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# LABOUR SOCIAL SECURITY LAW

*S C Srivastava**

## I INTRODUCTION

IN THE year 2010, there have been significant developments, both legislative and judicial, in the arena of social security law. During this year, three major amending legislations were passed by the Parliament. The most significant social security legislations, *viz.* the Employees' State Insurance Act, 1948 was amended by the Employees' State Insurance (Amendment) Act, 2010[1] 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

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1 Act No. 18 of 2010. The ESI Amendment Act has brought several changes. Most important among them are: (a) The scope of dependant under section 2(6A) has been widened to include such legitimate or adopted son or daughter who has not attained the age of 25 years; (b) The definition of employee under section 2(9) now includes even a person engaged as apprentice whose training period is extended to any length of time; (c) The definition of family now includes (i) in case the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependant on the income of insured person and (ii) dependant parents, whose income from all sources does not exceed such income as may be prescribed by the central government; (d) The composition of the medical council under section 10(1)(a)(s) and (b) has been replaced to include the director general, ESIC as chairman and the director general, health services, ex-officio as co-chairman; (e) Section 12(3) has been amended to provide that on becoming a minister or Speaker or Deputy Speaker of the House of the People or deputy chairman of the Council of States, a person shall cease to be a member of the ESI corporation. Under section 37, the valuation of assets and liabilities of the corporation shall now be made at an interval of three years instead of five years; (g) The inspector under sections 45 and 45A shall now be called social security inspector; (h) New section 51E has been inserted which extends the scope of "accident arising out of and in the course of employment" to include accident happening while commuting to the place of work and *vice versa*; (i) The medical benefit has been extended not only to superannuated employee but also to employees who retire under VRS scheme or take premature retirement or his spouse; (j) A new concept of public-private partnership has been introduced under section 59 for commissioning and running ESI hospitals through third party participation for providing medical treatment and attendance to insured persons and their families.

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was the amendment of the Payment of Gratuity Act, 1972 by the Payment of Gratuity (Amendment) Act, 2010[2] and the Plantation Labour Act, 1951 by the Plantation Labour (Amendment) Act, 2010.[3]

Like legislative developments, there has also been significant development in judicial sphere. In 2010, unlike 2009, only 6 cases of the Supreme Court were reported in various important areas of social security. These cases were decided under the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act), the Employees' State Insurance Act, 1948 (ESI Act), the Payment of Gratuity Act, 1972 (PG Act) and the Workmen's Compensation Act 1923 (WC Act). However, reported judgments of the High Courts cover almost all important areas of social security and minimum standards of employment.

## II BUILDING AND OTHER CONSTRUCTION WORKERS

In *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India*,[4] the Supreme Court was called upon to intervene on the failure of central government to issue directions under section 60 of the BOCW Act despite the court's direction. The petitioner in this case alleged that in state of Maharashtra, which employs about 30 lakhs construction workers and collected, till 2010, cess amounting to approximately Rs. 40.53 crores under the Building and other Construction Workers' Welfare Cess Act, 1996, had not set up the state welfare board as required under section 18[5] of the Act. In fact, even the preliminary step had not been taken

2 Act No. 15 of 2010. Under this amendment, the maximum amount of gratuity has been raised from 3 lakhs and 50 thousands to 10 lakhs rupees.

3 Act No. 17 of 2010. The most important amendments are: (a) Inclusion of chapter IV-A which provides for safety of plantation workers; (b) Payment of compensation has been provided to the plantation workers in case of accident in accordance with the provisions of the Workmen's Compensation Act, 1923 (now Employees' Compensation Act, 1923); and (c) The provision of punishment for violation of the provisions of the Plantation Labour Act has been made more deterrent. Further, minimum fine has been prescribed under this amendment.

4 2010 (9) SCALE 442.

5 Section 18 of the BOCW Act provides:

(1) Every State Government shall, with effect from such date as it may, by notification, appoint constitute a Board to be known as the … (name of the State) Building and Other Construction Workers' Welfare Board to exercise the powers conferred on, and perform the functions assigned to, it under this Act.

(2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal and shall by the said name sue and be sued.

(3) The Board shall consist of a chairperson, a person to be nominated by the Central Government and such number of other members, not exceeding fifteen, as may be appointed to it by the State Government:
Provided that the Board shall include an equal number of members representing the State Government, the employers and the building workers and that at least one member of the Board shall be a woman.

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under the provisions of the Act. This was so despite the court order issued on 18th January, 2010, wherein the apex court had observed that in several states, welfare boards which were required to be constituted under section 18 of the Act had not been constituted although the Act had come into force more than a decade ago. The court expressed surprise as to why the central government had not issued directions in that regard under section 60[6] of the Act. It had also observed that there were other states like Goa which had not taken any steps to set up the state welfare board under the Act.

In view of above the court directed the central government to call for necessary information from the states/union territories and to issue appropriate directions for setting up the welfare board at the first instance in terms of this court's order dated 18th January, 2010 within 8 weeks from the date of the order. The court further directed the central government to furnish the status report as to what steps they had taken with regard to implementation of the Act and the guidelines issued by it on 18th January, 2010. The court clarified that it was only enforcing the statutory provisions of the Act. The court also observed that it would monitor this from time to time.

