26

SOCIAL SECURITY AND LABOUR LAW

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I INTRODUCTION

IN THE year 2011 a number of Supreme Court and high court cases have been reported in various important areas of social security and minimum standard of employment law. The Supreme Court cases relate to the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 and Building and Other Construction Workers' Welfare Cess Act, 1996, Contract Labour (Regulation and Abolition) Act, 1970, Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and fixation of working hours. The high court cases covered almost all important areas of social security and minimum standards of employment. The courts generally gave beneficial interpretation to the provisions of social security and minimum standard legislation. Indeed the apex court at times evolved new strategies to deal with complex situations. Courts have also reiterated that it should not interfere with policy decisions of the state or its instrumentalities. It has also emphasised that excessive interference in the functions of executive is not proper. This survey seeks to examine the important judgements of the Supreme Court and some selected cases of high courts on social security and minimum standard labour legislation.

II CONTRACT LABOUR

In *Bhilwara Dugdh Utpadak Sahkari S. Ltd.* v. *V.K. Sharma,*[1] the Supreme Court laid down various principles of great relevance on the prevailing contract labour system. The appellant in this case filed a writ petition before the Rajasthan High Court challenging the award of the labour court wherein it was held that the workmen were employees of the appellant and not of the contractor. It also found that while workmen who were working under the orders of the officer's of the appellant, were paid Rs. 70 per day, the workmen/employees of the contractor

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1 2011(9) SCALE 578.

were paid Rs. 56 per day. The high court refused to interfere with the finding of facts recorded by the labour court but added that the appellant resorted to subterfuge to show that the workmen concerned were only workmen of the contractor. Thereupon the appellant filed an appeal before the Supreme Court. The court deprecated the tendency of the employers to avoid their liability under various labour legislation by resorting to subterfuge by trying to show that their employees are, in fact, the employees of a contractor. It remarked that it is high time that this practice must come to an end. The court observed:[2]

> Labour statutes were meant to protect the employees/workmen because it was realized that the employers and the employees are not on an equal bargaining position. Hence, protection of employees was required so that they may not be exploited. However this new technique of subterfuge has been adopted by some employers in recent years in order to deny the rights of the workmen under various labour statutes by showing that the concerned workmen are not their employees but are the employees/workmen of a contractor, or that they are merely daily wage or short term or casual employees when in fact they are doing the work of regular employees.

The court also cautioned the employer by observing that the court cannot countenance such practice any more.[3] Globalization/ liberalization in the name of growth cannot be at the human cost of exploitation of workers.

In *Delhi International Airport Pvt. Ltd.* v. *Union of India*[4] the Supreme Court decided two important issues: (i) Whether the notification dated 26.07.2004 issued by the central government under section 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970 (CLRAA) prohibiting employment of contract labour of trolley retrievals in the establishment of the Airport Authority of India (AAI) at the Indira Gandhi International Airport and Domestic Airport at Delhi would be applicable to the Delhi International Airport Private Limited (DIAL) (ii) whether Central Government is the appropriate government for DIAL under Contract Labour Regulation and Abolition Act (CLRAA) and the Industrial Disputes Act, 1947 (ID Act)?

In order to deal with the aforesaid issue it would be relevant to briefly state the facts of the case wherein 136 workers were employed by the contractor to do the work of trolley retrieving at the domestic and at the international airport, Delhi in the year 1992. In view of the perennial nature of the work, the workmen approached the labour court for abolition of contract labour system and for their absorption as its regular employees.[5]

The central government accepted the recommendations of the Contract Labour Board and issued a notification on 26.07.2004 abolishing the contract labour system. This notification was challenged by AAI before the Delhi High Court. The court

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2 *Id.* at 579-80.

3 *Id.* at 580.

4 2011(10) SCALE 478.

5 AAI came into force by merging the International Airport Authority Act, 1971 and the National Airport Authority Act, 1985.

felt that the present proceedings cannot be proceeded with till the matter is resolved by the High Powered Committee (HPC). Accordingly, the matter was referred to the HPC and the notification was not given effect to. Meanwhile, the aforesaid 136 workers were removed from service on 5.12.2003 as the contract had come to an end and a new contactor came in its place. Against this order these 136 workers filed a writ petition before the High Court of Delhi praying for their absorption in service as regular employees and for implementation of the notification dated 26.07. 2004. The single judge of the high court dismissed the petition and held that the establishment of AAI is no longer in existence and has changed. As such, the notification dated 26.07.2004 cannot be applied to the new entity DIAL. In view of this it directed appropriate government to issue a fresh notification. Thereupon the Indira Gandhi International Airport TDI Karamchari Union filed Letter Patent Appeal (LPA) against the judgement of the single judge. The Union of India also filed LPA against the judgement of the single judge. However, during the pendency of these LPAs, an order was passed by the chief labour commissioner, Government of India holding that the appropriate government for DIAL is the central government. These orders were challenged by DIAL in writ petition. After getting the permission, AAI filed another writ petition challenging the said notification on merit. The division bench of the high court heard all these matters together and passed the impugned order of 18.12.2009. Thereupon the review petition was filed by the Union of India which was decided on 12.03.2010 by the high court modifying para 61 of the impugned judgment. Against the impugned judgment of the division bench of the high court, two appeals were preferred by DIAL and three by AAI and one by the Indira Gandhi International Airport TDI Karamchari Union before the Supreme Court. In these appeals, two broad issues were raised, namely:

(i) Who is the appropriate government for DIAL under the CLRAA and ID Act?
(ii) Whether the notification dated 26.07.2004 is applicable to DIAL?

The court answered both the aforesaid questions in affirmative. It gave several reasons in support of its conclusions, namely: (i) DIAL could not have entered into a contract with AAI without approval of the central government according to the mandate of section 12A of the AAI Act. (ii) AAI acts under the authority of the central government and DIAL acts under the authority of AAI because of its contract with DIAL. From this it may be concluded that DIAL works under the authority of the central government; (iii) the central government has given AAI responsibility for overseeing the airports. To fulfil its obligations, AAI contracted with DIAL. However, if DIAL does not perform its work properly or adequately, then AAI will be breaching its statutory obligations and would be responsible for the consequences. (iv) AAI is under an obligation to follow the directions of the central government and if DIAL has undertaken those obligations through the OMDA, then DIAL is presumably also obligated to follow such directions. (v) Clause 5.1 of the OMDA specifically provides that the "right and obligations associated with the operation and management of the airport would stand transferred" to DIAL. If AAI obligated to follow the 26.07.2004 notification DIAL is equally bound to follow the

notification. (vi) To hold the 26.07.2004 notification inapplicable to DIAL would mean that the government would have to issue separate notification every time AAI contracts with a third party. This would violate the basic objects and reasons of CLRAA. (vii) The security of contract labour working for AAI envisaged that a law cannot be made to depend on the private sector. If the legislature had found it fit to specifically include AAI as an enumerated industry under the ID Act, it is extremely unlikely that it would have intended for AAI to be able to circumvent the central government orders by contracting with private parties. (viii) The privatization of the airports does not mean that the "appropriate government" cannot be the central government. Indeed according to the constitution bench judgment in *SAIL* v. *National Union Water Front Workers,*[6] the definition of `establishment' in the CLRAA covers private undertakings" Concerns about privatization are, therefore, unfounded. (ix) Under section 12(2) of the AAI Act, AAI is obliged to provide air traffic service and air transport service at the airport and since AAI has transferred its "air transport service" responsibilities to DIAL, the central government must be held to be the appropriate government for DIAL. (x) The OMDA makes it clear that AAI maintains ultimate responsibility for the airports. The fact that DIAL was transferred only a portion of AAI's work which DIAL only has incomplete control over as well as the fact that DIAL meets the definition of a contractor under the CLRA Act further suggests that DIAL is nothing more than a contractor for AAI establishment.

The court accordingly held that the notification dated 26.07.2004 directed at AAI establishment would also apply to DIAL. Further the obligation flowing from the said notification under section 10(1) CLRAA should continue to bind every private player that steps into the shoes of AAI.

