ***"Industrial Law"*** is released in the market. The release of new fourth edition, in itself, proves that the earlier edition was most useful to students because the book was especially prepared according to the syllabus of BMS examination of the University of Mumbai. I am undoubtedly very sure that this new edition will also turn out to be most useful to students preparing for BMS examination of the Mumbai University. Also, unfailingly, this book will help the students to understand and learn the subject of Industrial Law in its broad perspective.

I am very much thankful to Dr. Tushar Desai, M.Sc., Ph.D., the Principal of D.G. Ruparel College of Arts, Science and Commerce for his readily accepting and giving foreword and accrediting my book. I am also thankful to the Himalaya Publishing House Pvt. Ltd. for giving all the help and support in putting in the hands of students preparing for examination and understanding the subject in brief.

I know it very well that unless some feedback is given, no book can reach to the level of perfection. I am sure, my students will give me feedback to take this book to level of perfection. I await for the feedback, if any, from my students. No efforts are left out to avoid any mistake in the book. However, if any mistake

has crept in, please bring it to my knowledge so that I can correct it in my next edition, if any.

I.A. Saiyed

Advocate, Notary and Law Professor

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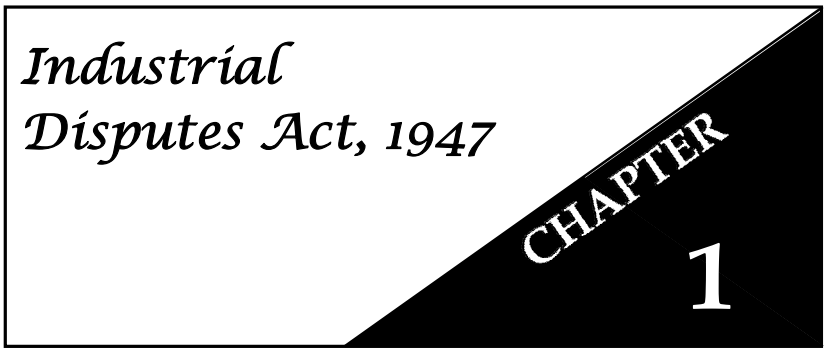
UNIT I: Laws Related to Industrial Relations and Industrial Disputes



1. INTRODUCTORY

During the time of 'industrial revolution', there were several changes, such as, emergence of giant Companies, Corporations, Monopolies and congestion of population in industrial centers. These changes gave rise to several problems, such as (1) Owners of agricultural fields came as Workers to industrial organization of not their ownership (2) Inter-Separation of family members (3) Industrial accidents, industrial diseases and spread of epidemics due to concentration of working population in an unhygienic condition and lack of medical care and so on. The unskilled workers were in predominance naturally because production was low and the technique was primitive then. Workers, therefore, had nothing to bargain with. But as the technique and technology of production and manufacturing-process advanced, a new class of skilled workers emerged. These workers naturally had with them something to bargain with, their skill, training and experience. Individually, they were very weak but in unity they were very strong to bargain with their employers. That is how the trade unionism and collective bargaining came into existence. In the Western countries, 'collective

bargaining' is preferred to the compulsory adjudication. But in underdeveloped countries, it is said that the 'compulsory adjudication' is far better than collective bargaining -so much so that, it is said that the 'compulsory adjudication' is as essential as the compulsory education or the compulsory taxation. Compulsory Adjudication or Arbitration means under compulsion of law, the Government requires the parties to go before a Tribunal for settlement or redressal of the dispute by adjudication. It is a benevolent compulsion and not a coercive or totalitarian measure. The Government thus retains the power to judge whether process of 'Collective Bargaining' is sincerely used or not. The Hon'ble Supreme Court of India[1] has rightly considered the importance of industrial adjudication at par with the fundamental rights guaranteed under the Constitution of India.

The first piece of legislation in England was the Ordinance of Laborers, promulgated by King Edward II in 1349. It was not for the welfare of workers but it was to ensure the regular supply of the labour. But laws of 18th century did reduce the severity of earlier laws and did recognize the right of Workers. Then finally, in England, the Trade Disputes Act of 1906 came to be passed. It was replaced by the Trade Disputes Act of 1913. In India, the first Trade Disputes Act, on the model of English Trade Disputes Act of 1913, was passed in the year 1920. It was replaced by the Trade Disputes Act, 1929 but then finally the Defence of India Rules came to be enacted. In the said enactment, to meet the exigency created by the World War II, **Rule 81-A**, was inserted to give powers to the appropriate Government to intervene in industrial disputes and provide speedy remedy for industrial disputes. Accordingly, compulsory conciliation, and reference were made compulsory. Awards passed upon such a reference were made legally binding on the parties. The strikes and lock-outs were prohibited during the pendency of conciliation. At last, the Industrial Disputes Bill was introduced in the Central Legislative Assembly on 8th October 1946.

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[1] *Workmen of Ballmer Lawrie & Co. Ltd. v/s BL & Co.* 1964 I LLJ 380.

This Bill embodies the essential principles of Rule 81-A of Defence of India Rules and also certain provisions of the Trade Dispute Act, 1929. The Bill was passed by the assembly in March 1947 and it became the law of the land with effect from 1st April 1947.

2. DEFINITIONS

Appropriate Government – Section 2(a)

It is the mandatory statutory duty of government to resolve industrial dispute – but which government – Central or State should do it? From Section 2(a) of the Act, it will clear that generally it is the State Government but in **specified** cases, it will be the Central Government. Therefore, necessarily, one always has to refer to categories specified in the Act.

Section 2(a) opens with "In relation to any industrial dispute concerning any industry carried on by or under the authority of central Government." The key words are "industry carried on by or under the authority of Central Government." The Apex Court[2] held that if the company in effect is separate from its share holders and the mere fact that the entire share capital was contributed by Central Government, it cannot be said that the Central Government is the appropriate Government. However, the Apex Court[3] observed that case of Heavy Engineering interpreted the words "appropriate Government" narrowly on the common law principles which no longer bear any relevance. From the above, it should be clear that the cases decided earlier do not now hold good on the issue of industry carried on or under the authority of Central Government. The Law now emerges is that the phraseology 'industry carried on or under the authority of Central Government' has to be given wider meaning and the industries for which the Central Government was not the appropriate government is now the appropriate government. The State Government would have jurisdiction only if the cause of action,

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[2] *Heavy Engineering Mazdoor Union v/s State of Bihar AIR* 1970 SC.82.

[3] *Air India Statutory Corporation v/s United Labour Union*, 1997 I CLR 292.

wholly or partly, arose within the state (*Indian Cable Co. Ltd. v/s in Workmen, 1962 I LLJ 409*). For Mahanagar Telephone Nigam and for a contractor of Railway, Central Government was held to be the appropriate Government.

Industry – Section 2(j)

The term "industry" is defined as: any

1. business,
2. trade,
3. undertaking,
4. manufacture or
5. Calling of Employers.

Not only are these but also included [in the term of industry] any:

1. calling,
2. services,
3. employment,
4. handicraft,
5. industrial occupation or
6. vocation of workers

The term "industry" is defined in most wide terms and anything and everything appears to have been included in the sweep of the term. Howsoever wide sweep may be surely the activities like **agricultural, domestic work; religious rituals, charitable activities and sovereign function are not included in the sweep of the term "industry".**

The term 'industry' is defined in two parts. The first part says as to what it *'means'* and it lays down as to what is 'industry' from the standpoint of the employer. The second part says what it *'includes'*. But in no case, two parts can be read in isolation. The two are counterparts of the same industry. It is like the obverse and reverse of one and the same coin. As such, one part cannot define the term 'industry'.

The Supreme Court took stock of all its earlier judgments and held[4]:

The term "industry" is defined with reference to Employers' occupation nevertheless it also includes the definition of Workmen. The Court gave some illustrations, say,

(i) if a kind hearted businessman employs workman and in his co-operation produces and supplies goods or services without charging any price or on receiving very negligible return, the activities of kindhearted business would fall under the term 'industry'

(ii) a devotee regularly sweeps the floor but although that devotee daily, regularly and punctually serves the Temple, yet that would not convert the Temple into 'industry'

(iii) professions of Doctors, Advocates, Teachers etc also do not fall under the definition of 'industry'

(iv) Painter uses not only intellectual skill but manual skill as well but his workplace is not converted into an 'industry'.

(v) Sovereign functions of the State cannot be included in industry. Court, however, clarified that

  (a) if a Dispensary or a hospital or a Nursing Home is run, as a business, in a commercial way, it is an "industry"

  (b) if there are industrial units severable from essential functions of Sovereign State then such units/ departments fall in the term 'industry'.

Following are the ingredients of the term 'industry'.

1. Co-operation of Employers and the Employees.
2. Object is the satisfaction of material needs.
3. It must be organized or arranged in a manner in which trade or business is generally organized or arranged.

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[4] *Bangalore Water Supply and Sewerage Board v/s A. Rajappa*, (1978) 2 SCC 213.

4. It must not be casual nor must it be for oneself nor for pleasure.
5. Absence of profit motive is irrelevant.

The Court also expressed its view that term 'industry' requires amendment.

Accordingly Industrial Disputes Amendment Act, 1982, Act No 46 of 1982, came to be passed. However, later on, the Apex Court[5] held that its earlier ruling[6] needs re-examination. But the larger bench of the Court[7] held that its earlier ruling was correct.

It is necessary to note here that the term "industry" is also used in the definition of workman. Necessarily, therefore, the two terms (one used as workman and the other used as 'industry') should be understood in the same manner. It means the "workman" is to be regarded as one who is employed in an 'industry' as defined in Section 2(j). Therefore, a 'workman' as defined in Section 2(s) is found when the employer carries on any business, trade, manufacture or calling of the Employers.

Industrial Dispute – Section 2(k)

The definition states that the phrase 'industrial dispute' means:

(A) Any dispute or differences between

Employers and Employers

OR

Employers and Workmen

OR

Workmen and Workmen

(B) The said dispute or difference must be connected with

The Employment or Non-employment

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5 *Coir Board v/s Indira Devi*, 1998 I CLR 866.

6 *Bangalore Water supply and Sewerage Board v/s A. Rajappa, AIR* 1978 SC 548.

7 *Coir Board v/s Indira Devi*, 1999 II LLJ 1109.

OR

The terms of Employment

OR

The Conditions of Labour

(C) Of any person.

The Term has its four facets, viz. (a) **Factum** of Dispute, (b) **Parties** to Dispute, (c) **Subject matter** of dispute and (d) Dispute must be relating to **an Industry**.

(a) Factum of Dispute

It is undoubtedly needless to observe that unless there is a dispute or difference of any sort, no legal machinery needs to take a start. For dispute or differences to arise, it is not necessary that the parties should come to blows but at the same time a mere personal quarrel or a grumbling will not amount to dispute or differences within the four corners of the definition[8]. Only those differences or disputes fall under 'industrial dispute' which have bearing upon the (1) relationship of Employers and Employers or (2) Employers and Workmen or (3) Workmen and Workmen and (4) condition of Labour. Thus dispute of "inter-se-seniority" between two workmen is an **individual** dispute and not an 'industrial dispute' if other employees are not concerned[9]. Industrial dispute of single workman requires to be espoused by union.

(b) Parties to the Dispute

There is a popular misconception that 'industrial disputes' is always between Employers and Workmen but the Act provides that any dispute or differences between:

(a) Employers and Employers or

(b) Employers and Workmen or

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[8] *Sambhunath Goyal v/s Bank of Baroda,* 1978 I LLJ 484.

[9] *Somasundram v/s Liyakatali,* 1998 II LLJ 719 (Madras).

(c) Workmen and Workmen can be taken up for conciliation or adjudication, are the 'industrial disputes. Needless, therefore, to state that

(i) Employers and Employers or

(ii) Employers and Workmen or

(iii) Workmen and Workmen are the parties in any given industrial dispute.

(c) Subject Matter of Dispute

The expression 'dispute or difference' means controversy connected with (**a**) the Employment or non-employment or (**b**) with the terms of employment or (**c**) the conditions of employment of any person. Further, it must also be a grievance felt by workmen and the Employer is in a position to remedy or set right.[10]

When dispute of individual workmen are taken up by any union it becomes an Industrial Dispute[11].

When an industrial dispute is amicably settled, it ceases to be an industrial dispute to be referred to any court[12].

(d) Contract of Employment

The Contract of Employment can be in Writing or Oral. If Oral, it can be inferred from the facts and circumstances of the case. The Contract of Employment includes all the ingredients of ordinary civil contract, namely:

(1) capacity of parties, service contract with infant or minor

(2) contract without consideration

(3) contract for illegal purpose or where the object of the contract is illegal

(4) contract under mistake, undue influence, misrepresentation etc.

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[10] *Madras Gymkhana Club Employees Union v/s Gymkhana Club*, 1967 II LLJ 720, *Safdarjang Hospital v/s Kuldip Singh Sethi*, 1970 II LLJ 266.

[11] *D.N. Banerji v/s P.R. Mukherjee, AIR*, 1963 SC 58.

[12] *Harayana State Ind. Dev. Corpn. Ltd. v/s P.O. L.C.*, 2004 (1) LLN 354.

In modern world, Contract of Employment is also inferred from non-compliance of legislative enactments like the Employment of Industrial Employment (Standing Orders) Act, 1946, Bonus Act, 1965, Minimum Wages Act, 1948, Payment of Wages Act, 1936, Payment of Gratuity Act, 1972 etc.

'Contract of Service' and 'Contract for Service'

If it is a Contract for Service between the two parties, the said two parties are not the Employer and Workman. But if the two parties have the Contract of Service, the two are the Employer and Workman under the Act. In a 'contract of service' the person is labeled as 'Workman' whereas in the case of 'contract for service' the person is self-employed and labeled as **Contractor.** In a contract of service, a man is employed as part of business and his work is an integral part of the business whereas, under a contract for service, his work although done for the business, is not integrated into it but it is only accessory to it. In a contract of service, a person undertakes to serve another and to obey all his reasonable orders within the scope of the duty undertaken. The identifying mark of the employee is that he should be ***under the control and supervision*** of the employer. Although with the advent of modern era, the test of control is not as determinative factor as it used to be, yet it still holds good. The Court[13] has held that to ascertain whether one is a Workman or not, the following tests may be applied:

1. Who has a right to give Order/Direction?
2. Whether it is an independent nature of Business?
3. Whether there is any 'Right of Supervision'.
4. Is it obligation to supply tools and other materials?
5. Is it obligatory to execute work daily and punctually?
6. Is any time fixed for the employee?
7. What is the Method of Payment?
8. Whether work is part of business or not?

---

[13] *Atam Prakash v/s State of Haryana*, 2005 II LLJ 195

(e) When does an 'Industrial Dispute' Arise?

For existence of an industrial dispute, there should be a **demand** by workmen and there must be a **refusal** by the Employer to grant it. How the demand should be raised cannot be a legal notion of fixity and rigidity. But surely, the grievance of the workmen and the demand for its redressal must be communicated to the management.

(f) Written Demand not Necessary.

A Demand need not be in writing to constitute an industrial dispute. The Act no where contemplates that the industrial dispute would come into existence in any particular specific or prescribed manner. For coming into existence of an industrial dispute, a written cause is not the requirement unless ofcourse in the case of Public Utility Service.

(g) Does it mean 'Collective Dispute'?

The term 'Industrial Dispute' conveys the meaning that dispute must be such as would *affect large groups*. However, it does not mean that all workmen or a majority of them should sponsor and support the dispute. In fact, there is nothing in the Act to require the dispute to be raised by all the workmen of the industry or by every one of them or even by a majority of them. It is enough if the controversy is between Employer on one side and the workmen on the other. So also, there is nothing in the Act to require that workmen raising the controversy should form a majority or the controversy affects, or will affect the interest of workmen as a class. The law envisages that in the interest of peace, the industrial dispute should be examined and decided in the manner laid down in the Act. It was held[14] that it is not necessary that the dispute should have been espoused only by a recognized union. Even a minority union can raise the dispute[15]. The Apex Court[16] held that the minority unions

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[14] *Indian Oxygen Ltd. v/s Its workmen* 1979 LIC 585.

[15] *State of Bihar v/s Kripa Shankar Jaiswal, AIR* 1961 SC 304, D.A.C.C. *v/s workmen, AIR* 1960 SC 777, *Pradip Lamp Works v/s Workmen* 1970 I LLJ 491, *Tata Chemicals v/s Workmen* 1978 I LLJ 22(SC).

and outside union can also raise an Industrial dispute. Suffice if it is proved that union did espouse the cause of the workman. The question before the Court[17] was whether "Workman" can espouse the cause of the non-workmen working in the same establishment. The Court held that they can, because they have substantial interest in the subject matter of the dispute and that there is a community of interest.

(h) Subsequent Withdrawal of Support

The Apex court in **Hindu**[18] case, held that subsequent withdrawal of support by workmen or Union will not have any effect. Conversely, subsequent support too will not convert it an Industrial dispute. The legal position is that when an individual workman is a part to an "Industrial dispute", he is not independently a party to the proceedings. The individual workman is at no stage a party to industrial dispute, independently of the union. The request by the worker to withdraw the dispute also will have no relevance because the dispute being raised by the union (or group of workmen) for withdrawal will not make the dispute any less an Industrial dispute[19].

(i) 'Any Person'

The Expression "any person" in the end of the definition is not subject to any qualification, restriction or limitation as to its scope. The word "person" has not been limited to workmen, nor is it co-extensive with any workman, potential or otherwise. Though the expression must receive a more general meaning, it cannot mean any body and every body in this wide world. The definition, therefore, requires that the dispute must relate to employment, non-employment or terms of employment or conditions of labour of "any person". Necessarily, therefore, the use of the term 'any person' in the definition imparts a limitation in the sense that a 'person" in respect of whom the employer employee relation never existed or

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[16] *J. H. Jadhav v/s Forbes Gotak,* (2005) 3 SCC 202.

[17] *Mukund Ltd. v/s M.Staff & Officers Association,* 2000 I CLR 707.

[18] *Bombay Union of Journalists v/s The Hindu* 1961 II LLJ 436.

[19] *Workmen of Dalmiya Cement (Bharat) Ltd. v/s State of Madras,* 1969 I LLJ 477.

can never exist cannot be the subject matter of an industrial dispute. The expression "any person" means a person in whose employment or conditions of labour, the "Workmen" as a class, have a direct and substantial interest with which they have community interest under the scheme of the Act. The Apex Court[20] held that liberal construction of expression 'any person" is impermissible.

Individual Dispute – Section 2A

There is a catena of case laws to state that individual disputes are not the industrial dispute, unless cause of individual workman is espoused by other workmen. But such a legal position created great hardship for those individual workmen who were discharged, dismissed, retrenched or whose services were terminated and they were not able to find any support, from their fellow-workman and/or the union. This gave the need to engraft a new definition, as is given in Section 2A, to treat the individual disputes as Industrial disputes in specified cases.

Definition given in Section 2A lays down that —

1. Where any Employer (a) Discharges, (b) Dismisses, (c) Retrenches or otherwise (d) Terminates the Services of an individual workman.
2. and if any dispute or difference on such discharge, dismissal, retrenchment or termination then.
3. that dispute/difference shall be **DEEMED** to be an 'Industrial dispute'.
4. notwithstanding that no other workman or any union of workmen is a party to the dispute.

Section 2A only introduces a fiction to the effect that an individual dispute connected with 'discharge', 'dismissal', 'retrenchment' or 'termination' is "Deemed" to be "industrial dispute" by this artificial measure; notwithstanding the fact that no other workmen espouses such a dispute.

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[20] *Dimakuchi Case* (1958 I LLJ 500.

The Apex Court[21] upheld the constitutional validity of Section 2A.

Despite a workman is dead, the "Industrial dispute" under Section 2A continues and the legal heirs can continue after his demise[22]. If there is a change in management then also the dispute does not come to an end it has to be adjudicated[23].

Workman – Section 2(s).

At the outset, it must be noted that the definition of 'Workman' given in Section 2(s), along-with the definition of 'Industry' given in Section 2(j) and the definition of 'Industrial dispute' given in Section 2(k), really forms the basic tripod on which the super structure of the entire Act rests.

Definition may be summarized thus:

1. Any person employed to do any (a) skilled (b) unskilled (c) manual or (d) clerical (e) Supervisory and (f) Technical nature of work is workman under the Act.
2. It is wholly immaterial whether the terms of employment are expressed or implied.
3. The definition includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.
4. Any person employed in Army, Police, Supervisory and Managerial personnel are excluded.

With the above parameters, and plethora of Courts rulings, the following may be noted to ascertain whether a person is 'Workman' or not under the Act.

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[21] *Delhi Cloth & General Mills Ltd. v/s Shambunath Mukherjee,* 1977 LIC 1695.

[22] *Rameshwar Manjhi v/s Mgt. Sangramgrah Colliery,* 1994 I CLR 9.

[23] *N.T.C. (Delhi, Punjab & Rajasthan) v/s Sayar,* 1994 II CLR 215.

1. Nature of work is really the relevant factor and not the Designation or the nomenclature[24] is of any consequence while deciding the status of person.
2. Can he (person claiming to be workman) bind the Employer to some kind of decisions on behalf of Employer/ company?
3. To find out the dominant purpose of Employment (and not additional duties) the employees may be performing.
4. Has the Employee power to recommend or sanction leave?
5. Has he power to take disciplinary action against workman or to terminate their services?
6. Has the employee power to direct or oversee the work of his subordinates?
7. Whether the Employee can examine quality of work to ascertain whether it is performed satisfactorily?
8. Whether he has power to assign duties?
9. Can he indent materials and distribute them amongst workmen?
10. Are there persons working under him?
11. Has he power to supervise work of men and not mere machines?
12. Whether Employee marks attendance of the workmen?
13. Whether he writes confidential reports of his subordinates?

Excluded

The definition specifically excludes four types of employees:

1. Any person who is subject to the Air Force Act, 1950, or Army Act, 1950 or Navy Act, 1957.
2. Any person employed in police service or as an officer or other employees of a prison.

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[24] *C. Gupta v/s Glaxo Smithkline Pharmaceuticals Ltd*. (2007) 7 SCC 171

3. Any person employed in managerial or administrative capacity or
4. Any person employed in supervisory category drawing wages exceeding ₹ 10,000/- P.M.

The "Exclusion" clause in the definition is in two parts; one is **specific**, the other one is **implied**. The categories specifically excluded are enumerated above. **By an implication** also an employee is excluded, if he does not perform any of the types of work stated in the definition.

Technical

In order to fall under the term 'Technical' it is not necessary to have any technical education. What is important is that the employee should possess such faculties which would enable him to produce something as a creation of his own. Nevertheless, even if a person is doing technical work yet he may not be 'Workman' if he is:

(i) employed mainly in managerial or administrative capacity or

(ii) being employed in supervisory capacity and draws wages exceeding ₹ 1,600/- per month or

(iii) exercises (either by nature of duties attached to the office or by reason of the powers so vested), functions mainly of managerial nature.

Supervisory Work

The word 'Supervision' means to over see or to look after. It means an employee in a higher position over the employees in lower position and the term is not used in relation to the supervision of an automatic plant. The Apex Court[25] held that 'Supervision' really means that the person exercising supervisory work is required to control men and not machine. It also held[26] that some incidental or a

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[25] *Tilaghur Paper Mills Co. Ltd. v/s I.T.,* 1982 LIC 307

[26] *Bellish India Ltd. v/s P.P.L.C.,* 2003 I CLR 463

small fraction of supervisory work will not take the workman out of the purview of workman. It is only the persons employed in supervisory capacity drawing wages exceeding ₹ 1,600/- per month or performing mainly of managerial nature who have been excluded from the definition.

Apprentice

A person is appointed as an apprentice to learn a trade. It is not obligatory upon the Employer to give employment on completion of the apprenticeship. Both parties (Employer and Apprentice) are free to choose their future course of action. However, the ID Act specifically includes apprentice in the definition of workman. The Apex Court[27] held that as ID Act treats apprentice as workman and the Apprentice Act does not, it is necessary to hold inquiry and determine whether in given case, an apprentice falls in the category of workman.

Public Utility Service – Section 2(n).

The 'Services' which 'Public' utilize the most are the 'Public Utility Services'. The services or the industries which affect the life, safety or well being of the public or the public life is likely to be dislocated by such services/industries, are treated as the 'Public Utility Services. Public utility service are enlist in First Schedule of the Act in which Railway, AIR, Public Bus, Major Ports, Post, Telegraph, Telephone, Water, Electricity and the Sanitation are treated as public utility services. But if the appropriate government intends to add to the list of public utility services in the said Schedule then it has issue Notification to that effect and has to satisfy the following requirements:

(1) It must be "industry" within the meaning of Section 2(j).

(2) The appropriate Government must satisfy itself that it is in public interest to declare any scheduled industry as the public utility services.

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[27] *National Small Ind. Corpn. Ltd. v/s V. Laxminarayana*, 2007 (1) 214

(3) The Notification must be published in the official gazette.

(4) The period to treat the industry as public utility services must be specified. But period should not exceed six months in the first instance.

(5) The period can be extended after six months. But each time appropriate Government must apply its mind and must satisfy itself that it is in larger public interest to treat it as public utility services.

Act then gives the following special treatment to such 'P.U.S':

(1) It is obligatory on conciliation officer to hold conciliation proceedings.

(2) It is mandatory upon Appropriate Government to make a reference of the industrial dispute if it relates to public utility service.

(3) Special provisions for strike and lock outs are laid down for public utility services.

Wages – Section 2(rr).

Traditionally, the word 'wages' means an amount paid periodically – hourly, daily weekly, monthly etc. to a person employed by the Employer for the work done for the Employer. But not accepting this traditional meaning, the legislature has given an artificial meaning to the word 'wages'. It is now so skillfully defined to connote as well as denote. As a result, the term includes much more than what is traditionally included in the word wages. The omnibus definition takes into its fold not only the actual wages (or remuneration) but also the 'allowances'.

As for the 'allowance', it may be of interest to know that after the Second World War living became very costly (dear). In order to compensate this dearness (costliness), the workers were begun to be paid 'Dearness Allowance', nicknamed as 'DA'. This DA was paid along with wages (or remuneration) in the fond hope that one day the cost of living will fall down and so the DA will disappear. But

contrary to the popular belief, the cost of living never came down and so DA never disappeared but came to stay permanently.

The term 'wages' includes:

(i) All remuneration (capable of being expressed in terms of money) payable to workman for the work done (for the employer). This really is the **denotation** of the term wages or **what it denotes.**

(ii) Certain allowances and amenities are included. In fact, that is the **extended connotation** of the word wages and

(iii) Excludes are the three payments – Bonus, P.F. or the like and Gratuity.

3. NOTICE OF CHANGE

Introductory

How an industrial dispute is prevented? Ofcourse, by preventing a unilateral change – in the existing working system. But if the Employer, in his good wisdom considers that change is absolutely necessary to run the business profitably and/or in businessman like manner, it is necessary that he, the employer, gives a 'Notice' to his employees for the 'Change' he proposes to be brought about in the existing working system[28]. This approach of Industrial Employer would reflect his harmonious and sympathetic cooperation in improving the status and dignity of the industrial employees in accordance with egalitarian and progressive trend of our industrial jurisprudence.

The provisions of this Section 9A are **mandatory.** The Section contemplates three stages:

(1) Proposal to effect a change

(2) Time when the Employer gives a **Notice of change** and

(3) When he effects the change.

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[28] *Tata Iron and Steel Co. v/s Workmen,* 1972 II LLJ 259.