A perusal of the court's direction shows the indifferent attitude of the central government in not exercising its express power to issue direction under section 60 of the BOCW Act despite the apex court's order. It is unfortunate that some state governments even after about one and a half decade of the enactment of BOCW Act and the Building and Other Construction Workers' Welfare Cess Act, 1996 have not taken any steps to constitute the welfare board, advisory committee and expert committee even though they have collected crores of rupees as cess. This not only shows the lack of sensitivity on the part of the executive towards millions of unorganized workers employed in building and other construction work but leads to denial of social security and human dignity provided to them under the BOCW Act. Under these circumstances, one may view the concern shown by the Supreme Court to mitigate the hardships of millions of poor and down-trodden class of unorganized workers. The continuous monitoring of the case by the apex court will certainly act as a great deterrent to the executive which has been showing complete apathy to the strict enforcement of the BOCW Act. It is submitted that had the courts not intervened these poor section of unorganized workers would have become legal orphan.

(4) The terms and conditions of appointment and the salaries and other allowances payable to the chairperson and the other members of the Board, and the manner of filling of casual vacancies of the members of the Board, shall be such as may be prescribed.

6 Under section 60 of BOCW Act, the central government is empowered, in appropriate cases, to issue directions to the state government or to a board as to the carrying into execution in that state of any of the provisions of the Act.

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*Adani Agri Logistics Ltd.* v. *State of Haryana*[7] decided several questions of great relevance, namely (i) whether the BOCW Act applied to the owner of the establishment (petitioner) on the ground that it had outsourced their construction activity to the contractor; (ii) whether the BOCW Act would apply to construction activity covered under the Factories Act, 1948; (iii) is the owner of the establishment required to comply with the provisions of the BOCW Act and the Building and other Construction Workers' Welfare Cess Act, 1966 (Cess Act). The Punjab and Harayana High Court answered all the questions in the affirmative.

As to first issue, the court observed that the definition of "employer" shows that the owner of an 'establishment' employing building workers is covered by the said definition. The definition further includes contractor who may be employed in relation to "building or other construction work". Even when there is no privity of contract with the workers of the contractor, it is the owner for whose benefit the work is carried on. The court added that the mere fact that the liability was undertaken by the contractor did not exclude the liability of the employer. The role of owner was akin to the role of principal employer under the scheme of the Contract Labour (Regulation and Abolition) Act, 1970. As to the second issue, the court held that merely because the provision of the Factories Act, 1948 have been made applicable besides other labour laws to the contractors, it would not exclude the applicability of BOCW Act and Cess Act to the petitioner-contractors. As to the third issue, the court held that the owner of the establishment for whom or for whose benefit the construction activity is carried on and who employs building workers is included and is required to comply with the provisions of the BOCW Act and the Cess Act. The court accordingly held that the petitioners cannot be excluded from the coverage of BOCW and the Cess Act.

**Call for amendment in BOCW Act**

The court, however, dealt with the question of coverage of an individual constructing his own house of the value of more than Rs.10 lakhs and pointed out that even though it has not been challenged by any such individual, the concerned authority may be well advised to have a fresh look at the monetary limit in the light of the expert opinion.

## III EMPLOYEES' COMPENSATION

**Employer's liability for compensation**

The WC Act (now the Employee's Compensation Act) imposes a liability on the employer to pay compensation for an accident arising out of and in the course of employment, which includes even occupational diseases. The aforesaid expression has been subject of judicial controversy in a series of

7 2010 LLR 752.

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decided cases. In the year under review also, the courts were invited not only to interpret the aforesaid expression but also to determine the scope of employer's liability.

In *Rashida Haroon Kupurade* v. *Divisional Manager, Oriental Insurance Co. Ltd.*,[8] a workman died due to heart attack six months after the accident. The commissioner for workmen's compensation awarded compensation to the dependants of the deceased workman under section 30 of the WC Act.[9] The insurance company challenged the order of payment of compensation awarded by the commissioner before the Karnataka High Court. The High Court partly allowed the appeal upon the finding that since the deceased workman had died of natural causes, namely heart attack, the insurance company could not be fastened with the liability of making payment of compensation since there was no nexus between the death of the workman and the accident, which had occurred about 6 months prior to his death. However, the High Court observed that at best, the relationship of the employer and employee as between the deceased and the insured not being in dispute and the death having occurred during and in the course of employment, liability could be fastened on the employer and not on the insurance company. Leave was, therefore, granted to the claimants to recover the compensation amount from the owner of the vehicle. Against this decision, an appeal was filed by the owner of the vehicle before the Supreme Court. It was contended on behalf of the appellant/owner of the vehicle that the provisions of section 3 of the WC Act had been wrongly interpreted by the High Court by observing that the liability for the death of the workman, even if it had no connection with the accident in question, was with the owner of the vehicle. According to them, the employer's liability for compensation under sub-section (1) of section 3 arose only if personal injuries was caused to a workman by accident arising out of and in the course of his employment. However, certain exceptions have been carved out in the proviso to the effect that there had to be some link between the accident and the death of the workman in order to attract the provisions of section 3 as far as the owner of the vehicle was concerned. The respondent/insurance company argued that since there was no nexus between the accident and the death of the employee, the High Court had correctly held that the liability for making payment under the award was not with the insurance company.

The Supreme Court held that the High Court had erred in holding that notwithstanding the fact that there was no connection with the accident and the death of the workman, the owner of the vehicle in question was still liable

8 2010 (3) SCC 271.

9 As per 2009 Amendment, it is now re-titled as the "Employees' Compensation Act".

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to pay compensation under the provisions of the WC Act. The court then referred to the provisions of section 3[10] of the WC Act and observed:[10a]

> It will be clear from the wording of … Section (3) that compensation would be payable only if the injury is caused to a workman by accident arising out of and in the course of his employment. There has to be an accident in order to attract the provisions of Section 3 and such accident must have occurred in the course of the workman's employment. As indicated hereinabove, in the instant case, there is no nexus between the accident and the death of the workman since the accident had occurred six months prior to his death.