In *General Manager, (OSD, Bengal Nagpur Cotton Mills, Rajnandgaon* v. *Bharat Lal*[7] the Supreme Court has addressed various issues relating to contract labour. The management (principal employer) entered into a security service agreement with the contractor for its mills premises. The contractor among others employed first respondent for guard duties at the appellant mill. Later the contractor terminated the services of first respondent from service. After about a month the management terminated the security service agreement with the contractor. This resulted in termination of service of the security guard. But five years after termination of his service he filed an application under section 31(3) of the Madhya Pradesh Industrial Relations Act, 1960 (the MPIR Act) for a declaration that his termination from service was illegal. He also sought a consequential direction to the management and the contractor to extend all the benefits which the employees of the management are entitled from the date of termination. He also alleged that he was unemployed and without income. The labour court allowed the application in part and directed the principal employer to reinstate the first respondent in his previous post and pay him all arrears. Against the order the appellant filed an appeal before the industrial court. The industrial court directed the appellant to comply with section 65(3) of the MPIR Act which required the employer to pay to the

6 (2001) 2 ILJ 1087.
7 (2011) 1 SCC 635.

employee the full wages last drawn by him, during the pendency of the appeal. Thereupon the management ordered reinstatement on a salary of Rs. 1000/- per month, though he was getting only a salary of Rs. 200/- from the contractor at the time of his disengagement. Shortly thereafter the management's mills were closed on and it was declared to be a sick industry by the board for industrial and financial reconstruction. But the industrial court, inter alia, held that the agreement between the principal employer and the contractor was sham/nominal and the first respondent should be treated as a direct employee of the management (principal employer). Against this order management filed a writ petition in the high court. The high court dismissed the writ petition. Aggrieved by this order the management filed an appeal by special leave before the Supreme Court. The response of the court may be analysed below.

(i) Sham contract

The appellant relied upon the decision of this court in *NTPC* v. *Badri Singh Thakur*[8] where the Supreme Court held that the provisions of the CLRA Act would override the provisions of the MPIR Act and in *Municipal Corpn. of Greater Mumbai* v. *K.V. Shramik Sangh*[9] again it was held that merely because the principal employer and contractor have not complied with the provisions of the CLRA Act in regard to registration, the system of carrying out work through contract labour could not be termed as sham. While dealing with the contention of the management the Supreme Court observed:[10]

> It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely camouflage to deny employment benefits to the employee and that there was in fact a direct employment it can grant relief to the employee by holding that the workman is the direct employee of the principal employer.

(ii) Test to determine employer –employee relationships

The Supreme Court while dealing with the issue whether the contract labourers are the direct employees of the principal employer laid down two tests, namely, (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. Dealing with onus the court added: [11]

> It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to the second test, the employee did not establish that he was working under the direct control and supervision of the principal employer. The Industrial Court misconstrued the meaning

8 (2008) 9 SCC 377: (2008) 2 SCC (L&S) 903.
9 (2002) 4 SCC 609 : 2002 SCC (L&S) 584.
10 *Supra* note 7 at 638.
11 *Ibid*.

> of the terms "control and supervision" and held that as the officers of the appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant.

(iii) Determinations of supervision and control

The court reiterated its earlier decision in *International Airport Authority of India* v. *International Air Cargo Workers' Union*[12] wherein while explaining the expression "control and supervision" in the context of contract labour the court observed:[13]

> .... if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.
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> The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise.

In view of above the court held that the industrial court ought to have held that the first respondent was not a direct employee of the appellant. The court accordingly set aside the orders of the labour court, the industrial court and the high court.

In *Mukhiya Karyapalak Adhikari, U.P. Khadi Tatha Gramodyog Board Karit Anubhag, Luknow* v. *Santosh Kumar*[14] the Supreme Court dealt with the right of contract labour to be appointed on regular basis. Here the management terminated the services of the respondent, who was engaged as a peon on a lump sum salary of Rs. 2500/- per month, after about a year and three months. Aggrieved by this order the respondent filed a writ petition in the Allahabad High Court. The single judge of the high court dismissed the petition. On appeal the division bench of the high court stayed the order passed by the management terminating the services of the respondent after about six years. It also directed that the management to permit the respondent to continue to work. Against this order the management filed an appeal by special leave before the Supreme Court. The court observed:[15]

> We fail to understand as to how the Division Bench while admitting an appeal could pass such an order so as to allow the appeal itself even at that interim stage. The respondent was not working when the suit was filed and his writ petition was dismissed. Despite the said fact not only the Division Bench stayed the operation of the order after six years of filing the appeal;

12 (2009) 13 SCC 374 : (2010) 1 SCC (L&S) 257.
13 *Supra* note 7 at 638-639.
14 2011 (10) SCALE 256.
15 *Id*. at 257.

but directed for allowing the respondent to continue to work despite the fact that he was not working on that date.

The court accordingly held that the order passed by the division bench was illegal, without jurisdiction and was passed without any application of mind. It accordingly set aside the said order and remitted back the matter to the division bench of the high court for disposal of the appeal as expeditiously as possible. The court, therefore, quashed the order dated 9.8.2010 passed by the division bench staying the order dated 26.6.2004 and directed the appellant to allow the respondent to continue to work and observed that it would not operate in any manner till the disposal of the appeal.

III EMPLOYEES' PROVIDENT FUND

Clubbing of two concerns for the application of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The Supreme Court in *L.N. Gadodia & Sons* v. *Regional Provident Fund Commissioner,*[16] was called upon to consider the question whether the two companies be regarded as one establishment for the purposes of the Employees' Provident Funds and Miscellaneous Provision Act, 1952 (EPF Act)? This question arose because section 2A of the EPF Act provides that where an establishment consist of different departments or has branches situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. Further, the EPF Act neither defines the establishment nor provides guidelines to determine as to when even two companies/ concerns may be considered as one establishment for the purposes of the EPF Act. In the absence of such a provision court laid down some guidelines. Moreover decided cases reveal that in some cases the concerned units were held to be the part of one establishment, where in some other cases they were held not to be so.

In the instant case the directors of two petitioner companies belonged to the same family. The managing director, commercial manager and technical manager were common. Both the concerns have same registered address and common telephone and gram number. Quite apart from this the audited account revealed that the second petitioner company had given a loan of Rs. 5 lakhs to the first petitioner in 1988. Even the employees of two companies were swapped. However, each of the two companies employed less than 20 employees, although the number of employees engaged by them were more than 20 when taken together. On these facts a question arose whether the two entities were two separate establishments and thereby not covered under the EPF Act. The regional provident fund commissioner clubbed the two companies concerned for the purposes of applying the provision of the EPF Act. On appeal the employees provident fund appellate tribunal held that two units were separate private limited companies and since a company is a juristic person, merely because there is a common managing director the two units cannot be considered to be one establishment. On a writ petition the High Court of Delhi reversed the findings of the appellate tribunal which finding

16 (2011) IV LLJ 503 (SC).

was upheld by the division bench of Delhi High Court. Thereupon a special leave petition was filed before the Supreme Court. A question arose whether the two units were to be regarded as one establishment for the purpose of EPF Act. The petitioner contended that the two entitles are two separate establishments under section 24 of the EPF Act because only different departments or branches of an establishment can be clubbed together, but not different establishments altogether. The court rejected the contention and observed that "this is an enabling provision in a welfare enactment." It, observed that no doubt the two petitioners may not be different departments of one establishment in the strict sense." but since there is an integrity of management, finance and workforce in the two private limited companies and they are family concerns of the Gododia family, they should be treated as branches of one establishment for the purposes of EPF Act.

