# 19

# LABOUR LAW — II
## (SOCIAL SECURITY LEGISLATION)

*Thomas Paul**

## I INTRODUCTION

AS IN the previous years, there has been lot of litigation in the area of social security as can be evidenced from the large number of cases reported in the various specialized labour law reporters. However, it may be mentioned that there has been a drop in the number of cases which reached the apex court for its decision. In most of the cases the settled law has been reiterated. Since it has not been possible to deal with all the cases in the survey, only important ones have been selected for discussion under specific heads.

## II CONTRACT LABOUR

**Power of competent authority to decide on wages**

The sole question in *Hindustan Paper Corporation Ltd.* v. *Kagajkal Thikadar Sramik Union*[1] was whether the division bench of the Gauhati High Court was justified in directing the appellant to pay equal and similar wages to the contract labourers under rule 25(2)(v) of the Contract Labour (Regulation and Abolition) Rules, 1971 when the labour commissioner had passed an interim order for continuing the existing conditions of wages and other facilities till a final settlement was arrived at. The apex court, after a reappraisal of the entire facts of the case, held that when the competent authority was seized of the matter, the division bench ought not to have ventured into a roving inquiry and decided the issue leaving the appropriate authority in the lurch. The proper course for the court was to direct the authority concerned to decide the issue expeditiously after giving equal opportunity to both the parties to present their case. Allowing the appeal and setting aside the order of the division bench, the Supreme Court directed the labour commissioner to decide the issue raised by the union and pass an order within a period of three months of its judgment in the instant case.

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1 (2008) 2 SCC 545.

**Overriding effect of central Act over state Act**

The respondents in the instant case[2] were employed through the contractor since 1987 as electricians for maintenance work of Korba Super Thermal Power Project colonies of the appellant. Even prior to their present engagement, they were employed through other contractors. It was their stand before the single judge of the high court that competent officers of the corporation supervised their work and the materials for their job were supplied by it and they worked for the colonies owned and controlled by the corporation. Despite the perennial nature of their work the corporation engaged them on job work basis just to continue with the contract labour system. They also claimed that the provisions of the MP Industrial Relations Act, 1960, governed their conditions of employment and they were entitled to the same wages as the workmen of the corporation.

The corporation took the stand that the law, which was applicable to them, was the central Act, viz., the Contract Labour (Regulation and Abolition) Act, 1970 and not the 1960 Act which is a state Act. Under entries 22, 23 and 24 of the concurrent list of schedule VII of the Constitution, once a legislation was passed by Parliament in respect of any field covered under the concurrent list, the same would have preference over the state law. It was further submitted that the corporation was a registered establishment under section 7 of the 1970 Act; the contractor was licensed under section 12; and there was no notification issued under section 10 of the Act by the appropriate government abolishing the contract labour. The single judge of the high court found in favour of the appellant and held that there was no scope for granting any relief to the respondents.

The division bench of the high court on appeal, however, held that the decision of the single judge that the 1960 Act was not applicable was not justified. On appeal the apex court, agreeing with the decision of the single judge of the high court and allowing the appeal, held that the 1970 Act governed the field in view of the supremacy of the central Act under article 254(1) of the Constitution. Relying on a number of earlier decisions[3] on the point, the apex court held that the respondents had no valid claim for absorption in the appellant corporation.

## III EMPLOYEES' PENSION SCHEME

**Records of employer company to be relied on rather than those of provident fund office for deciding date of birth**

It was held in *Regional Provident Fund Commissioner* v. *Bhavani*[4] that the proper evidence regarding date of birth for the purpose of computing the

2 (2008) 9 SCC377.

3 See, *Steel Authority of India Ltd*. v. *National Union Waterfront Workers,* (2001) 7 SCC 1; *Gujarat Electricity Board* v. *Hind Mazdoor Sabha,* (1995) 5 SCC 27; *Municipal Corporation of Greater Mumbai* v. *K.V. Shramit Sangh,* (2002) 4 SCC 609, etc.

4 (2008) 7 SCC 111.

date of superannuation was the entry in the records of the employer company and not the entries in the records of the regional provident fund commissioner. In the instant case there was a discrepancy in the date of birth of the respondent as recorded in the records of the employer company and those of the commissioner. In the records of the former it was entered as 31.12.1935 and in those of the latter it was 24.9.1932. She was a member of the Employees' Provident Fund and Family Pension Scheme, 1971 and was making contributions to the scheme. On her superannuation on 31.12.1995, the regional provident fund commissioner refused her claim for pension. Aggrieved, she filed an application before the consumer disputes redressal forum, praying for a direction to the appellant to release her pensionary benefits from the date of her retirement. Based on the date of birth records available with the appellant, it was contended on his behalf that since respondent had attained the age of 60 years on 24.9.1992, much before the pension scheme came into existence on 1.4.1993, she was not eligible for the same. It was also contended that she was not a consumer within the meaning of section 2(1) (d) of the Consumer Protection Act, 1986. The district forum, however, rejected the first contention on a scrutiny of the various documents submitted on her behalf to establish that her date of birth in the records of the company was 31.12.1935, and as such she was eligible for pension. It further held that she was a 'consumer' under section 2(1)(d) of the said Act and denial of her claim amounted to deficiency in service. The National Commission on appeal upheld the above decision.

On appeal, the apex court agreed with the decision of both the district forum and the National Commission and dismissed the same. The case shows the length to which the provident fund authorities can go to defeat the just claims of pension of an employee by advancing frivolous arguments before courts.