The court accordingly set aside the order of the High Court.

**Determination of loss of earning capacity and calculation of compensation**

*S. Suresh* v. *Oriental Insurance Co. Ltd.*[11] deals with disablement which may result in 100 percent earning capacity. In this case, the appellant (claimant), a lorry driver, while driving the vehicle, lost control and met with an accident on the road. As a result of the accident, he suffered serious injuries to his right leg, head and other parts of the body. Although he survived but ultimately his right leg had to be amputated just below the knee. The appellant filed a petition for compensation before the commissioner under the WC Act. It was contended that he was entitled to adequate compensation from the insurance company and the owner of the lorry (respondent) as he was 25 years of age earning Rs.4,000 per month with daily allowance of Rs.100 and had suffered permanent disability which prevented him from engaging in the job of driver which he could do earlier.

The commissioner came to the conclusion that the appellant's right leg up the knee having been amputated and he had suffered a loss of 100 per cent of his earning capacity as a driver. He, having observed that the appellant was 25 years of age at the time of the accident, determined the compensation payable to him at Rs.5,20,584/- alongwith interest @ 12 per cent per *annum* from one month after the date of the accident till the date of payment. Aggrieved by this award, the insurance company filed an appeal before the High Court. The High Court accepted the plea of the insurance company that as per the schedule to the WC Act, on amputation of a leg, the loss of earning capacity was only 50 per cent. The court also held that being an injury specified in schedule 1, medical opinion could not be relied upon in terms of section

10 Section 3(1) of the WC Act provides:
(1) 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….".

10a *Supra* note 8 at 273.

11 2010 LLR 250 (SC).

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4(1)(c)(iii) of the Act. Accordingly, applying the percentage of loss of earning capacity, as specified in part II of schedule 1, the High Court reduced the compensation by 50 per cent. However, award of interest @ 12 per cent per *annum* from one month after the date of accident till the date of payment was maintained. Thereupon, the claimant filed an appeal before the Supreme Court. It was contended by the appellant that the loss of his right leg *ipso facto* amounted to a "total disablement" under section 2(1)(1) of the WC Act and, as such, the compensation payable to him had to be computed on that basis. In support of his plea, he relied on a four-judge bench decision of the apex court in *Pratap Narain Singh Deo* v. *Srinivas Sabata*,[12] where a carpenter had suffered amputation of his left arm from the elbow. The Supreme Court held that this amounted to a total disability as the injury was of such nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident. Dealing with the contention, the court referred to the definition of the expression "total disablement" which has been defined in section 2(1)(1)[13] and held that the *ratio* of the above judgment was squarely applicable to the present case that on account of amputation of his right leg below knee, the appellant was rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he had lost 100 per cent of his earning which disqualified him from even getting a driving licence under the Motor Vehicles Act. The court accordingly set aside the judgment of the High Court and restored the compensation awarded by the commissioner.

*Pal Raj* v. *Divisional Controller, North East Karnataka Road Transport Corporation*[14] is another case on determination of loss of earning capacity, amount of compensation and interest. The appellant, who was employed as a bus driver in Karnataka state road transport corporation, while driving the vehicle met with an accident in which he sustained grievous injuries. Consequently, he was no longer able to drive a vehicle. The corporation accordingly appointed him as a peon on the same salary. The medical officer, who examined the appellant, found that the appellant had suffered 65 percent of total body disability and 20 percent of functional disability. The commissioner workmen's compensation, however, took 85 per cent as functional disability for quantifying the compensation payable to the appellant, who was drawing a salary of Rs.15,000 per month on the date of the accident. The commissioner accordingly awarded to the appellant compensation amounting to Rs.1,75,970, together with interest at the rate of 12 per cent per

12 1996 (32) FLR 92 : (1976) 1 SCC 289.

13 Section 2(1)(i) of the WC Act defines total disablement to mean such disablement whether of a temporary or permanent nature as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement.

14 2010 ACJ 2859 (SC).

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*annum* from 10.11.1998 till the date of deposit. Aggrieved by this order, the corporation filed an appeal in Karnataka High Court. A question arose whether the percentage of disability taken by the commissioner, workmen's compensation at 85 per cent was against the weight of medical evidence adduced in the case. The single judge of High Court held that the commissioner had erroneously taken 85 per cent to be the extent of disability suffered by the appellant and that the same ought to have been 20 per cent instead. On that basis, he modified the award of the commissioner and reduced the amount of compensation from Rs.1,75, 970 together with interest at the rate of 12 per cent per *annum* to Rs.41,404.80. He also held that the commissioner had committed an error in awarding interest from the date of filing of the claim petition and the appellant was entitled to interest on the compensation amount only after 30 days from the date of passing of the award. Against this order, an appeal was filed before the Supreme Court.

On behalf of the appellant, it was contended that the doctors had certified that appellant was 100 per cent disabled as far as his functioning as a driver was concerned and that his total disability had been found to be 65 per cent while his functional disability was assessed at 20 per cent. Taking the two together, the commissioner had found the appellant to have acquired 85 per cent disability that entitled him to a sum of Rs.1,75,970 in accordance with schedule IV of the WC Act by taking his monthly income as Rs.2,000 in view of explanation II to section 4 of the Act by multiplying it with the multiplier of 172.52. It was also submitted that, in fact, the limit imposed by way of explanation II to section 4 had been increased from Rs.2,000 to Rs.4,000 w.e.f. 8.1.2000 and the amount of compensation awarded to the appellant should have been computed on the basis of his monthly wages being Rs.4,000. The High Court had, therefore, erred in granting compensation on the basis of 20 per cent functional disability thereby reducing the figure from Rs.1,75,970 to Rs.41,404.80.

