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LABOUR LAW—II
(SOCIAL SECURITY AND WELFARE LEGISLATIONS)

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I INTRODUCTION

MAJORITY OF the decisions rendered by the higher judiciary in the area of social security during the year under survey has reiterated the already settled legal propositions. However, the important decisions which, according to the present reviewer, have furthered or helped in the advancement of the law has been discussed under appropriate subject headings. The topics covered include child labour, contract labour, employees' state insurance, gratuity, minimum wages, maternity benefit, pension scheme, persons with disabilities, provident fund and workmen's compensation.

II CHILD LABOUR

Dispute as regards age of child labour — procedure to be adopted

In *Anant Construction Co.* v. *Govt. Labour Officer & Inspector*[1] the two legal issues that came up for the consideration of the Supreme Court were whether the inspector appointed under the Child Labour (Prohibition and Regulation) Act, 1986 had the power to pass an order holding that the labour employed by the appellant were below the age of 14 as prescribed under the Act and whether he was competent to direct the appellant to pay compensation. The appellant was engaged in construction business. On an inspection visit to the construction site the respondent spotted three child labour being employed and issued notice to the appellant. Although the appellant produced two birth certificates, one issued by the *sarpanch* of the village *panchayat* and the other, by the medical officer, PHC Parel, certifying that the child labour were above 14 years of age, the inspector, not being convinced of the age as certified, directed the appellant to deposit Rs. 20,000 per child with the Child Labour Rehabilitation and Welfare Fund in keeping with the decision in *M.C. Mehta* v. *State of Tamil Nadu.*[2]

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1 (2006) 9 SCC 225.

2 (1996) 6 SCC 756.

In a writ petition before the high court the petitioner submitted that the inspector had no power/legal authority to decide the dispute regarding age of the child labour himself as he was bound to refer it for decision to the prescribed medical authority under section 10 of the Act. The court, however, did not agree with the contention of the appellant and dismissed the writ petition holding that the certificates produced by the appellant were unreliable. It did not interfere with the penalty ordered by the inspector.

The Supreme Court on an analysis of sections 10 and 16 of the Act, which speak about dispute as to age and procedure to be followed relating to offences, respectively, allowed the appeal. The court held that when the appellant employer produced certificates of age, the inspector was bound to refer the matter under section 10 of the Act to the prescribed medical authority. He was neither competent to decide the issue nor was he entitled to hold that in the absence of certificate of age, his own survey report would stand.

The court further held that the jurisdiction of inspector under section 16(2) to file a complaint did not extend to trying of the said complaint himself, which only courts, not inferior to the metropolitan magistrate or a magistrate of the first class, are competent to try. Moreover, he had no jurisdiction to impose fine, which was contrary to section 16(3) of the Act.

The court had no hesitation in setting aside the impugned order of the inspector being without jurisdiction and also the order of the high court upholding the order of the inspector. It is submitted that the court has rightly delineated on the powers of the inspector and the limitations thereon under the Act.

III CONTRACT LABOUR

Entitlement to absorption

It may be recalled that in *Air India Statutory Corpn.* v. *United Labour Union*[3] the apex court had held that though there is no express provision in the Contract Labour (Regulation and Abolition) Act, 1970 for absorption of contract labour, when engagement of contract labour stood prohibited on issuance of a notification under section 10(1) of the Act, a direct relationship was established between the contract labour and the erstwhile principal employer, and the latter was obliged to absorb the former. It was also held that if the high court had found that the workmen were engaged in violation of the provisions of the Act or were continued as contract labour in spite of the prohibition notification issued under section 10(1), it could, in exercise of its power of judicial review, direct the principal employer to absorb the contract labour, and it was not necessary for the workmen to seek a reference of the dispute relating to their absorption under section 10 of the Industrial Disputes Act, 1947.

Again, in *Secretary, Haryana State Electricity Board* v. *Suresh*,[4] following *Air India* it was held that where the work for which contract labour

3 (1997) 9 SCC 377.
4 (1999) 3 SCC 601.

was engaged was perennial in nature, as against seasonal, contract labour system should be abolished by issuing a notification under section 10(1) of the Contract Labour Act, so as to make the contract labour the direct employees of the principal employer. It was also held that if the prevailing contract labour system was not genuine, but a mere camouflage to deprive workers of the benefits under the various labour enactments, the court could pierce the veil and establish the direct relationship between the principal employer and the contract labour.

However, in *Steel Authority of India Ltd*. v. *National Union Waterfront Workers*[5] a constitution bench of the apex court overruled the decision in *Air India* and held that where contract labour were engaged in connection with the work in an establishment and employment of such contract labour was prohibited by issue of a notification under section 10(1) of the Contract Labour Act, there was no question of automatic absorption of the contract labour working in the establishment and the principal employer could not be required to absorb the contract labour. It was also held that on a contractor engaging contract labour in connection with the work entrusted to him by the principal employer, it did not culminate into a relationship of 'master and servant' between the principal employer and the contract labour. Whether the contract labour system was genuine or a mere camouflage had to be adjudicated by the industrial tribunal/court and not by the high court in its writ jurisdiction.

In *APSRTC* v. *G. Srinivas Reddy*[6] the Andhra Pradesh State Road Transport Corporation issued a circular on 1.9.1998 detailing the guidelines for absorption of persons directly employed by the corporation on casual basis or for a contractual period, on daily wages or on consolidated salary or piece-rate basis or under work-charged establishment, whose services had been ordered to be dispensed with under an earlier circular. As per the guidelines the benefit of absorption was to be availed of only by those who had been engaged for more than a year and against sanctioned vacancies. Contract labour engaged through contractors to work at bus stations etc. were specifically excluded.