## IV EMPLOYEES' STATE INSURANCE

**Whether service charges are 'wages' under the Act**

The basic question of law to be decided by the apex court in *Quality Inn Southern Star* v. *ESI Corpn*[5] was whether the service charge collected by the hotel management from the customers and distributed amongst the employees amounted to 'wages' within the meaning of section 2(22) of the Employees State Insurance Act, 1948 meriting ESI contribution. The respondent corporation's case was that the appellant is running a three star hotel and the establishment is covered under the Act. Ten per cent of the total bill amount is compulsorily collected as service charges from the customers and the same is distributed amongst the employees quarterly; it was distinguishable from 'tips' and amounted to 'additional reimbursement.' The ESI court, looking to the nature of the service charges so collected, since

5 2008 I LLJ907.

the same were not directly paid by the customers to the employees but formed part of the bills which the customers are obliged to pay without any option and the same was being paid to the employees equally once in three months, the appellant having total control and power of distribution of the amount, agreed with the contentions of the respondent corporation. This view was upheld by the high court as well.

On appeal before the apex court, on the basis of the memorandum issued by the corporation in the year 2002 clearly stating that service charges of the nature involved in the instant case would not form part of the wages, brought to its notice by the counsel for the appellant, set aside the order of the ESI court and that of the high court as not maintainable.[6] Is this not a case of approaching the courts with unclean hands insofar as it failed to bring to the notice of the courts its own memorandum exempting service charges from the concept of wages?

**Conditions for claiming disability benefits**

The appellant in the instant case[7] met with an accident in the course of his employment on 15.6.1990. His claim for disability benefit under section 46(1)(c) of the Act was refused by the corporation on the ground that although the employee as an insured person had made contributions up to 30.9.1989, he ceased to be an employee with effect from 1.10.1989 as his salary had exceeded Rs. 1600 per month from that date and as such would be entitled to only sickness benefit and not disability benefit. The insurance court, however, held that although the claimant ceased to be an employee with effect from the above noted date, he continued to be an 'insured person' under section 2(14) of the Act as he had paid contributions towards his insurance which would cover his case from 1.4.1989 to 30.9.1989, and he continued to be an insured person up to 30.6.1990. It, accordingly, allowed his claim for disability benefit for the injury he suffered on 15.6.1990.

On appeal by the corporation, the Kerala High Court, allowed the appeal, relying on its own earlier judgment in *ESI Corpn*. v. *K.K. Surendra Babu*[8] wherein it had held that if a person was not an employee during a particular contribution period and an accident had taken place during such period, he would not be entitled to ESI benefits. As the accident in the instant case had occurred after the claimant had ceased to be an employee, though within the contribution period, the court held that the claimant was not entitled to the benefit of the payment of insurance from the corporation.

The Supreme Court, on appeal by the claimant, had to decide on the undisputed facts of the case, the significance of the contribution period as

6 The court also placed reliance on *Sathianathan N. & Sons (P) Ltd*. v. *ESI Corpn.,* (2002) 2 LLJ 1002 (Mad).

7 *P.B. Krishnankutty Nair* v. *Regional Director, Employees' State Insurance Corporation*, (2008) 7 SCC 450.

8 MFA No.621 of 1986.

regards claim for disability benefit in the context of section 46(1)(c) of the Act. Dismissing the appeal, the apex court held that section 46(1)(c) specifically provides for two cumulative conditions for its applicability: (a) that the claimant must be an insured person, and (b) such an injury must be sustained when he was an employee. Since in the present case the injury suffered was after the claimant had ceased to be an employee, he would not be entitled to any benefit of disablement, notwithstanding the fact that his contribution period and his status as an insured person continued up to 30.6.1990. His entitlement, therefore, would only be for sickness benefit and not disablement benefit.

**Interest on contribution due – whether compromise for waiver permissible**

The respondent corporation[9] raised a demand for contribution under the Act for a specified period on the component of efficiency bonus paid quarterly to the employees of the appellant company. The demand was challenged by the appellant before the ESI court under section 75 of the Act. While these proceedings were pending, the respondent by a letter addressed to the appellant asked for production of record for the purpose of reverification and determination of the amount payable. After reverification of the amount payable, a compromise was arrived at wherein the appellant paid the contribution. The corporation, thereafter, demanded payment of interest on the amount of contribution due. Questioning the demand the appellant filed a writ petition in the high court taking the stand that since a compromise was arrived at as was apparent from the order of the ESI court to the effect that nothing was payable by the appellant, the new demand was not justified. The corporation, on the other hand, reasoned that the liability to pay interest was statutory and there could be no question of compromise on waiving the interest as it was statutorily not permissible. Accepting the corporation's reasoning the high court dismissed the writ petition.

On appeal, the apex court, after referring to section 39 (5)(a) of the Act which talks about contributions, and regulations 31 and 31A which provide for 'time for payment of contribution' and 'interest on contribution due, but not paid in time', respectively, held that the appeal was *sans* merit. The liability to pay interest being statutory, there could be no waiver and the question of compromise or settlement could not really arise. The reference by the ESI court to 'no further dues' was only with regard to the contribution payable and not as regards payment of interest thereon.[10] The court, accordingly, upheld the decision of the high court and dismissed the appeal.

9 *Goetze (India) Ltd.* v. *Employees' State Insurance Corporation*, (2008) 8 SCC 705.
10 *Id.* at 707.