Notice of Change in Conditions of Service

The Employer is prohibited from (1) giving effect to any change in (2) Service Conditions in respect of (3) matters specified in Schedule IV (4) without giving any Notice of Change (5) to workmen likely to be affected by the change. The Notice of Change has to be in the prescribed manner and for duration of 21 days. Necessarily, therefore, a change should have been brought the matters specified in Schedule IV of the Act. Schedule IV refers to matters, such as:

(1) Wages and mode of payment of wages

(2) PF, pension or other contributions by Employers

(3) Compensatory and other allowances

(4) Hours of work and rest intervals

(5) Leave and Holidays

(6) Shift working

(7) Grade classification

(8) Withdrawal of customary concession, privilege or change in usages

(9) New rules of Discipline or change in existing ones.

(10) Rationalization, standardization or improvement of plant or technique which is likely to lead to retrenchment; and

(11) Increase or decrease of in labour force (other than casual labour/workmen).

Section 9B.

The Appropriate Government is invested with powers under Section 9B to exempt workmen or certain class of industrial establishments from the application of Section 9A of the Act. But to fall under Section 9B of the Act, the Appropriate Government has to form its **opinion** that otherwise (1) serious repercussions may ensue or (2) that it is in public interest to do so and (3) notifies in the Government Gazette.

4. STRIKES AND LOCK OUTS

A. Strike

Strike is **concerted refusal to work** on the part of workmen who are in a particular vocational area. It is the popular belief is that in 'Strike' workers keep away from work-place. No doubt that is so but there are other forms also of resentment, dissentment and refusal of work. Those are: Stay-in, Sit-down, Tool down, Pen-down, Goslow and so on. Whatever name one may give to a particular form of agitation of workmen, if it falls within the mischief of definition of Strike given in the Act, it is 'Strike' notwithstanding the fact that it does not carry the brand name 'Strike' – otherwise, it is not 'strike' even if one calls it 'Strike'. Section 2(q) of the Act defines it as under:

'Cessation of Work' by a Body of Persons – employed in any industry – acting in combination or a concerted refusal or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment.

The essential ingredients of 'Strike' defined in Section 2(q) are as under:

(a) Industry (any industry)

(b) Cessation of work

(c) Concerted refusal of work

(d) Cessation or refusal of work must be in defiance of Employer's authority and

(e) Relationship of Master and Servant.

Needles to record that cessation of work must be *in any industry*. If it is not 'industry', it is no strike, even if other ingredients of strikes are present or satisfied. Further, in 'cessation of work' there must be:

- stoppage of work or
- refusal to continue to work or
- refusal to accept work.

'Refusal' or 'Cessation' by itself is not sufficient to fall within the mischief of the definition of strike and something more is necessary because, mere presence of workmen can be said to be the 'striking crowd' in absence of any satisfactory proof of their having ceased to work or refused to work.[29] Further, cessation of work must be a concerted action or that the refusal of work must be under a common understanding by persons employed by the Employer. Surely, therefore, a combined or a joint-action of workers is most essential and vital ingredient in the definition. 'Cessation of work' must be in defiance of the employer's authority. But question of defiance of the Employer's authority will arise only when Employer has a legal right to ask his employees to work. If an employer has no right, in law, to ask his employees to work and yet he asks his employees to work, such a refusal, even if a concerted action, would not amount to a strike[30].

The use of expression 'persons employed' in the definition is a sure indication that there must be a 'Contract of Employment' or there must exist relationship of 'Master and Servant'. The Contract of Employment, in turn, leads to reading a condition – express or implied – that workman will work. Unless, there is a condition to work, there cannot be a cessation of work. And unless, there is a cessation of work, there cannot be a strike.

Legal and Illegal Strikes

The Act lays down as to in which cases workers' strike is 'Strike' under the Act. The Act also lays down the pre-conditions or 'Conditions Precedents' for going on strike. If these pre-conditions are not fulfilled 'Strike' is '**Illegal Strike**' but if no illegality is attributable, it is the '**Legal Strike**'. Conditions for going on strike are laid down in Sections 10(3), 10(A), 22, 23 and 24 of the Act. Thus, even if it is **Strike** under Section 2(q) yet it may not be a

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[29] *O.K. Ghosh v/s E. X. Joseph,* 1962 II LLJ 615.

[30] *North Brook Jute Co. Ltd v/s Their workmen,* 1960 I LLJ 580 (584).

'*Legal*' strike unless all condition precedents for going on strike are complied with.

The strike is illegal:

1. If it is in breach of Contract of Employment.
2. If it is in Public Utility Services.
3. If Strike 'Notice' is not given.
4. If commenced during Award or settlement period.
5. If commenced **During** or **within 7 days** of completion of Conciliation Proceedings.
6. If commenced **During** or **within Two months of completion of Adjudication Proceedings**.

Constitutionality

The workers in a democratic state have a right to Strike to withhold their labour in order to express their grievance or to make certain demands. **Thus a Strike is a necessary safety valve in industrial relations.** Nevertheless, it is not a fundamental right[31]

B. Strikes in Public Utility Services

The Act draws a clear distinction between Strikes in ordinary industrial occupations and Strikes in Public Utility Services. Legislative intention is undoubtedly clear that a few cannot hold the innocent public at ransom by resorting to a strike, all of a sudden and out of blue. The Act has imposed a mandatory condition of giving Notice in public interest. Not only that it is mandatory for workman to give Notice but also the Appropriate Government is put on high alert and makes it mandatory for it to initiate Conciliation Proceedings and, if no settlement is reached, to make a reference of 'industrial dispute' for adjudication.

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[31] *(1) Radhey Shyam Sharma v/s Post Master General, AIR* 1965 SC 311 *(2) AIB Employees Association v/s IT, AIR* 1962 SC 171, *(3) Kameshwar Prasad v/s State of Bihar AIR,* 1962 SC 1166.

Section 22 of the Act lays down that:

(i) No person employed in Public Utility Service shall go on strike in breach of contract of employment:

(ii) Without giving Strike Notice.

(iii) Within 6 weeks of giving such Notice. It means that workmen cannot go on Strike after 6 weeks on the spacious ground that they had already given Notice before 6 weeks. In other words, the validity of the Strike Notice is only for a period of 6 weeks.

(iv) Within 14 days of giving such Notice. It means that workmen cannot immediately and forthwith go on Strike after giving the Strike Notice. They have to 'wait and watch' for a period of 14 days before commencing Strike. Effect of it is that workmen cannot go on strike immediately (or within a period of 14 days) after giving Notice of Strike.

(v) Before the expiry of the date of Strike specified in the Notice. For example, Strike Notice states that workers will go on Strike on and from 1st May – period of more than 14 days. Workers then cannot go on strike after 14 days as it will be contrary to their Notice of Strike. OR

(vi) during the pendency of any conciliation proceedings and 7 days after conclusion of such proceedings.

C. Lockout

Strike is 'Cessation of Work' by Employees; Lockout is 'Cessation of Work' by Employers. Just as Employees have a right not to sale their Labour, the same way the Employer has a right not to buy it, as a measure of settling the industrial dispute. In the struggle between the Capital and Labour the weapon of Strike is used by the Employees, the weapon of Lockout is used by the Employers. **The Lockout thus is antithesis of Strike**.

The object and reasons for which Lockout are prohibited are the same on which Strikes are prohibited. It is because the Employer and the Employees are not discriminated in their respective rights in the field of industrial relationship between the two. Thus what holds good-bad; legal-illegal, justified unjustified for Strikes, holds the same for the Lockout. As such, the provisions of the Act which prohibit the Strike also prohibit the Lockout. Lockout if not, in conflict with legal provisions is legal.

Section 2(*l*) defines Lockout as

"Temporary closing down of a place of employment or the suspension of work or the refusal by an employer to continue to employ any number of persons employed by him."

When Employer closes ***temporarily*** his place of Employment in order to force his employees to accept a compromise favourable to him on an Industrial dispute raised by his employees it is called as ***'Lockout'***. The Lockout can thus be described as temporary withholding of work by employer, undoubtedly to gain certain concessions from his unwilling employees. It is usually a counter blast by Employer to a Strike by employees and so the antithesis to Strike[32].

The phrase "Refusal by an Employer to continue to employ" corresponds to the phrase "Cessation of work" or "Refusal to continue to work or employment" occurring in the definition of Strike. The words "refusal by an employer to continue to employ any number of persons employed by him" has to be read with the rest of the definition and also with the word Lockout[33].

The Apex Court[34] held that if workmen had worked or had reported for duty during the period of lockout which was illegal then such workers are entitled for wages for the said period.

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[32] *Kairbetta Estate*, 1960 II LLJ 275.

[33] *Feroz Din v/s State of W.B.*, 1960 I LLJ 244.

[34] *Hindustan Fasteners (P) Ltd. v/s Nasik Workers Union*, (2007) 11 SCC 660.

Section 23 imposes general restriction on Strikes and Lockouts as under:

1. No strike or Lockout during and till expiry of 7 days of the conclusion of conciliation.
2. No Strike or Lockout during and 2 months after the conclusion of adjudication proceedings.
3. No strike or Lockout during and 2 months after the conclusion of Arbitration; and
4. No strike or Lockout during the period of operation of a Settlement or Award as the case may be.

The avowed object and purpose of the Act is to achieve peaceful solution of all Industrial Disputes and for that purpose, it has created (**1**) Conciliatory and (**2**) Adjudicatory machineries under the Act. But these machineries cannot work peacefully and in a tension free atmosphere if Strike or Lockout is looming large from the back. Therefore, in order to give full freedom to Conciliatory and Adjudicatory machineries in their work, it is necessary that Strikes and Lockouts are prohibited during the time this machinery is at work. Accordingly, the legislatures have invested powers in the Appropriate Government to prohibit Strikes and Lockouts pending the Conciliation and Adjudication. Undoubtedly, it is not mandatory upon the Appropriate Government to issue prohibitory orders prohibiting Strike/Lock-out during the pendency of Conciliation or Adjudication Proceedings. It is thus entirely at the discretion of Appropriate Government, to issue such prohibitory orders, however, before issuing any such prohibitory orders, three ingredients must be present:

1. An industrial dispute must have been referred to a Board or Court or Tribunal or National Tribunal.
2. Strike or Lockout must be in connection with the industrial dispute pending before the Board, Court, Tribunal etc. and
3. The Strike or Lockout must be in existence on the date, on which reference is made.

It is worthwhile to note that if workers go on Strike after fulfilling all conditions precedents, it will be legal Strike. But whether it is justified or unjustified is entirely a different issue altogether. There may be a legal Strike yet it may not be justified Strike. On the other hand, there may be illegal Strike, yet it may be justified strike. The concept of justified-unjustified Strike is completely novel and unknown; however, recently it is pressed into use to resolve the question of quantum of wages for the strike period. In awarding punishment courts have always looked to the aggravating and/or extenuating circumstance. Therefore, when a question is posed to the court; can workers be punished for going on Strike? The courts have considered the aggravating or extenuating circumstances, namely is the strike justified or unjustified? The answer modulated the punishment. That is how the issue of justified and unjustified Strike becomes relevant in modern times where workers have a freedom to going on Strike unlike ancient time when Strike was a criminal offence.

Courts have held the strike justified in the following case.

1. Demand of workers is of urgent and serious nature[35].
2. Reasons for going on Strike are not perverse or unreasonable.
3. No evidence of workers resorting to force, violence or sabotage[36].
4. Legitimate benefits are denied[37].

The Apex Court[38], while considering the order of Industrial Tribunal in which it was observed, that although the Strike was illegal, it was 'perfectly justified' took strong exception and queried how an illegal Strike could, at the same time, be justified. In the later ruling, Apex Court[39] held that illegality of Strike does not, per-se,

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[35] *Chandramalai Estate v/s Its Workers*, AIR 1960 SC 902.

[36] *Crompton Greaves Ltd. v/s Workmen,* 1978 II LLJ 80.

[37] *Amlendu Gupta v/s LIC.,* 1982 II LLJ 332.

[38] *General Navigation &Railways Ltd. v/s Their Workmen,* 1960 I LLJ 13.

[39] *Gujarat Steel Tubes v/s GST Mazdoor Sabha,* 1980 I LLJ 137.

result in unjustifiability. But if this view has to prevail then provisions in Section 22, 23 of the Act go redundant and infructuous. Therefore, a close scrutiny of the Apex Court is very much necessary and awaited.

A two member Bench of Apex Court[40] had held that workers are not entitled to wages if they have gone on Strike and have not worked. But the earlier Bench of three judges had taken the contrary view[41].

In one case, Employer chargesheeted all workmen who had had gone on illegal Strike. Those workmen who tendered apology were let off with warning letter but those who did not tender apology were dismissed. Apex Court[42] upheld dismissal. Court took the view that all persons did not stand on the same footing and hence same yardstick cannot be applied. It cannot be said that employer had discriminated against the respondent.

For Lockouts also the courts have adopted the same technique of apportioning the blame between the Employer and employees, so to say, concept of Justified and unjustified Lockout comes into operation. If Strike is unjustified followed by justified Lockout, the workmen will get no wages at all. Conversely if Strike is legal and Lockout is unjustified, the workmen will get the full wages for the period of strike-Lockout. However, where Strike is illegal followed by an illegal Lockout, the question of apportionment will arise[43].

D. Penalties

Section 26 prescribes penalty for, both, Strike and Lockout. However, before any punishment is imposed, it **must be proved beyond all reasonable doubt** that:

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[40] *Bank of India v/s T.S. Kelawalla,* 1990 ICLR 748.

[41] *General Navigation &Railways Ltd. v/s Their Workmen,* 1960 I LLJ 13.

[42] *Madurantakam Coop. Sugar Mills Ltd. v/s Vishwanathan,* (2005) 3 SCC 193.

[43] *India Marine Services (P) Ltd. v/s Their Workmen, AIR* 1963 SC 528.

1. A workman has in fact commenced or continued or has otherwise acted in furtherance of a Strike OR Employer has commenced or continued or has acted in furtherance of a Lockout; and
2. The Strike or Lockout is illegal. The illegality must be proved strictly with reference to the provisions of the Act and the *mens-rea* on the part of a workman or an employer is wholly irrelevant and immaterial.

   These two ingredients must co-exist and only if these two ingredients are present then:

   (a) Workman shall be punishable with imprisonment for a term upto **one month** or with fine which may extend upto **Fifty Rupees** or with **both**.

   (b) Employer shall be punishable with imprisonment for a term which may extend to **one month** or with a fine which may extend to **Rupees one thousand** or **both**.

5. LAYOFF, RETRENCHMENT AND CLOSURE

A. Introductory

It is not that Employers were not resorting to Layoffs, Retrenchments or Layoffs but there were no provisions. Whatever may be the justification of resorting to Layoffs, Retrenchments or Closures, the inevitable and unavoidable result was sudden unemployment with one stroke of pen. To meet with such sudden unemployment with a stroke of pen, Legislatures amended the Act in 1953 and engrafted one whole Chapter V-A. By this amendment, for the first time in India, the whole concept of Industrial Law was revolutionized, updated, terms like Layoff, Retrenchment were defined and Compensation for the same were **standardized**. A time came when there was spate of large-scale layoffs, retrenchments and closures. It was causing concern because it was causing large-scale unemployment in the locality resulting in demoralizing effect on

workmen. Necessarily, therefore, it was considered necessary to have checks and prevents on large scale Layoff, Retrenchment and Closure. Therefore, some amendments were made in 1972 and finally the Legislatures engrafted one another Chapter V – B in the Act in 1976. By these amendments, Employers employing fifty or more persons were cast with the duty to give sixty days Notice to Appropriate Government to enable the Appropriate Government to take remedial measures. But the powers vested in Appropriate Government were so very wide and sweeping that the Courts in diverse cases found them unconstitutional. As such, again the Act was amended in 1982 and again in 1984.

Chapter V – A has the following provisions:

Section 25 A	No Compensation if less than 50 workmen are employed in any Industrial Establishment.
Section 25 B	Defines 'Continuous Service'.
Section 25 C	Entitlement of Layoff Compensation,
Section 25 D	Prescribes maintaining of muster roll.
Section 25 E	Disentitlement of Layoff Compensation.
Section 25 F	Conditions Precedent for Retrenchment.
Section 25 FF	Transfer of 'Undertaking'.
Section 25 FFA	60 days Notice to Government for Closure.
Section 25 FFF	Closure Compensation.
Section 25 G	Last Come – First Go.
Section 25 H	Re-employment on restarting.
Section 25 I	Omitted by Act of 1956 from 10-3-1957.
Section 25 J	Laws inconsistent with Chapter V-A will have no effect.

Chapter V – B has the following provisions:

Section 25 K	Chapter will apply only to 'Industrial establishments' (1) employing less than 100 workmen and (2) not of a seasonal character.
Section 25 L	Term 'Industrial establishment' is especially defined for chapter V-B.
Section 25 M	large-scale Layoffs are prohibited in Industrial establishments without prior permission of appropriate government.
Section 25 N	large-scale Retrenchments are prohibited in Industrial establishments without prior permission of appropriate government.
Section 25 O	large-scale Closures are prohibited in Industrial establishments without prior permission of appropriate government.
Section 25 P	Special powers are given to appropriate government to restart the Industrial establishments which are closed down in larger public interest.
Section 25 Q	Penalty is prescribed for Layoffs and Retrenchment in violation of Chapter V B.
Section 25 R	Penalty is prescribed for Closures in violation of Chapter V B.
Section 25 S	Certain provisions to apply to Industrial establishments to which **Chapter V B** applies.

B. Layoffs

When Employer decides to discontinue his business **forever** it is **Closure** but when he decides to discontinue his business, not forever but for a short while, in order to tide over his difficulties, it is called as **Layoff**. In Layoff, Contract of employment goes under *suspended animation* or the relationship is kept in cold storage. The workmen continue to be on the muster roll but the employer suspends the

contract for the time being. The relationship (of master and servant) is resumed as soon as the work is resumed by the employer. Thus, the Layoff is a temporary suspension of work and it is resumed as soon as the circumstances permit the employer to do so. It means that the Employer cannot keep away the workman for an indefinite period in the garb of Layoff or cannot breach the contract of employment. But the period has to be temporary. But can 'temporary' period be 'indefinite' period? The Act is completely silent on this issue and all will depend upon the facts of each case.

(i) Definition – Layoff

Layoff is defined in **Section 2** (**kkk**). Briefly, it says:

Layoff means failure, refusal or inability of Employer to give employment to workman whose name is on the muster roll. Failure, Refusal or inability to give work must be for shortage of coal, power or raw materials or accumulation of stocks or breakdown of machinery or natural calamity or any other connected reason. EXPLANATION – workman must present himself for work at the appointed time and place and if no work is given within two hours, he shall be deemed to be laid off for the whole day PROVIDED that workman is asked to come in the second half of the day/shift. If he accordingly reports and work is given to him, he shall be deemed to have been laid off only for the half-day. PROVIDED FURTHER – if workman is given work elsewhere instead of his usual place work, he shall not be deemed to have been laid-of for the half day/shift and he will be entitled to full wages and Dearness Allowance for that part of the day.

Definition makes it abundantly clear that Employer's refusal to give work must be for:

- Shortage of coal
- Shortage of power (Electricity)
- Shortage of raw material
- Accumulation of stocks

- Break down of machinery
- Natural calamity
- *Force-Major* and
- Any other connected reason.

The Apex court held[44] that it is impossible to hold that supplies mean the supply of money or funds but refusal to give work on account of death of Director, Old age of Director falls under the definition of layoff[45].

The explanation contemplates three different eventualities:

(a) Workman presents himself for work and the work is not given.

(b) Employer in first half of the day/shift directs workman to come in the second half of the day/shift and he is given work.

(c) Workman accordingly comes in second half and yet he is not given work.

It should be clear from explanation that workman has to come for work and he has to be given work within two hours otherwise he will be **deemed to be laid off for the whole day**. In the second eventuality, workman is called in the second half of the shift and workman accordingly presents himself. If he is given work, he is deemed to be laid off for first half of the shift or for half day. But if Employer is not able to provide work in the second half also then Workman will be entitled to **full basic wages and the Dearness Allowance** for that part of the day.

(ii) Layoff Compensation

Section 25 C requires that workmen who are laid-off must be paid Layoff Compensation. However, **Section 25E** carves out exceptions and absolves the Employer from giving Layoff

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[44] *Workmen of Dewan Tea Estate v/s DTE, AIR* 1964 SC 1458.

[45] *Gauhati Press (P) Ltd. v/s P.O.L.C.* 1983 LIC 824.

Compensation. Thus under Section 25C workmen are **entitled** to and under Section E **disentitled** to receive Layoff Compensation. Whereas Section 25D requires the employer to maintain Muster-roll and Section 25 A lays down that it is not obligatory to pay Layoff Compensation, if on an '**average**' less than fifty workmen are deployed in the preceding calendar month.

Muster-roll is the 'record' that enables the employer to compute the amount of Layoff Compensation. The failure of the employer to maintain the muster roll attracts penalty under Section 31 of the Act and debars Employer from taking advantage available under the Act.

Section 25C provides for Layoff Compensation equal to 50% Basic Pay + D.A. for days during which workman is laid-off **except** for the intervening holidays. Workman can recover it if employer fails and neglects to pay it.

Section 25E refers to **disentitlement** to recover Layoff Compensation if:

1. Workman refuses to accept alternate employment Alternate employment must be:
   (a) In the same establishment from where he is sought to be laid off to OR
   (b) In any other establishment belonging to the same employer either:
      (i) Situated in the same town or village OR
      (ii) Situated within a radius of five miles from the establishment to which he belongs OR
   (c) In opinion of the employer, the alternate employment does not call for any special skill or previous experience and can be done by the workman to be laid off.
   (d) The alternate employment should not reduce the status, benefit and wages of the workmen to be laid off.
2. Workman defaults to present himself for work and
3. Layoff is on account of strike or go-slow.

It means Workman **disentitles** himself for his bifurcate. (1) own default (a) default in accepting alternate employment or (b) default in presenting for the work and (2) for the default of his co-workman inasmuch as his fellow workmen are on strike or Go Slow. Thus, Default may be:

1. On account of not accepting alternative employment
2. On account of not presenting for the work and
3. By co-workmen when they refuse to work either by going on strike or Go-Slow.

(iii) No Liability to Pay Layoff Compensation

No liability of Layoff Compensation if:

(a) Employee is not a 'workman' as defined in Section 2(s) of the Act.

(b) Workman' under section 2(s) of the Act but a 'Badli' or 'Casual' who has not completed one year of continuous service.

(c) Less than 50 workmen on average are employed.

(d) Provisions of Section 25E are attracted.

(e) Industrial Establishment is of a 'Seasonal' character or work is performed intermittently.

(f) Industrial Establishment is not a:

(i) Factory under the Factories Act, 1948.

(ii) Mine under the Mines Act, 1952. and

(iii) Plantation under the Plantations Labour Act, 1951.

(g) Provisions of **Chapter VB** are applicable.

(h) Workman has not worked for continuous period of 240 days.

(i) **Contract of Employment** or the **Standing Orders** does not provide for Layoff.

(j) Workman's name is not on the muster roll of the employer or he is retrenched.

(k) Employer and Workman have agreed that no Layoff Compensation will be payable after 45 days and Layoff goes beyond 45 days.

(l) Layoff lasts for more than 45 days in twelve months (Employer is free to retrench his workmen).

(m) Act only requires Employer to **pay** Layoff Compensation and does not require him not to Layoff.

C. Retrenchment

Termination of surplus labour force in a running business is Retrenchment. In other words, Retrenchment is **termination of services**. However, it may clearly be noted that Termination of Service' can be effected in various ways, such as by way of:

1. Punishment – Dismissal.
2. Not for Punishment – Discharge – Simplicitor.
3. Retirement – Superannuation.
4. Resignation – Abandonment of service and also.
5. Retrenchment etc.

But every Termination of Service is not retrenchment. Apex Court held[46] that retrenchment does not include dismissal.

Employer when takes stock of his work-force and finds that more employees than necessary are deployed then, as a prudent businessman, he terminates services of all such surplus labour force. Such termination of surplus labour force in a running business, in legal phraseology, is called as the **retrenchment**.

(a) Definition – Retrenchment

The Definition, in substance, states that *retrenchment* is termination of services for any reason whatsoever but does not include termination by way of (**a**) Punishment (**b**) Voluntary Retirement (**c**) Superannuation (**d**) non-renewal of contract of

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[46] *Maharashtra State Seeds Corpn. Ltd. v/s Vilas,* (2005) 12 SCC 422.

employment (**e**) Continuous ill-health or (**f**) termination of services (i) for non-renewal of contract of employment or (ii) in accordance with a condition in Letter of Appointment (Contract of Employment). Definition really stands in two parts:

A. In the first part it lays down as to what retrenchment means and

B. In the second part it excludes termination of services from the ambit of retrenchment.

The words 'any reason whatsoever' deployed in the definition are the key words. The Apex Court held[47] that in retrenchment business itself is continued but a portion of the staff or the Labour force is discharged as surplusage but termination as a result of Closure does not come within the mischief of the term 'retrenchment'. The Apex Court[48] held that ALL terminations are retrenchment **EXCEPT** terminations falling in excepted categories, namely, terminations by way of punishment, voluntary retirement, superannuation, or continued ill health. Wider connotation was adopted by The Apex Court on the ground that definition deploys the expression 'for any reason whatsoever. Therefore, in order to restrict and control expression 'for any reason whatsoever' Legislature amended the definition. As a result, (1) termination of services as a result of non-renewal of contract (of employment) on its expiry and (2) the termination of service in accordance with the condition stipulated in the contract of employment stand excluded.

The Contract of Employment is the corner stone in industrial jurisprudence. The Contract of Employment means and includes (1) Letter of appointment (2) certified standing orders or in its place (3) the model standing order. In Government and allied organization, in place of standing order, the Service Rules govern the conditions of employment. Service Rules very often provide for termination upon one month's Notice or without Notice but on payment of month's

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[47] *Pipraich Sugar Mills Ltd. v/s PSM Mazdoor Union* 1957 I LLJ 235.

[48] *L. Robert D'souza v/s Ex. Eng. S. Rly.,* 1982 LIC 811.

salary in lieu of Notice. As for termination without Notice, the Apex Court[49] held that such a provision is Henry VIII clause and unconstitutional. However, the Apex Court[50] upheld that simply because sub-clause (bb) is misutilized or misused, it can not be said that the provision is arbitrary or violative of Articles 14, 19, 21, 23 and/or 39 of the constitution of India.

At the cost of repetition, it may be stated that prior to amendment, concept of retrenchment was unknown, atleast in India. Firstly, it was taken cognizance and defined in Section 2(oo) then under Section 25 F, it was made **compulsory and mandatory** for the employers intending to effect retrenchment to first pay compensation at a prescribed rate if the workman has completed continuous service of one year. Section 25F of the Act lays down that:

1. One Month's Notice (of Retrenchment) must be given to the workman who is to be retrenched.
2. The Notice of Retrenchment must be in writing. Notice under reference must clearly indicate the reasons for retrenchment. Reasons given in the Retrenchment Notice for retrenchment must be real and genuine. Alternatively, the Employer is given freedom to pay one Month's Wages in lieu of Notice. Either one month's Notice or wages in lieu thereof and not both.
3. The Notice of Retrenchment must record the reasons for retrenchment.
4. The Period of one month must expire OR, alternatively, one-month's-wages must have been paid in lieu of Retrenchment Notice.
5. The workman must also be paid the Retrenchment Compensation at the prescribed rate.
6. The Payments to workman (referred to 4 and 5 above) must be paid at the time of retrenchment and not after the

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[49] *Central Inland Water transport Corpn. v/s Brojonath, AIR* 1986 SC 1571.