The respondents claiming to be scavengers employed by the appellant corporation approached the high court by way of writ petition seeking direction for regularization. The court, without examining their claim on merit directed the corporation to 'consider' their cases in terms of the above mentioned circular. In pursuance thereof, the divisional manager sent a letter dated 14.7.1992 instructing the depot manager to verify their claim and report back to him. Meanwhile, alleging inaction the respondents approached the high court for a declaration that the corporation's failure to take action in pursuance of the said letter was illegal and that the corporation should be directed to absorb them into its service. The single judge, again without examining the matter on merits, directed the corporation to consider their claim for absorption as per the guidelines.

5 (2001) 7 SCC 1.
6 (2006) 3 SCC 674.

The corporation considered their cases but turned down their claim for absorption on the ground, *inter alia*, that they were the employees of contractors and the corporation exercised no control over them. They again approached the high court and the single judge held that the respondents could not be denied relief on the ground that they were employed as contract labour, since the corporation did not take such a contention in the earlier petition. The judge also held that when the direction was to 'consider' the case for absorption in terms of the guidelines, the corporation could not reject the claim by taking a stand that the respondents were employed as contract labour. Writ appeal filed by the corporation was dismissed by the division bench mainly on the ground that the work for which the respondents were employed as contract labour, that is to clean the buses and to sweep the bus-stand premises, was perennial in nature and not seasonal which work could not have been contracted out.

Allowing the appeal of the corporation the apex court held that in the instant case there was neither a notification under section 10(1) of the Act prohibiting contract labour nor a contention raised or a finding given that the contract with the contractor was sham and nominal and the contract labour working in the establishment were, in fact, employees of the principal employer. The high court, by assuming that the contract labour system was only a camouflage and that there was a direct relationship of employer and employee between the corporation and the respondents, could not have directed absorption of the respondents who were held to be contract labour in view of the principles laid down in *Steel Authority of India*.[7] If they wanted the relief of absorption, the right course for them would have been to approach the industrial tribunal/court and establish that the contract labour system was only a ruse/camouflage to avoid labour law benefits to them. The court held that the high court under article 226 of the Constitution could not direct absorption of the respondents on the ground that work for which the respondents were engaged as contract labour was perennial in nature.[8]

The apex court further held that the respondents were also not entitled to the relief of absorption/regularization on the basis of the circular dated 1.9.1988 as it specifically excluded contract labour. The order of the single judge of the high court on both the occasions had not examined the status of the respondents, nor recorded a finding that they were entitled to absorption. Therefore, if the corporation on considering the claims of the respondents found that they were not employed by it, but were contract labour who were not entitled to seek absorption under the guidelines, the corporation was justified in rejecting their claim for absorption.[9]

7 *Supra* note 5.
8 *Supra* note 6 at 682.
9 *Ibid.*

IV EMPLOYEES' STATE INSURANCE

Has ESI contribution to be related to ESI facilities availed?

The propriety of the high court's order directing payment of ESI contributions only prospectively, i.e., from the date of its judgment was the important question before the Supreme Court in *ESI Corporation* v. *Jardine Henderson Staff Association*.[10] The facts involved were thus: The central government by notification dated 23.12.1996 amended rules 50, 51 and 54 of the Employees' State Insurance (Central) Rules, 1950 raising the wage limit from Rs. 3000 to Rs. 6500 with effect from 1.1.1997 for coverage of an employee under section 2(9)(b) of the ESI Act.

The respondents filed writ petitions before the Calcutta High Court challenging the said notification and for a declaration that the amended rules are *ultra vires*. A single judge of the high court, while disposing of a number of writ petitions as also the present one, by a common judgment and order, quashed the amendment notification and as a result thereof there was no enhancement of wage ceiling. The ESI Corporation as also the Union of India assailed the judgment of the single judge in a writ appeal. By the impugned common judgment, the division bench of the court allowed the appeals and set aside the judgment of the single judge by holding that the enhancement of wage ceiling could not be termed as *ultra vires* for the purposes of the Act or as being inconsistent therewith. The division bench also vacated all interim orders passed by the single judge in this connection, including the staying of the operation of the said enhancement. The court, however, directed the employers who had obtained stay order in their favour, to implement the amendment from the date of its judgment, i.e., from 16.3.2004 and not from the date of the amendment's coming into operation, i.e., from 1.1.1997. In the present SLP before the Supreme Court the appellant confined the challenge to this direction of the division bench of the high court.

The apex court found that the interim stay order passed by the single judge restraining the employers from deducting the contribution required to be deposited with the corporation (which continued for almost seven years) was neither appealed against nor challenged by the corporation during the pendency of the appeal before the division bench of the high court. Besides, as per the directions of the single judge, the respondents continued to provide medical benefits to their employees. Dismissing the appeal, the apex court held that the high court was fully justified in passing the judicious impugned order after considering the equities by directing the employer and employees to make the ESI contribution for the future. The court observed:[11]

> The respondent companies have spent large amounts of money on the employees and provided medical facilities in view of the order of

10 (2006) 6 SCC 581. For a similar case, see, *ESI Corpn.* v. *Distilleries and Chemical Mazdoor Union*, 2006 6 SCC 604.

11 *Id*. at 600, 603.