**Factors to be considered while clubbing independently owned/registered firms for coverage under Act**

In *Sumangali* v. *Regional Director, ESI Corpn*.[11] some independently owned establishments/firms having familial ties, registered under various statutes were clubbed together for the purpose of coverage of the ESI scheme on the basis of an inspection report submitted by the inspector of the appellant corporation after an on site inspection of the various premises of the establishments. In one case it clubbed two separate proprietary concerns of two brothers engaged in textile business. Both were carrying on the business from the same building with a temporary wooden partition separating the two establishments. Both had separate registration under the Shops and Commercial Establishments Act, the Kerala Sales Tax Act and the Income Tax Act. In another case it clubbed together three concerns, one a partnership firm owned by the mother and the son and two proprietary concerns, owned separately by the husband and the wife. In the third case another four establishments were clubbed together for purposes of coverage of the Act. Both the ESI court and the high court found nothing wrong in clubbing of these establishments for coverage purposes**.**

The Supreme Court in appeal agreed with the factual findings arrived at by the ESI court and the high court. Dismissing the appeal it held that for the purpose of ESI coverage, the different units could be treated as 'one establishment' since there was unity in management, supervision and control, geographical proximity, financial unity, general unity of purpose and functional integrality between the different units. Thus, the dogged endeavours of the employers to deny the benefits of a beneficial legislation like the ESI Act was stalled by the court in this case.

## V MINIMUM WAGES

**Employment in textile mills**

The object of the Minimum Wages Act, 1948 is to provide for fixing minimum rates of wages in certain employments. The schedule attached to the Act specifies under two parts the employments in respect of which the minimum wages of the employees can be fixed. Section 27 of the Act authorizes the appropriate government to add to either part of the schedule, after giving three months' notice of its intention to do so, any other

11 (2008) 9 SCC 106. Also see, *ESIC* v. *Ved Prakash Gupta*, 2008 LLR 881 wherein the Delhi High Court has held that no law prohibits a father and son from carrying on two separate and independent businesses from the same premises. What is to be seen is whether there is functional integration or proximity in two businesses to decide, after lifting the veil, whether both are two faces of the same business. Therefore, unity of ownership, functional integration, interchangeability of employees and unity of purpose have to be viewed cumulatively and not in isolation. This is specially true, when the applicability of the ESI Act is sought to be extended by clubbing the two establishments. Also see, *Employees' State Insurance Corporation, Kanpur* v. *M/s Tops Food Products,* LLR 2008 42.

employment in respect of which it is of the opinion that minimum rates of wages should be fixed under the Act. The State of Tamil Nadu, on receipt of several complaints from trade unions and individuals regarding the practice of engagement of poor village women by the textile mill owners under the 'camp coolie scheme', giving them the designation of 'apprentice', paying them a paltry sum of Rs. 30 to Rs. 40 per day as stipend, and after the expiry of three years discharging them on the ground that their training period was over, decided to include 'employment in textile mills' in the schedule to the Act for the purpose of fixing minimum wages for them under the Act. The said inclusion was objected to by the petitioners in *Tamil Nadu Mills Association* v. *State of Tamil Nadu*[12] as unlawful, *ultra vires* and amounting to abuse of power conferred under section 27 of the Act.

The challenge of the petitioner was three fold: (a) the government under section 27 of the Act could exercise this power only to prevent sweated labour or exploitation of unorganized labour; and for this it was mandatory to form an opinion as to the necessity to bring textile mills under the schedule to the Act. In the instant case there was hardly any material with the government; (b) both in view of the definition of 'appropriate government' in section 2(b) of the Act and the fact that textile industry is included in the first schedule to the Industries (Development and Regulation) Act, 1951, the appropriate government in this case was the central government and therefore the notification issued by the state government was without jurisdiction; and (c) in view of the bar contained in section 3(2A) of the Act, it was not permissible for the state government to fix the minimum rates of wages in respect of the scheduled employment when any industrial dispute relating to the rates of wages payable to the employees working in that employment is pending before the tribunal or national tribunal under the Industrial Disputes Act, 1947.

The Madras High Court, however, found 'absolutely no merit' in all the three contentions and dismissed the petition. As regards the first contention the court held that there was no restriction placed upon the powers of the government to include in the list only such categories of labour which could be categorized as sweated labour. The Act itself did not lay down any such restriction anywhere. Merely because the items mentioned in the schedule showed that it comprised sweated labour, it did not necessarily follow that no minimum wages could be fixed in regard to labour in general, which was not actually sweated labour.[13]

While negating the second contention the court observed that section 2(b) of the Act defines appropriate government to mean that in relation to any scheduled employment carried on by or under the authority of the central government or a railway administration or in relation to a mine, oil field, or major port or any corporation established by a central Act, the central

12 2008 I LLJ 583 (Mad).

13 *Id*. at 586. Reliance was placed on Edward Mills Co. Ltd. v. State of Ajmer, AIR 1955 SC 25.

government. Textile industry is not carried on by or under the authority of the central government or the other authorities mentioned therein. Thus, it is only the state government which was the appropriate government. The court further held that so far as the powers under section 27 of the Act were concerned, the inclusion of the textile industry as item 23 in schedule I to the Industries (Development and Regulation) Act did not make it as one established under the authority of the central government and the inclusion of the textile mills in the said Act only empowered the central government to regulate the said industry.[14]

Regarding the last contention based on section 3(2A) of the Act which contemplates that where a wage dispute is referred to a tribunal or national tribunal the appropriate government should not fix the minimum wage in respect of the employment in question, the court held that in the instant case the appropriate government had not yet fixed the minimum wages in respect of textile industry. The challenge of the petitioners was only to the notification under section 27 of the Act whereby textile industry was included in part I of the schedule to the Act. The pendency of the proceedings before the special tribunal had no bearing upon the exercise of the power by the appropriate government under section 27 of the Act.[15]

This, indeed, is a very good decision as it has put a stop to the 'textile mafia' who were exploiting the poor women folk from the villages just because employment in textile industry was not listed in the schedule to the Act.

