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# UNIT - I

## INTRODUCTION

### SOCIAL SECURITY AND LABOUR WELFARE

#### Introduction

The concept of social security has evolved over a period of time. In primitive societies it was mankind's struggle against insecurity and his struggle to protect himself from the vagaries of nature or to find the basic necessities of day-to-day life. Later, community living came into existence, which created the family to provide adequate social measures for the needy. With rapid industrialisation, there was break in the family setup, destroying the traditional system and resulting in the need for an institutionalised and state-cum-society regulated social security arrangement. Therefore, the concept of social security constantly evolves and widens and there is no commonly accepted definition of the term.

#### Concept of Social Security

All industrialised countries of the world have developed measures to promote the economic security and welfare of the individual and his family. These measures have come to be called Social Security. Social security is a dynamic concept and an indispensable chapter of a national programme that seeks to strike at the root of poverty, unemployment and diseases.

The International Labour Organization, in various Conventions, has been giving due emphasis to social security; and various laws were added and existing legislations were amended. The ILO has suggested multiple methods of organizing, establishing, and financing various social security schemes. The status of Social security legislations and measures is different in developed, underdeveloped and developing countries. In underdeveloped countries there are only a very few social security schemes having a fairly low level of benefits.

Social security may provide for the welfare of persons who become incapable of working by reason of old age, sickness and invalidity/disability and/or are unable to earn anything for their livelihood. It is necessary to analyse various definitions of social security in order to appreciate the nature and concept of social security.

#### Definitions of Social Security

**Sir William Beveridge** defines Social Security as, "The security of an income to take place of the earnings when they are interrupted by unemployment, by sickness or accident to provide for retirement through age, to provide against the loss of support by the death of another person and meet exceptional expenditure, such as those connected with birth, death and marriage.

**The International Labour Organization** defines social security as 'security that society furnishes through appropriate organizations against certain risks to which its members are exposed', i.e., the security is furnished by society, to the members of the society. The origin of society itself is an outcome of the fact that man is a social animal and he can survive only in collective humane circumstances. Being a part of society, he expects help from society when he faces a risk, which is the most common factor in human life. The ILO casts a duty on society to furnish that protection to its members when one is exposed to a risk in life.

**The ILO Social Security (Minimum Standards) Convention No.102 of 1952** defines Social Security to mean: 'The result achieved by a comprehensive and successful series of measures for protecting the public (or a large sector of it) from the economic distress, that, in the absence of such measures, would be caused by the stoppage of earning in sickness, unemployment or old age and after death; for making available to that same public medical care as needed; and for subsidizing families bringing up young children'.

According to the **National Commission on Labour**, the concept of social security is based on the ideas of human dignity and social justice. According to the Commission the underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare, should be given protection against certain hazards.

According to the **National Council on Labour** also, social security envisages that the members of the community shall be protected by collective action against social risks causing undue hardships and privation to individuals whose private resources can seldom be adequate to meet them. Individuals working in various fields and in different capacities contribute towards the enrichment of society and in turn 'deserve to be taken care of, in times, when calamity befalls them'.

### **Need for Social Security**

Human development insists that everyone should enjoy a minimum level of security. Workers also want to be free from the economic threats which disrupt their daily lives. Hence, there must be a system in which the State bears the responsibility for providing and ensuring a basic level of social security which is an essential ingredient in the protection, development and full utilisation of human resources.

As social security is one of the fundamental needs of modern human society to ensure provision for alternative sources of income to workers at the time of contingencies through a concerted effort of the most appropriate organisations, the State keenly realised the importance of protecting the victims from the contingencies of work life. It is to meet this type of need that the institution of social security was developed.

Hence, social security is a protection rendered by society through collective action against social risks causing hardship to individuals whose resources are seldom adequate to meet them. According to this definition, social security is ensured by way of different schemes which provide the citizens with benefits designed to support when unable to earn and to restore them to gainful activity. It is an opportunity to earn one's living and freedom from fear, especially of economic ruin which involves physical or moral ruin.

Social security law involves those legal mechanisms primarily concerned with ensuring the provision for their individual of a cash income adequate, when taken along with the benefits in kind provided by other social services, to assure him a culturally acceptable minimum standard of living where the normal means of doing so fail.

### **Need for Social Security Legislations**

A comprehensive service of social security is designed to encompass the five giants in the path of social progress—want, disease, ignorance, squalor and idleness. Thus, it is a programme of protection provided by security against those contingencies of modern life, sickness, unemployment, old age, dependency, industrial accidents and invalidity against which the individual cannot be expected to protect himself and his family by his own ability or foresight. According to the overview prepared by the Ministry of Labour

of India, social security law protects not just the workman but his entire family by giving benefit packages in financial security and health care. They are

- The scheme for social security should guarantee income in case of an involuntary loss of all, or a large part of, the income from work;
- The system must be initiated by legislations so as to define obligations upon the public or other organizations to ensure the same;
- The system must be administered by public or private organizations;
- The system must assure that the benefits will be available when required and the protection will be adequate both in quantity and quality

### **Characteristics of Social Security**

The purpose of any social security measure is to provide individuals and families with the confidence that their standard of living will not be eroded by meeting with unexpected socio-economic contingencies in their life. The concept of social security varies from country to country. This is understandable, in a way, because of the differential social and economic development of societies in different parts of the world. But the need for economic protection is universal and hence social security measures have three major characteristics even though they vary from country to country and from time to time according to the need of the people and the availability of the countries' resources.

Social security measures are established by law. They provide cash benefit to replace at least a part of the income in case of contingencies such as unemployment, maternity, employment injury, sickness, old age etc. These benefits are provided in three major ways, namely, social assistance, social insurance and public services. The most well known techniques adopted by social security at present are no doubt social assistance and social insurance.

Social assistance schemes will grant benefits to people who need them. The ILO defines a social assistance scheme as one that provides benefits to persons of small means granted as of right in amounts sufficient to meet a minimum standard of need and financed from taxation. The special characteristic of this measure is that it is financed wholly from the general revenues of the state and the benefits are provided free of cost. But the beneficiary has to satisfy the means test which means certain prescribed conditions. The first risk to be covered was that of old age, but gradually non-contributory benefits were also introduced for invalids, survivors and unemployed persons as well. Today social assistance programmes include schemes like unemployment assistance, old age assistance, national assistance.

Thus, social assistance underlines the idea that the care of people could not be left to voluntary charity and should be placed on a compulsory and statutory basis. It represents, "the unilateral obligation of the community towards its dependent groups".

### **Aim of Social Security**

Social security represents society's current answer to the problem of economic insecurity. Social security measures have a twofold significance for every developing country. They constitute an important step towards the goal of a welfare state, by improving living and working conditions and affording the people

protection against the uncertainties of the future. These measures are also important for every industrialisation plan, for, not only do they enable workers to become more efficient, but they also reduce wastage arising from industrial disputes causing work stoppages. Hence, the aims of all social security measures are three fold in nature, namely:

- Compensation - It aims to substitute income when there is interruption of earnings due to unemployment, sickness, permanent disability, old age etc.
- Restoration - It is designed to provide certain services like medical care to the sick and invalid as well as rehabilitation in cases of need.
- Prevention - Social security measures not only provide relief when occasions require expenditure that strains family budget, but also prevents the risks from arising in the first place itself. Prevention is designed to avoid the loss of productive capacity due to sickness, unemployment or invalidity and to make available resources which are used up by voidable disease and idleness and to increase the material, intellectual and moral well being of the community.

### **Social Security and the Indian Constitution**

The Constitution of India guarantees fundamental rights to every citizen including the right to life and, as the Supreme Court has pointed out, the right to livelihood is inherent in the right to life. The ultimate aim of social security is to ensure that everyone has the means of livelihood and hence the right to social security and protection of the family are integral parts of right to life. Further, the Supreme Court has also held that security against sickness and disablement and also right to family pension form part of the right to life under Article 21 of the Constitution.

The Directive Principles of State policy set standards of achievement based on a socialistic pattern of society as it embraces principles and policies pertaining to social security measures which are to be followed by the State in the future. It is pertinent to discuss the following provisions which are relevant to social security:

- To Secure a Social Order for the Promotion of Welfare of the People
- Directives to the State to Secure Social Security Measures While Enacting Legislations
- Adequate means of livelihood; Proper distribution of ownership and control of the material resources of the community so that it may sub-serve the common need;
- Prevention of the concentration of wealth and means of production; Equal pay for equal work for men and women; The health and strength of workers; and Childhood and youth are protected against exploitation.
- Right to Work, to Education and to Public Assistance in Certain Cases
- Provision for Just and Humane Conditions

Article 43 requires the state to strive to secure to the worker work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

**In Standard Vacuum Refining Co. of India v. Workmen, AIR 1961 SC 895, 901** it has been observed that every workman shall have a wage which will maintain him in the highest state of industrial efficiency, which will enable him to provide his family with the material things which are needed for their health and physical well-being, enough to enable him to discharge his duties as a citizen.

From the above discussion it is clear that social security measures have introduced an element of stability and protection in the midst of the stresses and strains of modern life. Lack of social security impedes production and prevents the formation of a stable and efficient labour force. Social security is, therefore, not a burden, but a wise investment which yields good dividends in the long run

### **Emergence of Social Security as a Human Right**

Human Rights is a 20<sup>th</sup> Century term for what have been traditionally known as natural rights or rights of man. The Declaration of Independence issued by the Thirteen American States in July 1776 stated “that all men are created equal; that they are endowed with certain inalienable rights; and among these are life, liberty and pursuit of happiness”. The Declaration of Rights of Man and Citizen issued by Constituent Assembly in France asserts that “men are born and remain free and equal in rights.”

The natural rights to life, liberty etc., have been understood as categorical rights, i.e., nobody could find any excuse for disrespecting those rights. Such political right can be secured by legislation. But social and economic rights can rarely be secured by legislations alone. The rights like right to work, right to social security etc., come under the second category. India enacted the Protection of Human Rights Act, 1993 which defines human right as the rights relating to life, liberty, equality, and dignity of the individual guaranteed by the constitution or embodied in the International Covenants. The International Covenant referred to therein which is relevant to Social Security, is the International Covenant on Economic, Social and Cultural Rights adopted by General Assembly of the UN.

### **Evolution of Social Security Laws**

The Indian Social Security Schemes for organized sector have been influenced by these factors:

- British policy to raise labour cost in the established industries.
- A policy of corporate paternalism leading to a variety of benefits like promoting loyalty of employees.
- In the post-independence era, the emergence of the welfare state concept which has led to a series of welfare and protective legislations based on relevant international labour standards.
- Many of the social security and welfare measures became statutory obligation of employers.
- Due to rapid industrialization there was a need to promote the commitment to work force for industrial and urban life.

In India due to rapid industrialization a new class of Industrial proletariat was created, having a rural background and with very little social and material resources. For them there was a great need of systematized help through social security agencies. The non-industrial classes were also in urgent need of social security due to industrialization in 19th Century.

Indian social reformers, labour welfare organizations and many progressive employers persuaded the government to undertake social security measures as a protection for the workers against a few contingencies.

The Indian Government appointed a Committee of Enquiry and the Committee reported that steps should be taken by mill owners to alleviate the distress caused by unemployment. It further recommended that a voluntary gratuity scheme should be introduced but, unfortunately, no action was taken for its implementation.

In 1929, the Government of Bombay was the first to give a proposal for enacting a Maternity Act. It was observed that productivity depends upon the quality of labour which further depends upon its health, nutrition, literacy, social values and customs.

The Bombay textile Labour Enquiry observed, "That in all pursuits a high standard of efficiency can be expected only from persons who are physically fit and free from mental worries, that is, only from persons who are properly trained, properly housed, properly fed and properly clothed."

It is understood that to neglect the labour is to neglect productivity as, finally, the welfare of the country lies in their welfare. To build up a stable labour force with full commitment was only possible by creating a genuine welfare state, good perceptions and psychological feelings for creating good moral habits.

### **Pre-Independence Period and the Social Security of Workers**

In 1877, the first labour unrest took place at "Empress Mills Nagpur" with the aim of improving their wages. In 1890, the first Trade Union - Bombay Mill Hands Association - was formed under the leadership of N.M. Lokhande.

In 1885, the first Fatal Accidents Act was passed. Despite this, workers were living under very poor and inhumane conditions. There was no provision of any measure for social security before 1920.

In 1920, the International Labour Organization gave a boost to labour welfare and social security schemes. In the ILO Convention of 1929, the workers social security schemes were considered to be of high importance. Then there came strong recommendations on labour welfare and social security.

After the First World War, due to the Indian National movement, the British Government started thinking about the employees and accordingly (i) Workmen's compensation Act, 1923 (ii) The payment of wages Act' 1936 (iii) Minimum wages Payment Act (iv) Maternity Benefits Act were passed from time to time. Dr .B.R. Ambedkar was appointed as a 'Labour Member of the Viceroy's Council" after Second World War.

"The Whitley Commission" recommended that some suitable measures should be taken to restore health to the workers. On the recommendation of the Commission and in consultation with the "Standing Advisory Committee of Labour and Industries" the government agreed to a contributory Medical scheme in which both employer and employee would contribute towards a common fund.

In 1937, a contributory Health Insurance Scheme was formulated. At the same time , the Bombay Textile Enquiry Committee also recommended the formulation of a Health Insurance Scheme in which the (i) Employer (ii) Employee and (iii) The State Government contributed towards the fund.

In 1940, during the first Labour Minister's Conference, the need for a Sickness Benefit Fund was felt. In 1943, Indian Government appointed a Commission under the Chairmanship of Dr.B.R. Ambedkar and its report was submitted in 1944.

The Dr B.R. Ambedkar Commission's strategy recommended the upper age limit of 60 years and employment was divided into three categories- permanent, temporary and casual. The employer was required to pay contribution towards insurance schemes for all the workers, whereas only permanent and temporary workers were required to pay their contribution.

In 1947, the Industrial Dispute Act was enacted with the main objective of making provisions for the investigation and settlement of industrial disputes. One of the most important contributions was the creation of the Employee's State Insurance Act 1948.

### **Post-Independence period and Social Security**

In 1947, India got Independence and the Indian Government intensified labour welfare and social security measures. In 1948, Employees' State Insurance Act was duly modified and that was beginning of the era of Social Insurance for Indian labour.

In 1952, the International Labour Organization provided the specialist advice from eight experts on social security for six long months for the proper implementation of the schemes of the Employee State Insurance Act. They devised and advised on the method of its administration, the development of the panel system of medical benefit and training of the necessary staff in order to extend the scheme throughout the country.

In 1948, the Indian government made certain important amendments in the existing Indian act 1934 and came up with an entirely new nomenclature "The Factories Act 1948" with the main purpose of regulating conditions of work in manufacturing establishments for ensuring adequate health, welfare measures, hours of work and leave with wages.

The real sense of social security legislations took shape only after independence even though its birth may be traced back to the industrial revolution. India witnessed the introduction of industrial adjudication in 1947. The interim Government formulated a five year programme for the welfare of the labour class with a view to raising the living standards of workers. The significant features of the programmes were as follows:

- Organisation of health insurance scheme, applicable initially to factory workers;
- Revision of Workmen's compensation Act;
- A central law for maternity benefit;
- Extension to other classes of workers of the right, within specific limits, to leave with allowance during sickness

Further, the Constitution of India provides an overarching framework for the regulation of conditions of work as well as protection and promotion of livelihoods. The Constitution of India guarantees Fundamental Rights to every citizen including the right to life. The ultimate aim of social security is to ensure means of livelihood and therefore, the right to social security is also inherent in the right to life. Thus, there was a complete change in the approach to labour legislations after independence as the ideas of Social Justice and Welfare State were enshrined in the Constitution which laid down directives to the State under part IV relating to labour and its welfare.

Accordingly, the following legislative measures have been adopted by the Government of India by way of social security schemes for industrial workers:

- Employees' Compensation Act, 1923;
- Employees' State Insurance Act, 1948;
- Employees Provident Funds and Miscellaneous Provisions Act, 1952;
- Maternity Benefit Act, 1961;
- Payment of Gratuity Act, 1972.
- Payment of Wages Act, 1936;
- Factories Act, 1948;
- Minimum Wages Act, 1948;
- Plantation Labour Act, 1951;
- Contract Labour (Regulation and Abolition) Act, 1970;
- Bonded Labour (Abolition) Act, 1976;
- Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979;
- Child Labour (Prohibition and Regulation) Act, 1986;
- Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996;
- Beedi and Cigar (Conditions of Employment) Act, 1996.

From the above observations it can be concluded that there is considerable development in social security measures during the post-independence period. Even from the perusal of Five Year Plans, it can be inferred that the State has moved to translate the objectives stated in the Directive Principles of State Policy to statutes which are to safeguard the interests of workers against sickness, accident, disease, old age and unemployment. Particularly, the programmes of the Sixth Plan were focussed on the effective implementation of different legislative enactments regarding labour and special programmes for agricultural labourers, artisans, handloom weavers, leather workers etc., and it paid special attention to the problems of bonded labour, child labour, women labour, contract labour, construction labour and inter-state migrant labour. The Eighth Five Year Plan also pointed out that the enforcement of labour laws, especially laws relating to the unorganised labour, should be effective.

### **International Labour Organisation**

The International Labour Organization is one of the 12 specialized agencies of UN. It has one of the most effective and well-developed mechanisms for human rights protection in the international system. The preamble of ILO states the objective of regulating the hours of work including the establishment of maximum working days and weeks, the regulation of labour supply, the prevention of unemployment, the provision of adequate living wage, the protection of workers against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provisions for old age and injury, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other such measures.

The declaration of ILO categorically states that the ILO frames international industrial jurisprudence. It envisages measures for entering into agreements on basic labour standards and provides guiding principles for policy and administration throughout the world. The First World War caused a setback to industries. Failure of some nations to adopt humane conditions of labour was seen as an obstacle in the way of other nations which desired to improve labour security conditions in their own countries. In these circumstances, it was realized that permanent world peace could not be achieved by achievement of political and economic justice alone, but that it required the securing of social justice also. The need for Workers' well-being, regulation of labour supply, the prevention of unemployment, provision for adequate living wage, protection of weaker sections, provision for sickness, disease, injury, old age and protection of young persons and women led to the creation of ILO in 1919 as a part of League of Nations by Part XIII of the Treaty of Versailles.

The Treaty is “the first known to history for containing a provision dealing with labour” and provides for establishing a standard setting mechanism called ILO. The ILO is distinct from other international institutions as its major concern is social justice. The aims and purposes of this institution were reaffirmed in 1944 through the Philadelphia Charter. In 1946, the ILO and United Nations entered into an agreement and ILO was recognized as a specialized agency of the UN. In the era of the UN, there was greater attainment of social justice as part of the aim of International co-operation and cooperative actions.

The conference recognizes the solemn obligation of ILO to further among the nations of the world programmes which will achieve—

- full employment and a raise in the standard of living;
- the employment of workers in which they can have the satisfaction of giving the fullest measure of their skills and attainments and make their greatest contribution to the common well-being;
- facilities for training and transfer of labour for employment and settlement;
- policies with regard to wages and earning hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and minimum living wage to all employed and all in need of such protection;
- official recognition of collective bargaining, co-operation of management and labour;
- provision for child welfare and maternity protection;
- assurance of equality of educational and vocational opportunity;
- provision for adequate nutrition, housing and facilities for recreation and culture;
- adequate protection of life and health of all workers in all occupations; and
- extension of social security measures to provide basic income to all in need of such protection and comprehensive medical care.

In this declaration, ILO emphasizes states' social commitment to the upliftment of working class and affirms the right of workers for decent living.

While recognizing these rights, ILO actually assures a life with human dignity which is one of the basic human rights.

## **Universal Declaration of Human Rights**

The preliminary steps towards an elaborate formulation of standards in relation to human rights in an Instrument which would have undoubted legal force as a Treaty, is the Universal Declaration of Human Rights. It contains 30 Articles defining diverse rights from right to life, to the right to work and right to rest and leisure. It has both been construed as law and as a common standard of human rights which everyone, every State, should endeavour to achieve. Among the 30 Articles are provisions relating to civil, political, economic, social and cultural rights including right to work, right to leisure and rest, right to social security, right to just and favourable conditions of work, right to equal pay for equal work, right to fair remuneration, right to form and join trade unions, right to maximum working hours and periodic holidays with pay, right to adequate standard of living, including food, clothing and shelter, right to medical care and education, right to special protection and assistance, right to motherhood and childhood, right to equal access to all for higher education on the basis of merit, right to participate in the cultural life of the community and right to enjoyment of art and cultural activities and right to share scientific advancement and its benefit. All the above recognized rights aim at general welfare of a democratic society. Article 25(1) explicitly deals with the right of workers. It reads,

“Everyone has the right to a standard of living adequate for the health of and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, in widowhood, old age or other lack of livelihood in circumstances beyond his control”.

Hence, the above Article categorically establishes the security measures which are basic rights not only of the wage earner but also of his family. All aspects or ingredients of social security are dealt within this Article.

### **Conclusion**

It was ILO experts and Professor Adarkar whose joint efforts instigated the Government of India in 1946 to introduce these important elements of social security legislations:

- Organization of health Insurance scheme.
- Revision of Workmen’s Compensation Act.
- Central Law of Maternity Benefits.
- Extension of these schemes to other classes of Workers
- Some other schemes like leave with allowance during sickness were introduced which lead to enactment of Employee’s State Insurance Act, 1948, The Plantation Labour Act, 1951 and Employees Provident Fund Act, 1952.

An analysis of the development of social security as a term and concept reveals the fact that it evolved as a protective measure for the benefit of the poor; and the acceptance of poverty as a social problem placed the burden on the Government to protect its citizens from economic distress. Considering the fact that the working class contributes towards the development of society, as the guardian of the community, the State is duty-bound to protect workers in case of disruption of their income arising out of disablement, accident, death or old age. The present system of social security is developed from a series of public measures reshaped from time to time by expanding coverage and risks. In the Indian context, social security should be, in essence, a measure for ensuring social justice and human dignity as envisaged in the Constitution of India. The international community accepts social security as a human right and ILO has come forward to guide member States to ensure social security to workers in their countries.

## UNIT - II

# SOCIAL SECURITY: INDUSTRIAL INJURIES

## THE EMPLOYEES' COMPENSATION ACT, 1923

### Introduction

The Employees' Compensation Act was enacted by the Legislature in 1923 with a view to providing for the payment of compensation by certain classes of employers to their workmen for injury by accident in their establishment. Prior to this enactment, if an employee was injured, or the injury resulted in death because of any employment in which he was engaged, he, or those representing him or dependent on him, could recover compensation for such injury or death, only when the same could be attributed to the negligence of the employer. Hence, it was thought necessary that there should be a legislation which would secure workmen and their dependents against becoming objects of charity, by making provision for reasonable compensation for all such calamities as are incidental to the employment.