> the high court granting stay/injunction, etc. If the high court had not passed the order of injunction, the respondent companies would have contributed the ESI contribution instead of spending monies on the medical facilities and allowances. In these circumstances, … it would be unfair and unjust to make the employer pay contribution …for the past several years for no fault of their own. No party much less the respondents should suffer because of the orders of the court, if duly complied with. The maxim of equity *actus curiae neminem gravabit* (no party shall be prejudiced for the act of court) is founded upon justice and good sense was applied by the high court as well as another maxim *lex non cogit ad impossibilia* (the law does not compel a man to do what he cannot possibly perform).

The court also held that the Supreme Court under article 142 of the Constitution is empowered to mould the relief in the facts and circumstances of the case in such a manner that it is not only just but also equitable even while declaring the law.[12]

Transferee company liable to pay damages imposed on transferor company

Whether damages imposed under section 85-B of the ESI Act on the transferor employer could be recovered from the transferee employer in view of section 93-A was the main issue to be decided in *Regional Director, ESI Corporation* v. *Pradeep Kumar.*[13] Section 85-B of the Act empowers the ESI Corporation to impose damages in case of non payment of contribution in time. Imposition of damages is a penal proceeding and can be imposed over and above the levy of interest payable under section 68. Section 93-A which speaks of liability in case of transfer of establishment lays down that "where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part by sale, gift …., the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act …"

In the instant case, the respondent company purchased another company. ESI contribution was due from that company for which after due notice and compliance with formalities, damages under section 85-B were levied. Respondent company successfully contended before the ESI court that as transferee company, it was not liable to pay damages since the same were penal in nature. In appeal by the corporation, the Kerala High Court, allowing the same, held that any amount due at the time of transfer could be recovered from the transferee employer as both transferor employer and transferee employer are jointly and severally liable. Merely because damages were penal in nature it could not be excluded from the words "any other amount payable under the Act in respect of the periods upto the date of transfer" in section 93-A,

12 *Id*. at 602.

though the liability of the transferee company was limited to the value of the assets obtained by him by such transfer.

V GRATUITY

Forfeiture of gratuity

Section 4 of the Payment of Gratuity Act, 1972 speaks about payment of gratuity to an employee on the termination of his employment after he has rendered continuous service for not less than five years – (a) on his retirement or resignation, (b) on his superannuatrion, and (c) on his death or disablement due to accident or disease. However, sub-section (6) of section 4 lays down certain circumstances wherein an employee's gratuity could be forfeited. One such situation is where gratuity of an employee could be forfeited to the extent of damage or loss so caused if the services of such employee have been terminated for any act, wilful omission or negligence causing any damage or loss to or destruction of, property belonging to the employer. For the application of this clause the services of the employee should have been terminated for any act, wilful omission or negligence causing any damage or loss or destruction of property belonging to the employer. The other circumstannces where the gratuity of an employee may be either partially or wholly forfeited are, if the services of the employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or if the termination was as a result of an act which constitutes an offence involving moral turpitude, provided the same was committed by him in the course of his employment.

In *Gujarat State Road Transport Corporation* v. *Devendrabhai Mulvantrai Vaidya*[14] the appellant corporation withheld payment of gratuity to the respondent employee who retired after 38 years of service on attaining superannuation on the grounds that criminal and departmental proceedings were pending against him. Also, that gratuity being a kind of reward for good, efficient and faithful service rendered for a considerable period of time, there would be no justification for awarding the same to the respondent employee who had committed misconduct.

Dismissing the appeal, the Gujarat High Court held that the submissions made by the appellant were misconceived. The appellant corporation was not at all entitled to forfeit the gratuity of the respondent either wholly or partially since his services were not terminated under any of the provisions of section 4 (6) of the Act.[15]

An employee must opt a particular scheme of gratuity as a whole – not best terms of both

Applying the golden rule of interpretation the Supreme Court in *Beed District Central Coop. Bank Ltd.* v. *State of Maharashtra*[16] held that where

13 2006 I LLJ 544.
14 2006 I LLJ 324.
15 *Id.* at 325.
16 (2006) 8 SCC 514.

the scheme of the employer offered a better rate of gratuity subject to a comparatively smaller maximum amount while the Gratuity Act provided for a lesser rate of gratuity subject to a comparatively higher maximum amount, effect could be given either to the contract or to the statute. The workman could not opt for the best terms of the statute as well as those of the contract.

The gratuity scheme of the appellant bank provided for gratuity to superannuating employees at the rate of 26 days salary for every completed year of service with a ceiling limit of Rs. 1.7 lakhs with effect from May 1994. This ceiling limit was subsequently raised to Rs. 2.50 lakhs. As per the provisions of the Gratuity Act, however, the rate of gratuity is to be calculated at 15 days' salary for every completed year of service with a ceiling limit of Rs. 2.5 lakhs which was raised to 3.5 lakhs with effect from September 1997. The respondents retired during the currency of the scheme of the bank. Their claim for the benefit of the scheme as also the ceiling limit fixed under the Act was accepted by the high court. Hence this appeal to the apex court.

Allowing the appeal, the Supreme Court held that although under the provisions of section 4(5) of the Act, an employee has a right to receive better terms of gratuity under any award or agreement or contract with the employer, it does not contemplate that he would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a part of the statute. He cannot have both the options; he has to opt for either of them and not the best of the terms of the statute as well as those of the contract.

The argument based on the 'doctrine of blue pencil'[17] which was pressed into service to sustain the claim of the respondents was repelled by the court as not applicable to the facts of the instant case.