Effect of withdrawal/cancellation of exemption/relaxation granted under the employees' provident fund scheme

In *Marathwada Gramin Bank Karmchari Sanghatana* v. *Management of Marathwada Gramin Bank*[17] the Supreme Court examined the effect of withdrawal / cancellation of exemption / relaxation granted to the respondent bank from complying with the statutory provisions of the Employees Provident Fund Scheme, 1952 (EPF Scheme) framed under the EPF Act. In this case the provision of the Employees Provident Fund Scheme, 1952 was made applicable to the Marthwada Gramin Bank (respondent Bank) which was established in 1976 with effect from 01.09.1979. Accordingly the respondent bank complied with the provisions of the said scheme till 31.08.1981. Thereafter, the respondent bank formed its own trust and framed its own scheme for payment of provident fund to its employees. According to that scheme of the bank the employees were getting provident fund more than the one provided under the EPF Scheme. In view of this the regional provident fund commissioner vide order dated 29.08.1981 exempted the respondent bank from complying with the statutory provisions of the scheme with effect from 01.09.1981 and permitted the respondent bank to pay provident fund to its employees according to its own scheme. The respondent bank contributed provident fund to its employees as per its own scheme for the period from 01.09.1981 to 31.08.1993. The said exemption / relaxation granted to the respondent bank was withdrawn and cancelled on 14.10.1991 and the respondent bank was directed to implement the provisions of the statutory scheme. However, despite cancellation of exemption, the respondent bank continued to pay excess provident fund to its employees in accordance with the earlier scheme till 31.08.1993. But owing to huge accumulated losses the respondent bank issued a notice of change under section 9A of the Industrial Disputes Act, 1947 and discontinued payment of provident fund in excess of its statutory liability with effect from 01.11.1998, but continued to contribute towards employees provident fund as per EPF Scheme. The regional provident fund commissioner issued a letter dated on 13.05.1999 informing the respondent bank that it cannot withdraw the benefit of paying matching employer's share without any limit to wage ceiling and directed it to continue extending the same benefit as

17 (2011) 9 SCC 620.

was granted prior to 01.11.1998. Thereafter, the central government referred the dispute to the Central Government Industrial Tribunal, Nagpur (tribunal). The tribunal relying on section 12[18] of the EPF Act held that the management cannot reduce, directly or indirectly, the wages of any employee to whom the scheme applied or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, express or implied. The tribunal accordingly held that the action of the bank was not justified. It, therefore, directed that the workmen shall continue to draw benefit without any ceiling. Aggrieved by this order the respondent bank filed a writ petition in the Nagpur bench of the Bombay High Court. It was contended on behalf of the respondent bank that the impugned award as well as the communication issued by the regional provident fund commissioner was contrary to law as the same was based on the assumption that section 12 of the EPF Act creates bar for imposing the ceiling Act. It was also submitted that the respondent bank is under an obligation to make contribution towards employees provident fund in accordance with the EPF Act. It was further urged that the respondent bank all through has at least made contribution towards employees provident fund in consonance with the statutory provisions. On behalf of the respondent bank it was submitted that the respondent bank has always complied with the statutory obligation. It was also contended by the respondent bank that the appellants cannot claim as a matter of right the amount in excess of the statutory provisions of the EPF Act. But before the high court, the appellants for the first time submitted that section 17(3)(b)[19] of the EPF Act regarding exemption of any establishment from the operation of the scheme subject to certain conditions was applicable in the case.[20]

The single judge rejected the contention and observed that section 17(3)(b) of the EPF Act was never pressed into service by the appellants herein either before it or before the tribunal and the appellants herein cannot be allowed to raise the said

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18 S.12 of the EPF Act reads as follows: No employer in relation to an establishment to which any Scheme or the Insurance Scheme applies shall, by reason only of his liability for the payment of any contribution to the Fund or the Insurance Fund or any charges under this Act or the Scheme or the Insurance Scheme reduce whether directly or indirectly, the wages of any employee to whom the Scheme or the Insurance Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, express or implied.

19 S.17(3)(b) of the EPF Act provides as under Where in respect of any person or class of persons employed in an establishment an exemption is granted under this section from the operation of all or any of the provisions of any Scheme (whether such exemption has been granted to the establishment wherein such person or class of persons is employed or to the person or class of persons as such), the employer in relation to such establishment—

(a) ……..

(b) shall not, at any time after the exemption, without the leave of the Central Government, reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person or class of persons was entitled at the time of the exemption;"

20 *Supra* note 17 at 623.

contention for the first time in the writ petition. The judge also observed that even otherwise, the said provision applies when the exemption is granted and is in force and in the instant case admittedly the exemption was already cancelled. Therefore, section 17(3)(b) of 1952 Act is not applicable.

Dealing with the provisions of section 12 of the EPF Act, the single judge held that section 12 will not operate as otherwise held by the tribunal in the impugned award. Accordingly the single judge set aside the impugned judgement of the tribunal and allowed the writ petition filed by the respondent bank. Thereupon the appellants, preferred letters patent appeals before the division bench of the high court of judicature at Bombay, and contended that under section 17(3)(b) of the EPF Act once the exemption is granted by the appropriate government, it shall not, without the leave of the central government reduce the total quantum of benefits in the nature of pension, gratuity or provident fund etc. It was also contended by the appellants that in the instant case, the respondent bank did not obtain leave of the central government before acting on the communication dated 14.10.1991 by issuing notice of change. The division bench, however, rejected the contention and affirmed the order of the single judge. Thereupon the appellant filed a special leave petition before the Supreme Court. The appellant submitted that section 12 is attracted. The court rejected the contention and observed:[21]

> The respondent Bank is under an obligation to pay provident fund to its employees in accordance with the provisions of statutory Scheme. The respondent Bank cannot be compelled to pay the amount in excess of its statutory liability for all times to come just because the respondent Bank formed its own trust and started paying provident fund in excess of its statutory liability for some time. The appellants are certainly entitled to provident fund according to statutory liability of the respondent bank. The respondent bank never discontinued its contribution towards provident fund according to the provisions of the statutory scheme.

The court accordingly affirmed the decision of the single judge as affirmed by the division bench of the high court.

IV BUILDING AND OTHER CONSTRUCTION WORKERS

In 2011, like 2009 and 2010 the national campaign committee also filed a writ petition under article 32 of the Constitution before the Supreme Court. But unlike previous years this year three[22] writ petitions were filed before the Supreme Court out of which one relates to contempt petition for non-compliance of directions of the Supreme Court.

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21 *Supra* note 17 at 623.

22 *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India* (2011) 4 SCC 655; *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India* (2011) 4 SCC 653 and *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India* (2011) 4 SCC 647.

In *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India*[23] 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 several states and union territories collected cess under the Building and other Construction Workers' Welfare Cess Act, 1996, but had not passed the benefits to workers. Some of the States have not even constituted the state welfare board as required under section 18 of the Act. In fact, even the preliminary step such as registration of workers as contemplated by the BOCW Act was not done, what to talk of implementation of BOCW Act.

In view of the 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. 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.

Again in *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India*[24] a writ petition was filed under article 32 of the Constitution wherein the petitioner contended that in the State of Maharashtra, which has an estimated 30 lakh construction workers and which has collected till date, cess amounting to approximately Rs. 10.53 crores, had not set up the board, as required under section 18[25] of the BOCW Act and yet the welfare board was not set up. Indeed even the preliminary step had not been taken under the provisions of the BOCW Act. There are other states also like Goa which has not taken the steps to set up the welfare board under the BOCW Act.

In view of above, the court directed the central government to call for the necessary information from the states/union territories concerned and to issue

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23 (2011) 4 SCC 655.

24 (2011) 4 SCC 653.

25 S.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.

(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 if the Board, shall be such as may be prescribed.

Under s. 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 this Act.

appropriate directions for setting up the welfare boards in the first instance in terms of court's order dated 18.01.2010. The court directed that the entire exercise must be completed within eight weeks from the date of order. It also pointed out that as far as subsequent directions are concerned it would monitor this from time to time. The central government was asked to furnish the status report of the central advisory committee as to what steps they had taken with regard to implementation of the BOCW Act and the guidelines given by this court vide order dated 18.01.2010. It clarified that it is only enforcing the statutory provisions of the BOCW Act.

In *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India*[26] the Supreme Court in a writ petition and contempt petition was called upon to issue writ of *mandamus* and other appropriate writ or directions to the central government and other concerned states not only for failure to perform their statutory obligation under the BOCW Act, but for willful disobedience of the order of the Supreme Court. The petitioner impleaded union of India all the 36 states/union territories as respondents to the petition.

In order to deal with response of the Supreme Court it is desirable to examine briefly the various orders/directions issued by it prior to this case.

(i) The Supreme Court, *vide* its order dated 28.07.2006 issued notice to all the respondents, the states and the union of India to file replies and after hearing passed various directions in different orders from time to time and the respondents were required to comply with these directions.