On the other hand, it was contended on behalf of the respondent corporation that in addition to the compensation awarded to the appellant, he had also been given alternative employment as peon in the establishment of the corporation and was also being paid the same salary which he would have drawn had he continued to be a driver so that, despite his accident, appellant did not face any loss of earnings. Further, since the commissioner had erroneously confused the amount of functional disability of the appellant as against his permanent disability, he ought to have taken the percentage of disability of the accident of 20 per cent and not 85 per cent, after taking into consideration the fact that the appellant had been provided with employment as a peon in the respondent-corporation, where he was drawing the same salary as earlier.

The Supreme Court observed that while computing compensation for disabilities being suffered by a workman in the case of his employment, it was the functional disability resulting in loss of earning capacity which is followed in assessing compensation under WC Act. The court also pointed out that in the instant case, the appellant had lost his capacity to function as a driver, but

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with the help of external aids his mobility has, to some extent, been restored and he is able to perform work which is suitable to his physical condition after the accident. The court then referred to the provisions of section 4[15] WC Act and observed:[15a]

> The aforesaid provision would indicate that where a workman suffers injury which is not specified in Schedule I to the Act, compensation is to be assessed on such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity, permanently caused by the injury as assessed by a qualified medical practitioner. Since in the instant case, the nature of injury suffered by appellant is not specified in Schedule I, the compensation has necessarily to be assessed on the basis of the loss of earning capacity caused by the injury which could amount to 100 per cent disablement in a given case. In the instant case, however, although the appellant has lost the use of his legs for the purpose of driving a vehicle, which could be said to be total disablement, so far as driving of a vehicle is concerned, he is in a position to earn a living other than by functioning as a driver, which, in fact he is currently doing, having been posted as a peon by the respondent xxxx

The court added:[15b]

> Accordingly, apart from the fact that the Commissioner, Workmen's Compensation had confused the concept of functional disablement with permanent disablement in arriving at the figure of 85 per cent loss

15 Section 4(1)(c) of the WC Act provides as follows:
Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:
Where permanent partial disablement results from the injury,
(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury and
(ii) in the case of an injury not specified in Schedule I such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;
*(iii)* *Explanation I.* – Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.
*(iv)* *Explanation II.* – In assessing the loss of earning capacity for the purpose of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I.

15a *Supra* note 14 at 2863.

15b *Ibid.*

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> of earning capacity, we also have to take into consideration the fact that the injury suffered by the appellant did not disable him permanently from earning his living other than as a driver. We, therefore, are of the view that the percentage of functional disablement has to be modified, since the appellant is permanently disabled as far as earning a livelihood as a driver is concerned.

**Payment of interest**

Regarding the question of payment of interest the Supreme Court referred to the provisions of section 4-A[16] of the WC Act and observed:[16a]

> It will be evident that compensation assessed under section 4 is to be paid as soon as it falls due and in case of default in payment of the compensation due under the Act within one month from the date when it falls due. The Commissioner would be entitled to direct payment of simple interest on the amount of the arrears at the rate of 12 per cent per annum or at such higher rates which do not exceed the maximum lending rates of any scheduled bank as may be specified by the Central Government. Both the Commissioner, Workmen's Compensation, as also the High Court, therefore, rightly held that interest under the 1923 Act cannot be claimed from the date of the

16 Section 4A provides:
(1) Compensation under section 4 shall be paid as soon as it falls due.
(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be without prejudice to the right of the workman to make any further claim.
(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall -
(a) direct that the employer shall, in addition to the amount of the arrears pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
(b) if, in his opinion, there is no justification fro the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty:
Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.
*Explanation* – For the purpose of this sub-section, 'scheduled bank' means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934(2 of 1934).
(3-A) The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependent as the case may be.

16a *Supra* note 14 at 2864.

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filing of the application, but only after a default is committed in respect of the payment of compensation within 30 days from the date on which the payment becomes due.

The court accordingly held that the loss of earning capacity has to be computed keeping in mind the alternate employment given to the appellant on the same salary as he was enjoying while performing the duty of a bus driver. This factor cannot be ignored in computing the amount of compensation, which the appellant was entitled to. In that view, the Supreme Court maintained the order of the High Court but directed the appellant to be provided with compensation on the basis of functional disability to the extent of 35 per cent and not 20 per cent as indicated by the High Court.

There appears to be a conflict between the above two decisions. In both cases, the driver who had met with accident, arising out of and in the course of employment, had suffered permanent disability which prevented them from engaging in the job of driver which they used to do prior to accident. While in *Rashida Haroon Kupurade*, the apex court held that the loss was 100 per cent of earning capacity as a driver and awarded compensation accordingly, in *Pal Raj*, even though the court conceded that loss of earning could amount to 100 per cent, it determined functional disability to the extent of 35 per cent only. The only distinguishing feature of *Pal Raj* was that the employer appointed the driver after the accident as a peon on the same salary and this factor seems to have influenced the court to arrive at this decision. Further, while in *Rashida Haroon Kupurade*, the court adopted the criteria of unfitness for work as a driver, in *Pal Raj*, though the court conceded that the "driver has lost his capacity to function as driver" but added that with the help of external aid he was able to perform work suitable to his physical condition after the accident.

