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SOCIAL SECURITY LAW

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I INTRODUCTION

IN THE year 2009, there have been significant developments, both legislative and judicial, in the arena of social security. One of the most significant social security legislations, *viz.* the Workmen's Compensation Act, 1923 was amended by the Workmen's Compensation (Amendment) Act, 2009 in the light of the recommendations of the (second) National Commission on Labour and suggestions received from the related ministries/departments and state governments/union territory administrations. Another development in this year was the enactment of the Unorganised Worker's Social Security Act 2008, which came into force with effect from 16th May, 2009.

In the year 2009, a number of Supreme Court cases have been reported in various important areas of social security law. These cases relate to the Building and Other Construction Workers' Regulation of Employment and Conditions of Service Act, 1996, the Contract Labour (Regulation & Abolition) Act, 1970, the Employees' State Insurance Act, 1948, the Employees' Provident Funds and Miscellaneous Provisions Act 1952, the Payment of Gratuity Act, 1972, the Pension and the Workmen's Compensation Act 1923. The courts generally gave beneficial interpretation to the provisions of social security legislations. Indeed the apex court at times evolved new strategies to safeguard the interest of workers. It even issued directions to state governments to implement the welfare legislation.

This survey seeks to examine all of the important judgements of the Supreme Court falling under various social security legislations.

II CONTRACT LABOUR

In *International Airport Authority of India* v. *International Air Cargo Workers' Union*,[1] the court decided various issues of great relevance under the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA Act). The international airport authority of India (IAAI) (appellant) by an agreement

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1 (2009) 13 SCC 374.

granted a licence to M/s Airfreight (P) Ltd. (Airfreight), a private company, to be its ground handling agent in respect of export, import and transhipment cargo consignments It was required to pay a licence fee to IAAI, linked to the total revenue realized by it. Under the agreement, Airfreight had to engage the required number of workers for handling the cargo and be responsible for payment of wages to them. It was entitled to receive payment from the owners of the cargo for the work done.

In 1985, IAAI decided to take over the ground handling work and entrust the same to a new licensee by inviting competitive tenders. It accordingly terminated the license of Airfreight. The workers (loaders and packers) employed by Airfreight made a request to IAAI to provide them employment which gave them casual employment for some time purely as a temporary measure and on humanitarian grounds. Subsequently, the workers formed a cooperative society to which the contract of ground handling of cargo was given again as a temporary measure. On these facts, three questions arose for determination by the Supreme Court: (i) Was the agreement for cargo handling work between the contractor society and IAAI a sham and nominal and consequently, the workers engaged as contract labour for cargo handling work were the direct employees of IAAI? (ii) Was the status of loaders-cum-packers engaged in cargo handling work illegally changed from that of direct casual labour to contract labour in violation of section 9-A of the Industrial Disputes Act, 1947 (ID Act)? and (iii) Did the absence of a notification under section 10 the CLRA Act prohibiting the employment of contract labour in the process/operation of cargo handling work entitle the workers to claim absorption? While dealing with the first question, the court observed:[2]

> If the contract is found to be sham or nominal and merely a camouflage, then the so-called contract labour will have to be treated as direct employees of the principal employer and the industrial adjudicator should direct the principal employer to regularize their services in the establishment subject to such conditions as it may specify for that purpose. On the other hand, if the contract is found to be genuine and at the same time there is a prohibition notification under section 10(1) of the CLRA Act, in respect of the establishment, the principal employer intending to employ regular workmen for the process, operation or other work of the establishment in regard to which the prohibition notification has been issued, it shall give preference to the erstwhile contract labour if otherwise found suitable, if necessary, by giving relaxation of age.

2 *Id.* at 387.

It added:[3]

> But where there is no abolition of contract labour under Section 10 of the CLRA Act, but the contract labours contend that the contract between the principal employer and the contractor is sham and nominal, the remedy is purely under the ID Act. The principles in *Gujarat Electricity Board* continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct employees of the principal employer and the agreement is sham, normal and merely a camouflage, even when there is no order under Section 10(1) of the CLRA Act.

Referring to the powers of industrial tribunal to grant relief, the court ruled:[3a]

> If it finds the contract between the principal employer and the contractor to be sham, nominal and merely a camouflage to deny employment benefits to employees and that there is, in fact, a direct employment, by applying tests; who pays like salary; who has power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short, who has direction and control over the employee?

The aforesaid tests are applied to determine whether a person is an employee or an independent contractor. It may, however, not automatically be applicable in finding out whether the contract labour agreement is a sham, nominal or a mere camouflage.

Dealing with the second issue, the court ruled that the notice of change under section 9-A of the ID Act was required only if the employer wanted to change the service conditions of its workmen in regard to matters enumerated in the fourth schedule to the Act. Applying the principle in this case, the court held that the workers were specifically put on notice that their casual employment was purely *ad hoc* and, as a humanitarian measure, to be continued only till a contract labour contract was negotiated and finalized with the society. This was recorded by the court while dismissing the writ petition filed by the worker's union. The workers were not entitled to put forth a contention contrary to the proposal/scheme of IAAI recorded by the High Court. Thus, the question of violation of section 9-A of the ID Act did not arise.[4]

As to third issue, the court held that where no notification was issued under section 10 of the Act and it was not proved in the industrial

3 *Ibid*.
3a *Id.* at 375.
4 *Id.* at 387-88.

adjudication that the contract was sham/nominal and camouflage, the question of directing the principal employer to absorb or regularize the services of the contract labour did not arise. The court accordingly held that labourers were not entitled to any relief.

In *Panki Terminal Station* v. *Vidyut Mazdoor Sangthan*,[5] 118 workmen working in the establishment for several years raised an industrial dispute. The tribunal held that the action of the employer in not regularizing their services was justified and valid and that they were not entitled to any relief. Apart from this, the commissioner held that the workmen were working in the establishment for several years and refusal to pay wages similar to regular workmen had no legal justification. He, therefore, directed that the workmen in question should be paid wages as was being paid to unskilled regular workmen along with D.A. and other allowances on the principle of equal pay for equal work. On a writ petition, the High Court held that though the workmen had been registered under the provisions of the U.P. Contract Labour (Regulation and Abolition) Act, 1970, they were definitely working directly under the employer and that each one of them had worked for more than 240 days in a previous calendar year and the commissioner's order did not suffer from any infirmity. On appeal, the Supreme Court held that the commissioner failed to consider the difference between the labour contract and the job contract. "The labour contract is entered for supply of labour and the labour so supplied work under the directions of the employer whereas in the present case work was given like coal handling and cleaning to the contractor for a *lump sum* amount for a certain period. Neither the number of employees was fixed nor were they under the control of the appellants", ruled the court. Therefore, rule 25 had no application. Dealing with the decision of the High Court, the Supreme Court remarked:[5a]

> The High Court's judgment is a bundle of confusions. In the commissioner's order there is no discussion as to how the commissioner arrived at the conclusion about similarity of work. The commissioner ought to have considered on the basis of pleadings and materials placed by the parties. The commissioner was required to arrive at a conclusion that the workmen had been performing the same duties as are being performed by regular employees. The commissioner's order does not reflect that these aspects were considered.