It may be submitted that the apex court rightly thwarted the attempt of the respondents to have the cake and eat it too. As rightly explained by the court, in the cases where the amount of gratuity is calculated at the rate of 26 days' salary for every completed year of service, *vis-a-vis* 15 days' salary thereto, the tenure of an employee similarly situate will vary drastically. Whereas in the former case an employee may receive the entire amount of gratuity while working for a lesser period, in the latter case an employee drawing the same salary will have to work for a longer period. This definitely was not the intent and purpose of enacting section 4(5) of the Act.

17 This doctrine was evolved by the English and American courts and has been explained in the *Halsbury's Laws of England.* " 430. *Severance of illegal and void provisions*. - A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of trade, but the following principles are applicable to contracts in general." 9 *Halsbury's Laws of England* 297 (4th Edn).

VI MINIMUM WAGES

No liability to pay minimum wages if employment is not listed in schedule to the Minimum Wages Act

In *Lingegowd Detective and Security Chamber (P) Ltd.* v. *Mysore Kirloskar Ltd.*[18] the appellant company was engaged in providing detective and security services to various organizations. Aggrieved by the orders passed by the authority under the Minimum Wages Act, 1948 requiring the appellant to pay minimum wages to its employees, it filed a writ petition in the Karnataka High Court praying for setting aside the said orders. It was contended that since its engagement of providing security personnel to various organizations was not a scheduled employment as listed in the schedule to the Act, and as no specific notification was issued in that behalf, the impugned orders of the authority were without jurisdiction.

A single judge of the high court allowing the writ petition held that the workmen of the appellant were not entitled to the grant of minimum wages. He, however, looking to the beneficial nature of the legislation directed Mysore Kirloskar Ltd., as the principal employer, to pay a sum of Rs. one lakh as *ex gratia* to the workmen. Aggrieved, the respondent Mazdoor union filed writ appeal before the division bench of the high court which was allowed. It was held that where a person provides labour or services to another for remuneration, which is less than the minimum wages, the labour or services provided by him fell within the scope and ambit of the words "forced labour" under article 23 of the Constitution, and therefore, the orders passed by the authority under the Act were not to be interfered with. It was further held that since the principal employer's activities were included in the list of scheduled employments, under the schedule to the Act, there was no requirement of issuing a separate notification to that effect.[19] Hence, this appeal to the apex court.

Relying on few of its earlier judgments[20] the Supreme Court held that since detective and security services provided by the appellant to various organizations did not form part of the scheduled employment as detailed in the schedule to the Act, the decision of the division bench was liable to be set aside. Allowing the appeal, the court restored the decision of the single judge of the high court. The court further held that there was no master and servant/ employer-employee relationship between these workmen of the appellant and Mysore Kirloskar Ltd. and that, the provisions of the Contract Labour

18 (2006) 5 SCC 180.

19 For arriving at this conclusion, the court placed reliance on several decisions relating to the true essence of the expression 'right to life' under article 21 of the Constitution.

20 *M.P. Mineral Industry Assn.* v. *Regional Labour Commr,* (1960) 3 SCR 476; *Bhikusa Yamasa Kahatriya* v. *Sangamner Akola Taluka Bidi Kamgar Union,* 1963 Supp (1) SCR 524; *Haryana Unrecognized Schools' Assn.* v. *State of Haryana,* (1966) 4 SCC 225; *Patel Ishwerbhai Prahladbhai* v. *Taluka Development Officer,* (1983) 1 SCC 403.

(Prohibition and Abolition) Act, 1970 had no applicability to the facts of the case.

It is submitted that the view taken by the division bench of the high court seems to be correct as both the grounds advocated by it encapsules the right interpretation of law applicable in the instant case.

Right to minimum wage should be enforced in forum created under the statute

Placing reliance on three Supreme Court decisions[21] it was argued in *Gujarat Mazdoor Sabha* v. *Commissioner of Labour*[22] before the Gujarat High Court that if the right to receive the minimum wages is a fundamental right as held in those cases, and non-payment of the same amounts to violation of article 23 of the Constitution, irrespective of the existence of other fora, the court must issue a writ under article 226 of the Constitution against every entrepreneur, employer, industrialist, who is not making the payment of minimum wages to their employees.

The court, after conceding that though the apex court had held in *People's Union for Democratic Rights*[23] that non-payment of minimum wages amounted to violation of the fundamental rights, it did not issue a writ against the employers but only required the state and its agencies to institute an effective system to ensure that the minimum wages are paid. The court further held that when labour laws provide for a procedural forum, the aggrieved party must approach the same and must not short circuit it simply because it is time consuming. Even otherwise, the court reasoned, "if we start entertaining such applications, then, any order made by us or any writ issued by us, would again lead to a problem. This Court, after issuing the writs will have to act as a Labour Court for enforcing the writs, which, in fact, is not the intention of the Constitution of India."[24]

Besides, the court reasoned further, "when the law provides for a proper forum, then, any person, for redressal of his grievance, must approach the said forum because the officers are trained, they know how to handle the matters and the law further provides that in what manner, such orders can be executed."[25] The court, accordingly, dismissed the letters patent appeal.