(ii) The Supreme Court on 12.05.2008 directed the secretary of the labour department of each state to submit a detailed status report within eight weeks about the steps taken by them to implement the provision of the BOCW Act. On examination of the reports /affidavits filed by the concerned states/union territories the court noticed that the provision of both the acts have not been substantially complied with. This resulted in passing of a detailed order by 13.01.2009[27] in which it was noticed that under section 6 of the BOCW Act, the appropriate government was required to appoint registration officers and under section 7 of the Act it was to register their establishment with the said officer. Their attention was also drawn about their obligation to constitute the state welfare boards under the provisions of section 18 of BOCW Act.

(iii) In view of failure of the various state governments to take steps to implement the provisions of BOCW Act the court directed chief secretaries of the respective states and secretary (labour) of each state and the union territories to take timely steps as per the provision of the Act, if not already done.

(iv) The court thereafter passed various orders and directions requiring the respective states to implement the provision of the BOCW Act and vide order dated 18.1.2010,[28] constitute the state welfare boars hold meetings of the said boards at regular intervals to discharge their statutory duties, create awareness about the

26 (2011) 4 SCC 647.

27 *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India* (2009) 3 SCC 269: (2009) 1 SCC (L&S) 651.

28 *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India* (2011) 4 SCC 655.

benefits of the BOCW Act amongst the beneficiaries through media, appoint registering officers and set up centres in each district for that purpose. This court further directed that all contracts with the government shall require registration of workers under the BOCW Act to give benefits of the Act to the registered persons, the CAG to conduct audit of the entire implementation of the Act and use of the allocated funds and finally the boards to prepare detailed reports in regard to the implementation. However, despite these orders, the provision of the Act were not implemented.

(v) On 10.09.2010 the Supreme Court in view of persisting default made by states/ union territories and in view of the fact that the central government has not even issued any directions under section 60 of the Act, despite the court's order dated 18.01.2010 directed the central government to issue necessary directions to the states as well as furnish the status report of the central advisory committee as to the steps had been taken by them to implement the provisions of the respective Acts.

On subsequent dates, the petitioner submitted that the directions of the court as well as the provision of the Act were not being implemented by various states. In view of this the court, granted liberty to the petitioner, vide its order dated 22.11.2010, to take out contempt motion statewise.

(vi) On 05.01.2011 the petitioner filed IA no.6 of 2011 praying for filing of additional documents which included charts giving details of the states which had not constituted the welfare boards, information about constitution of the cess collecting authority, number of workers registered with each state and the schemes framed and implemented. The charts revealed that most of the states had defaulted in complying with the provision of the Act and some of them, in fact, had not even constituted the state welfare boards despite the writ petition being pending in this court since the year 2006 and various directions issued by it.

(vii) The petitioner then filed contempt petitions nos. 42 and 43 of 2011. In contempt petition no. 42 of 2011 in which it has averred that respondents 2 to 10 including the Union Territories of Lakshadweep, the Government of the State of Meghalaya, the Government of the State of Nagaland and the Union of India, have failed to take even the preliminary steps to constitute the welfare boards under section 18 of the BOCW Act and that the central government has neither issued any directions nor taken any steps in that behalf.

(viii) This was followed by filing contempt petition no. 43 of 2011 on the ground that the respondents namely, the State of Maharashtra Goa, Himachal Pradesh, Rajasthan, Uttarakhand, Uttar Pradesh, Manipur and the Union Territories of Daman and Diu, Dadra and Nagar Haveli, Chandigarh, Andaman and Nicobar Islands had willfully disobeyed orders of this court particularly the order dated 18.01.2010 and they have not implemented the provision of the Act. Further the registering officers have not been appointed and the workers are not being registered, resulting in non-implementation of the schemes for grant of benefits and the facilities to such workers.

The court after referring to the aforesaid order / directions issued by it examined the relevant provisions of the BOCW Act regarding the obligations of the appropriate government also noticed that the appropriate governments have not complied with their statutory duties and functions. A number of states, particularly the Union

Territory of Lakshdweep and the States of Meghalaya and Nagaland have not even constituted the welfare boards in terms of section 18 of the Act. The state of Uttar Pradesh has completed the formality of constituting a board but it is a one-man board instead of having a minimum of three or more members as required under section 18 of the Act. Further no worker has been registered by the States of Assam, Mizoram, Sikkim and Jammu and Kashmir. The appropriate governments and registering authorities, wherever constituted, particularly the respondent state governments in these applications/ petitions have failed to either collect the requisite cess amount or have collected the same inadequately and in any case have failed to distribute the benefits and facilities to the beneficiaries.

The court observed that the respondents have, on the one hand disobeyed the orders of this court particularly the orders dated 18.01.2010, 13.08.2010 and 10.09.2010, while on the other they have failed to perform their statutory obligations under the provisions of the Act despite direction of this court. Such default on the part of these respondents, persisted over a long period and, therefore, the court "is left with no alternative except to pass appropriate directions/orders in accordance with law on these two contempt petitions." Accordingly the court issued notice to show cause why proceedings under the Contempt of Court Act, 1971 be not initiated against all the respondents in contempt petition nos.42 and 43 of 2011 and directed the labour secretary, ministry of labour, labour secretary, Lakshadweep, UT of Lakshadweep, the labour secretary, Meghalaya, labour secretary, Nagaland and the director general of Inspection, Government of India to be present in the court.

The aforesaid decision shows the concern of the Supreme Court to protect the interest of building and other construction workers. However it is unfortunate despite enactment of BOCW Act the executive have failed to perform its statutory obligations under the BOCW Act, despite several direction issued by the Supreme Court. It has not even constituted welfare board and a state like U.P. where such welfare board is constituted has merely appointed only one member when the BOCW Act requires at least three. Whatever may be the explanation the worst sufferer are building and other construction workers who constitute a majority of unorganised labour and are denied social security. This, it is submitted, is also violative of article 21 of the Constitution.

V CONSTITUTIONAL VALIDITY OF PRESCRIBING LONGER HOURS OF WORK ONLY FOR NEW RECRUITS

The current judicial approach of non-interference with the policy decision of the state, judicial self restraint and judicial legislation to meet the changing needs of hour is best depicted in *Transport and Dock Workers Union* v. *Mumbai Port Trust*.[29] In this case, the Supreme Court was called upon to consider whether introduction of longer hours of work for persons appointed as typist-cum-computer clerk to enhance competitiveness of public sector namely, Mumbai Port Trust was valid and permissible under article 14 of the Constitution. While dealing with this issue the court evolved a number of principles of great relevance.

29 (2011) 2 SCC 575.

The facts leading to this case may briefly be stated as follows: The working hours of employees including typist-cum-computer clerks of indoor establishment recruited prior to 01.11.1996 were 7 hours including half an hour lunch break. Later the management in order to meet changing business environment and to bring uniformity in indoor and outdoor establishment introduced 8 work hours including half an hour rest for employees working as typist-cum-computer clerk appointed after 11.11.1996 in indoor establishment. But in order to avoid labour dispute it did not make any such change for existing employees working on indoor establishment. A registered trade union of the employees (including typist-cum-computer clerk) filed a writ petition before the Bombay High Court prescribing longer hours of work for typist-cum-computer clerks working in the indoor establishment of Mumbai Port Trust appointed after 01.11.1996 alleging that it was voilative of article 14 of the Constitution. The high court dismissed the petition. Thereupon the appellant, the registered trade union, filed a special leave petition before the Supreme Court. It was contended that prescribing seven-and-half hours of work per day for those typist-cum-computer clerk appointed after 01.11.1996 and having six-and-half hours per day for employees who were recruited as typist-cum-computer clerk before 01.11.1996 was discriminatory and voilates article 14 of the Constitution. The appellants also claimed that this practice is contrary to clause 24 of the settlement dated 06.12.1994 reached between the employees' union and the respondent port and also violates section 9-A of the Industrial Disputes Act. The appellants prayed that either their duty hours be reduced by one hours, or else they be given overtime allowance for one hour.