## VI PAYMENT OF BONUS

**Entitlement to bonus**

The respondents in the instant case[16] were employed in the appellant board on daily wage basis. On a reference made by the appropriate government against their claim petition under section 33C(2) of the Industrial Disputes Act, 1947 for bonus, the labour court held that they were entitled to be paid minimum statutory bonus within the stipulated time. Before the high court it was contended by the counsel for the appellant that daily wagers were not entitled to be paid bonus since as per section 2(21) of the Payment of Bonus Act, 1965, it is applicable only to employees who are paid salaries or wages on a monthly basis. Merely because a person worked for 30 days in a year, would not entitle him to bonus. Besides, the labour court had no jurisdiction to adjudicate the matter under section 33C(2) since the provision relates to only pre-existing right and the claim for bonus cannot be included within its scope. The high court, however, held that since there was a statutory obligation to pay minimum bonus, the application under section 33C(2) of the ID Act was maintainable.

14 *Id*. at 587.
15 *Ibid.*
16 *HP State Electricity Board* v. *Ranjeet Singh and Others*, (2008) 4 SCC 241.

The Supreme Court, allowing the appeal, held that the benefit which can be enforced under section 33C(2) must be a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on the one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within the jurisdiction of the labour court exercising powers under section 33C(2) of the Act while the latter does not. In case of pre-existing rights there must be agreements by both sides about existence of such rights. If there is disagreement, it has to be decided by the competent authority. In the instant case, the respondents' right to bonus itself was to be determined, and as such it was not a pre-existing right or benefit. Therefore, it did not fall within the ambit of the above mentioned provision.

Besides, according to the apex court, the high court seems to have been not aware of the fact that the labour court under the Act can decide only matters specified in the second schedule and bonus is not covered therein. Item 6 of the second schedule lays down that it deals with all matters except those covered by the third schedule. 'Bonus' is listed as item 5 in the third schedule and, therefore, only the industrial tribunal has the jurisdiction to decide on it.

Since these aspects had not been considered by the high court, the apex court remitted the matter to the former for considering (i) the applicability of section 33C(2) of the ID Act; (ii) the jurisdiction of the labour court to decide the matter; and (iii) the applicability of the Bonus Act to daily wage workmen.[17]

## VII PAYMENT OF GRATUITY

**Recovery from gratuity of losses caused due to negligence of employee – whether permissible?**

The respondent in *UP State Sugar Corporation Ltd*. v. *Kamal Swaroop Tondon*[18] was employed as resident engineer in the appellant corporation. On 13.1.2000 he was issued a show cause notice alleging that due to his lack of precaution, irregularity, gross negligence and carelessness the corporation had incurred a loss of Rs. one lakh. His explanation which was submitted on15.1.2000 denying the allegations and contending that he had not committed any illegality, was found unsatisfactory by the corporation. It, therefore, initiated disciplinary proceedings against him and issued a charge sheet on 31.1.2000, which he received at 6.45 pm. On that very day the respondent retired on superannuation from the service of the corporation. He filed a writ petition in the Allahabad High Court praying the court to quash the charge sheet and the departmental proceedings. During the pendency of this petition, two orders were passed against him, one for Rs. one lakh and the other for Rs. 73,235 to be recovered from his gratuity, for the loss

17 *Id.* at 246.
18 (2008) 2 SCC 41.

caused to the corporation due to his negligence. The respondent challenged these two orders as well.

By the impugned order the high court held that as the respondent had retired on 31.1.2000, and the relationship of employer and employee ceased to exist, no proceedings could have been initiated against him and, consequently, the two orders for recovery passed against him were not valid. It also directed the corporation to pay to the respondent all benefits of gratuity, leave encashment and other dues payable to him along with eight per cent interest thereon from the date of retirement till the date of actual payment.

On appeal to the Supreme Court it was contended on behalf of the corporation that it is the settled law that the relationship of employer and employee continues to remain so long as all retiral benefits have not been paid to him. Since in the instant case the amount of gratuity, leave encashment and other pensionary benefits were yet to be paid, the proceedings initiated against the respondent were in accordance with law. Even otherwise, under the UP State Sugar Corporation Ltd. General Service Rules, 1988, such proceedings could be initiated even against a retired employee for recovery of loss caused to the corporation. When the corporation for recovering the loss from the one who caused it initiated such an action, the high court ought not to have exercised discretionary and equitable jurisdiction under article 226 of the Constitution on that count. The counsel for the respondent, on the other hand, supported the views expressed by the high court.

The apex court, considering the facts and circumstances of the case in its entirety, and the legal precedents regarding the matter,[19] allowed the appeal. It held that proceedings could be taken for the recovery of financial loss suffered by the corporation due to negligence and carelessness attributable to the respondent employee. The impugned action, therefore, could not be said to be illegal or without jurisdiction and the high court was wrong in quashing the proceedings as also the orders issued by the corporation.[20]

Since the high court had allowed the petition only on the ground that the proceedings could not have been instituted against the respondent, the apex court remitted the matter to the high court without expressing any opinion of its own for taking appropriate action on merits after considering the rival contentions of both the parties.[21]

It is submitted that the ends of justice would have well been served if the apex court had decided the issue once and for all, instead of forcing the respondent, a retired employee, to another round of litigation.

19 Reliance was placed on *Garment Cleaning Works* v. *Workmen,* AIR 1962 SC 673; and *Calcutta Insurance Ltd*. v. *Workmen*, AIR 1967 SC 1286.

20 *Supra* note 6 at 55.