VII MATERNITY BENEFIT

Inflexible nature of liability

The petitioner in *Bharti Gupta* v. *Rail India Technical and Economical Services Ltd. (RITES)*[26] was an architect in the respondent company RITES

21 *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1443; *Sanjit Roy* v. *State of Rajasthan*, AIR 1983 SC 328; and *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.
22 2006 I LLJ 546.
23 *Supra* note 20.
24 *Supra* note 22 at 547.
25 *Ibid.*
26 2006 I LLJ 74.

engaged on contract basis for spells of six months each. Her employment was continued on a routine basis and fresh contracts were being issued subsequently. On 23.5.2000 she was issued a letter stating that the term of her employment would be for six months from 17.4.2000 to 16.10.2000. She continued in employment even after 16.10.2000, a fact not disputed by the respondents. She applied for maternity leave from 11.11.2000 which was refused by the respondent on the ground that she was no more in its employment forcing her to file this writ petition in the Delhi High Court.

It was submitted on behalf of the petitioner that the provisions of the Maternity Benefit Act, 1961, especially sections 3 to 5, 12 and 27, having universal application, entitled her to maternity leave as well as maternity bonus and the same could not be withheld. It was futher contended that grant of maternity benefits was not a matter of charity, it being a positive mandate of law, as was held by the apex court in *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll*).[27]

The high court, after a brief reference to the provisions of the Act and articles 14 and 15 of the Constitution, held that the two objectives of the Act, viz., affirmative action and non-discrimination, had universal application. It also noted that the Act was in tune with the United Nation's Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979.

Allowing the writ petition the court held that in view of the admitted facts and the circumstances under which the petitioner went on maternity leave, the respondent could not escape from its liability to pay the benefits under the Act.

VIII PENSION SCHEME

Disablement pension

Avinash Anand Vaidya v. *Regional Provident Fund Commissioner, Sub-Accounts Office, Thane*[28] is a writ petition claiming disablement pension which was denied by the provident fund authorities on the reasoning that the disablement suffered by the petitioner was only 90 per cent. The facts, which led to the unfortunate claim being made, is tragic. The petitioner who was employed as sales manager with a certain company met with an accident which resulted in amputation of both his legs. Unable to do the work and discharge his duties of sales manager which involved touring, he resigned the job and applied for disability pension under the Employees' Pension Scheme, 1995 which was denied to him on the ground stated above. Hence this writ petition to the Bombay High Court.

For the respondent authority, it was argued before the high court that since the medical board had not certified 100 per cent disablement, the disablement pension could not be paid, as under the scheme to be eligible for

27 2000 (3) SCC 224. In this case the Supreme Court had held that even daily wage employees on muster rolls were entitled to the bnenefits under the Act.

28 2006 I LLJ 489.

disablement pension, the employee must have suffered permanent total disablement and that meant 100 per cent disablement.

Paragraph 2(xvi) of the pension scheme defines permanent total disablement as "such disablement of permanent nature as incapacitates an employee for all work which he/she was capable of performing at the time of disablement regardless of whether such disablement is sustained in the course of employment or otherwise."

Paragraph 15 which provides for benefit on permanent and total disablement states that "(1) a member, who is permanently and totally disabled during employment shall be entitled to pension as admissible….(3) a member applying for benefits under this praragraph shall be required to undergo such medical examination as may be prescribed by the central board to determine whether or not he or she is permanently and totally unfit for the employment which he or she was doing at the time of such disablement."

Thus, permanent total disablement as defined in paragraph 2(xvi) contemplates two situations : one, that disablement is permanent in nature; and two, such disablement has resulted in incapacitating the employee for all work which he or she was capable of performing at the time of disablement.

The court observed that the purpose of enacting the pension scheme is to benefit the employees who had suffered disablement and as such the provisions of the scheme have to be given purposive and beneficial construction.

In the instant case the court found that though the medical board had found the percentage of disablement to be 90 per cent, it had certified that the petitioner had suffered permanent and total disablement incapacitating him for all the work that he was capable of doing at the time of disablement. The court, therefore, opined that to enable the member to claim the disability pension, what is important is not the percentage of disability but the factum of permanent and total unfitness for employment.

Allowing the writ petition with cost the court rightly held that in cases of this nature, the percentage of disability is not the criterion but it is whether the disablement incpacitates the employee for all work which he was capable of performing at the time of disablement.[29]

IX PERSONS WITH DISABILITIES

Employee who acquires disability and person with disability – distinction

Dilbagh Singh v. *Delhi Transport Corporation*[30] depicts the insensitivity of the authorities and the dogged perseverance of the person who suffered disabilities while doing his duties for getting justice. The petitioner in the instant case was a driver in the respondent corporation who was the victim of a mob attack in 1991 while he was driving the bus on route

29 Reliance for this view was placed on *Regional Provident Fund Commissioner, Hyderabad* v. *Deepak Kulkarni*, 2002 II LLJ 1.

30 2006 I LLJ 480.

from Delhi to Balaji. In 1996 he was prematurely retired by the corporation on the ground that he was medically unfit. His two writ petitions to get the chief commissioner to consider his case sympathetically and give him a suitable employment in the corporation proved to be futile. The reason stated being that his disability was only 20 per cent which was much below the requisite disability of 40 per cent required under section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Hence, the instant writ petition to the Delhi High Court for the relief.

On behalf of the respondent, it was contended in the high court that the petitioner could not be called as a 'person with disability' under the Act; and in order to qualify for relief under its provisions, including section 47, the petitioner should have suffered or incurred a disability which was not less than 40 per cent. It was also contended that the petitioner was paid compensation, and therefore could not seek the relief of reinstatement.

Section 47 lays down as follows :

> *Non-discrimination in Government Employment* :- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service :
> Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuating, whichever is earlier.
> (2) No promotion shall be denied to a person merely on the ground of his disability…...