The Supreme Court while dealing with scope of protection under article 14 of the Constitution observed: [30]

> …Article 14 of the Constitution does not take away from the State or its instrumentality the power of classification, which to some degree is bound to produce some inequality.[31] However, in our opinion, mere inequality is not enough to violate Article 14. Differential treatment, per se, does not constitute violation of Article 14. It denies equal protection only when there is no reasonable basis for differentiation.[32] If the law or the practice deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

The court then dealt with the power of state to make classification. It has been repeatedly held by the apex court that article 14 does not prohibit reasonable classification for the purpose of legislation or for the purposes of adoption of a policy of the legislature or the executive, provided the policy takes care to reasonably

30 *Id*. at 584.

31 *Ibid*., see also *State of Bombay* v. *F.N. Balsara*, AIR 1951 SC 318: (1951) 53 Crl LJ 1361.

32 *Ameerunnissa Begum* v. *Mahboob Begum*, AIR 1953 SC 91 and *Babulal Amithalal Mehta* v. *Collector of Customs*, AIR 1957 SC 877.

classify persons for achieving the purpose of the policy and it deals equally with all persons belonging to a well-defined class. It is not open to the charge of denial of equal protection on the ground that the new policy does not apply to other persons. In order, however, to pass the test of permissible classification, as has been laid down by the Supreme Court in a catena of its decisions, two conditions must be fulfilled: (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.[33]

The court pointed out that the classification would not violate the equality provision contained in article 14 of the Constitution if it has a rational or reasonable basis. However, it added:[34]

> The question remains: what is "rational" or "unreasonable?" These are vague words. What may be regarded as rational or reasonable by one Judge may not be so regarded by another. This could lead to chaos in the law.

The court formulated certain questions to decide whether a classification or differentiation is reasonable or not, namely *is it conductive to the functioning of modern society?* If it is then it is certainly reasonable and rational.[35] The court pointed out that the purpose of the classification was to make the activities of the port competitive and efficient. With the introduction of privatization and setting up of private ports, the respondent had to face competition. Also, it wanted to rationalize its activities by having uniform working hours for its indoor and outdoor establishment employees, while at the same time avoiding labour disputes with employees appointed before 01.11.1996. In the modern world businesses have to face competition with other businesses. To do so, they may have to have longer working hours and introduce efficiency, while avoiding labour disputes. Looked at from this point of view the classification in question seemed to be reasonable for the court.

Dealing with the new policy adopted by the respondent port the court observed that it was meant to bring about uniformity in the working hours of the personnel working on the indoor and outdoor establishment. For achieving that purpose the port took a policy decision to lay down a condition in the appointment orders of the personnel recruited on indoor establishment after 01.11.1996 that they will have to work for eight hours. The purpose of this was to make the organization competitive and efficient. This decision of the port, the court felt was *bonafide*, and it cannot be said that it violates article 14 of the Constitution.

Dealing with the policy decision of the port the court said that it cannot be said to cause any prejudice to the interest of the personnel recruited after 01.11.1996 because before their recruitment they were clearly given to understand as to what would be their working hours, in case they accept the appointment. Thus "the

33 *Gopi Chand* v. *Delhi Admn*., AIR 1959 SC 609: 1959 Cr LJ 782.
34 *Supra* note 29 at 585.
35 *Ibid*.

introduction of the new policy was a *bonafide* decision of the port, and the acceptance of the conditions with open eyes by the appellants and the recruits after 01.11.1996 means that they can now have no grievance. It is well settled that courts should not ordinarily interfere with policy decisions."[36]

Dealing with fixation of cut-off date the court observed that there may be various considerations in the mind of the executive authorities due to which a particular cut-off date has been fixed. These considerations may be financial, administrative or any other. But court should exercise judicial restraint and leave it to the executive authorities to fix the cut-off date. The government "must be left with some leeway and free play at the joints in this connection." The court accordingly held that there was no violation of article 14 of the Constitution.

VI EMPLOYEES' COMPENSATION

The Employees' Compensation Act, 1923 (EC Act) imposes a liability upon the employer to pay compensation to the workmen and their dependents for accident including certain occupational diseases arising out of and in the course of employment resulting in death or disablement. The Second National Commission on Labour set up in the year 2002 had proposed a few changes in the Act and based on the said recommendations, certain amendments were introduced as per the Workmen's Compensation (Amendment) Act, 2009. It received the assent of the President of India on 22.12.2009 and the Act was notified in the gazette on December 22, 2009 including amendments in section 20 of EC Act relating to the qualification for appointment of commissioner.

The effect of aforesaid amendment in section 20 of the EC Act was examined in *Janesh Gupta* v. *State of Himachal Pradesh.*[37] The State of Himachal Pradesh by notification[38] had appointed sub-division officer (civil) and land acquisition officer

36 *Id*. at 587.

37 (2011) 4 LLJ 766 (HP).

38 The notification, dated August 22, 2005 reads as follows:"In supersession of all previous notifications on the subject and in exercise of the powers conferred by sub-section (1) of s.20 of the Workmen's Compensation Act, 1923 (8 of 1923), the Governor, Himachal Pradesh is pleased to appoint the following officers as "commissioner" for Workmen's Compensation in respect of the cases of 'INJURED WORKMEN" for the purpose in Himachal Pradesh from the date of issue of this Notification.

Designation	Jurisdiction
All Sub-Division Officers (Civil) in Himachal Pradesh.	Within their respective jurisdiction in respect of all workmen other than the workmen of P.W.D., M.P.P., Electricity Board, I.P.H. and Land Acquisition Officers.
All Land Acquisition Officers in Himachal Pradesh	Within their respective jurisdiction in respect of workmen of P.W.D., I.P.H., Electricity Board and multipurpose Projects.

as commissioners under section 20(1)[39] of the Workmen's Compensation Act (unamended). Against this notification/ appointment an advocate filed a writ petition in the Himachal Pradesh High Court challenging appointment of persons as Commissioners under the Workmen's Compensation Act, 1923. He prayed that (i) respondents may be directed to appoint such persons as "commissioners" workmen's compensation as envisaged in sub-section (1) of section 20 of Workmen's Compensation Act (Act No.45/2009); (ii) to quash the notification, dated 22.08.2005 and respondents may be directed to withdraw immediately all pending cases under the Workmen's Compensation Act, from the officers as they lack requisite qualification to hold such office.

In order to deal with the contention and prayer the court referred to the following amended provisions of section 20 which came into force on 18.01.2010:

> In section 20 of the principal Act, in sub section (1), after the words "appoint any person," the words "who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been for not less than five years an advocate or a Pleader or is or has been a Gazetted Officer for not less than five years having educational qualifications and experience in Personnel Management Human Resource Development and Industrial Relations" shall be inserted.

The court observed that the commissioner appointed by notification do not fulfill the requirements under section 20. The court pointed out that the sub divisional officers may be vested with several powers under various statutes. But, for them to act as commissioners under the Workmen's Compensation Act, it is not enough that they be gazette officers with training in personnel management. The requirement is that they should be gazetted officers for not less than five years having educational qualifications and experience in personnel management, human resources development and industrial relations. The court added: [40]

> There cannot be a presumption that a Sub Divisional Magistrate would possess the qualifications, as prescribed under the Workmen's Compensation Act, to be a Commissioner. Even if the State wants to confer such power on a Sub Divisional Officer, it has to be first examined as to

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39 S.20, as it originally stood, read as follows:
(1) The State Government may by notification in the Official Gazette appoint any person to be a Commissioner for Workmen's Compensation for such area as may be specified in the notification.
(2) Where more than one Commissioner has been appointed for any area the State Government may by general or special order regulate the distribution of business between them.
(3) Any Commissioner may for the purpose of deciding any matter referred to him for decision under this Act choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.
(4) Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code.

40 (2011) 4 LLJ 766 at 768.

whether that particular officers holding the office possess the prescribed educational qualification in Personnel management, Human Resources Development and Industrial Relations and experience apart from the five years tenure as a Gazetted Officer. That officer should have both the qualifications and experience in those areas.

