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SOCIAL SECURITY AND LABOUR LAW

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I INTRODUCTION

IN THE year 2012 unlike 2011, only 2 cases of Supreme Court have been reported in areas of social security and minimum standard of employment law which relate to the Building and Other Construction Workers' Welfare Cess Act, 1996 and Workmen's Compensation Act, 1923 (now Employees' Compensation Act, 1923). 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. This survey seeks to examine the judgements of the Supreme Court and some selected cases of high courts on social security and minimum standard labour legislation.

II BUILDING AND OTHER CONSTRUCTION WORKERS

The Supreme Court in *Dewan Chand Builders & Contractors* v. *Union of India*[1] dealt with the constitutional validity and competence of the Parliament to levy cess under the Building and other Construction Workers Welfare Cess Act, 1996 (Cess Act) and the cess rules framed thereunder.The main ground for challenge to the validity of the Cess Act was the lack of legislative competence of the Parliament.

On behalf of the appellant it was contended that the impost levied by the Cess Act is a compulsory and involuntary ex-action, made for a public purpose without reference to any special benefit for the payer of the cess. It was argued that there exists no co-relationship between the payee of the cess and the services rendered and therefore, the levy is, in effect a tax. It was further submitted that the maintenance of a separate corpus namely building and other construction workers welfare fund, which also vests in the state, is a cloak to cover the true character of the levy, which is to be utilized for the benefit of the building worker, is in fact a 'tax'. In view of this it was asserted that the Cess Act in fact provides for the levy of tax even though

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1 2012 LLR 1 (S.C.).

it is termed as cess and that no tax can be levied or collected in terms of article 265 of the Constitution, except by authority of law. In other words, the power to make a legislation imposing a tax has to be traced with reference to a specific entry in the lists in the seventh schedule to the Constitution. Thus, the subject-matter of the Cess Act is fully covered by entry 49 in list II (state List) pertaining to taxes on "lands and buildings", the power to levy cess would not be available to the Parliament, based on the assumption of residuary power.

On the other hand it was contended on behalf of the respondents that the Cess Act is within the legislative competence of Parliament with reference to entry 97 of List I in the seventh schedule. It was pleaded that the charging section in the Cess Act makes it clear that the levy is attracted when there is an activity of building and construction. The collection of cess on the cost of construction is for enhancing the resources of the building & other construction workers welfare boards constituted under the Building and other Construction Workers Act, 1996 (BOCW Act). The Cess so collected is directed to a specific end spelt out in the BOCW Act itself; it is set apart for the benefit of the building and construction workers; appropriated specifically for the performance of such welfare work and is not merged in the public revenues for the benefit of the general public.

In view of above, the core issue which arose for consideration before the Supreme Court was whether the cess levied under the scheme of the impugned Cess Act is a 'fee' or a 'tax'. In order to deal with this issue, the court examined the concept of 'tax' and 'fee'. The court referred to its earlier decisions wherein it was laid down that the true test to determine the character of a levy, delineating 'tax' from 'fee' is the primary object of the levy and the essential purpose intended to be achieved. In view of above this court observed: [2]

> There is no doubt in our mind that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose, the enactment seeks to achieve *i.e.* to augment the Welfare Fund under the BOCW Act. The levy of Cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the principle laid down in the aforesaid decisions of this Court, it is clear that the said levy is a 'fee' and not 'tax'. The said fund is set apart and appropriated specifically for the performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the Cess and the purpose for which it is levied gets established, satisfying the element of quid pro quo in the scheme. With these features of the Cess Act in view, the subject levy has to be construed as 'fee' and not a 'tax'.

The court accordingly upheld the findings of the high court upholding the validity of the Cess Act.

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2 *Id.* at 7.

III EMPLOYEES' COMPENSATION

Payment of compensation when due and penalty for default

Section 4-A (1) of the Workmen's Compensation Act, 1923 [now Employees' Compensation Act, 1923 (EC Act)] provides that the compensation under section 4 shall be paid as soon as it falls due. A combined reading sections 3 (1), 4 (1) and 4-A(1) clearly indicates that injured workman becomes entitled to compensation as per the Act the moment he suffers personal injuries of the types contemplated by these provisions. Thus, the right of the injured employees or his heirs to receive compensation gets crystallized the moment personal injury takes place. The corresponding liability of the employer to make good this liability also springs forth simultaneously and the said liability has to be complied as per clause (1) of section 4.[3] However, in case of default in payment under section 4-A (1), section 4-A (3)[4] would apply, which deals with the interest and penalty in clauses (a) and (b) respectively.