The court traced the origin of the Act by referring to international conventions and the measures taken in the US and UK. According to the court, section 47 applies regardless of where the employee incurs the disability; it acquires primacy, and can be invoked, without application of laches; and its benefits have to be given even if compensation is paid, for premature retirement of an employee.[31]

The court emphasized that "section 47 was enacted as an absolute, unalterable, non-discriminatory standard to be followed by every establishment, in relation to their disabled employees, at the work place. The provision is broad in its coverage, and does not allow deviation on account

31 For these propositions reliance was palaced on *Krishan Chander* v. *DTC*, 2004 (115) DLT 558; *Vijender Singh* v. *DTC*, 2003 (105) DLT 261; *DTC* v. *Harpal Singh*, 2003 (105) DLT 113; *DTC* v. *Rajbir Singh*, 2003 I LLJ 865; *Baljeet Singh* v. *DTC*, 2000 III LLJ (Suppl) 339; *Virender Kumar Gupta* v. *DTC*, 2002 IV LLJ (Suppl) 1314; and *Kuldeep Singh* v. *DTC*, 3003 I LLJ 672.

of an employer's compulsion or inability to provide an alternative post of employment; indeed he is under a positive obligation to give some work or job to the disabled employee, who suffers injury or incurs disability, and protect the existing terms and conditions of service, if necessary, by keeping him on supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier…".[32]

The court distinguished the expression "No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service" used in section 47 and the expression "person with disability" used in section 2(t) which mandates 40 per cent disability. The court held that the absence of the expression "person with disability" in section 47 is thus not without significance since the controlling expression in section 47 is person "who acquires a disability." The court accordingly held that the view taken by the chief commissioner of DTC that the petitioner was not entitled to employment, was opposed to the plain language of the enactment.

As regards the contention that since the petitioner had already availed of the compensation he was not entitled to be reinstated, the court held that terms of section 72 of the Act makes it abundantly clear that the rights under section 47 are independent of, and in addition to rights and entitlements under other laws/rules or conditions of service. Therefore, this contention of DTC was devoid of merit.

The court, accordingly, directed the respondent DTC to reinstate the petitioner in its services within a period of six weeks from the date of judgment, "to a suitable post, of equivalent rank, and grant continuity of service, in regard to matters such as pay revisions, allowances, increments, seniority, etc."[33]

It must be pointed out that the approach of the chief commissioner of DTC betrays non-application of mind and wrong interpretation of the statutory provisions.

X PROVIDENT FUND

Meaning of employee

Whether an apprentice could be deemed to be an employee within the meaning of section 2(f) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 was the question to be decided by the Supreme Court in *Regional Provident Fund Commissioner* v. *Central Arecanut and Coca Marketing and Processing Coop. Ltd*.[34] The single bench as also the division bench of the Karnataka High Court had answered this question in the negative.

Before the apex court the appellant contended that the high court had failed to notice the true import of section 2(f) of the Act, and therefore, had erroneously held that the trainees were not covered by the Act. Section 2(f)

32 *Id*. at 486.
33 *Id*. at 488.
34 (2006) 2 SCC 381.

of the Act defines an "employee" as "any person who is employed for wages in any kind of work, manual or otherwise….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, 1951 or under the standing orders of the establishment." Thus, though the definition of employee includes an apprentice, it excludes an apprentice engaged under the Apprentices Act or under the Standing Orders Act.

In the instant case the respondent had taken 45 persons as trainees for a stipulated sum as stipend along with a caveat that they would not be entitled to claim right of appointment after the completion of the training period. The standing orders of the company at the relevant time were not certified and therefore, in terms of section 12-A of the Industrial Employment (Standing Orders) Act, 1946 the prescribed model standing orders were deemed to be applicable. An apprentice under the model standing orders is defined as a learner who is paid allowance during the period of training. In the present case, the trainees had no right to employment, nor did they have any obligation to accept any employment even if offered.

Dismissing the appeal and agreeing with the views expressed by the high court, the apex court held that the trainees were apprentices engaged under the standing orders of the establishment and hence were not employees under section 2(f) of the EPF Act entitling them to provident fund.[35]

Infancy protection

Notwithstanding the deletion of section 16(1)(*d*) of the Act which granted infancy protection for a period of three years with effect from 22.9.1997 by an amendment in 1998, whether the right to infancy protection accrued prior to that date continued to survive for the balance of the period was the question to be decided by the apex court in *S.L. Srinivasa Jute Twine Mills (P) Ltd.* v. *Union of India*.[36] The appellants were establishments entitled to exemption from the provisions of the Act for the infancy period in terms of the original section 16(1)(*d*). During the currency of the infancy period, clause (*d*) of section 16(1) was deleted which took away the appellant's infancy protection.[37] Aggrieved, they approached the Andhra Pradesh High Court by way of writ petitions for a declaration that the omission of clause (*d*) would have no effect on their right to exemption for the balance of their infancy period in terms of erstwhile section 16(1)(*d*). The high court, however, dismissed the writ petitions by holding that as clause (*d*) was deleted with effect from 22.9.1997, the Act had application to every establishment and no exemption or "infancy period" whatsoever was available from that date. Hence this appeal to the Supreme Court.

35 *Id.* at 384.
36 (2006) 2 SCC 740.
37 The deleted clause (d) of section 16(1) read: "This Act shall not apply ……..(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been set up."

It was contended by the appellants before the Supreme Court that the unamended provisions as they stood before the amendment in 1988 under clause (*d*), applied to their cases and they were entitled to the protection regarding non-application of the Act for a period of three years from the date on which such establishment was set up.