[50] *Ram Prasad v/s State of Rajasthan,* 92 LIC 2139.

retrenchment. It means making of payments is a **Condition Precedent to Retrenchment**.

7. The Notice in prescribed manner must have been served upon the Appropriate Government or such other authority as may have been specified by the appropriate government.

Retrenchment Compensation has to be paid:

(i) At the time of retrenchment (and not after the retrenchment)

(ii) Calculated at the rate of 15 days (of average pay)

(iii) For every completed year of **'continuous service'** or

(iv) Any part in excess of six months

Compensation is payable at the time of retrenchment and not after retrenchment is effected. In other words payment of retrenchment compensation is a condition precedent and it is not the condition subsequent. Apex Court held[51] that if conditions precedents are not complied with, retrenchment is non-est or non-existing.

Employer cannot ask the employee to come and collect money. He must tender it together with the letter under which retrenchment is effected. It is for the workman to accept or refuse the payment and employer cannot make the employee to accept payment. He has only to offer the payment. It is sufficient for Employer to offer or tender actual Payment of amount of retrenchment compensation personally or by Money Order or by Bank Draft or by any other recognized means. Acceptance of retrenchment compensation is no bar in raising an industrial dispute on the legality of the retrenchment because, retrenchment which is void ab-initio and non-est does not snap off the relationship of master and servant between the Employer and Workman.

After death of workman, right to receive wages for the period from the date of retrenchment till date of death devolves and passed on to his heirs.

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[51] *Mohanlal v/s Management of Bharat Electronics Ltd.* 1981 LIC 806.

D. 'CONTINUOUS SERVICE'

The magic word is **'continuous service'**. It is explained in **Section 25B** of the Act. The Employer has to pay fifteen days average pay for every completed year of **'continuous service'**. 'Continuous Service' is defined as interruption of service, on account of any of the following reasons, namely,

(a) Sickness

(b) Authorized Leave

(c) An Accident

(d) A Strike which is not illegal

(e) A Lock out and

(f) A cessation of work which is not due to any fault of the workman.

shall be added back in computing the 'continuous service'. This shows that the legislature has carved out an artificial meaning for the benefit of workers sought to be retrenched. The period of one year or six months **means** has worked for

A. period of **one year**

(a) 190 days below ground (in mine) or

(b) 240 days in any other case.

B. period of **six months**,

(a) 95 days below ground (in mine) or

(b) 120 days in any other case.

It should thus be clear that it is not necessary for the workman to work all the days in any given period but he is given liberty to work for less number of days if he is sick, on authorized leave or if he has met with accident or if there is a strike (which is not illegal) or if there is cessation of work not on account of his fault. Further, workman is required to work for 240 days instead of 365 days in a year (or 190 days if he is working below ground). Really speaking, the workmen do not 'actually work' on holidays and/or Sundays.

Therefore one may be led to believe that while computing 240 days on which 'workman has actually worked', Sundays and Holidays will have to be excluded. But that is not so. The expression 'has actually worked' has to be construed liberally. The expression takes in its fold the notional presence, such as Sundays and gazetted Holidays. It is also made explicitly clear that interruption caused by strike will be condoned only if it is not illegal. Necessarily, therefore, if strike is illegal, it must be taken as 'interruption' in service.

(a) Retrenchment Compensation (RC)

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[52] *Mohanlal v/s Management of Bharat Electronics Ltd.* 1981 LIC 806.

E. Closure

The term 'Closure' is defined in **Section 2(cc)** to mean `the permanent closing of a place of employment or part thereof'. Thus a Closure may be of the entire undertaking or even a part of it. But a partial Closure must be of such a part of the undertaking that the closed part has the independent functioning.

(a) Closure and Lockout – Distinction

In Closure, Employer closes down his business permanently, finally and irrevocably. There is no **intention** on his part to restart the work. But in Lockout Employer does not and has no intention to close down the business ***itself***. No doubt in Closure and in Lockout Employer stops his business and so he closes his business. But in Lockout, he closes it down only the business **premises *temporarily*** whereas in Closure, the **business itself** is closed down **permanently**.

Closure does not by itself bring about termination of services of the Employees because **contract of service** does not automatically stand terminated just because the company stops its activities. In order to terminate services, it is absolutely necessary that a Notice is given to the Employees whose services are desired to be terminated. The Notice of termination may be given individually or collectively but a notice is a must[53].

(b) Closure Compensation

By Section 25FFF Legislatures provide for (1) Notice for the intended Closure and (2) Compensation to workmen who were in continuous service for not less than one year.

The Employer is exempted from the onerous liability of Notice and paying Closure Compensation if Closure is for unavoidable circumstances for the *force-majore*. Following are the circumstances

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[53] *(1) Workmen of Sur Iron & Steel Co. (P) Ltd. v/s Sur Iron & Steel Co. (P) Ltd.,* 1971 I LLJ 570 (Bombay) *(2) D.S. Vasavada v/s PRF Commissioner,* 1985 I LLJ 263 (Guj).

which cannot be called as the unavoidable circumstances beyond the control of the Employer:

1. Financial difficulties/Losses
2. Accumulated stock
3. Expiry of Lease period
4. In case of mining operations, exhausting of minerals in the area of operation.

Section 25FFF provides that in case of Mines, workmen will not be given Closure compensations if minerals get exhausted and as a result, the mining operations have to be discontinued. Exemptions are also given to (1) Buildings, (2) Bridges, (3) Roads, (4) Canals and (5) Dams.

Section 25 FF applies to Transfer of Undertaking. The expression 'industrial establishment or **undertaking**' is defined in Section 2 (ka) but it only lays down that 'Industry' is the whole, 'undertaking' is only a part of it. Section 25FF lays down that

1. Where ownership or management of an undertaking is transferred.
2. Whether undertaking is transferred by agreement or by operation of law but
3. Every workman, in 'Continuous Service' for not less than one year (i.e., 240 days). Needles to record that the provisions of Section 25B (definition of Continuous Service) and Section 25D (maintaining Muster Roll) will come in operation.
4. **shall** be entitled to Notice and Compensation in accordance with Section 25F.
5. Compensation equivalent to 15 days average pay for every completed year of continuous service or any part thereof in excess of six months as is provided under Section 25F.

Compensation need not be paid:

(**A**) if workmen are given continuity of service by the new employer taking over the undertaking.

(**B**) workmen's Service Conditions remain unchanged and

(**C**) in case of retrenchment, workmen will be paid on the basis that his service has been continuous and has not been interrupted by the transfer.

F. Chapter V-B

As already aforesaid, a time came when there were large-scale Layoffs, Retrenchments and Closures. Therefore it became necessary to have checks and prevents on them. As a result, Chapter V-B came to included in the Act in 1976. In the light of this change, the Layoffs, Retrenchment and Closures can now again be seen.

(i) When Chapter V–B comes in Operation?

Section 25K lays down that chapter VB will be applicable to:

1. Industrial establishments in which not less than 100 workmen per working day for the preceding twelve months were working.
2. Industrial establishment is not of a seasonal character in which work is performed only intermittently and
3. Chapter VB is restricted to Section 25K to Section 25S only.

It may clearly be noted that ONLY for Chapter VB, the term Industrial establishment is defined in **Section 25L** and Section 25K clarifies that prior permission is mandatory. Section 25L defines 'Industrial establishment' to mean:

(a) Factory, Mine or Plantation.

(b) 100 or more workmen are employed in Factory, Mine or Plantation.

(c) Factory, Mine or Plantation is/are not of a Seasonal character or where work is not performed only intermittently.

(ii) Prior Permission for Layoffs

It is provided under Section 25M that prior to effecting Layoff, permission of Appropriate Government will have to be obtained. The prohibition for Layoff is only:

(a) for the workman other than a badli workman or a casual workman

(b) for the industrial establishment employing one hundred or more workmen

(c) the industrial establishment which is not of a seasonal character or in which work is performed only intermittently. The Layoff permission need not be taken if it is due to natural calamity, shortage of power, fire, flood, excess of inflammable gas or explosion.

(iii) Application for Permission for Layoff

The Employer has to make an Application for Layoff in the prescribed form in prescribed manner to prescribed authority. The Appropriate Government or the prescribed authority has to:

1. Make such enquiry as it may think fit
2. Give opportunity of being heard to (a) employer (b) workmen and (c) the persons interested in the Layoff (union)
3. Consider
   (a) the genuineness and adequacy for Layoff
   (b) interests of workmen and
   (c) all other relevant factors
4. Records reasons for the order in writing and
5. Communicate the order to the parties before it.

As a matter of fact, provisions for seeking permission, review, deemed permission, finality and penalty are also similar and discussed in the next heading of Retrenchment. Therefore, not discussed here.

(iv) Pre-conditions for Retrenchment

Employer, under Section 25N, is prohibited from retrenching workmen without giving three months Notice or Wages in lieu of Notice (It is well to remember here that under Section 25F, it is only one month's notice or wages in lieu of Notice is necessary whereas, here, under Section 25N, the period of Notice is three months). But more important and material is that the clause (b) requires the Employers to obtain a prior permission of the appropriate Government to effect retrenchment, if he has employed not less than one hundred workmen on an average per working day for the preceding twelve months. Needless to record that Section 25N has to be read with Section 25K and Section 25L.

It must be noted that the Conditions Precedent for retrenchment are three, if Section 25N is to be applicable, viz.

1. Prior permission of appropriate government or deemed permission of appropriate government for retrenchment.
2. Three month’s notice in writing indicating reasons for retrenchment or wages in lieu of such Notice and
3. Payment of retrenchment as specified in Section 25F(b).

It is not necessary to repeat that all the three conditions precedents are mandatory and non-compliance of any one of them will render the retrenchment null and void-ab-initio.

(v) Application for Retrenchment Permission

Application for retrenchment permission has to be made in the prescribed manner to the prescribed authority. Employer has to furnish all information and bring into focus all aspects which the Employer wants to be considered by the prescribed authority. Prescribed authority is then under *statutory obligation* to make an exhaustive enquiry for which it must give ‘hearing’ to (a) Employer, (b) Workmen and/or (c) Union or (d) other persons opposing or interested in such retrenchment. The Prescribed Authority is required to consider:

1. Genuineness of retrenchment
2. Adequacy of reasons for the retrenchment
3. Interests of workmen
4. And all other relevant factors.

In other words the competent authority should

(a) Ascertain as to whether really retrenchment is necessary and it is real.

(b) Any alternative to retrenchment is available

(c) Whether interest of other parties is dependent upon retrenchment. In the sense, interest of ancillary industry, their workmen, interest of customers, economy etc. will have to be looked into.

Section 25N requires the competent authority to give reasons to its order. Decision of the competent authority, however, should not be perverse, capricious or arbitrary. Order of the authority is final and conclusive and remains in force for a period of one year, save and except by Review or Reference. It is laid down that:

1. Government itself suo-motto can review its own order OR
2. Aggrieved party, Employer, Workmen or Union can move for the review OR
3. A reference can be made to Industrial Tribunal for adjudication of the dispute on proposed retrenchment.
4. Time limit of 30 days is laid down.

Appropriate Government is vested with powers to grant exemption from prior permission. The appropriate government can exercise its powers only when exceptional circumstances, like accident in the establishment or death of the Employer exist.

(vi) Condition Precedent for Closer

Section 25FFA requires that an Employer who intends to effect a Closure to give Notice:

1. At least 60 days before intended Closure
2. Serve a Notice in the prescribed manner.
3. to the Appropriate Government
4. stating clearly the reasons
5. for the intended Closure.

This is the **Condition Precedent to effect Clouse** and, in no way, it takes away the Employer's fundamental right of closing down of his business. Section 25FFA only requires the Employer to give Notice of 60 days to the appropriate Government giving reasons of Closure. However, the Appropriate Government has to satisfy itself that it is necessary to grant such an exemption. Indeed, it is made abundantly clear that appropriate government's 'satisfaction' must be for the reasons, like the accident in the undertaking or the death of the employer or the like.

The failure to give such Notice attracts **penalty** of imprisonment for a term up to 6 months or fine up to ₹ 5,000/- or both under **Section 30 A** of the Act. Section 25FFA is not attracted if:

1. an undertaking in which
   (a) less than fifty workmen are employed or
   (b) less then fifty workers were employed, on an average, per working day on the preceding twelve months
   and
2. an undertaking engaged in construction of buildings, bridges, roads, canals, dams or other construction work or project.

(vii) Prior Permission for Closure – Section 25 O.

Only if it is an 'Industrial establishment' as defined in Section 25L and only if Chapter V-B of the Act is applicable, it is mandatory to take prior permission of 'Appropriate Government' as laid down in Section 25-O of the Act. Section 25-O specifically and in

particular seeks to check and prevent the Closure in the Industrial establishments. Section 25-O lays down that:

1. Employer must apply for Closure Permission:
   (i) To the Appropriate Government, in the prescribed manner, atleast before 90 days of Closure.
   (ii) Copy of Application is simultaneously served on Workmen or their representative.
   (iii) Exception is carved for undertakings carrying on business in Construction or Buildings or Bridges, Roads, Canals, Dams or the like.
2. On receiving Closure Application, Appropriate Government must:
   - 'Hear' Employer, Workmen and Persons interested in inquiry.
   - Inquire into (i) genuineness and adequacy of reasons given in Closure Application (ii) interest of general public and (iii) all relevant facts.
   - Pass Order in Writing giving 'Reasons' and
   - Give Copy to Employer and Workmen.
3. Failure to inform Order within 60 days of making Closure Application is 'Deemed Closure Permission'.
4. Order on Closure Application is final and remains in force for One Year.
5. Appropriate Government can Review the Order of Closure.
   - Review can be made (**i**) Suo-motto (**ii**) on application of (**a**) Employer or (**b**) Workmen.
   - Appropriate Government itself may review its Order or make a Reference to Industrial Court adjudication.
6. Closure is 'Deemed to be illegal' if Closure is effected
   - after Refusal – of Closure Permission or
   - without making Closure Application

7. Notwithstanding any thing, Appropriate Government may direct that provisions not to apply for a specified period.
8. Employer shall pay Closure Compensation to workmen, calculated at the rate of 15 days wages for every year's service when closure is permitted or deemed to have been permitted.

   It should be clearly noted that every workman shall be entitled to receive compensation which shall be equivalent to fifteen days 'average pay' for every completed years or any part thereof in excess of six months. While in cases of retrenchment the provision is made for a Notice or Wages in Lieu of Notice. But it is not the case here. Further, in case of Section 25F retrenchment compensation is mandatory as well as condition precedent, whereas that is not so here[54]. Thus the only right which accrues in favour of workmen is to obtain compensation. In case, the appropriate government, under section 25(O) decides to merge two companies (so one company is closed down), the Apex Court held that all consequences would flow from that order, however, even after merger of two companies if no Closure Order in respect of merged made is made by the appropriate government under Section 25(O) of the Act[55].

(viii) Restarting of Undertaking

The appropriate government is vested with powers under Section 25P to direct the closed-down 'industrial undertaking' to restart. For this, the Appropriate Government has to form its opinion and then only it can direct the undertaking to restart it. Once the opinion is formed by the Appropriate Government to give direction to restart the undertaking then it has to publish its order or direction in the Official Gazette that undertaking shall be restarted with such time – not being less than one month form the date of the order as

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[54] *Sunder Sing v/s Beas Construction Board*, 1979 LIC 12.

[55] *Managing Dir. Karnataka Forest Dev. Corpn. v/s Workmen of K.P. Ltd.* – 2008 I CLR 63.

may be specified in the order or direction. The conditions which must cumulatively apply are:

1. The undertaking was closed otherwise than on account of unavoidable circumstances beyond the control of the employer.
2. There are possibilities of restarting the undertaking.
3. It is necessary for the rehabilitation of the workmen employed in such undertaking before its close
4. Maintenance of supplies and services essential to the life of the community and
5. Restarting will not result in hardship to the employer in relation to the undertaking.

The appropriate government is under duty of obligation before giving the direction for restarting the undertaking that it

1. Gives an opportunity to such an Employer to place his Say or Objection to restart the undertaking.
2. Gives an opportunity to Workmen to place their Say on the restarting of the undertaking.

In other words, in both cases, the appropriate government must, under the principles of natural justice, 'Hear' the Workmen.

(ix) Last Come First Go

Courts, long before, have evolved a principle which safeguards the interest of workers against the arbitrary discretion of the employer in the matter of effecting retrenchment. The principle, so involved, does not allow the employer to adopt a 'pick-and-choose' method but gives him a guide line in effecting retrenchment. According to this principle, where all other things are equal ordinarily the **workman who was the last person to be employed in that category is retrenched first.** It means the workman who has come last will be retrenched first and the workman who has came first (joined first) will be retrenched at the last, if need arises. This principle is popularly called as 'Last Come First Go or 'First Come Last Go'. This principle

is given a statutory recognition. The Legislature has introduced Section 25G. It is laid down that Employer should first classify or categorize his workmen, like Clerks, Typists, Stenos, Mechanics, Welders etc. Then the Employer should prepare a Seniority List. This Seniority List should have been accepted before it is acted upon. There are apparent and invisible pre-conditions before Section 25G comes in operation. It is laid down that:

1. Employee must be a "workman" under Section 2(s) of the Act.
2. Workman should be a Citizen of India.
3. The Employer's establishment must be an Industry' under Section 2(j) of the Act.
4. Workman must have been categorized and the workman proposed to be retrenchment must fall in the given category of workmen which has surplus labour force.
5. There should be no agreement to the contrary existing or subsisting in the industrial establishment.
6. While preparing seniority list, all workmen will be listed including the workmen who have not completed 240 days.
7. Section 25(G) would not at all come in operation if it is not a case of retrenchment.

(x) Re-employment after Retrenchment

The Employer is free to retrench his surplus labour force but when he gets a chance to expand and start deploying more staff, it is mandatory upon him (under Section 25H) to re-deploy the same staff which he had retrenched earlier as surplus labour force. Section 25H is applicable to a person who:

(a) is a workman within Section 2(s) of the Act.

(b) is retrenched under Section 25F of the Act.

(c) is a Citizen of India

(d) offers for re-employment

(e) to the Employer who had retrenched him.

The Section does not promise either the same job or same-remuneration or same terms and condition of service.

(xi) Penalty

1. Not taking prior permission for (i) Layoffs and (ii) Retrenchment invites penalty under Section 25Q of imprisonment for one month or fine upto ₹ 5,000/- or both.
2. Not taking prior permission for Closure invites penalty under Section 25R imprisonment upto 6 months or Fine upto ₹ 5,000/- or both. If it is a Continuing Offence, further Fine upto ₹ 2,000/- for every day during which contravention continues.
3. Commission of Unfair Labour Practices invites penalty under Section 25Q of imprisonment upto 6 months or Fine upto ₹ 1000/- or both.
4. Section 32 lays down special provision for the company or the corporate body and states that if offence is committed with the knowledge of natural person, contravention of Act or any rule made thereunder will be punishable with fine upto ₹ 100/-.

The actual quantum of punishment is always left to the sole judicial description of the Court trying the offence.

Act lays down that cognizance of the offence can be taken only upon a complaint by or under the authority of the appropriate Government. It further lays down that only the judicial Magistrate of First Class (JMFC) or a Metropolitan Magistrate can take the cognizance.

6. AUTHORITIES UNDER THE ACT

A. Introductory

The Act first of all seeks to pre-empt an Industrial dispute. But if it arises, at all, then a mechanism is provided to resolve it peacefully amicable and in constitutional way. It is in three fold:

(1) By direct **negotiation** works committees (at shop floor level)

(2) By **Conciliation** by appointing

  (a) Court of Inquiry (only when necessary)

  (b) Conciliation officer and

  (c) Board of Conciliation

(3) By **adjudication** or arbitration

  (a) Labour Court

  (b) Industrial Tribunal

  (c) National Industrial Tribunals or

  (d) Arbitration. (Voluntary)

B. Works Committees

Direct negotiations between the Employer and Workmen are provided under the Act by constituting the works committee. The Act requires the appropriate government to direct the industrial establishments employing hundred or more workmen to constitute the works committee. The formation of works committee is the first step in establishing close contacts between the Employer and workmen at the shop floor level. The close contacts, in turn, build up the good harmonious relations. The good relations help the Employer in keeping away the Industrial dispute. The Act was amended in 1982 and chapter IIB was engrafted to provide for setting up of a ***Grievance Settlement Authority.*** The works committees are to be set-up if hundred or more workmen are employed whereas the Grievance Settlement Authority is to be set up if fifty or more workmen are employed.

C. Conciliation

The Act professes that good relations between Employers and Workmen will keep away all the disputes. But if at all, any dispute arises, it has to be resolved by mediation or conciliation. The conciliation **can help** the parties to settle their dispute but **cannot**

force them to settle it. If no settlement is arrived at the conciliation, the conciliation authority can do nothing save and except recording its failure and submit its **Failure Report** to the Appropriate Government. The Appropriate Government thereupon decides whether to make a reference or not.

There is no hard and fast rule to raise an Industrial dispute. It can be raised by simple letter or a Notice in writing addressed to the Employer. Such a letter or Notice in writing is called as a Demand Notice**.** After Demand Notice, if Employer concedes the demand, no Industrial dispute arises. But if he refuses then workman has to request (by another letter/Notice) to the Conciliating Authority to initiate Conciliation Proceedings under the Act. But in no case, the stage of conciliation can be by-passed. It is, in fact, a stepping stone to approach the Court/Tribunal.

The conciliation authority can take note of existing as well as apprehended dispute. It takes start when Workman/Workmen or Employer approaches it. However, if none approaches it yet it takes start suo-moto (on its own) if it finds that an Industrial dispute is likely to arise. On receipt of letter intimating that a demand was raised but it was not conceded, the Conciliating Authority starts Conciliation Proceeding. The first step is to call the parties to a negotiating table and endeavour to chisle out a settlement. Act provides for conciliation either by Conciliation Officer or Conciliation Board. The Board is appointed for a particular dispute which involves a complex nature of dispute. It is rare that the Conciliation Boards are constituted.

D. Conciliation Officer

The term Conciliation Officer is defined in Section 2 (d) of the Act. It only says that Conciliation Officer is one who is appointed under the Act by the appropriate government. Appointment has to be made by a notification in the official gazette of Government. Act also makes it clear that the conciliation officer may be appointed for a specified area or for specified industries or for one or more specified industries either permanently or for a limited period.

Conciliation Officer is deemed to be the Public Servant under Indian Penal Code.

Conciliation Officer takes action when:

(a) Industrial dispute is **in existence**.

(b) Industrial dispute is **apprehended**.

(c) Industrial dispute is in **public utility services** and

(d) Notice of Strike or Lockout is given.

If any one single eventuality exists, conciliation officer is under duty of obligation to initiate the action. However, if it is a Public Utility Services or where any Notice of Strike/Lockout is given, it is **mandatory** upon him to start conciliation proceedings. Once a conciliation officer chooses to intervene or **is required to** intervene, he has to send Notice to concerned parties. He then informs, advises and uses his powers and skill to chisel out a settlement. But if he fails to chisel out a settlement, he can do nothing except recording his failure and sending his Failure Report to the appropriate government. Submission of Failure Report means that the *conciliation proceedings are concluded* which has relevance in prohibiting strike or Lockout.

Conciliation proceedings are deemed to be concluded:

(a) When Settlement is reached between the parties to the dispute;

or

(b) When Failure Report is received by appropriate government from the conciliation officer;

or

(c) When Reference is made to Court/Tribunal.

E. Conciliation Boards

The Boards of Conciliation may be constituted, if dispute is of a complicated nature and the issues involved are important. The procedure and powers of the Conciliation Boards are no different than those prescribed for the conciliation officer.

F. Labour Court

The term Labour Court is defined to mean a Labour Court constituted under Act. There may be one or more of such Courts in a State. Labour Court consists of one person only. The Labour Courts are conferred jurisdiction to adjudicate upon the disputes specified in **Second Schedule**. However, appropriate Government has discretion to refer disputes specified in **Third Schedule**. The Labour Court has the exclusive jurisdiction to hear the Applications under **Section 33C (2)** of the Act.

G. Industrial Tribunal

The appropriate government may by notification in the official gazette, constitutes one or more Industrial Tribunals. The matters specified in second schedule or the third schedule and such other matter can be referred to the Industrial Tribunal. The Tribunal is of one person only. But appropriate government may, if it so thinks fit, appoint two persons as Assessors to advise the Tribunal in the preceding before it. It may be noted that to deal with Industrial disputes affecting industries spread over the entire country, like, Banking industries, Insurance industries necessarily, only the Central Government is competent to constitute one or more such National Tribunals.

H. Courts of Inquiry

The "fact finding" agency appointed by the appropriate government is referred to as the Court of Inquiry. The function of the Court of Inquiry is neither conciliatory nor adjudicatory but it is only investigatory. The Report of the Court of Inquiry enables the appropriate government to decide to refer the Industrial dispute for adjudication or not. The role of Court of Inquiry is so very limited that it is hardly of any use. It is, perhaps for this reason that the appropriate governments have very sparingly used and constituted Courts of Inquiry.

The Court of Inquiry is defined to mean the one constituted under the Act. The appointment has to be notified in the official gazette. Court consists of one or more independent persons. If more than two persons are appointed, one of them will act as the Chairman. For constituting Court of Inquiry following three conditions need to be satisfied:

(i) there exists or apprehension of an industrial dispute.

(ii) the matter referred to must be connected with or relevant to the Industrial dispute and

(iii) the order of reference must be in writing.

I. Arbitrator

It may be noted here that the Act has devised several modes first to prevent or pre-empt the Industrial Dispute and if that fails then to resolve the dispute. In furtherance of its avowed policy, the Act has given due recognition to Arbitration. The parties are given discretion to take their industrial dispute to Arbitration. The Arbitrator can investigate and adjudicate upon the Industrial Dispute. The Award of Arbitrator binds even those who are not parties to the reference or Agreement for Arbitration. The Provision of the Arbitration Act are not applicable to the Arbitration under this Act. The rationale behind such a provision is to exclude the jurisdiction of civil courts over the matters dealt with by the Arbitrator under this Act.

J. Reference

Reference of Industrial Dispute under Section 10 empowers the appropriate government to refer the industrial dispute for adjudication to various authorities, like **(a)** Conciliation Board **(b)** Court of Inquiry **(c)** Labour Court or **(d)** Industrial/National Tribunal.

If Industrial Dispute is not likely affecting more than one hundred workmen then notwithstanding the fact that such Industrial dispute requires a reference to Industrial Tribunal, the same can be referred to the Labour Court. It is imperative for the appropriate government to act swiftly and make a reference if the dispute relates

to "Public Utility Services" and Notice of Strike or Lockout is given. The government may, however, refuse to make reference if it considers

(a) that Notice of Strike/Lock out is of frivolous or vexations nature or

(b) that it would be inexpedient to make the reference also that Strike/Lockout Notice is not given or it is illegal or not in accordance with Section 22 of the Act. The provision is intended to avoid a possible stoppage of work so that society at large is not put to inconvenience.

It is also provided that even if appropriate government is the Central Government yet the State Government can make a reference. Similarly, if it is a dispute involving questions of national importance or dispute relating to establishments situated in more than one State, notwithstanding the fact that appropriate government is the State Government, the Central Government is vested with powers to make a reference. All that it requires is that the Central Government should form an "Opinion" that:

(a) There exists (or it is apprehended) an Industrial Dispute as defined under section 2(k) of the Act.

(b) The Industrial Dispute should exist or apprehended at the time of making the reference or forming the opinion.

(c) Such dispute must involve any question of national importance or it is situated in more than one state.