The court accordingly held that the commissioners appointed namely sub divisional officers (Civil) in Himachal Pradesh and land acquisition officers in Himachal Pradesh are not empowered to act and function as commissioners under section 20 of the Workmen's Compensation Act, 1923. It, therefore, directed the state to appoint commissioners in terms of section 20(1) of the Act, as amended in the year 2009. It, however, clarified that declaration as above would not affect the orders already passed or action taken by the commissioners as after the introduction of the amendment to the Workmen's Compensation Act on 22.12.2009, in view of section 6 of the H.P. General Clauses Act, 1968, till date.

In *Shaikh Salim Ramzan* v. *Ashok Beniram Kihawade,*[41] the Bombay High Court had an occasion to determine the scope of "total disablement" under EC Act. A driver of motor vehicle of the employer met with an accident during the course of employment which resulted besides multiple injuries on his person loss of total eye sight of his right eye. Thereupon the said driver filed an application for compensation before the commissioner for employee's compensation. The commissioner granted compensation of Rs. 77,107/-, however, did not accept the claim of the appellant of being 30 years of age but held that he was 42 years of age on the date of accident. The commissioner further held that as per the disability certificate, the permanent disability is only 40% and not 100% and as such he found that the earning capacity of the applicant has been lost to the extent of 40%. The commissioner also held that the salary of the appellant was Rs. 1800/- per month and not Rs. 3000 per month. Aggrieved by this order the driver filed an appeal before the Bombay High Court. The court dealt with the computation of compensation under the Employees' Compensation Act and observed that even though under the medical terms, the disability is only 30% but while computing the compensation the loss of earning capacity is to be considered as because of the loss of vision of right eye and that the appellant would not be in a position to continue with his avocation as a driver. The court added that while computing compensation there is a need to take into account the object and spirit behind the provisions of the Workmen's Compensation Act, and the definition of total disablement which means such a disablement whether of a temporary or permanent nature as incapacitates workman for all work, which he was capable of performing at the time of accident resulting in such disablement. The court then explained the expression "incapacitates workman for all work which he was capable of performing at the time of accident resulting in such disablement" to mean the workman having been rendered incapable of performing that "work" which he had undertaken at the time of accident.

While dealing with the question whether in the instant case section 4(1)(c), as applied by the commissioner, or section 4(1)(b) would apply, the court observed

41 (2011) 4 LLJ 23 (Bom).

that the commissioner committed a serious error in law in applying section 4(1)(c) instead of section 4(1) (b) of the Workmen's Compensation Act. Once it is found that it is the case of permanent total disablement section 4(1)(b) of the Act would be applicable. Consequently, schedule I part I and item 4[42] would be applicable and not schedule I part II item 25 as has been applied by the commissioner. Applying the principle in this case the court held that because of loss of vision of right eye, the claimant has been incapacitated for all work as driver and had to surrender licence rendering him unable to perform any work of driver thereby resulting in 100% loss of earning capacity.

In *National Insurance Co. Ltd.* v. *Zaheeda Banu*[43] a driver of a vehicle died while he was sitting in the cabin of the vehicle. The dependents claimed compensations under the Workmen's Compensation Act, 1923. The commissioner under the W.C. (now ECA) Act awarded compensation. Aggrieved by this order the insurance company filed an appeal before the Karnataka High Court. It was contended by the company that the death of the driver was not necessarily due to stress and strain attributable to the nature of the employment, but in the normal course. Moreover the claimants did not prove that the death was due to the stress and strain caused on the employee due to the work pressure while in such employment. A division bench of the high court while dealing with the contention laid down the following principles:

(i) The burden is always upon the person who takes up the defence that the death was in the natural course of events and not in the course of employment but due to some other reasons.
(ii) The driving job is a tension filled job to cope with present day traffic and other things.
(iii) When there is no dispute that the person who died was actually sitting in his work place i.e. cabin while he was at the steering, there can never be any presumption that death was due to some other reason.

The court deprecated the tendency of the insurance company to take up a defence that death was neither in the course of employment nor due to the pressure of work. The company is resorting to untenable, petty and cantankerous reasons to wriggle out of its liability which is not befitting the status of an insurance company which is nationalized. This is all the more so under the Workmen's Compensation Act, which is a piece of social welfare legislation. Indeed, such untenable stands only expose the public sector undertakings and put them in poor light, and more importantly results in undue harassment to the poor claimants as well as works at cross purposes to the objects of the Act itself.

In *Jayalakshmi M. Shetty* v. *Ramesh*[44] a driver, while driving the vehicle, suddenly fell ill, suffered brain hemorrhage and ultimately died. The legal heirs of the deceased driver filed a petition for payment of compensation under the

42 Item 4 part I of schedule I lays down that if the loss of sight is to such an extent which renders claimant unable to perform any work for which eye sight is essential, then 100% loss of earning capacity is to be considered.
43 (2011) 3 LLJ 299.
44 (2011) 3 LLJ 108.

Workmen's Compensation Act, 1923. The workmen's compensation commissioner however, dismissed the petition on the ground that in the medical records of the deceased, the doctors have found the history of consumption of alcohol and smoking. Aggrieved by this order the legal heirs preferred an appeal against the award of the commissioner, before the Karnataka High Court. A division bench of the high court set aside the order of the commissioner and awarded compensation, mainly on two grounds: (i) Merely because the history of the deceased states that the worker was consuming alcohol and smoking, it cannot be a ground for the commissioner to dismiss the claim petition when such a ground was not taken by the insurance company, that too in the absence of an issue which was required to be considered by the trial court. (ii) There is no medical evidence to show that the death was due to consumption of alcohol and smoking.

The court accordingly set aside the order of the commissioner and awarded compensation of Rs. 3.2 lakhs with interest.

VII EMPLOYEES' STATE INSURANCE

Scope of the terms 'employee,' 'principal employer' and 'wages'

In *Employees State Insurance Corporation* v. *Padma Bhawan Engineers (P.) Ltd.*,[45] the Punjab and Haryana High Court examined the concept and scope of "employee," "principal employer" and "wages" under section 2 of the Employees' State Insurance Act, 1948 (ESI Act).

In the present case, the managing director of the Padma Bhawan Engineers (P) Ltd was authorized by the board of directors through resolution to file the suit before the trial court. A demand was raised by the Employees' State Insurance Corporation (ESIC) for non-deposit of the contribution of Rs. 4762.50/- out of the salary paid to the managing director and the interest thereon on the ground that managing director was employee under the ESI Act.

The management challenged the order of ESIC before the employees insurance court, under section 75 of the ESI Act. The ESI court held that the director/ managing director of the company was not the employee under section 2(9) of the ESI Act and salary paid to them was not wages in terms of section 2(22) of the ESI Act rather, the director / managing director of the company is the principal employer in terms of section 2(17) of the ESI Act. Against this order the ESI Corporation filed an appeal before the Punjab and Haryana High Court. The questions involved in this appeal were (i) whether the director/managing director of the company is an

45 (2011) 4 LLJ 222 P&H.

employee within meaning of section 2(9)[46] of the ESI Act? (ii) whether the remuneration paid to the director/managing director of the company is wages in terms of section 2(22)[47] of the ESI Act? (iii) whether the director/managing director of the company is the principal employer or the company is the principal employer?[48]

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46 S.2(9) of ESI Act defines - "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 estab-lishment or elsewhere; or
(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; [and includes any person employed for wages on any work connected with the administra-tion of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment (or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include)
(a) any member of (the Indian) naval, military or air forces; or
(b) any person so employed whose wages (excluding remu-neration for overtime work) exceed (such wages as may be prescribed by the Central Government): Provided that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] at any time after (and not before) the begin-ning of the contribution period, shall continue to be an employee until the end of that period)

47 S.2(22) of the ESI Act defines - "wages" to mean: all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes (any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or layoff and) other additional remuneration, if any, (paid at intervals not exceeding two months), but does not include —(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act ;

48 S.2(17) defines "principal employer" to mean —
(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under 3[the Factories Act, 1948] (63 of 1948), the person so named;
(ii) in any establishment under the control of any depart-ment of any Government in India, the authority ap-pointed by such Government in this behalf or where no authority is so appointed, the head of the department;
(iii) in any other establishment, any person responsible for the supervision and control of the establishment;

The court relying upon the decision of the Supreme Court in *Employees State Insurance Corporation* v. *Apex Engineering Pvt. Ltd.*[49] answered all the questions in affirmative and held that (i) the director/ managing director of the company, who is working for remuneration is an "employee" under section 2(9) of the ESI Act, (ii) the director/managing director of the company, who is not the owner or the sole occupier of the factory is not the 'principal employer', (iii) the salary paid to the director/managing director of the company, who is working in the factory, is wages under section 2(22) of the ESI Act.