21 *Ibid.*

**Temple will be 'establishment' for purposes of gratuity**

The Karnataka High Court has, in *Management of Sri Venkataramana Temple and Sri Hale Mariyamma Temple, Kapu Udupi District* v. *Deputy Labour Commissioner and the Appellate Authority under the Payment of Gratuity Act, 1972, Hassan Region, Hassan*[22] held that a temple will be an establishment to be covered under section 1(3)(b) of the Act. According to the court the term 'establishment' need not be restricted to only commercial establishments since profitability is not a relevant consideration. Therefore, any institution or organization where systematic activity is carried on by employing ten or more persons would fall within the ambit of the provision. In a temple, the main activity of facilitating devotees to offer prayers, requires the employment of personnel who render service just as they would in any other establishment. Thus, the Act would be applicable to the petitioners and the employees therein would be eligible for gratuity under the Act.

**Withholding of gratuity without hearing, not legal**

The Punjab and Haryana High Court has held in *Raghubir Singh* v. *Indian Red Cross Society and Others*[23] that withholding of gratuity and leave encashment affects the civil rights of the petitioner and therefore it cannot be done without giving an opportunity to the affected party.

**Technical teacher an 'employee' eligible for gratuity**

The fourth respondent was working as assistant professor in the appellant institute[24] and after superannuation applied to the controlling authority for gratuity under the Act. The same was allowed. Aggrieved, the institute filed an appeal before the commissioner, labour, who dismissed the same. The writ petition filed by the institute before the single judge of the Jharkhand High Court also met with the same fate. The institute thereupon filed the present letters patent appeal before the high court.

The main points of challenge were: (a) Respondent no. 4 was not an employee within the meaning of section 2(e) of the Act since the nature of his job was to impart education/knowledge to the students of his faculty; (b) the notification dated 3.4.1997 issued by the central government making the provisions of the Act applicable to educational institutions would not apply to him since he had not completed five years of continuous service after the said notification was issued; and (c) the judgment in *Ahmedabad Private Teachers' Association* v. *Administrative Officer and Others*[25] wherein it had been held that teachers were not employees of the establishment would apply to the facts in the instant case and therefore, the findings of the

22 2008 LLR 263.
23 2008 LLR 849.
24 *Birla Institute of Technology* v. *State of Jharkhand and Others*, 2008 LLR 832.
25 (2004) 1 SCC 755.

authorities below including that of the single judge were wrong.[26]

In response, it was argued on behalf of respondent no. 4 that (i) he was a qualified mechanical engineer employed as an assistant professor in the institute, teaching definite subjects and engaging in material testing in the laboratory, etc. made him an 'employee' within the meaning of section 2(e) of the Act; (ii) he joined the institute in 1971 and was working there on the date of notification and retired only in 2001; therefore, the five year period has to be calculated from the date of joining the service and not from the date of notification; and (iii) the ratio of *Ahmedabad Private Teachers' Association* as it related to primary school teachers, would not be applicable to the educational institutions like that of the appellants, especially when the respondent was entrusted with the job of a technical nature.[27]

In the light of the rival contentions, the court after a careful analysis of the term 'employee' in section 2 (e) of the Act held that though respondent no. 4 was not employed in any factory, mine, oil field, plantation etc., the word 'establishment' in the section is comprehensive to include within its ambit all kinds of institutions like the appellant giving technical education. For a person to be termed as an 'employee' he should be engaged in any establishment or organization to do any skilled, semi skilled, unskilled, manual, supervisory, technical or clerical work. In the instant case, he was employed as a technical teacher in the appellant institute. Technical teachers of engineering colleges are appointed for skilled, supervisory and technical works. Thus, the court, in view of the concurrent finding of fact that respondent no. 4 was appointed as a technical teacher, doing skilled and technical work as defined in section 2(e) of the Act, refused to interfere with the findings of the lower authorities.

While dismissing the second contention of the appellant the court held that as respondent no. 4 was in employment on the day the Act became applicable to the employees of educational institutions, viz., 3.4.1997, and retired only in 2001, his entire period of service must be reckoned for the purpose of payment of gratuity and not the period served from the above mentioned date.

The court found no merit in the third contention either. It held that *Ahmedabad Private Teachers' Association* had no relevance to the facts in the instant case and could not be applied as an authority to deny respondent no. 4 the benefits of gratuity. That case entirely dealt with primary school teachers and not with teachers in technical institutions like that of the appellant. The court, accordingly, dismissed the appeal.

26 For the above arguments reliance was placed on *State of Maharashtra and Others* v. *Dr. Hari Shankar Vaidhya and Others,* (1997) 9 SCC 521; *H.E. Education Society* v. *The Appellants Authority under the Payment of Gratuity Act,* 2001 I LLJ 691.

27 Reliance for this stand was placed on *Aspinuall & Co*. v. *Lalitha Padugady*, (1995) 5 SCC 642; *Central Coal Fields Ltd.* v. *Union of India*, (1998) 9 SCC 192; *Commissioner, Tiruvarur Municipality* v. *Deputy Commissioner of Labour,* 1995 Lab IC 2323, etc.

It is surprising to note the extent to which the authorities of a state run institution like that of the appellant can go to deny the just retiral benefits due to one of its employees who had served the institution with distinction over a number of years.

**Trainees entitled to gratuity**

In *H. Ramappa and Others* v. *General Manager, Sri Yellamma Cotton, Woollen and Silk Mills, Devanagere District and Others*[28] the Karnataka High Court has held that trainees/apprentices who are not appointed under the Apprentices Act, 1961 will be entitled to gratuity if they have rendered not less than five years of continuous service. The court further held that continuous service will be presumed when no order has been passed by the employer intimating any break in service for entitlement of gratuity. The court, thus, thwarted the intention of the employers not to pay gratuity to their employees.