## IV EMPLOYEES' STATE INSURANCE

**Scope and applicability of the ESI Act**

The employees' state insurance scheme under the ESI Act is a piece of social security legislation conceived as a means of eradicating the evils of society, namely disease, dirt, ignorance and indigence. It was the first, and till recently; the only social insurance scheme in India. However, the scope and coverage of the Act has been subject of judicial interpretation in a series of decided cases.[17]

In *Managing Director, Hassan Co-operative Milk Producers' Society Union Ltd.* v. *Assistant Regional Director, Employees' State Insurance Corporation*,[18] the question was whether the principal employer was liable to

17 See S.C. Srivastava, *Social Security and Labour Law* 158 (Eastern Book Co., Lucknow, 1985).

18 (2010) 2 LLJ 860 (SC).

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pay contribution under the ESI Act in respect to persons employed through the contractor in performance of the contract awarded to them by the principal employer (appellant) for transportation of milk when such persons were neither employed in the factory or establishment nor there was any supervision of the principal employer. After examining the provisions of section 2(9) of the ESI Act, which defines the term "employee", the Supreme Court observed:[19]

> Merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'. He must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9).

*Applicability of section 2(9)(i)*

The court then examined whether the persons employed by the contractor were covered by section 2(9)(i).[20] It held that the said section covered only employees who were directly employed by the principal employer. In other words, persons who were not directly employed by the principal employer could not be eligible under section 2(9)(i). Therefore, in such a situation, section 2(9)(i) was not attracted.

*Applicability of section 2(9)(ii)*

The court also examined whether the persons employed by contractor were covered under section 2(9)(ii) of the Act and held that it covered only such an employee, who works (a) on the premises of the establishment, or (b) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment".

*Scope of the expression "on the premises of the factory or establishment"*

Explaining the scope of the expression "on the premises of the factory or establishment", the court pointed out that it comprehended presence of the

19 *Id.* at 867.

20 Section 2(9), *inter alia*, defines the term "employee" to mean: any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and –

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment', whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer of his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment....

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persons on the premises of the factory or establishment for execution of the principal activity of the industrial establishment and not casual or occasional presence. The court added that even assuming that for the purposes of loading and unloading the milk cans, the truck driver and loaders entered the premises of the appellants, mere entry for such purpose cannot be treated as an employment of those persons on the premises of the factory or the establishment. It held that the aforesaid expression did not comprehend every person who entered the factory for whatever purpose. This was not and could never be said to be the purpose of the expression. It accordingly held that the persons employed by the contractor for loading and unloading of milk cans were not the persons employed on the premises of the appellants' establishment.[21]

*Supervision and control*

Dealing with the question whether there was supervision of the principal employer, the court observed that the expression 'supervision of the principal employer' under section 2(9) meant something more than mere exercise of some remote or indirect control over the activities or the work of the workers. The supervision for the purposes of section 2(9) was 'consistency of vigil' by the principal employer'. The court added:[21a]

> Exercise of the supervision and issue of some direction by the principal employer over the activities of the contractor and his employees is inevitable in contracts of this nature and that by itself is not sufficient to make the principal employer liable.

In view of the above, the court observed that even if it be held that the transportation of milk was incidental to the purpose of factory or establishment, for want of any supervision of the appellants on the work of such employees, these employees were not covered by the definition of 'employee' under section 2(9) of the ESI Act.

A perusal of this decision reveals that the court has relaxed the qualitative and quantitative content of direction and control test in determining whether a person is an "employee" by holding that exercise of supervision and issue of some direction by the principal employer over the activities of the contractor and his employees is inevitable in contract and that by itself is not sufficient to make the principal employer liable.

21 *Supra* note 18 at 867.
21a *Id.* at 869.

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## V PAYMENT OF GRATUITY

Does the PG Act apply to working journalists who covered under the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (WJNE Act) which specifically provides for payment of gratuity. This issue was raised in *P. Rajan Sandhi* v. *Union of India*.[22] The appellant, an assistant editor in a newspaper publishing company, was charge-sheeted for making false allegations against the managing director of the company and of using discourteous language and for various other instances of misconduct. The management, after holding an enquiry and giving an opportunity of hearing, dismissed him from service. The appellant raised an industrial dispute which was referred to the industrial tribunal for adjudication. The industrial tribunal upheld the order of dismissal. Against this order, the appellant filed a writ petition before the High Court which was dismissed. Thereafter, the appellant unsuccessfully challenged the order by filing a writ appeal which was also dismissed. Against this order, a special leave petition was filed by the appellant before the Supreme Court which was also dismissed.

The management had rejected the claim of the appellant for payment of gratuity. Against this rejection of the claim, the appellant filed a writ petition which was allowed by the single judge of the High Court. However, in writ appeal, the division bench of the High Court set aside the judgment of the single judge. Against this order of the division bench, the appellant filed an appeal by special leave, before the Supreme Court. The appellant relies on section 4(6)[23] of the PG Act contending that since no damage or loss to, or destruction of, property of the employer was alleged or proved against the appellant nor was he alleged to have committed any riotous or disorderly conduct or any other act of violence or any offence involving moral turpitude, his claim for gratuity could not have been denied. On the other hand, the respondent relied on section 5(1)(a)(i) of WJNE Act.[24]

22 2010(10) SCALE 163.