In the year under review the Supreme Court in *Oriental Insurance Co. Ltd.* v. *Siby George*[5] was called upon to decide the scope of section 4A (3) of the Workmen's Compensation Act (now Employees' Compensation Act, 1923).

In this case, the commissioner for workmen's compensation, Ernakulum directed the company to make payment of simple interest at the rate of 12% per annum on the amount of compensation from the date of the accident. Against this order the appellant filed an appeal which was dismissed by the Kerala High Court as barred by limitation. Thereupon the appellant filed the special leave petition before the Supreme Court. A question arose as to (1) when the payment of compensation under the Workmen's Compensation Act (now Employees' Compensation Act, 1923) become due and what is the point of time from which interest would be payable on the amount of compensation under section 4A (3)?.

In order to deal with the question the court examined the contentions of the parties. The appellant submitted that the commissioner was wrong in directing for payment of interest from the date of the accident and any interest on the amount of

3 S. 4-A (1) and (3) of the Employees' Compensation Act, 1923 provides as under:-

4 A. Compensation to be paid when due and penalty for default.—(1) compensation under section 4 shall be paid as soon as it falls due.

(2) x x x x x x x x x

(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 for 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 cl. (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

4 S.C. Srivastava, Labour Law and Labour Law 100 (1985).

5 2012 (7) SCALE 86.

compensation would be payable only from the date of the order of the commissioner. In support of the submission, he relied upon a decision of the Supreme Court in *National Insurance Co. Ltd.* v. *Mubasir Ahmed*[6] in which it was held that the compensation becomes due on the basis of the adjudication of the claim and hence, no interest can be levied prior to the date of the passing of the order determining the amount of compensation.[7]

The appellant also relied upon the decision of the Supreme Court in *Oriental Insurance Company Limited* v. *Mohd. Nasir*[8] wherein it was held that "there cannot be any doubt whatsoever that interest would be from the date of default and not from the date of award of compensation". However it added that the EC Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim petition till an order is passed on it, adding that the higher, statutory rate of interest under sub-section (3) of section 4 would be payable in a case that attracted that provision and for which "a finding of fact as envisaged therein has to be arrived at". The court then referred the decision in *Mubasir Ahmad* case but declined to follow it observing that the earlier decision the Supreme Court had not considered the aspect of the matter as was being viewed in *Mohd. Nasir* case. The court finally held that for payment of interest at the rate of 7½% per annum from the date of filing the application till the date of the award, and observing that thereafter interest would be payable at the rate as directed in the order passed by the commissioner.[9]

The court then referred to the provisions of sub-section (1) and (3) of section 4 A and observed:[10]

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6 (2007) 2 SCC 349.

7 In para 9 the court observed :
"9…..In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as to when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because s. 4-A (1) prescribes that compensation under s.4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of ss. (2) of s. 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is "falls due". Significantly, legislature has not used the expression "from the date of accident". Unless there is adjudication, the question of an amount falling due does not arise."

8 (2009) 6 SCC 280.

9 Commenting on the aforesaid observation the Supreme Court in the instant case observed: The view taken by the court in *Mohd. Nasir* that the rate of interest provided under sub-section (3) of section 4-A would apply only in case the "finding of fact as envisaged therein" is arrived at by the Commissioner, it must respectfully be stated, seems to result from the mixing up of 'interest due to default in payment of compensation' and 'penalty for an unjustified delay in payment of compensation' and is based on a misreading of the sub-section (3) of section 4-A. (See *supra* note 5 at 89)

10 *Supra* note 5 at 89.

> Sub-Section (3) of section 7-A is in two parts, separately dealing with interest and penalty in clauses (a) and (b) respectively. Clause (a) makes the levy of interest, with no option, in case of default in payment of compensation, without going into the question regarding the reasons for the default. Clause (b) provides for imposition of penalty in case, in the opinion of the Commissioner, there was no justification for the delay. Before imposing penalty, however, the Commissioner is required to give the employer a reasonable opportunity to show cause. On a plain reading of the provisions of sub-section (3) it becomes clear that payment of interest is a consequence of default in payment without going into the reasons for the delay and it is only in case where the delay is without justification, the employer might also be held liable to penalty after giving him a show cause. Therefore, a finding to the effect that the delay in payment of the amount due was unjustified is required to be recorded only in case of imposition of penalty and no such finding is required in case of interest which is to be levied on default *per se*.

The court also dealt with the question as to when does the payment of compensation fall due and what would be the point for the commencement of interest and ruled that neither the decision in *Mubasir Ahmed* nor in *Mohd. Nasir* can be said to provide any valid guidelines because both the decision were rendered in ignorance of earlier four judge bench of this court in *Pratap Narain Singh Deo* v. *Shrinivas Sabata*[11] wherein it was held that an employer becomes liable to pay compensation as soon as the personal injury is caused to the workmen by the accident which arose out of and in the course of employment. Thus, the relevant date for determination of the rate of compensation is the date of the accident and not the date of adjudication of the claim.