## VIII PROVIDENT FUND

**Whether leave encashment part of basic wage**

The point of law that was involved in *Manipal Academy of Higher Education* v. *Provident Fund Commissioner*[29] was whether the amount received by encashing the earned leave is a part of 'basic wage' under section 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 requiring pro rata employer's contribution. For many years the parties with mutual consent were including leave encashment as emoluments for the purpose of calculating provident fund dues from both the employer as well as from the employees. However, disputes having arisen over the issue, the Karnataka High Court, following the judgment of the Bombay High Court in *Hindustan Lever Employees Union* v. *Regional Provident Fund Commissioner*,[30] by the impugned judgment, held that leave encashment dues should be included for the provident fund contribution. Hence this appeal to the apex court.

The Supreme Court after an analysis of section 2 (b) which defines the expression 'basic wages' and section 6 which lays down details about contributions and matters which may be provided for in the schemes, allowed the appeal and held that basic wage can never include amounts received for leave encashment. The test that needs to be applied in such cases is one of universality and not one based on different contingencies and uncertainties. Relying on the principles laid down by it in *Bridge & Roofs Co. Ltd.* v. *Union of India*[31] on a combined reading of sections 2(b) and 6, the court held that

28 2008 LLR 839.
29 2008 II LLJ 666.
30 (1995) 2 LLJ 279.
31 AIR 1963 SC 1480.

where the wage is universally, necessarily and ordinarily paid to all across the board, such emoluments are basic wages. However, where the payment is available to be specially paid to those who avail of the opportunity, it is not basic wages. By way of explication, the court held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern across the board. Therefore, it is excluded from the concept of basic wages. So also in many cases the employees do not take leave and encash it at the time of their retirement or the same may be encashed after their death. In such cases also they do not satisfy the test of universality and hence do not qualify to be counted as basic wages. Accordingly, the appeal was rightly allowed by the court.

**Determination of the amounts due from employer**

The appellant corporation[32] which is a company registered under the Companies Act, 1956 came into existence in 1974. In 1988 proceedings were initiated under section 7A of the Act for deposit of the provident fund and for determination of the amounts due from the appellant for the period 1982-88. The appellant contended that the Act was not applicable to it since it was not an 'industrial establishment' under section 2(e) of the Industrial Employment (Standing Orders) Act, 1946 or under section 25(k) of the Industrial Disputes Act, 1947. The regional provident fund commissioner, however, in 1999 took the view that the appellant was covered under section 1(4) of the Act as it had voluntarily submitted to its coverage and had been allotted a provident fund code number. He also decided on the amount due. In appeal, the employees' provident fund appellate tribunal while agreeing with the commissioner that the Act was applicable to the appellant, remitted the matter to him for redetermination of the amount due since the amount claimed pertained to the year 1982. The writ petition filed by the appellant corporation was dismissed by the high court, thus confirming the view taken by the tribunal.

In appeal, the Supreme Court while deploring the inaction on the part of the commissioner to initiate proceedings within a reasonable time, held that since the corporation had itself submitted that it was covered under the Act and also in view of the limited relief granted by the authorities below, no interference with the decision was called for. The court, however, held that the amounts due from the appellant should be determined only with respect to those employees who were identifiable and whose entitlement could be proved on the evidence and in the event of non-availability of evidence, no adverse inference was to be drawn against the appellant. With the above modification, the court dismissed the appeal. There could not have been a more just and reasonable decision than that was rendered by the apex court in the facts and circumstances of the instant case.

32 *Himachal Pradesh State Forest Corporation* v. *Regional Provident Fund Commissioner,* 2008 III LLJ 581.

**Exemption granted to infant establishments – effect of omission by amendment**

Section 16(1)(d) of the Act, as amended with effect from 1988 exempts from the applicability of the Act "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." By a subsequent amendment in 1997, clause (d) was deleted and the said exemption was taken away with effect from 22.9.1997. The appellant in the instant case[33] started its establishment on 1.9.1995. It availed of the exemption granted under section 16(1)(d) for a period of three years and started complying with the provisions of the Act from August 1998. The regional provident fund commissioner, however, demanded compliance with effect from 22.9.1997, the date from which the exemption clause was deleted from the statute. Writ petition filed by the appellant in the high court was dismissed. The crucial question to be decided by the apex court was, what was the effect of the amendment on the existing rights of the appellant?

According to the appellant it was entitled to the infancy protection from the applicability of the Act as amended in 1988 [per section 16(1)(d)] for the period of three years from the date it was established. Counsel for the respondent, however, contended that as clause (d) was deleted with effect from 22.9.1997 the Act was applicable to every establishment and no exemption or 'infancy period' was available from that date.

Allowing the appeal, the apex court held that it is a cardinal principle of interpretation of statutes that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. Unless there are words in the statute itself sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only.[34] Even otherwise, the court held, that in terms of section 6 (c) of the General Clauses Act, 1897, unless a different intention appears the repeal shall not affect any right, privilege or liability acquired, accrued or incurred under the repealed enactment. The effect of the amendment in the instant case also was the same.[35] The court, accordingly, correctly set aside the judgment of the high court as indefensible.

## IX WORKMEN'S COMPENSATION

**Workman missing for more than seven years – whether entitled to compensation under the Act**

The missing workman in the instant case[36] was employed as a driver. He reported for duty at about 9.30 in the morning on 9.10.1996. Since then he went missing and was not heard of either by his parents, or by his employer. There were two different versions about his disappearance. One version,

33 *Sangam Spinners* v. *Regional Provident Fund Commissioner*, 2008 I LLJ 661.