In view of the above, the Supreme Court held that neither the labour court nor the High Court addressed the basic issues. In view of this, the impugned judgment of the labour court as affirmed by the High Court cannot be maintained and should be set aside. The court, therefore, remitted the

5 2009 LLR 347.
5a *Id*. at 280.

matter to the commissioner to decide the matter afresh.

III EMPLOYEES' PROVIDENT FUND

In *Maharashtra State Cooperative Bank* v. *Provident Fund Commissioner*,[6] the Supreme Court was called upon to decide an extremely important issue of whether the sugar bags pledged by sugar mills in favour of the bank as security for repayment of the loan could be attached and sold for realisation of the dues of provident funds payable by the employer under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act). In this case, two appeals were heard together. In the first appeal, Maharashtra State Coop. Bank Ltd. (bank) advanced a loan of Rs. 4,000 lakhs to Kannad Sahakari Sakhar Karkana Ltd. (the sugar mill). For securing repayment of the loan and interest, the management of the sugar mill executed necessary documents including deed of pledge. On failure of the sugar mills to pay the dues of provident funds, *etc*. the assistant provident fund commissioner (APFC) passed an order under section 7-A of the EPF Act whereby he held the sugar mill liable to pay Rs. 1,75,10,477 towards employees' provident fund contributions, EPF administrative charges, employees deposit linked insurance (EDLI) contributions and EDLI administrative charges and directed it to pay the amount with interest within ten days. On failure to comply with that order, the APFC and recovery officer issued warrant of attachment under section 8-B of the Act for recovery of Rs. 3,85,21,734 which was duly executed. The bank challenged the warrant of attachment and consequential action taken by the enforcement officer in a writ petition. During the pendency of the writ petition, the APFC filed a civil application for sale of the sugar bags. After taking note of the submission of the bank, the division bench of the High Court allowed the application and directed that the sugar bags attached by the bank as well as the APFC shall be jointly auctioned and the sale proceeds deposited with the registrar of the High Court. Further, the successful bidder was required to draw a demand draft or a banker's cheque in the name of the registrar general of the court. Accordingly, the sugar bags lying in the godowns of the sugar mill were auctioned for a sum of Rs. 9,24,08,254. Thereafter, the APFC filed an application for permission to withdraw a sum of Rs. 7,77,46,511 towards the dues of provident fund, *etc*. During the pendency of the litigation, the APFC passed another order whereby he attached the bank account and movable and immovable properties of the sugar mill along with 69,000 sugar bags. Thereupon, the sugar mill filed civil application with the prayer that attachment effected by the assistant commissioner may be vacated.

In the second appeal, the appellant advanced Rs. 2,000 lakhs to Gangapur Sahakari Sakhar Karkhana Ltd. during crushing season 2002-03. For securing

6 (2009) 10 SCC 123.

the payment of the loan, the management of the sugar mill executed three deeds and pledged the sugar bags lying in the godowns. Simultaneously, three promissory notes were executed for payment of the amounts specified therein with interest at the rate of 13.5 per cent per annum with half-yearly rests. The terms and conditions of these deeds were similar to the deed of pledge executed by the management of Kannad Sahakri Sakhar Karkhana Ltd. On failure of the employer to pay the dues of provident fund, *etc*., the competent authority passed orders under sections 7-A, 7-Q and 14-B of the EPF Act and held it liable to pay total sum of Rs. 9,11,72,892 towards the dues of provident fund, interest and damages. After some time, the APFC issued a warrant of attachment which was duly executed by the enforcement officer. The appellant challenged the warrant of attachment in a writ petition which was dismissed by the single judge of the High Court. The letters patent appeal preferred by the appellant bank was transferred to the principal seat of the Bombay High Court at Mumbai. During the pendency of the letters patent appeal, the APFC filed civil application for sale of the sugar bags lying in the godown of the employer. The High Court granted the prayer of the assistant commissioner and directed that the sale amount be deposited with the registrar general. Thereafter, the assistant commissioner filed civil application for permission to withdraw the amount lying with the registrar general of the High Court. The division bench of the High Court held that "in view of the fact that this court has taken a consistent view that the amounts recovered from sugar factories by disposing of sugar against recovery made by cooperative banks for the secured creditors can be appropriated towards payment of provident fund dues, we find no reason to take a different stand, and allow the application." Against this order, a special leave to appeal was filed before the Supreme Court. The court while dealing with the issue mentioned above considered the preamble and directive principles of state policy. It also referred to the object, scheme and relevant provisions of the EPF Act and several of its earlier decisions and observed:[7]

> Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society *i.e.* the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution.

It then considered the question whether the provision contained in section 11(2) of the EPF Act operated against other debts like mortgage, pledge, *etc.* and observed:[8]

7 *Id.* at 141.
8 *Id*. at 142-143.

> The priority given to the dues of provident fund, *etc.* in Section 11 is not hedged with any limitation or condition. Rather, a bare reading of the section makes it clear that the amount due is required to be paid in priority to all other debts. Any doubt on the width and scope of Section 11 qua other debts is removed by the use of expression "all other debts" in both the sub-sections. This would mean that the priority clause enshrined in Section 11 will operate against statutory as well as non-statutory and secured as well as unsecured debts including a mortgage or pledge. Sub section (2) was designedly inserted in the Act for ensuring that the provident fund dues of the workers are not defeated by prior claims of secured or unsecured creditors.

The court also examined the nature and scope of section 11(2) and also the issue whether the sugar bags pledged with the appellant bank constitute assets of the establishment within the meaning of section 11(2) of the Act and observed:[9]

> (I)t is apposite to mention that Section 11 is declaratory in nature. Sub-section (2) thereof declares that any amount due from an employer shall be deemed to be first charge on the assets of the establishment and shall be paid in priority to all other debts. For recovery of the amount due from an employer which is treated as arrear of land revenue, the Recovery Officer or any other authorised officer has to take recourse to the provisions contained in Section 8 read with sections 8-B and 8-F. The recovery can be effected by attachment or sale of the movable or immovable property of the establishment or, as the case may be, the employer, or by arrest of the employer and his detention in prison or by appointing a Receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer or by taking action in the manner laid down in the Third Schedule to the Income Tax Act, 1961.