In *M.M. Rubber Company Ltd.* v. *Dy. Director, Employees State Insurance Corporation*[50] the Madras High Court was called upon to decide four issues, namely:

(i) whether section 22 of Sick Industries (Special Provisions) Act bar Employees State Insurance authority to recover the contribution to ESI fund?
(ii) what is the remedy for a person aggrieved by the order under section 45A of the ESI Act, 1948?
(iii) can the management be absolved to pay dues under ESI Act merely because the trade union filed a writ petition?
(iv) can the interest for delayed payment levied under section 39(5) of the ESI Act, 1948 be waived or modified?

The response of the court in relation to these issues was as under:

Issue no.1: While dealing with this issue the court relied upon a full bench decision of the Kerala High Court in *Gowri Spinning Mills (Private) Ltd., (rep. by Managing Director), Dharmapurai* v. *Assistant Provident Fund Commissioner, Salem*[51] wherein it was held that the pendency of BIFR proceedings cannot prevent the ESI authorities from enforcing the provisions of the Act.

Issue no. 2: As regard the second issue the court relied upon the decision of the Supreme Court in *ESI Corporation* v. *C.C. Santhakumar*[52] wherein it was held that the only remedy open to the aggrieved person is to approach the appropriate ESI Court with a petition filed under section 75 of the ESI Act. The court added:[53]

> The legislature has provided for a special remedy to deal with special cases. The determination of the claim is left to the Corporation, which is based on the information available to it. It shows whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears. So, the non-availability of the records after five years, as per the Regulation, would not debar the Corporation to determine the amount of arrears. Therefore, if the provisions of section 45A are read with section

49 (1998) 1 LLJ 274 (SC).
50 (2011) LLR 454.
51 (2006) 4 MLJ 1261: (2007) 1 LLJ 140.
52 (2007) 1 SCC 584 : (2007) 2 LLJ 3.
53 *Supra* note 50 at 455.

45B of the Act, then, the determination made by the Corporation is concerned. It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application under section 75 of the Act. If the employer fails to challenge the said determination under section 75 of the Act before the Court, then the determination under section 45A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined under section 45B of the Act.

Issue no. 3: As regard this issue the court held that mere filing of writ petition by a trade union would not absolve the management to pay dues under the ESI Act.

Issue no. 4: On the question of interest, the court referred to the decision of the Supreme Court in *Goetze (India) Limited* v. *Employees' State Insurance Corporation*[54] wherein it was held that the liability to pay interest is statutory. There is no power of waiver. The question of any compromise or settlement does not really arise. The court accordingly dismissed the petition.

VIII MINIMUM WAGES

The Minimum Wages Act, 1948 empowers the appropriate government to fix minimum rates of wages in certain employments. The Act also imposes an obligation on the employer to pay not less than the statutory wages. Further, sections 3 and 27 confer extensive power of choosing employments for the implementation of the Act. But these objectives of the Act cannot override the express provisions of the Constitution.

The issue of non-payment of minimum wage by the state to part time workers arose in *Manjulaben Punjalal Dabhi* v. *State of Gujrat.*[55] In this case a lady was appointed as a "part time water bearer" in the office of the director of medical services, ESI scheme. She was required to discharge her duties for 6 hours in a day for which consolidated salary was paid. Her services were terminated twice but were set aside by the court. She was also denied minimum wage as per the notification issued by the government which provided that the workers employed on part-time basis shall be paid 50% of the minimum rates of wages plus special allowance, if he works upto four hours and if he works more than four hours, he shall be paid full minimum rates of wages plus special allowance. In view of this she filed a writ petition before the Gujarat High Court mainly on the ground that she has not been given the wages, which even as per the state authorities are the prescribed minimum wages to be admissible to those part timers working in the doctor's dispensary or consulting room, as the notification dated 11.02.2009 contains explanation for the purpose of notification. In view of this she prayed that she be either given the wages of Rs. 3500/- which was revised fixed pay as per resolution dated 24.09.2010, which was based upon the 5th pay commission recommendations only, or she may be paid the minimum wages as prescribed and provided in government resolution dated 11.02.2009. Dealing with the contention the court held the petitioner is entitled

54 AIR 2008 SC 3122: (2008) 3 LLJ 356.

55 (2011) 4 LLJ 758 (Guj).

to claim proper reasonable treatment from state and the state cannot deny her wages to full rates of wage plus special allowance which are made admissible to the part time employees of doctor's dispensary and consulting rooms, who are putting more than four hours of part time work to its own employees like present petitioner, who are admittedly working for six hours a day. Such denial is hit by article 14 of the Constitution of India.

Accepting the aforesaid contention of the appellant the court directed the respondent (i) to pay the wages to the lady part employee (the applicant) equivalent to full rate of minimum wages plus allowance, which have been made applicable by the state to be paid to the part time employees' working in the dispensary and consulting rooms of the doctors for more than four hours from the date of this application (ii) alternatively, it would be open to the respondents to pay fixed monthly wages of Rs. 3500/- p.m. to the applicant from the date of this application (iii) the arrears of wages from the date of application till its actual payment be worked out based upon aforesaid direction and shall be paid on or before 01.03.2011 and in case, if it is not paid, then, the interest on arrears shall be paid at the rate of 8% p.a. till the same is actually paid.

IX PAYMENT OF GRATUITY

Effect of pendency of criminal proceedings on payment of gratuity

In *New India Assurance Co. Ltd.* v. *Ashwin Chimanlal Sheth*,[56] a question arose whether mere pendency of criminal proceedings against the employee would justify the employer to withhold the gratuity under the Payment of Gratuity Act, 1972? In this case an employee was permitted to retire on attaining the age of superannuation. However, the management did not pay the amount of gratuity on the ground that the criminal case of misappropriate and fraud under the household insurance policy resulting into huge financial loss to the company was pending against him. However, neither any departmental inquiry was initiated nor any order was passed to forfeit the gratuity against the said employee. On an application filed by the said employee the controlling authority under the Payment of Gratuity Act directed the management to pay Rs. 3,50,000 along with 10% interest till the gratuity is paid. On appeal the appellate authority dismissed the petition. Aggrieved by the order the management filed a petition under articles 226 and 227 of the Constitution before the Gujarat High Court. The court observed:[57]

> It appears that relying upon the Rule 45(1) & (2) of General Insurance Employees Pension Scheme, 1995 which provides that an employee who has retired on attaining the age of superannuation and against whom any departmental or judicial proceedings are instituted or any departmental proceedings were continued in such case, gratuity has not been paid to such employee only conclusion of proceedings against him, the amount of gratuity is withheld by the petitioner. As held by the Hon'ble Surpeme Court in the case of *Jaswant Singh Gill* v. *Bharat Coking Coal Ltd*., (2007)

56 2011 LLR 66 (Guj).

57 *Id*. at 68.

> 1 LLR 427 provision of Payment of Gratuity Act, 1972 would prevail over rules and that unless and until loss or damage has been quantified, gratuity amount is not liable to be forfeited and that amount of gratuity is liable to be forfeited only to the extent of damage or loss caused.

In view of above the court held that respondent is entitled to gratuity particularly when there is no order of forfeiture by the employer and the respondent was permitted to retire on attaining the age of superannuation and therefore, no illegality had been committed by both the authorities below in directing the petitioner to pay sum of Rs. 3,50,000/- by way of gratuity.

Effect of 2009 amendment in Payment of Gratuity Act to teacher

The Payment of Gratuity Act, 1972 (PGA) is a piece of social welfare legislation and deals with the payment of gratuity which is a kind of retiral benefit like pension, provident fund etc. The main purpose and concept of gratuity is to help the workman after retirement, whether retirement is a result of rules of superannuation or physical disablement or impairment of vital part of the body. It is a sort of financial assistance to tide over post-retiral hardships and inconveniences.