The Employees' Act, 1923 is one of the earliest labour welfare and social security legislations enacted in India. It recognizes the fact that if a workman is a victim of an accident or an occupational disease in the course of his employment, he needs to be compensated. The Act does not apply to those workers who are insured under the Employees' State Insurance Act, 1948. The Karnataka High Court held that the object behind the legislation is the protection of weaker sections with a view to ensuring social justice. Hence, the provisions of the Act have to be interpreted liberally so much so that, other things being equal, the leaning of the Court has to be towards the person for whose benefit the legislation is made. [**United India Insurance Co. Ltd. v. (Smt.) Susheela, 2004 (101) FLR 393 (Karn HC)**].

### Objectives

The Himachal Pradesh High Court observed in **Gian Chand v. Mani Karan, [1989 (58) FLR 360]** observed as follows:

*“Although the Workmen’s Compensation Act, 1923 is a pre-constitutional law, it is a beneficial piece of legislation reflecting the constitutional goal of socio-economic justice and the mandate contained in the Directive Principles of State Policy embodied in Articles 41, 42 and 43 of the Constitution”.*

The objective of the Employees' Compensation Act is to ensure that in the case of injury or permanent disablement or death of a workman by accident arising out of and in the course of employment, his employer pays him compensation in accordance with the provisions contained in the Workmen's Compensation Act and such employee who has suffered injuries or permanent disablement or the dependants of the deceased employee are not left high and dry [ **B.T. Shipping London Ltd. v. Anati Narayanan, 2000 (86) FLR 901 (Bom HC)** ]

### Nature and Scope

The Employees' Compensation Act, 1923 imposes statutory liability upon an employer to discharge his moral obligations towards employees when they suffer from any physical disabilities or diseases, during the course of employment in hazardous working conditions. The aim of the Act is to provide quicker and

cheaper disposal of disputes relating to compensation than would be possible in cases of proceedings under civil law. The Act also provides relief to the dependants from hardships rising from accident.

The Act extends to the whole of India and it applies to railways and other transport establishments; factories; establishments engaged in making, altering, repairing, adapting, transport or sale of any articles; mines; docks; establishments engaged in construction; fire-brigade; plantations; oilfields, and other employments listed in Schedule II of the Act. The Workmen's Compensation (Amendment) Act, 1995, has extended the scope of the Act to cover workers of newspaper establishments, drivers, cleaners, etc. working in connection with motor vehicles, workers employed by Indian companies abroad, persons engaged in spraying or dusting of insecticides or pesticides in agricultural operations, mechanized harvesting and threshing, horticultural operations and doing other mechanical jobs.

## **Definitions**

**Section 2 (1) (d) "dependant"** means any of the following relatives of deceased employee, namely:—

- (i) a widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter or a widowed mother; and
- (ii) if wholly dependent on the earnings of the employee at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;
- (iii) if wholly or in part dependant on the earnings of the employee at the time of his death,—
  - (a) a widower,
  - (b) a parent other than a widowed mother,
  - (c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter, legitimate or illegitimate or adopted if married and a minor or if widowed and a minor,
  - (d) a minor brother or an unmarried sister or a widowed sister if a minor,
  - (e) a widowed daughter-in-law,
  - (f) a minor child of a pre-deceased son,
  - (g) a minor child of a pre-deceased daughter where no parent of the child is alive, or
  - (h) a paternal grandparent if no parent of the employee is alive;

**Explanation.**—For the purposes of sub-clause (ii) and items (f) and (g) of sub-clause (iii), references to a son, daughter or child include an adopted son, daughter or child respectively.

**Section 2(1)(dd) "Employee"** means any person who is : -

- i) A railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specifies in schedule II; or

- ii) (a) a master, a seamen or other members of the crew of a ship ,
  - (b) a captain or other member of the crew of an aircraft,
  - (c) a person recruited as driver, helper, mechanic, cleaner or in other capacity in connection with a motor vehicle,
  - (d) a person recruited for work abroad by a company and who is employed outside India in any such capacity as is specified in schedule II and the ship, aircraft or motor vehicle, or company, as a case may be, is registered in India; or
- (iii) employed in any such capacity as is specified in schedule II, whether the contract of employment was made before or after the passing of this Act, and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the armed forces of the Union; and any reference to any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of the them.

**Section 2(1)(e) “employer”** includes any Body of persons, whether incorporated or not, and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a employee are temporarily lent or let on hire to another person by the person with whom the employee has entered into a contract of service or apprenticeship, means such other person while the employee is working for him;

**Section 2(1) (f) “managing agent”** means any person appointed or acting as the representative of another person for the purpose of carrying on such other person’s trade or business, but does not include an individual manager subordinate to an employer;

**Section 2(1) (g) “partial disablement”** means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a employee in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time; provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement;

**Section 2(1) (l) “total disablement”** means such disablement, whether of a temporary or 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:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;

**Section 2(1) (m) “wages”**, includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of an employee towards any pension or provident fund or a sum paid to an employee to cover any special expenses entailed on him by the nature of his employment;

(2) The exercise and performance of the powers and duties of a local authority or of any department acting on behalf of the Government shall, for the purposes of this Act, unless a contrary intention appears, be deemed to be the trade or business of such authority or department.

(3) The Central Government or the State Government, by notification in the Official Gazette, after giving not less than three months' notice of its intention so to do, may, by a like notification, add to Schedule II any class of persons employed in any occupation which it is satisfied is a hazardous occupation, and the provisions of this Act shall thereupon apply, in case of a notification by the Central Government, within the territories to which the Act extends, or, in the case of a notification by the State Government, within the State, to such classes of persons:

Provided that in making addition, the Central Government or the State Government, as the case may be, may direct that the provisions of this Act shall apply to such classes of persons in respect of specified injuries only.

### **Section 3 - Liability of the employer to pay compensation**

The Compensation extends to cases of "personal injury caused to an employee by accident arising out of or in the course of the employment." A plain reading of the material provision of Section 3 of the Act, makes it crystal clear that the employer's liability to pay compensation to a workman arises only if the employee suffers personal injury; such personal injury is caused to the workman by an accident, and the accident arises out of and in the course of his employment. But the injury must have resulted either in the death of the employee or in total or partial disablement for a period exceeding three days. [**Ananthamma v. M.D. Co-operative Spinning Mill Ltd., Raichur, 1999 I LLJ 1053 (Kant)**]

Thus, in order for Section 3(1) to render an employer liable to pay compensation to his employee under the provisions of the Act, the following three conditions must be satisfied:

1. He must suffer personal injury
2. Such personal injury must be caused by an accident
3. The accident must arise out of and in the course of employment.

Hence, the Employees' Compensation Act excludes the employer from liability in respect of any injury which does not result in total or partial disablement exceeding three days.

Let us now analyse the various terms used in the Act; namely, 'personal injury', 'accident arising out of and in the course of employment', 'disablement' etc.

#### **Accident**

The word 'Accident' has not been defined in the Act. So, one must rely on the ordinary dictionary meaning of the term. The meaning of the word 'accident' is to be gathered from the context, the subject-matter, the intention of the Legislature, effect of the meaning given and the object of the enactment. [**National Insurance Co. Ltd. v. Sabita Gope, 2000 I LLJ 1375 (Gau)**]

The word 'accident' is used in the Act in the popular and ordinary sense of the word denoting an unlooked-for mishap or an untoward event which is not expected or designed, "any unexpected personal injury resulting to the workman in the course of his employment from any unlooked for mishap or occurrence" or "any unintended and unexpected occurrence which produces hurt or loss". The term "by accident" includes (1) personal injury sustained under circumstances which can be referred to as "an accident" and it also includes (2) cases in which there are no such circumstances capable of being so described but in which the results of the occurrence are so unexpected that they may be fairly considered as accidental [**Warner v. Couchmen, (1912) AC 35**]. It was held in **Ibrahim v. MacKinnon Mackenzie & Co., [1966 MLJ 220]** that in case of doubt whether the death was due to accident or not, the benefit of doubt should be given to the employee by holding the death to be due to accident.

### **Disablement**

**Partial Disablement S 2(1) (g):** partial disablement means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of an employee in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement;

**Total Disablement S 2(1) (l):** total disablement means such disablement, whether of a temporary or 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: Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent. or more

### **Section 3 (2)**

An occupational disease contracted by an employee is deemed to be a personal injury caused to the employee by an accident arising out of or in the course of employment. Occupational diseases have been listed out in Parts A, B and C of Schedule III of the Act

### **Doctrine of Notional Extension of 'Time' and 'Place'**

As a general 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. The doctrine of notional extension refers to a reasonable extension of both time and place of an employee i.e. the employee may be regarded as in the course of employment even though he had not reached or had left his employer's premises

In **New India Assurance Co VsmtPadmavati [2005 Lab IC 3190 AP]**, the deceased was working as a cleaner of a vehicle. The accident occurred while the deceased was bringing tiffin on the instruction of the driver when the vehicle was parked after reaching the destination. It was held in this case that the job undertaken by the deceased was ancillary and incidental to his employment and has to be construed as 'arising out of and in the course of employment'. Thus, the dependents of the deceased were entitled to compensation under the Act.

In **United India Insurance Co. Ltd. v. (Smt.) Susheela [2004 (101) FLR 393, Karn HC.]**, the deceased was working as a watchman and he left his residence on 5-6-1994 at 6 p.m. to report for duty. He was engaged in duty throughout the night. While returning to roll call in the morning, he complained of chest pain and immediately taken to hospital, where he was declared dead. It was held by the Karnataka High Court that death was the result of over exertion in duty and court also found a causal connection between the incident and his employment. The Court further observed that: "it is necessary to note that the concept of 'during the course of employment' can be extended from the time the workman leaves home and returns back after completion of his duty.

In **Saurashtra Salt Manufacturing Co. v. BaiValu Raja, [AIR 1958 SC 881: (1958) 2 LLJ 249]**, the Supreme Court while discussing the scope of section 3 (1) observed that it is now well settled that 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, is subject to the theory of notional extension of the employers premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work.

### **Circumstances under which an employer is not liable for compensation**

1. When the injury does not exceed three days
2. Influence of drink, wilful disobedience etc on the part of the employee

However, these exceptions do not apply in cases where the accident results in the death or total permanent disablement of the employee.

### **Section 3 (5)**

"In order to avoid unnecessary litigation, and to prevent double claims against employers, a workman who considers that, in addition to a claims against employers, for compensation, he could also sue in a Civil Court for damages is compelled to choose which remedy he will take, and is bound by his own decision when taken. In the case of all but the most highly paid workmen there would be little advantage in choosing to sue for damages, but a workman in receipt of high salary may prefer to do so as no limit is set to the amount he can recover in a Civil Court, whereas strict limits are set to compensation.

Under section 3(5) of the Employees' Compensation Act, 1923, the workman or his dependents have to elect between filing a civil suit in Civil Court or claim before Workmen's Compensation Commissioner under the Act. Certainly, he cannot seek both remedies at one time since only one of the remedies can be sought.

### **Section 4 – Amount of Compensation**

Sec. 4 deals with the amount of compensation. The amount of compensation allowable under the Act has been fixed by the Statute itself thereby leaving no option to the Commissioner but to allow the compensation so fixed once he holds the employee or his heirs entitled to claim compensation.

Clause (a) of sub-section (1) of Section 4 deals with the case where death results from the injury. Clause (b) of sub-section (1) of Section 4 deals with the compensation where permanent total disablement results from the injury. Clause (c) of sub-section (1) of Section 4 deals with the case where partial permanent

disablement is suffered due to the injury. Clause (d) of sub-section (1) of Section 4 deals with the cases where temporary disablement is suffered due to the injury. Clause (d) of sub-section (1) of Section 4 deals with the cases where temporary disablement whether total or partial results from the injury. So far as Clauses (a), (b) and (c) of Section 4(1) are concerned, the compensation is for the loss of life or permanent disablement caused as a result of the accident, whereas Clause (d) deals with half monthly payment of the sum during the course of treatment or during the course of temporary disablement as a result of the injury.

As per Clause (d) of Section 4(1), the injured would be entitled to the half-monthly payment of sum equivalent to a particular percentage of wages for the period during which the worker was temporarily disabled from attending to his duties. The sub-section (2) of Section 4 prescribes the limit to which the injured would be entitled to compensation as per Clause (d). As per the proviso to sub-section (2) of Section 4, the amount of any payment or allowance received from the employer towards compensation should be appropriated from the lump sum compensation or from the half monthly payments. The employee, who received compensation under clause (d) of sub-section 1 of Section 4 for the period during which he could not attend to his duties due to temporary disablement as a result of the injury, is not debarred from claiming compensation for permanent partial disablement under Clauses (c) or (b) of Section 4(1) and the compensation payable under the above two heads are entirely different and distinct.

### **Compensation payable under the Act**

Section 4 of the Act prescribes the amount of compensation payable under the provisions of the Act. Amount of compensation payable to a workman depends on:

- 1) The nature of the injury caused by accident.
- 2) The monthly wages of the workman concerned, and
- 3) The relevant factor for working out lump-sum equivalent of compensation amount as specified in Schedule IV

There is no distinction between an adult and a minor worker with respect to the amount of compensation for:

- 1) Death;
- 2) Permanent total disablement;
- 3) Permanent partial disablement; and
- 4) Temporary disablement – total or partial.

1) Compensation for Death Sec 4(1)(a): Where death results from an injury, the amount of compensation shall be equal to 50 percent of the monthly wages of the deceased workman multiplied by the relevant factor, or Rs. 1,20,000 whichever is more.

2) Compensation for Permanent Total Disablement Sec 4(1)(b): Where permanent total disablement results from an injury, the amount of compensation payable shall be equal to 60 percent of the monthly wages of the injured workman multiplied by the relevant factor, or Rs. 1.40,000, whichever is more.

3) Compensation for Permanent Partial Disablement Sec 4(1)(c): i) In the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by the injury; and in other words, the percentage of compensation payable is proportionate to the loss of earning capacity permanently caused by the Scheduled injury. Thus, if the loss of earning capacity caused by an injury specified in Part II of Schedule I is 30 percent, the amount of compensation shall be 30 percent of compensation payable in case of permanent total disablement. ii) In the case of an injury not specified in Schedule I such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

4) Compensation for Temporary Disablement Sec 4(1)(d): A half monthly payment of the sum whether total or partial results equivalent to 25% of monthly wages of the from the injury workman to be paid in the manner prescribed.

5) Compensation to be paid when due and Penalty for Default: Section 4A provides for the payment of compensation and the penalty for default. It provides that compensation shall be paid as soon as it falls due. Section 4 mandates employer to pay compensation amount as soon as it falls due to victim or his or her legal heirs. However, where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of workman to make any further claim.

#### **Assessment of loss in earning capacity**

In the case of unspecified injury resulting in permanent/partial disablement, it is not possible for a normal workman to establish his loss of earning capacity by his prospects or the offers to him in the open labour market.

In such a circumstance, the Commissioner has to, in discharge of his judicial functions, assess the loss of earning capacity of the workmen:

- (i) In the light of the medical report; and
- (ii) On the basis of:
  - A. His own estimate of the workmen's possibilities of employment in the open labour market:
  - B. Similar other relief factors.

The principles upon which the loss of earning capacity under section 4(1)(c)(ii) has to be determined are,

- (1) Loss of physical capacity is not co-extensive with loss of earning capacity.
- (2) Loss of earning capacity is not co-extensive with loss of physical capacity.
- (3) There may be cases where even the loss of physical capacity may be of such nature as to make it abundantly clear that there has been large, if not complete, loss of earning capacity even though there has been immediate reduction in wages.

## **Section 8 - Distribution of compensation**

Section 8 of the Employees' Compensation Act provides for the distribution of the compensation payable to the dependants of the employee if the employment injury results in the death of the employee. Any direct payment of compensation by the employer to the dependents of the deceased employee is deemed to be payment of compensation. The responsibility of distribution is therefore thrown on the Commissioner, who will examine the extent to which each claimant should benefit, and will make inquiries regarding absent dependants, if necessary. Employers are also enabled to deposit any compensation payable with the Commissioner, and to obtain their discharge. The Commissioner is also made responsible for the adequate protection of the interests of women or a person under legal disability.

The provision to deposit of the compensation amount with the Commissioner prevents lump sums, payable as compensation on death, from being squandered or getting into wrong hands. According to Section 8(1), Compensation payable to the dependent in respect of an employee whose injury has resulted in death is deposited with the Commissioner by the Employer. Section 8(4) provides that on the deposit of money, the Commissioner, if he thinks necessary, can cause notice to be published or to be served on each dependent in such manner as he thinks fit. When the dependent appears on the fixed date the Commissioner determines the distribution of the Compensation.

According to Section 8(7), where any sum deposited with the Commissioner is payable to a woman or a person with legal disability, the Commissioner may invest, apply or otherwise deal in such sum for the benefit of the woman or person with legal disability. The sum deposited is dealt with in such manner as the commissioner may direct. Where a payment is payable to any person under a legal disability, the Commissioner may, of his own motion or on an application made to him in this behalf, order that the payment be made during the disability to any dependent of the employee or to any other person whom the Commissioner thinks best fitted to provide for the welfare of the employee.

### **Refund to employer in case of no dependents**

Section 8 makes it quite clear that compensation is payable only to the dependants of the deceased. Sub-clause (4) of that section makes it still clearer that if the Commissioner is satisfied after enquiry, which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom he was paid. It follows, therefore, that if no near relation who is mentioned in section 2(1)(d) exists, the money cannot be paid to more distant relations even though they may be his next of kin. The amount is to be refunded to the employer [**Kalka Prasad (in re:), 118 IC 719**]

### **Dependant dying before making claim: right passes to heirs**

On the death of workman through some accident arising in the course of his employment, the right to compensation, payable by the employer under the Employees' Compensation Act vests in his dependent or dependants actually existing at the time of his death; and if such dependant died before any claim to such compensation is made or investigated, the right passes on to his heirs or legal representatives as they are included in the word "dependant" in section 8 of the Act [**PasupatiDutt v. Kelvin Jute Mills, AIR 1937 Cal 495**].

Similarly, it has been held in **Ikkassintakath Abdurahiman v. Nadakkaun MalikkalBeeranKoya, (AIR 1938 Mad 402)** that once an allotment of compensation to dependant or a distribution of compensation money among several dependants is made, the compensation so allotted or distributed becomes the property of the dependant and if the dependant dies, the said sum being his property will devolve on his or her heir or heirs and will not revert back to the employer.

#### **Notice and Claim - Section 10**

Section 10(1) states: No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or in case of death within two years from the date of death: Provided that where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the employee was continuously absent from work in consequence of the disablement caused by the disease: Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the employee to absent himself from work, the period of two years shall be counted from the day the employee gives notice of the disablement to his employer: Provided further that if an employee who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected: Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim

(a) if the claim is preferred in respect of the death of a an employee resulting from an accident which occurred on the premises of the employer, or at any place where the employee at the time of the accident was working under the control of the employer or of any person employed by him, and the employee died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured employee was employed had knowledge of the accident from any other source at or about the time when it occurred: Provided further that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause.

Section 10 (2): Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon any one of several employers, or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

Section 10 (3): The State Government may require that any prescribed class of employers shall maintain at their premises at which employees are employed a notice book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured employee employed on the premises and to any person acting bona fide on his behalf.

**Section 10 (4):** A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice-book is maintained, by entry in the notice-book.

**Section 10A - Power to require from employers statements regarding fatal accidents .—**

- (1) Where a Commissioner receives information from any source that an employee has died as a result of an accident arising out of and in the course of his employment, he may send by registered post a notice to the workman's employer requiring him to submit, within thirty days of the service of the notice, a statement, in the prescribed form, giving the circumstances attending the death of the employee, and indicating whether, in the opinion of the employer, he is or is not liable to deposit compensation on account of the death.
- (2) If the employer is of opinion that he is liable to deposit compensation, he shall make the deposit within thirty days of the service of the notice.
- (3) If the employer is of opinion that he is not liable to deposit compensation, he shall in his statement indicate the grounds on which he disclaims liability.
- (4) Where the employer has so disclaimed liability, the Commissioner, after such inquiry as he may think fit, may inform any of the dependants of the deceased employee that it is open to the dependants to prefer a claim for compensation, and may give them such other further information as he may think fit.

**Section 10B - Reports of fatal accidents and serious bodily injuries**

- (1) Where, by any law for the time being in force, notice is required to be given to any authority, by or on behalf of an employer, of any accident occurring on his premises which results in death or serious bodily injury, the person required to give the notice shall, within seven days of the death or serious bodily injury, send a report to the Commissioner giving the circumstances attending the death or serious bodily injury: Provided that where the State Government has so prescribed the person required to give the notice may instead of sending such report to the Commissioner send it to the authority to whom he is required to give the notice. Explanation: "Serious bodily injury" means an injury which involves, or in all probability will involve the permanent loss of the use of, or permanent injury to, any limb, or the permanent loss of or injury to the sight or hearing, or the fracture of any limb, or the enforced absence of the injured person from work for a period exceeding twenty days.
- (2) The State Government may, by notification in the Official Gazette, extend the provisions of sub-section (1) to any class of premises other than those coming within the scope of that sub-section, and may, by such notification, specify the persons who shall send the report to the Commissioner.
- 3) Nothing in this section shall apply to factories to which the Employees' State Insurance Act, 1948 (34 of 1948), applies.

The existence of persons wholly dependent will not exclude others who are only partially dependent from sharing in the award, but the shares of the two classes are not the same in extent, as may be the case where the compensation is apportioned among several who are wholly dependent.

The amount of any lump sum payable as compensation may be settled by an agreement between the parties under Section 7 or of lump sum compensation as being payable to a woman or a person under legal disability may be settled. The employer has to send a Memorandum of such settlement agreed upon by the parties. The Commissioner, on being satisfied as to the genuineness of the agreement, enters the Memorandum in a Register in the prescribed manner (Section 28).

The Commissioner may refuse to record an agreement as to the payment of lump sum whether by way of redemption of self- payments or otherwise or an agreement as to the amount of compensation payable to a woman or person under a legal disability. The Commissioner may refuse to record the Memorandum of agreement under S 28 if it appears to him that the agreement ought not to be recorded by reason of agreement having been obtained by fraud, undue influence or other improper means.

#### **Section 19 - Reference to Commissioners:**

(1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not an employee) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by a Commissioner.

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act.

#### **Section 20 - Appointment of Commissioners**

(1) The State Government may, by notification in the Official Gazette, appoint any person who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been for not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations to be a Commissioner for Employee's Compensation for such area as may be specified in the notification.

(2) Where more than one Commissioner has been appointed for any area, the State Government may, by general or special order, regulate the distribution of business between them.

(3) Any Commissioner may, for the purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.

(4) Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860).