The court rejected the contention of the appellant bank that the interest payable in terms of section 7-Q and damages imposed under section 14-B of the EPF Act cannot be treated as first charge on the assets of the establishment payable in priority to all other debts within the meaning of section 11(2). Dismissing the appeal, it observed:[10]

> The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the

9 *Id.* at 158.
10 *Id.* at 159-60.

object of the Act and other provisions contained therein including sub-section (1) of section 11 and Sections 7-A, 7-Q, 14-B, and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

IV EMPLOYEES' STATE INSURANCE

Scope and applicability of the ESI Act

In *M/s. Hotel New Nalanda* v. *Regional Director, E.S.I. Corporation,*[11] the officers of the Employees' State Insurance Corporation (ESI corporation), on inspection, found that there were 15 persons working as employees in the M/s. Hotel New Nalanda (appellant). They also found a refrigerator and an electric grinder there. In view of this, the officers opined that the appellant establishment was a factory[10a] under section 2(12) of the Employees' State Insurance Act, 1948 (ESI Act) and came within the purview of the Act. They accordingly asked the managing director to comply with the provisions of the Act. Against this order, the hotel filed an application under section 75 read with section 77 of the Act before the employees' state insurance court (ESIC), seeking a declaration that the establishment was not covered by the ESI Act and, therefore, it was not bound to follow the provisions of the ESI Act. The ESIC found that 14 persons were employed in the establishment; the 15th person was the managing partner and he could not be counted among the employees in the establishment. The ESIC further held there was no satisfactory evidence that there was a refrigerator and a grinder being used in any manufacturing process being carried on in the establishment. On the basis of the second finding, the ESIC held that the establishment was not a factory within the meaning of section 2(12) of the ESI Act and therefore not covered under the Act. Against this order, the

10a Section 2(12) of the ESI Act defines 'factory' as follows:-
Factory means any premises including the precincts thereof –
(a) Whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or
(b) Whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed.

11 (2009) LLR 950 (SC)

regional director, ESI Corporation preferred an appeal before the High Court which reversed the order of ESI court. The High Court observed that the presence of a grinder and a refrigerator in the establishment was sufficient to hold that there was use of power in the manufacturing process. The High Court accordingly allowed the appeal. Against this order, the appellant filed an appeal before the Supreme Court. A question arose whether, having regard to the materials on record, the finding recorded by the ESI court can be said to be perverse and fit to be interfered with in appeal under section 82 (2) of the ESI Act? Allowing the appeal and setting aside the judgment of the High Court, the Supreme Court observed:[11a]

> For holding an establishment to be a 'factory' within the meaning of section 2(12) of the Act it must first be established that some work or process is carried on in any part of the establishment that amounts to 'manufacturing process' as defined under section 2(k) of the Factories Act, 1948. In case the number of persons employed in the establishment is less than twenty but more than ten then it must further be established that the manufacturing process in the establishment is being carried on with the aid of power. Further, the use of power in the manufacturing process should be direct and proximate. The expression 'manufacturing process being carried on with the aid of power' in section 2(12) of the Act does not mean a very indirect application of power such as use of electric bulbs for providing light in the work-area. Unless the links are established, that is to say, it is shown that some process or work is carried on in the establishment which qualifies as 'manufacturing process; within the meaning of section 2(k) of the Factories Act and the manufacturing process is carried on with the aid of power, the mere presence of a refrigerator and a grinder there, even though connected to the main power line may not necessarily lead to the inference that the establishment is a factory as defined under section 2(12) of the Act.

In *Qazi Noorul, H.H.H. Petrol Pump* v. *Deputy Director, Employee's State Insurance Corporation,*[12] the appellant who was running a petrol pump filed a writ petition in the High Court of Allahabad challenging an order issued by the deputy director, Employees' State Insurance Corporation (ESIC), Regional Office, Kanpur directing the appellant to make contribution under the ESI Ac) from August 1993 to May 2000 and interest on the aforesaid amount, failing which recovery shall be issued under sections 45-C and 45-G of the Act. The High Court dismissed the petition. Thereupon, the appellant filed an appeal before the Supreme Court. A question arose

11a *Hotel New Nalanda* v. *Regional Director, Employes State Insurance Corpn.* (2009) 14 SCC 558 at 563

12 (2009) 15 SCC 30.

whether the appellant was covered under the Employees' State Insurance Act, 1948 (ESI Act) which is applicable to all factories? The court referred to section 2(12) and observed that the expressions "manufacturing process" as well as "power" used in the Act had been given the same meaning under section 2 (14-AA) and 2 (15-C) of the Factories Act. It also reproduced the provisions of sub-clause (ii) of section 2 (k) of the Factories Act, 1948 which states that pumping oil was a manufacturing process and observed:

> Admittedly, the appellant does the work of pumping oil. When we go to a petrol pump for getting petrol or diesel, the petrol or diesel is in a tank and it does not on its own flow from the tank to the pipe and thereafter into the vehicle, but only by means of a pump by using power.

It rejected the contention of the appellant that one should see the object and intention of the statute and observed:[13]

> It is well settled that once the statute is clear, the literal rule of interpretation applies, and there is no need to go into the object and intention of the Statute (vide article entitled "*A Note on Interpretation of Statutes*" by Justice Markandey Katju, published in the Journal Section of AIR 2007 SC p. 22). In the present case, Section 2 (14-AA) of the Act states that "manufacturing process" shall have the meaning assigned to it in the Factories Act, 1948. In the Factories Act, 1948, Section 2(k) of the Act includes pumping oil as a manufacturing process.

The court accordingly held that the ESI Act applied to the appellant and the respondent was right in issuing notice to it for making contribution and interest thereon for the period in question.

In *Bangalore Turf Club Limited* v. *E.S.I. Corporation*,[14] a question arose whether the appellant (Turf Club) was covered under ESI Act. Answering the question, the Supreme Court observed that under section 1(5) of the ESI Act, all establishments were not automatically covered; it covered only such establishments as mentioned in the notification issued by the appropriate government under that section. This provision was not like section 1(4) which automatically covered all factories. Referring to the notification issued by the government, the court observed that the notifications issued under section 1(5) in the present cases used the word 'shop'. The court then proceeded to determine whether the word 'shop' included clubs like Turf Club and observed:

13 *Id.* at 32.
14 2009 LLR 826 (S.C.).

> The word 'shop' has not been defined either in the ESI Act nor in the notification issued by the appropriate government under section 1(5). Hence, in our opinion, the meaning of 'shop' will be that used in common parlance. In common parlance when we go for shopping to a market, we do not mean going to a racing club. Hence, *prima facie*, we are of the opinion that the appellant-club is not a shop within the meaning of the Act or the notification issued by the appropriate government.