(d) Such industrial dispute should be referred to the **National**.

The appropriate government is also vested with powers to fix the time limit for the adjudication in each case. However, time limit of three months is laid down for the cases of individual workmen with regard to dismissal, discharge etc. All said and done, discretion is given to the adjudicator to extend the time after recording its reasons for the same. It is also laid down that proceedings shall not abet (come to an end) if period (prescribed in order of Reference) has expired.

The Act also vests powers in the appropriate government to prohibit strikes/lockouts if:

1. Reference of Industrial dispute is already made and
2. Strikes/Lockouts continue on the date of Reference and
3. The Strikes/Lockouts are in connection with such dispute. The powers of the appropriate government are absolutely discretionary and there is no compulsion to issue any such prohibitory order.

The Labour Court/Industrial/National Tribunal is creature of the Act. Necessarily, therefore its jurisdiction is circumscribed by the provisions of the Act. If there is lack of jurisdiction, the orders passed by the Court/Tribunal are null-and-void ab-initio. Consent can not invest jurisdiction. Even if no objection is taken for lack of jurisdiction then also the orders passed by the court or the Tribunal are not sustainable or maintainable in law.

K. Award

Award is defined in Section 2(b) of the Act to mean an interim or a final determination of any Industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award. The form of the Award is set out in Section. It only requires that Award should be in writing and it must be signed. Section 17 requires that the Award should be sent to the appropriate government and the appropriate government, in its turn, must publish it either in the government gazette or in any other manner it may deem fit. In any case, publication of Award is mandatory. Further, the Award is given finality and no appeal is provided. Section 17A provides that an Award including an Arbitration award becomes enforceable only on the expiry of 30 days from the date of its publication. It may be specifically noted here that unless the award is published as provided, it does not become enforceable. It is undoubtedly left to the Court to decide as to when the award will come into operation.

The Award comes into operation on the date on which it is made operational in the Award itself. However, if the Award is silent on the date of operation then it comes into operation on the date when it becomes enforceable. The date of operation of Award coinsides with the date of enforceability.

The Act is amended and Section 17B is included. By this amendment, if Employer challenges the Award of reinstatement of Labour Court/Industrial/National Tribunal, in the High Court or Supreme Court, the Employer is required to pay full wages last drawn by the Workman inclusive of any maintenance allowance admissible to him during the pendency of proceedings in the High Court or Supreme Court. Such liability to pay full back wages arises only if workman is not employed in any establishment during such period and an affidavit is filed by the workman in such Court. However, liability of payment of last drawn wages does not arise if workman is gainfully employed elsewhere.

L. Settlement

The Preamble of the Act professes settlement of Industrial dispute. As such, what is to be settled under the Act is the industrial dispute and nothing else. The term settlement as defined in the Act envisages two categories of settlements:

(i) Settlement arrived at in the course of conciliation and

(ii) Settlement arrived at privately or otherwise than in the course of conciliation.

The settlement arrived at during the conciliation stand on a higher plane than the settlements arrived at otherwise than conciliation. Settlement during the conciliation does not mean that settlement should have arrived at during the time when conciliation was in process but it is the one which is assisted and aided by the conciliation officer by his advice and concurrence on his being satisfied that the settlement is fair and reasonable[56].

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[56] *Bata Shoe Co. v/s D.N. Ganguly,* 1961 I LLJ 303.

Settlements arrived at in the course of conciliation binds one and all. Section 18 makes it clear that settlements arrived at in the course of conciliation binds not only the parties to the dispute but also it is binding upon heirs, successors and assigns of the employer and also in certain cases parties summoned to appear in the proceedings and also present and future workmen. On the other hand, the settlements arrived at otherwise than conciliation, binds only the parties to the settlement and no one else.

A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

Settlement comes in operation on such date as is agreed upon by the parties and if no date is agreed upon, on the date on which the settlement is signed by the parties to the dispute. Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date of signing the settlement and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a Notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.

The Settlement can be terminated by the recognized Union after giving two months' Notice in writing to the employer in that behalf.

The Trade Unions Act, 1926

CHAPTER 2

1. INTRODUCTION

The 'Laissez faire' means Freedom of Contract. The Freedom of Contact, in its turn, means every individual has a right to enter into a 'Contract' with any other individual or group of individuals and to 'have and hold' the property. It is a part of the English Common Law relating to Individual's right. It was believed that 'Laissez faire' or the 'Freedom of Contact' would automatically regulate the relationship of Employers and the Workers. Because the Employers were free to "hire and fire" their labour to suit their need so were the workers free to offer their services for wages. However, this myth was blown to pieces during the time of Industrial Revolution.

'Collective Bargaining by Riots'

During the time of Industrial Revolution, there were several changes, such as, the emergence of giant Companies, Corporations, Monopolies and congestion of population in Industrial centers. These changes gave rise to new problems. One was that workers were brought from their own agricultural fields to industrial organization not belong to them. Second was the inter-separation of family members. The third was the industrial accidents, Industrial diseases, and spread of epidemics due to concentration of working population

in unhygienic condition and lack of medical care. Naturally, the workers reacted sharply to these social evils. In order to compel their employers to redress their grievances, the Workers started to resort to violence. They destroyed machinery, factories, mines and workshops. The Employers, managerial personnel and even the police were not spared. This was intended to achieve 'collective bargaining' by riot. But surely, this blew up the myth of freedom of contract or the 'Laissez faire' to pieces.

Rise of 'Non-violent' Collective Bargaining

When the industrial revolution was taking shape, unskilled workers were in predominance naturally because production was low and the technique was primitive then. The workers, therefore, had nothing to bargain with. But when the Technique and the Technology of production and manufacturing process advanced, a new class of skilled workers emerged. These skilled workers naturally had with them something to bargain with, their (i) Skill (ii) Training and (iii) Experience. However, they were very weak individually to bargain with their Employers. They then realized that united they would be in a stronger position to bargain with their employers. They also felt sure that if they came together, they would be able to avoid competition amongst them. This gave rise to the 'collective bargaining'. The International Labour Organization has defined 'Collective Bargaining' as negotiations between Employer and Employees about the terms and conditions of employment with a view to arrive at an agreement. This concept was first formulated in 1897. This is a classical theory because it is in consonance with the classical and traditional concept of collective bargaining. According to this theory 'individual bargaining' is substituted by the "collective bargaining" through the medium of a trade union.

The Trade Union Act, 1926

The Trade Union Act, 1926 is one of the old enactments but it only deals with the registration of the trade union. As is seen in chapter 1 of this Book, man is a 'living person' but even 'non-living

person', or the 'artificial person', too is recognized by Law. The `artificial person' is born when it is incorporated under any given statute. Such 'artificial person' may be partnership firm under Partnership Act, company under Companies Act, Co-operative society under Co-operative Societies Act or trade union under the Trade Union Act, etc. It may however, be noted clearly that the Act does not make it mandatory or compulsory to have the trade union registered under the Act. Nevertheless, it is always advisable to have it registered as otherwise it may be unregistered body which cannot sue and be sued for any acts of omissions and commissions of its members, office bearers or the outsiders.

Legal Status on Registration

On registration of the Trade Union, it gets the legal status as under:-

1. Every registered Trade Union becomes a body corporate by the name under which it is registered.
2. It has the perpetual succession and a common seal.
3. It can acquire and hold the property, both moveable and immoveable.
4. It can enter into any contract in its own name.
5. It can sue and can be sued in its own name.

The Act is applicable throughout the territories of India except the State of Jammu and Kashmir.

Definition of 'Trade Union' under the Act.

The Act defines the term 'trade union' to mean **Any Combination**, whether temporary or permanent, formed primarily for the purpose of regulating the relations between:

(a) workmen and employers

(b) workmen and workmen,

(c) employers and employers

for imposing restrictive conditions on

the conduct of any trade or business, and

(d) two or more Trade Unions.

2. REGISTRATION OF TRADE UNIONS

Whenever, it is decided to incorporate a 'corporate body' under the Act for the purposes set out above, it is necessary to have it registered under the Act so as to make it a distinct legal entity which can function independently and on its own. The Act invests powers in the Government to appoint a Registrar of Trade Unions who will be responsible to register the trade unions under the Act. It is significant and important to note that Section 14 of the Act lays down that the Act shall not apply to (i) the Society Registration Act, 1860, (ii) the Co-operative Societies Act and/or the Company Act, and the registration of the Trade Union under the Act shall be void.

The Act lays down that any seven or more persons by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act can apply for the REGISTRATION under the Act.

It is wholly inconsequence if some of the applicants, but not exceeding half of the total number of persons who made the application, have ceased to be members of the Trade Union or have given Notice in writing to the Registrar disassociating themselves from the application.

The Act also lays down that application for registration has to be made to the Registrar, and shall be accompanied by:

(i) A copy of the Rules of the Trade Unions and a

(ii) Statement of the following particulars, namely:

  (a) Names, Occupations and Addresses of the members making the application

  (b) Name of the Trade Union

  (c) Address of its Head Office and

(d) Titles, names, ages, addresses and occupations of the office bearers of the Trade Union.

The Act also lays down and ensures that:

(a) The general funds of the Trade Union shall be applied only for the purposes for which the Trade Union is set up.

(b) The list of the members of the Trade Union is maintained at all the time and made available for inspection by the office-bearers and members of the Trade Union;

The Act lays down that the provision has to be made so as to admit (1) Ordinary members who shall be the persons actually engaged in or employed in an Industry with which the Trade Union is connected with and (2) the Honorary or temporary members as office bearers. The Act also lays down that the payment of a subscription by members shall be not be less than twenty-five paise per month per member. It is incumbent under the Act to lay down the procedure:

(i) as to how the Rules can be amended, varied or rescinded.

(ii) for appointment and removal of members of the Executive "Committee and the other office bearers".

A person is disqualified for being a member of the Executive Committee or any other office-bearer if (i) he has not attained the age of eighteen years and/or (ii) he has been convicted of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release.

The Act also lays down that not less than one half of the total number of the office bearers of every registered Trade Union shall be persons actually engaged or employed in an Industry with which the Trade Union is connected:

(iii) for the safe custody of the funds of the Union,

The Act lays down that the general funds of the Trade Union cannot be spent for any other reason except for the

payment of salaries, allowances and expenses of the office bearers of the Trade Union;

(iv) for Annual Audit of the accounts of the Union;

(v) for the adequate facilities for the inspection of the books of account by the office bearers and members of the Union;

(vi) for dissolving the Trade Union.

The Act vests powers in the Registrar to call for further particulars and satisfy himself before he grants Registration Certificate to the Trade Union. It is needless to state that the Trade Union seeking registration is under duty of obligation to supply the information called for by the Registrar of Trade Unions. The Registrar of Trade Unions is also vested with powers to refuse to register the trade union in case another Trade Union is registered with the same or identical name or when, in the opinion of Registrar, the resemblance is so near that it is likely to deceive the public or the members of either Trade Union.

Amalgamation

The Act lays down that any two or more registered Trade Unions may become amalgamated together as one Trade Union with or without dissolution or division of the funds of such Trade Unions or either or any of them. However, it will be necessary to give Notice signed by the Secretary and by seven members of the Trade Union changing its name to the Registrar. The change in the name of a registered Trade Union shall not affect any rights or obligations of the Trade Union or render defective any legal proceeding by or against the Trade Union, or any legal proceeding which might have been continued or commenced by or against it by its former name the legal proceedings may be continued or commenced by or against it by its new name. Further, an amalgamation of two or more registered Trade Unions shall not prejudice any right of any such Trade Unions or any right of a creditor of any of them.

3. OBLIGATIONS ON THE REGISTERED TRADE UNIONS

The Act requires every registered Trade Union to maintain the following:

(i) Register of membership and subscription,

(ii) Register of receipts and disbursements from the general fund account,

(iii) Minutes book of Meetings,

(iv) Register of stock, tools and plant,

(v) Machine numbered subscription receipt book,

(vi) Register of receipts and disbursements for the political fund,

(vii) A file of vouchers.

The Act also requires that every registered Trade Union should submit to the Registrar of Trade Unions:

(a) ANNUAL RETURNS to be submitted on or before the 30th day of April in each year,

(b) A general statement audited in the prescribed manner,

(c) All receipts of income and expenditure during the year ending on the 31st day of December next preceding prescribed date,

(d) Statements in the prescribed form with prescribed particulars with regard to assets and liabilities of the Trade Union existing on 31st day of December,

(e) Statement showing all changes of office bearers made by the Trade Union during the year,

(f) A copy of the rules of the Trade Union corrected up to the date,

(g) A copy of every alteration made in the rules of a registered Trade Union to be sent within fifteen days of the making of the alteration.

4. CANCELLATION OF CERTIFICATE OF REGISTRATION

The Registrar on being satisfied can issue CERTIFICATE OF REGISTRATION of the Trade Union by entering in a register maintained by his Office in the prescribed form. The Registrar is also similarly vested with powers of cancellation of the registration:

(a) on duly verified application made by the Trade Union in the prescribed manner, OR

(b) When the Registrar is satisfied that the certificate has been obtained by fraud or mistake,

(c) The Trade Union has ceased to exist,

(d) The Trade Union after Notice from the Registrar has contravened any provision of the Act,

(e) When the Trade Union has allowed any rule to continue in force which is inconsistent with any such provision,

(f) The Trade union has rescinded any rule which ought to have been provided for under the Act.

5. DISSOLUTION OF REGISTERED TRADE UNION

For dissolving a Registered Trade Union, it is necessary that Notice of dissolution is signed by seven members and by the Secretary of the Trade Union within fourteen days of the dissolution and it is sent to the Registrar. The Registrar shall register the said dissolution if he is satisfied that the dissolution is effected in accordance with the rules of the Trade Union. The dissolution takes effect from the date of such registration. Where dissolution is not registered and the rules of the Trade Union do not provide for the distribution of funds of the Trade Union on dissolution, the Registrar shall divide the funds amongst the members in such manner as may be prescribed.

6. POWERS OF REGISTRAR

The Registrar is vested with powers to require inspection of the:

(a) Certificate of Registration,

(b) Account books, registers and

(c) Other documents relating to Trade Union,

at its Registered Office or may require their production at such place as he may specify in this behalf, but no such place shall be at a distance of more than ten miles from the Registered Office of a Trade Union.

7. POWER OF INDUSTRIAL COURT

The Act invests powers in the Industrial Court to decide the disputes arising under the Act and takes away the powers of the Civil Court to decide disputes arising under the Act. However, if the Civil Court has already started to decide any dispute which is in exclusive domain of the Industrial Court then in that case, the Industrial Court is invested with powers to intimate to the concerned Civil Court that it is seized of the question whereupon, the Act lays down that the Civil Court shall cease to exercise jurisdiction in respect thereof. The Orders of the Industrial Court are given finality and the same cannot be called in question in any Civil Court. The Orders passed by the Industrial Court are binding on all the parties.

The Act lays down that Industrial Court may–

1. Decide disputes arising under the Act.
2. Decide as to whether or not any person is an office-bearer or member of the registered Trade Union.
3. Decide as to the wrongful expulsion of office-bearer or member.
4. Decide disputes regarding the property and Account books.
5. Decide disputes referred to by the Registrar of Trade Unions.

6. Require any office bearer or a member of the registered Trade Union to be appointed whether by election or otherwise.
7. Require the Election to be held under supervision of such person as it may appoint.
8. Grant interim Orders pending its decision in the matter.
9. Appoint a Committee of Administration for any purpose under the Act including the purpose of taking possession or control of the property in dispute and manage the same.

The Industrial Tribunal is invested with powers which he can exercise by following non-production of the same procedure as he can exercise in deciding industrial disputes under the Bombay Industrial Relations Act, 1946.

8. OFFENCES AND PENALTIES

The Act under Sections 31 and 32 prescribes the following as offence:

1. default in giving any notice;
2. default in non-production or sending of any Statement required to be made under Section 28 of the Act;
3. document as required by or under any provision of this Act;
4. making any false entry in the Annual Return knowingly and willfully;
5. Giving incorrect copy of rules and regulations of the Trade Union with the intention to deceive any person.

Every office bearer or other person bound by the rules of the Trade Union to give or send the same, every member of the Executive Committee shall be punishable with fine which may extend to five rupees and, in the case of a continuing default, with an additional fine which may extend to five rupees for each week after the first during which the default continues. However, the aggregate fine shall not exceed fifty rupees. Any person who willfully makes,

or causes to be made, any false entry shall be punishable with fine which may extend to five hundred rupees. Whereas supplying false information, any alterations shall be punishable with fine which may extend to two hundred rupees. No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act and cognizance can be taken only after a Complaint is made by, or with the previous sanction of the Registrar. The period of limitation prescribed under the act is six months of the date on which the offence is alleged to have been committed and in the case of offence under Section 31, within six months next after the alleged offence came to the knowledge of the Registrar.

UNIT II: Laws Related to Health, Safety and Welfare

1. INTRODUCTION

The Act came into force during the time of Industrial Revolution and it was enacted to help the investors. Therefore, in consonance with its avowed object, the employers were given powers to ask workers to work — for not less than 15 hours a day**!** However, with the advent of time, the Act too underwent a complete overhauling and now it does not allow the Employer to take work from his workers for not more than 8 hours a day. The legislation of this nature is known as the 'Social Welfare Legislation' or the 'Bread and Butter Legislation.' In *G.L. Hotels Ltd. vs. Sarin T.C., 1993 (4) SCC 363,* the apex Court held that in ***social welfare legislation***, the meaning of the term "Factory" has to be construed liberally and it should not be confined to common usage of the term. The scope of the Act is very much wide and enlarged in its new "avatar". It now seeks to secure health, safety, welfare, proper working hours, leave and other such benefits for the workers deployed in the factory.

2. MEANING OF THE 'FACTORY'

Man is a 'living person' but 'non-living persons', the 'artificial persons', too are recognized by Law. The 'artificial person' is born when it is incorporated under any given statue. Such 'artificial person' may be partnership firm under Partnership Act, company under Companies Act, Co-operative society under Co-operative Societies Act or Trust under Public Trust Act, etc. But the 'Factory' is not such an 'artificial person' because it is not incorporated under the Factories Act. The Factories Act is only christening a 'Manufacturing Process' as ***"Factory"*** if it is carried on in the prescribed manner, no matter ***what*** business is carried on and no matter ***whether*** it is 'Proprietary Concern', HUF business, 'Partnership firm', 'Company', 'Co-operative Society' or 'Trust'. The Factory under Section 2(m) of the Act, *inter-alia*, means:

(i) any ***manufacturing process***, which is carried on –OR- ordinarily carried on.

(ii) on any ***premises*** or any ***precincts thereof*** in which:

  (a) ***10 workers*** (or more) are/were working in the preceding 12 months ***with*** the aid of power OR

  (b) ***20 workers*** (or more) are/were working in proceeding 12 months ***without*** the aid of ***power*** OR

  (c) If less than ***10*** workers are working then it should have been notified as such under Section 85.

But does not include:

(a) Mine as defined under Mines Act

(b) Mobile Unit of Indian Armed Forces

(c) Railway Running Shed

(d) Hotel, Restaurant or eating place

(e) Computer Unit, if no manufacturing process is carried on

(f) Electrical Data Processing Unit, if no manufacturing process is carried on.

The '***manufacturing process***' is defined under Section 2 (k) as:

Any Process for:

(i) making, altering, repairing, ornamenting, finishing packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal or

(ii) pumping oil, water, sewage or any other substance or

(iii) generating , transforming or transmitting power or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or booking binding or

(v) constructing or reconstructing , repairing, refitting, finishing or breaking up ships or vessels or

(vi) preserving or storing any article in cold storage.

In *Regional Director, ESIC, Bangalore vs. Jai Hind Road Ways, 2001 II CLR 438,* it was held that the company, engaged in transportation of goods, was not carrying on any 'manufacturing process'. In *State of U.P. vs. Singh M.P., AIR 1960 SC 569,* it was held that if workers are working on the field of sugarcane, such workers can be said to be working in the manufacturing process of sugar factory notwithstanding the fact that sugarcane field is part of sugar manufacturing process. In *Rohtas Industries Ltd. vs. Ramlakhan Singh, AIR 1978 SC 849,* the Apex Court held that raw material used for manufacturing paper is included in the term 'manufacturing process'. So also the raw material used in laying the Railway line – *Lal Mohammed vs. Indian Railways Construction Co. Ltd., AIR 1999 SC 355.* It was held in this case that the term `factory' is wide enough to cover the open lands, buildings and precincts thereof where manufacturing activities are carried out. Collection of tobacco leaves etc. and its transportation is manufacturing process – *Gopal Rao vs. Public Prosecutor, AIR 1970 SC 66.* Cleaning, drying of Ginger & Pepper for sale is also manufacturing process *State of Kerala vs. Patel V.M., 1961 I LLJ 549.* In *S.G. Chemicals and Dyes*

Trading Employees Union vs. SG Chemicals and Dyes Ltd., 1986 U KKH 490, the Apex Court held that all departments or divisions, either on one premises or different premises where manufacturing process is carried out, will be covered under the Act. In one unit only 4 workers are working but in another unit there are more than 10 persons working, the unit where only 4 workers are working is also covered, as there is functional integrality. So also on the ground of functional integrality, the Contractor whose unit is adjoining the Principal whose work he is carried on and if the Contractor is covered under the Act, the Principal too will be covered under the Act, *Lakshmanmurthy B.M. vs. The ESIC, 1974 AIR SC 759.*

Maintaining existing line of generation and transmission and transformation of power in sub-station or zonal stations and where no manufacturing process is carried on is not the factory – *Workmen of Delhi Electric Supply Undertaking vs. Mgmt. of DESU, 1972 II LLJ 130.* Mere installation of data processing unit or computer is not covered under the Act – *Seelan Raj vs. P. Residign Officer, I Addl. Labour Court, 2001 I LLJ 1335.*

The term ***'Power'***, is defined in Section 2(g) as electrical energy, or any other form of energy, which is mechanically transmitted and not generated by human or animal agency.

The term ***worker*** is defined in Section 2(l). It lays down that worker means any person employed, directly or through a contractor with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises or any work incidental to it. But does not include any member of the armed forces of the Union of India.

3. GOVERNMENT'S POWER TO GRANT EXEMPTION FROM OPERATION OF THE ACT

The State Government, in grave emergency, is invested with powers under Section 5 of the Act, to grant exemption to any factory

from all or any of the provisions of the Act for such period, not exceeding 3 months at a time. The exemption may be granted on such terms and conditions as may be deemed fit and proper by the State Government. The terms 'public emergency' is explained by the Act to mean a grave emergency whereby the security of India or of any part of the territory of India is threatened by war or external aggression or internal disturbance.

4. FACTORY REGISTRATION-LICENCE – MANDATORY

The Act under Section 6 requires that, even before the FACTORY is set up, an Application should be made to the Chief Factory Inspector for his approval. The Application has to be made along with the prescribed fee.

It is prohibited to carry on any manufacturing process until a certificate of stability is sent to the Chief Inspector of Factory ***and*** the same is approved by him. Similarly, no place can be used as factory unless the Chief Inspector of Factory has approved the Factory Plan ***and*** he has issued the necessary certificate as to the disposal of waste etc. In case of renewal also, it is incumbent to comply with the conditions under which licence was issued. It must be clearly noted that Section 6 refers to ***Licence*** as well as ***Registration***. Form No. 2 is prescribed for Registration and Form No. 3 is prescribed for Licence. If the Licence or Registration certificate is lost or destroyed, the ***Duplicate*** can be issued on the payment of prescribed fee.

In the absence of or in case of death or insolvency of the Occupier, any other person is entitled to continue the business. Section 7 makes it mandatory to give Notice to the Chief Inspector of Factory at least 15 days before beginning or occupying the factory.

The State of Maharashtra has made a provision whereby if an application for grant of licence is made and no licence is issued within 4 months, the licence shall be deemed to have been granted by the Chief Inspector of Factory. Such a provision ensures that ***no***

undue delay is caused in granting or rejecting the licence and registration under the Act.

The State Government or the Chief Inspector of Factory is vested with the powers to amend, renew, revoke or suspend any registration on the grounds specified in Rules 5 to 13 framed under Section 6 of the Act. Needless to record that the Chief Factory Inspector of Factory has to satisfy himself for granting and rejecting the licence/registration. No doubt such satisfaction of Chief Factory Inspector has to be judicious and not arbitrary or capricious or on extraneous grounds.

The mandate is on the 'occupier' and it is incumbent upon him to make the application in the prescribed form, prescribed under Rules framed under the Act. The Occupier has always to comply with all the provisions of the Act and non-compliance of some of them invites penalty under the Act. Sections 11 to 50 of the Act enumerate the duties of the Occupier. The term 'Occupier' is defined in Section 2(n) to mean any person who has the ultimate control over the affairs of the factory PROVIDED:

(i) in case of a firm or association of individuals, any one of the individual partner or members thereof shall be deemed to be the occupier,

(ii) if it is the factory of Central Government or State Government or Local authority, person or persons appointed to manage the affairs,

(iii) in case of ship repair or maintenance work, in respect of the ship if carried out in dry dock which is available for hire,

(iv) In case of ship which is being repaired, or maintenance is carried out in dry dock which is available for hire,

(a) The owner of dock shall be the occupier

(A) for Sections 6, 7, 7A, 7B,11, 12,

(B) for Section 17 — so far as it relates to the maintenance of light in and around the dock and

(C) for Sections 18, 19, 42, 46, 47 and 49 in relation to workers employed in it.

(b) Owner of Ship, his agent or Master of Ship or other officer-in-charge for the purposes of Sections 13, 14, 16, 17, Chapter IV –except Section 27 or Sections 43, 44, or 45, Chapter VI, VII, VIII, IX or Sections 108, 109, 110 in relation to –

(A) workers employed directly by him or through any agency AND

(B) machinery, plants or premises in use .

It should thus be clear that only one of the directors of the company who can be notified, as occupier of the factory and the company cannot nominate any employee as the occupier. In *Indian Oil Corporation Ltd. vs. Chief Inspector of Factories, 1998 II CLR 506,* it was held that no person other than the director could be notified as the occupier even if it is the Government Company.

The general duties of Occupier can be found in Section 7-A of the Act. It, *inter-alia,* lays down that the Occupier has to ensure health, safety and welfare of workers working in the Factory.

Section 101 of the Act protects the Occupier inasmuch as he invites no penalty. It is, *inter-alia,* laid down that (1) if acts with due diligence, to enforce the provisions of the Act, (2) if some other person is specifically entrusted with the compliance with the provisions of the Act, (3) if the person so entrusted with the duties commits any offence and (4) if the offence committed by such person is without the knowledge, consent or connivance of the Occupier, the Occupier can not be prosecuted or punished under the Act. However, Section 101 will have to be read together with Section 117, which lays down that even if the act is done in good faith, the Occupier cannot exonerate himself from the penalty under the Act. In other words, the Occupier cannot plead in defense his *mens-rea* or the intention. If the act is done with good intention, yet the Occupier will invite penalty if his act is penal under the Act.

Briefly stated, the Occupier can only be the Director having ultimate control over the affairs of the factory. It is incumbent upon him to submit the Plan of factory to Chief Inspector or State Government and obtain permission of the site of factory. Indeed, prescribed Licence Fee has to be paid. It is also incumbent upon him to give prior Notice of Occupation to the Factory Inspector or the Government. Thereafter, it is the duty of the Occupier to ensure reasonable and practical facilities provided for health, safety and welfare of workers who are on duty. The Occupier has also to make special provisions for hazardous processes, if carried out in the factory.

5. PROTECTION AGAINST HAZARDOUS PROCESSES

The Act lays down various provisions for protecting workers from the hazardous processes carried on in the Factory.