## **Section 21 - Venue of proceedings and transfer**

(1) Where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before the Commissioner for the area in which—

- (a) the accident took place which resulted in the injury; or
- (b) the employee or in case of his death, the dependant claiming the compensation ordinarily resides; or
- (c) the employer has his registered office:

Provided that no matter shall be processed before or by a Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned: Provided further that, where the employee, being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or an employee in a motor vehicle or a company, meets with the accident outside India any such matter may be done by or before a Commissioner for the area in which the owner or agent of the ship, aircraft or motor vehicle resides or carries on business or the registered office of the company is situated, as the case may be.

(1A) If a Commissioner, other than the Commissioner with whom any money has been deposited under section 8, proceeds with a matter under this Act, the former may for the proper disposal of the matter call for transfer of any records or moneys remaining with the latter and on receipt of such a request, he shall comply with the same.

(2) If a Commissioner is satisfied that any matter arising out of any proceedings pending before him can be more conveniently dealt with by any other Commissioner, whether in the same State or not, he may, subject to rules made under this Act, order such matter to be transferred to such other Commissioner either for report or for disposal, and, if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and, where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hands or invested by him for the benefit of any party to the proceedings: Provided that the Commissioner shall not, where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependants of a lump sum without giving such party an opportunity of being heard

(3) The Commissioner to whom any matter is so transferred shall, subject to rules made under this Act, inquire thereinto and, if the matter was transferred for report, return his report thereon or, if the matter was transferred for disposal, continue the proceedings as if they had originally commenced before him.

(4) On receipt of a report from a Commissioner to whom any matter has been transferred for report under sub-section (2), the Commissioner by whom it was referred shall decide the matter referred in conformity with such report.

(5) The State Government may transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it.

### **Section 23 - Powers and procedure of Commissioners**

The Commissioner shall have for the following powers—

- a. taking evidence on oath;
- b. enforcing the attendance of witness;
- c. compelling the production of documents and material objects.

According to the Section 26, all costs incidental to any proceedings before a Commissioner shall subject to rules under this Act.

The Act empowers the Commissioner in making his investigations and in conducting his hearings, and authorises him to receive and consider, subject to well-defined statutory limitations, any kind of evidence that may throw light on a claim pending before him. Although the Commissioner may not be restricted by the strict technical rules of evidence, nevertheless, this section requires that the admissibility and credibility of evidence must be judged in accordance with the practice and procedure laid down for the ordinary Civil Court.

If a workman dies during the pendency of proceedings for compensation there is no abatement of the claim and his heirs are brought on record, there being no necessity of a separate claim being filed by the heirs. The Commissioner is also empowered to bring the legal representative of the deceased on record.

### **Section 30 - Appeals**

- (1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely:—
  - (a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;
  - (aa) an order awarding interest or penalty under section 4A;
  - (b) an order refusing to allow redemption of a half-monthly payment;
  - (c) an order providing for the distribution of compensation among the dependants of a deceased employee, or disallowing any claim of a person alleging himself to be such dependant;
  - (d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of section 12; or
  - (e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions:

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees: Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties: Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.

- (2) The period of limitation for an appeal under this section shall be sixty days.
- (3) The provisions of section 5 of the Limitation Act, 1963 (36 of 1963), shall be applicable to appeals under this section.

The mere difficulty of applying the facts to the law will not amount to a substantial question of law; (**AsmathBedi (dead) v. Marimuthu, 1990 ( LLR 450 (Mad) )**). An appeal against the order of the Compensation Commissioner lies only when a substantial question of law is involved; (**Mangala Ben v. Dalip Motwani, (1998 LLR 656)**). Scope of section 30 of the Workmen's Compensation Act for entertaining the appeal against the order passed by the Commissioner is very limited. The said section 30 very clearly provides that the award of the Commissioner passed under the Act can be challenged in the appeal where substantial question of law are involved; (**General Manager, C.C. Ltd. v. Bhim Yadav, 2003 LLR 574 (Jhk HC)**).

## UNIT - III

### SOCIAL SECURITY : SOCIAL INSURANCE

#### THE EMPLOYEES' STATE INSURANCE ACT, 1948

The Employee's State Insurance Act, 1948 applies throughout India to all factories, excluding seasonal factories. The applicability of this Act can also be made on a similar establishment functioning in another State. This Act contains provisions relating to provision of sickness, maternity and employment injury benefits.

The promulgation of Employees' State Insurance Act, 1948 envisaged an integrated need based social insurance scheme that would protect the interests of workers in contingencies such as sickness, maternity, temporary or permanent physical disablement, or death due to employment injury resulting in loss of wages or earning capacity. The Act also guarantees reasonably good medical care to workers and their family members.

The ESI Act 1948 applies to

- Factories other than seasonal factories using and
- Non – seasonal and non power using factories and establishments employing twenty(20) or more persons

Nothing contained in Sec 1(4) shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits under this Act. As per Section 1(5), the Central Government may extend the provisions of the Act to apply to any other establishment or class of establishment after a one month notice. Section 1(6) states that a factory or establishment to which this Act applies shall continue to be governed by the Act even if the number of persons employed therein falls below the threshold limit or if power is no longer used in the manufacturing process.

#### OBJECT OF THE ACT

The Employees' State Insurance Act (ESI Act) was enacted with the object of introducing a scheme of health insurance for industrial workers. The scheme envisaged by it is one of compulsory State Insurance providing for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with the work in factories other than seasonal factories. ESI Act is one of the most comprehensive legislations in the field of Social Security to safeguard the interests of labour in factories in the first instance. It also has the power to extend to other establishments.

#### DEFINITIONS

**Section 2(3)** "confinement" means labour resulting in the issue of a living child, or labour after twenty-six weeks of pregnancy resulting in the issue of a child whether alive or dead

**Section 2 (4)** "contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act;

**Section 2 (6)** “Corporation” means the Employees’ State Insurance Corporation set up under this Act;

**Section [2(6A)** “dependant” means any of the following relatives of a deceased insured person, namely:—

- (i) a widow, a legitimate or adopted son who has not attained the age of twenty-five years, an unmarried legitimate or adopted daughter,
  - (ia) a widowed mother;
- (ii) if wholly dependant on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of <sup>23</sup>[twenty-five years] and is infirm;
- (iii) if wholly or in part dependant on the earnings of the insured person at the time of his death,—
  - (a) a parent other than a widowed mother,
  - (b) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor,
  - (c) a minor brother or an unmarried sister or a widowed sister if a minor,
  - (d) a widowed daughter-in-law,
  - (e) a minor child of a pre-deceased son,
  - (f) a minor child of a pre-deceased daughter where no parent of the child is alive, or
  - (g) a paternal grand-parent if no parent of the insured person is alive;

**Section 2 (8)** “employment injury” means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India;

**Section 2(9)** “employee” means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and —

- (i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere ; or
- (ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment ; or
- (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service ; and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment ; or any

person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), and includes such person engaged as apprentice whose training period is extended to any length of time

but does not include —

- (a) any member of the Indian naval, military or air forces ; or
- (b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

**Section 2 (11)** “family” means all or any of the following relatives of an insured person, namely:—

- (i) a spouse;
- (ii) a minor legitimate or adopted child dependant upon the insured person;
- (iii) a child who is wholly dependant on the earnings of the insured person and who is—
  - (a) receiving education, till he or she attains the age of twenty-one years,
  - (b) an unmarried daughter;
- (iv) a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependant on the earnings of the insured person, so long as the infirmity continues;
- (v) dependant parents, whose income from all sources does not exceed such income as may be prescribed by the Central Government;
- (vi) in case the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependant upon the earnings of the insured person;

**Section 2(13)** “immediate employer “ in relation to employees employed by or through him, means a person who has undertaken the execution on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor

**Section 2 (15A)** “permanent partial disablement” means such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

Provided that every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement;

**Section 2 (15B) “permanent total disablement”** means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident in such disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent. or more;

**Section 2(17) “principal employer”** means —

- (i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named ;
- (ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department;
- (iii) in any other establishment, any person responsible for the supervision and control of the establishment

**Section 2 (21) “temporary disablement”** means a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of the injury

**Section 2 (22) “wages”** means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes [any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and] other additional remuneration, if any, paid at intervals not exceeding two months], but does not include—

- (a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;
- (b) any travelling allowance or the value of any travelling concession;
- (c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
- (d) any gratuity payable on discharge;

**Section 2 (23) “wage period”** in relation to an employee means the period in respect of which wages are ordinarily payable to him whether in terms of the contract of employment, express or implied or otherwise

### **Section 3 - Establishment of Employees' State Insurance Corporation**

The Act provides that the Employee State Insurance Corporation shall be established by the Central Government by notification in the Official Gazette for the administration of the Scheme. The main features of the Corporation are:

1. It shall be a body corporate by the name of Employees' State Insurance Corporation
2. The Corporation shall have Perpetual Succession
3. It shall also have a common seal
4. It can sue and be sued in its own name.

### **Section 4 - Constitution of Corporation**

This section details the constitution of the Corporation, who would be appointed by the Central Government. The Corporation will be headed by the Chairman. The Corporation shall consist of the following members, namely : —

- (a) a Chairman to be appointed by the Central Government ;
- (b) a Vice-Chairman to be appointed by the Central Government ;
- (c) not more than five persons to be appointed by the Central Government
- (d) one person each representing each of the States in which this Act is in force to be appointed by the State Government concerned;
- (e) one person to be appointed by the Central Government to represent the Union territories;
- (f) ten persons representing employers to be appointed by the Central Government in consultation with such organisations of employers as may be recognised for the purpose by the Central Government;
- (g) ten persons representing employees to be appointed by the Central Government in consultation with such organisations of employees as may be recognised for the purpose by the Central Government ;
- (h) two persons representing the medical profession to be appointed by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government;
- (i) three members of Parliament of whom two shall be members of the House of the People (Lok Sabha) and one shall be a member of the Council of States (Rajya Sabha) elected respectively by the members of the House of the People and the members of the Council of States ; and
- (j) the Director-General of the Corporation, ex-officio.

## **Section 8 –Constitution of the Standing Committee**

A Standing Committee of the Corporation shall be constituted from among its members, consisting of:

- (a) a Chairman appointed by the Central Government;
- (b) three members of the Corporation, appointed by the Central Government;
- (bb) three members of the Corporation representing such three State Governments thereon as the Central Government may, by notification in the Official Gazette, specify from time to time;
- (c) eight members elected by the Corporation as follows:
  - three members from among the members of the Corporation representing employers;
  - three members from among the members of the Corporation representing employees;
  - one member from among the members of the Corporation representing the medical profession ; and
  - one member from among the members of the Corporation elected by Parliament;
- (d) the Director-General of the Corporation, ex-officio

## **Section 10 - Medical Benefit Council**

- (1) The Central Government shall constitute a Medical Benefit Council consisting of —
  - (a) the Director General, the Employees' State Insurance Corporation, ex-officio as Chairman;
  - (b) the Director General, Health Services, ex-officio as Co-Chairman;
  - (c) the Medical Commissioner of the Corporation, ex-officio;
  - (d) one member each representing each of the States (other than Union territories) in which this Act is in force to be appointed by the State Government concerned;
  - (e) three members representing employers to be appointed by the Central Government in consultation with such organisations of employers as may be recognised for the purpose by the Central Government ;
  - (f) three members representing employees to be appointed by the Central Government in consultation with such organisations of employees as may be recognised for the purpose by the Central Government; and
  - (g) three members, of whom not less than one shall be a woman, representing the medical profession, to be appointed by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government.
- (2) Save as otherwise expressly provided in this Act, the term of office of a member of the Medical Benefit Council, other than a member referred to in any of the clauses (a) to (d) of sub-section (1),

shall be four years from the date on which his appointment is notified: Provided that a member of the Medical Benefit Council shall, notwithstanding the expiry of the said period of four years continue to hold office until the appointment of his successor is notified.

- (3) A member of the Medical Benefit Council referred to in clauses (b) and (d) of subsection(1) shall hold office during the pleasure of the Government appointing him

### **Section 26 - Employees' State Insurance Fund**

All contributions paid under the ESI Act and all other moneys received on behalf of the Corporation shall be paid into the ESI Fund. The ESI Fund shall be held and administered by the Corporation for the purposes of this Act. According to subsection (2) of Section 26, the Corporation may accept grants, donations and gifts from the Central or any State Government, local authority or any individual or body whether incorporated or not, for all or any of the purposes of the Act. All moneys accruing or payable to the ESI Fund shall be paid into the RBI or such other bank as may be approved by the Central Government, credited to the ESI fund. This rule is subject to the provisions of this Act and to any rules or regulations made hereunder. The Account of the ESI Fund shall be operated on by such officers as may be authorised by the Standing Committee with the approval or the Corporation.

### **Section 28 - Purposes for which the Fund may be expended**

This Fund would be used for paying all reasonable expenses to the employee under this Act, including, salaries and allowances, expenses related to medical benefits, cost of auditing of accounts, cost of setting up judicial authorities under this Act, and all other expenses which the Central Government will specify. The Act states the following purposes:

- payment of benefits and provision of medical treatment and attendance to insured persons and, where the medical benefit in accordance with the provisions of this Act; provisions of medical benefit to the families of insured persons where such benefit is so extended and defraying the charges and costs in the above cases.
- 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;
- 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;
- establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families;
- 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;

- defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of its assets and liabilities;
- defraying the cost (including all expenses) of the Employees' Insurance Courts set up under this Act;
- payment of any sums under any contract entered into for the purposes of this Act by the Corporation or the Standing Committee or by any officer duly authorised by the Corporation or the Standing Committee in that behalf;
- payment of sums under any decree, order or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceeding or claim instituted or made against the Corporation;
- defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act;
- defraying expenditure, within the limits prescribed, on measures for the improvement of the health, welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured; and
- such other purposes as may be authorised by the Corporation with the previous approval of the Central Government.

### **Section 38 - All employees to be insured**

This section makes it mandatory to get all employees of a factory or establishment insured. The Employees' State Insurance Act is aimed at conferring benefits on employees in case of sickness, maternity and employment injury. Section 38 of the Act makes it obligatory to insure all employees in factories or establishments. The initial and vital endeavour should be to identify the beneficiaries or the employees for insurance; (**Transport Corporation of India v. Employees' State Insurance Corporation, AIR 2000 SC 238** ).

### **Section 39 – Contributions**

- Employee and employer liable for payment of the contribution to the Employee State Insurance Corporation.
- The rate of contribution paid by employer and employee will be decided by the central government.
- Currently, the employee's contribution rate (w.e.f. 1.1.97) is 1.75% of the wages and that of employer's is 4.75% of the wages paid/payable in respect of the employees in every wage period.
- If wage is received every month by employee, the Contribution to the ESI Corporation should be made by employer and employee every month without fail.
- @ 12% of interest per year should be paid If employer delays in payment of the contribution to ESI corporation

Contribution is payable by the employer even in respect of casual labourers under section 39(3) and (4); [ **Employees' State Insurance Corporation v. Jaipur Enterprises, (1988) 56 FLR 207 (Raj)**  ].

Contribution for the past period is recoverable even if the employees had not availed the benefit of insurance; [ **Employees' State Insurance Corporation v. Hotel Kalpaka International, 1993 LLR 177 (SC)**  ].

The applicability of the clause (a) of sub-section (5) of section 39 of the Act is where the employer fails to make contributions. If such failure is on account of circumstances beyond his control or if the circumstances make it impossible for the employer to make contributions even if he wanted to do so, unless he risks being hauled up for contempt of Court, such failure on the part of the employer in making payment in time cannot be called a failure within the meaning of this provision; **Fenner (India) Ltd. v. Joint Regional Director, Employees' State Insurance Corporation, (2003) 2 LLJ 447 (Mad)**.

#### **Section 40 - Principal employer to pay contribution in the first instance**

This section casts a duty on the principal employer to pay both employee's contribution and the employer's contribution. Further the employer can also deduct from employee's wages the amount of employee contribution. The employer's liability to contribute continues till the closure of factory or establishment; [ **Employees' State Insurance Corporation v. Hotel Kalpaka International, 1993 LLR 117 (SC)**  ].

#### **Section 41 - Recovery of contribution from immediate employer**

Section 41 deals with two sets of powers. Subsection (1) of Section 41 deals with the powers of the principal employer to recover the employee's contribution as well as the employer's contribution from the immediate employer, in respect of employees employed by or through an immediate employer. According to S. 41(1-A), the immediate employer shall maintain a register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under S. 41(1). Section 41(2) deals with the power of the immediate employer to deduct the employee's contribution from the wages of employees. But this right is, subject to Section 40(2), limited to a deduction from the wages only to the period or part of a period for which the wages are paid. The principal employer's power to recover contribution paid by him from the immediate employer is two-fold, namely, (a) by way of deduction from any amount payable to the immediate employer by the principal employer under any contract or (b) by to treat the sum paid as a debt and recover it through a Court of law.

### **BENEFITS**

#### **Section 46 – Benefits**

The following benefits will be paid to insured persons or to their dependents [Section 46]

- Periodical payments to any insured person in case of his sickness certified by a duly appointed medical practitioner.
- Periodical payments to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, such woman being certified to be eligible for such payments.

- periodical payments to an insured person suffering from disablement as a result of an employment injury
- periodical payments to such dependants of an insured person who dies as a result of an employment injury
- medical benefits

### **Section 49 - Sickness Benefit**

Sickness Benefit represents periodical cash payments made to an Insured Person during the period of certified sickness occurring in a benefit period when the Insured Person requires medical treatment and attendance with abstention from work on medical grounds. The qualification of a person to claim sickness benefit; the conditions subject to which such benefit may be given; and the rates and period of payment shall be such as may be prescribed by the Central Government.

- An Insured Person becomes eligible to Sickness Benefit, if his contributions were payable for not less than 78 days during the corresponding contribution period. It is not necessary that the contribution should have been actually paid, it is enough if it was 'payable'.
- A person who has entered into insurable employment for the first time has to wait for 156 days before becoming eligible to sickness benefit, because his corresponding benefit period starts only after that interval.

According to Section 69, employer shall be liable for payment of excess sickness benefit, if the sickness to the insured person/ employee is caused by insanitary working conditions in the factory or establishment or the neglect of the owner/occupier in observing health regulations enjoined upon him by any

### **Section 50 Maternity Benefit**

Maternity Benefit is payable to an Insured Woman in the following cases subject to contributory conditions:-  
(Read with Section 46(1)(b) and Rule 56

- Confinement-payable for a period of 12 weeks (84 days) (Section 46(1)(b))
- Miscarriage or Medical Termination of Pregnancy (MTP)-payable for 6 weeks from the date following miscarriage.
- Sickness arising out of Pregnancy, Confinement, Premature birth-payable for a period not exceeding one month.
- In the event of the death of the Insured Woman during confinement leaving behind a child, Maternity Benefit is payable to her nominee
- Maternity benefit rate is double the Standard Benefit Rate, or roughly equal to the average daily wage.

## **Section 51 Disablement Benefit**

### **Temporary disablement benefit (TDB)**

#### **Eligibility for TDB:**

- It is payable with respect to employees who sustain temporary disablement of not less than 3 days, excluding the day of the accident
- The daily rate of benefit shall be 90% of standard benefit rate in the contribution period corresponding to the benefit period in which the employment injury occurs rounded to the next higher rupee.

#### **Duration of TDB:**

There is no prescribed limit for the duration of TDB. This is payable as long as temporary disablement lasts and significant improvement by treatment is possible. If a Temporary Disablement spell lasts for less than 3 days (excluding day of accident), the insured person will be paid sickness benefit, if otherwise eligible.

### **Permanent Disablement Benefit (PDB)**

Employer will be liable for the accidents caused to his employer in the following circumstances

- Section 51A – an accident arising in the course of an employee’s employment shall be presumed, in the absence of evidence to the contrary, also to have arisen out of that employment
- Section 51B - An accident shall be deemed to arise out of and in the course of an employee’s employment notwithstanding that he is at the time of the accident acting in contravention of the provisions of any law applicable to him, or of any orders given by or on behalf of his employer or that he is acting without instructions from his employer, if —
  - the accident would have been deemed so to have arisen had the act not been done in contravention as aforesaid or without instructions from his employer, as the case may be ; and
  - the act is done for the purpose of and in connection with the employer’s trade or business.
- Section 51C - An accident happening while an employee is, with the express or implied permission of his employer, travelling as a passenger by any vehicle to or from his place of work shall, notwithstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of and in the course of his employment, if —
  - the accident would have been deemed so to have arisen had he been under such obligation; and
  - at the time of the accident, the vehicle —
    - (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer; and

- (ii) is not being operated in the ordinary course of public transport service.

In this section “vehicle “ includes a vessel and an aircraft

- **Section 51D - Accidents happening while meeting emergency. —** An accident happening to an employee in or about any premises at which he is for the time being employed for the purpose of his employer’s trade or business shall be deemed to arise out of and in the course of his employment, if it happens while he is taking steps, on an actual or supposed emergency at those premises, to rescue, succour or protect persons who are, or are thought to be or possibly to be, injured or imperiled, or to avert or minimize serious damage to property.

## **Section 52 Dependants’ Benefit**

As prescribed by the central government, the dependants’ benefit is payable to the dependants in cases where an Insured Person dies as result of Employment Injury. Rule 58 States:

- (1) Dependant’s benefit shall be paid to the dependants of the insured person who dies as a result of an employment injury, in the following manner : —
  - (A) In the case of death of the insured person, the dependants’ benefit shall be payable to his widow, children and widowed mother as follows :
    - (a) to the widow during life until remarriage, an amount equivalent to three-fifths of the full rate and, if there are two or more widows, the amount payable to the widow as aforesaid shall be divided equally between the widows ;
    - (b) to each legitimate or adopted son, an amount equivalent to two-fifths of the full rate until he attains the age of twenty-five years : Provided that in the case of a legitimate or adopted son] who is infirm and who is wholly dependent on the earnings of the insured person at the time of his death, dependants benefits shall continue to be paid while the infirmity lasts ;
    - (c) to each legitimate or adopted unmarried daughter, an amount equivalent to two-fifths or the full rate : Provided that in the case of legitimate or adopted daughter who is infirm and is wholly dependant on the earnings of the insured person at the time of his death, dependants’ benefit shall continue to be paid while the infirmity lasts : Provided further that if the total of the dependants’ benefits distributed among the widow or widows and legitimate or adopted children and widowed mother of the deceased person as aforesaid exceeds at any time the full rate, the share of each of the dependants shall be proportionately reduced, so that the total amount payable to them does not exceed the amount of disablement benefits at the full rate.
    - (d) to the widowed mother during life an amount equivalent to two-fifths of the full rate.
  - (B) In case the deceased person does not leave widow or legitimate or adopted child or widowed mother dependants’ benefits shall be payable to other dependants as follows : —
    - (a) To a parent other than the widowed mother or grandparent, for life, at an amount equivalent to three-tenths of the full rate and if there are two or more parents (other than widowed mother) or grandparents the amount payable to the parents (other than widowed mother) or grandparents as aforesaid shall be equally divided between them.