The aforesaid view was reiterated by a three judge bench of the Supreme Court in *Kerala State Electricity Board* v. *Valsala K*[12] and followed by a full bench of Kerala High Court in *United India Insurance Co. Ltd.* v. *Alavi*.[13] In view of this the court held that in view of the decisions in *Pratap Narain Singh Deo* and *Valsala*, it is not open to contend that the payment of compensation would fall due only after the commissioner's order or with reference to the date on which the claim application is made. The court remarked that the decisions in *Mubasir Ahmed* and *Mohd. Nasir* insofar as they took a contrary view to the earlier decisions in *Pratap Narain Singh Deo* and *Valsala* do not express the correct view and do not make binding precedents.

Employers' liability for compensation

In *Sankar Kal* v. *Sunil Kumar Saha*[14], assistant-cum-cleaner of vehicle under the respondent after carrying goods, an employee (deceased) working as when the vehicle was parked remained in the vehicle, where he was supposed to sleep, died for consuming heavy quantity of ethy alcohol which resulted in myocardial heart

11 AIR 1976 SC 222.
12 AIR 1999 SC 3502.
13 1998 (1) Ker LT 951.
14 2012 LLR 1060.

failure. Thereupon the brother of the deceased filed a petition before the commissioner, employees' compensation for granting him compensation for the death of his brother as his death occurred while working as assistant-cum-cleaner arising out of and in the course of employment. The tribunal held that the deceased died due to consumption of excessive quantity of ethyl alcohol and such death was not incidental to his nature of work. It therefore, refused to grant compensation under the Workmen's Compensation Act, and accordingly, dismissed the petition.

Being aggrieved, the appellant-petitioner filed and appeal before the Gauhati High Court. The high court observed: [15]

> In the case at hand, the deceased voluntarily consumed heavy quantity of ethyl alcohol as a result of which he died due to myocardial heart failure. The doctrine of added peril, therefore, is applicable to the case of the deceased. Further, the maxim "*Nemo ex proprio dolo Consequitur actionem*", which means that a person cannot be permitted to take advantage of his own wrong, he will not be allowed to found a claim upon his own iniquity. The maxim is applicable in the case of the deceased workman.

The court accordingly dismissed the petition.

It is submitted that court failed to examine the effect of clause (1) of proviso (b) of section 3 which provides:

> The employer is not liable to pay compensation in the following circumstances If an injury (not resulting in death) is directly attributable to:
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> i. the workman having been at the time of the accident under the influence of drink or drugs; or
> ii. the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen; or
> iii. the wilful removal or disregard by the workman of any safety guard or other device which has been provided for the purpose of securing safety of workmen.

A perusal of the aforesaid provisions reveals shows that if the personal injury results in death of the workman, the employer will be liable, even though the workman may himself have contributed to the accident by being under the influence of drink or drugs or by wilfully disobeying security measures or removing security devices. In case of death, the legislature has specifically included cases where the workman by his misconduct of the kinds mentioned in the proviso causes accident. Such accident will nonetheless be deemed to be arising out of and in the course of his employment. Obviously the legislative intent is to widen the significance and concept of an accident arising out of and in the course of employment in cases of death.[16]

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15 *Id.* at 1065.

16 S.C. Srivastava, *Social Security and Labour Law* 87 Eastern Book Co., Lucknow (1985)

Effect of amendment in section 2 (n)

The effect of amendment in section 2 (1) (n) through the Amending Act, 46 of 2000 in the Workmen's Compensation Act, 1923 (now Employees' Compensation Act, 1923) was considered in *Govind Goenka* v. *Dayawati.*[17] In the present case, the deceased workman had succumbed to his injuries and died while he alongwith other labourers was removing the partition of the wall in the shop which belongs to the premises of the appellant. It was contended by the employer that the deceased does not fall within the definition of "workman" as defined under section 2 (1) (n) of the Workmen's Compensation Act, 1923.The court rejected the contention and observed:[18]

> So far as the definition of workman envisaged in section 2(n) of the said Act is concerned, there has been a drastic change in definition of the "workman" as it stood prior to the amendment and after the amendment. Prior to the amendment[19], certainly the workman whose employment was of a casual nature and who was employed otherwise than for the purpose of trade or business of the employer would not fall in the said definition. However, after the amendment[20] of the said definition through the Amending

17 2012 LLR 675.

18 *Supra* note 18 at 681.