23 Section 4(6) of the Payment of Gratuity Act provides:

(a) The gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) The gratuity payable to an employee may be wholly or partially forfeited

(i) If the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) If the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

24 Section 5 1(a) of the WJNE Act provides:

Where

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The Supreme Court observed that there was a difference between the provisions for denial of gratuity under PG Act and in the WJNE Act. While under the WJNE Act gratuity can be denied if the service was terminated as a punishment inflicted by way of disciplinary act, as has been done in the instant case, it was not so under PG Act. The court ruled that section 5 of WJNE Act being a special law will prevail over section 4(6) of the PG Act which is a general law. Section 5 of the WJNE Act was only for working journalists, whereas the PGA was available to all employees covered by that Act and not limited to working journalists. The court added that it was well settled that special law will prevail over the general law. The special law, *i.e.* section 5(1)(a)(i) of the WJNE Act, does not require any allegation of proof of any damage or loss to, or destruction of, property, *etc*. as required under the general law, *i.e*. the PG Act. All that was required under the WJ Act was that the termination should be as a punishment inflicted by way of disciplinary action, which was the position in the case at hand. Thus, if the service of an employee had been terminated by way of disciplinary action under the WJNE Act, he was not entitled to gratuity.

## VI CONTRACT LABOUR

In *Bharat Coking Coal Ltd.* v. *Workman, Bharat Coking Coal Ltd.*,[25] the Jharkhand High Court held that the industrial tribunal was not empowered to direct Bharat Coking Coal Ltd., the principal employer, to absorb the persons engaged by the contractor (on their discontinuance) as its permanent employee. The court followed a number of decided cases of the Supreme Court[26] and gave these reasons in support of its conclusion: (i) No notification was issued by the appropriate government under section 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970 prohibiting employment of contract labour in their establishment; (ii) There was no finding of the industrial tribunal that the contract by which contract labour were employed was *sham* or *camouflage* (iii) Merely because the contract labour had worked continuously for more than 240 days in a calendar year, no absorption or regularization can take place.

(a) any working journalist has been in continuous service, whether before or after the commencement of this Act, for not less than three years in any newspaper establishment, and

(i) his services are terminated by the employer in relation to that newspaper establishment for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, or

25 (2010) 2 LLJ 131.

26 *SAIL* v. *National Union Water Front Workers* (2001) 2 LLJ 1087; *National Thermal Power Corporation* v. *Badri Singh Thakur* (2009) 1 LLJ 198 and *Gangadhar Pillai* v. *Siemens* (2007) 1 LLJ 580 and *HAL* v. *Dan Bahadur* (2007) 3 LLJ 234.

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## VII EMPLOYEES' PROVIDENT FUND

**Application of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952**

In *All India Association for Christian Higher Education* v. *Presiding Officer, Employees' Provident Funds Appellate Tribunal*,[27] the issue was whether the EPF Act was applicable to a society registered under the Societies Registration Act, 1860 which was engaged in imparting education and training, organizing seminar to member colleges for which registration fee was charged, publishing journals on education and give grants for conducting training programme. In order to decide the issue, the court referred to the notification dated 19th February, 1982 issued by the Government of India in exercise of power under section 1(3)(b) of the EPF Act specifying the following classes of establishments in which 20 or more persons are employed as establishments to which the said Act applies, namely:

(i) Any University;
(ii) Any college, whether or not affiliated to a University;
(iii) Any school, whether or not recognized or aided by the Central or a State Government;
(iv) Any scientific institution;
(v) Any institution in which research in respect of any matter is carried on;
(vi) Any other institution in which the activity of imparting knowledge or training is systematically carried on.

While dealing with scope of the above notification, the court referred to the language of the notification and the decisions of the Supreme Court in *Andhra University* v. *Regional Provident Fund Commissioner of Andhra Pradesh*,[28] in which it was held that the EPF Act, being a beneficial piece of social welfare legislation, aimed at promoting and securing the well being of the employees and the court should not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act. In view of this, the High Court observed that the notifications under the EPF Act have to be liberally construed so as to bring employees of maximum number of establishments within the ambit of the Act. It was not required to be establishments specific. There can be one notification with respect to a class of establishments. In view of this, the court held that since the notification was intended to cover all educational, research, training, scientific institutions, it could not be contended that the petitioner did not fall in this category. The court accordingly held the society fell within the meaning of EPF Act.

27 (2010) 126 FLR 930 : (2011) II LLJ 566 (Del.).
28 1985 II CLR 334 (SC).

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*Pee Aar Electrodes* v. *RPF Commissioner*[29] also raised the issue of applicability of the provisions of the EPF Act to the petitioner employed 19 persons but on inspection by the regional provident fund commissioner (RPFC), an accountant of Jindal Singla and Associates Chartered Accountant was also found working in the establishment of the petitioner. In view of this, the RPFC held that the establishment of the petitioner employed 20 persons and the EPF Act was applicable. The appellate tribunal stayed the operation of the order of RPFC. The petitioner filed a writ petition before the Delhi High Court. The question arose whether the presence of the said accountant would make the number of persons employed in the establishment of the petitioner as 20 so as to make the provisions of the EPF Act applicable to the petitioner. The Delhi High Court held that a chartered accountant firm cannot be the employee of the petitioner within the meaning of section 2(f) of the EPF Act. The court pointed out that even though the definition of employee under section 2(f) was wide enough to include a contract labourer but it did not include a contractor, even if the chartered accountant firm were to be equated to a contractor. According to the court, the word "employee" under section 2(f) of the Act, must be a natural person and cannot be a firm as the chartered accountant firm was. The court added that had there been a finding in the order of the RPFC that a particular individual of the said chartered accountant firm was regularly looking after the accounts of the petitioner, even if not exclusively looking after the affairs of the petitioner, it could have been argued by the respondents that he/she should be considered as the employee of the petitioner. However, the finding was that "some personnels" or "any personnel" indicating plurality, of the chartered accountant firm were doing the said job for the petitioner. It indicates that the chartered accountant firm deputes any of its chartered accountants, accountant, assistant, trainee, clerk, *etc*. for the work of the petitioner and the said person need not to be the same all the time. In view of this, the court held that it cannot be said that any particular person was the 20$^{th}$ employee of the petitioner to make the provisions of the EPF Act applicable to it because no relationship of employer and employee existed between the petitioner and any such person. Such an arrangement would constitute hiring by the petitioner of the services of the chartered accountant firm and not a contract for employment. The court accordingly quashed the order of the RPFC under section 7A of the EPF Act.