- (b) to any other —
  - (i) male dependant, until he attains the age of eighteen years,
  - (ii) female dependant, until she attains the age of eighteen years or until marriage, whichever is earlier or if widowed, until she attains eighteen years of age or re-marriage, whichever is earlier at an amount equivalent to two-tenths of the full rate: Provided that if there be more than one dependant under clause (b) the amount payable under this clause shall be equally divided between them.
- (2) The daily rate of dependant's benefit shall be ninety per cent. of the standard benefit rate in the contribution period corresponding to the benefit period in which the employment injury occurs : Provided that where an employment injury occurs before the commencement of the first benefit period in respect of a person, the daily rate of dependants' benefit shall be —
  - (a) where a person sustains employment injury after the expiry of the first wage period in the contribution period in which the injury occurs, ninety per cent. of his average daily wages during that wage period, rounded to the next higher rupee ;
  - (b) where a person sustains employment injury before the expiry of the first wage period in the contribution period in which the injury occurs, ninety per cent. of wages actually earned or which would have been earned had he worked for a full day on the date of accident, rounded to the next higher rupee

#### **Section 56 - Medical Benefit**

Under Section 46(1)(e), an insured person and his family members are entitled to medical benefits in the manner prescribed in Section 5 of the Act as follows:

- a. Out-patient treatment
- b. Attachment to any hospital or dispensary or clinic under the ESI scheme
- c. Doctor's visit to the home of an insured person
- d. In-patient treatment in a hospital or other institution.

However, if he ceases to be in reasonable employment due to permanent disablement from an employment injury, he shall be eligible to receive medical benefits for himself and his spouse or production of evidence, till the date of superannuation.

#### **Funeral Expenses (Section 46(1)(f))**

The eldest surviving male member of the family of the deceased insured person shall be entitled to receive funeral expenses. Where no such member is available, the funeral expenses are paid to the person who actually incurred the expense. The amount of funeral expenses is prescribed by the Central Government.

## **ADJUDICATION OF DISPUTES**

### **Section 74 - Constitution of Employees' Insurance Court**

The State Government shall, by notification in the Official Gazette, constitute an Employees' Insurance Court for such local areas may be specified in the notification. The Court shall consist of such number of judges as the State Government may think fit. Any person who is or has been a judicial officer or is a legal practitioner of five years' standing shall be qualified to be a Judge of the Employees' Insurance Court. The State Government may appoint the same Court for two or more local areas or two or more Courts for the same local area. Where more than one Court has been appointed for the same local area, the State Government may by general or special order regulate the distribution of business between them

### **Section 75 - Matters to be decided by Employees' Insurance Court**

If any question or dispute arises as to—

- whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or
- the rate of wages or average daily wages of an employee for the purposes of this Act, or
- the rate of contribution payable by a principal employer in respect of any employee, or
- the person who is or was the principal employer in respect of any employee, or
- the right of any person to any benefit and as to the amount and duration thereof, or
- any direction issued by the Corporation under section 55A on a review of any payment of dependants' benefit, or
- any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act, such question or dispute subject to the provisions of sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

However, Section 75(2A) lays down that if any question on disablement arises and the decision of the Medical Board or the Medical Appeal Tribunal is not obtained on such question, in that case, the Employees' Insurance Court shall require the ESI Corporation to get it decided by such Board or Tribunal, in accordance with the Act. The following claims shall be decided by the Employees' Insurance Court, namely:—

- claim for the recovery of contributions from the principal employer;
- claim by a principal employer to recover contributions from any immediate employer;
- claim against a principal employer;
- claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and
- any claim for the recovery of any benefit admissible under this Act.

In **Maheshwari Fertilizer Ltd Vs ESI Corporation, Jaipur [2000 (1) LLJ 385]**, it was held that a writ under Art 226 can be permitted on facts and circumstances even though a remedy before the ESI Court is available.

In **M Mali Street Unit Vs ESIC, Ghaziabad [1985 LIC 28 ALL HC]**, held that an ESI Court can grant an injunction as it functions as a Court, even though it is a Tribunal.

### **Section 78 - Powers of Employee's Insurance Court**

The powers of the Employee's Insurance Court will be the same as of a civil court, and its rulings will be enforceable as if it were a decree of court. All costs incidental to any proceeding before an Employees' Insurance Court shall, subject to such rules as may be made in this behalf by the State Government, be in the discretion of the court. Only some of the powers of the Civil Court have been conferred on the ESI Court.

### **PENALTIES**

SECTION	DESCRIPTION	PENALTY
84	<ul style="list-style-type: none"> <li>● Whoever, for the purpose of causing any increase in payment</li> <li>● Whoever, for the purpose of causing any payment or benefit to be made where no payment</li> <li>● Whoever, for the purpose of avoiding any payment to be made by himself under this Act</li> <li>● Whoever, enabling any other person to avoid any such payment, knowingly makes</li> <li>● Whoever, made any false statement or false representation,</li> </ul>	<p>punishable with imprisonment for a term which may extend to 6 months, or with fine not exceeding 2000/- rupees, or with both.</p> <p>PROVIDED that ,where an insured person is convicted under this Section, he shall not be entitled for any cash benefit under this Act for such period as may be prescribed by the Central Government.</p>
85	<p>fails to pay any contribution which under this Act he is liable to pay</p> <p>in case of failure to pay the employee's contribution which has been deducted by him from the employee's wages</p> <ul style="list-style-type: none"> <li>● fails or refuses to submit any return required by the regulations, or makes a false return,</li> <li>● deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution,</li> <li>● obstructs any Inspector or other official of the Corporation in the discharge of his duties,</li> </ul>	<p>imprisonment for a term which may extend to 3 years but which shall not be less than one year,</p> <p>fine of 10,000/- rupees and imprisonment which shall not be less than six months</p> <p>Imprisonment for a term which may extend to one year or with fine which may extend to 4000/- rupees, or with both.</p>
85A	<p>Repeated failure by the employer to pay any contribution which under this Act he is liable to pay,</p>	<p>Imprisonment for a term which may extend to 5 years but which shall not be less than 2 years and shall also be liable to fine of 25,000/- thousand rupees.</p>

# UNIT - IV

## OTHER SOCIAL SECURITY LEGISLATIONS

### I. THE MATERNITY BENEFIT ACT, 1961

#### INTRODUCTION

The object of maternity leave and benefit is to protect the dignity of women by providing for the full and healthy maintenance of women and her child when she is not working. Modern day society, economic pressures have increased the need for families to have dual incomes. Hence, women constitute a large majority of the labour force and they require particular attention to facilitate them in overcoming the state of motherhood honourably, peacefully and undeterred by the fear of being victimised for absence during the pre- or post- natal period.

The Supreme Court has also observed that to become a mother is the most natural phenomenon in the life a woman. Whatever is needed to facilitate the birth of a child to a woman who is in , the employer has to regulate the employment of women considering the physical differences she would face in pursuing her duties all the while carrying a baby in the womb or while rearing the child after birth. To relieve the hardships of women workers, the Maternity Benefit Act, 1961 was passed

#### Aims and Objectives

The Maternity Benefit Act aims to regulate of employment of women employees in certain establishments for certain periods before and after child birth and provides for maternity and certain other benefits.

The Act extends to the whole of India and is applicable to:

- Every factory, mine or plantation (including those belonging to Government) and
- An establishment engaged in the exhibition of equestrian, acrobatic and other performances, irrespective of the number of employees, and
- To every shop or establishment wherein 10 or more persons are employed or were employed on any day of the preceding 12 months.

The State Government may extend the Act to any other establishment or class or establishments; industrial, commercial, agricultural or otherwise.

However, the Act **does not apply** to any such **factory/other establishment** to which the provisions of the **Employees' State Insurance Act** are **applicable** for the time being.

#### Definitions – Section 3

Section 3(b) “child” includes a still-born child;

Section 3 (c) “delivery” means the birth of a child;

Section 3 (o) “woman” means a woman employed, whether directly or through any agency, for wages in any establishment.

#### **Section 4 - Employment of, or work by, women prohibited during certain period**

- (1) No employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery or her miscarriage.
- (2) No woman shall work in any establishment during the six weeks immediately following the day of her delivery or her miscarriage.
- (3) Without prejudice to the provisions of section 6, no pregnant woman shall, on a request being made by her in this behalf, be required by her employer to do during the period specified in sub-section (4) any work which is of an arduous nature or which involves long hours of standing, or which in any way is likely to interfere with her pregnancy or the normal development of the foetus, or is likely to cause her miscarriage or otherwise to adversely affect her health.
- (4) The period referred to in sub-section (3) shall be—
  - (a) the period of one month immediately preceding the period of six weeks, before the date of her expected delivery;
  - (b) any period during the said period of six weeks for which the pregnant woman does not avail of leave of absence under section 6.

#### **Eligibility and Maternity Benefits**

##### **Who is Entitled to Maternity Benefit**

- Every woman employee, whether employed directly or through a contractor, who has actually worked in the establishment for a period of at least 80 days during the 12 months immediately preceding the date of her expected delivery, is entitled to receive maternity benefit.
- No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery.
- For calculating the number of days on which a woman has actually worked during the preceding 12 months, the days on which she has been laid off or was on holidays with wages shall also be counted.
- There is neither a wage ceiling for coverage under the Act nor there is any restriction as regards the type of work a woman is engaged in.

In **Municipal Corporation of Delhi v. Female Workers' (Muster Rolls) and Another** female workers employed by Municipal Corporation, Delhi on daily wages raised a demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that they were not regularised. The respondents, the Municipal Corporation of Delhi stated that it granted maternity leave to its regular female workers but not to the daily wage ones, that is, the ones on the muster rolls. The respondents argued that the practice was unfair as there was hardly any difference in the work allotted to female workers who were regular and those who were on daily wage. Accepting the contention, the Supreme Court upheld the right of female construction workers to be granted maternity leave by extending the scope of the **Maternity Benefits Act, 1961** to daily wage workers as long as they fulfilled Section 5(2).

## **Section 5 - Right to payment of maternity benefit**

Every working women is entitled to receive maternity benefits for the period of her actual absence during the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day and it is the liability of the employer to pay such benefits at the rate of average daily wage of the woman. Average daily wages is calculated for the three calendar month preceding the date she absents herself. The maximum period of maternity benefit shall be 12 weeks of which not less than 6 weeks shall precede the date of her expected delivery (Section 5(3))

## **Section 5A - Continuance of payment of maternity benefit in certain cases**

Every woman entitled to the payment of maternity benefit under this Act shall, notwithstanding the applicability of the ESI Act to the factory or other establishment in which she is employed, continue to be so entitled until she becomes qualified to claim maternity benefit under the ESI Act.

## **Section 5B - Payment of maternity benefit in certain cases**

Every woman who may be entitled for the maternity benefit under this Act - a) employed in a factory or other establishment to which the provisions of the Employees' State Insurance Act, 1948 apply b) whose wages (excluding remuneration for over-time work) for a month exceed the amount specified in section 2 (9)(b) of the ESI Act c) Who fulfill conditions as in section 5(2) of the Maternity benefit Act.

## **Section 8 - Payment of medical bonus**

Every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus, if no pre-natal confinement and post-natal care is provided for by the employer free of charge

## **Section 9 - Leave for Miscarriage and Illness**

In case of miscarriage or medical termination of pregnancy, a woman shall, on production of the prescribed proof, be entitled to leave with wages at the rate of maternity benefit, for a period of 6 weeks immediately following the day of her miscarriage or medical termination of pregnancy.

## **Section 9A - Leave for Tubectomy Operation**

In case of tubectomy operation, a woman shall, on production of prescribed proof, be entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of operation.

## **Section 10 - Leave For Illness**

Leave for a maximum period of one month with wages at the rate of maternity benefit are allowable in case of illness arising out of pregnancy, delivery, premature birth of child, miscarriage or medical termination of pregnancy or tubectomy operation.

## **Section 11 - Nursing breaks**

Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months.

## **Section 12 - Dismissal during absence of pregnancy**

(1) When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.

(2) (a) The discharge or dismissal of a woman at any time during her pregnancy, if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus referred to in section 8, shall not have the effect of depriving her of the maternity benefit or medical bonus: Provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman, deprive her of the maternity benefit or medical bonus or both.

(b) Any woman deprived of maternity benefit or medical bonus, or both, or discharged or dismissed during or on account of her absence from work in accordance with the provisions of this Act, may, within sixty days from the date on which order of such deprivation or discharge or dismissal is communicated to her, appeal to such authority as may be prescribed, and the decision of that authority on such appeal, whether the woman should or should not be deprived of maternity benefit or medical bonus, or both, or discharged or dismissed shall be final.

## **Section 13- No deduction of wages in certain cases**

No deduction from the normal and usual daily wages of a woman entitled to maternity benefit under the provisions of this Act shall be made by reason only of— (a) the nature of work assigned to her by virtue of the provisions contained in sub-section (3) of section 4; or (b) breaks for nursing the child allowed to her under the provisions of section 11.

## **Section 14 - Appointment of Inspectors**

The appropriate Government may, by notification in the Official Gazette, appoint such officers as it thinks fit to be Inspectors for the purposes of this Act and may define the local limits of the jurisdiction within which they shall exercise their functions under this Act.

## **Section 15 Powers and duties of Inspectors**

An Inspector may, subject to such restrictions or conditions as may be prescribed, exercise all or any of the following powers, namely:—

(a) enter at all reasonable times with such assistants, if any, being persons in the service of the Government or any local or other public authority, as he thinks fit, any premises or place where women are employed or work is given to them in an establishment, for the purposes of examining any registers, records and notices required to be kept or exhibited by or under this Act and require their production for inspection;

(b) examine any person whom he finds in any premises or place and who, he has reasonable cause to believe, is employed in the establishment: Provided that no person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself;

(c) require the employer to give information regarding the names and addresses of women employed, payments made to them, and applications or notices received from them under this Act; and

(d) take copies of any registers and records or notices or any portions thereof.

## **Section 16. Inspectors to be public servants**

Every Inspector appointed under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

### **Period for Which Benefit Allowed**

The maximum period for which any woman shall be entitled to maternity benefit shall be 12 weeks in all whether taken before or after childbirth. However she cannot take more than six weeks before her expected delivery.

Prior to the amendment of 1989, a woman employee could not avail of the six weeks' leave preceding the date of her delivery; she was entitled to only six weeks leave following the day of her delivery. However, by the above amendment, the position has changed. Now, in case a woman employee does not avail of six weeks' leave preceding the date of her delivery, she can avail of that leave following her delivery, provided the total leave period, i.e. preceding and following the day of her delivery does not exceed 12 weeks. In **Ram Bahadur Thakur (P) Ltd. v Chief Inspector of Plantations, [1982 (2) LLJ 20]** a female worker employed at the Pambar Tea Estate was denied maternity benefits on the grounds that she had actually worked for 157 days instead of the 160 days required to qualify for them. The Supreme Court, however, held that for the purposes of computing maternity benefits, all days including Sundays and unpaid holidays must be taken into consideration.

### **Section 6 - Notice of claim for maternity benefit and payment thereof**

A woman employee entitled to maternity benefit may give a notice in writing (in the prescribed form) to her employer, stating as follows:

- that her maternity benefit may be paid to her or to her nominee (to be specified in the notice);
- that she will not work in any establishment during the period for which she receives maternity benefit; and
- that she will be absent from work from such date (to be specified by her), which shall not be earlier than 6 weeks before the date of her expected delivery.

The notice may be given during the pregnancy or as soon as possible, after the delivery. On receipt of the notice, the employer shall permit such woman to absent herself from work after the day of her delivery. The failure to give notice, however, does not disentitle the woman to the benefit of the Act.

The woman shall be entitled to maternity benefit even if she has not given an application. In any such case an Inspector may either of his own motion or on an application made to him by the woman, order the payment of such benefit or amount within such period as may be specified in the order.

### **Section 21 - Penalties for Contravention of Act by Employer**

For failure to pay maternity benefit as provided for under the Act, the penalty is imprisonment upto one year and fine upto Rs. 5000. The minimum being 3 months and Rs. 2000 respectively.

For dismissal or discharge of a woman as provided for under the Act, the penalty is imprisonment upto one year and fine upto Rs. 5000. The minimum being 3 months and Rs.2000 respectively.

## **Key changes in the proposed Amendment suggested in the Maternity Benefits Acts which are pending in the Parliament**

- **Increase in the duration of paid maternity leave:** From 12 weeks (of which not more than 6 weeks shall precede the expected date of delivery) to **26 weeks** (of which not more than 8 weeks shall precede the expected date of delivery)..
- **Surrogacy leave:** Paid surrogacy leave of **12 weeks** from the date when the child is handed over. This leave can only be availed by a commissioning mother who uses her egg to create an embryo to be implanted in another woman.
- **Adoption Leave:** Paid adoption leave of 12 weeks from the date when the child is handed over, provided the child is less than 3 months old.
- **Work from home option:** Applicable after the period of maternity leave, on such terms as may be mutually agreed to between the employer and the woman.
- **Crèche facilities:** An obligation on employers with 50 or more employees to provide **crèche facilities** to women. While an earlier draft of the Amendment had proposed the distance from the workplace to the crèche to be one kilometre or less, the Amendment simply states that it will be as prescribed. We would need to wait for a subsequent government notification in this regard. The Amendment also does not make it explicit whether the crèche facility can be provided on a chargeable basis to employees or whether the facility has to be provided free of charge. Further, the Amendment also permits four visits per day to the crèche, which shall also include the interval of rest allowed to the woman employee. This appears to be in addition to the two nursing breaks that the MB Act already permits till the child is of 15 months of age.

**Obligation to notify:** An obligation on employers to inform (in writing and electronically) to every woman newly appointed within the organization about the benefits available under the MB Act.

## 2. THE EMPLOYEE'S PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

### Introduction

The Employees' Provident Fund & MP Act, 1952 is an important piece of Social Security legislation enacted by the Parliament to provide social security benefits to the workers. At present, the Act and the Schemes framed there under provides for three types of benefits -Contributory Provident Fund, Pensionary benefits to the employees/ family members and the insurance cover to the members of the Provident Fund. It is one of the **largest social security organisations** in the world in terms of the number of covered beneficiaries and the volume of financial transactions undertaken.

### Object

The Constitution of India under "Directive Principles of State Policy" provides that the State shall within the limits of its economic capacity make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old-age, sickness & disablement and undeserved want.

With this chief objective the Act has been passed to provide provident fund, pension and insurance scheme for the future of industrial worker after his retirement or for his dependents in case of his early death. Only after retirement but this Act also provides monetary assurance to meet in the course of employment. These may relate to education or marriage of employee's children or construction of house etc.

### Scope and Applicability

Section 1(3)(a) state that This Act shall be applicable to every establishment which is a factory engaged in any industry specified in Schedule I employing 20 or more persons or, as per Section 1(3)(b) any other establishment employing 20 or more persons or class of such establishments which the Central Government may specify in the territory of India. It is further provided that where the Central Provident Fund Commissioner thinks, whether on an application made to him in this behalf or otherwise, that the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to the establishment, he may, by notification in the Official Gazette, apply the provisions of this Act to that establishment. (Section 1(4))

### Definitions

**Section 2 (b) "basic wages"** means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include—

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer;

**Section 2(c) “contribution”** means a contribution payable in respect of a member under a Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies];

**Section 2(3) (e) “employer”** means-

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause f of sub-section 1 of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

**Section 2 (f) “employee”** means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of<sup>7</sup>[ an establishment], and who gets, his wages directly or indirectly from the employer, <sup>8</sup>[ and includes any person,—

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 ( 52 of 1961), or under the standing orders of the establishment;]

It has been held by the court in **Enfield India v RPFC 2000 (85) FLR 519(Mad)** a person doing work of the principal employer, even though employed by a contractor is also an employee covered by the definition.

It has been decided by the courts that trainees are not employees and are not covered by the EPF Act. The court has held that stipend paid is not wages. It must be noted that trainees were recruited under a particular Training Scheme and there was no guarantee of employment after completion of the training period and that they were not entitled to other benefits, which were available to other permanent employees. These aspects have been decided in **Sri Rama Vilas Service Ltd. V RPFC 2000 –I-LLJ-709(Mad)** .

**Section 2(i) “Industry”** means any industry specified in Schedule I, and includes any other industry added to the Schedule by notification under section 4;

(ia) “Insurance Fund” means the Deposit-linked Insurance Fund established under sub-section (2) of section 6C;

(ib) “Insurance Scheme” means the Employees’ Deposit-linked Insurance Scheme framed under sub-section (1) of section 6Q]

**Section 2 (k) “occupier of a factory”** means the person who has ultimate control over the affairs of the factory, and, where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

[(kA) “Pension Fund” means the Employees’ Pension Fund established under sub-section (2) of section 6A;

(kB) “Pension Scheme” means the Employees’ Pension Scheme framed under sub-section (I) of section 6A;]

## **Section 17 – Exemption from applicability**

### **17. Power to exempt –**

**(1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification exempt, whether prospectively or retrospectively, from the operation of all or any of the provisions of any Scheme –**

**(a) any establishment to which this Act applies, if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character; or**

**(b) any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any Scheme in relation to employees in any other establishment of a similar character. Provided that no such exemption shall be made except after consultation with the Central Board which on such consultation shall forward its views on exemption to the appropriate Government within such time limit as may be specified in the Scheme.**

**(1A). Where an exemption has been granted to an establishment under clause (a) of sub-section 1,**

**(a) the provisions of sections 6, 7A, 8 and 14B shall, so far as may be, apply to the employer of the exempted establishment in addition to such other conditions as may be specified in the notification granting such exemption, and where such employer contravenes, or makes default in complying with any of the said provision or conditions or any other provision of this Act, he shall be punishable under section 14 as if the said establishment had not been exempted under the said clause a;**

**(b) the employer shall establish a Board of Trustees for the administration of the provident fund consisting of such number of members as may be specified in the Scheme;**

**(c) the terms and conditions of service of members of the Board of Trustees shall be such as may be specified in the Scheme:**

**(d) The Board of Trustees constituted under clause b shall – (i) maintain detailed accounts to show the contributions credited, withdrawals made and interest accrued in respect of each employee; (ii) submit such returns to the Regional Provident Fund Commissioner or any other officer as the Central Government may direct from time to time; (iii) invest the provident fund monies in accordance with the directions issued by the Central Government from time to time; (iv) transfer, where necessary, the provident fund account of any employee; and (v) perform such other duties as may be specified in the Scheme.**

**(IB) Where the Board of Trustees established under clause (b) of sub-section (1A) contravenes, or makes default in complying with, any provisions of clause (d) of that sub-section, the Trustees of the said Board shall be deemed to have committed an offence under subsection (2A) of section 14 and shall be punishable with the penalties provided in that sub-section.**

(IC) The appropriate Government may, by notification in the Official Gazette, and subject to the condition on the pattern of investment of pension fund and such other conditions as may be specified therein, exempt any establishment or class of establishments from the operation of the Pension Scheme if the employees of such establishment or class of establishments are either members of any other pension scheme or propose to be members of such pension scheme, where the pensionary benefits are at par or more favourable than the Pension Scheme under this Act.