19 S. 2(1) (n) of WCA as it stood prior to amendment Act 46 of 2000 read as under:
(i) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is –
(ii) employed in any such capacity as is specified in schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

20 S. 2(1)(n) of the Amended Act (Act 46 of 2000) defines "workman" to mean any person who is:
(i) a railway servant as defined in (cl. 34) of s.2 of the Indian Railways Act, 1989 (24 of 1989) not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in schedule II or
(ia)(a) a master, seaman or other member of the crew of a ship,
(b) a captain or other member of the crew of an aircraft
(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle
(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India or;
(ii) employed in any such capacity as is specified in schedule II, whether the contract of employment was made before or after the passing of this Act and whether the contract is expressed or implied oral or in writing; but does not include any person working in the capacity of a member of (the Armed Forces of the Union) and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

> Act 46 of 2000, the Parliament had removed the said mischief which was then prevailing and coming in the way of such casual workmen who met with an accident during the course of the employment unconnected with the employer's trade or business. With the amendment of the said definition, now certainly the workman whose employment is of casual nature and who is employed otherwise than for the purpose of employer's trade or business would also be covered within the definition of workman.

IV EMPLOYEES' PROVIDENT FUND

Clubbing of two concerns for the application of EPF Act

In *Regional Provident Fund Commissioner* v. *Bombay Selection House*,[21] the Punjab and Haryana High Court had an occasion to consider as to when an establishment be clubbed with another establishment under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act). This question arose because section 2 A of the EPF Act provides that where an establishment consist of different departments or branches in the same place or in different places all such departments or branches shall be treated as part of the same establishment.

Briefly the facts are that Bombay Selection House (respondent no. 1) was allotted a code for compliance of the provision of EPF Act by treating another establishment, namely, M/s. Best Choice as part of employees employed in the establishment. This order was passed by the assistant provident fund commissioner on the basis of report of enforcement officer wherein he stated that line of business of both the establishment was the same and, therefore, they were family concerns. Aggrieved by this order the respondents filed an appeal before the Employees' Provident Fund Appellate Tribunal (tribunal). The tribunal set aside the order of the assistant labour commissioner directing clubbing of the two establishments. Against this order a writ petition was filed by the employees' provident fund organisation before the Punjab & Haryana High Court. The court examined several judgments[22] of Supreme Court and observed: [23]

> What can be culled out of the various judgments on the issues, as referred to above, is that no straight-jacket formula has been laid down for considering as to whether two units should be considered one establishment for the purpose of coverage under the provisions of the EPF Act. Various steps, as are required to be considered for the purpose, are in the form of unity of ownership, management, control, finance, labour, employment and functional integrality. Place of business of two units is another factor

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21 2012 LLR 1139.

22 *M/s. Rajasthan Prem Krishan Goods Transport Co.* v. *Regional Provident Fund Commissioner, New Delhi*, 1996 II CLR 217 (S.C.); *M/s. L.N. Gododia* v. *Regional Provident Fund Commissioner,* 2011 III CLR 677 (S.C.); *Regional Provident Fund Commissioner, Jaipur* v. Naraini Udyog, (1996) 5 SCC 522; *Regional Provident Fund Commissioner* v. *Dharamsi Moraji Chemical Co. Ltd.*, (1998) II CLR 151 (S.C.); *Regional Provident Fund Commissioner* v. *Raj's Continental Exports (P) Ltd.,* 2007 LLR 642 (S.C.).

23 *Supra* note 22 at 1145.

which may be relevant. The mere fact that both the units are owned by one person or some of the partners are common may not be sufficient to treat two units as one establishment.

Dealing with the case the court pointed out that the commissioner, while passing a totally non-speaking order, accepted the contention raised by the enforcement officer while upholding clubbing of two establishments. It has no where been pointed out in the order by the commissioner that there was unity of ownership, management, control, finance, labour, employment and functional integrality. The court also pointed out that the order passed by the commissioner does not record the reasons in support thereof while discussing the contentions raised by both the parties. It had merely agreed with the submissions of the enforcement officer. Similar is the position with the order passed by the tribunal. Further, the commissioner has not referred to any material, which has either not been considered by the tribunal or has been misread to take a view that the finding recorded is perverse. Referring to the facts the court observed that these are two different partnership firms with three partners in one and five in another. May be these are family concerns, where some partners are common, but that itself will not make any difference. Both are carrying on their business at different places. There is no financial or functional integrality or interdependency as there is no material referred to in support thereof. Both the firms being separately registered under the Shops and Commercial Establishments Act are assessed to income tax separately.[24]

In view of above the court held that the aforesaid facts do not, in any manner, justify that it was a case where by lifting the veil, the establishments could be clubbed and treated as one for the purpose of coverage under the provisions of EPF Act. Accordingly, the court dismissed the petition.