The apex, after looking into the effect of repeal as contained in section 6 of the General Clauses Act, 1897 held that unless a different intention appears the repeal would not affect any right, privilege or liability acquired, accrued or incurred under the repealed enactment. The amendment in the instant case could not, in the absence of an express intention, take away the already accrued right to infancy protection. [38]

XI WORKMEN'S COMPENSATION

Power of commissioner to review his order

The sole question before the Gauhati High Court in *Goljan Nesha* v. *Gammon India Ltd.*[39] was "whether the Commissioner under the Workmen's Compensation Act had the jurisdiction either to revise or to review its own order"?

The appellant was the widow of a workman who died as a result of an accident suffered by him. The commissioner for workmen's compensation allowed the appellant's claim for compensation along with simple interest @ 12 per cent and ordered respondent 4, the National Insurance Company Ltd. to pay the same. The insurance company as also the respondent, filed petitions seeking revision/review of the award on the grounds, *inter alia*, that the quantum of compensation awarded should have been as per the unamended provisions of the Act, since the accident had occurred prior to the amendment. The commissioner, without serving notice on the appellant, revised his award of compensation accordingly.

On challenge in the high court, it was argued that the power of revision/ review being a creature of statute the commissioner, in the absence of such provision in the Act or in the rules made thereunder, exceeded his jurisdiction. Besides, as per rule 32(2) of the Workmen's Compensation Rules, 1924 the commissioner, once the award has been given, is not empowered to amend the award by way of addition or alteration other than correction of clerical and/or arithmetical mistake arising from any accidental slip or omission.

The high court, relying on two apex court decisions[40] held that the impugned revision of his own order was an apparent error of law, as under the statute only correction of clerical mistake was permitted and the power of

38 For arriving at this conclusion the court relied on *Jayantilal Amrathal* v. *Union of India,* (1972) 4 SCC 174; *Govind Das* v. *ITO,* (1976) 1 SCC 906; *State of J&K* v. *Triloki Nath Khosa,* (1974) 1 SCC 19; and *Chairman, Rly. Board* v. *C.R. Rangadhamaiah,* (1997) 6 SCC 623.

39 2006 I LLJ 210.

40 *Harbhajan Singh* v. *Karam Singh,* AIR 1966 SC 641; and *Patel Narshi Thakershi* v. *Pradyumanshinghi Arjunsinghji,* AIR 1970 SC 1273.

review was not an inherent power conferred on the commissioner either by statute specifically or by necessary implication.

'Casual worker' not 'workman' under the Act

The respondent in *Central Mine Planning and Design Institute Ltd.* v. *Ramu Pasi*[41] fought upto the Supreme Court his case against the appellant for denying the claimant respondent a meager sum of Rs. 4001.00 awarded by the presiding officer, labour court, Dhanbad on the sole ground that the respondent was only a casual worker and not a workman entitled to compensation under the Act. The labour court had awarded the said amount of compensation for the injury suffered by the respondent on his left ring finger while working in the factory of the appellant even though it had recorded a finding that the respondent was a casual worker. In the high court the appellant had contended that the labour court should not have entertained the respondent's claim petition as he was not a workman, but a casual worker who was engaged not for the purposes of the employer's trade and business. A single judge of the high court, finding that the sum involved was so negligible, took the view that the question involved was only of academic interest and dismissed the appeal which view of the single judge was endorsed by the division bench of the high court. Hence this appeal to the Supreme Court.

The Supreme Court, after an analysis of the definition of workman in section 2(1)(n) of the Act, held that the expression workman as defined in the Act did not include casual worker unless he was employed for the purposes of the employer's trade or business. The apex court, therefore, opined that the claim application being not maintainable, the labour court should not have entertained the same, and to that extent the high court also was not correct in its view.

The court, however, considering the small quantum awarded, directed that the amount if paid to the claimant should not be recovered; and in case the same had not been paid, it should be paid forthwith; and on deposit, the claimant should be permitted to withdraw the same.

It is surprising, why in the first place, the court admitted the appeal. What did the appellant gain ultimately? Nothing; may be the personal satisfaction of dragging the hapless respondent up to the highest court of the land! It is submitted that such cases should be dismissed at the admission stage itself so that the court's time is not wasted on trivial matters of this nature.

Insurer not liable to pay interest/penalty

Under the provisions of the Workmen's Compensation Act, 1923 an employer is not statutorily liable to enter into a contract of insurance, unlike under the provisions of the Motor Vehicles Act.[42] However, where an employer enters into a contract of insurance with an insurance company, the

41 2006 1 LLR 683.
42 S. 147 of the Motor Vehicles Act provides for compulsory insurance.

latter shall be liable to indemnify the former. The terms of the contract of insurance would, however, depend upon the intention of the parties, since such contract of insurance is governed by the provisions of the Insurance Act.

Whether interest was payable by an insurer while indemnifying the insured the amount of compensation awarded against him under the WC Act was the question to be decided by the apex court in *New India Assurance Co. Ltd.* v. *Harshadbhai Amrutbhai Madhiya*.[43] Under the contract of insurance, the insurer was liable to reimburse the insured if during the period of insurance any employee in his immediate service sustained personal injury by accident or disease arising out of and in the course of employment and he is liable to pay compensation to the employee or the claimant, either under the Act or under common law. However, a proviso appended thereto provided that the insurance granted thereunder was not extended to include any interest and/ or penalty imposed on the insured on account of his/her failure to comply with the requirements laid down under the Act.