(2) Any Scheme may make provision for exemption of any person or class of persons employed in any establishment to which the Scheme applies from the operation of all or any of the provisions of the Scheme, if such person or class of persons is entitled to benefits in the nature of provident fund, gratuity or old age pension and such benefits, separately or jointly, are on the whole not less favourable than the benefits provided under this Act or the Scheme: Provided that no such exemption shall be granted in respect of a class of persons unless the appropriate Government is of opinion that the majority of persons constituting such class desire to continue to be entitled to such benefits.

(2A) The Central Provident Fund Commissioner may, if requested so to do by the employer, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt, whether prospectively or retrospectively, any establishment from the operation of all or any of the provisions of the Insurance Scheme, if he is satisfied that the employees of such establishment are, without making any separate contribution or payment of premium, in enjoyment of benefits in the nature of life insurance, whether linked to their deposits in provident fund or not, and such benefits are more favourable to such employees than the benefits admissible under the Insurance Scheme.

(2B) Without prejudice to the provisions of sub-section 2A, the Insurance Scheme may provide for the exemption of any person or class of persons employed in any establishment and covered by that scheme from the operation of all or any of the provisions thereof, if the benefits in the nature of life insurance admissible to such person or class of persons are more favourable than the benefits provided under the Insurance Scheme.

(3) Where in respect of any person or class of persons employed in an establishment an exemption is granted under this section from the operation of all or any of the provisions of any Scheme whether such exemption has been granted to the establishment wherein such person or class of persons is employed, or to the person or class of persons as such, the employer in relation to such establishment - (a) shall, in relation to the provident fund, pension and gratuity to which any such person or class of persons is entitled, maintain such accounts, submit such returns, make such investment, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct. (b) shall not, at any time after the exemption, without the leave of the Central Government, reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person or class of persons was entitled at the time of exemption; and (c) shall, where any such person leaves his employment and obtains re-employment in another establishment to which this Act applies, transfer within such time as may be specified in this behalf by the Central Government, the amount of accumulations to the credit of that person in the provident fund of the establishment left by him to the credit of that person's account in the provident fund of the establishment in which he is re-employed or, as the case may be, in the Fund established under the Scheme applicable to the establishment.

(3A) Where, in respect of any person or class of persons employed in any establishment, an exemption is granted under sub-section (2A) or sub-section (2B) or from the operation of all or any of the provisions of the Insurance Scheme whether such exemption is granted to the establishment wherein such person or class of persons is employed or to the person or class of persons as such, the employer in relation to such establishment – (a) shall, in relation to the benefits in the nature of life insurance, to which any such person or class of persons is entitled, or any insurance fund, maintain such accounts, submit such returns, make such investments, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct; (b) shall not, at any time after the exemption without the leave of the Central Government, reduce the total quantum of benefits in the nature of life insurance to which any such person or class of persons was entitled immediately before the date of the exemption.

(4) Any exemption granted under this section may be cancelled by the authority which granted it, by order in writing, if an employer fails to comply, - (a) in the case of an exemption granted under sub-section 1, with any of the conditions imposed under that sub-section or sub-section 1A or with any of the provisions of sub-section 3; (aa) in the case of an exemption granted under sub-section 1C, with any of the conditions imposed under that sub-section; and (b) in the case of an exemption granted under sub-section 2, with any of the provisions of sub-section 3; (c) in the case of an exemption granted under sub-section 2A, with any of the conditions imposed under that sub-section or with any of the provisions of sub-section 3A; (d) in the case of an exemption granted under sub-section 2B, with any of the provisions of sub-section 3A.

(5) Where any exemption granted under sub-section 1, sub-section 1C, sub-section 2, sub-section 2A or sub-section 2B is cancelled, the amount of accumulations to the credit of every employee to whom such exemption applied, in the provident fund, the Pension Fund or the Insurance Fund of the establishment in which he is employed together with any amount forfeited from the employer's share of contribution to the credit of the employee who leaves the employment before the completion of the full period of service shall be transferred within such time and in such manner as may be specified in the Scheme or the Pension Scheme or the Insurance Scheme to the credit of his account in the Fund or the Pension Fund or the Insurance Fund, as the case may be.

(6) Subject to the provisions of sub-section 1C, the employer of an exempted establishment or of an exempted employee of an establishment to which the provisions of the Pension Scheme apply, shall, notwithstanding any exemption granted under sub-section 1 or sub-section 2, pay to the Pension Fund such portion of the employer's contribution to its provident fund within such time and in such manner as may be specified in the Pension Scheme.

## **Authorities under the Act**

### **Section 5A**

1) The Central Government may, by notification in the Official Gazette, constitute, with effect from such date as may be specified therein, a Board of Trustees for the territories to which this Act extends (hereinafter in this Act referred to as the Central Board) consisting of the following persons as members, namely:—

- (a) a Chairman and a Vice-Chairman to be appointed by the Central Government;
- (b) not more than five persons appointed by the Central Government from amongst its officials;

- (c) not more than fifteen persons representing Governments of such states as the Central Government may specify in this behalf, appointed by the Central Government;
- (d) ten persons representing employers of the establishments to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employers as may be recognised by the Central Government in this behalf; and
- (e) ten persons representing employees in the establishments to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employees as may be recognised by the Central Government in this behalf.

#### **Section 5AA**

This section provides that Central Government may constitute an Executive Committee to assist the Central Board in the performance of its functions. The Committee shall consist a Chairman appointed by the Central Government from amongst the members of the Central Board; 2 persons appointed by the Central Government from amongst the persons referred to in clause (b) of sub-section (1) of section 5A; 3 persons appointed by the Central Government from amongst the persons referred to in clause (c) of sub-section (1) of section 5A; 3 persons representing the employers elected by the Central Board from amongst the persons referred to in clause (d) of sub-section (1) of section 5A; 3 persons representing the employees elected by the Central Board from amongst the persons referred to in clause (e) of sub-section (1) of section 5A; and the Central Provident Fund Commissioner, ex officio.

#### **Section 5B - State Board**

This section provides that Central Government may, after consultation with the Government of any State constitute for that State a State Board to perform such duties as the Central Government may assign to it from time to time.

#### **Section 5C - Board of Trustees to be body corporate**

This section provides that every Board of Trustees constituted under section 5A or section 5B shall be a body corporate.

#### **Section 5D - Appointment of Officers**

This section provides that Central Government shall appoint a Central Provident Fund Commissioner who shall be the Chief Executive Officer of the Central Board and shall be subject to the general control and superintendence of that Board. It may also appoint a Financial Adviser and Chief Accounts Officer to assist the Central Provident Fund Commissioner in the discharge of his duties and such other officers and employees as it may consider necessary for the efficient administration of the Scheme. It is further provided that a State Board may, with the approval of the State Government concerned, appoint such staff as it may consider necessary. The method of recruitment, salary and allowances, discipline and other conditions of service of officers and employees shall be such as prescribed by the Government.

#### **Section 6 - Contributions and matters which may be provided for in Schemes**

The contribution which shall be paid by the employer to the Fund shall be twelve percent. Of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees

whether employed by him directly or by or through a contractor, and the employee's contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten percent of his basic wages, dearness allowance and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.

**Explanation I** – For the purposes of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

**Explanation II.** – For the purposes of this section, “retaining allowance” means allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services

Encashment of leave does not fall under dearness allowance or retaining allowance or basic wages and is not to be considered in computing the amount to be deposited under the EPF Act. This aspect has been upheld by the court in **Hindustan Lever Employees Union v RPF 1995 (71) FLR 46 (Bom)**.

The employer shall pay the contribution payable to the EPF, Employees' Deposit Linked Insurance and Employees' Pension Fund in respect of the member of the Employees' Pension Fund employed by him directly by or through a contractor. It shall be the responsibility of the principal employer to pay the contributions payable to the EPF, EDLI and Employees' Pension Fund by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor.

## **Section 5 - Employees' Provident Funds Scheme**

(1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees' Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be established, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.

(1A) The Fund shall vest in, and be administered by, the Central Board constituted under section 5A.

(1B) Subject to the provisions of this Act, a Scheme framed under sub-section 1 may provide for all or any of the matters specified in Schedule II.

(2) A Scheme framed under sub-section 1 may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme.

## **Section 6A. Employees' Pension Scheme**

(1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees Pension Scheme for the purpose of providing for –

- (a) superannuation pension, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies; and
  - (b) Widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.
- (2) Notwithstanding anything contained in section 6, there shall be established , as soon as may be after framing of the Pension Scheme, a Pension Fund into which there shall be paid, from time to time, in respect of every employee who is a member of the Pension Scheme, -
- (a) such sums from the employer's contribution under section 6, not exceeding eight and one-third per cent of the basic wages, dearness allowance and retaining allowance, if any, of the concerned employees, as may be specified in the Pension Scheme;
  - (b) such sums as are payable by the employers of exempted establishments under sub-section (6) of section 17;
  - (c) the net assets of the Employees Family Pension as on the date of establishment of the Pension Fund;
  - (d) such sums as the central Government may, after due appropriation by Parliament by law in this behalf, specify.

(3) On the establishment of the Pension Fund, the Family Pension Scheme hereinafter referred to as the ceased scheme shall cease to operate and all assets of the ceased scheme shall vest in and shall stand transferred to, and all liabilities under the ceased scheme shall be enforceable against, the Pension Fund and the beneficiaries under the ceased scheme shall be entitled to draw the benefits, not less than the benefits, they were entitled to under the ceased scheme, from the Pension fund.

(4) Pension Fund shall vest in and be administered by the Central Board in such manner as may be specified in the Pension Scheme.

(5) Subject to the provisions of this Act, the Pension Scheme may provide for all or any of the matters specified in Schedule III.

(6) The Pension Scheme may provide that all or any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in that behalf in that scheme.

(7) A Pension Scheme, framed under sub-section 1 shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the scheme or both Houses agree that the scheme should not be made, the scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the scheme.

- Contribution is payable out of the employer's share of PF and no contribution is payable by the employee.
- Pension contribution not to be paid: When an employee crosses 58 years of age and is in service (EPS members cease on completion of 58 years). When an EPS pensioner is drawing Reduced Pension and rejoins as an employee. In both cases, the pension contribution of 8.33 % is to be added to the employer share of PF. Pension contribution is not to be diverted and the total employer's share goes to the PF.
- In case an employee who is not an existing EPF/EP member joins on or after 1/9/2014 with wages above Rs 15, 000 the pension contribution part will be added to the employee's share EPF
- In all other cases, Pension contribution is payable. A member joining after 50 years of age, if not a pensioner, does not have a choice of not getting the pension contribution on grounds that he will not complete 10 years of eligible service. The social security cover is applicable as long as he is a member.

### **Section 6C. Employees' Deposit Linked Insurance Scheme**

(1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees Deposit-linked Insurance Scheme for the purpose of providing life insurance benefits to the employees of any establishment or class of establishments to which this Act applies.

(2) There shall be established, as soon as may be after the framing of Insurance Scheme, a Deposit-linked Insurance Fund into which shall be paid by the employer from time to time in respect of every such employee in relation to whom he is the employer, such amount, not being more than one per cent of the aggregate of the basic wages, dearness allowance and retaining allowance if any for the time being payable in relation to such employee as the Central Government may, by notification in the Official Gazette, specify.

Explanation - For the purposes of this sub-section, the expressions "dearness allowance" and "retaining allowance" have the same meanings as in section 6.

(4) (a) The employer shall pay into the Insurance Fund such further sums of money, not exceeding one-fourth of the contribution which he is required to make under sub-section 2, as the Central Government may, from time to time, determine to meet all the expenses in connection with the administration of the Insurance Scheme other than the expenses towards the cost of any benefits provided by or under that Scheme.

(5) The Insurance Fund shall vest in the Central Board and be administered by it in such manner as may be specified in the Insurance Scheme.

(6) The insurance Scheme may provide for all or any of the matters specified in Schedule IV.

(7) The Insurance Scheme may provide that any of its provision shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in that Scheme.

### **Section - 7A.Determination of moneys due from employers. –**

The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order, (a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and (b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

The officer conducting the inquiry under sub-section 1 shall, for the purposes of such inquiry have the same powers as are vested in a court under the code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:-

- (a) enforcing the attendance of any person or examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) issuing commissions for the examination of witnesses, and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code 45 of 1960.

### **Section 7B - Review of orders passed under Section 7A.**

Any person aggrieved by an order made under sub-section 1 of section 7A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:

### **Section 8. Mode of recovery of moneys due from employers–**

Any amount due - (a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under section 14B, accumulations required to be transferred under sub-section 2 of section 15 or under sub-section 5 of section 17 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or (b) from the employer in relation to an exempted establishment in respect of any damages recoverable under section 14B or any charges payable by him the appropriate Government under any provision of this Act or under any of the conditions specified under section 17 or in respect of the contribution payable by him towards the Pension Scheme under the said section 17, may, if the amount is in arrear, be recovered in the manner specified in section 8B to 8G

### **Section 8B - Issue of certificate to the Recovery Officer.**

The PF Commissioner or any other officer as may be authorised by the Central Government by notification in the Official Gazette may issue to the Recovery Officer a certificate under his signature specifying the

amount of arrears and that Recovery officer shall proceed to recover that mount specified in the certificate from the establishment or employer by of the following modes:

- attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;
- arrest of the employer and his detention in prison;
- appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

### **Section 10 - Protection against attachment**

Amount standing to the credit of any member in Fund or of any exempted employee in a provident fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any court in respect of any debt or liability incurred by the member or the exempted employee, and neither the official assignee appointed under the Presidency Towns Insolvency Act, 1909 (3 of 1909) nor any receiver appointed under the Provincial Insolvency Act, 1920 (5 of 1920), shall be entitled to have any claim on, any such amount.

Any amount standing to the credit of a member in the fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the Scheme or the rules of the provident fund shall, subject to any deduction authorised by the said Scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of exempted employee and shall also not be liable to attachment under any decree or order of any court.

The provisions of sub-section 1 and sub-section 2 shall, so far as may be, apply in relation to the pension or any other amount, payable under the Pension Scheme and also in relation to any amount payable under the Insurance Scheme as they apply in relation to any amount payable out of the Fund.

### **Section 13 - Inspectors**

This section provides that appropriate Government may appoint such persons as thinks fit to be Inspectors for the purposes of this Act. It further provides that Inspector so appointed for the purpose of inquiring into the correctness of any information furnished in connection with this Act may:

- require an employer to furnish such information as he may consider necessary,
- at any reasonable time and with such assistance, if any, as he may think fit, enter and search any establishment or any premises connected therewith and require any one found in charge thereof to produce before him for examination any accounts, books, registers and other documents relating to the employment of persons or the payment of wages in the establishment;
- examine, with respect to any matter relevant to any of the purposes aforesaid, the employer or any contractor from whom any amount is recoverable under section 8A], his agent or servant or any other person found in charge of the establishment of any premises connected therewith or whom the Inspector has reasonable cause to believe to be or to have been, an employee in the establishment;

- make copies of, take extracts from, any book, register or other document maintained in relation to the establishment and, where he has reason to believe that any offence under this Act has been committed by an employee, seize with such assistance as he may think fit, such book, register or other document or portions thereof as he may consider relevant in respect of that offence;
- exercise such other powers as the Scheme or the Insurance Scheme may provide.

#### **Section 14 - Penalties**

This section provides that whoever, for the purpose of avoiding any payment to be made by himself under this Act knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term of up to 1 year, or with fine of five thousand rupees, or with both. It further provides that employer who contravenes, or makes default in complying with, the provisions of section 6 or clause (a) of sub-section (3) of section 17 in so far as it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term of 1 to 3 years and fine of ten thousand rupees in case of default in payment of the employees' contribution which has been deducted by the employer from the employees' wages; and imprisonment of 6 months to 3 years and a fine of five thousand rupees, in any other case.

However, the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term.

It is further provided that the Scheme may provide that any person who contravenes, or makes default in complying with, any of the provisions thereof shall be punishable with imprisonment for a term of up to 1 year, or with fine of up to four thousand rupees, or with both.

It also provides that if no other penalty is elsewhere provided by or under this Act for any contravention or non-compliance, punishment shall be imprisonment of 1 to 6 months, and fine of up to five thousand rupees.

### 3. THE PAYMENT OF BONUS ACT, 1965

The Payment of Bonus Act, 1965 has been enacted for the payment of bonus to persons employed in certain establishments on the basis of production or productivity and for matters connected therewith.

#### Scope and Objective

The primary objectives of the Act include,

- To impose statutory liability on the employer to pay bonus in case of profits or losses.
- To lay down the principle for payment of bonus according to the prescribed formula
- To prescribe Minimum & Maximum bonus
- Payment of bonus as per the scheme of set off and set on
- To provide redressal mechanism for enforcement of liability

#### Position prior to the passing of the Payment of Bonus Act, 1965 – Bonus Commission

Before 1965, till the enactment of the Payment of Bonus Act, 1965 demand for Bonus was not a statutory but judicial rights, as the term “Bonus” has not been defined in any legislative enactment. Pronouncements by committees, courts however to a great extent give an insight into the nature of Bonus.

The practice of paying Bonus as a periodical payment could be said to have begun during the First World War when the industries made huge profits due to war. This practice came to an end after the war when the boom came to an end due to which the workers resorted to strikes. To resolve these, the government appointed the Bonus Dispute Committee in 1924. This committee is an important step in development of the nature of Bonus since it firmly established the claim for Bonus not as a legal right but as an ex gratia payment to the workers.” Only when the profits are huge, can the employers share them out to the workers as Bonus. The committee thus, established a firm link between the presence of profits and the granting of Bonus, which could be said to be the origin of the Profit Theory.

Subsequently, steps were taken towards the recognition of bonus as a Right. Rule 81 of Defence of India Rules, 1941 made compulsory reference to adjudication of industrial disputes by ad hoc adjudicators. The industrial disputes also included the demand for bonus. The Bonus Disputes Committee declared payment of Bonus as Ex Gratia but nevertheless recognized the fact that the nature of bonus is a matter under the governance of industrial relations of the employer and employee.

In **Mill Owners Association, Bombay v. Their Employees [1950 (II) LLJ 1247]** the court observed that Bonus, though not a legal right, could be a subject matter of an industrial dispute. The profit Theory was reiterated in *General Motors (India) Ltd. v. Their Workmen* the Court laid down that since profits are made possible by the contribution of labour and capital, the labour has a share in the increased profits. This is achieved by giving bonus.

Even though, profit sharing continued in the form of periodic bonus no uniform basis of calculation of bonus especially on the basis of labour's share in profits was discernable in these awards. To remedy this, the Tribunal in **Mill Owner's Association, Bombay v. Rashtriya Mazdoor Mill Sangh [(1960) L.L.J. 1247]** laid down Full Bench Formula. The surplus available for distribution was determined after debiting certain prior charges from gross profits, which was given as Bonus. The Tribunal firmly laid down adherence to Profit Theory. Where the industry is earning profit and payment of living wage is desirable then bonus is a right and an industrial dispute could be raised. The court did not accept the contention that a claim to bonus is not admissible where wages have been standardized at a figure lower than the living wage.

The court emphasised that here bonus would represent more as a cash incentive for greater efficiency and production. An implication of this view was the emergence of the Gap Theory wherein Bonus is seen as a means to fill the gap between the living wages and the basic wage. This was mentioned in **Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union [(1955) I SCR 991]**.

While the formula was a guideline it was vague in regard to the share of the workmen in the available surplus, and the order of priorities as between the charges. Thus need was felt to examine the formula. The question relating to allocation of amount as a prior charge against profit which provided no upper limit for deduction relating to reserves for rehabilitation was raised before the Supreme Court in **Associated Cement Co. Ltd. v. Their Workmen [1960 AIR 777]**. The court was hesitant to interfere with the Full Bench Formula and suggested a High Powered Commission should consider the question.

Subsequently, the government of India appointed a Bonus Commission on December 16, 1961. Some of its recommendations were implemented in the Payment of Bonus Act, 1965. The committee in its report went in favour of the Profit Theory. It observed that it was difficult to define Bonus in rigid terms but it is possible to urge that once profits exceed a certain base, labour should legitimately seek a share in it. A mention was made of Gap Theory as the commission observed that sharing of prosperity augments the workers earnings and so helps to bridge the gap between actual and need based wage.

The Bonus Commission was appointed by the Government of India in 1961 consisting of the following representatives

- Two representatives of Employers
- Two representatives of Employees
- Two representatives of Consumers
- One Chairman with high judicial experience

### **Definitions and Applicability**

Section 2 (1) "accounting year" means-

- (i) in relation to a corporation, the year ending on the day on which the books and accounts of the corporation are to be closed and balanced;
- (ii) in relation to a company, the period in respect of which any profit and loss account of the company laid before it in annual general meeting is made up, whether that period is a year or not;

(iii) in any other case-

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

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

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

Section 2 (4) "allocable surplus" means-

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

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

**Allocable Surplus:** In the case of a company, allocable surplus means 67 % (percentage sixty seven) of the available surplus in an accounting year of the company which has not made the arrangements prescribed under the Income-Tax Act for declaration and payment within India of dividends payable out of its profits in accordance with the provisions of section 194 of that Bonus Act. The allocable surplus is to be distributed by way of bonus to the employees subject to the limit of 20 % (percentage twenty) of the total salary or wage of the employees.

Section 2 (6) - "available surplus" means the available surplus computed under section 5;

Available surplus in an accounting year is computed under section 5 of the Bonus Act, which provides that the available surplus in respect of an accounting year shall be the gross profit for the year minus deductions referred to in section 6 of the Bonus Act namely: depreciation, development rebate, investment allowance, any direct tax which the establishment is liable to pay etc

Section 5 of the Act says that the surplus available in an accounting year will be the gross profit after deduction of the sums as referred in section 6. it has been provided that the available surplus in a financial year commencing on any day in the year 1968 and in respect of every subsequent financial year will be the total of- (a) the gross profits for that accounting year after deducting the sums referred in section 6 and (b) an amount to the difference between (i) the direct tax, in respect of an amount equal to the gross profits of the employer for the immediately preceding financial year and (ii) the direct tax, in respect of an amount equal to the gross profits of the employer for such preceding accounting year after deducting the amount of bonus from it, which the employer has paid or is liable to pay to his employees as per the provisions of this act for that year.