The court then examined its earlier decision in *Employees State Insurance Corporation* v. *Hyderabad Race Club*[15] and felt that the said decision required reconsideration. In common parlance, a club was not a shop. It observed that "the error in the judgment is that it has been presumed therein that all establishments are covered by the Act. That is not correct. Only such establishments are covered as are notified under section 1(5) in the official gazette." The court rejected the contention that the judgment in *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa*[16] would be applicable and opined that reliance on the aforesaid decision was wholly misplaced. It added:

> The definition of 'industry' in the Industrial Disputes Act is very wide as interpreted in the aforesaid decision. We cannot apply the judgment given under a different Act to a case which is covered by the ESI Act. Under various labour laws different definitions have been given to the words 'industry' or 'factory' *etc.* and we cannot apply the definition in one Act to that in another Act (unless the statute specifically says so). It is only where the language used in the definition is in *pari materia* that this may be possible.

In view of the above, the court observed that its earlier decision in *Hyderabad Race Club* should be reconsidered by a larger Bench. In the meantime, the ESI Corporation was directed not to raise any demand against the appellant-club.

In *Bombay Anand Bhavan* v. *ESI Corporation*,[17] the Supreme Court was called upon to decide whether the ESI Act was applicable to restaurants (registered under the Shops and Commercial Establishments Act) engaged in making and selling coffee, tea and other beverages and also sweets and savouries employing 10 or more persons by using (i) power for the coffee roasting machine and bottle cooler and (ii) liquified petroleum gas (LPG) for the purposes of cooking. In order to decide the issue, the court referred to the object and purpose of the ESI Act and observed that it was a beneficial

15 (2004) 6 SCC 191.
16 1978 (36) FLR 266: 1978 (2) SCC 213.
17 (2009) 9 SCC 61.

legislation the main purpose of which, as the preamble suggests, was to provide for certain benefits to employees of a factory in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. Further, it was a social security legislation and the canons of interpreting a social legislation were different from the canons of interpretation of criminal or taxation law. The courts must not countenance any subterfuge which would defeat the provisions of social legislation and the courts must, if necessary, strain the language of the Act in order to achieve the purpose which the legislature had in placing the legislation on the statute book. The Act, therefore, must receive a liberal construction so as to promote its objects. The court then laid down the following conditions which must be fulfilled in order to apply the ESI Act:

(i) Manufacturing process was being carried out in the establishment;
(ii) There was power being used to aid the manufacturing process being carried out;
(iii) 10 or more workers were working in the establishment any day in the preceding twelve months, if power was being used to aid the manufacturing process; or
(iv) 20 or more workers were working in the establishment any day in the preceding twelve months, if power was not being used to aid the manufacturing process.

In view of above, the court examined whether any manufacturing process was carried on in the establishment of the appellants. For the purpose, the court referred to the definition of "manufacturing process" under section 2(k) of the Factories Act, 1948 which reads thus:

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or
(ii) pumping oil, water, sewage or any other substance; or
(iii) generating, transforming or transmitting power; or
(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or
(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
(vi) preserving or storing any article in cold storage.

The court also referred the definition of "power" which was in two parts. Firstly, it was electrical energy and included any other form of energy which was mechanically transmitted. The second part of the definition provided for exclusion from the definition of power, *i.e.* it does not include power generated by human or animal energy. In view of this, the court held that the definition was wide enough to include all forms of energy which was

mechanically transmitted. The court then examined whether LPG or LP Gas was covered under "power" and observed:

> In case of LPG stored in a cylinder the mechanism of transmissions is essentially the same as the gas travels from the cylinder where it is stored to the gas cooking stove. While transmission of electricity involves a switch, transmission of LPG involves a value mechanism or a regulator to ensure smooth flow. Hence, LPG is a source of energy which is mechanically transmitted by way of the tube attached to the machinery.

Accordingly, the court held that the use of LPG satisfied the definition of power as it was mechanically transmitted and not generated by human or animal agency. Since the establishments of the appellants involved a manufacturing process with the aid of LPG, which could now be termed as power, the establishments of the appellants could be termed as factory, and therefore, the ESI Act applied to it. The court also held that the establishment using power for the coffee-roasting machine and the bottle cooler of the appellant's restaurant was covered under the ESI Act.

Effect of bar created by section 53

In *National Insurance Co.* v. *Hamida Khatton,*[18] the Supreme Court examined the effect of the bar created by section 53 of the ESI Act. In this case, one Abdul Hamid (the deceased) was travelling by matador from Saharanpur to Sarsawa. A truck belonging to the Border Security Force (BSF) dashed against the said vehicle resulting in serious injuries on the body of the deceased. A claim petition was filed before the motor accidents claims tribunal, Saharanpur (MACT). The MACT held that the accident occurred due to rash and negligent driving of the driver of the truck and, therefore, awarded Rs.1,20,000/- as compensation. In appeal, the appellant contended that the application filed by the respondent claimant under section 173 of the Motor Vehicles Act, 1988 was not maintainable in view of section 53 of the ESI Act. The High Court rejected the contention on the ground that no such plea was taken specifically in the written statement before MACT. It also held that as regards applicability of section 53 of the Act, certain factual aspects were to be considered. The appeal was, therefore, dismissed. On further appeal before the Supreme Court, while considering the effect of bar created under section 53 of ESI Act, the court observed:[19]

> Bar is against receiving or recovering any compensation or damages under the Workmen's Compensation Act or any other law for the time being in force or otherwise in respect of an employment injury.

18 (2009) 13 SCC 361.
19 *Id.* at 366.

> The bar is absolute as can be seen from the use of the words shall not be entitled to receive or recover, 'whether from the employer of the insured person or from any other person', 'any compensation or damages' 'under the Workmen's Compensation Act, 1923, or any other law for the time being in force or otherwise'. The words employed by the legislature are clear and unequivocal. When such a bar is created in clear and express terms it would neither be permissible nor proper to infer a different intention by referring to the previous history of the legislation. That would amount to bypassing the bar and defeating the object of the provision. In view of the clear language of the section we find no justification in interpreting or construing it as not taking away the right of the workman who is an insured person and an employee under the ESI Act to claim compensation under the Workmen's Compensation Act.

The court accordingly held that in view of the bar created by section 53, the application for compensation filed by the appellant under the Workmen's Compensation Act was not maintainable. The court also held that the scheme of the Act and the rules and the regulations clearly speltout that the insurance covered under the Act was distinct and different from the contract of insurance in general. In view of this, the court held that the High Court was not justified in holding otherwise. The appeal was accordingly allowed.