## VIII PLANTATION LABOUR

The Kerala High Court in *Kerala Plantation Workers Federation* v. *Union of India*[30] was called upon to decide the constitutional validity of section 2(k)(ii) of the Plantation Labour Act, 1951 (PL Act) which prescribes wage ceiling of Rs.750/- p.m. in order to be eligible to claim benefits. The trade unions

29 (2010) 3 LLJ 355.
30 (2010) 2 LLJ 316.

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which challenged the validity of this section contended that (i) ever since implementation of the PL Act, the workers who were entitled to get the benefit thereunder were taken out of the purview of several other welfare enactments like ESI Act; (ii) grave consequences had resulted because the minimum wages notified by the government as payable to plantation workers had crossed the maximum ceiling of Rs.750/- per month prescribed under section 2(k)(ii) and thereby the very purpose of the enactment had been defeated insofar as there was no plantation worker in Kerala and even in the entire country, who was now getting a salary of less than Rs.750/- per month so as to avail the benefit provided under the Act. In view of the above anomalous situation, the workers for whose benefit the Act was brought about, were prevented from pursuing their rights and remedies under the relevant enactments, which govern the field in respect of the workers in other areas like ESI Act. This disabled them from enjoying the benefits of the Act itself by taking them out of the purview of the term 'worker' by virtue of the ceiling of the maximum wages stipulated as Rs.750/- per month under section 2(k)(ii). It was further asserted by the petitioners that there was a clear infringement of article 21 of the Constitution of India insofar as the right to life was having a much wider meaning and it was not mere animal existence as explained by the apex court on many occasions. With reference to the mandate under the articles 39(e) and 43 of the Constitution, it was also pointed out that there was 'constitutional failure' on the part of the respondents insofar as they were virtually shirking off their statutory duties to give effect to the PL Act by incorporating appropriate amendments, thus, acting detrimental to the interest of the workers, without any regard to the object and scope of the enactment and in turn, against the legislative intent.

On the other hand, it was contended by the respondent that the wage ceiling of Rs.750/- was fixed in 1981 and that the process for 'amendment proposals' to enhance the wage ceiling was under consideration since 1985. It was also stated that the Plantation Labour (Amendment) Bill, 1988 was introduced in the *Lok Sabha* on December 16, 1988, though the same lapsed consequent to the dissolution of the *Lok Sabha*. It was further added that the Plantation Labour (Amendment) Bill, 1992 which was introduced in the *Rajya Sabha* was passed on July 30, 1992. The Bill was introduced again in the *Lok Sabha* but the bill again lapsed due to its dissolution on May 19, 1996. It was also stated that the amendment proposal to the PL Act was under active consideration of the government which was discussed in the meeting of the "tripartite industrial committee on plantation industry" held on April 3, 2002 and as decided in the meeting, an 'inter-ministerial committee' with the representatives of the ministries of commerce, finance and labour and also the state government of Assam, West Bengal, Kerala and Tamil Nadu was constituted on May 6, 2002 to look into the various issues concerning the plantation sector. It was further stated that the 'inter-ministerial committee' had submitted the report to the ministry of labour on August 18, 2003 recommending the provisions of the PL Act to be amended/reviewed and the cabinet has approved the amendment of section 2(k) of the PL Act and the bill

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containing the amendment proposal was "likely to be introduced in the ensuing session of Parliament".

Dealing with the rival contention, the court observed that it cannot direct the respondents to legislate on a particular subject in view of the settled law as declared by the Supreme Court in *A.K. Roy* v. *Union of India*,[31] but "this court need not be shy to declare the resultant position as totally unjustified or at least non-workable." The court then referred to the object, scheme and statutory provisions of the PL Act and held that in the existing scenario, the maximum ceiling of Rs.750/- provided under section 2(k)(ii) which is stated as "being subjected" to amendment for nearly two and a half decades and still to be materialized, has definitely to go. Accordingly, the stipulation of Rs.750/ - as the maximum ceiling under section 2(k)(ii) of the PL Act, 1951 was *ultra vires* the Constitution. The court, however, made it clear that the appropriate government was very much at liberty to invoke its power to legislate on the subject, providing appropriate ceiling to the maximum wages under section 2(k) of the PL Act by way of appropriate amendments to be brought out at an appropriate time, as the government found fit and proper.

## IX OCCUPIER IN FACTORY

In *Dutta H @ Hiramanya Dutta* v. *State of Jharkhand*,[32] the Jharkhand High Court was called upon the determine the scope of "occupier" under the Factories Act, 1948 (Act). Here, the petitioner was employed as a senior manager of a firm of civil contractor, which undertook civil work under contract in a cement factory. A complaint was filed against him in the court of chief judicial magistrate for not taking safety measures required under the Act which resulted in death of a worker. Against this order, he filed a writ petition in the High Court for quashing the entire criminal proceedings. A question arose whether the petitioner could be prosecuted for being an "occupier" under the Act. The court answered the question in the negative. It referred the definition of "occupier"[33] and observed:[33a]

31 AIR 1982 SC 710.

32 (2010) 3 LLJ 561 (Jhar).