Section 2 (12) "direct tax" means-

- (a) any tax chargeable under-
  - (i) the Income-tax Act;
  - (ii) the Super Profits Tax Act, 1963 (14 of 1963);
  - (iii) the Companies (Profits) Surtax Act, 1964 (7 of 1964);
  - (iv) the agricultural income-tax law; and
- (b) any other tax which, having regard to its nature or incidence, may be declared by the Central government, by notification in the Official Gazette, to be a direct tax for the purposes of this Act;

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

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

- (i) any other allowance which the employee is for the time being entitled to;
- (ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles;
- (iii) any travelling concession;
- (iv) any bonus (including incentive, production and attendance bonus);
- (v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force;
- (vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex gratia payment made to him;
- (vii) any commission payable to the employee.

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

### **Section 1 - Applicability**

The Bonus Act applies to every factory whereon ten or more workers are working or were working on any day of the preceding twelve months and the manufacturing process is being carried on with the aid of power (Section 1(3)(a)). Further, the Bonus Act also applies to every establishment in which 20 (twenty) or

more workers are employed on any day during an accounting year (Section 1(3)(b)). Additionally, an establishment or factory once covered under the Bonus Act shall continue to be governed by the said Act even if the number of employees fall below ten or 20 (twenty) as the case may be (Section 1(5)).

### **Applicability to Universities, Educational Institutions, Hospitals And Chambers Of Commerce**

Section 32 (V) (b) and (c) of the Bonus Act excludes universities, educational institutions, other institutions like hospitals, chambers of commerce, social welfare institutions from the preview of payment of bonus, provided the said institutes are established 'not for purposes of profit'. For non-applicability of the above provision, in excluding certain classes of establishments, no specific exemption is required. Enough, if it is shown to be charitable institution. The Supreme Court has clarified that the above exemption is allowed with a deliberate object, viz, not to subject such establishments to burden of bonus which are conducted without any profit motive and run for charitable purpose [**Sanghvi J.G.C v. Madras Chillies, Grains and Kirana Merchants Workers Union, AIR 1969 SC 530**]. In another judgment, the Karnataka High Court has held that as per section 32 of the Bonus Act, employees of institutions including hospital established not for purpose of profit would not come within the preview of the Bonus Act [**Dr. (Ms.) SitaBhateja Nursing Home (Trust), Bangalore v. Presiding Offices, Labour Court, Bangalore, 1999 II LLJ 1194**]. The Court observed that it is common knowledge that bonus is cash payment made in addition to wages as a stimulus to extra work and efficiency by the workmen. However to claim bonus, one has to satisfy the requirements of the Bonus Act, which has been enacted to provide the payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith. Before deciding exemption under the above mentioned section, it has to be seen whether the concerned institution was established for purpose of profit or for charitable purpose.

### **Section 8 – Eligibility for Bonus**

Section 8 of the Act says that every employee is entitled to be paid by his employer in an accounting year, bonus, provided that he has worked in the organization for not less than thirty working days in that year.

An employee under the Bonus Act means any person other than an apprentice, engaged by an establishment, drawing salary not exceeding Rs. 21,000 (twenty one thousand) per month subject to him / her working for at least 30 (thirty) days in an accounting year. However, for calculation purposes Rs.7,000 (seven thousand rupees) or the minimum wage for the scheduled employment, as fixed by the appropriate Government, whichever is higher will be taken even if an employee is drawing up to Rs 21,000 (twenty one thousand) per month. An employee getting wages / salary more than Rs 21,000 (twenty one thousand) per month is not eligible for bonus.

The following employees are eligible for bonus:

- regular / full time employees subject to the criteria mentioned above;
- seasonal employees who have worked for not less than 30 (thirty) working days;
- employees working on part time basis; and
- a probationer

- Employees engaged through a contractors are covered under the Contract Labour (Regulation & Abolition) Act, 1970 will not be entitled to bonus from the principal Employer [**Hindalco Industries Ltd. v. CJM Sonebhadra (1999) I CLR 693 (All HC)**]. Contract laborers are not 'employees' as defined under the Bonus Act and therefore there is no obligation on the part of the principal employer to pay bonus at par with regular employees.

### **Minimum and Maximum Bonus**

Section 10 of the Act says that conditional to the other provision of this Act, every employer will be bound to pay to every employee in respect of the accounting year commencing on any day of the year 2009 and in respect of every subsequent year, a minimum bonus which shall be 8.33% of the salary or wage earned by the employee during the accounting year or one hundred rupees whichever is higher, whether or not the employer has any allocable surplus for this purpose in the accounting year. Further it has been provided that where an employee has not completed 15 years of age at the beginning of the accounting year, a minimum bonus of 8.33% or Rs 60, whichever is higher is payable.

Section 11 of the Act provides that where in respect of any accounting year referred to in section 10, the surplus available for this purpose exceeds the amount of minimum bonus available to the employees under that section, the employer shall, in lieu of such minimum bonus, be bound to pay to every employee in respect of that accounting year bonus will be an amount in proportion to the salary or wage earned by the employee during the accounting year, subject to a maximum of twenty percent of such salary or wage. In computing the allocable surplus under this section, the amount set on or the amount set off under the provisions of section 15 will be taken into account in accordance with the provisions of that section.

An establishment shall be bound to pay the eligible employee in respect of the accounting year, a minimum bonus which shall be 8.33 % (eight decimal three three) of the salary or wages earned by the employee during the accounting year or Rs 100 (one hundred), whichever is higher, whether or not the establishment has any allocable surplus in the accounting year or not. Where an employee has not completed 15 (fifteen) years of age at the beginning of the accounting year Rs 60 (sixty) will be substituted for the above mentioned Rs 100 (hundred). Payment of minimum bonus cannot be avoided merely because there was loss in the concerned accounting year unless it is proved that the workmen had principally contributed to financial loss to the establishment in that accounting year. It is therefore clear that even if the organization suffers loss it is bound to pay minimum bonus.

### **Set off and Set on**

Section 15 provides for set-on and set-off of allocable surplus. Where for any accounting year the allocable surplus exceeds the amount of maximum bonus payable to employees in an establishment under section 11 of the Bonus Act, then the excess shall, subject to a limit of 20 % (percentage twenty) of the total salary or wage of the employees employed in the establishment in that accounting year, be carried forward in the succeeding accounting year, up to the fourth accounting year to be utilized for the purpose of payment of bonus in the manner illustrated in the Fourth Schedule of the Bonus Act. Where there is no allocable surplus and there is no amount or sufficient amount carried forward for the purpose of payment of the minimum bonus, then such minimum amount of the deficiency, as the case may be, shall be carried forward for being set off on the succeeding accounting year up to the fourth accounting year. The amount of set-on or set-off carried forward from earliest accounting year shall be taken into account.

As per the Bonus Act the words 'working days' in an accounting year includes days not worked because of leave, absenteeism due to disablement caused by accident arising out of and in the course of employment, maternity leave and days involved in lay-offs under an agreement or as permitted by standing orders under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946).

### **Disqualification to Bonus**

Section 9 of the Act states that notwithstanding anything contained in this Act, an employee will be disqualified from receiving bonus under this Act, if he is dismissed from service for, fraud or riotous or violent behaviour in the organization or in case he is found guilty of theft, misappropriation or sabotage of any property of the organization.

If an employee has been dismissed from service for fraud, riotous or violent behavior while on the premises of the establishment or / and theft, misappropriation or sabotage of any property of the establishment, the employer has the right to forfeit bonus of the concerned employee. It must be however kept in mind that, in the above mentioned circumstance the employer can forfeit bonus of the concerned employee only in the accounting year in which the misconduct took place, and not with respect to any year preceding or succeeding the accounting year in question [**Himalaya Drug Co. Makali v. II Additional Labour Court, Bangalore (1986) II L.L.J 45 (Karnataka High Court)**].

### **Section 19 - Time Limit For Payment of Bonus**

Bonus has to be paid within eight months of the end of an accounting year. The appropriate government may on an application made by the establishment extend the said period of eight months to such further period as it thinks fit. But the total period so extended shall not exceed two years. If there is a dispute regarding payment of bonus pending before an authority, the time limit for payment of bonus is within one month from the date on which the award becomes enforceable or settlement comes into operation.

### **Section 29 – Penal provisions**

If any person contravenes any of the provisions of the Bonus Act or any rule made there under; or to whom a direction is given or a requisition is made under this Act fails to comply with the direction or requisition, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs 1,000 (one thousand), or with both.

## 4. THE PAYMENT OF GRATUITY ACT, 1972

Gratuity is a social welfare measure rendering some economic by providing economic security to an employee on retirement or at the termination of his employment due to death or disablement. The Payment of Gratuity Act aims to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oil fields, plantations, Port, Railway Companies, shops or other establishments and for the matters connected therewith or incidental thereto.

### Objectives and Scope

The objects of the Payment of Gratuity Act, 1972 are mentioned below-

- (i) To provide for a Scheme for the payment of Gratuity to employees.
- (ii) To provide for matters connected with or incidental to the Scheme for payment of Gratuity.
- (iii) To define the procedure for computation of gratuity.
- (iv) To provide machinery to decide disputes relating to payment of gratuity.

### Applicability of the Act

The Payment of Gratuity Act 1972 applies to the whole of India and so far as it relates to ports and plantations it does not apply to the State of Jammu and Kashmir. It applies to:

- (a) every factory, mine, oilfield, plantation, port and railway company. S 1(3)(e)
- (b) Every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State, in which 10 or more persons are or were employed on any day in the preceding 12 months. S 1(3)(b)
- (c) Such other establishments or class of establishment, in which 10 or more employees are or were employed on any day in the preceding 12 months, as the Central Government may notify in this behalf. S 1(3)(c)

Section 1(3A) states any shop or establishment shall continue to be governed by the Act even if the no. of its employees comes below 10 persons at any time in the future

### Definitions

Section 2 (b) "completed year of service" means continuous service for one year;

Section 2(c) "continuous service" means continuous service as defined in section 2A;

Section 2 (e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;

**Section 2 (q) “retirement” means termination of the service of an employee otherwise than on superannuation;**

**Section 2 (r) “superannuation”, in relation to an employee, means the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employer shall vacate the employment;**

**Section 2 (s) “wages” means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employments and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.**

### **Section 2A – Continuous Service**

**The expression ‘continuous service’ for this Act, means:**

**Firstly, any worker is said to be in ‘continuous service’ for any period if he has worked without any interruption for that period of time. Such periods may however, include any hindrances caused due to causes like sickness, accident, leave, absence from duty without leave (which however, cannot be an absence in respect of which an order treating the absence as break in service has been passed according to the standing orders, rules or regulations which govern the employees of the organisation), lay-off, strike or a lock-out or stopping of work which is not the result of any act of the worker himself, whether such whether such interrupted or uninterrupted service was rendered before or after the commencement of this Act.**

**Secondly, in case the worker, who actually does not belong to a periodical organisation, but, does not work for a regular and continuous time period of one year or six months (continuous service as under clause (1)), then, he shall be understood to be in continuous service under the employer:**

- (a) for the said period of 1 year, if the worker continues to work under that employer, during that 1 year immediately before the date on which such calculation is made, for a time period which is not lesser than -**
  - (i) 190 days, in case of the workers who work below the ground in a mine or in any organisation working for less than 6 days in a week; and**
  - (ii) 240 days, in all other cases.**
- (b) for the already mentioned time period of 6 months, if the worker actually works under his organisation, during the 6 months immediately before the date when such calculation is to be done, for a time period which is not lesser than:**
  - (i) 95 days, if the worker works below the ground in a mine or in any organisation which works for less than 6 days per week, and**
  - (ii) 120 days, in all other cases.**

**The explanation says, that, in regard to clause (2), the number of working days for a worker means the days on which he actually does his job under his employer and which includes the days, when:**

- (i) he has not been made to work as by an agreement in this regard or through any regulations for such purpose as made under the Industrial Employment (Standing Orders) Act of 1946 or under the Industrial Disputes Act of 1947 or under any other laws that apply his/her organisation.
- (ii) he was on a paid leave which he earned in the last year;
- (iii) he did not attend work due to some brief inability to work due to any accident that happened during his job or due to the reason of his job in that organisation.
- (iv) in the event of a female worker, if she was on maternity leave; however, this period can only extend to a maximum of 12 weeks and no more.

Thirdly, in case of any worker who works in an organisation which works only during certain periods of time, is not in continued service as under clause (1), for any time period of the 1 year or the 6 months, then, he will be understood to be in continued service only if he actually works for atleast 75% of the total number of days for which his organisation is functional.

Mere absence cannot be said to result in breach of continuity of service for the purpose of the Act [**Kothari Corporation v. Appellate Authority (Deputy Commissioner of Labour), Karnool 1998 LLR 223**]

While determining continuous service under section 2(A) weekly holidays and national holidays are to be included in view of the fact that cessation of work on these days is not due to fault of employee. [**Management of Sri Akilandeswari Mills Ltd v. Asst Commissioner of Labour [(2000) ILLJ 1411 Mad]**]

The Supreme Court in the case of **Workmen of American Express International Banking Corporation v. American Express International Banking Corporation**[AIR 1986 SC 458] held that while calculating 240 days for the purpose of continuous service under **Section 25-B** of the Industrial Disputes Act, 1947, Sundays and other paid holidays should be taken into account in counting the number of days on which the workman is said to have actually worked and the following observation of the Apex Court is relevant for the purpose of this case.

The Supreme Court in the case of **Digvijay Woollen Mills Ltd. v. MahendraPratapraiBuch** [1980 (2) LLN 417] has held that the wages for 26 days are to be treated as monthly wages and not of thirty days and submitted that since for calculating monthly wages, the wages taken is for 26 working days, under the same principle, the weekly holidays and national and festival holidays should be excluded in the computation of continuous service for the purpose of gratuity under the provisions of the Gratuity Act.

#### **Section 4 - Eligibility for payment of Gratuity**

Section 4 of Payment of Gratuity Act, 1972 provides that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years. It is generally payable on superannuation or on retirement or death or disablement of employee due to accident or disease. The condition of completion of service of five years shall not be necessary where the termination of employment is due to death or disablement due to accident or disease of the employee. It is considered disablement if it has incapacitated the employee from the work which he was capable of performing before the accident or disease causing such disablement.

**Section 4 is explained below:**

**(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,- (a) on his superannuation, or (b) on his retirement or resignation, (c) on his death or disablement due to accident or disease: Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement: Provided further that in case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is minor, the share of such minor, shall be deposited with the Controlling Authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.**

**Explanation - For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.**

**(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned: Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account: Provided further that in the case of an employee who is employed in a seasonal establishment, and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season. Explanation: In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.**

**(3) The amount of gratuity payable to an employee shall not exceed ten lakh rupees.**

**(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.**

**(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.**

**(6) Notwithstanding anything contained in sub-section (i),- (a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. (b) the gratuity payable to an employee may be wholly or partially forfeited]. (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.**

#### 4A. Compulsory Insurance

(1) With effect from such date as may be notified by the appropriate Government in this behalf, every employer, other than an employer or an establishment belonging to, or under the control of, the Central Government or a State Government, shall, subject to the provisions of sub-section (2), obtain an insurance in the manner prescribed, for his liability for payment towards the gratuity under this Act, from the Life Insurance Corporation of India established under the Life Insurance Corporation of India Act, 1956 (31 of 1956) or any other prescribed insurer: Provided that different dates may be appointed for different establishments or class of establishments or for different areas.

(2) The appropriate Government may, subject to such conditions as may be prescribed, exempt every employer who had already established an approved gratuity fund in respect of his employees and who desires to continue such arrangement, and every employer employing five hundred or more persons who establishes an approved gratuity fund in the manner prescribed from the provisions of sub-section (1).

(3) For the purpose of effectively implementing the provisions of this section, every employer shall within such time as may be prescribed get his establishment registered with the controlling authority in the prescribed manner and no employer shall be registered under the provisions of this section unless he has taken an insurance referred to in sub-section (1) or has established an approved gratuity fund referred to in sub-section (2).

(4) The appropriate Government may, by notification, make rules to give effect to the provisions of this section and such rules may provide for the composition of the Board of Trustees of the approved gratuity fund and for the recovery by the controlling authority of the amount of the gratuity payable to an employee from the Life Insurance Corporation of India or any other insurer with whom an insurance has been taken under sub-section (1), or as the case may be, the Board of Trustees of the approved gratuity fund.

(5) Where an employer fails to make any payment by way of premium to the insurance referred to in sub-section (1) or by way of contribution to an approved gratuity fund referred to in sub-section (2) he shall be liable to pay the amount of gratuity due under this Act (including interest, if any, for delayed payments) forthwith to the controlling authority. (6) Whoever contravenes the provisions of sub-section (5) shall be punishable with fine which may extend to ten thousand rupees and in the case of a continuing offence with a further fine which may extend to one thousand rupees for each day during which the offence continues. Explanation.-In this section "approved gratuity fund" shall have the same meaning as in clause (v) of Section 2 of the Income Tax Act, 1961 (43 of 1961).

The Madras High Court in Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd. [AIR 1984 SC 1064], observed that pension and gratuity coupled with contributory provident fund are well recognised retiral benefits governed by various statutes. These statutes are legislative responses to the developing notions of the fair and humane conditions of work, being the promise of Part IV of the Constitution. It was observed:

*"the fundamental principle underlying gratuity is that it is a retirement benefit for long service as a provision for old age. Demands of social security and social justice made it necessary to provide for payment of gratuity. On the enactment of Payment of Gratuity Act, 1972 a statutory liability was cast on the employer to pay gratuity."*

## **Section 7 – Determination of amount of Gratuity**

Section 7 discusses about the determination of the amount of gratuity to be paid. Any one who has to be paid such amount or who is given such right in writing, has to send a written application within a specified time and in the specific form for such payment.

An employer is to determine the amount of gratuity as soon as it becomes payable to an employee whether or not an application for payment of gratuity has been made by the employee under sub section (1) of section 7. The employer also has to send the notice of determination of the amount of gratuity to the employee concerned and to the controlling authority. Further employer shall make arrangements for paying the gratuity amount within a period of 30 days from the day it becomes payable.

If the gratuity amount to be paid as does not get paid within 30 days then, for every day that the gratuity lies pending to be paid to the worker, a simple interest at the rate of not more than the rate as notified by the Central Government of India at regular intervals for repaying the long-term deposits, as the Government specifically notifies, has to be paid. No such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has to obtain permission in writing from the controlling authority for the delayed payment on this ground.

In case of any dispute as to the amount of gratuity payable under this Act or as to the admissibility of any claim or as to the person entitled to receive such gratuity, the employer has to deposit the amount as he admits to be payable by him with the controlling authority (S. 7 (4)(a))

Section 7(4)(b) states that where there is a dispute with respect to any matter or matters specified in clause (a), the employer or employee or any other person related to the dispute may approach the Controlling Authority to decide the dispute

It is further necessary for the controlling authority to conduct the required inquiry and give parties the chance to present their cases. Only then the issue can be said to be decided by the relevant authority. It can also rule the payment of any required amount to the employee if he deserves it. This amount can also be subtracted from the already deposited amount of the employer. Such amounts can also be paid to the applicant in case he is not the direct employee, or a nominee or a guardian of the nominee, or to the employee's heir as considered apt by the deciding authority.

The Apex Court in the case of **D.V. Kapoor v. Union of India and others [AIR 1990 SC 190]** observed that there is no provision under the Payment of Gratuity Act which empowers the employer to withhold the gratuity as well,

## **Section 5 - Power to exempt**

Section 5 provides that the appropriate government by notification in the official gazette may exempt any establishment, factory, mine, oil field, plantation, port, railway company or shop to which this Act applies, if in its opinion, the employees are in receipt or gratuity or pensionary benefits not less favourable than that conferred under this Act.

## **Forfeiture of Gratuity – Section 4(6)**

Gratuity may be wholly or partially forfeited if

- (i) The services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or
- (ii) The services have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

An employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. Gratuity cannot be forfeited unless quantum of loss or damage has been ascertained. [Bharat Motors N.R.P.Ltd. V. Presiding Officer, Labour Court, (1998) 1 Lab Lj 907 (Mad)]

## **Powers of controlling authority (Section 7(5))**

The controlling authority shall have the powers in respect of the following matters, namely;

- enforcing the attendance of any person
- requiring the discovery and production of documents;
- receiving evidence on affidavits;
- issuing commissions for the examination of witnesses.

Appeal if any shall be made within 60 days from the date of the order. Appeal by employer will not be admitted unless the disputed amount is deposited appellate authority, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority. (Sections 7(7) and 7(8))

## **Section 9 – Penalties**

Failure to comply with the Payment of Gratuity Act 1972 entails certain penalties, which are the following:

- (i) Whoever, for the purpose of avoiding any payment to be made by himself under this Act or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.
- (ii) An employer who contravenes, or make default in complying with, any of the provisions of this Act or any rule or order made there under shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both

Provided that where the offence relates to non-payment of any gratuity payable under this Act, the employer shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years, unless the court trying the offence, for reasons to be recorded by it in writing, is of opinion that a lesser term of imprisonment or the imposition of a fine would meet the ends of justice.

# UNIT - V

## LABOUR WELFARE LEGISLATIONS

### THE FACTORIES ACT, 1948

#### **Introduction**

Factories Act is a beneficial piece of legislation existing since 1881 and is focussed on achieving the objective of protecting workers exposed in factories against industrial or occupational risks. It aims at regulating working hours, weekly off, provisions regarding women and children etc. It imposes upon the owners and occupiers obligations to protect the workers. It was amended in 1911, 1923, 1935, and 1987. But the most important amendments were made in 1948 and included safety of working place, health provisions, working hours, weekly off, paid leave etc.

Today however factory and industry are understood to be interchangeable. But this is incorrect. Industry is a steady and systematic activity in which trade is organized whereas factory refers to the place where such activities are carried on. The entire day to day activity taking place in the factory is governed by the Factory Act 1948.

#### **Object and Scope of the Factories Act**

The main objectives of the Indian Factories Act, 1948 are to regulate the working conditions in factories, to regulate health, safety welfare, and annual leave and enact special provision in respect of young persons, women and children who work in the factories.

#### **Applicability**

Section 1: Short title, extent and commencement. -(1) This Act may be called the Factories Act, 1948.(2) It extends to the whole of India (3) It shall come into force on the 1st day of April, 1949.