Impleading workers / trade union as necessary parties

Employees' State Insurance Corporation v. *Bhakra Beas Management Board*[20] has brought out new concept of impleading workers and/or trade union as necessary parties in a petition filed under section 75 of the (ESI Act) before Employees' State Insurance Court (ESI court) or High Court whenever a notice was issued by Employees' State Insurance Corporation (ESIC) under section 45-A of ESI Act. The ESIC issued a notice under section 45-A of the ESI Act for making employer's contribution towards the employees' state insurance. The Bhakra beas management board (board) challenged the said notice before the ESIC. It appears that neither the concerned workers of the board nor any one of their representatives was made party in the petition under section 75 of the Act before the ESI Court or before the High Court. The ESI court decided in favour of the appellant and directed the board to pay its contribution towards the employees' insurance. The board filed an appeal against the direction under section 82 of the ESI Act before the High Court. The High Court allowed the appeal by holding that the sub-stations of board were not factories within the meaning of the ESI Act. The Supreme Court on further appeal referred to the provision of section 75(1)(a) of the ESI Act which states that if any question or dispute arose as to (i) whether any person was an employee of the

20 (2009) 10 SCC 671.

employer concerned; or (ii) whether the employer was liable to pay the employer's contribution towards the said persons' insurance, the same had to be decided by the ESI Court. In view of this, the person concerned had to be heard before a determination was made against him that he was not an employee of the employer concerned. The court also referred to the rules of natural justice which required that if any adverse order was made against any party, he/she must be heard. The court added that since the determination by the ESI Court was a quasi-judicial determination, natural justice required that any party which may be adversely affected or suffer civil consequences by such determination, must be heard before passing any order by the authority/court. After laying down these principles, the court ruled:[20a]

> [W]herever any petition is filed by an employer under Section 75 of the Act, the employer has not only to implead ESIC but has also to implead at least some of the workers concerned (in a representative capacity if there are a large number of workers) or the trade union representing the said workers. If that is not done, and a decision is given in favour of the employer, the same will be in violation of the rules of natural justice.

The court added:[20b]

> The Act has been enacted for the benefit of the workers to give them medical benefits, which have been mentioned in Section 46 of the Act. Hence, the principal beneficiary of the Act is the workmen and not ESI Corporation. ESI Corporation is only the agency to implement and carry out the project of the Act and it has nothing to lose if the decision of the Employees' Insurance Court is given in favour of the employer. It is only the workmen who have to lose if a decision is given in favour of the employer. Hence, the workmen (or at least some of them in a representative capacity, or their trade union) have to be necessarily made a party/ parties because the Act is a labour legislation made for the benefit of the workmen.

The court accordingly set aside the impugned judgment and order of the High Court as well as that of the ESI Court and remanded the matter to the ESI Court for deciding the same after impleading the workers of the board or their union in a representative capacity. Since the case pertained to the year 1987, it requested the ESI Court to decide the same expeditiously.

Again, in *Fertilizer & Chemical Travancore Ltd.* v. *ESI Corpn.*,[21] the appellant, in its petition before the ESI Court, only impleaded the ESI

20a *Id.* at 673.
20b *Id.* at 673-74.
21 (2009) 9 SCC 485 : (2009) 2 SCC (L&S) 693.

Corporation and the district collector of Alleppey as the respondents but did not implead even a single workman as a respondent. The Supreme Court held that labour statutes were meant for the benefit of the workmen. Ordinarily, in all cases under labour statutes, the workmen, or at least some of them in a representative capacity, or the trade union representing the workmen concerned, must be made a party.

V PAYMENT OF GRATUITY

Interest on delayed payment of gratuity

In *Kerala State Cashew Development Corporation Limited* v. *N. Asokan*,[22] the respondent, was not paid gratuity by the Kerala State Cashew Development Corporation Limited even eight years after his retirement. The respondent filed a writ petition in the High Court of Kerala. The single judge of the Kerala High Court directed the corporation to pay gratuity with interest to the respondent. The High Court also dismissed the appeal. Aggrieved by this order, the corporation filed an appeal by special leave before the Supreme Court. A question arose whether the interest on delayed payment of gratuity can be directed to be paid by the corporation to the respondent in compliance with section 7(3-A) of the Payment of Gratuity Act, 1972. The Supreme Court referred to the provisions section 7(3-A) of the Act which reads as under:[22a]

> If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:
>
> Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

While interpreting the aforesaid provisions, the court observed:[22b]

> [I]t is absolutely clear that if any amount of gratuity, which is payable under section 7 is not paid by the employer within the period

22 (2009) 16 SCC 758.
22a *Id.* at 759.
22b *Ibid.*

> specified in sub-section (3), the employer is liable to pay interest from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, but on those delayed payments, where the employer has obtained permission in writing from the controlling authority for delayed payment, in that case, no such interest shall be payable to the employee.

Applying the above principle in the present case, the court held that as permission required was obtained by the employer in writing from the controlling authority, section 7 (3-A) and its terms were squarely applicable in the facts of the case. The court accordingly upheld the decision of the High Court.

Constitutional validity of gratuity (service compensation under the A.P. Shops and Establishments Act, 1988)

In *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union* v. *Srinivasa Resorts Limited*,[23] the court decided the question relating to the validity of section 47(3) & (4) of A.P. Shops and Establishments Act, 1988 (AP Shop Act) which is said to be in direct conflict with the Payment of Gratuity Act, 1972 (PG Act). Here, the assistant labour officer, on a visit to the hotel at the instance of the trade union, asked them to furnish final settlement statement of the employees who had left the service of the hotel which was not complied. Thereupon, the assistant labour officer called upon the respondent company to show cause as to why penal action should not be taken against them for failure to furnish the required documents under section 16(3). Against this order, the hotel (which was registered under the AP Shop Act) filed a writ petition before the High Court challenging the constitutional validity of the provisions of section 47(3) and 47(4) of the AP Shops Act on the ground that they were *ex facie* unreasonable since the service compensation was now payable under the same even to the employees who have resigned or voluntarily left service after attaining the age of 60 years though they had not put in long and continuous service as required under the PG Act. The High Court on comparison of the provision of the PG Act and the AP Shop Act, found that they were almost identical and the payment of gratuity was replaced by the introduction of the concept of service compensation. The only difference was to the extent of the minimum requirement period of six months to one year. It also observed that the service compensation was nothing but a gratuity, which was payable to the employee as a gift or reward for rendering long and continuous service. It accordingly held that limiting this period only

23 (2009) 5 SCC 342.