Non-applicability of EPF Act

In *Joseph Varghese* v. *State of Kerala*[25] the Kerala High Court decided the question whether the state and district co-operative bank covered under the Employees' Pension Scheme, 1995 framed under section 6 A of EPF Act and registered under the Co-operative Societies Act, 1912 and employing more than 50 persons can be exempted under section 16 of the EPF Act?. In order to deal with this issue it is relevant to refer to the provisions of section 16 which is as follows, This Act shall not apply:[26]

i. to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to Co-operative Societies, employing less than fifty persons and working without the aid of power; or
ii. to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to

24 *Ibid.*

25 2012 LLR 594; See also *Subhaya Kumar, M.K. Ernakulam* v. *State of Kerala*, 2012 LLR 625 and *Diwakaran* v. *State of Kerala*, 2013 LLR 394 where similar view was expressed.

26 *Ibid.*

the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or

iii. to any other establishment set up under any Central Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

While dealing with the scope of the aforesaid provisions the court observed that there is a statutory exclusion under sub clauses (a), (b) and (c) of section 16 (1) of the EPF Act of the establishments mentioned therein. Explaining the scope of section 16 (1) (a) the court pointed out that the Act does not apply to any establishment registered under the Co-operative Societies Act employing less than fifty persons and working without the aid of power. Hence the state co-operative bank and the district co-operative banks employing more than fifty persons can not seek statutory exclusion under section 16 (1) (a) of the Act.

Dealing with the scope of section 16 (1) (b) the court observed that the Act does not apply if the establishment belongs to or is under the control of the central government or a state government as it is settled law that there is no control of the state government over the state co-operative bank and district co-operative banks registered under the Kerala Co-operative Societies Act, 1969.

The court then examined the scope of section 16 (1) (c) and observed that it does not apply to any establishment 'set up' under any central, provincial or state Act because the legislature has cautiously used the word 'set up' in contra distinction to the word 'registered' under section 16 (1) (a) of the EPF Act. Moreover the state co-operative bank and the district co-operative banks are not set up under the state Act even though registered under the Kerala State Co-operative Societies Act. The court accordingly held that section 16 (1) (b) and (c) do not apply to the state co-operative bank or the district co-operative bank and they are covered by the Act.

Dealing with the scope of section 16 (2) of the EPF Act the court held that no doubt the central government by notification in the official gazette has excluded a class of establishments from the operation of the Act but the power so exclude is available to the central government only and that too by notification in the official gazette either prospectively or retrospectively. But in the instant case the order has been passed by the Regional Provident Fund Commissioner, Kerala who has absolutely no authority to grant exclusion.

Applicability of the conditions of pre-deposit for filing appeal

In *Regional Provident Fund Commissioner* v. *Employees Provident Fund Appellate Tribunal*,[27] the Punjab & Haryana High Court had an opportunity to examine the scope of section 7 - O of the EPF Act which is reproduced below:

> 7-O Deposit of amount due, on filling appeal – No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent of the amount due from him as determined by an officer referred to in Section 7A.

27 2012 LLR 1154.

Explaining the scope of the aforesaid provision the court pointed out that section 70 shows that the requirement of pre-deposit of 75% of amount is applicable only in case where the amount had been determined under this section. However this section does not provide that condition of pre-deposit is applicable in cases of assessments under section 7Q or 14B of the EPF Act.

Review of the order passed under section 7 A

In *Gulati Package Pvt. Ltd.* v. *Assistant Provident Fund Commissioner*,[28] the Uttrakhand High Court laid down the following principles relating to review of the order under section 7 A (1) of the EPF Act:

(i) An order dismissing a review is not appealable as there is a specific bar in that regard under sub-section (5) of Section 7B of the EPF Act.
(ii) No application for review will be entertained unless the application for review is submitted within 45 days from the date of making of the original order under review.
(iii) While Rule 7 … authorises the Appellate Tribunal to condone delay in preferring an appeal, the said Rule does not authorize an authority, who has passed an order under sub-section (1) of section 7A of the EPF Act, to condone delay in preferring a review application. In the circumstances, power and recover damages by way of penalty.

In *Arambagh Hatcheries Ltd.* v. *Employees' Provident Fund Organisation*,[29] the Calcutta High Court considered the nature and scope of section 14B[30] of the EPF Act. In this case, the respondent no. 2 issued a show-cause notice to the petitioner-company for levying damages under section 14B of the EPF Act for belated payment of its contribution under the EPF Scheme, 1952. Thereupon the petitioner made a representation for exemption from payment of the above damages. However, the respondent no. 3 rejected the prayer and taking into consideration the

28 2012 LLR 1248.