#### **Definitions – Section 2**

**Section 2(m) “factory”** means any premises including the precincts thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,- but does not include a mine subject to the operation of the Mines Act, 1952 (XXXV of 1952) or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place;

**Explanation I.**—For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account;

**Explanation II.**—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof ;

**Section 2(k) “manufacturing process”** means any process for-

- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adopting 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 book-binding; or
- (v) constructing, reconstructing,, repairing, refitting, finishing or breaking up ships or vessels; or
- (vi) preserving or storing any article in cold storage ;

**Section 2(n) “occupier”** of a factory means the person, who has ultimate control over the affairs of the factory,

Provided that-

- (i) in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;
- (ii) in the case of a company, any one of the directors, shall be deemed to be the occupier:
- (iii) in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier :

Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire,

(1) the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under-

- (a) section 6, section 7, section 7A, section 7B, section 11 or section 12;
- (b) section 17, in so far as it relates to the providing and maintenance of sufficient and suitable lighting in or around the dock;
- (e) section 18, section 19, section 42, section 46, section 47 or section 49, in relation to the workers employed on such repair or maintenance;

(2) the owner of the ship or his agent or master or other officer-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be the occupier for the purposes of any matter provided for by or under section 13, section 14, section 16 or section 17 (save as otherwise provided in this proviso) or Chapter IV (except section 27) or section 43, section 44 or section 45, Chapter VI, Chapter VII, Chapter VIII or Chapter IX or section 108, section 109 or section 110, in relation to-

- (a) the workers employed directly by him or by or through any agency; and
- (b) the machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person ;

**Section 2(cb) "hazardous process"** means any process or activity in relation to an industry specified in the 'First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes or effluents thereof would-

- (i) cause material impairment to the health of the persons engaged in or connected therewith, or
- (ii) result in the pollution of the general environment:

Provided that the State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry specified in the said Schedule;

**Section 2(l) "worker"** means a person employed directly or by or through any agency (including 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 used for a manufacturing process, or in any other kind of work incidental to, or connected with the manufacturing process, or the subject of the manufacturing process but does not include any member of the armed forces of the Union;

### **Health Measures in a Factory – Sections 11-20**

These are provisions for the health of the workers employed in factories, to ensure they are protected

#### **Section 11 - Cleanliness of the factory premises**

Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance. It is specifically provided that in a factory—

- accumulations of dirt and refuse shall be removed daily, by sweeping or any other method, from the floors and benches of work rooms and from stair cases and passages, and disposed off in a suitable manner;
- the floor of every room shall be cleaned. This shall be done at least once every week by washing, using disinfectant or by some other effective method;
- where a floor is liable to become wet in the course of any manufacturing process to such an extent as is capable of being drained, effective means of drainage shall be provided.

- all inside wall and partitions, all ceilings or tops of rooms and all walls, sides and tops of passages and staircases shall be painted or varnished, and repainted and revarnished at least once in a period of five years; where they are painted or varnished, be cleaned at least once in a period of 14 months by such methods as may be prescribed by the Government and where painting or varnishing is not required, be kept white washed or colour washed, and the white washing or colour washing shall be carried out at least once in every period of 14 months.

## **Section 12 - Disposal of Wastes and Effluents**

Effective arrangement shall be made for the disposal of wastes and effluents arising out of manufacturing process in the factories.

## **Section 13 - Ventilation and Temperature**

Section 13 provides for the maintenance of adequate ventilation and regulation of temperature in the factories. Effective and suitable provisions shall be made in every factory for securing and maintaining in every work room- adequate ventilation by the circulation of fresh air, and such a temperature as will secure to workers reasonable conditions of comfort, and prevent injury to health. The state government shall prescribe the standards of adequate ventilation and reasonable temperature for any factory or part thereof.

## **Section 14 -Dust and Fume**

In every factory, where due to manufacturing process, dust or fume or other impurity arise which is likely to be injurious to the health of workers employed, effective measures shall be taken to prevent its inhalation, and accumulation in any workroom. If it is necessary to install exhaust appliances, it would be installed near the point of origin of the dust, fumes, or other impurity. Measures shall be taken to enclose such points.

## **Section 15 - Artificial humidification**

(1) In respect of all factories in which the humidity of the air is artificially increased, the State Government may make rules,-

- (a) prescribing standards of humidification;
- (b) regulating the methods used for artificially increasing the humidity of the air;
- (c) directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded;
- (d) prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the workrooms.

(2) In any factory in which the humidity of the air is artificially increased, the water used for the purpose shall be taken from a public supply, or other source of drinking water, or shall be effectively purified before it is so used.

(3) If it appears to an Inspector that the water used in a factory for increasing humidity which is required to be effectively purified under sub-section (2) is not effectively purified he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before specified date.

## **Section 16 - Overcrowding**

No room in any factory shall be overcrowded to such an extent which becomes injurious to the health of the workers employed therein. There shall be in every work room of a factory in existence on the date of the commencement of this Act atleast 9.9 cubic meters and of a factory built after the commencement of this Act atleast 4.2 cubic meters of space for every worker employed therein.

The Chief Inspector of factories by order in writing shall fix the maximum member of workers to be employed in each room in the factory.

## **Section 17 - Lighting:**

The Factories Act provides for sufficient and suitable lighting, natural or artificial where workers are working or passing through. Provision of cleaning of inner and outer surface is provided for all glazed windows and skylights used for the lighting of the workrooms. In every factory, effective provision shall be made for the prevention of glare, either directly from a source of light or by reflection from a smooth or polished surface.

## **Section 18 - Drinking Water**

In every factory, effective arrangement shall be made at suitable places for sufficient supply of wholesome drinking water. Such places shall be legibly marked 'Drinking Water' in a language understood by a majority of the workers employed in the factory. In case of factories employing more than 250 workers, provisions shall be made for cooling drinking water during hot weather by effective means, and for its distribution.

## **Section 19 - Latrines and Urinals**

The Factories Act requires that provision should be made for sufficient and separate enclosed accommodation for male and female workers latrine and urinal accommodation conveniently situated and accessible to workers while they are in the factory;

Where the number of workers in a factory is more than 250

- latrines and urinals shall be of prescribed sanitary types;
- the floor and internal walls of the latrines and urinals shall be laid with glazed tiles;
- floors and walls and the sanitary pans of latrines and urinals shall be thoroughly washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.

## **Section 20 - Spittoons**

Spittoons Sufficient number of spittoons must be provided in every factory and maintained in clean and hygienic condition. No person shall spit within the premises of a factory except in the spittoons. A notice containing this provision and the penalty for its violation shall be prominently displayed at suitable places in the factory premises.

**Thornton v. Fisher and Ludlow Ltd. [(1968) Lab IC 1469]** raised an important issue regarding the adequacy of lighting arrangements. In this case, the management failed to provide suitable lighting arrangement. On certain date half an hour before sunrise, a cleaner employed by the management of a factory who was on her way to work in the factory, tripped over a coil of wire, one end of which had been forced into the tarmac, and suffered injuries, because of the obstruction of the pavement (which was the natural place for person to pass on foot and it was necessary for pedestrians coming along to do their work in the factory to walk down the roads). The court held that failure to turn on the lights that was the effective cause of the accident that occurred.

### **Safety measures (Sections 21 – 40)**

Safety measures result in improving the conditions under which workers are employed and work. It improves not only their physical efficiency, but also provides protection to their life and limb. Inadequate provision of safety measures in factories may lead to increase in the number of accidents. Human failure due to carelessness, ignorance, inadequate skill, and improper supervision have also contributed to accidents, and the consequent need for safety measures. Safety measures which are provided in the Factories Act, 1948, are considered to be minimum in terms of adequacy. Such measures are required to be effectively implemented

The Factories Act provides for the following safety measures:

#### **Section 21 Fencing of Machinery**

Section 21 provides for the fencing of machinery including the fencing of every moving part of a prime mover and every fly wheel connected to a prime mover and every part of transmission machinery.

#### **Section 22 - Work on or near Machinery in Motion**

Where in any factory, it becomes necessary to examine any part of machinery, while the machinery is in motion, such examination shall be carried out only by specially trained adult male workers. Such workers shall wear tight fitting clothing and their names shall be recorded in the register prescribed in this connection. The machinery in motion with which such workers would otherwise be liable to come in contact during the course of its examination, shall be securely fenced to prevent such contact. No woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or transmission machinery, while the machinery is in motion.

In **State of Gujarat v. Nair, S.P., [(1965) I LLJ 528]** the court explained that one of the necessary conditions in section 22 is that all the spur, worm or other toothed friction gearing in motion with which such worker is liable to come in contact shall be securely fenced to prevent such contact. In the absence of any evidence to show that this was an excluded occasion by reason of the worker permitted to do it in accordance with the provisions of section 22 (1) there was breach of section 21(1)(iv)(e) which was punishable under section 92 of the Factories Act, 1948.

#### **Section 23 - Employment of Young Persons on Dangerous Machines**

The Factories Act prohibits employment of young persons on certain types of machines as specified under Sec.23 of the Act. They can work only after they have been fully instructed as to the dangers arising in connection with the machines and the precautions to be observed. They should have received sufficient

training in work at such machines. They should be under adequate supervision by a person who has a thorough knowledge and experience of the machines.

#### **Section 24 - Striking Gear and Devices for cutting off Power**

In every factory suitable striking gear or other efficient mechanical appliances shall be provided and maintained, and used to move driving belts to and from fast and loose pulleys which form part of transmission machinery. Driving belts when not in use, shall not be allowed to rest or ride upon shaft in motion. In every factory, suitable devices for cutting off power in emergencies from running machinery shall be provided and maintained in every workroom.

In **JayathilalDhaniji& Co. Oil Mills v. Employees' State Insurance Corporation [(1966) 2 LLJ 542]**, the occupier failed to provide or maintain suitable striking gear or other effective mechanical appliance to move driving belts to and from fast and loose pulleys which formed part of the transmission machinery. He also failed to provide the equipment indicated in section 24. The court therefore held that the appellant was guilty of negligence under section 24.

#### **Section 25 - Self-acting Machine**

No traversing part of a self-acting machine in any factory, and no material carried thereon shall, if the space over which it runs, is a space cover which any person is liable to pass, whether in the course of his employment or otherwise, be allowed to run on its outward or inward traverse within a distance of forty-five centimetres from any fixed structure which is not a part of the machine. This is to safeguard the workers from being injured by self acting machines.

#### **Section 26 - Casing of New Machinery**

Every set screw, bolt or key on any revolving shaft, spindle, wheel, or pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger in all machinery driven by power and installed in the factory. The State government is authorised to make rules specifying further safeguards to be provided in respect of any dangerous part of any particular machine or class or description of machines in this connection.

#### **Section 27 - Prohibition of Employment of Women and Children near Cotton openers**

No women or child shall be employed in any part of a factory where pressing a cotton-opener is at work.

#### **Section 28 - Hoists and Lifts**

In every factory hoists and lifts shall be of good mechanical construction, sound material and of adequate strength and they should be properly maintained.

Where in the hoists and lifts used for carrying persons, the cage is supported by rope or chain, there shall be at least two ropes or chains separately connected with the cage and balance weight, and each rope or chain with its attachments shall be capable of carrying the whole weight of the cage together with its maximum load. Efficient devices shall be provided and maintained capable of supporting the cage together with its maximum load in the event of breakage of the rope, chain or attachments. An efficient automatic device shall be provided and maintained to prevent the cage from overrunning.

## **Section 29 - Lifting Machines, Chains, Ropes and Lifting Tackles**

'Lifting machine' means any crane, crab, winch, toggle, pulley block, gin wheel, transporter and runway. "Lifting tackle" means any chain sling, rope sling, hook, shackle, swivel, coupling, socket, clamp, tray or similar appliance, whether fixed or movable, used in connection with the raising or lowering of persons, or loads by use lifting machines. In every factory, following safety measures shall be adopted in respect of every lifting machine (other than a hoist and lift) and every chain, rope and lifting tackle for the purpose of raising or lowering persons, goods or materials

All parts including the working gear of every lifting machine and every chain, rope or lifting tackle shall be of good construction, sound material and adequate strength, and free from defect;

No lifting machine and no chain, rope, or lifting tackle shall be loaded beyond the safe working load which shall be plainly marked on it.

While any person is employed or working on or near the wheel track of a travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken to ensure that the crane does not approach within six metres of that place. A lifting machine or a chain, rope or lifting tackle shall be thoroughly examined in order to arrive at a reliable conclusion as to its safety.

## **Section 30 - Revolving Machinery**

Effective measures shall be taken in every factory to ensure that the safe working peripheral speed of every revolving vessel, cage, basket, flywheel, pulley disc or similar appliance driven by power is not exceeded. A notice indicating the maximum safe working peripheral speed of every revolving machinery shall be put up in every room in a factory in which the process of grinding is carried on.

## **Section 31 - Pressure Plant**

If in any factory, any part of the plant or machinery used in a manufacturing process is operated at a pressure above atmospheric pressure, effective measures shall be taken to ensure that the safe working pressure of such part is not exceeded.

## **Section 32 - Floors, Stairs, and Means of Access**

In every factory all floors, steps, stairs and passages shall be of sound construction and properly maintained, and where it is necessary to ensure safety, steps, stairs, and passages shall be provided with substantial hand rails and there shall, so far as is reasonably practicable, be provided, and maintained safe means of access to every place at which any person is at any time required to work.

## **Section 33 - Pits, Sumps, openings in floor etc**

Pits, Sumps, openings in floor which may be a source of danger, shall be either securely covered or securely fenced. Securely fencing a pit means covering or fencing it in such a way that it ceases to be a source of danger.

## **Section 34 - Excessive Weights**

No person shall be employed in any factory to lift, carry or move any load so heavy as to be likely to cause him an injury.

### **Section 35 - Protection of Eyes**

If the manufacturing process carried on in any factory is such that it involves risk of injury to the eyes from particles thrown off in the course of the process or risk to the eyes by reason of exposure to excessive lights, effective screens or suitable goggles shall be provided for the protection of persons employed on, or in the immediate nearness of, the process.

### **Section 36- Precautions against Dangerous Fumes and use of Portable Light**

No person shall enter any chamber, tank, vat, pit, pipe or other confined space in a factory in which dangerous fumes are likely to be present to such an extent as to cause risk of persons being overcome thereby;

No portable electric light of voltage exceeding twenty four volts shall be permitted in any factory for use inside any confined space. Where the fumes present are likely to be inflammable no lamp or light, other than of flame-proof nature, shall be allowed to be used.

No person in any factory shall be allowed to enter any confined space, until all practicable measures have been taken to reverse any fumes which may be present and to prevent any ingress of fumes.

Suitable breathing apparatus, reviving apparatus and belts and ropes shall be kept in every factory for instant use. All such apparatus shall be periodically examined and certified by a competent person to be fit for use.

No person shall be permitted to enter in any factory, any boiler, furnace, chamber, tank, pipe, or other confined space for the purpose of working or making any examination until it has been sufficiently cooled by ventilation or otherwise to be safe for persons to enter.

### **Section 37 - Explosive or Inflammable Dust, Gas etc**

If any manufacturing process in the factory produces dust, gas, fume, or vapour of such a nature as is likely to explode on ignition, measures shall be taken to prevent any such explosion by:

effective enclosure of the plant or machinery used in the process;

removal or prevention of the accumulation of such dust, gas, fume or vapour;

exclusion or effective enclosure of all possible source of ignition.

Measures shall also be adopted to restrict the spread and effects of the explosion by providing in the plant or machinery of chokes, baffles, vents, or other effective appliances.

### **Section 38 - Precautions in case of fire**

- Every factory shall be provided with such means of escape in case of fire as may be prescribed;
- In every factory, the doors affording exit from any room shall not be locked so that they cannot be easily and immediately opened from the inside while any person is within the room, and all such doors, unless they are of sliding type, shall be constructed to open outwards.

- Every door, window or other exit affording a means to escape in case of fire shall be distinctively marked in a language understood by the majority of the workers. Such marking should be in red letters of adequate size or by some other effective and clearly understood sign.
- An effective and clearly audible means of giving warning, in case of fire, to every person shall be provided in the factory.
- A free passage-way giving access to each means of escape in case of fire shall be maintained for the use of all workers in the factory.
- Effective measures shall be taken to ensure that in every factory all workers are familiar with the means of escape in case of fire and have been adequately trained in the routine to be followed in such a case.

### **Section 39 - Power to require specifications of defective parts or tests of stability**

If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing requiring him before a specified date-

- (a) to furnish such drawings, specifications and other particulars as may be necessary to determine whether such buildings, ways, machinery or plant can be used with safety, or
- (b) to carry out such tests in such manner as may be specified in the order, and to inform the Inspector of the results thereof.

### **Section 40 - Safety of Building and Machinery**

In case it appears that any building, machinery or plant in a factory is in such a condition that it is dangerous to human life or safety, the manager of the factory may be served an order specifying measures to be adopted as prescribed. Further, in case it appears that the use of any building, machinery or plant in a factory involves imminent danger to human life or safety, an order may be served prohibiting the use of such building or machinery, until it has been repaired or altered.

### **Section 40A - Maintenance of buildings**

If it appears to the Inspector that any building or part of a building in a factory is in such a state of disrepair as is likely to lead to conditions detrimental to the health and welfare of the workers, he may serve on the occupier or manager or both of the factory an order in writing specifying the measures which in his opinion should be taken and requiring the same to be carried out before such date as is specified in the order.

### **Section 40B - Safety Officers**

(1) In every factory-

- (i) wherein one thousand or more workers are ordinarily employed, or
- (ii) wherein, in the opinion of the State Government, any manufacturing process or operation is carried on, which process or operation involves any risk of bodily injury, poisoning or disease or any other hazard to health, to the person employed in the factory,

the occupier shall, if so required by the State Government by notification in Official Gazette, employ such number of Safety Officers as may be specified in that notification.

(2) The duties, qualifications and conditions of service of Safety Officers shall be such as may be prescribed by the State Government.

### **Section 41 - Power to make rules to supplement this Chapter**

The State Government may make rules requiring the provision in any factory or in any class or description of factories of such further devices and measures for securing safety of persons employed therein as it may deem necessary.

### **Welfare provisions in Factories (Sections 42 – 50)**

#### **Section 42 - Washing facilities:**

The Factories Act provides for

- adequate and suitable facilities for washing for the use of workers in the factories. The workers who live in crowded areas have inadequate facilities for washing at their homes, and bathing facilities add to their comfort, health and efficiency
- Separate and adequately screened washing facilities for the use of male and female workers.
- Such facilities being conveniently accessible, and being kept clean.

#### **Section 43- Facilities for storing and drying clothes**

A suitable place for keeping clothes not worn during working hours shall be provided in every factory. Facilities shall also be provided for the drying of wet clothes.

#### **Section 44 - Facilities for sitting**

For workers who are to work in a standing position, suitable arrangement for sitting shall be provided in the factories. This is to enable workers to take advantage of any opportunity for rest which may occur in the course of their work.

#### **Section 45 - First-aid appliances**

First-aid boxes or cupboards equipped with the required contents should be provided for workers in every factory. This should be readily accessible to them during all working hours. The number of such first aid boxes shall not be less than one for every 150 workers employed in the factory. Such first-aid box shall be kept in the charge of a responsible person who is trained in first-aid treatment and who shall be available during the working hours of the factory. In factories employing more than 500 workers, there shall be an ambulance room. It should contain the prescribed equipments, and be in the charge of such medical and nursing staff as may be prescribed.

## **Section 46 – Canteens**

In factories employing more than 250 workers, there shall be a canteen for the use of workers.

## **Section 47 - Shelters, restrooms and lunch rooms**

Adequate and suitable shelters, rest rooms, and lunch rooms with drinking water facility shall be made in factories employing 150 workers or more. Workers can eat meals brought by them in such rooms. Rest and lunch rooms shall be sufficiently lighted and ventilated. It shall be maintained in cool and clean conditions.

## **Section - 48 Crèches**

In every factory, where more than 50 women workers are employed, provision shall be made for suitable and adequate room for the use of children under the age of six years of such women. Such a room shall be adequately lighted and ventilated. It shall be maintained in clean and sanitary conditions under the charge of a woman trained in the care of children and infants.

## **Section 49 - Welfare Officer**

The factories Act also provides for employment of welfare officers with prescribed qualification to look into the implementation of various facilities provided for. Such a provision exist in every factory employing more than 500 workers.

## **Working Hours (Section 51 – 66)**

### **Section 51- Weekly Hours**

The Factories Act, 1948 prescribes that no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week.

### **Section 52 - Weekly holidays**

(1) No adult worker shall be required or allowed to work in a factory on first day of the week (hereinafter referred to as the said day), unless- (a) he has or will have a holiday for whole day on one of three days immediately before or after the said day, and (b) the manager of the factory has, before the said day or the substituted day under clause (a), whichever is earlier,- (i) delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted, and (ii) displayed a notice to that effect in the factory: Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day. (2) Notices given under sub-section (1) may be canceled by a notice delivered at the office of the Inspector and a notice displayed in the factory not later than the day before the said day or the holiday to be canceled, whichever is earlier. (3) Where, in accordance with the Provisions of sub-section (1), any worker works on the said day and has had a holiday on one of the three days immediately before it, that said day shall, for the purpose of calculating his weekly hours of work, be included in the preceding week.

### **Section 53 – Compensatory holidays**

The workman should have one holiday for a whole day in a week. Where he was asked to work on his scheduled weekly holiday, he should be given compensatory holiday within three days of his scheduled weekly holiday.

### **Section 54 – Daily Hours**

Section 54 stipulates that subject to the provision of Section 51 no adult worker shall be required or allowed to work in a factory for more than nine hours in any day. However, there is a provision to this section which states that subject to the prior approval of the Chief Inspector, the daily maximum hours specified in Section 54 may be exceeded in order to facilitate the change of shifts.

After obtaining approval from the Inspector of Factories, the workman shall be allowed to avail the compensatory holidays unavailed by him, within that month during which the compensatory holidays are due or within two months immediately following that month.

### **Section 55 – Interval for Rest**

The timings of work should be fixed in such a way that no worker should be required to work continuously for more than five hours; and he should be allowed to avail an interval for rest of at least half-an hour during his work in a day.

### **Section 56 – Spread over**

The period of work of a workman should be so arranged that inclusive of his interval for rest under Section 55 should not spread over more than ten and a half hours in any day. The Chief Inspector, may, however, increase the spread over upto twelve hours on specific grounds.

### **Section 57 – Night Shifts**

Where a worker in a factory works on a shift which extends beyond midnight, (a) for the purposes of sections 52 and 53, a holiday for a whole day shall mean in his case a period of twenty-four consecutive hours beginning when his shift ends; (b) the following day for him shall be deemed to be the period of twenty-four hours beginning when such shift ends, and the hours he has worked after midnight shall be counted in the previous day.

### **Section 58 - Prohibition of overlapping shifts**

Work shall not be carried on in any factory by means of a system of shifts so arranged that more than one relay of workers is engaged in work of the same kind at the same time.

### **Section 59 - Extra wages for overtime**

Where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

### **Section 60 - Restriction on double employment**

No adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed.