to one year was unreasonable and discriminatory. As regards the scheme of payment of gratuity as required by the PG Act, the court observed that section 4(1)(b) had been held to be a reasonable classification within the meaning of Article 19(1)(g) of the Constitution of India. The court pointed out that merely because the state legislation had received the Presidential assent that by itself could not save the state legislation if it was otherwise discriminatory. Thus, the High Court specifically found the two provisions, *viz.* sections 47(3) and 47(4) to be unreasonable and contrary to the basic principles of service jurisprudence. The High Court therefore allowed the writ petition. Aggrieved by this decision, the hotel filed an appeal by special leave before the Supreme Court. It was contended by the appellant that (i) the impugned sections 47(3) and 47(4) were constitutionally valid and sufferred from no infirmity; and (ii) the legislation could not be struck down on the ground of mere hardship and a comparison could not be made between two legislations by two different legislatures while deciding upon the constitutionality of the aforementioned provisions. These contentions were refuted by the respondent. Dealing with the rival contentions, the court observed that (i) the impugned provision was of compulsory nature; (ii) there was total absence of any guidelines; and (iii) it was not understood as to how and why in all employments one year or even lesser time had been provided and what was the rationale for the same. The court held that (i) it cannot be said that in all the circumstances, it was permissible for the legislatures to prescribe a lesser period; and (ii) section 47(3), which did not provide for a reasonable period for the entitlement to get the gratuity was therefore unreasonable. The court added that section 40(3) was comparable to sections 47(3) and 47(4), as the last part of the former section was identical with the wording in section 47(4). The court added that "the only difference which we find is that instead of the word 'gratuity', the terminology of 'service compensation' is substituted." The court accordingly held that both the central Act (PG Act) and the impugned state Act (AP Shop Act) operated in the same field inasmuch as the "service compensation" was nothing but "gratuity" though called by a different name. In view of this, the court held that "unless it was shown that while obtaining the Presidential assent for the State Act, the conflict between the two Acts was specifically brought to the notice of the President, before obtaining the same, the State could not have used the escape route provided by article 254(2) of the Constitution."

VI PENSION

In *Dakshin Haryana Bijli Vitran Nigam* v. *Bachan Singh*,[24] the court decided an important issue of entitlement of pensionary benefit scheme for workers in work-charged category on non-exercise of option within prescribed time-limit. The respondent joined the services of the appellants

24 (2009) 14 SCC 793.

as a laboratory attendant in work-charged capacity on 16.5.1963 and continued to perform his duties on work-charged basis on different posts until he was regularized as head mistry w.e.f. 14.10.1981. He was a member of the employees' provident fund scheme (EPF scheme), during the period he remained a work-charged employee. The respondent had retired from the service on attaining the age of superannuation on 28.2.2001. The appellants computed the respondent's pensionary benefits by taking into account only the services rendered by him on regular basis and denied benefit of the services rendered by him from 16.5.1963 to 13.10.1981 on work-charged basis. The appellants issued instructions on 6.8.1993 for the grant of benefit of work-charged service towards pensionary benefits wherein the work-charged employees were given three months' time to submit an option to the appellants. The appellants issued another circular on 9.8.1994 allowing the said employees who could not exercise their option in response to the circular dated 6.8.1993 to opt for pensionary benefits. The only condition for opting the pensionary benefits was that the employee concerned would refund the amount of employer's share received by him/her under the EPF scheme along with interest accrued thereon. The respondent had not exercised the option but pleaded that he had no knowledge about the aforesaid instructions issued by the appellants nor had the same been noted from him and as such, he could not exercise his option for grant of pensionary benefits within the prescribed time-limit. The respondent submitted that immediately after acquiring the knowledge of the circular, he exercised his option for being governed under the pension scheme on 20.12.1994. The respondent submitted his option for pension under the EPF scheme. The appellants did not give any response and after retirement of the respondent calculated his pension and other retiral benefits with effect from the date of his regularization, *i.e*. 14.10.1981. The respondent issued reminders but did not receive any response from the appellants. Since no response was received by him, he filed a writ petition before the Punjab and Haryana High Court which held that the appellants had failed to produce any record showing that the instructions dated 6.8.1993 and 9.8.1994 were actually got noted in writing by the respondent. The court further observed that in the absence of any such material, the only inference which might be drawn was that the respondent had no knowledge about the options called by the appellants *vide* circulars dated 6.8.1993 and 9.8.1994. The court also observed that it was unreasonable to deny pensionary benefits to the respondent despite the said circulars issued by the appellants. In the appeals filed by the appellant, the Supreme Court observed:[24a]

> In view of the law as has been articulated in a large number of cases where the Supreme Court has observed that any discriminatory

24a *Id*. at 795.

> action on the part of the Government would be liable to be struck down. Hence, it would be totally unreasonable and irrational to deny the respondent the pensionary benefits under the scheme particularly when the appellants have failed to produce any record showing that the instructions dated 6.8.1993 and 9.8.1994 were actually got noted in writing by the respondent. In the absence of any such material it can well be inferred that the respondent had no knowledge about the options called by the appellants.

The court accordingly held the view taken by the High Court as rational, just and fair which called for no interference. It is submitted that the court took a pragmatic approach to deal with the case where management denied pensionery benefit merely on the ground that the workers had not exercised option within the prescribed period.

VII WORKMEN'S COMPENSATION

In *Malikarjun G. Hiremath* v. *Branch Manager, the Oriental Insurance Co. Ltd.*,[25] the claimant was employed as a driver of the appellant (the owner of vehicle who was insured). On the date of the accident, the driver (deceased) drove the vehicle from Siraguppa to Gurugunta Amreshwara temple along with some passengers on the direction of the owner of insured vehicle. When the vehicle reached the destination, the deceased went to the pond and while taking bath at a pit, slipped, fell down and drowned. The wife of deceased filed a claim petition under the Workmen's Compensation Act, 1923 (WC Act) taking the stand that the death of the deceased had occurred during and in course of employment under the appellant who was insured and the risk of driver was covered by the insurance. The commissioner, Bellary allowed the petition and determined the compensation payable at Rs.2,20,046 with 12 per cent interest. It was also held that the insurer was liable to pay the compensation. Against this order, the insurer filed an appeal before the High Court. It was contended by the insurer and the appellant that there was no connection between the accident causing death of the workman and the vehicle and, therefore, neither the insurer nor the insured had any liability to pay any compensation. The High Court allowed the appeal filed by the insurer by holding that there was no causal connection and, therefore, the insurance company was not liable. The High Court accordingly granted liberty to recover the compensation awarded from the appellant. Aggrieved by this order, the appellant filed a special leave petition before the Supreme Court. It was contended by the appellant that death had not been occasioned during and in course of employment. It was also contended that the approach of the High Court was clearly erroneous. After having held that there was no

25 (2009) 13 SCC 405.

causal connection between the death and the employment of the workman and after exonerating the insurer, the High Court should not have directed the claimant to recover the amount from the present appellant. In order to determine the liability of the appellant, the court referred to the provisions of section 3(1)[26] of the WC Act and observed:[27]

> Under Section 3(1) it has to be established that there was some casual connection between the death of the workman and his employment. If the workman dies a natural death because of the disease from which he was suffering or while suffering from a particular disease he dies of that disease as a result of wear and tear of the employment, no liability would be fixed upon the employer. But if the employment is a contributory cause or has accelerated the death, or if the death was due not only to the disease but also the disease coupled with the employment, then it can be said that the death arose out of the employment and the employer would be liable.