29 2012 LLR 86.

30 14B. Power to recover damages - Where an employer makes default in the payment of any contribution to the Fund [the Pension Fund] or the [Insurance Fund] or in the transfer of accumulations required to be transferred by him under ss. (2) of s. 15 or ss. (5) of s. 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under s. 17, the central provident fund commissioner or such other officer as may be authorized by the central government, by notification in the official gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the scheme.
Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard.
Provided further that the central board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under s. 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the scheme.

second proviso of section 14B passed the impugned order levying a sum of Rs. 25,61,671 towards damages upon the petitioner-company under section 14B for belated payment for its contribution towards the said Scheme. Against this order the company filed a writ petition before the Calcutta High Court. It was submitted by the petitioner, that after amendment of section 14B of the said Act, levying of damages is a penalty. According to him, the authority is under an obligation to form an opinion in view of the language used by the legislature in the above provision[31] and the word "may" used in the section 14B does not mean or purport "shall" because a penal provision is to be interpreted strictly. Further, the impugned order is an outcome of non-application of mind and the prayer of the petitioner was not considered applying mind in its proper perspective.

On the other hand it was submitted that the writ application is not maintainable on the ground of availability of alternative forum under the provisions of the EPF Act. It was also submitted that on a harmonious reading of the provisions of section 14B of the EPF Act and 32A of the scheme framed under the Act it appears that the levy of damages is a mandatory provision and the same can only be exempted in accordance with the provisions of second proviso to section 14B of the EPF Act.[32]

It was also submitted that the prayer of the petitioner was rejected taking into consideration the provisions of second proviso to section 14B of the said Act. Moreover, financial constraints cannot be considered as a ground for granting exemption.

While dealing with the rival contentions the court held that:[33]

(i) if the power to levy damages is discretionary then, in a fit case, it is open to the respondent authority to waive the damages. For that purpose the authority is to form an opinion applying its mind on the ground on which prayer is made for waiving the same.

(ii) The grounds taken in the representation of the petitioner company were not at all considered in case of rejecting the prayer of waiving the levy of damages. Therefore, the impugned order suffers from violation of the provisions of section 14B of the EPF Act on the basis of the settled principles of law that when a law authorises an authority to act in a certain manner, he is to do the same in that manner and any other mode of compliance is forbidden.

(iii) Paragraph 32A of the Scheme of the Act is a subordinate legislation and it cannot supplant the provisions of legislation made by the legislature as it only supplements the same.

(iv) When the interpretation of provision of section 14B or any other section

31 The petitioner relied upon the decisions of *P. T. Rajan* v. *T. P. M. Sahir*, (2003) 8 SCC 498, *Employees' State Insurance Corporation* v. *HMT Ltd.*, (2008) 3 SCC 35, *Assistant Controller of Central Excise, Rajamundry* v. *Duncan Agro Industries Ltd.*, (2000) 7 SCC 53 and an unreported decision of a single bench of the Supreme Court of Oct. 30, 2009 in the matter of *Crystal Cable Industries Ltd.* v. *Union of India* (In Re: WP 2571(W) of 2006).

32 *Supra* note 29.

33 *Ibid.*

of the EPF Act is involved, the judicial review under article 226 of the Constitution is permissible despite availability of another forum providing remedy to the dispute.

V EMPLOYEES' STATE INSURANCE

Scope and coverage

In *Consulting Engineering Services (India) Pvt. Ltd.* v. *Chairman, ESI Corporation*[34] a question arose whether a company rendering engineering and architectural consultancy services is covered under the Employees' State Insurance Act, 1948 (ESI Act). The High Court of Delhi answered the question in affirmative.

In the present case, the appellant, a private limited company rendered various kinds of engineering and architectural services. However, it neither carried out any manufacturing activity nor it produce any goods for marketing and supply to any of its clients and customers nor it produce or supplies any goods to the public in general. The appellant was brought within the purview of ESI Act by the ESI authorities. Against this order the appellant filed a petition before the ESI Court which held that the appellant is covered by ESI Act. Against this order the appellant filed a writ petition before Delhi High Court. The court observed: [35]

> I am of the view that the present case stands squarely covered by the decision of the Supreme Court rendered in the case of *Kirloskar Consultants Ltd.* v. *Employees' State Insurance Corpn.*[36] In the said case, as in this case, the business carried on by the appellant was of consultancy services to its customers in respect of industrial, technical, marketing and management activities and preparation of project reports by engaging the services of architects, engineers and other experts. The Supreme Court in the said case after reviewing the entire gamut of case law held that the nature of activities carried on by the appellant was commercial or economical and would amount to parting with the same at a "price".