Section 41A provides for constitution of "Site Appraisal Committee". The said Committee is constituted from amongst the Chief Inspector of Factories and representatives of different Pollution.

Section 41B makes it mandatory for the "Occupier" of the Factory to disclose all information as to dangers involved in the process to be carried out in the proposed factory. The workers at work can file Written Statements for Health and Safety.

Sections 41C to Section 41H required that (i) Prescribed Records have to be maintained (ii) Qualified persons have to be appointed as supervisors, (iii) Inquiry Committee has to be constituted, (iv) For exposure of chemicals and toxic substance, it is necessary to provide for maximum permissible threshold limits in the prescribed manner, (v) Safety Committees has to be set up in which the representatives of the employer and workers are to be nominated. The Rules also require that workers having reasonable apprehension of imminent danger to their lives or health due to any accident

should be able to bring their apprehension to the notice of the Occupier or Manager.

Rules are framed so as to obtain or develop information of every hazardous substance or material handled in manufacturing process. It is the duty and obligation of the Manager or the Occupier to furnish specified information to (i) Workers handling hazardous materials, (ii) the General Public (iii) Local Authorities and (iv) The Chief Factory Inspector. He must be given information in detail about the solid and liquid waste generated per day.

Rules are framed for factories employing 50 and more workers employed in hazardous process or occupation for (1) medical examination (2) maintaining Health Centres, (3) Ambulance vans equipped with specified items and (4) Decontamination facility in specified manner depending upon the number of workers deployed in the factory. It is also mandatory for the Factories to maintain health records and safety precautions for Thermic Fluid Heater.

Section 88 is not only mandatory but also penal. It lays down that the (1) Factory Inspector (2) ESI Authority, (3) nearest Police Station (4) Sub-Divisional Magistrate and (5) nearest relative of the deceased workman must be forthwith given ***Notice of Accident*** or ***Dangerous Occurance*** in the factory in the prescribed form.

Section 89 is also similarly not only mandatory but also penal. It lays down that the manager or the occupier must forthwith send ***Notice*** of the poisoning diseases to the Chief Factory Inspector, Medical Inspector of Factories and ESI authorities.

6. HEALTH, SAFETY AND WELFARE OF THE WORKERS

Health

The Act lays great emphasis on Factory workers inasmuch as it lays down the provisions in great detail and requires the same to be followed strictly.

Section 11 requires the Factory to keep cleanliness. The Factory must be kept free from effluents arising from any drain, privy or other nuisance, the floors must be kept clean, accumulated dirt must be removed and provisions for drainage must be made and, once in 5 years, doors, windows etc. must be painted.

Section 12 requires the proper disposal of effluents in the prescribed manner.

Section 13 lays down that proper arrangement for ventilation, fresh and maintaining necessary temperature in the prescribed manner must be made.

Section 14 lays down that Exhaust Appliance must be made in the Factories where fumes and dust is produced during the manufacturing process.

Section 15 requires determining and keeping the record of humidity in the air and maintaining standard humidification by increasing humidity by artificial method in the prescribed manner. The Rules 23 to 33 are made under this Section. It is laid down in the rules that hygrometer in all departments of cotton weaving and spinning factories must be provided and that temperature has to be recorded at each hygrometer of prescribed specification must be provided. The thermometers have to be got certified from the Factory Inspector and they must be maintained in efficient order. In other words, inaccurate thermometers cannot be used. No reading must be taken within 15 minutes of renewal of water and where steam is introduced for humidification, it must be in the prescribed manner.

Section 16 prohibits overcrowding in the room/s of the Factory. The Rule framed under the Act lays down that minimum space of 14.2 cubs. mtr. for every worker employed in the Factory must be available.

Section 17 lays down that natural or artificial light must be made available at the place of work or at the place frequently used by workers in the specified manner specified in the Rules framed under

the Act. If the Factory has glazed tiles, it is necessary to prevent glare and formation of shadows.

Section 18 requires of the Factory to make proper arrangement for the Drinking Water, at least 5 ltrs. per worker and if there are more than 250 workers then it is essential to provide for the water Cooler so that workers get the cool drinking water at the work place. The water cooler water has to meet with the specifications laid down in this regard in the Rules framed under this provision. It is also laid down that the drinking water should ***NOT*** be within 6 mtrs. of the washing place and the water connection should be connected with the public water supply or as approved by the Health Officer. The Health Officer has to certify and give report as that the water is fit for human consumption. If the water supply is from the storage tank or the vessel, the same is required to be dust proof. But if the water supply is made from the well or reservoir the same should be protected from the pollution of chemicals. The Rules framed under this provision can be found in rules 40 to 44.

Section 19 lays down that separate latrines and urinals, for male and female with proper doors, fastening and adequate lighting must be made and sign boards must indicate that one is for male and the other is for the female. One urinal for every 50 worker up to 500 workers and thereafter for every 100 worker one latrine has to be provided for in the Factory premises. Indeed, not only the proper drainage system with proper connection with sewage system and whitewash for the urinals and latrines is essential but also maintaining the record is equally essential. So also it is essential to construct and maintain drains, water taps in latrines and appointment of adequate number of sweepers. Rules 45 to 53-A are relevant in this connection.

Section 20 requires prohibition of spitting ***Except*** in spittoons in the Factory and contravention should be made punishable with fine of ₹ 5/-. The number and types of spittoons and locations should be as per the instructions of the Factory Inspectors. The cleaning atleast once a day has to be carried out.

Briefly stated, it is mandatory to take measures to keep the factory premises clean, dispose of wastes effluents, maintain adequate ventilation and reasonable temperature, prevent accumulation of dust and fume, avoid over crowding and provide sufficient lighting, drinking water, latrines and urinals and spittoons.

Safety

Section 21 requires fencing of every moving part of prime mover, flywheel, headrace and tailrace of water wheel, part of stock-bar and every part of electric generator, transmission, machinery etc.

Section 22 requires maintaining a register of specially trained workers attending to machines and also it requires tight fitting clothing.

Section 27 prohibits employment of women and children for pressing. Whereas Section 22 prohibits deployment of young person on machines without previous instructions as to the danger of operation, training and adequate supervision. Section 2(d) defines Young Person to mean a person who is either child or an adolescent. The terms 'child' and 'adolescent' in turn are respectively defined in Section 2(b) and 2(b). As per the definition, a person who has not completed the age of 15 years is child and a person who has completed 15 years but has not completed his 18^{th} year is the young person.

Section 24 requires arrangement of gear, suitable striking gear and power cutting devices.

Section 28 requires (except specified) hoists (elevator) and lifts to be of good mechanical construction, properly maintained and sufficiently protected. The examination has to be recorded in the Register in the prescribed form.

Section 29 similarly requires the lifting machines, chains, ropes and lifting tackles to be of good construction, properly maintained and thoroughly examined and recorded in the Register. It is

prohibited to use the lifting machines, chains etc. for the first time unless properly tested and examined.

Section 30 requires the Factories engaged in grinding on revolving machines to give and display near the machine, the notice of safe working and the peripheral speed.

Section 31 requires safety measures to be taken in respect of pressure and plant and vessels operated under pressure over atmospheric pressure and maintaining of the record in prescribed manner.

Section 32 requires that floors, stairs and ingress/exit must be of sound construction and should be free from all obstructions.

Section 33 lays down that fixed vessels, sump tank pit must be covered or fenced securely.

Section 34 imposes prohibition on employment of any person to lift, carry or move any heavy load beyond prescribed limit so as to cause him any injury.

Section 35 requires protection to be given to those who work in manufacturing process, involving risk of injury to eyes. The Factory is required to provide proper screens and suitable goggles to workers working in that condition.

Sections 36 and 36A requires that precautions must be taken (i) in the use of portable electric light and (ii) against fumes, gases etc. in the prescribed manner prescribed under Rule 67 and as laid down in Schedule I or II.

Section 37 requires practicable measures to prevent explosion arising out of manufacturing process, produces, dust, gas, fumes or vapour.

Section 38 requires precaution for preventing any breakout of fire and its spread, both internally and externally and provides safe means for escape. It is necessary for this purpose to have the fire extinguisher and training thereof. Rules 70, 71, 71-B are framed in this connection.

The Factory Inspector is vested with sufficient powers with regard to safety in Sections 39, 40, 40A, 40B and 41.

Briefly stated, the Factory must make appropriate steps to (i) fence certain machinery, (ii) protect workers repairing machinery in motion, (iii) protect young persons working in dangerous machines, (iv) maintain hoists and lifts in good condition (v) protect workers from injury to their eyes, (vi) protect workers from dangerous dust, gas, fumes and vapours and (vii) protect workers from fire etc.

The factories employing more than prescribed number of employees — one thousand employees, under Section 40 B, are required to appoint one or more number of SAFETY OFFICERS.

Welfare

Section 42 requires that there should be washing facility, separately for men and women and it should be adequate and suitable.

Section 43 requires the facility for storing clothes which are not worn during the working hours and the facility for drying of wet clothes.

Section 44 requires sitting facility during rest hours to be made for workers who are required to work in standing position.

Section 45 requires 'first aid' facility to be made available. It is laid down that there should be one first aid box/cupboard for every 100 workers. The first aid box or cupboard should contain prescribed sufficient equipment. It is also necessary to have the trained person/s in first aid and he/she/they should be in-charge of the first aid box/cupboard. The Notice giving name/s of in-charge of first aid box/board should be displayed near the first aid box/board.

Section 46 requires ***Canteen*** facility provided in prescribed manner in the factory where more than 250 workers are employed. Further, it is necessary to provide the facility of dining-hall having sufficient utensils, crockery, furniture and other necessary equipment, where 30% workers at a time can use the facility. It is also necessary

to control the prices of foodstuff, beverages, and other items served in the Canteen and for that purpose, it is mandatory to display the price list at the conspicuous place of the canteen and books of accounts are to be maintained, produced on demand. The accounts should be duly audited once in a year. The Canteen Committee should be formed which shall check and control the canteen facility, quality and quantity of the foodstuffs in the canteen. If the Inspector of Factory who is vested with sufficient powers in this regard and can direct the prices to be changed so as to be on 'no-profit, no-loss' basis. Rules 79 to 85 are framed in this regard. It may be clearly noted that under Section 46, if prescribed number of workers are working in the factory, it is mandatory to provide for the CANTEEN. In *Piramal Chandra Raha vs. Life Insurance Corporation of India, 1995 II CLR 194*, the Hon'ble Supreme Court of India has laid down that it is a statutory obligation and duty to maintain a Canteen and as such, the Canteen is part of the factory. Therefore, the Canteen workers are the employees of the factory. It necessarily leads to the logical conclusion that same rules of Factory Act are applicable to the Canteen employees also.

Section 47 requires the Factories deploying 150 or more workers to make available and maintain (as prescribed in Rule 86) the facilities of shelters, rest rooms, and lunchrooms with water facility.

Section 48 requires Crèches facility to be provided where more than 30 women are working. The Crèches should be conveniently accessible to mothers but not closely connected with the factory where fumes dust etc. is carried on. The Crèches should have proper ventilation, adequately furnished, suitably fenced and shady open ground in the prescribed manner. The Crèches should have the washing facility and that the pure milk 300 ml. per child above 2 years of age should be supplied. The wholesome refreshment is also to be provided. The qualified woman should be put in charge of the Crèches and adequate number of female attendants to help her (woman attendant) should be made available. Rules 87 to 90 are framed in this connection. Exemption is given to Factories working

less than 190 days in a year or where less than 15 married women or widows are working or number of children below 6 years are not more than 4 in number.

Section 49 lays down that where 500 or more workers are deployed, it is necessary to appoint the Welfare Officer in the prescribed manner.

Section 114 makes it abundantly clear that ***No Fee*** can be charged or collected from the workers for the facilities or conveniences provided under the Act save and except the food served in the factory canteen.

The factories employing more than the prescribed number of employees – Five hundred employees, under Section 49, are required to appoint one or more number of ***Welfare Officers.***

Briefly stated, every Factory must make available the facilities like, washing, sitting, first aid box, cupboards and lockers for storing clothes. In case, the factory is big, it is also necessary to make available the facilities like, drying of wet clothes, canteens, rest rooms and crèches.

7. WORKING HOURS OF ADULTS

The Act prohibits employment of Adult workers for a period of more than 48 hours in a week (Section 51). But in no case an adult worker can be asked to work for more than 9 hours in a day (Section 54) and in any case a worker cannot be asked to work continuously for a period of ten and half hours in a day (Section 56). At the same time, a worker has to be given a rest or interval of half an hour before or after a period of 5 hours of working and this period of interval has to be included in the total hours of working of 10½ hours in any given day (Section 55 read with Section 56). In other words, the spread over should not exceed 10 and ½ hours including rest interval. Further, Section 60 requires that if a worker has already worked in other factory for the day he should not be employed in the factory. Indeed powers are vested with the Factory Inspector to grant

deployment if he is satisfied that in a week, the worker is not putting more than 48 hours of work and enjoys weekly off. It is in the larger interest of worker, rather his health. So far as ***Woman Worker*** is concerned, Section 66 puts further restriction on working of women workers. It requires that women workers can be employed between 6 a.m. and 7 p.m. and there will be no change in shifts. It is mandatory to give weekly holiday once in a week and in case the worker is deprived off her weekly holiday, she has to be given a compensatory holiday. Section 59 requires payment of ***Overtime Wages*** to workers working for more than 9 hours in a day or for more than 48 hours in a week. Section 59 itself lays down the rate of wages and states that worker shall be paid at double the rate of his normal wages. Normal wages or the ordinary rate of wages is clarified to mean Basic Wages + Allowances including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles but does not include Bonus and wages for overtime work. Rules are framed to issue Duplicate copy of Wage Slips to workers.

Section 58 prohibits overlapping shifts although Printing Press attached to News Paper Office is exempted under certain conditions.

Briefly Stated, workers cannot be employed for more than 48 hours in a week, he cannot be employed for more than 9 hours in a day and an interval of rest of at least ½ hour after 5 hours break has to be given. The total periods of work inclusive of rest interval must not spread over more than 10½ hours in a day. The worker must be given a holiday for a whole day in every week or he must be paid overtime wages at the double the ordinary rate of wages. A woman worker cannot be employed beyond the hours of 6 a.m. and 7 p.m.

8. WORKING OF YOUNG PERSONS

The Act prohibits employment of young children. Section 67 states that no child who has not completed 14th year of age shall be required to work in the Factory. Section 69 requires that in case a young person who has completed 14th year of age and if he is to be

employed, has to obtain a Certificate of Fitness to work from the Certifying Surgeon. Section 68 prohibits deployment of such person unless such Certificate of Fitness to work is given to him. The adolescent and the Female workers are required to be given the Token Certificate of Fitness and they have to carry it with them. Their working hours cannot be for more than 4 ½ hours a day, no overlapping of shifts; no night shift and spread over should not be for more than 5 hours a day. No second employment is allowed in their case too. Section 72 Section 73 require a Notice to be displayed and a record maintained showing the name, nature of children employed in the factory and the work done by them together with the other detail. Sub-Section 1A of Section 73 makes it crystal clear that save and except the children whose names are shown in the displayed Notice, no other child can work in the factory. Whereas Section 74 further clarifies that work should correspond with the notice under Section 72 and registers under Section 73. Section 77 makes it further more clear that the provisions made in the Act are in addition to and not in derogation of the Employment of Children Act, 1938.

Briefly stated the employment of child below the age of 14 years is totally prohibited. However, a child who has completed 14 years of age but has not completed 15 years can be employed for a maximum period of 4½ hours in a day and not night time, i.e. 10 p.m. to 6 a.m. and such child must have a certificate of fitness granted by the Certifying Surgeon. The child between the age of 15 and 18 years of age can be employed as an adult if he has a certificate of fitness for a full day's work. The Factory Manager must maintain a register of child workers in the prescribed form.

9. ANNUAL LEAVE WITH WAGES

The Act makes it very clear in Section 78 that it shall not operate to the prejudice of worker's RIGHT to which he may be entitled to under (1) any law for the time being in force, (2) an Award of any court (3) any agreement or settlement or (4) contract of service. So far as the annual ***Leave*** with wages is concerned, the ***Provisio*** lays down that if worker is entitled to longer period of

annual leave with wages under (i) any Award of the Court, (ii) agreement/settlement or (iii) contract of service, then he shall get it under Award/Agreement/Settlement/Contract of Service. However if what is provided in the Act is more beneficial to the worker then the provisions of the Act shall apply. Sub-Section(2) of Section 78 takes away the applicability of the Act if the workers are working in factory of any Railway, administered by Government, who are governed by leave rules approved by Central Government.

Section 79 lays down that a worker has to be given leave with wages for one day, if in the earlier year he has worked for 20 days in case of adult and 15 days in the case of child. While computing number of days worked, it is necessary to include the number of days of days of (1) Lay off given (2) maternity leave and (3) the earned leave enjoyed during this period. But the holidays falling during the leave or prefixing or suffixing the leave will have to be excluded in the Leave under this section. The work on half day has to be treated as full day. Leave not utilized upto the period of 30 days has to be added back in the subsequent year. However, if the worker has applied for leave and the same is refused to him, in that case, the worker is entitled to carry forward the leave refused without any limit. In any case, it is for the worker to apply in writing for the leave to the Factory Manager not less than fifteen days before the date on which he wishes his leave to begin. However application in writing is not necessary in case the worker wants to avail himself of the leave with wages due to him to cover the period of illness.

Worker discharged or dismissed is also entitled to wages in lieu of such leave and the Notice period for discharge or dismissal is not to be taken into consideration.

The rate of wages for the leave will be equal to the daily average of total earnings of days worked. The Act also provides for advance payment in case leave is allowed for 4 days in case of adult and 5 days in case of a child and the payment has to made at the beginning of his leave.

The unpaid wages can be recovered as delayed wages under the Payment of Wages Act. Incase a worker dies before resuming duties and if he is entitled to payment of balance period of leave with wages, his nominee or the legal representatives (as the case may be) will receive the amount payable to the worker.

The responsibility is upon the Factory Manager to keep and maintain register for the leave with wages and other record for a period of 3 years from the date of last entry. The Factory Manager has to provide Leave book in the prescribed Form to workers entitled to leave during calendar year. It is also the duty of the Factory Manager to display the notice at the main entrance of the factory for the information of the workers working in the factory.

10. WORKERS' RIGHTS AND OBLIGATIONS

The Act grants rights and so also casts obligations on the workers working in the Factory. The workers have the RIGHT to (1) obtain information relating to workers' health and safety at work from the Occupier or the Manager of the Factory (2) get himself sponsored for the training in the Health and Safety of workers at work at the Training Centre or Institute, duly approved by the Chief Inspector of Factories for imparting any such training AND (3) represent to the Inspector, directly or through his representative, about the matter of inadequate provisions for protection of health or safety in the factory.

The Obligations on the workers are that they can not willfully (1) interfere with or misuse any appliances, conveniences or things provided for health, safety or welfare (2) they cannot neglect to use appliances or other things made available for health or safety AND (3) cannot do anything which is likely to endanger him or others.

If any worker contravenes any of the aforesaid obligations, he may be punished under Section 111(2), with imprisonment upto 3 months or with fine upto ₹ 100/- or with both.

11. OBLIGATIONS OF FACTORY OWNERS/ MANAGERS

The Factory Owner, Occupier or the Manager has the following obligations under the Act:

(i) To maintain in the prescribed form and manner the registers of:

(1) Lime washing, painting etc.

(2) Adult workers

(3) Child workers

(4) Working hours of (a) Adult workers and (b) Child workers

(5) Details of Gas Holder

(6) Workers attending machinery

(7) Humidity

(8) Leave

(9) Muster Roll

(10) Accidents and Dangerous Occurrences

(ii) To send

(1) Accident-Report

(2) Notices of Dangerous occurrences

(3) Notices of Poisoning Diseases and the

(4) Annual Returns in the prescribed form and manner AND

(iii) To display abstracts of the Act and Rules on the Notice Board of the Factory at its conspicuous place.

12. OFFENCES AND PENALTIES

Section	Nature of Offence	Penalty
92	Contravention of any provisions of the Act or Rule by any Manager or occupier of the Factory	Imprisonment up to 2 years or Fine up to ₹ 1 lakh or both
	Continuance of aforesaid offences	Further Fine up to ₹ 1,000/- for each day of continuance
	If contravention of safety rules results in death	Fine not less than ₹ 25,000/-
	If contravention results in serious bodily injury	Fine up to ₹ 5,000/-
94	Further contravention of above offences under Section 92	Imprisonment up to 3 years or Fine not less than ₹ 2 lakh or both
96	Disclosure of results of analysis samples taken in the belief of contravention of provisions of the Act/rules	Imprisonment up to 6 months or Fine up to ₹ 10,000/- or both
96-A	Non-disclosure of mandatory Information regarding dangers or hazardous process etc. (Section 41-B) Failure to maintain health records etc. (Section 41C) Failure to warn workers of imminent danger	Imprisonment up to 7 years or Fine up to ₹ 2 lakhs
	Continuance of offence stated in Section 96-A above	Additional fine or ₹ 5,000 for each day of continuance
	Continuance of offence under Section 96-A above for a period beyond 1 year after conviction	Imprisonment up to 10 years
97	Offence by Workers	Fine up to ₹ 500/-
98	Use of Fitness Certificate issued to someone else	Imprisonment up to 2 months or Fine up to ₹ 1,000/- or both
99	Double Employment of children	Punishment Fine up to ₹ 1,000/- to guardian or parent/s

The Employees' Compensation Act, 1923

CHAPTER 4

1. THE EVOLUTION

When Law was in its primitive stage, Compensation to Workmen was unknown to Law. But then Law grew in its concept and grip. The Industrial Revolution was spreading all over the world which revolutionized the Industrial Law and the ever growing Law quickly noticed that Workmen needed protection from hardships arising due to accidents. The Law then finally recognized the Compensation to Workmen. The Law of Compensation resembles with the Law of Torts yet it is not the same. The Law of Torts takes into consideration, the anguish, sufferings and agonies of injured Employee. The Law of Compensation does not take all these into consideration and it simply seeks to compensate the Loss of Earning Capacity.

The Government of India in July 1921 had addressed letters to Local Governments and had invited their views on Compensation to Workmen. The Local Governments were in favor of Legislation. Then in June 1922 a Committee was convened to consider the views and when Committee too was in favor of Legislation, a Bill was drafted and presented in the Legislature. The Legislatures (of the then India) then finally passed the Workmen's Compensation Act, 1923. In the year 2009, the Indian Legislatures of today, by Amending Act of 45, *inter-alia*, changed the name as the **Employees' Compensation Act, 1923**.

2. DEFINITIONS

Employee

The term Workman is replaced by the term Employee and it is defined in **Section 2 (dd)** of the Amended Act. The amended definition lays down that the term **Employee** means:

A Person who is

(i) Railway Servant as defined in Section 2 (34)} of the Railway Act, 1989 not permanently employed in any 'Administrative', 'District' or Sub –Divisional Office of a Railway and not employed in any such capacity as is specified in Schedule II; or

(ii) Master, Seaman or other member of the crew of a ship.

(iii) Captain or other member of the crew of an aircraft

(iv) A person recruited as driver, helper, and mechanic, cleaner or employed in any other capacity with a Motor Vehicle

(v) A person recruited for work abroad by a Company who is employed outside India in any capacity as specified in Schedule II by the Company registered in India

(vi) Employed in any such capacity specified in Schedule II – whether Contract of Employment was expressed or implied.

If Employee is dead then his 'Dependents' will be treated as 'Employee'. However, if strict view of the term "Employee"' is taken, the Compensation coming in the hands of Dependents can be attached, assigned or a charge can be raised. But surely, such strict view is not taken and the Compensation given to Dependents (of the deceased) is completely secured under **Section 9** of the Act. Further, the Dependent, in his own name, can file the Appeal the right of appeal is not upon death of the Employee.

Dependent

The term Dependent is defined in **Section 2 (d)** of the Act. No doubt, a relative is always presumed to be the 'Dependent' on the

earnings of the Deceased Employee but the Act segregates the 'Dependent' in three different categories, (1) Dependents in whose case, it is not necessary to prove their dependency on the earnings of the Deceased Employee the (2) Dependents in whose case, it is mandatory to prove that they were **wholly dependent** and (3) Dependents who were **wholly or partly dependent** on the earnings of the Deceased Employee **at the time of his death**.

(i) In the following cases, the Claimant simply has to **prove his relationship** and need **not prove his dependency** on the earnings of Deceased Employee:

  (a) Widow,

  (b) Minor Son, Legitimate or Adopted.

  (c) Unmarried Daughter, legitimate or adopted. And

  (d) Widowed mother.

(ii) In the following cases, the Claimant has not only to prove his relationship but also prove that he was **Wholly Dependent** upon the earnings of the Deceased Employee at the time of his death:

  (a) Son

  (b) Daughter of 18 years age and who is **infirm**.

(iii) In the following cases, the Claimant has not only to prove his relationship but also prove that he was **Wholly or Partly Dependent** upon the earnings of the Deceased Employee at the time of his death:

  (a) Widower

  (b) Parent other than a Widowed Mother

  (c) Minor illegitimate son,

  (d) Unmarried illegitimate Daughter

  (e) Daughter, Legitimate, illegitimate, or Adopted if married and minor or if widowed and minor

  (f) Minor brother

(g) Unmarried Minor Sister

(h) Widowed Minor Sister

(i) Widowed Daughter-in-Law

(j) Minor child of a pre-deceased Son

(k) Minor child of a pre-deceased Daughter where no parent of the child is alive

(l) Paternal Grandparent if no parent of the Employee is alive

The Allocation of Funds amongst Dependents

The Act does not lay down any guide lines as to how the amount of Compensation will be allocated to each of the dependents if the dependents are more than one. However, the Commissioner should take into consideration:

(i) The status of family,

(ii) The age of Widow and ascertain the circumstances, extent and possibility of her remarriage

Employer

The term Employer is defined in **Section 2(e)** of Act. The Amended Act brings the following under the fold of the term Employer.

(i) Anybody of persons, whether incorporated or not.

(ii) Managing Agent of the Employer

(iii) Legal Representative of a Deceased Employer.

(iv) When services of Employee are temporarily lent to another person or given on hire to another person, the said Employer. The injured Employee is vested with a right under Section 12 of the Act to proceed either against the principal or the Contractor who had employed him.

(v) The definition of the Employer, as is clear from the definition, is 'inclusive' and not 'exhaustive'. As such,

persons enumerated in the definition do not exhaust the whole body of persons who can be called as Employer under the Act.

In order to make the Principal Employer liable to pay Compensation, it must be shown that

(a) The principal Employer is carrying on a trade or business and in the course of that trade or business he engages a Contractor to execute his work.

(b) The work assigned to the Contractor is ordinarily a part of the trade or business of the principal Employer

(c) The injury or accident must have occurred on, in or about the premises on which the principal has undertaken or usually undertakes to execute the work which is under his control or supervision.

(d) The accident must have arisen while the Employee was in the course of his employment in executing the work.

The Legislatures have left no stone unturned in protecting the Workmen against the Employer. **Section 17** lays down that Employer cannot enter into any agreement – Voluntarily on the part of Employee or otherwise – to the effect that Employee will receive any lesser amount than due under the Act. The recital in the agreement that the Employee had voluntarily agreed to accept in full and final settlement of his claim did not render the agreement valid.