34 Reliance was placed on *Kesavan Madhava Menon* v. *State of Bombay*, AIR 1951 SC 128; *Delhi Cloth and General Mills Co. Ltd.* v. *CIT*, AIR 1927 PC 242; *Chairman, Railway Board* v. *C.R. Rangadhamaiah,* (1997) 6 SCC 623, etc.

35 *Supra* note 5 at 665.

36 *Oriental Insurance Co. Ltd*. v. *Sorumai Gogoi and Others*, (2008) 4 SCC 572.

supported by the owner of the vehicle, stating that some miscreants had taken away the vehicle along with the driver which could not be traced by the police; and the other that the workman had himself run away with the vehicle. The police, on the basis of the latter version, filed a charge sheet against the workman and the court declared him a proclaimed offender. The parents, respondents in the instant case, however, filed a compensation petition under the Workmen's Compensation Act, 1923 after seven years on the basis of his presumed death on duty. The commissioner for workmen's compensation, on an appraisal of the rival contentions, allowed the compensation claim on the ground that the workman was not heard alive for the last seven years and, therefore, presumption of death would arise under section 108 of the Evidence Act, 1872. The high court upheld this view of the commissioner. Hence this appeal by the insurance company to the apex court.

Reversing the decision taken by the compensation commissioner as upheld by the high court, the apex court held that if some miscreants had kidnapped the driver and took away the vehicle or murdered him, it could be considered as an offence. This alone would not give rise to a presumption that death had occurred out of or in the course of his employment, unless further evidence was produced. If the police version were correct, viz., that he had himself run away with the vehicle and had not been heard of for a period of seven years, especially when the court had declared him a proclaimed offender, the only presumption that could be taken under section 108 of the Evidence Act would be for the criminal court to drop the criminal case against him. It could not be invoked for the purpose of grant of compensation under section 3 of the 1923 Act without the conditions precedent, as laid down in the section, were fulfilled. Also, according to the court, it was difficult to rely upon a self-serving statement made by the claimants that they had not heard of their son for a period of seven years. Besides, since the rights of the parties were required to be determined as on the date of the incident, namely, 9.10.1996, it was difficult to hold that a subsequent event and that too, a presumption under section 108 of the Evidence Act, could be relied upon to award compensation to the claimants under the 1923 Act.

The appeal was, accordingly, allowed and since nobody appeared on behalf of the respondents, there was no order as to costs.

It is submitted that the court has been too technical in deciding this case. When the workman went missing from the place of employment as corroborated by the employer himself and was not heard of for the last seven years, it could have been presumed that he died out of and in the course of employment. Disbelieving the testimony of the parents of the deceased that he was not heard of being alive for the last seven years as 'self serving' and denying them the compensation granted by the commissioner as upheld by the high court, has not furthered the intention of the benevolent legislation under which they claimed compensation. The fact that the respondents who could not even afford to engage an advocate to plead their case against the mighty insurance company, was good enough reason for the court to grant

compensation as allowed by the authorities below. Be that as it may, the observation of the court that "since nobody appeared on behalf of the respondents there would be no order as to costs" is really disturbing. One wonders whether it is a *just judgment or just a judgment*?

**Pre-deposit of amount payable**

The apex court held in *EMM Tex Synthetics* v. *Om Parkash*[37] that production of proof of deposit of compensation amount would be substantial compliance under section 30 of the Act. The high court, therefore, should not have rejected the appeal of the employer filed against the compensation commissioner since he had deposited by a demand draft the entire amount of compensation as awarded along with a covering letter, especially when there is no prescribed format either in the Act or the rules regarding the mode of deposit.

**Relevant considerations for computing compensation**

*K. Janardhan* v. *United India Insurance Compary Ltd.*[38] is an appeal against the judgment of a single judge of the Karnataka High Court reducing the amount of compensation almost by half awarded by the compensation commissioner. The appellant claimant was a tanker driver who met with a serious accident while on duty necessitating amputation of his right leg up to the knee joint. The commissioner for workmen's compensation, taking the view that due to the amputation the claimant suffered a loss of 100 per cent of his earning capacity as a driver, awarded compensation of Rs. 2,49,576 along with interest of 12 per cent thereon from the date of the accident.

On appeal by the insurance company a single judge of the high court, accepting the plea of the counsel for the respondent, that as per the schedule to the Act, the loss of a leg on amputation amounted to only 60 per cent reduction in the earning capacity and the claimant suffered only 65 per cent disability as per the doctor's certificate, reduced proportionately from the compensation amount as awarded by the commissioner. In the Supreme Court on appeal, the counsel for the claimant submitted that being a tanker driver, the loss of his right leg *ipso facto* meant a total disablement as understood in terms of section 2(1)(l) of the Act and as such he was entitled to have his compensation computed on that basis. Reliance was placed on *Pratap Narain Singh Deo* v. *Srinivas Sabata*[39] wherein a carpenter who had suffered amputation of his left arm from the elbow, the apex court had held that it amounted to total disablement as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident.

37 2008 LLR 872.
38 (2008) 8 SCC 518.
39 (1976) 1 SCC 289.

Applying the same ratio to the facts of the instant case, the apex court held that the appellant also 'suffered 100 per cent disability and incapacity in earning his keep as a tanker driver.'[40] As an added reason the court also pointed out that a perusal of sections 8 and 9 of the Motor Vehicles Act, 1988 would show that the appellant would now be disqualified from even getting a driving licence. The court, accordingly, set aside the decision of the high court and restored that of the commissioner. This judgment has amply revealed the just and humane side of the court.