Notwithstanding the need for payment of gratuity the apex court[58] held that teachers are not entitled for gratuity. This led to the amendment, inter alia, in section 2(e) of the Payment of Gratuity Act, 1972.

In 2011, the Madhya Pradesh High Court in *Mahendra Singh Chhabra* v. *Appellate Authority, Payment of Gratuity Act*[59] had an occasion to examine the effect of the 2009 amendment in the Payment of Gratuity Act, 1972. The petitioner who started his service career as a teacher superannuated on 14.09.2000. As no gratuity was paid to him, be submitted an application before the controlling authority for payment of gratuity. The controlling authority by an order dated 28.03.2003, by taking into account the services of the petitioner, directed payment of gratuity to the tune of Rs. 2,50,546/-. Against this order the management filed a writ petition and thereafter a liberty was granted to the management to prefer an appeal before the appellate authority held that teachers are not entitled for gratuity. Aggrieved by this order the petitioner filed a writ petition. The court noted the provisions of section 2(e) of the Payment of Gratuity Amendment Act of 2009 which reads as under:[60]

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

58 *Ahmedabad Pvt. Teachers' Association. Appellant* v. *Administrative Officer*, 2004 LLR 97: 2004 (100) FLR 601 (SC): 2004 (14) AIC 1 (SC).

59 (2012) LLJ 432 (MP).

60 *Id*. at 439.

Interpreting the aforesaid provision the court observed:[61]

> The aforesaid Amendment Act makes it very clear that teachers are also entitled to payment of gratuity and the amendment has been made applicable with retrospective effect *i.e.*, *w.e.f.* 3.4.1997 the date on which the earlier Notification was issued by the Ministry of Labour and Employment by which the provisions of the Payment of Gratuity Act, 1972.

In view of the above the court held that the services rendered by the petitioner on the post of teacher are required to be taken into account for the purposes of calculation of gratuity as directed by the controlling authority. It accordingly directed the management to pay the gratuity amount to the petitioner.

The net effect of the aforesaid amendment and decision is that a teacher is now entitled to gratuity under the Payment of Gratuity Act, 1972.

X BONDED LABOUR

Bonded labourers constitute one of the most exploited sections of the rural labour. It is the "relic of feudal exploitative system." Till recently, there existed in our country a system of usury under which the debtor, his descendants or dependents, had to work for the creditor without reasonable wages or with no wages in order to repay the debt. "At times, several generations work under bondage for the repayment of the paltry sum which had been taken by some remote ancestor. The interest rates were exorbitant and such bondage could not be regarded as a result of a legitimate contract or agreement. This system implies violation of human rights and destruction of the dignity of human labour. The practice of forced labour is condemned in almost every international document dealing with human rights. In India article 23(1) of the Constitution prohibits beggar and other forms of forced labour, and provides that a contravention thereof shall be punishable in accordance with law. To give effect to the constitutional provisions as well as to protect the interest of bonded labourers, Bonded Labour System (Abolition) Act, 1976 (BLS Act), was enacted which abolished the bonded labour system throughout the country.[62] The Act seeks to prevent the economic and physical exploitation of the weaker sections of society and such related or incidental matters.

In the year under survey despite constitutional prohibition and abolition of bonded labour a complaint about the existence of bonded labour system in brick kiln in a village was filed, which ultimately came up for decision in *Shiva Ent. Udyog* v. *National Human Rights Commission*.[63]

In this case Gopal filed a complaint to National Human Rights Commission (NHRC), alleging that he along with his family members are held as bonded labourers by Pappan and Babu, owners of a firm 'Shiva Bhatta' which is engaged in the business of running a brick kiln. He also alleged ill-treatment and misbehaviour with women; non-payment of wages and restrictions placed on their movement.

61 *Ibid.*

62 See S.C. Srivasatava, *Labour Law in Factories, Mines, Plantations and Other Establishments* 102 (Prentice Hall of India Pvt. Ltd., 1992).

63 (2011) 4 LLJ 864. (All)

The commission was requested to rescue them and other persons held as bonded labourers. On receipt of the complaint the director general (investigation) NHRC was directed by the commission to depute competent authority and to take appropriate action in the matter. The investigation team of NHRC after examining documents, and the persons available on the spot and the district submitted a report. The commission noted that a head constable had first enquired into the matter and submitted a report that there was no one at the brick kiln found as bonded labor. The commission felt that the police officer did not have any authority to either enquire into the matter or to verify the register, books of accounts etc. It further found that the district magistrate, Bulandshahr had marked the complaint to the assistant labour commissioner, who in turn directed the labour officer to enquire into the matter. The labour officer submitted a report after examining the brick kiln owners, reporting that the labourers have gone back to their home on 23.02.2010. On the statement of the employer, the non-payment of wages and attendance before the labour officer, a challan was submitted against the brick kiln owner.

In view of above the Assistant Registrar (Law), NHRC observed that the sub-divisional magistrate did not enquire into the matter. The additional district magistrate did not bother to collect any documents or agreement which may have been entered into between the workers of the brick kiln and the owners. No settlement under the Industrial Dispute Act before the conciliation officer was arrived at or produced to verify the payment of wages. The brick kiln owner did not produce the relevant records, on which the employer was fined for Rs. 250/-. Instead of protecting the interest of the laborers, the NHRC found that all the authorities got together to protect the brick kiln owner. He thereafter recorded finding that Shri Deep Chand thekedar who brought 16-17 families to the brick kiln, and had paid different amounts in advance to the laborers ranging from Rs. 2000-4000 at the village. After their arrival at the brickkiln, the owners had paid the laborers ranging from Rs. 20,000/- to Rs. 40,000/- each. The books of accounts, registers, wage slips were not maintained. The brick kiln owner thereafter detained them at the brick kiln, until he had recovered the advance paid to them. On the arrival of the police, they were set free, and in the process the payment of minimum wages was forgotten by all concerned. No one had taken action for enforcement and payment of minimum wages at all. In view of this he directed the district magistrate, Bunlandshahr to initiate action against the petitioner under the BLS Act and to send action taken report to the commission within six weeks. Aggrieved by this order the brick kiln owner filed a writ petition in the Allahabad High Court. The court observed that the complaint included all the elements of bonded labour system under section (2)(g) of the BLS Act and it was not investigated properly by the police administration and labour enforcement officer. They simply took the statement of brick kiln owner and the workers, who were found to be working (other than the complainant) on the site. The court accordingly held that the violation of the BLS Act is also a violation of human rights as defined under section 2(d) and (f) of the Protection of Human Rights Act, 1993 for which national human rights commission is empowered under the Protection of Human Rights Act, 1993, to enquire, investigate and to take steps provided under sections 13, 14 and 16 of the BLS Act. The court accordingly dismissed the petition.

XI CONCLUSION

An analysis of the judicial decisions during 2011 reveals that the apex court denounced the new technique of subterfuge adopted by some employers in recent years to deny the rights of workmen under various labour legislations by showing that they were contract labours, daily wagers or casual workers when in fact they were doing the work of regular employees. Further, while dealing with the globalization, liberalization or privatisation in the name of economic development or growth the court cautioned that it cannot be at the human cost of exploitation of workers. However, the apex court adopted the policy of non-interference with the policy decision of the state and judicial self restraint while approving the scheme for providing longer hours of work for new recruits to enhance competitiveness of public sector. While dealing with the employees' provident fund, the court has tried to maintain a balance between the right of workers and employers, when it held that the employer cannot be compelled to pay the amount in excess of its statutory liability under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 just because it formed its own trust and had started paying provident fund for a certain period in excess of its statutory obligation. Another positive trend is the interference by the court to protect the interest of building and other construction workers, where dispute related to of BOCW Act and Cess Act, and the executive had failed to perform its statutory obligations despite several directions issued by the apex court. The court entertained contempt petitions and issued necessary directions to various authorities. The court, while dealing with violation of the Bonded Labour System (Abolition) Act, 1976, ruled that violation of the Act is also a violation of human rights and, therefore, the National Human Rights Commission is empowered to enquire, investigate and take necessary steps under the Protection of Human Rights Act, 1993.