Wages

The Act, under **Section 2(m)**, defines 'Wages' very skillfully by not limiting its meaning by including all 'Benefits' capable of being computed in terms of money. Thus, Overtime Wages, Bonus, Daily Allowances, Line Allowance or Night Out or Outstation Allowance, Gratuity, Bhatta, Clothing Allowance, Free Accommodation, Free Water are all included in the term 'Wages'. **Section 5** then proceeds to explain the method of calculating Wages falling under the Act. It may be noted that the Employees, not working on monthly basis, are also brought within the ambit of the Act.

Section 5 lays down that whether wages are payable monthly or otherwise or at piece rate, the monthly wages are calculated in the prescribed manner.

3. NOTICE OF ACCIDENT

Section 10 requires that Employer must be informed of the accident so as to make him liable to pay Compensation under the Act. Necessarily, information, in legal terms means **Notice of Accident** to the Employer. Needless to state that the Notice must be the (a) Notice in Writing (b) giving names and address (c) of the injured employee (d) the date of Accident. Further, the Notice of Accident must be delivered to Employer at (A) his residence or (B) any office or (C) the place of business. The Act makes it explicit as to what is implicit that the Notice of Accident must be sent (1) by registered post OR (2) when a Notice Book is maintained, by making entry in that book. The Act then further requires that Notice of Accident should be given as soon as practicable. But No–Notice–of–Accident is required to be given if (a) the Employer had the Notice of Accident OR (b) One of the several Employers had the Notice of Accident OR (c) Any person responsible to the Employer for the management or any branch of the trade or business in which injury was caused.

The Notice of Accident, under Section 10, is required to be served upon (a) Employer OR (b) Anyone of the Several Employers OR (c) Upon any person responsible to the Employer for the management or any branch of the trade or business in which the injured Workmen was employed. Such Notice of Accident has to be within 2 years and if Employer fails to settle the claim, the Claimant has to move the Commissioner within 2 years from the date of accident/Death. **Thus Period of Limitation (1) for giving Notice of Accident to Employer and (2) for filing Claim before the Commissioner is prescribed as TWO Years from the date of accident/death of the Employee.** However, the Act relaxes, the rigour of Period of Limitation and vests Powers in the Commissioner of Employees' Compensation to entertain the Claim not preferred

within the prescribed period of limitation, if he is satisfied that the failure to come within the prescribed period of Limitation was due to Sufficient Cause. The phrase 'sufficient cause' is an old one and appears in numerous enactments on different topics.

4. LIABILITY TO PAY COMPENSATION

Section 3 of the Act imposes liability upon Employer to pay Compensation to his Employee when he sustains (**i**) personal injury (**ii**) caused by accident (**iii**) out of and (**iv**) in course of employment. Thus following ingredient must be present for seeking compensation.

1. **Personal Injury** to the Employee
2. Injury must caused by **accident** and
3. The accident must have arisen **out of and in the course of employment**.

First of all, it must be clearly understood that (A) the 'personal Injury' referred to in the Section does not include any Injury caused or designed by the Employee himself and (B) the root word 'Injury' is not defined in the Act but surely, Injury means physiological Injury or which imperils the life or causes pain. In any case, it must be remembered that the term 'Injury' is of a wide import.

Accident

No doubt, like the term 'Injury' the term 'accident' is also not defined in the Act. Nevertheless, from time to time the Courts have given interpretation to the term accident occurring in **Section 3** of the Act. The Apex Court[1] held that the accident ordinarily would have to be understood as unforeseen or un-comprehended or as that which could not be foreseen or comprehended. Broadly, the following points emerge as relevant to determine to decide as to whether it is an accident or not.

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[1] *Shakuntala Chandrakant Shreshti v/s Prabhakar Maruti Garvali, AIR* 2007 SC 248.

(i) The word Accident is used in popular and ordinary sense and means 'mishap', untoward event, not expected or designed.

(ii) It has to be actual physical happening which is avoidable by safety measures or by adopting methods of other care or caution at the time of happening.

(iii) The accident must be construed from the point of view of the deceased.

(iv) The accident should have been resulted from the exertion of the employee in performance of his duties.

(v) If it is an unexpected event, it is accident even if intentionally caused or some act committed willfully by the Employee.

(vi) There may be internal ailment. But some external factor must cause death.

5. PAYMENT OF COMPENSATION

In case, the Employee is not alive, who will receive the Compensation? Undoubtedly the Dependent will receive it. But possibility is not ruled out that Employer may not be interested in payment of Compensation as he may not know the number of dependents or it may not be possible for him to gather the information or it may take a long time in the process. Naturally, therefore, the Act, under **Section 8**, enshrines the responsibility in the Commissioner of Employees' Compensation. He undertakes the exercise of distributing the Compensation amongst the dependents and he is also made responsible for the adequate protection of women, minor and their legally disabled persons. The Employer is discharged from his liability of payment when he deposits the Amount of Compensation with the Commissioner.

Section 8(1) prohibits an Employer from

(a) Making payments of Compensation directly to the heirs and legal representatives of the Deceased Employee.

(b) Payments made directly to the Legal Heirs of the Deceased Employee **cannot** be treated as 'Provisional Payments' so that the same can be adjusted against the actual payment of Compensation required to be paid to Dependents under the Act.

Section 4 of the Act has created an absolute liability of paying Compensation. The liability so created under this provision is so absolute, hard and fast that even a private payment of Compensation does not discharge the Employer from the statutory Liability. If the Employer pays out of pity, special grace, magnanimity or liberality, he has no right to recover it from the Compensation or even from the Contractor inasmuch as the Payment made by the Contractor does not exonerate the Principal Employer from his liability to pay the Compensation. In this connection it may noted that **Section 12(1)** of the Act casts a 'Legal Duty' upon the Principal Employer to specifically claim and plead the indemnity from payment of Compensation. And if the Principal Employer fails to claim any such indemnity of paying the Compensation, the Order passed under Section 12(1) (holding the Principal Employer liable) will not give any indemnity to Principal Employer from paying the Compensation unless independent findings are given on the indemnity of not paying the Compensation. Further, the Agreement contrary to Section 12(2) is inoperative.

6. COMPUTATION OF COMPENSATION

In order to compute the amount of Compensation, one must clearly understand the terms, like:

(i) Partial Disablement,

(ii) Permanent Disablement,

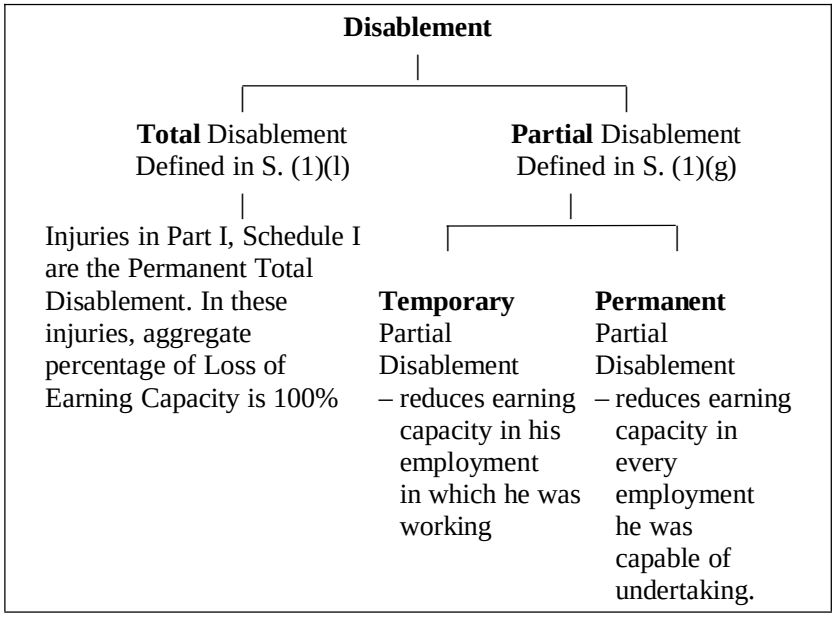
(iii) Loss of Earning Capacity. The actual earning is not identical with earning capacity. Rise in wages after accident does not necessarily indicate that there is no Loss of Earning Capacity. Similarly, loss of Physical Capacity also does not necessarily indicate the extent of Loss of Earning

Capacity. The Loss of Earning Capacity or incapacity to work also includes inability to get work done.

and

(iv) Injury caused 'in the course of and out of employment'

Partial Disablement



As can be understood from the above Table, the Disablement is divided into two; (a) Total Disablement and (b) Not –Total– Disablement called as Partial Disablement. **Section 2 (1) (g)** of the Act defines Partial Disablement which may be Temporary or Permanent. Temporary Disablement reduces 'Earning Capacity' **in his** Employment in which he was working. But Permanent Disablement reduces 'Earning Capacity' **in every** Employment which Employee was capable of undertaking. Injuries given in Part II of Schedule I are the Permanent Partial Disablement. **Section 2 (1) (l)** of the Act defines Total Disablement which may be Temporary or Permanent and incapacitates the Workman **for** all work which he was capable of performing at the time of accident. And Every Injury specified in Part I of Schedule I will be deemed to be Permanent

Total Disablement or Any combination of injuries specified in Part II (of Schedule I) where aggregate percentage of Loss of Earning Capacity amounts to 100%. The basic difference between Partial and Total disablement is that it:

- Reduces earning capacity **in the Employment** in which Workman was engaged (at the time of accident),.
- Reduces Earning capacity **in every employment** the Workman was capable of undertaking (at the time of accident) OR so to say the accident

Part I lists the 'Total Disablement' whereas Part II lists 'Partial Disablement'. In these Two Parts of Scheduled injuries, against each type of Injury, the percentage of Loss of Earning Capacity is given.

Non- scheduled Injuries

Where the 'Injury' is 'Nonscheduled Injury' incapacity to work is to be judged in relation to the work for which the Workman was engaged at the time of accident, and not in relation to another job of lighter duly assigned to him after the accident on the same pay. In any case, the Employee cannot be denied his Compensation merely because the Injury sustained by him does not find any place in the Schedule of the Act.

Mode of Calculation

The payment is to be made on the basis of monthly wages and the age of the Workman. Younger the Workman, Higher is the amount. The Schedule IV is devised by the Act accordingly. Schedule IV gives the **Factor** for each year of age. Factor corresponding to the age of the Workman on his **Birth Date** proceeding the date of accident or the date when Compensation fell due is relevant. It may be noted that up to 16 years of age the Factor is constant or unchanged.

Section 4 of the Act lays down that the Employer must pay Compensation (1) to his Employee if he sustains personal injury

resulting in partial or total disablement or (2) to Dependents of the deceased employee.

Death	50% monthly Wages multiplied by Relevant Factor **or** One Lakh Twenty Thousand Rupees –whichever is **more**
Permanent **Total** Disablement	60% monthly Wages multiplied by Relevant Factor **or** One Lakh Forty Thousand Rupees –whichever is **more**
Permanent **Partial** Disablement	Injury specified in Schedule I of Part II – As shown in the Schedule. Injury not specified in Schedule, Compensation proportionately payable for Permanent Total Disablement with reference to loss of earning capacity decided by medical practitioner.
Temporary Disablement (Total or Partial)	Half Monthly Payment equivalent to 25% of Monthly Wages. It may be noted that expression "Half Monthly Wages" does not mean 50% of Salary/Wages. Only quantum is prescribed as 25% of Monthly Salary/ Wages. Half Monthly Payments are payable if Temporary Disablement continues (1) for a period 28 days or (2) 5 years, whichever is shorter. Instead of paying half monthly wages, the Employer is permitted to pay it in lumpsum.

The employee can get the medical expenses reimbursed and the same is not treated as Compensation under Section 4.

The Parties can arrive at an Agreement for commuting the half monthly payment. However, if the parties are unable to chisel out an Agreement then the Commissioner is required to be moved by either Party by an Application to commute the half monthly payment. In any case, if commutation is by agreement then it must be just fair and not depriving off the employee of his statutory right inasmuch as

the Commissioner under **Section 28** has a right to reject such agreements.

It is also provided in Section 4 that if the injury results in death of the employee, the Employer has to deposit ₹ 5,000/- towards funeral expenses with the Commissioner in addition to Compensation payable under the Act. The deposited amount will be paid to the eldest surviving dependent or to the person who actually incurred the funeral expenses.

Section 4-A of the Act lays down that if the Employer fails to deposit the amount or delays in depositing the Compensation, the Commissioner is vested with power to impose penalty and interest. The amount of interest and penalty has to be paid to the Employee or his dependent.

7. PENALTIES

The Act imposes penalty for the following

- Fails to maintain Notice Book to be maintained under Section 10 (3).
- Fails to send to the Commissioner, the Statement required to be sent under Section 10A (1).
- Fails to send the Report to the Commissioner required to be sent to him under Section 10 B.
- Fails to make a Return required to make under Section 16.

The punishment prescribed is Fine up to ₹ 5,000/-

8. AGREEMENT

The Scheme of the Act shows that there can be mutual **Agreement** between the Employee and Employer without resorting to litigation. However, the Agreement must be only and strictly in accordance with the provisions of the Act. But once, the Agreement is arrived at, it has to be registered and if it is registered, the Employer is discharged from obligation, indeed to the extent the

subject matter is covered by the agreement. The Commissioner indeed may refuse to register the Agreement if it is obtained by fraud, under influence or other improper means. In any case, the Commissioner of Employees' Compensation has to satisfy himself as to the genuineness of the Agreement.

As is clear, the Payment of Compensation must be by mutual Agreement without resorting to litigation. But the Agreement must be with regard to mannerism of payment and ***not with regard to the Quantum of Compensation***. Therefore, the Employer cannot enter into any agreement (voluntarily on the part of Workman or otherwise) to the effect that Workman will receive any lesser amount than due under the Act. Such a methodology, in Law, is called as Contracting Out. Section 7 prohibits any such '**Contracting Out**'.

No doubt, the Act requires the parties to settle the claim by mutual Agreement; nevertheless, it envisages some dispute between Employer and the Employee with regard to (a) liability to pay Compensation (b) whether the injured person is an Employee or not (c) the amount of Compensation (d) duration of Compensation and (e) the extent of Disablement. Therefore, if any such dispute arises, **Section 19** lays down that that dispute will be settled by the Commissioner appointed under the Act, however, (1) Employer must have been given Notice of Accident and (2) Claim for Compensation must have been filed within 2 years of date of accident.

9. COMMISSIONER OF EMPLOYEES' COMPENSATION

The Act requires the Commissioner to be appointed however it simply lays down the manner and method in which the State Government can make the appointment. The appointment of the Commissioner under the Act has to be by Notification in the Official Gazette.

10. APPEALS

First and foremost, the appeal, under **Section 30** lies in the High Court but only on question of law and not on question of facts. True it is that appeal would lie if findings of facts recorded by the Commissioner are not based on evidence. In any case, **Section 30** lays down that appeal would lie (1) Lump sum Compensation or disallowing the Claim in full or in part for a lump sum, (2) Order of interest or Penalty, (3) Refusal to redemption of a half monthly payment (4) Order (of distribution of Compensation amongst the Dependents) (5) Order in connection with indemnity under **Section 12(2)** and (6) Refusal to register agreement. The Period of Limitation is prescribed as 60 days from the date of the order. Further, if the Appeal is filed by the Employer, it is made incumbent upon him to deposit the amount of Compensation awarded by the Commissioner of Employees' Compensation.

UNIT III: Social Legislation

The Employees State Insurance Act, 1948

CHAPTER 5

1. INTRODUCTION

The Act is a piece of legislation of social security. The social security is one of the fundamental necessities. The social security, perhaps and in all probability includes security against sickness, maternity, invalidity, employment injuries, unemployment, old age and death. India has given this security by passing the Act way back in the year 1948. After independence and the Constitution of India coming into the force, these social securities have been placed in the Fundamental Rights. Therefore, it has now become all the more important that such securities are given without any exception.

2. SOME OF THE TERMS DEFINED UNDER THE ACT

Confinement – Labour resulting in the issue of a living child, or labour after twenty-six weeks of pregnancy resulting in the issue of a child whether alive or dead.

Contribution – Sum of money payable to the Corporation by the principal employer and includes amounts payable by or on behalf of the employee.

Dependents – In case of some of the relatives of the deceased, whether they were depending upon the income of the deceased or not, is wholly irrelevant because Law will presume dependency even if they (the relative) were not depending upon the income of the deceased. Whereas in case of some of the relatives, it is necessary that they were fully dependent upon the income of the deceased before the benefits flowing from the Act are conferred upon them. Whereas the benefits flowing from Act can be conferred upon the relatives, only and only if they were depending EVEN PARTLY, upon the earnings of the insured person at the time of his death. Keeping this aspect of dependency, the Act has grouped the relatives to whom the benefits of the Act are conferred upon.

(i) Dependency is immaterial:

Widow, minor son (legitimate or adopted), unmarried daughter (legitimate or adopted), widowed mother.

(ii) Only when wholly dependent:

After 18 years of age – Son or Daughter (legitimate or adopted) if he/she is INFIRM;

(iii) Wholly or partly dependent:

(a) a parent other than a widowed mother,

(b) minor illegitimate son,

unmarried illegitimate daughter

daughter legitimate or adopted

illegitimate daughter if married and minor or if widowed and a minor,

(c) minor brother or an unmarried sister or a widowed sister if a minor,

(d) widowed daughter-in-law,

(e) minor child of a pre-deceased son,

(f) minor child of a pre-deceased daughter where no parent of the child is alive.

(g) paternal grand-parent if no parent is alive

Employment Injury

Introductory

In the expression "arising out of and in the course of employment", the magic word is "employment". The legislature very wisely has used the term employment and has avoided to use the word work in the phrase. If the word "work" would have been used in place of the word 'employment', the application of the phrase would have been tremendously curtailed and restricted. By using the Word "work", the phrase would read thus "arising out of and in the course of work". But by using the term employment legislature have given extended meanings rather than restricted meaning to the given phrase. The phrase thus applies to Employment, nature of employment, conditions of employment, obligations of employments and incidents of employment. As such, it is necessary to first ascertain the sphere of the workman's employment and then determine how the accident occurred and then decide the a matter of Law as whether the accident arose out of and in the course of employment The injury must not only arise "in the course" of but also out of the employment. These twin conditions must both exist before it can be said that the employer has incurred a liability under the Act.

What is Employment? When it begins and when it ends?

It is well to remember that the Act deploys the expression "Employment" and not "work". The reason for doing it, perhaps, appears to be that the word "Employment" is of wider import than the expression "work". A man is at "work" only when he is actually working. But he is in the employment even when he is not working but proceeds towards it or returns to the place other than his work-place. Thus, a man's employment is neither confined to his work place nor does it end with the "tool down" signal. The language deployed in the Act is of wider amplitude to cover not only the nature of employment but also its character, conditions, accidents and special risk. In this context, the term "employment" has to be construed which in turn, extends to the work place notionally.

Theory of Notional Extension of Sphere of "Employment"

When accident takes place in the premises of the Employer at the time when the workman is at Work, there is no difficulty in holding that the accident took place as contemplated under the Act. The simple question is what is the work place and for what period of time it continues. In other words, time and place is very much relevant in determining the fact whether the workman was at work or not, at the time of accident. For the purposes of the Act, the time and place of work is notionally extended. Thus, for workmen, place of employment is not limited to the actual place of his work but also extended to the place where he is doing acts belonging to the work. Similarly, time is also extended. Time for lunch hours, can also be included for the purposes of the Act.

Commencement and Cessation of Employment

In Manufacturing Co. *vs.* Bai Vatu Raja AIR 1958 SC 881 the Apex Court 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 premises so as to include an area which the workman passes and re-passes in going to and in leaving the actual place of work. There may be some reasonable extensions both, time and place, and the workman may be regarded as in the course of his employment even though he has not reached or has left his employer's premises. The fact and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view, at all times, this theory of notional extension.

Arising out of and in the Course of Employment

The phrase "arising out of and in the course of employment" has been characterized as **"Deceptively simple and litigiously prolific phrase"**. The two phrasologies (a) arising over of and (b) in the course of are distinctly separate and independent of each other without the one having any nexus or connection with the other. The one cannot be read or confused with or substituted for the other. So also the words "arising out of employment" necessarily mean that injury must be direct result of and must be immediately connected with the employment and the theory of notional extension is not applicable to the injury arising out of employment (but applicable only to the injury sustained in the course of employment.

Employee

Any person employed for wages in or in connection with the work of a factory or establishment and

(i) who is directly employed by the principal employer

(ii) who is employed by or through an immediate employer

(iii) whose services are temporarily lent or let on hire to the principal employer under a contract of service;

and includes any person employed for wages or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961.

BUT DOES NOT INCLUDE

(a) any member of the Indian Naval, Military or Air Forces; or

(b) any person so employed whose wages exceed prescribed limit.

In order to be an "Employee" the work need not be done by the employee in the factory alone. It can be done also "elsewhere" so long as the work is part of the factory. Similarly, the Casual Workers, Part-time employees and the Construction workers are also the employees under the Act.

A principal employer can also be an employee because it is not incongruous under our present legal system for two different jural capacities in one and the same person. Therefore, the company or the factory is liable to pay contributions in respect of remuneration paid to such Principal Employer.

Exempted Employee

The exempted of employee is one who is not liable under this Act to pay the employee's contribution under the Act.

(a) Family

Family means and includes

(i) Spouse,

(ii) Minor dependent children (legitimate or adopted). Children that are wholly dependent who are receiving education till the age of 21 years,

(iii) Unmarried daughter;

(iv) Child who is infirm (physically, mentally or due to abnormality or injury) and is wholly dependent until infirmity continues;

(v) Dependent parents;

(b) Insurable Employment

The insurable employment is an employment in a factory or establishment to which this Act applies.

(c) Insured Person

The insured person is a person who is or was an employee in respect of whom contributions are or were payable and who is, by reason thereof, entitled to benefits under the Act.

Permanent PARTIAL Disablement – The permanent partial disablement is such disablement of a permanent nature, as reduces the earning capacity of an employee IN EVERY EMPLOYMENT which he was capable of undertaking at the time of the accident.

Permanent TOTAL Disablement – The permanent partial disablement is such disablement of a permanent nature as incapacitates an employee for ALL WORK which he was capable of performing at the time of the accident resulting in such disablement. The Law will presume permanent total disablement in cases of injuries specified in Part I of the Second Schedule OR Combination of injuries specified in Part II aggregating to cent percent (or more) loss of earning capacity.

Temporary Disablement – The temporary disablement is a condition resulting from an employment injury which requires medical treatment and renders an employee temporarily incapable of doing work.

Sickness – The sickness is the condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds.

Wages – The wages means all remuneration paid or payable whether the 'contract of employment' was express or implied INCLUDING Wages for

Authorized leave,

Lockout,

Strike (which is not illegal)

Layoff and other

Additional remuneration, if any, paid within two months

BUT DOES NOT INCLUDE

Contribution paid in the Pension fund or PF

Travelling Allowance/Concession or its value.

Payments to defray special expenses on employment AND

Gratuity.

3. EMPLOYEES' STATE INSURANCE CORPORATION

The Act seeks to create a statutory establishment under the name of the Employees State Insurance Corporation. It also seeks to set up the Standing Committee as well as the Medical Benefit Councils to carry out the intents and purports of the Act. The Act also requires the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils to be set up or establish which carry out the work at the Regional level or the State level. The Act creates obligation on the Central Government to create a FUND for this purpose and seeks to treat the expenditure incurred by the Central Government as loan to the ESI Corporation. The Fund so created has to be expended for:

(i) payment of benefits, provision of medical treatment and attendance to insured persons or to their families. The provision of such Medical benefit to their families.

(ii) payment of fees and allowances to members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;

(iii) payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the provisions of this Act;

(iv) establishment and maintenance of hospitals, dispensaries and other institutions and the provisions of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families;

(v) payment of contributions to any State Government, local authority or any private body or individual, towards the

cost of medical treatment and attendance provided to insured persons and, where the medical benefit is extended to their families, including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;

(vi) defraying the cost and expenses of auditing the accounts;

(vii) defraying the cost and expenses of ESI Courts;

(viii) payments of contracts;

(ix) payment of decree, order or award of any Court or Tribunal.

(x) defraying the cost and other charges of instituting or defending any civil or criminal proceedings.

(xi) defraying expenditure for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured AND

(xii) for such other purposes.

The Act invests powers in the Corporation to establish the provident or the benefit fund for the benefit of its staff or any class of them.

Needless to record that the Corporation has to maintain its true and correct accounts of its income in the prescribed manner and get it audited by the Comptroller and Auditor-General of India and get it certified. The annual report, the audited accounts, the report of the Comptroller and Auditor-General of India, the comments of the Corporation on such report and the budget as finally adopted by the Corporation has to be placed before the Parliament.

4. MANDATORY CONTRIBUTIONS

The Act lays down that ALL the employees have to be insured. The Employee as well as the Employer has to CONTRIBUTE AND PAY to the ESI Corporation, regularly and punctually. The Employee’s contribution and the Employer's contribution have to be

at the rate prescribed by the Central Government. If any contribution is not paid by the principal employer on the due date then the Principal Employer has to pay it simple interest at the rate of 12% per annum or on such higher rate as may be prescribed by the Government. The payment of contribution (of employer and employee) has always to be paid by the Principal Employer who will be entitled to recover from the employee. It will be for the principal employer to bear the expenses of remitting the contributions to the Corporation.

No employee's contribution is payable if average daily wages are below the prescribed wages.

Contribution (both the employer's contribution and the employee's contribution) shall be payable by the principal employer for each wage period in respect of the whole or part of which wages are payable to the employee.

It is made mandatory for the Employers to furnish returns and maintain registers and submit the same to the Corporation. But if the Employer fails to submit such returns or registers then the Corporation may require the Employer to furnish such particulars as may be considered necessary for deciding whether the Act is applicable to the factory or establishment.

5. APPOINTMENT AND POWERS OF INSPECTORS

The Act invests powers in the Corporation to appoint Inspectors for the purpose of this Act, within such local limits as it may assign to them.

The Inspectors appointed under the Act are vested with powers to:

(a) cause enquiries into the correctness of the particulars,

(b) ascertain whether the provisions of the Act have been complied with,

(c) requires any principal or immediate employer to furnish to him such information as he may consider necessary,

(d) Enter, at any reasonable time, in the office, establishment, factory or other premises occupied by such principal or immediate employer,

(e) requires any person found in charge of the documents to produce the same to him,

(f) allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary, or

(g) examine the principal or immediate employer his agent or servant, or any person found in such factory, establishment, office or other official,

(h) make copies of, or take extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises,

(i) exercise such other powers as may be prescribed.

6. BENEFITS

The Act seeks to establish hospitals, dispensaries and other medical and surgical services for the benefit of employees. The Act also invests powers with the Government to enter into contract with local body hospitals, dispensaries and also private medical practioners to give medical treatment.

The insured persons, their dependents and/or the specified persons are conferred with the benefits, which are as under:

(a) periodical payments in case of sickness certified by medical practitioner.

(b) periodical payments or the maternity benefits to women in case of confinement or miscarriage or sickness arising out

of pregnancy, confinement, premature birth of child or miscarriage.

(c) periodical payments in case of suffering from disablement as a result of 'employment injury' or the disablement benefit.

(d) periodical payments or the dependents benefit to such dependents of an insured person who dies as a result of an 'employment injury'.

(e) medical treatment or attendance or the medical benefit.

(f) Payment towards funeral expenditure of the deceased Insured person.

The Employees or the members of his family (if so entitled to) can receive the medical treatment and/or the medical attendance, if that be so necessary in the given case. Such medical benefit may be EITHER in the form of out-patient treatment and/or attendance in a hospital or dispensary, clinic of other institution or by visits to the home of the concerned employee OR the treatment as in-door patient in the hospital or other institution. Such medical benefits are also extended to:

(a) the employees (or the family members if entitled) in whose case contribution ceases to be payable.