**Compensation can be claimed only if the person is/was a 'workman'**

Whether a casual employee who was appointed for a limited period to carry out repairing job in a building would be a 'workman' within the provisions of section 2(1)(n) of the Act was the main question to be decided by the apex court in *Om Parkash Batish* v. *Ranjit*.[41] The deceased Ram Lal was working on daily wages in the residence of the appellant whose house was situated beside an industrial establishment by name M/s Chandrika Textiles. By accident he came in contact with a high tension electrical wire passing over the roof of the textile mill and died of electric shock. In the claim petition before the compensation commissioner the appellant, opposing the claim pleaded that the accident took place not while he was working at his premises but when the deceased had climbed on to the roof of the textile mill. He also argued that the deceased could not be considered as 'workman' within the meaning of the provisions of the Act. The commissioner, after considering several issues, including whether the deceased was employed as workman by the appellant on the relevant date; and whether the claim petition was maintainable, held that the deceased was not a workman and that as the deceased had met with the accident at another place the claim petition was not maintainable.

On appeal to the high court under section 30 of the Act, the court proceeded on the basis that appreciation of evidence also would give rise to a substantial question of law, reappraised the entire evidence and awarded a certain sum as compensation and also imposed a penalty of 50 per cent of that amount to be paid by the appellant. The apex court on appeal, after an analysis of the definition of 'workman' under the Act as it stood on the date of the incident, observed that for a person to be a workman under the provisions of the Act, two conditions must be fulfilled : (a) he must not be employed as a casual workman; (b) his employment must be in connection with the employer's trade or business. In the instant case, although the deceased was employed for a limited period to carry out repair works in a residential house, it did not qualify him to be a 'workman' under the Act. The court added that, even otherwise, working in a residential house did not

40 *Supra* note 18 at 520.
41 (2008)12 SCC 212.

satisfy the requirements of law. The court, accordingly, rightly set aside the judgment of the high court with the observation that if the appellant had paid any amount to the respondents, the same shall not be recovered.

**Payment of interest on compensation from date of accident**

The Kerala High Court has held in *National Insurance Co. Ltd.* v. *Rekha*[42] that unlike the Motor Vehicles Act where the motor accident claims tribunal has discretion to award interest on the compensation awarded, under the Workmen's Compensation Act it is mandatory that the interest is to be paid on the compensation amount from the date it fell due for payment. The expression 'fell due' under the latter Act means that the compensation for an accident has to be calculated with reference to the provisions of the Act as on the date of accident, as compensation fell due on that date itself. Hence, the relevant date for determination of rights and liabilities of the parties concerned is the date of accident and not the date of adjudication of the claim.

**Employees in clerical or ministerial services not workmen under the Act**

The respondent's husband in *President/Secretary, Cheyyar Cooperative Primary Agricultural and Rural Development Bank Ltd., Tiruvannamalai Taluk* v. *R. Indirani*[43] was working as an attender in the appellant bank and was paid wages of Rs. 1500 per month. When he was out in connection with official work, he allegedly developed chest pain and died of heart attack. In the compensation claim petition filed by the respondent widow, the compensation commissioner, holding that even casual employees are to be deemed to be workman within the meaning of section 2(l)(n) of the Act and that death arose out of and in the course of employment, awarded compensation to the respondent.

On appeal before the Madras High Court the appellant bank raised three contentions : (a) the deceased was not a workman as defined under the Act and therefore the claim petition was not maintainable; (b) unless a person was employed in any category as defined in schedule II of the Act, (the appellant bank being an establishment covered by the Tamil Nadu Shops and Establishment Act where only clerical work is done), he could not be held to be an employee in such capacity as specified therein and hence the application for compensation could not be maintained; and (c) the deceased was already a heart patient and he died a natural death as a result of heart attack and therefore there was no causal connection between his employment and death.

The counsel for the respondent, on the other hand, submitted that the deceased was an office helper who used to collect loan amount for the appellant from agriculturists by going to the villages. Therefore, he must be

42 2008 LLR 5.
43 2008 LLR 500.

deemed to have been employed in connection with land or maintenance of live stock and must be construed to be a workman under section 2(1)(n) of the Act and brought under item XLI, schedule II.

The court held that a combined reading of the provisions of the definition of workman under section 2(1)(n) and the nature of trade and avocations enumerated in schedule II, would imply that only those persons who are engaged in manual and skilled activities in the listed trade and avocations can only be considered as workmen. Those who are employed in clerical or ministerial cadre in the factory/trade are not to be treated as workmen and are not covered by the provisions of the Act. The court further held that the persons who are working in clerical capacity, although associated with the trades and avocations mentioned in schedule II are excluded from the definitional ambit of workman.

Based on the above reasoning the court held that the deceased who was employed in the office of the appellant cooperative bank did not fall within the definitional ambit of section 2(1)(n) and schedule II of the Act and, therefore the compensation commissioner was not right in awarding compensation to the respondent. The court, accordingly allowed the appeal and set aside the order of the compensation commissioner.

## X CONCLUSION

From the foregoing analysis of the cases surveyed both of the apex court and the high courts it may be stated that by and large the courts have been liberal in interpreting the various provisions of the concerned legislation involved in the respective cases keeping in view their purpose. In most of the cases, it has been noted, that the courts have come to the rescue of the petitioners and granted them justice they sought for. In *K. Janardhan*[44] the apex court went out of the way to grant the workman the full compensation amount by observing that the disability suffered by the petitioner-appellant amounted to hundred per cent. However, it is doubtful, if the same can be said of its decision in *Sorumai Gogoi*[45] where the court by adopting a very narrow interpretation refused to grant compensation to the poor parents of a driver who went missing from the workplace and was not heard of thereafter.

44 *Supra* note 38.
45 *Supra* note 36.