The Court added: [37]

> The irresistible conclusion, in my view, therefore, is that whenever an establishment carries on activities in the nature of trade or commerce, it must be held that the premises being used therefore is a "shop" by giving an expanded meaning to the word "shop". The giving of the expanded meaning is entirely justified in view of the fact that the Preamble to the Act explicitly states:
>
> An Act to provide for certain benefits to employees in case of sickness, maternity and "employment injury" and to make provision for certain other matters in relation thereto.

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34 (2012) 2 LLJ 407.
35 *Supra* note 34 at 413.
36 (2000) 2 LLJ 1657.
37 *Id.* at 414.

> The aforesaid object, being a beneficent one, it stands to reason that a narrow or restricted meaning assigned to the coverage of the ESI Act would defeat the very purpose of the enactment itself.

The court accordingly held that the appellant company is not entitled to any relief.

Employment injury

In the *Regional Director, Employees State Insurance Corporation*,[38] the deceased employee was murdered by agitated workers, who were on illegal strike, when he reached the gate of the factory at about 8.30 p.m. to join his shift duty which was to commence at 9.30 p.m. thereupon the widow of the deceased claimed death benefit under the ESI Act. The ESI Court allowed the claim of the widow of the deceased and directed the appellant to make payment. Against this order the appellant filed an appeal under section 82 of ESI Act before Chhattisgarh High Court. On these fact a question arose whether death of the deceased employee amounted to employment injury within the meaning of section 2 (8) of the ESI Act entitling the widow of the deceased to claim death benefit.[39]

In order to deal with this issue the court dealt with several decisions[40] of the Supreme Court as well as high courts and on the basis of the aforesaid decisions laid down the following principles:

(i) To come within the Act, the injury by accident must arise both out of and in the course of employment.

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38 2012 LLR 886.

39 S.2(8) of the Act of 1048 defines employment injury to mean a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupation disease is contracted within or outside the territorial limits of India.
Explaining the scope of aforesaid section, the court observed:
"Employment injury" envisages a personal injury to an employee caused by an accident or an occupational disease "arising out of and in the course of his employment". Therefore, in order to succeed in her case, the widow of the deceased will have to prove that her husband had died in the accident, which arose "out of and in the course of his employment". Both the conditions will have to fulfill before she could claim any benefit under the ESI Act.

40 *Regional Director, E.S.I. Corporation* v. Francies De Costa, AIR 1997 SC 432; *State of Rajasthan* v. *Ramprasad*, (2001) 9 SCC 395 and *Mackinnon Machenzie & Co. (P) Ltd.* v. *Ibrahm Mohammed Issak*, AIR 1970 SC 1906. The Supreme Court in the case of *Regional Director, E.S.I. Corporation* v. *Francis De Costa,* (AIR 1997 SC 432) observed:
A workman might be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case would have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension. A workman is not in the course of his employment from moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension.

(ii) The words "in the course of employment" mean in the course of work which the workman is employed to do and which is incidental to it.
(iii) The words "arising out of the employment" are understood to mean "during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe (that) the *workman* would not otherwise have suffered". In other words, there must be a casual relationship between the accident and the employment.
(iv) Expression "arising out of employment" is not confined to the mere nature of the employment. The expression applies to the employment as such to its nature, it conditions, its obligations and its incidents. If by any reason of any of those factors the workman is brought within the zone of special danger, the injury would be one which arises out of employment.
(v) The *onus* of proving that the injury by accident arose out of and in the course of employment rests upon the applicant but these essentials may be inferred when the proved facts justify the inference.

Applying the aforesaid principle in the case under review the court pointed out that deceased was at the verge of entering into factory premises to attend his duties scheduled to commence at 9.30 p.m. when he was murdered by agitated employees. Certainly, late Ramruj would not have been murdered, had he not been trying to enter into factory premises to join his duties against the wishes of employees on strike. Thus injury will become "employment injury" not only when an employee is doing something which an employee was under obligation to do but also when he was doing something only incidental thereto. Thus, casual relation exists between the incident and the employment in the instant case. Further during strike employees on strike may not allow co-employees to join their duties. In order to eliminate such possibility, if an employee comes to his place of work sometime before commencement of his duty hours and incident takes place, then it cannot be said, incident did not arise out of and during the course of his employment.

The court added that merely because the deceased employee reached the place of work sometime earlier would not make the accident out of purview of "employment "injury" within the meaning of section 2 (8) of the ESI Act.