It also referred to a large number of English and American decisions, some of which had been noted in *ESI Corpn.* v. *Francis De Costa*,[28] in regard to essential ingredients for such findings and the tests attracting the provisions of Section 3 of the Act. The principles are:

(1) There must be a causal connection between the injury and the accident and the work done in the course of employment.
(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.
(3) If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case.

26 Section 3(1) of the Act which is relevant for the purpose of this case reads as follows-
If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:Provided that the employer shall not be so liable - (a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;
(b) in respect of any injury, not resulting in death or permanent total disablement, caused by an accident which is directly attributable to –
(i) the workman having been at the time thereof under the influence of drink or drugs, or
(ii) the willful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or (iii) the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen."

27 *Supra* note 27 at 408.

28 (1996) 6 SCC 1.

The court then observed that an accident may lead to death but that accident had taken place must be proved. Only because death had taken place in the course of employment, will not amount to accident. In other words, death must arise out of an accident. There is no presumption that an accident had occurred. It then held that in a case of this nature, to prove that accident had taken place, the following factors should be taken into account:

(i) stress and strain arising during the course of employment,
(ii) nature of employment,
(iii) injury aggravated due to stress and strain.

In view of above, the court held that neither the insurer nor the insured were liable.

In *Oriental Insurance Co. Ltd.* v. *Mohd. Nasir*,[29] the respondent no.1 in the first appeal was a truck driver. He met with an accident wherein he suffered an injury in his right leg, besides others. He filed an application for award of compensation before the commissioner for workmen's compensation, claiming a sum of Rs.1,50,000 with interest. The commissioner held that although the workmen had suffered 15 per cent disability, the loss of his earning capacity was 100 per cent. After taking into account his age (which was about 35 years) and his salary (which was Rs. 320 per month), it awarded a sum of Rs.3,78,355.20 and interest at the rate of 12 per cent *per annum* from the date of accident till payment. The High Court dismissed the appeal in *limine*.

In the second appeal, respondent no. 1 was a cleaner in a truck which collided with a tanker resulting in the fracture of his right thigh. Respondent 1 was hospitalised for about 20 days. He filed claim petition under the WC Act for a sum of Rs.3,00,000. The commissioner awarded a sum of Rs.93,302 on the basis that he was aged 22 years and his income was Rs. 2,003 per month. Although the doctor who had treated him, in his deposition, stated that the disability of the respondent was between 20 per cent to 25 per cent, the disability was determined at 35per cent. The High Court determined his loss of earning capacity at 60 per cent and on the said premise, enhanced the compensation to Rs.2,65,865.37.

In the third appeal, the first respondent was hired as a casual labour for loading and uploading. At the time of accident, he was working in a truck which collided with a stationary lorry as a result which he sustained injuries. He filed a claim petition before the commissioner under WC Act claiming a sum of Rs.1,50,000. The commissioner assessed his disability at 40 per cent. However, the loss of earning capacity was taken to be 80 per cent. An amount of Rs.2,17,169.83 was awarded as compensation. An appeal filed by the insurance company was dismissed by the High Court.

29 (2009) 6 SCC 280.In this case, five appeals were heard together by the Supreme Court as they involved a common question of law.

In the fourth appeal, respondent nos. 1 and 2 were engaged for loading and uploading broken rice on casual basis in a lorry which collided with a stationary lorry resulting in injuries to respondent no. 1. He filed an application before the commissioner claiming an amount of Rs.3,00,000 as compensation. His disability was assessed at 40 per cent but loss of earning capacity was assessed at 80 per cent by the doctor. The commissioner, assessed the disability of the respondents at 80 per cent and loss of earning capacity at 100 per cent. A sum of Rs.2,09,123 was awarded. The High Court affirmed the award.

In the fifth and last appeal, the respondent, about 65 years old, was travelling in an ambassador car which collided with a bus as a result which he sustained injuries. He filed an application under section 166 of the 1988 Act claiming a sum of Rs.18,00,000/- before the MACT which assessed the permanent disability suffered by him at 50 per cent. A sum of Rs.1,95,000/- was awarded keeping in view the fact that he was unable to work for 39 months. A sum of Rs.50,000/- was also awarded towards future loss of income. In total, MACT awarded Rs.7,42,191/- with 9 per cent interest *per annum*. On appeal, the High Court enhanced the amount of compensation to Rs.12,37,191/- with 9 per cent interest *per annum*. In appeals filed before the Supreme Court in all the above cases, following questions arose:

(i) Was the percentage of loss of earning capacity and the physical disability the same? Question had also been raised regarding the applicability of the multiplier specified in the second schedule appended to the Motor Vehicles Act on the ground that the same would not be applicable in respect of the claim petition filed under section 166 of the Act.
(ii) Should the payment of interest be calculated from the date of default?
(iii) Can any amount be directed in excess to the amount claimed?

Determination of amount of compensation: General Principle

The court held that the WC Act and the MV Act were beneficent legislations insofar as they provided for payment of compensation to the workmen employed by the employers and/or by use of motor vehicle by the owner thereof and/or the insurer to the claimants suffering permanent disability. The amount of compensation was to be determined in terms of the provisions of the respective Acts. Whereas in terms of the WC Act, the commissioner as quasi-judicial authority, was bound to apply the principles and the factors laid down in the Act for the purpose of determining the compensation. Section 168 of the MV Act enjoins the tribunal to make an award determining the amount of compensation which appears to be just. The court examined the nature of injuries and as to whether the same fell within the purview of part I or part II thereof and observed that whereas part I specified the injuries which would deem to result in permanent total disablement, part II specified injuries which would be deemed to result in

permanent partial disablement. The court observed that in determining the amount of compensation, several factors were required to be taken into consideration having regard to the note. Functional disability, thus, has a direct relationship with the loss of limb.