33 Section 2(n) of the Factories Act, 1948 defines the word 'occupier' to mean: the person who has ultimate control over the affairs of the factory. Provided that –

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

(ii) In the case of a company, any one of the directors shall be deemed to be the occupier.

(iii) In the case of factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier.

33a *Supra* note 32 at 563-64.

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> On going through the definition of occupier, the petitioner who is a senior Manager of a firm, namely, Petron Civil Engineering Pvt. Ltd. can never be said to be an occupier of the factory, i.e. Lafarge India Limited, still the petitioner is being prosecuted as, according to the statement made in the counter affidavit, the petitioner was in ultimate control of the 'work' but this assumption would not bring the petitioner within the definition of occupier as it speaks about the person, who has ultimate control over the affairs of the factory and not the work. Admittedly, the petitioner is not the person, who has ultimate control over the affairs of the Cement factory. Of course, a person other than occupier of the factory can come within the definition of occupier in terms of Section 93 of the Act, if any premises or building of the factory is leased out to different occupiers for use as separate factories as in that event, the owner of the premises shall be responsible for maintenance of the common facilities and services but that is not the situation here as it is never a case of the prosecution that any building was leased out to the firm of the petitioner for running a separate factory.

## X EQUAL PAY FOR EQUAL WORK

In *Janta Shikshan Prasark Mandal* v. *Industrial Court*,[34] two female sweepers who were appointed on purely temporary basis on compassionate ground after the death of their respective husbands in girls hostel of engineering college on a temporary basis filed a complaint under items 5 and 9 of schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Practices Act, 1971 contending violation of constitutional guarantee of equal pay for equal work. They alleged they had been denied pay scale given to two male sweepers working in the boys' hostel under the same management. The industrial court held that work performed by both male and female sweepers was identical. It was also found that the said female sweepers were discriminated. Thus, there was unfair labour practice under items 9 and 5 of schedule IV of Act. Against this order, a writ petition was filed before the Bombay High Court which, while upholding the order of industrial court, held that in view of section 3 of the Equal Remuneration Act, 1976 the complainants performing same work or work of similar nature should not have been paid wages less than their counterpart male sweepers.

## XI PAYMENT OF WAGES

In *Zilla Parishad Chandrapur, through its Chief Executive Officer* v. *Labour Court*,[35] the authority under the Payment of Wages Act, 1936 (PW

34 (2010) 3 LLJ 114.
35 (2010) 3 LLJ 352.

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Act) imposed penalty of 10 times of wages though it held that this was a case of delayed payment of wages. Disapproving the approach and decision, the Bombay High Court observed that in case of delay in making payment of wages the authority under the PW Act was not justified in imposing penalty. The court pointed out that section 15(3) did not contemplate a penalty but only compensation to the maximum of 10 times the amount of wages payable to an employee in case of deduction of payment of wages but not in a case of delayed payment of wages. In cases of delayed payment of wages, the maximum penalty imposable and payable by the petitioner was Rs.25/- only.

In *Sweta Jalan* v. *Nandall & Sons Tea Industries (P) Ltd.*,[36] a question arose whether the assistant labour commissioner was competent to hear and decide claims under section 15 of the PW Act which eventually culminated into issuance of recovery proceedings in December, 2003 when no such power was vested in him at that time, namely prior to November 9, 2005. Dealing with the issue, the division bench of Gauhati High Court referred to section 15 of the PW Act (prior to amendment on November 9, 2009) and observed that under the pre-amended section 15,[37] the assistant labour commissioner has not been included as one of the authorities to hear and decide claims arising due to deduction from the wages or delay in payment of wages. The court referred to the amended section 15[38] which came into effect from November 9, 2005 and observed:[39]

> It is settled position of law that all amendment of Acts/Rules, unless specifically provided therein to be retrospective, shall be prospective

36 2010 (2) LLJ 99.

37 Section 15 of the Payment of Wages Act reads as under:
The appropriate Government may, by notification in the Official Gazette, appoint
(a) Presiding Officer of any Labour Court or Industrial Tribunal constituted under the Industrial Disputes Act, 1947 or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State or
(b) Commissioner for Workmen's Compensation or
(c) Any officer with the experience as a Judge of a Civil Court or a stipendiary Magistrate.

38 Section 15 of the amended Act is as follows:
"15. Claims arising out of the deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims –
(1) The appropriate Government may, by notification in the Official Gazette, appoint -
(a) Any Commissioner for Workmen's Compensation;
(b) Any officer of the Central Government exercising function as –
(i) Regional Labour Commissioner or
(ii) Assistant Labour Commissioner with atleast two years' experience or
(c) Any officer of the State Government not below the rank of Assistant Labour Commissioner with at least two years' experience or …

39 *Supra* note 36 at 104.

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in its operation. Admittedly, amendment of Section 15 of the Wages Act, 1936 was without any retrospective effect, and as such the office of the assistant labour commissioner became an authority to hear and decide claims under Section 15 of the Wages Act, only with effect from November 9, 2005. It is also noticed that the State Government respondents did not file any affidavit showing the source of power to appoint assistant labour commissioner as the authority under section 15 of the Wages Act to hear and decide cases *etc*., prior to the aforesaid amendment dated November 9, 2005 and as such the proceedings conducted by the assistant labour commissioner including the issuance of order dated October 23, 2003 and the requisition for recovery dated December 24, 2003 as referred to above were without jurisdiction and legal competence and consequently, al the proceeding before the assistant labour commissioner are *ab initio* void and order; passed thereunder are null and void.

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