In the instant case, the deceased who met with an accident during the course of his employment was a salesman in the employment of the insured employer. In the claim petition filed by the respondent-claimant, the commissioner of workmen's compensation awarded a certain sum along with 9 per cent interest to be paid to the claimant from the date of filing of application till realization of the amount. The appellant, though, raised the plea of limited liability as per the terms of the contract of insurance, was directed to pay the whole amount by the commissioner. It's appeal to the high court under section 30 of the Act was dismissed. Hence this appeal to the Supreme Court.

Allowing the appeal, the apex court held that a contract of insurance is to be construed as per the terms used in it just like any other contract. An analysis of the contract in question makes it clear that the insurer had not undertaken the liability for interest and penalty, but had undertaken to indemnify the employer only to reimburse the compensation the employer was liable to pay under the Act. Unlike the scheme in the Motor Vehicles Act, the WC Act does not confer a right on the claimant for compensation under that Act to claim the payment of compensation in its entirety from the insurer himself. Construing the contract involved in the instant case, the court held that the insurer had specifically excluded any liability for interest or penalty under the WC Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid.[44]

43 (2006) 5 SCC 192.

44 To the same effect is the decision in *P.J. Narayan* v. *Union of India,* (2006) 5 SCC 200. It was held in this case that the statutory liability under the WC Act is on the employer and not on the insurer. Hence, the insurance company stipulating in the insurance policy that it would be liable for compensation under the WC Act sans the interest thereunder, would be proper and the courts could not force the insurance company to undertake the liability for interest also.

Workman suffering from chest disease dying of heart attack at work spot, not accident arising out of and in the course of employment

In *Jyothi Ademma* v. *Plant Engineer, Nellore*[45] the appellant's husband who was suffering from chest disease and was being treated for it, died at the work spot as a result of heart attack. The plea that death was due to the stress and strain closely linked with the employment of the deceased workman and therefore, was attributable to an accident arising out of and in the course of employment, was accepted by the commissioner of workmen's compensation and a compensation of Rs. 1 lakh was awarded to the appellant. In appeal under section 30 of the Act the high court, on a finding that the nature of the job which the deceased workman was doing (switch on and switch off) could not have caused any stress and strain, held that death due to heart attack could not be said to have caused due to any accident arising out of and in the course of his employment.

The Supreme Court, in appeal by the claimant, agreed with the view of the high court. It opined that under section 3(1) it has to be established that there was some causal connection between the death of the workman and his employment. If the workman died as a natural result of the disease which he was suffering from, or while suffering from a particular disease he died of that disease as a result of wear and tear of the employment, no liability could be fixed on the employer. But, the court observed further, if the employment is a contributory cause or has accelerated the death, or if death was due not only to the disease but also the disease coupled with the employment, then it could be said that death arose out of the employment and the employer would be liable.

The court, accordingly, dismissed the appeal. However, considering the peculiar circumstances of the case, the court directed that there shall be no recovery from the appellant of any amount paid to her as compensation, though in law she was not entitled to any amount as compensation.[46]

Doctrine of election

A person who becomes entitled to claim compensation both under the Motor Vehicles Act, 1988 and under the Workmen's Compensation Act, 1923, because of a motor vehicle accident, has to elect whether to make his claim under the former or the latter Act. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where death or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also under the 1923 Act, the person entitled to compensation may claim compensation under either of those Acts but not under both. Section 167 contains a *non obstante* clause providing for such an option notwithstanding anything contained in the 1923 Act.[47]

45 (2006) 5 SCC 513.
46 *Id.* at 515.
47 *National Insurance Co. Ltd.* v. *Mastan,* (2006) 2 SCC 641 at 648.

A party suffering an injury or the dependent of the deceased who has died in the course of an accident arising out of the use of a motor vehicle may have claims under different statutes. But when the cause of action arises under different statutes and the claimant elects the forum under one Act in preference to the other, he cannot thereafter be permitted to raise a contention which is available to him only in the former.[48]

XII CONCLUSION

It may be pointed out that the pro-labour stand of the court, which used to be the hallmark of judicial decisions in the area of social security, is not very conspicuous in the decisions analyzed above. The decision of the court in *Lingegowd Detective and Security Chamber (P) Ltd.*[49] that there was no liability on the employer to pay the minimum wages if the employment is not a listed employment in the schedule to the Minimum Wages Act, 1948 is not consistent with the purpose and object underlying this beneficial statute. Again, the decision of the apex court in *Gujarat Mazdoor Sabha*,[50] holding that when labour laws provide for a procedural forum, the aggrieved party must approach the same and must not short circuit it simply because it is time consuming is a literal construction of the statute when the court could have adopted the purposive construction thereby saving the worker of the agony of a protracted legal battle.

Regarding absorption of contract labour, the court has, in *APSRTC*[51] restated the law to the effect that the high court under article 226 of the Constitution could not direct absorption of contract labour on the ground that work for which they were engaged was perennial in nature.

In *Beed District Central Coop. Bank Ltd.*[52] the court has made it clear that an employee must opt a particular scheme of gratuity as a whole and not the best terms of both – the scheme as well as the Act. Regarding workmen's compensation also, the court, emphasizing the doctrine of election, has held that when two alternate remedies, one under the Motor Vehicles Act, 1988 and the other under the Workmen's Compensation Act, 1923, are available for the same relief, the aggrieved party has the option to elect either of them but not both.[53]

48 *Id.* at 650.
49 *Supra* note 18.
50 *Supra* note 22.
51 *Supra* note 6.
52 *Supra* note 16.
53 See, *National Insurance Co. Ltd., supra* note 46.