### **Section 61- Notice of periods of work for adults**

There shall be displayed and correctly maintained in every factory, a notice of periods of work for adults, showing clearly for every day the periods during which adult workers may be required to work.

### **Section 66 - Further restrictions on employment of women**

A woman should not be employed between 10 pm and 5am. The working timing for a woman should be from 6am to 7pm.

### **Employment of young persons (Section 67 – 77)**

- Section 67 prohibits the employment of children below the age of 14 years.
- Section 68 - A child who has completed his fourteenth year or an adolescent shall not be required or allowed to work in any factory unless (a) a certificate of fitness granted with reference to him under section 69 is in the custody of the manager of the factory, and (b) such child or adolescent carries while he is at work a token giving a reference to such certificate.
- Section 69 A- certificate of fitness certifying that a young person is fit to work at a factory should be given in accordance with this section. An adolescent who possesses a certificate of fitness should be considered as an adult.
- Section 71 - Children can be employed only for 4.5 hours in a day. A female child cannot be required to work between 8 am and 7 pm.
- Section 72 - Notice of period of work for children Every factory must display and correctly maintain a notice of periods work for children. Such notice should show clearly the periods during which children may be required or allowed to work. The periods shown in the notice shall be fixed beforehand as per section 61 regarding period of work for adults, but there shall be no contravention of the provisions of section 71.
- Section 73 - Register of child workers The manager of every factory in which children are employed shall maintain a register of child workers showing the child workers engaged at the factory
- Section 74 - Hours of work to correspond with notice under section 72 and register under section 73 No child shall be employed in any factory otherwise than in accordance with the notice of periods of work for children displayed in the factory and the entries made before hand against his name in the register of child workers of the factory.
- Section 75 – empowers the inspector of factories to require the medical examination of young persons.

- **Section 76 – The State Government may make rules –**
  - ❖ prescribing the forms of certificate of witness to be granted under section 69 and
  - ❖ to prescribe the physical standards to be attained by the children and adolescent working in factories
- **Section 77 - The provisions of this chapter shall be in addition to and not in derogation of, the provisions of the Employment of Children Act, 1938**

### **Annual Leave with Wages (Section 78 – 84)**

#### **Section 78 - Application of Chapter VIII**

- (1) The provisions of this Chapter shall not operate to prejudice of any right to which a worker may be entitled under any other law or under the terms of any award, agreement including settlement or contract of service: Provided that if such award, agreement (including settlement) or contract of service provides for a longer annual leave with wages than provided in this Chapter, the quantum of leave, which the worker shall be entitled to, shall be in accordance with such award, agreement or contract of service, but in relation to matters not provided for in such award, agreement or contract of service or matters which are provided for less favourable therein, the provisions of sections 79 to 82, so far as may be, shall apply.
- (2) The provisions of this Chapter shall not apply to workers in any factory of any railway administered by the Government, who are governed by leave rules approved by the Central Government

**Section 79:** Every worker who has worked for a period of 240 days or more in a factory during a calendar year shall be allowed during the subsequent calendar year, leave with wages for a number of days calculated at the rate of -

- (i) if an adult, one day for every twenty days of work performed by him during the previous calendar year;
- (ii) if a child, one day for every fifteen days of work performed by him during the previous calendar year.

For the purposes of this sub-section-

- (a) any days of lay-off, by agreement or contract or as permissible under the standing orders;
- (b) in the case of a female worker, maternity leave for any number of days not exceeding twelve weeks; and
- (c) the leave earned in the year prior to that in which the leave is enjoyed;

shall be deemed to be days on which the worker has worked in a factory for the purpose of computation of the period of 240 days or more, but he shall not earn leave for these days.

- If a worker is discharged or dismissed from service or quits his employment or is superannuated or dies while in service, during the course of the calendar year, he or his heir or nominee, as the case may be, shall be entitled to wages in lieu of the quantum of leave to which he was entitled immediately before his discharge, dismissal, quitting of employment, superannuation or death,

calculated at the rates specified in sub-section (1), even if he had not worked for the entire period specified in sub-section(1) or sub-section (2) making him eligible to avail of such leave

- For the leave allowed to him under the aforesaid section, a worker shall be entitled to wages at a rate equal to the daily average of his total full time earnings for the day on which he actually worked during the months immediately preceding his leave, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of advantage accruing through the concessional sale to the worker of food grains and other articles, provided that in the case of a worker who has not worked on any day during the calendar month immediately preceding his leave, he shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the last calendar month preceding his leave, in which he actually worked, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the workers of food grains and other articles.

In **H.R. Sugar Factory Ltd., Bareilly v. Their Workmen [(1953) 1 LLJ 314]**, certain workmen of the sugar factory enjoyed better terms regarding leave than provided under the Factories Act, 1948. The question arose whether the leave should be governed by the standing order or the Factories Act, 1948. The adjudicator held that the question of leave should be decided in accordance with the standing orders and not in accordance with the Factories Act, 1948. It further held that the workers are entitled to payment in lieu of periods of unavailed leave irrespective of whether they applied for such leave and were refused or not.

In **AmgaudSidramHakke v. Maharashtra Small Scale Industries Development Corporation Ltd.[1996 LLR 249]**, the Bombay High Court held that even if an employee has earned leave to his credit that leave is to be sanctioned at the discretion of the employer. If the employees choose to remain away from work, shoots innumerable telegrams to the employer for extension of leave on vague excuses and then finds himself in hot water, he does so at his peril.

### **Section 80 - Wages during leave periods**

(1) For the leave allowed to him under section 78 or section 79, as the case may be, a worker shall be entitled to wages at a rate equal to the daily average of his total full time earnings for the day on which he actually worked during the months immediately preceding his leave, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of advantage accruing through the concessional sale to the worker of foodgrains and other articles:

Provided that in the case of a worker who has not worked on any day during the calendar month immediately preceding his leave, he shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the last calendar month preceding his leave, in which he actually worked, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the workers of foodgrains and other articles.

(2) The cash equivalent of the advantage accruing through the concessional sale to the worker of food grains and other articles shall be computed as often as may be prescribed, on the basis of the maximum quantity of food grains and other articles admissible to a standard family.

**Explanation 1.** - “Standard family” means a family consisting of a worker, his or her spouse and two children below the age of fourteen years requiring in all three adult consumption units.

**Explanation 2.** - “Adult consumption unit” means the consumption unit of a male above the age of fourteen years; and the consumption unit of a female above the age of fourteen years, and that of a child below the age of fourteen years shall be calculated at the rates of 8 and 6 respectively of one adult consumption unit.

**(3) The State Government may make rules prescribing –**

- (a) the manner in which the cash equivalent of the advantage accruing through the concessional sale to a worker of food grains and other articles shall be computed; and**
- (b) the registers that shall be maintained in a factory for the purpose of securing compliance with the provisions of this section.**

**Section 81 - Payment in advance in certain cases**

A worker who has been allowed leave for not less than four days, in the case of an adult, and five days, in the case of a child, shall, before his leave begins, be paid the wages due for the periods of the leave allowed.

**Section 82 - Mode of recovery of unpaid wages**

Any sum required to be paid by an employer, under this Chapter but not paid by him, shall be recoverable as delayed wages under the provisions of the Payment of Wages Act, 1936 (IV of 1936).

**Section 83- Power to make rules**

The State Government may make rules directing managers of factories to keep registers containing such particulars as may be prescribed and requiring the registers to be made available for examination by Inspectors.

**Section 84- Power to exempt factories**

Where the State Government is satisfied that the leave rules applicable to workers in a factory provide benefits which in its opinion, are not less favourable than those for which this Chapter makes provisions, it may by written order, exempt the factory from all or any of the provisions of this Chapter subject to such conditions as may be specified in the order.

**Explanation.** - For the purposes of this section, in deciding whether the benefits which are provided for by any leave rules are less favourable than those for which this Chapter makes provision, or not, the totality of the benefits shall be taken into account.

## **Special Provisions**

Section 87 empowers the State Government to make rules in a factory or class or description of factories where manufacturing process or operation which is carried on, may-

- (i) expose any person employed in it to a serious risk or bodily injury, or
- (ii) cause poisoning, or
- (iii) expose disease.

The rules may

- (i) specify dangerous manufacturing process or operations,
- (ii) prohibit or restrict the employment of women, adolescents or children in such operation,
- (iii) provide for the periodical medical examination of persons employed, or seeking to be employed in the operation, and prohibit the employment of persons not certified fit for such employment and require the payment by the occupier of the factory of fees for such medical examination
- (iv) provide for the protection for all persons employed in the operation or in the vicinity of the places where it is carried on,
- (v) prohibit, restrict or control the use of any specified materials or processes in connection with the operation,
- (vi) require the provision of additional welfare amenities and sanitary facilities and the supply of protective equipment and clothing, and lay down the standards thereof, having regard to the dangerous nature of the manufacturing process or operation,
- (vii) provide for use of orders in writing by the Inspector or the Chief Inspector to both the manager or the occupier of the factory directing them to carry out such measures, and within such time, as may be specified in such order with a view to removing conditions dangerous to the health of the workers, or to suspend any process, where such process constitutes, in the opinion of the Inspector or the Chief Inspector, as the case may be, imminent danger of poisoning or toxicity.

### **Section 87A - deals with prohibition of employment on account of health hazard**

Where it appears to the Inspector that conditions in a factory or part thereof are such that they may cause serious hazard by way of injury or death, or to persons employed therein or, to the general public in the vicinity, the Inspector may, by order in writing to the occupier of the factory state the particulars in respect of which he considers the factory or part thereof to be the cause of such serious hazard, and prohibit such occupier from employing any number of persons necessary to attend to the minimum tasks till the hazard is removed.

Where in case of accident or dangerous occurrences, notice to be given to the prescribed authorities. (Sections 88 and 88A)

Where a worker contracts any occupational disease medical officer should examine the worker and thereafter notice should be sent to the prescribed authorities (Section 89).

## **2. THE TAMIL NADU SHOPS AND ESTABLISHMENTS ACT, 1947**

### **Introduction**

There is no enactment in this Province regulating the conditions of work of employees in shops, commercial undertaking, restaurants, etc. The Weekly Holidays Act, 1942 is limited in scope in that it provides only for the grant of holidays and does not contain provisions for various other matters affecting them, such as hours of work, payment of wages, health and safety. It is considered that there should be a comprehensive measure in this Province to regulate these matters on the lines of similar enactments in force in other Provinces.

The Tamil Nadu Shops and Establishments Act was enacted with a view to provide for the regulation of conditions of work in shops, commercial establishments, restaurants, theatres and other establishments, and for certain other purposes.

### **Applicability**

The Tamil Nadu Shop and Establishment Act is a state legislation governing the proper functioning and conduct of businesses, within the state of Tamil Nadu. The Act applies to persons employed in shops, commercial firms, restaurants, theatres, etc. The Act defined 'shop' and 'commercial establishment'.

The following persons or types of establishments will not come under the purview of the Tamil Nadu Shop and Establishment Act:

- Persons employed in any establishment in a position of management
- Persons whose work involves travelling and persons employed as canvassers and care takers.
- Establishments under the Central and State Government, Local Authorities, the Reserve Bank of India, and Cantonment Authorities, establishments in mines and oil fields
- Establishments in bazaars in places where fairs or festivals are held temporarily for a period not exceeding fifteen days at a time
- Establishments which, not being factories within the meaning of the Factories Act, 1948 are in respect of matters dealt within this Act, governed by a separate law for the time being in force in the state.

Further, the regulations relating to opening and closing hours of shops, and grant of holidays will not apply to hospitals, institutions for the treatment or care of the sick, chemists or druggists shops as specified by time to time by the State Government.

### **Objectives**

The objectives of the Act include

- Regulation of the employment of workers in shops and commercial establishments.
- enable the Government to fix the opening and closing hours of shops, commercial firms, restaurants, etc.

- Sale of goods other than newspapers in or adjacent to a street or public places after the closing hour fixed for shops in that locality has been prohibited.
- Provision has also been made as in the Weekly Holidays Act, 1942, for granting to the persons employed a compulsory holiday for one day in a week and if required by Government, half-holiday also in a week.
- Prohibits the employment of children i.e., persons who have not completed 14 years, in shops, commercial firms, restaurant, etc. The employment of young persons who have completed 14 but not completed 17 and of women before 6.00 A.M and after 7.00 P.M has also been prohibited.
- Provision for the grant of annual holidays with pay to them.

### **Definitions**

Section 2 (3) "commercial establishment" means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, broker's office or exchange and includes such other establishment as the State Government may by notification<sup>1</sup> declare to be a commercial establishment for the purposes of this Act;

Section 2 (6) "establishment" means a shop, commercial establishment, restaurant, eating-house, residential hotel, theatre or any place of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be an establishment for the purposes of this Act;

Section 2 (12) "person employed" means—

- (i) in the case of a shop, a person wholly or principally employed therein in connexion with the business of the shop;
- (ii) in the case of a factory or an industrial undertaking, a member of the clerical staff employed in such a factory or undertaking ;
- (iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking, a person wholly or principally employed in connection with the business of the establishment, and includes a peon;
- (iv) in the case of a restaurant or eating-house, a person wholly or principally employed in the preparation or the serving of food or drink or in attendance on customers or in cleaning utensils used in the premises or as a clerk or cashier;
- (v) in the case of a theatre, a person employed as an operator, clerk, door-keeper, usher or in such capacity as may be specified by the State Government by general or special order;
- (vi) in the case of an establishment not falling under paragraphs (i) to (v) above, a person wholly or principally employed in connection with the business of the establishment, and includes a peon;
- (vii) in the case of all establishments, a person wholly or principally employed in cleaning any part of the premises;

but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer who lives with and is dependent on such employer;

Section 2 (16) "shop" means any premises where any trade or business is carried on or where services are rendered to customers and includes offices, store-rooms, godowns and warehouses, whether in the same premises or otherwise, used in connection with such business but does not include a restaurant, eating-house or commercial establishment;

### **Opening and Closing hours**

As per Section 7 (Opening and closing hours of Shops) of the Tamil Nadu Shop and Establishment Act, no person employed in any shop or commercial establishment shall be required to work for more than eight hours in any day and forty eight hours in any week without overtime wages. Further, every person employed in any shop or commercial establishment should be allowed in each week a holiday of one whole day.

In case of establishments other than shops, Section 13 states that no establishment shall be opened earlier or closed later than such hour as may be fixed by the Government, by general or special order in that behalf: Provided that in the case of a restaurant or eating house, any customer who was being served or was waiting to be served therein at the hour fixed for the closing may be served during the quarter of an hour immediately following such hour.

### **Daily and weekly hours of work in shops-**

Section 9 on the Daily and weekly hours of work in shops states that no person employed in any shop shall be required or allowed to work therein for more than eight hours in any day and forty eight hours in any week and in case of excess hours of work, the same shall be subject to payment of overtime wages, if the period of work including overtime work, does not exceed ten hours in any day and in the aggregate fifty-four hours in any week.

Similarly for establishments other than shops, section 14 states that no person employed in any establishment shall be required or allowed to work for more than eight hours in any day and forty- eight hours in any week: Provided that any such person may be allowed to work in such establishment for any period in excess of the limit fixed under this sub- section subject to payment of overtime wages, if the period of work, including overtime work, does not exceed ten hours in any day and in the aggregate fifty- four hours in any week.

Also, no person employed in any shop shall be required or allowed to work therein for more than four hours in any day unless he has had an interval for rest of at least one hour.

### **Section 11. Closing of shops and grant of holidays**

Section 11 states that every shop shall remain entirely close on one day of the week which day shall be specified by the shopkeeper in a notice permanently exhibited in a conspicuous place in the shop; and the day so specified shall not be altered by the shopkeeper more often than once in three months. Also, every person employed in a shop shall be allowed in each week a holiday of one whole day;

A proviso has been added to the section which states that nothing in this sub section shall apply to any person whose total period of employment in the week, including any days spent on authorized leave, is less than six days, or entitle a person who has been allowed a whole holiday on the day on which the shop has remained closed.

The weekly day on which a shop is closed in pursuance shall be specified by the shop keeper in a notice permanently exhibited in a conspicuous place in the shop, and shall not be altered by the shopkeeper more often than once in three months. Also, no deduction shall be made from the wage of any person employed in a shop on account of any day or part of a day on which it has remained closed or a holiday has been allowed in accordance with this section ; and if such person is employed on the basis that he would not ordinarily receive wages for such day or part of a day, he shall nonetheless be paid for such day or part of a day the wages he would have drawn, had the shop not remained closed, or had the holiday not been allowed, on that day or part of a day.

#### **Section 16 - Holidays:**

Every person employed in an establishment shall be allowed in each week a holiday of one whole day: Provided that nothing in this sub- section shall apply to any person whose total period of employment in the week, including any days spent on authorized leave, is less than six days.

#### **Employment of Children and Young Persons**

Section 17 stipulates that Children shall not to work in establishments while section 18 states young persons to work only between 6 a.m. and 7 p.m. and section 19 lays down the Daily and weekly hours of work for young persons in any establishment which shall not be for more than seven hours in any day and forty- two hours in any week nor shall such person be allowed to work overtime.

As per the Tamil Nadu Shops and Establishments Act, no child shall be required or allowed to work in any establishment. A 'child ' means a person who has not completed fourteen years of age.

Further, no young person shall be required to work in any establishment before 6a.m. and after 7 p.m. Further, a young person can only work for seven hours in any day and forty- two hours in any week. 'Young person' means a person who is not a child and has not completed seventeen years.

#### **Section 20 – 23 Health and Safety**

As per the Tamil Nadu Shops and Establishments Act, the following aspects relating to health and safety must be maintained at all shops and commercial establishments:

- **Cleanliness:** The premises of every establishment must be kept clean and free from effluvia arising from any drain or privy or other nuisance and should be cleaned at regular intervals.
- **Ventilation:** The premises of every establishment must be well ventilated.
- **Lighting:** The premises of every establishment must be sufficiently lighted during all working hours.
- **Precautions against fire:** In every establishment, precautions must be taken against fire.

#### **Section 25 – Holidays and Sick leave**

- Person employed in any shop or establishment shall be entitled, after twelve months of continuous service with the establishment, to holidays with wages for a period of 12 days in the subsequent period of twelve months, provided that such holidays with wages may be accumulated up to a maximum of twenty- four days.

- to leave with wages for a period not exceeding twelve days, on the ground of any sickness incurred or accident sustained by him and
- to casual leave with wages for a period not exceeding twelve days on any reasonable ground.

A person employed shall be deemed to have completed a period of twelve months continuous service within the meaning of this section, notwithstanding any interruption in service during those twelve months brought about (i) by sickness, accident, or authorized leave not exceeding 90 days in the aggregate of all three. (ii) by a lockout (iii) by a strike which is not an illegal strike (iv) by intermittent periods of involuntary unemployment not exceeding thirty days in the aggregate and authorized leave shall be deemed not to include any weekly holiday or half- day holiday under this Act which occurs at the beginning or end of an interruption brought about by the leave.

### **Section 26 - Pay during annual holidays:**

Every person employed shall, for the holidays or the period of leave allowed under section 25, be paid at a rate equivalent to the daily average of his wages for the days on which he actually worked during the preceding three months exclusive of any earnings in respect of overtime.

### **Payment of Wages**

Employers are responsible for the payment of wages to persons employed. All employers are required to fix a period in respect of which wages shall be payable and wage periods shall not exceed one month. The wages and deductions to be made are dealt under chapter VII with a view to ensure prompt payment of wages and the prohibition of unauthorised deductions from wages.

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6. K. D. Srivastava: Factories Act, 1948

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# Model Question Paper with Answer Key

## Part A (2x12 = 24)

Answer any **TWO** of the following

Q1. "There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or left his employer's premises." Explain the statement with the help of decided case laws

A1. Notional Extension theory – Employees' Compensation Act – with cases

Q2. Examine the various benefits provided under the Employees' State Insurance Act and discuss the conditions under which the insured employee is entitled to claim those benefits

A2. Medical benefit, Sickness benefit, Maternity benefit, Disablement benefit, dependent's benefit, funeral expenses etc with conditions –with relevant Sections and Rules.

Q3. Examine the responsibility of the authorities to enforce the regulatory provisions of Factories Act

A3. Chapter III of the Factories Act, 1948 and relevant sections from Chapter IV, V, VI, VII, VIII, IX and X.

## Part B ( 2x7 = 14)

Answer any **TWO** of the following

Q4. Examine the scope of Section 12 of the Maternity Benefit Act whereby the employer is prohibited from dismissing a woman worker

A4. Provision and cases

Q5. Examine the concept of maximum and minimum bonus under the Bonus Act

A5. Definitions, Operative Sections (Sections 10 and 11 of the Payment of Bonus Act) and cases

Q6. "The object of the social security system is to make provisions for economic security." Discuss

A6. Meaning, need, objective and scope of social security legislations

## Part C (5x4 = 20)

Answer any **FIVE** of the following

Q7

a. Continuous service

Refer to Section 2A of the Payment of Gratuity Act with case laws

b. Employee under the Employees' Compensation Act

Section 2(1) (dd) – relevant case laws

**c. Employment injury**

ESI Act- Section 2(8) - relevant case laws

**d. Factory**

Section 2(m) of the Factories Act - relevant case laws

**e. Bonus linked with production or productivity**

Section 31 A of the Payment of Bonus Act, 1965

**f. Procedure for nomination under the Payment of Gratuity Act**

Section 6

**g. Hazardous process**

Section 2(cb) of the Factories Act, 1948

**Part D (2x6 = 12)**

Answer any **TWO** of the following

**Q8.** 'X' a worker of a steel factory, while working, lost his right eye due to an injury caused by a spark running into his eyes. A notice in English directing all the workers to use goggles while at work was put up on the notice board. X filed a claim for compensation but the employer refused to pay on the ground that X was negligent as he disobeyed the instructions for not using the goggles. Decide

**Q9.** Arusuvai is a company which undertakes to grind masala for Pechi Trading Company. The Regional Provident Fund Commissioner clubbed Arusuvai Company with the Pechi Trading Company for coverage under the Provident Fund Act. But the Arusuvai Company challenged on the ground that it does such work as an independent contractor. Decide

**Q10.** In a premise, about 25 workers were engaged in the work of garbling pepper by winnowing, cleaning, washing it on a concrete floor and a similar process of curing ginger dipped in lime and laid out to dry in the premises. The Inspector of Factories directed the owner to comply with the provisions of the Factories Act. But the occupier contended that it was not a factory as there is no manufacturing process. Decide.

**For Questions 8, 9 and 10: Steps to be followed**

1. **Facts of the Case:** Briefly summarise the key facts as per the question
2. **Issue:** Enumerate the legal issue(s) involved
3. **Discussion:** Explain the legal provisions and relevant case laws related to the problem
4. **Decision**