(b) the employee ceases to be in Insurable Employment on account of permanent disablement.

(c) the employee has attained the age of superannuation. So also his spouse, subject to payment of contribution and such other prescribed conditions. The Act also makes it clear that the Medical Benefits flowing from this Act cannot be received as of right and it will be entirely at the sole discretion of the ESI Corporation.

The Act makes it clear that the employee shall receive such medical benefits as is provided by the dispensary, hospital or the clinic to which he or his family is allotted. The employee will have no absolute right to claim the medical benefits but he will receive the

same and on such scale as may be provided by the State Government or by the Corporation. The employee is not entitled to claim reimbursement from the Corporation of any expenses incurred in respect of any medical treatment except as may be provided by the regulations.

No benefit shall be payable to an employee in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment.

If an employee or his dependent receives or recovers any benefit under the Act, he cannot receive or recover any benefits or compensation or damages under the Workmen's Compensation Act or any other law for the time being in force.

The Act also lays down in clear terms that

(i) the employee cannot transfer his right to receive any payment of any benefit under this Act.

(ii) no cash benefit payable under this Act is liable to be attached or sold in execution of any decree or order of any Court.

The Act also stipulates that an employee who is the recipient of sickness or disablement benefit (but not permanent disablement) has to observe the following conditions:

(a) he has to remain under medical treatment at a dispensary, hospital, clinic, or other institution and shall carry out the instructions given by the medical officer.

(b) he shall not while under treatment do anything which might retard or prejudice his chances of recovery;

(c) he shall not leave the area in which medical treatment is provided to him without the permission of the medical officer.

(d) he shall allow himself to be examined by the Medical Officer.

The Act further makes it clear that an Employee shall not be entitled to receive for the same period:

(a) both, sickness benefit and maternity benefit; or

(b) both, sickness benefit and disablement benefit for temporary disablement; or

(c) both, maternity benefit and disablement benefit for temporary disablement.

In case, an employee is entitled to more than one benefit he will have to choose only one benefit.

The Act invests powers in the ESI Corporation to take appropriate measures in case the incidence of sickness among insured person is excessive by reason of:

(a) insanitary working conditions or neglect to observe health regulations or

(b) insanitary conditions of any tenement or lodging occupied by employee and such insanitary conditions are attributable to the neglect of the owners of the tenements or lodgings to observe any health regulations.

The ESI Corporation is then vested with powers to recover from the owner of the tenements or lodgings, as the case may be, the cost or the extra expenditure incurred by the Corporation as sickness benefit; and if the claim is not settled, the Corporation after inquiry into the matter may recover it as if it were a decree for payment of money passed in a suit by a Civil Court.

The Act lays down that in case any person has received any benefit or payment unlawfully he shall have to repay the same to the Corporation and in the case of his death his representative shall have to repay the same from the assets of the deceased, if any, in his hands.

If the employee dies during any period for which he is entitled to a cash benefit under this Act, the amount of such benefit up to and including the day of his death has to be paid to the heir or nominee or the legal representative of the deceased person in writing in such

form as may be specified in the regulations or, if there is no such nomination, to the heir or the deceased person.

Act also gives mandate that no employer by reason only of his liability for any contributions shall, directly or indirectly reduce the wages of any employee. STILL FURTHER THE ACT PROHIBITS THE EMPLOYER FROM DISMISSING OR REDUCING OR OTHERWISE PUNISHING THE EMPLOYEE DURING THE PERIOD HE/SHE IS IN RECEIPT OF SICKNESS BENEFIT. Not only that but also no notice of dismissal or discharge or reduction can be given to an employee during this period and even if given it will not be valid or operative.

7. BAR AGAINST RECEIVING COMPENSATION OR DAMAGES UNDER ANY OTHER LAW

It is settled general principle of law that no one is permitted to take DOUBLE BENEFITS and therefore, in consonance with this general principle of law, the Act bars the insured person or his dependents from receiving or recovering any compensation or damages under:

1. The Workmen's Compensation Act or
2. any other law for the time being in force or otherwise from the
   (a) the employer or
   (b) from any other person.

The bar is irrespective of benefits received under the Act.

8. DETERMINATION OF QUESTION OF DISABLEMENT

Any question:

(a) whether the accident has resulted in permanent disablement; or

(b) whether the extent of loss of earning capacity can be assessed provisionally or finally; or

(c) whether the assessment of the proportion of the loss of earning capacity is provisional or final ; or

(d) in the case of provisional assessment, the period for which such assessment is caused shall be determined by the MEDICAL BOARD constituted under the Act.

9. MEDICAL BOARDS AND MEDICAL APPEAL TRIBUNALS AND EMPLOYEES' INSURANCE COURTS

The Act seeks to set up (i) the Medical Boards, (ii) the Medical Appeal Tribunals and also the (iii) Employees Insurance Courts. The questions of 'permanent disablement' benefits and/or the extent of loss of earning capacity are required to be referred to the Medical Board constituted under the Act. But if the employee or the Corporation is not satisfied with the decision of the Medical Board, then an appeal in the prescribed manner and within the prescribed time can be filed before the Medical Appeal Tribunal constituted under the Act. A further appeal in the prescribed manner and within the prescribed time can be filed before the Employees' Insurance Court. In fact, even the Insurance Court can be directly moved without undertaking to the route of appeal to the Medical Appeal Board. The Medical Boards and also the Medical Appeal Tribunals are vested with powers at their sole discretion to REVIEW their own decisions at any time if the Board/Tribunal is satisfied by fresh evidence that the decision was given in consequence of non-disclosure or misrepresentation by the employee or other person, fraudulently or otherwise.

10. PENALTIES

The Act treats certain acts of omissions and commissions as OFFENCES and prescribes penalties as under:

1. causing any increase in payment or benefit
2. causing any payment or benefit where no payment or benefit is authorised by or under this Act
3. avoiding any payment to be made under this Act
4. enabling any other person to avoid any such payment,
5. knowingly making or causing to be made any false statement or false representation.

The Act prescribes the punishment which may be imprisonment for a term which may extend to 6 months or fine not exceeding ₹ 2,000/- or both:

The Act also imposes punishment upon insured person inasmuch as he is debarred from availing the cash benefit flowing from this Act for a prescribed period.

The Act further treats the following acts as offences and prescribes punishment for the same.

(a) Failure to pay contribution,

(b) Deductions or attempts to deduction from the wages the whole or any part of employer's contribution,

(c) Contravention of Section 72 i.e., reducing wages or any privileges or benefits admissible to an employee, or

(d) Contravention of Section 73 i.e., dismissing, discharging, reducing or otherwise punishing an employee during the period of his sickness,

(e) Failure or refusal to submit any return required by the regulations,

(f) Making a false return, or

(g) Obstructing the Inspector or other official of the Corporation in the discharge of his duties, or

(h) Contravention or non-compliance with any of the requirements of this Act or the rules or the regulations.

The Act prescribes punishment for the offence:

(i) where offence is under clause (a) with imprisonment for a term which may extend to three years but:

  (a) which shall not be less than one year, in case of failure to pay the employee's contribution and shall also be liable to pay fine of ₹ 10,000/-.

  (b) which shall not be less than six months, in any other case, and shall also be liable to fine of five thousand rupees.

(ii) where offence is under any of the clauses (b) to (g), the punishment will be imprisonment for a term which may extend to one year or with fine which may extend to ₹ 4,000/- or with both.

The Act lays down that whoever, having been ONCE convicted, if commits the same offence again, he will be punishable for every such subsequent offence with Imprisonment for a term which may extend to two years and with fine of ₹ 5,000/- or with both. But in case of failure to pay contribution, the punishment will be, for every such subsequent offence, imprisonment for a term which may extend to five years but which shall not be less than two years and shall also be liable to pay fine of ₹ 25,000/-. If the Employer fails to comply with the order of the Court, it shall be deemed that he has committed a further offence and liable to be punished accordingly.

If the person committing an offence is a company, (1) the Company itself and also (2) every person who was in-charge or was responsible for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. If any person responsible for the business and affairs of the company wants to be excused from the prosecution and punishment then he has to PROVE that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. But if the offence is committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director or Manager,

Secretary or other Officer of the Company, such Director, Manager, Secretary or other officer shall be deemed to be guilty of that offence and shall be proceeded against and punished accordingly.

The powers to try the offences under the Act are given to Court, not inferior to that of a Metropolitan Magistrate or Judicial Magistrate, First Class. Further, the cognizance of the offence can be taken only upon a Complaint made in writing and the prosecution cannot be instituted without the previous sanction of the Insurance Commissioner or by the person authorised by the Director General of the Corporation.

The ESI Corporation, after giving opportunity of BEING HEARD, is also vested with powers to recover DAMAGES from the employer who has failed to pay contribution or any other amount payable under this Act. The damages will not exceed the amount of arrears or as may be specified in the regulations. The Corporation has powers to recover the damages and the same can be recovered as arrears of land revenue.

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952

CHAPTER 6

1. INTRODUCTION

The Act institutes the ***Provident Fund (PF)*** as a beneficent measure for the employees working in factories and other establishments. The provisions in the Act are made for making the better future of the industrial workers on their retirement and for the benefit of their dependents in case of death while in employment. The object of the Legislating this Act is apparent not only from the preamble but also from its various provisions. The Act is aimed at promoting and securing the well being of the employees and as such, provisions of the Act have always to be interpreted in the larger interest of employees and indeed charitably.

The Act comes into force automatically by its own force and the Employer or Factory Owner or anyone deploying the work–force need to be informed that hereafter the Act will applicable to you. Thus, the Act applies upon fulfillment of the conditions mentioned in the Act.

2. APPLICABILITY OF THE ACT

The Act in Section 1 makes it clear that the Act is applicable to the whole of India except Jammu and Kashmir. It further lays down that subject to Section 16, the Act is applicable to:

(a) every establishment which is a factory engaged in any industry specified in **Schedule 1** and in which twenty or more persons are employed.

(b) any other establishment employing twenty or more persons or class of such establishments which Central Government notifies in the Government Gazette.

(c) any establishment in which the employer and the majority of employees agree that the Act should be made applicable.

(d) any establishment in which immediately before the Act was made applicable, PF was already in existence in the establishment.

What is relevant is Schedule I, in which the industries are already notified. A cursory look at the Schedule 1 will show that each and every industry is covered up. What is implicit in Schedule I is made explicit here that Schedule refers to entire industry and the constituent units which come under one or more industries are deemed to have been covered up under the Act. For example, Textile industry is included in the Schedule and as such, the textile mills are automatically covered up, notwithstanding the fact that textile mills are not in the Schedule. Necessarily, therefore, it means that when entire industry is included in the Schedule I, no further notification or information or any letter of intimation is required to be sent to the constituent unit of the industry that Act is applicable to it.

Once the Act is applicable, it continues to be applicable even when number of employees working in the establishment fall below the prescribed number of employees required to be employed for making the Act applicable. However, where the Act is applicable but for some reason, the establishment is closed down and there is no establishment or there is no employer and no employee, undoubtedly, the Act ceases to apply inasmuch as the Act cannot be applicable in vacuum. However, the Act lays down that **once the Act is applicable, it is always applicable.**

3. ACT NOT APPLICABLE

Section 1 itself makes it expressly clear that the applicability of the Act is subject to the provisions of Section 16, which in turn, *inter-alia,* lays down that the **Act shall not be applicable to**:

(i) Any establishment registered under the Co-operative Societies Act, deploying less than fifty persons and working without the aid of power.

(ii) Any other establishment notified by the Central Government.

(iii) Any other establishment set up by Central or State Governments and whose employees are entitled to receive benefits of contributory PF or old age pension.

4. FUNCTIONAL OPERATION OF THE ACT

The Act is made operational under Section 5, by framing a SCHEME, to be called as the Employees' Provident Fund Scheme. Thus, under the EPF Scheme, the intents and purports of the Act are carried into effect. The Schemes framed by the Central Government, under Section 6D, has to be laid before the Parliament and thereafter only it comes into force. The Act under Section 5-A also seeks to constitute a **Central Board.** The Board is to be headed by the Chairman/Vice-Chairman and the PF Commissioner has to be the ex-officio member of the Central Board. Not more than 5 persons can be appointed by the Central Government. Not more than 15 persons representing the State Governments are to be specified by the Central Government. 10 persons from the employers and 10 persons from the employees constitute the Central Board. The Central Board is assisted by the **Executive Committee** as is clear from Section 5AA which is similarly formed by the Central Government. The Act also similarly seeks to set up (1) the **State Boards** under Section 5B and (2) the **Board of Trustees**, under Section 5C, which are to be the body corporate. The functionaries so appointed, in turn, appoint the Officers to assist them and carry out the provisions of the Act. Amongst the Officers are the Recovery Officers and Inspectors who

are given the duty of obligation to enforce the provisions of the Act. It may, however, be noted that the Central PF Commissioner is central executive authority and the State PF Commissioners are the regional executive authorities under the Act. The Orders passed by these authorities are appealable before the PF Appellate Tribunal.

5. SCHEME – EPF SCHEME OF 1952

The Act, as aforesaid, requires a Scheme to be framed and laid before the Parliament. Accordingly, the scheme framed is called as the Employees Provident Fund Scheme of 1952. Every employee – employed in or in connection with the work of a factory or other establishment covered by the scheme other than the EXCLUDED EMPLOYEE – is entitled and required to be a member of the Fund from the joining of the employment. The expression "Excluded employee" means:

(i) an employee who, having been a member of the Fund, has withdrawn the full amount of his contribution in the Fund:
   (a) on retirement from service after attaining the age of 55 years.
   (b) before migration from India for permanent settlement abroad.
   (c) for taking employment abroad;

(ii) an employee whose pay exceeds ₹ 6,500/- per month

(iii) an apprentice.

It is significant to note that even the employees deployed through the Contractor are also treated as the employee of the Principal Employer and hence they (the contractor's employees) too are entitled to the benefit of the scheme.

6. CONTRIBUTIONS

As aforesaid, the Act envisages a Scheme to be framed and accordingly, the Central Government has framed the Scheme in the prescribed manner. In the said Scheme, it is provided that the

Employee has to pay the contribution at certain percentage of his salary towards his FUND which is to be given to him after his retirement or termination of services. The equal amount has to be contributed by the employer. Since, the cost of working the Scheme has to be recovered, it is also provided in Chapter V of the Scheme that the administrative charges should also be recovered from the Employer. The detail of contributions is as under:

(1) Contribution payable by **Employer**:

At the rate of 10% of

Basic wage

+ D.A. including cash value of food concessions

+ Retaining allowance (if any)

The rate of contribution shall be 12% in respect of establishments specified by Central Government.

(2) Contribution payable by **Employees**.

Same as payable by the Employer.

Unless the Employee desires to contribute more than prescribed, in which case, the employer shall not be under any obligation to pay any contribution more than his contribution payable under the Act.

The amount of contribution will ***always*** be on the basis of actually drawn wages during the whole month whether paid on daily, weekly, fortnightly or monthly basis. Each contribution has to be calculated to the nearest rupee. 50 paise or more to be counted as one rupee and less than 50 paise to be ignored.

(3) The employer shall, in the first instance, pay both contributions – payable by him and payable by employees – employed by him directly or through a contractor.

The Contractor shall recover from his employees the employees' contributions. The contractor shall pay over to the 'Principal Employer' (1) employees' contributions + (2) his Share of contribution + (3) the Administrative Charges.

(4) It is the responsibility of the principal employer to pay contributions (payable by him, by employees directly employed by him and through the contractor) ***together with*** the administrative charges. 'Administrative charges' means such percentage of the amount of contributions payable to the employees – ***other than excluded employees.***

(5) The Employer cannot deduct his (employer's) share from the wages of the employees, notwithstanding any contract to the contrary.

Where an employer fails and neglects to PF contribution and when it falls in the arrears, the Employer has to pay the arrears of PF arrears with compound interest, at a rate determined by the Central Government.

Since PF is the retiremental benefits to be given to employee on his retirement/termination of service, obviously, the employee is required to nominate any one of his family members to receive the amount to his credit, in case of his demise before collecting the said PF amount. But he is not permitted to nominate any one who is not a member of his family.

If the employee changes his employment, his previous PF in balance is transferred in his new account in the new establishment.

Nomination: If the employee has no family, in that case and in that eventuality, he can nominate any person other than his family member. But when subsequently, he acquires the family, he has to make another nomination as his earlier nomination will be rendered inoperative and invalid. A nomination can be modified at any time under Para 61 of the Scheme.

7. THE BENEFITS FLOWING FROM PF

The employee, under the Act and the Scheme, is conferred with certain benefits and as such, within 30 days from the date of receipt of claim, he can make application to the Commissioner for the benefits, viz. (1) the benefit of withdrawing the PF amount. (2) the

benefit of non-refundable advance and (3) the benefit of financing Life Insurance Policies.

(1) Benefit of withdrawing the PF amount.

An Employee can withdraw the full amount standing to his credit in the Provident Fund in the following circumstances:

(a) On retirement after the age of 55 years,

(b) On retirement due to incapacity to work,

(c) In case of migration for permanent settlement abroad,

(d) In case of mass retrenchment,

(e) On voluntary retirement,

(f) On closure of establishment,

(g) On transfer to establishment not covered under Act,

(h) On discharge with payment of retrenchment compensation, etc.

(i) In all the other cases of leaving services, if he remains unemployed after waiting period of two months.

(2) Benefit of Non-refundable Advances.

Non-refundable advances can be taken for the following:

(a) For the purchase of a house,

(b) For the repayment of a loan, for housing,

(c) In case of unemployment due to lock-out or temporary closure,

(d) In case of unemployment due to illness,

(e) For the purpose of marriage of (1) self (2) daughter, (3) son (4) sister or (5) brother,

(f) For the purpose of education of son or daughter,

(g) For meeting the exceptional circumstances or calamity.

(3) Benefit of financing Life Insurance Policies:

The Employee is also conferred with the benefit of subscribing to the LIC policies.

On the death of a member, the benefit of withdrawal is available to the Nominee or to his family members or to the legal heirs, as the case may be.

8. THE EMPLOYEES FAMILY PENSION SCHEME, 1971

The purpose of the Scheme is to provide for (1) superannuation pension, retiring pension or permanent total disablement pension and (2) widow or widower's pension, pension to children or orphan pension payable to the beneficiaries of such employees.

It has come into force from 16-11-1995.

The Scheme seeks to set up the FUND from and out of the contribution payable by the Employer under Section 6 of the Act. The amount equivalent to 8.33% has to be credited to the Pension Fund. The Central Government also (at the rate of 1.16 per cent of the pay) contributes to the Fund of the members of the Scheme. The liability of the Employer and the Central Government is limited to the extent of wages not exceeding ₹ 6,500/- per month only. If wages exceed to this limit, the Employer or the Central Government have not to contribute more than this salary limit to the Pension Scheme. However, this limit is at the option of the employer and the employee and if contributions are made on the higher salary, Pensionable salary is on such higher salary.

The Scheme applies to:

(1) Employees who are the members of the Pension Scheme,

(2) Employees who have become members of PF on or after 16-11-1995.

(3) Employees who are members of PF but not being members of Pension opt to join the same within six months from 16-11-1995.

9. OFFENCES UNDER THE PF SCHEME

(a) deduction of Employer's contribution from the wages of the employee;

(b) failure to submit 'Returns', 'Statements' or other documents required to be submitted under the Scheme;

(c) submission of false Returns, Statements or other documents

(d) making a false 'Declaration';

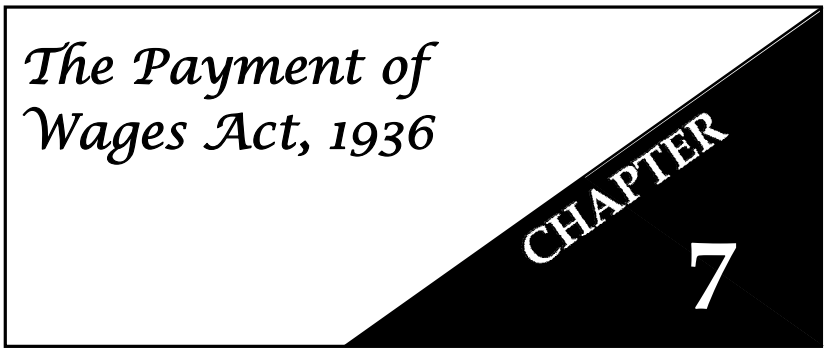
(e) obstructing PF inspector in discharge of his duties;

(f) failure to produce the record for his inspection;

(g) contravention of or non-compliance of the Scheme;

The punishment prescribed for the aforesaid offences is imprisonment up to 1 year, or fine up to ₹ 4,000/- or with both.

UNIT IV: Laws Related to Compensation Management



1. EVOLUTION

Before industrialisation, in England, people used to work on farms, handicrafts and small scale industries confined to their own villages. Since their activities were confined only to small villages, few laws were needed for them. But the industrial revolution took firm grip and that changed, the whole character of the society. The Factories, Large sized Workshops and Giant Companies came up for the first time. This gave a fillip to the need of plethora of laws.

Turning to India, she was then reeling under the British rule and hence it was sailing in the same boat with Britain. The one of the laws, on labour, India enacted was Payment of Wages Act, 1936. It was undoubtedly by far the most advanced piece of legislation on labour laws in those days but by no chance it has lost its utility or importance even in twenty first century.

2. OBJECT OF THE ACT

The Preamble of the Act states that the Act was passed to regulate payment of wages to certain class of "employed persons" in

"industry". In other words, the Act was brought into force to avoid unnecessary delay in payment of wages and to prevent unauthorized deductions from the wages.

3. APPLICATION OF THE ACT

(a) Act is not applicable

(b) Act is applicable

(a) Act is not applicable: The Act is not applicable to employees drawing more than ₹ 6,500/- p.m.

Act is also not made applicable to:

1. Cooperative Societies: It is as per the ruling reported in (1997) Factory Law Reporter on page 356.
2. Cooperative Banks: It is as per the ruling reported in (1991) Labour and Industrial Cases on page 655.
3. Educational Institutes: It is as per the ruling reported in (1991) II Current Labour Reports on page 105.
4. Insurance Companies: It is as per the ruling reported in (1991) Labour and Industrial Cases on page 1082.
5. Food Corporation of India: It is as per the ruling reported in (1997) Factory Law Reporter on page 84.
6. Dock Labour Board: It is as per the ruling reported in (1982) Labour and Industrial Cases on page 657.
7. Khadi and Village Industries: It is as per the ruling reported in (1985) Labour and Industrial Cases on page 1534.

(b) Act is Applicable: As a matter of fact, the Act is applicable to persons working on land, below the land and above the land.

Sub-Section 4 of Section 1 lays down that the Act will be applicable, in the first instance to:

1. Persons employed in any ***factory***. Factory means factory as defined in the Factories Act, 1948.
2. Persons employed in (other than factory) ***railways***.

3. Persons employed in industrial and other establishments, namely, trams ways, motor transport, air transport (not of the military, airforce or. navalforce), dock, wharf or jetty, inland vessel, mine, quarry or oilfield, plantation, workshop or establishments carrying on construction/development maintenance/buildings/roads/bridges/cannals OR navigation, irrigation OR supply of water OR operations connected with generation,transmission, distribution of electricity or any other form of power. And
4. Industrial establishments as may be notified.

The Act is also made application through other *Statutes*, namely,

- The Bombay Shops and Establishment Act, 1948. The Act, thus, becomes applicable to cities of Mumbai, Pune, Kolhapur, Solapur, Nagpur, etc., in the, state of Maharashtra.
- The Factories Act, 1948. It provides that mode of recovery of unpaid wages will be the same as provided under the Act.
- The Minimum Wages Act, 1948. Section 22F lays down the mode of recovery of minimum wages as laid down under the Act.
- The Mines Act, 1952. Section 55 provides that the provisions of the Act will apply.
- The Motor Transport Act, 1961. Section 25 extends the provisions of the Act.
- The Administrative Act. Although there is no clear-cut provisions but the rulings of the courts have held that Act too has the applications.

4. RESPONSIBILITY AND WAGE PERIOD OF PAYMENT

Section 3 fixes the responsibility upon the Employer. However, the term Employer includes in it the ***manager*** or any ***person*** nominated as Employer or any person who has the over control of the business. Whereas Section 4 casts a statutory duty upon the Employer to decide the wage period. The wage period may be daily, weekly, and fortnightly, monthly or something else. However, it is clear from the Section that wage period shall not exceed one month.

5. TIME OF PAYMENT

Section 5 prescribes the time of payment and if wages are not paid within this time, it will amount to ***delayed wages***.

(A) Factory, Railway or	
Industrial Establishment	Time when wages must be paid
Less than 1000 employees are Employed.	On any working day before expiry of 7th day of wage period.
More than 1000 employees are Employed.	On any working day before expiry of 10th day of wage period.
(B) Dock, Wharf, Jetty or Mine	On any working day before the 7th day after completion of final tonnage account of the ship or wagon loaded or unloaded.
(C) On termination of Services.	On any working day before the 2nd day of termination.

It is needless to record that if the due date of payment of wages falls on a holiday, wages should be paid on the earlier day rather than on the subsequent day. Section 6 also makes it abundantly clear that the ***payment must be paid in cheque***.

6. DEDUCTIONS FROM WAGES

The Act makes it abundantly clear that wages must be paid without deductions. But Explanation II to Section 7 lays down that the following are not treated as deductions from wages:

(i) Withholding of regular increment, increments at the efficiency bar, promotion to higher post or scale

(ii) Reduction to lower post or scale or lower stage in time scale and suspension.

Sub-Section (2) of Section 7 states that the Employer can make the following deductions and no other deductions:

(a) Fines.

(b) Unauthorised absence/leave, which means:

Leave in excess of permissible limits/Absence from duty.

(c) Loss of goods (or damage to it) expressly entrusted in the custody of the workman. Loss of money, for which workman is accounted for, but in both cases (Loss/damage of goods/money) negligence/default has to be directly attributable to the employed person.

(d) House accommodation supplied by or on behalf of the Employer.

(e) Supply of amenities/service other than tools and raw materials used for the work of the Employer.

(f) Recovery of advances including advances for T.A. or C.A., interest on advances and adjustment for over payments of wages.

(ff) Recovery of loans given from authorised (labour) welfare fund.

(fff) Recovery of loans given for building house for any purpose approved by the State Government and Interest on loans.

(g) Income Tax.

(h) Recovery under the Court order or any competent authority.

(i) Dues of loan given for Cooperative Society from PF, Insurance premium or post office.

(k) With consent in writing–payments made to/for LIC premium, purchase of Government Securities, Post Office savings account, deposit payments.

(kk) With consent in writing Contribution to any fund created by Employer or Trade Unions for the welfare of the employed person approved by Government.

(kkk) With consent in writing Registration fees of a registered trade union.

(l) Insurance premium on fidelity Guarantee Bonds. Payments and Deductions.

(m) Recovery by railways for loss on account of accepting counterfeit or base coins or forged currency notes.

(n) Recovery by railways for loss on account of: failure to make invoice or (prepare) Bill, Collect appropriate charges of fares, freight, wharfage and carnage, Sale of food in catering establishment, commodities in grain shop.

(o) Recovery by Railways for losses for rebates or refunds incorrectly and negligently granted by the employed person clause.

(p) With consent in writing contributions made to PM's National Relief Fund or the other notified funds.

(q) Contribution to any Insurance Scheme framed by the Central Government.

(r) Any amount payable under any law for the time being in force by the workman.