Application of the above principle in five appeals

After laying down the aforesaid principle, the court applied the principle in five appeals mentioned above. As to the first appeal, the court held that the extent of disability should have been determined at 15 per cent and not 100 per cent. The appeal was, therefore, allowed to the aforementioned extent. As to the second appeal, the court held that a fracture in the leg suffered by cleaner would not amount to loss of permanent use of the limb, *i.e.* the entire foot. The note appended to the second schedule had no application. The court, therefore, set aside the judgment of the High Court and restored the order of commissioner, workmen's compensation. As to the third appeal, where the claimants were casual workmen, the disability was assessed by the doctor at 40 per cent, the loss of earning capacity was taken to be 80 per cent. The court observed that the doctor having found the disability to the extent of 40 per cent could not have determined the loss of earning capacity to 80 per cent. The court accordingly held that judgment and order of the High Court as well asthat of the commissioner was not sustainable. The appeal was, therefore, allowed and the amount of compensation was directed to be calculated on the said basis. As to the fourth appeal, the doctor assessed his physical disability at 40 per cent and the loss of earning capacity as 80 per cent. The commissioner, in his award, assessed the physical disability at 80 per cent and loss of earning capacity at 100 per cent. The High Court had affirmed the award. However, no reason had been assigned therefor. In view of this, the Supreme Court held that the impugned judgment and order of the High Court and award passed by the commissioner, could not be sustained and the same were set aside. In the fifth appeal, the claimant was a practicing advocate and his income was determined at Rs.5,000/- per month. He had been out of practice for 39 months. The High Court determined it at Rs.10,000/- per month. It was on that basis that multiplier of 5 had been applied. The Supreme Court questioned as to how the High Court arrived at such conclusion as that has not been disclosed. Further, no reason had been assigned in its support. Also, if the principle laid down in the second schedule was to be applied, the loss of income could not have exceeded 52 weeks. In view of this, the judgment of the High Court was set aside. The court, therefore, remitted the matter to the tribunal for deciding the matter afresh.

Payment of interest

The Supreme Court then examined the question with regard to the payment of interest and held that there cannot be any doubt whatsoever that interest would be payable from the date of default and not from the date of award of compensation. It then referred to the provision of section 4A(3) of

the WC Act and observed:[29a]

> Section 4A (3), as it appears from a plain reading, is penal in nature. It, however, does not take into consideration the chargeability of interest on various other grounds including the amount which the claimant would have earned if the amount of compensation would have been determined as on the date of filing of the claim petition. The Workmen's Compensation Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim petition till an order is passed. Only when sub-section (3) of Section 4A would be attracted, a higher rate of interest would be payable wherefor a finding of fact as envisaged therein has to be arrived at. Only because in a given case, penalty may not be held to be leviable, by itself may not be a ground not to award reasonable interest.

Power of commission to award compensation in excess of amount claimed

While dealing with the issue "whether any amount could be directed to be paid in excess of the amount claimed", the court held that it was the function of commissioner to determine the amount of compensation as laid down under the Act. Even if no amount was claimed, he must determine the amount which was found payable to the workman. Even in the cases arising out of the MV Act, it was the duty of the tribunal to arrive at a just compensation having regard to the provisions contained in section 168. In view of above, the court held that the commissioner/tribunal should determine the amount of compensation in the respective cases in the light of the observations made above.

VIII BUILDING AND OTHER CONSTRUCTION WORKERS

In *National Campaign Committee* v. *Union of India*,[30] the Supreme Court was called upon to intervene on the failure of the executive to implement even after more than a decade of its enactment the provisions of the Building and Other Construction Worker (Regulation of Employment and Conditions of Service) Act, 1996 and the Building and Other Construction Workers' Welfare Cess Act, 1966.

In a writ petition, it was alleged that many of the provisions of the Building and Other Construction Worker (Regulation of Employment and Conditions of Service Act, 1996 were not put in practice and the respective authorities had not complied with the statutory provisions. It was contended by the petitioner that (i) many of the state governments had not taken steps as *per* the provisions of the Act, (ii) even though some of the state

29a *Id.* at 294-95.
30 (2009) 3 SCC 269.

governments had collected cess but the benefits had not been fully passed on to the construction workers, and (iii) some of the state governments had not constituted either the state advisory committee or the expert committee or the welfare board as envisaged under the Act. While dealing with these contentions, the court referred to the steps taken by Delhi government, which had framed detailed rules, namely the Delhi Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2002. These rules exclusively dealt with the matter and gave model forms also for compliance with the provisions of the Act. In view of this, the court observed that the state governments and the union territories which had not framed rules as *per* section 62 of the Act could adopt the Delhi Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2002, as a model for this purpose.

The court also directed the chief secretaries of the respective states and secretary (labour) of each State and union territory to take immediate steps as *per* the provisions of the Act, if not already done. The court further ordered that the appraisal report be submitted to it in the first week of May for action taken in this regard. If any of the state government had not done anything pursuant to the Act, urgent steps be taken so that the benefits of the legislation did not go waste. Otherwise, the unorganized workers of the construction sector would be denied the benefit of the Act.

The aforesaid decision shows the concern of the Indian Judiciary to protect the interest of unorganized workers, including the building and other construction workers, who constitute 93 per cent of labour force and to whom most of labour legislation are not applicable. It is unfortunate that even after more than a decade of the enactment of the above two Acts many states have not taken any steps to implement them. Some of them have not even constituted state advisory committee, expert committee or the welfare board as envisaged under the Act. In such a situation, the apex court not only issued directions to implement these Acts but also sought appraised report.

Critics call the above judicial intervention as judicial activism and assert that the judiciary should uphold rule of law and doctrine of separation of powers. It is submitted that this criticism is not valid when the state does not act or ignores the interest of weaker section of society or unorganized labour in providing social security and welfare measures. If at the courts do not intervene, the poor sections of unorganized labour would become legal orphans.

IX CONCLUSION

The court gave a beneficial interpretation to the ESI Act. It has also clarified that the cannon of interpretation of social legislation like ESI Act was different from the interpretation of criminal and taxation law. A similar line of approach was adopted for the EPF Act to protect the interest of weaker section of society. It is imperative to give a purposive interpretation to the provisions contained therein keeping in view the directive principles

of state policy embodied under articles 38 and 43 of the Constitution.

Another positive trend is to protect the interest of workers by evolving new strategy. Thus, the apex court brought the new concept of impleading workers and/or trade union as necessary parties in a petition filed under section 75 of the ESI Act before the Employees' State Insurance Court or the High Court whenever a notice was issued by ESI Corporation under section 45-A of the ESI Act. However, in determining the liability of the employer and insurer, the court gave a narrow interpretation to the expression "arising out of and in the course of employment" and thereby deprived the widow of the deceased from claiming compensation under the WC Act. It is submitted that the WC Act is a social security legislation intended to promote the welfare of workers. Further, the court failed to apply the doctrine of notional extension. The court also failed to take into account the policy consideration and the modern concept of social security. Indeed, it overlooked the proviso to section 3 of the WC Act.

Sensitivity and human approach has been displayed by the apex court in the case of pension to workers. The court deprecated the tendency of employer to deny pension to the workers in work-charged category where the option was not exercised within the specified period. However, no new principle was laid down by the apex court in dealing with the cases falling under the Contract Labour (Regulation and Abolition) Act, 1970, the EPF Act and the PG Act. The court merely reiterated its earlier views.