No doubt the above deductions are legal under Section 7 of the Act, yet the entire amount of wages cannot be appropriated towards the above deductions because something must be left for the

employed person to live on. As such, Sub-Section (3) clearly lays down that:

1. Deductions towards cooperative society in clause (j) can be only up to 75% of wages and/or
2. In any other case 50%
3. But if sum total of all deductions comes to 75% as perclause (g) or 50% under other clauses, the balance can be deducted gradually or in the prescribed manner but not at a time. However, take a case of a worker who has resigned and the Employer adjusts his entire salary towards loan taken by the worker for constructing a house. The worker cannot take a resort to provisions of Payment of Wages Act because after resignation there exists no relationship of employer-employee and their relationship is governed under the Contract Act.

Section 8 lays down that (i) the conditions on which deduction can be made on account of 'fines' may be imposed, (ii) mode of recovering fines (iii) maintaining of a Register of fines, and (iv) Purpose for which fine can be utilized.

Section 8 lays down that:

(a) No fine can be imposed upon person under the age of 15 years (clause 5)

(b) No fine can be recovered in instalments and in any case, not after 60 days (sub-clause 6)

(c) Before any act of omission or commission is made penal, prior approval of the State Government or the prescribed authority in respect thereof if necessary (clause 1)

(d) After approval, a Notice of penal acts has to be displayed in prescribed manner in the premises (clause 2) (i) on which employment is carried on and (ii) in case of railway, at the prescribed place or premises.

7. DISPLAY OF ABSTRACT OF THE ACT AND RULES

Section 25 requires that the person responsible under the Act should by a Notice display.

(a) an abstract of the Act, and

(b) Rules formed there under.

It also lays down that the Notice should be in English and in local language. This provision applies only to the factories.

8. MAINTENANCE OF REGISTERS AND RECORDS

Section 13A imposes a mandatory condition upon the Employer to maintain Prescribed Registers and Records as under:

(a) Register of wages in Form II.

(b) Register of deductions for damages or loss in Form III under Section 10(2) of the Act.

(c) Register of Fines in Form I under Section 8(1) of the Act.

Section 13-A lays down that the following particulars must be provided in the register/records maintained by the Employer.

1. Particulars of person employed by him (name, sex, age, address, etc.)
2. Work performed by employed person (mechanic, clerk, peon, etc.)
3. Wages paid to them. If any scale is applicable, the same should be shown, overtime wages, etc.
4. Deductions made from the wages.
5. Payment Receipts.
6. Other particulars as may be prescribed.

The Government of Maharashtra has laid down that:

(a) At the beginning of the Register of Fines, the list of penalties should be shown. No doubt the penalties should have the prior approval as laid down in Section 8(1) of the Act.

(b) Voucher or Receipts of expenditure for the funds will be required to be produced for scrutiny of the Inspector appointed under the Act. But no such separate register is required to be maintained if a composite register in form II is maintained.

The employer's non-compliance of Section 13A will be a "conclusive proof" against the Employer that he has not complied with Sections 4, 5(4), 6 and/or 8(4) which attract penalty. The Employer will be held guilty of criminal offence for breaches of those provisions rather than non-compliance of Section 13A. The Act also lays down that the records will be required to be retained for a period of 3 years. After 3 years, the Employer is free to destroy the record and registers.

9. INSPECTORS

In order to effect checks and controls on the compliance of the provisions of the Act, it is provided that the Factory Inspectors under the Factories Act will be responsible for the compliance of the provisions of the Act. The State Government is vested with powers to appoint the Inspectors by notification in the *Official Gazette*.

The functions and duties of the Inspectors, under Section 14, are as under:

(a) see that rules and the provisions of this Act are complied with by the Employers and for that purpose, he is free to make such inquiries and examination as he may think fit and proper.

(b) enter, inspect and search the premises upon the following conditions.

(i) he is free to take assistance of anyone (including police).

(ii) entry, inspection and search has to be at the reasonable time, usually after sunset and before sunrise, it is not to be done. But if necessary, he is not prevented also.

(iii) entry, inspection and search must be for the purpose of carrying out the objects of this Act. Necessarily, therefore the PW Inspectors are not given a License to cause their entry, inspection or search for any other purpose or for an exterior purpose or with ulterior motive.

(iv) for entry, inspection and search the Inspectors can act under the provisions of Code of Criminal Procedure, 1973 so far as may apply to this aspect.

The Search Warrant under Section 94 of Cr.P.C. may be applied, if circumstances so require.

(v) The Inspector, for this purpose is treated as "public servant".

(c) Supervise the payment of wages to employed persons by the Employers if necessary.

(d) The Inspector can:

(i) require production of registers/records, if necessary, by written orders at a specified time and place.

(ii) call upon any person to make a statement on the spot.

(iii) take the registers and records, he had required to be produced.

10. APPLICATION FOR WAGES

The Act provides the mode, manner, method and the Authority or the Forum before whom claims can be made. The legislature confers the jurisdiction on it to decide the claims arising under the Act. Needless to state that jurisdiction can be divided into two. One,

a territorial jurisdiction and, two, jurisdiction on the basis of subject-matter. In the first part of Section 15, the territorial jurisdiction is dealt with.

The State Government is vested with powers to appoint the Authority by a Notification in the *Official Gazette* to decide the claims under the Act. The Authority can be

(1) Judge of a labour court under I.D. Act.

(2) Presiding officer of an Industrial Tribunal under I.D. Act.

(3) Presiding officer of a Tribunal under State laws relating to industrial disputes, such as BIR Act or the MRTU and PULP Act.

(4) Commissioner appointed under the Workmen's Compensation Act,

(5) Any Officer with experience of a judge of a Civil Court, or

(6) Stipendiary Magistrate.

The Authority can be so appointed for any specified area but if necessary, the State Government can appoint more number of persons as the Authority under the Act.

It is incumbent upon the Authority to give a full opportunity of being "Heard" to the Employer and Employee. As such, it is laid down that parties will be heard before any order is passed. The Authority after hearing can pass the order or Refund the amount deducted and make payment of delayed wages.

11. POWERS OF THE AUTHORITY

The Authority under the Act will exercise its powers as laid down under the Civil Procedure Code. As such, the Authority under the Act can:

(a) take evidence

(b) enforce the attendance of witnesses, and

(c) compel the production of documents.

The Authority under the Act shall be "Deemed" to be a 'Civil Court' only for the purposes of

(a) Section 195 of Cr.P.C.: refers to prosecution for contempt of court for offences against public justice and for offences relating to documents given in evidence, whereas.

(b) Chapter XXVI of Cr.P.C.: relates to provisions as to offence affecting the administration of justice.

The Authority can exercise such powers and pass the following Orders:

(i) Granting the Compensation. But no compensation if the delay or deduction is on account of:

(a) Bonafide-error/dispute on amount payable to employed person.

(b) Emergency or exceptional circumstances beyond the control of Employer.

(c) Employee failed to receive or accept the wages.

For deciding compensation, factors like

(1) earning interest on amount if paid in time,

(2) sufferance on account of non-payment, and

(3) deduction to which the employee was subjected to are all to be taken into account.

(ii) Granting:

(a) Penalty upon Employee, if he has filed any vexations or malicious application.

(b) Penalty upon Employer if an employee was forced to take recourse to this Act.

12. LIMITATION IN CLAIMING 'DELAYED WAGES'

The Act also lays down the Period of Limitation which is twelve months from the date on which the payment becomes due. However,

the claim can be made even after the period of limitation but for that reason, it is necessary to apply for condonation of delay. However, if the parties fully participate in proceeding without raising objection as to limitation, the court can proceed to take it that the delay was condoned by implication. The decision of the Authority to condone the delay is a discretionary matter.

13. APPEAL AGAINST THE AUTHORITY UNDER THE ACT

The Order passed by the Authority prescribed under the Act can be challenged in the COURT OF SMALL CAUSES COURT in the Presidency towns and elsewhere in the District Court. The period of limitation is prescribed as 30 days. The right of appeal is limited as follows: If an Employer has to file an appeal, then

(i) total amount ordered does not exceed ₹ 300/-

(ii) the financial liability does not exceed ₹ 1,000/-

If Employee has to file an appeal then

(iii) claim of an individual–should exceed ₹ 20/-

(iv) in case of claim of unpaid wages by same unpaid group

(v) the total wages claimed should exceed ₹ 50/-

14. ATTACHMENT BEFORE JUDGEMENT (ABJ)

(i) Generally: The Order 38 of the C.P.C. deals with the attachment before judgement and ordinarily, the proceedings of such nature are briefly, called as the ABJ proceedings. The whole purpose of such proceedings is to prevent and preempt the person from running away from his liability when finally determined. Section 17A of the Act does not permit a blanket order of attachment in as much as if the amount to be recovered from the Employer is worth ₹ 100/- the property of ₹ 1,000/- cannot be attached.

(ii) What is Attachment: Attachment is the prohibitory order of the competent court whereby a party is restrained from disposing of or selling of or creating any interest in the property. Needless to state here that property may be movable or immovable. Both these kinds of properties are amenable to the order of attachment of the court. No doubt, the movable properties may create some practical difficulty because one may not be able to locate and find out the exact value of the movable property. However, the Bank accounts and Bank lockers are mostly targeted in the ABJ proceedings. Once the order of attachment is issued by the Court in respect of immovable property, no dealings in respect of said property can be lawfully made and the property remains under the order of the Court. Similarly, the attachment of Bank accounts and Bank Lockers, Deposits, etc., will result in freezing the farther dealing of the same and thus the property is saved and protected.

It may clearly be noted that ABJ order can be obtained only against the specified properties. It means it will be necessary to give the list of property with full description of the property and of course the value of each item of property. The Attachment must be proportionate to the amount to be recovered.

Requirements of ABJ

(a) Application under Section 15(2) should have been filed or

(b) Appeal under Section 17 should have been preferred.

(c) The Authority should be satisfied that the Employer or person responsible to make payment is likely to evade payment when ordered.

(d) The Authority should form the opinion that the ends of justice would be defeated by the delay.

(e) After hearing the Employers the order of ABJ can be passed. Undoubtedly, what is called as ad-interim order (of ABJ) can be temporarily passed even without hearing the Employer.

(f) The provision of C.P.C. will apply even in the proceedings under Section 17A of the Act.

15. PENALTIES AND FINES

The Act under Section 20 prescribes the following acts of omissions and commissions as offences and imposes the following penalties.

	Offences	Punishments
(1)	Contravention of:	Fine - Not less than ₹ 200/-
	(i) Section 5, except Sub-Section (4)	But can be extended up to ₹ 1,000/-
	(ii) Section 7	
	(iii) Section 8, except Sub-Section (8)	
	(vi) Section 9	
	(v) Section 10, except Sub-Section (2)	
	(vi) Section 11	
	(vii) Section 12	
	(viii) Section 13	
(2)	Contravention of (i)	Fine up to ₹ 500/-
	(ii) Sub-Section (4) of Section (5)	
	(iii) Section 6	
	(iv) Sub-Section (8) of Section 8	
	(v) Sub-Section (10) of Section 25	
(3)	(a) Failure to maintain Registers and Records under the Act	Fine - Not less than ₹ 200/-
	Fine, up to ₹ 5,007/-	May be extended up to ₹ 1,000/-
	(b) Wilfully refusal or without lawful excuse neglect to furnish (i) information (ii) returns	
	(c) Furnishes (i) information or (ii) records which are known to be false	

	(d)	Refusal to answer or wilfully gives a false answer necessary for obtaining any information	
(4)	(a)	Wilfully obstructs entry to Inspector discharging his duty under the Act	Fine - Not less than ₹ 200/- which may extend to ₹ 1,000/-
	(b)	Refuses or wilfully neglects to afford facility to Inspector to (i) Entry (ii) Inspect (iii) Examine (iv) Supervise or (v) Inquire Under this Act	
	(c)	Wilfully refuses to produce on demand before the Inspector- (i) Any Register or (ii) Document Maintained under this Act	
	(d)	Prevents or attempts to prevent or likely to prevent any person (i) appearing before or (ii) being examined by the Inspector under the Act.	
(5)		Failure to pay wages on the date fixed by the Authority.	Without prejudice to any other action: Additional fine up to ₹ 100/- per day of default.
(6)		Subsequent commission of offence: [Subsequent offence means and relates to the offence for which conviction was made Not more than Two years before the Second offence came to light]	(a) Imprisonment for a term, not less than ONE month. But may be extended up to SIX months AND (b) Fine–Not less than ₹ 500/-. But may be extended up to ₹ 300/-.

Payment of Bonus Act, 1965

CHAPTER 8

1. INTRODUCTORY

In India, in 1917, certain Textile Mills started giving War Bonus. Later on, the demands for Bonus were being raised as an industrial dispute. In fact, in 1950, the Full Bench of the Labour Appellate Court evolved a formula for determination of bonus. In 1960, the Government of India set up the Standing Labour Committee which suggested setting up a Tripartite Commission to go into the question of Bonus and evolve suitable norms. Accordingly, the Tripartite Committee was set which gave its recommendation. On the basis of which the Government of India issued the Ordinance, the Payment of Bonus Ordinance, 1965. Later on the Bill came to be introduced in the Parliament and finally the Payment of Bonus Act of 1965 was passed. The Act is applicable to the whole of India.

2. PAYMENT OF BONUS

At the outset, it may be recorded that the Act is not made applicable to some Public Sector Undertakings[1]. As such the

[1] LIC, Seamen under Merchant Shipping Act, 1958, Employees under the Dock Workers (Regulation of Employment) Act, Central/State/Local/Civic employees, Red Cross Society Employees, University/educational institutions, Hospitals, Chambers of Commercial/Social Welfare Institutes working on no–profit–no–loss, RBI, Finance Corporation of India or any Corporations falling under the State Financial Corporations Act, Deposit Insurance Corporation, National Bank

employees of these Undertakings will not be entitled to receive Bonus under the Act. However, save and except them, the ***Act is applicable to every factory and every other establishment in which 10[2] or more persons are employed***. Indeed, the Appropriate Government has the power to include/exclude other factory/ establishment after Notification in the Official Gazette.

The Act then further makes it clear that **Every Employee shall be entitled to the Bonus**, if he has worked for not less than thirty working days.

The Bonus has to be paid within eight months from the close of every accounting year unless Bonus Dispute is pending, in which case within One Month of Award becoming enforceable. It would not out of place to record that in cases of Public Sector Undertakings, the Appropriate Government is vested with powers to make a Reference of a Bonus Dispute as if it is an industrial dispute under the Industrial Dispute Act.

Disqualification For Bonus – The Employee will be disqualified from receiving Bonus if he was dismissed for fraud, riotous/violent behavior, theft, misappropriation or for sabotage.

3. QUANTUM OF BONUS

The Employees will receive Bonus on the basis of Monthly Salary. The term '**Salary**' is defined to mean any remuneration (other than overtime) capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to employee in respect of his employment or work done in such employment. Such Salary/Wages will include Dearness Allowance (that it is to say all cash payments by whatever

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for Agriculture and Rural Development, Unit Trust of India, Industrial Development Bank of India, Small Industries Development Bank of India, National Housing Bank, other than a banking company, being Public Sector Undertakings.

[2] Earlier, it was 20 or more persons but it is now 10 or more persons as per amendment carried out w.e.f. 11-4-1984

name called) paid to an employee on account of rise in the cost of living. However, the terms Salary and Wages will not include any other allowances like:

(a) Travelling Concession,

(b) Value of any House Accommodation,

(c) Supply of Light, Water, Medical Attendance

(d) Other Amenity of any service or

(e) Any Concessional Supply of Food Grain or other Articles,

(f) Bonus,

(g) any Contribution paid or payable by the employer to any Pension Fund or PF for the benefit of employee under any law for the time being in force,

(h) Retrenchment Compensation

(i) Gratuity

(j) Other Retirement Benefits to the employee

(k) Ex-gratia Payment made to him or

(l) Any Commission payable to employee.

It is always that the Employer has to pay Bonus on the basis of available Surplus Profit, however, notwithstanding the non-availability of the Surplus Profit, **the Employer is bound to Pay Minimum Bonus @ 8.33%** of the Salary/Wages or One Hundred Rupees, whichever is higher – but the employees under 15 years, will be paid Bonus of ₹ 60/- instead of ₹ 100/- **The Act then prescribes the Maximum Limit of Bonus @ 20%.** The Act gives benefit to Employers inasmuch as it lays down that even if Salary is more than ₹ 10,000/- the Employer will give Bonus on the Salary of ₹ 3,500/- only. The Employer is further given benefit that, in case, an **Employee has not worked** for all the working days the Employer can reduce the Bonus proportionately. But the Act explains the expression "Employee has not" and states that the Employee will be **deemed to have worked** if (a) he was laid off, (b) on leave with salary or (c) absent due to accident or (d) on maternity leave.

4. CALCULATIONS

As is clear from the above, Employer has to pay at least the Minimum Bonus. However, otherwise, the Bonus has to be paid on the Available Surplus. The Surplus shall be the Gross after deducting:

(a) Depreciation admissible under Income-tax Act

(b) Development Rebate/Allowance or Investment Allowance deductable under Income-tax Act

(c) Profits and Gains subject to Section 7 of the Direct Tax, if applicable in the given case or

(d) Such further sums as are specified in Third Schedule.

The Act clarifies that where allocable surplus exceeds maximum bonus, the excess is carried forward in the succeeding accounting year and can be adjusted for payment of Customary or Interim Bonus. So also Employer is further allowed to deduct the amount of financial Losses caused to him in cases where the Employee is found guilty of misconduct. The Act accords Legal Presumption to the accuracy of the Balance-Sheet and Profit and Loss Account if Audited.

The Act makes it clear that, for calculating the Profit and Loss Accounts, income from various and different sources are to be included unless Employer maintains separate Profit and Loss Accounts for his different Departments/Sections/Branches'

The Act mandates that the Employer shall (a) maintain registers/records/documents in the prescribed manner and (b) get Profit and Loss Accounts to be audited. Such Audited Balance Sheet is accorded Legal Presumption of **accuracy**.

5. RECOVERY OF BONUS

The Act lays down that if the Employer fails to pay Bonus, without prejudice to other mode of recovery, the Employee can make an Application to the Appropriate Government who will issue Certificate where–after, the Collector will recover the Bonus from

the Employer as if it is Arrears of Land Revenue. The Application for Bonus has to be made within a period of One Year but limitation can be condoned if sufficient cause is made out.

6. PENALTY UNDER THE ACT

The Act divides offences into two; one committed by individuals and another committed by the corporate body. The Act then proceeds to lay down that if any person (a) contravenes any provision or rule made thereunder or (b) fails to comply with the direction/requisition made under the Act then such person shall be punishable with imprisonment up to six months, or fine upto one thousand rupees or both.

In case, the offence is committed by Corporate Bodies, the Act lays down that (1) every person in charge or responsible to the Company shall be deemed to be guilty of committing the offence provided it is proved that offence was committed without his knowledge or that he exercised all due diligence care to prevent the commission of such offence, but if the offence under the Act is committed by the Company and it is proved that the offence has been committed with the consent or connivance attributable to any neglect on the part of, any Director, Manager, Secretary or other officer of the company such person shall also be deemed to be guilty of that offence.

The Act then lays down that the (1) Cognizance of the Offence can be taken only on a Complaint of the Regional Labour Commissioner or Labour Commissioner or Authorized Government Officer and (2) no Court inferior to Presidency Magistrate or First Class Magistrate can try the offence under the Act.

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The Payment of Gratuity Act, 1972

CHAPTER 9

1. INTRODUCTION

In early stages, the gratuity was treated as ***gift*** or payment ***gratuitously*** made to employees by the employer at his sole discretion and as such, the employee could not demand it AS OF ***right***. However, with the advent of time, the gratuitously made payment came to be regarded as the term of contract of employment and in the industrial adjudication, it came to be regarded as reward paid to the workmen for ***long, good, efficient, faithful and meritorious services*** rendered by employees for a substantially long period and it was intended to help employee after his retirement, death, physical-incapacity, disability or otherwise. It then came to be regarded as the legitimate claim of the employee and became the subject matter of industrial adjudication. It then became the customer benefits and post retiremental benefits. Finally, the Parliament passed the Payment of Gratuity Act, 1972.

The Act is passed with the object of providing a uniform scheme for payment of gratuity to industrial workers throughout the country.

2. APPLICABILITY OF THE ACT

The Act is applicable to:

(a) Every factory, mine, oilfield, plantation, port and railway company.

(b) Every factory or establishment in which ten or more persons are employed and

(c) Such other establishments in which ten or more persons are employed as the Central Government may specify in this behalf.

(d) Employee becomes entitled to gratuity on his retirement or termination or on leaving the service after completion of 5 years' service at the rate of 15 days' wages per completed year of service.

3. OBLIGATIONS OF EMPLOYER

(a) Display of abstract of the Act: Every employer must display an abstract of the Act and the Rules made thereunder in English and in the language understood by the majority of the employees at a conspicuous place at or near the main entrance of the establishment.

(b) Payment of gratuity: Section 7 of the Act makes the following provision with regard to the Employer's obligation of payment of gratuity:

(A) If any employee has completed FIVE YEARS of service with the Employer then it is mandatory obligation upon Employer to (1) determine the amount of gratuity as soon as it becomes payable (2) inform in writing to the employee (3) inform in writing to the Controlling Authority and (4) PAY the gratuity (5) within thirty days.

(B) If the Employer fails and neglects to pay the gratuity, the employee claiming gratuity, if he is entitled to, has to give NOTICE in Form I, to the employer within 30 days from

the date of gratuity becoming payable to him. Even if the Application is not in Form I, the Employer is duty bound to take cognizance of the same if the Employee's application gives necessary details. If the Employer accepts the claim of the Employee, he (the employer) (i) has to inform the employee, in Form L, the amount of gratuity (ii) the proposed date of payment of gratuity, which shall be within 15 days of the receipt of the application and (iii) pay off the gratuity.

The Employee can claim his gratuity even if Notice as contemplated under the Act is not given and his right to claim gratuity is not extinguished just because he did not given Notice contemplated under the Act.

(C) In case, the employer does not accept the claim of gratuity raised by the employee, within 15 days of the receipt of the application, he has to inform the employee, in Form M, the reason as to why the claim is not accepted by him.

(D) But if the employer does not take any action on the application, within 90 days, the employee has to apply to the Controlling Authority, in Form N or Form T as the case may be, for necessary direction to the employer for payment of gratuity.

The Employee can claim gratuity even after the period of limitation by making an Application for Condonation of Delay.

(E) The Controlling Authority after hearing the parties, the Employer and the Employee, will pass the appropriate order on the application for gratuity. If the Controlling Authority directs the Employer to pay gratuity and in case, the Employer fails and neglects to pay the same, on application by the employee, the Controlling Authority recovers the gratuity ***through collector as arrears of land revenue.***

(F) The employer has to pay the amount of gratuity in cash or, if so desired by the employee, by Demand Draft or Bank Cheques. If the employee so desires and the amount is less than ₹ 1,000, payment may be made by postal money order after deducting the postal money order commission thereof.

(G) If the gratuity is not paid by the employer within thirty days from the date it becomes payable, the employer has to pay ***simple interest,*** at ten per cent per annum, on the amount of gratuity due and payable to the employee.

(H) If any party is aggrieved by the Order of the Controlling Authority, the aggrieved party can prefer an appeal to the Appellate Authority within 60 days from the date of the receipt of the order.

The Appeal can be filed even after the period limitation of 60 days (1) if 'sufficient cause' is shown for not preferring the appeal within the prescribed period of limitation and further (2) if delay is not for more than sixty days.

(I) By reason of Section 14 of the Act, no civil court has justification to adjudicate upon any matter covered by the Act.

4. AMOUNT AND FORFEITURE OF GRATUITY

(i) Amount: It is mandatory to pay gratuity to those employees who have worked for not less than 5 years with the employer. The employee is entitled to receive gratuity at the rate of 15 days' salary per completed year of service or part thereof in excess of six months. The computation of gratuity will be on the ***last drawn salary*** of the employee. In case of monthly rated employees, the rate of one's wages is to be computed by dividing the monthly wages by 26 days – and neither 28 nor 29 nor 30 nor 31 days of the month. It is always the completed year of calendar month and not year commencing from the date of appointment of the employee. The maximum limit of gratuity is ***three lakhs fifty thousand.*** However, the employee is

always entitled to better terms of gratuity if he is entitled to the same under any agreement, settlement, 'contract of employment' or the Award of any competent Court of Law.

The Act defines the term 'wages' to mean all emoluments which are earned by an employee while on duty or on leave and includes dearness allowances but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

The gratuity, under Section 4, shall be ***payable*** on termination of employment after he has rendered ***continuous service*** for not less than 5 years. The phrase 'continuous service' is most relevant, material and of great practical significance in computing the gratuity. The 'continuous service' is specially and separately defined in Section 2A. It is, *inter-alia*, laid down as under:

(1) An employee shall be said to be in continuous service for the period if he is in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absent in respect of which a lawful order is passed, treat it break in service, lay-off, strike or a lock-out or cessation of work not due to any fault of the employee.

(2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service:

(a) for the said period of one year, if the employee during the period of twelve calendar months has actually worked under the employer for not less than:

(i) 190 days

if employees are working below ground or in mines or in an establishment which works for less than 60 days in a week and

(ii) 240 days, in any other case;

(b) for the said period of six months, if the employee has actually worked under the employer for not less than:

(i) 95 days

if employees are working below ground or in mines or in an establishment which works for less than 60 days in a week and

(ii) 125 days in any other case.

Explanation: For the purposes of clause (2), the number of days on which an employee has actually worked shall include the days on which:

(i) he has been laid-off under any law

(ii) he has been on leave with full wages

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment and

(iv) in the case of a female, she has been on maternity leave in which case, total period of such maternity leave does not exceed twelve weeks.

(3) Where an employee is working in ***seasonal establishment,*** he shall be ***deemed to be*** in continuous service if he has actually worked for not less than seventy-five per cent., of the number of days on which the establishment was in operation during such period ***although*** he is not in continuous service within the meaning of clause (1) above.

(ii) Forfeiture: The Employer is entitled to **Forfeit, Wholly** or **Partly**, the gratuity.

The employer can forfeit the **Whole** gratuity of the employee for the following:

(i) On the PROVED riotous behaviour or disorderly conduct or any other act of violence of the employee.

(ii) On PROVED misconduct involving moral turpitude.

The employer can forfeit the gratuity PARTLY when the employee's services are terminated for any PROVED act of willful omission or negligence causing any damage or loss or destruction of the employer's property – to the extent of loss or damage to the property.

5. PROTECTION OF GRATUITY

By reason of death of the employee, the amount due to him on account of his gratuity has to be paid to his heirs and/or legal representatives, as the case may be.

The gratuity payable under the Act cannot be attached by reason of Section 13 of the Act, in execution of any decree or order of any civil, revenue or criminal Court. But in case, the employee dies and his gratuity is paid to heirs, the gratuity becomes attachable in the hands of the heir of the employee who receives the gratuity.

If there is any inferior scheme of gratuity under any other Act, or in any instrument or contract made under any other Act, under Section 14 of the Act, the provisions of the Act superseded the same and thereby the gratuity is protected.

6. OFFENCES

The Act treats the following acts of commissions and omissions as offences and makes them punishable as follows:

(1) If any person, for avoiding any payment under the Act, knowingly makes or causes to be made any false statement or false representation he would be punished with imprisonment upto 6 months, or with fine upto ₹ 10,000/- or, with both.

(2) If any employer contravenes, or makes default in complying with any provisions of the Act or any rule or order made here under, he would be punished with imprisonment upto 1 year, or with fine upto ₹ 20,000/-, or with both.

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