Exemption from operation of ESI Act

Can the issue of exemption from the operation of the Employees' State Insurance Act, 1948 (the ES Act) be ranked up in a dispute under section 75 thereof ?. This issue arose in a writ petition before *Kancor Ingredients Ltd.* v. *E.S.I. Corporation.*[41] The facts leading to this writ petition are,The petitioner, is a Public Limited Company operating an oleoresin factory which had earlier availed exemption from the provisions of the ESI Act, by the order passed by the State Government of Kerala granting exemption from the operation of the Act for the period from 01.01.1998 to 31.12.1998. Such exemption was granted to the permanent employees of the factory under section 87 of the ESI Act. The factory has since been covered by the Act and the dispute in this case relates to the denial of exemption for the period from 01.01.1997 to 31.10.1997 and 01.01.2001 to 31.12.2001. However, the state

41 2012 LLR 351.

government by its order of 03.06.2008[42] denied the exemption sought for by the petitioner which *inter-alia* reads as follows:

> Government have examined the matter in detail and that the benefits under E.S.I. Scheme are far superior and beneficial to the workers when compared with the benefits provided by the KANCOR Ingredients to their employees.

It was contended that the order is laconic and that the petitioner had a legitimate expectation of securing exemption especially when it enjoyed the same during the previous period. The Employees' State Insurance Corporation contended that the writ petition is not maintainable since a dispute can as well be raised under section 75[43] of the E.S.I. Act. In other words, the contention of the Employees' State Insurance Corporation was that the denial of exemption could be questioned only before the Employees' Insurance Court under the ESI Act. The Kerala High Court rejected the contention and observed: [44]

> It may at once be noticed that Section 75(1) (g) of the Act essentially deals with the dispute between the employer and the Employees' State Insurance Corporation. The dispute is also in respect of any contribution or benefit payable under the W.P.(C) No.25639 of 2009 4 Act in respect of an establishment covered by it. Section 75(1) (g) of the Act does not speak of a dispute with the Government which only has got the plenary power to grant exemption. The order granting or denying exemption is certainly open to judicial review under Article 226 of the Constitution of India.

The court relied upon the decision of the Madras High Court in *Employees State Insurance Corporation* v. *Pondicherry Agro Service and Industries Corporation Limited*,[45] wherein it observed:

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42 87. Exemption of a factory or establishment or class of factories or establishments.- The appropriate Government, may, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year and may from time to time by like notification renew any such exemption for periods not exceeding one year at a time.

43 S. 75 (i) (g) of the ESI, reads as under:
75 - Matters to be decided by Employees' Insurance Court – (1) If any question or dispute arises as to:
(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, 11(or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act)
Such question or dispute 11(subject to the provision of sub-section (2A)) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act".

44 *Supra* note 40 at 352.

45 (2011) 2 LLJ 608.

> …. The E.S.I. Court constituted under Section 75 has no jurisdiction to take up or sit over the decision given under Section 87 of the Act granting an exemption. On the contrary, the power to grant exemption is a plenary power given to an appropriate Government. The Court constituted under Section 75 cannot decide such matters including the validity of an exemption notification or that it should provide the basis for grant of an exemption.

Dealing with the order passed by the State Government of Kerala, the court observed:[46]

> A reading of Ext.P20 order denying exemption in the instant case would reveal that no reasons have been assigned to justify the conclusion arrived at. It would not be sufficient to merely state mechanically that the benefits under the E.S.I. Scheme are far more superior and beneficial. The various benefits extended by the petitioner and the Employees' State Insurance Corporation have to be analysed item wise. A detailed order is warranted while granting or disallowing exemption under Section 87 of the Act. This is especially so since the interest of a large section of workers are involved whose representative also deserves to be heard in the exercise. The principal beneficiary of the Act is the employees who have a right to be heard as held in *Fertilizer & Chemicals Travancore Ltd.* v. *ESI Corporation*, (2009 (3) KLT 946 (SC): (2009) 9 SCC 485. It needs no mention that exemption under Section 87 of the Act could be granted either prospectively or retrospectively under Section 91A of the Act.

The court accordingly held that question of exemption under section 87 cannot be raked up in a dispute under section 75 of the ESI Act. The Employees State Insurance Court constituted under section 74 of the ESI Act cannot decide the legality or otherwise of an order relating to exemption passed by the state government. The court found that the order denying exemption under section 87 of the ESI Act is bereft of reasons revealing a total non-application of mind.

VI PAYMENT OF GRATUITY

Constitutional validity

The constitutional validity of sections 2 (e) and 13 of the Payment of Gratuity (Amendment) Act, 2009 was challenged in *Jain Citizens Education Society, Surendranagar* v. *Union of India*,[47] on the ground that it cannot be given retrospective effect. According to the petitioners, the Payment of Gratuity (Amendment) Act, 2009, having received assent from the President on 31.12.09 as published in the Gazette of India, extra part II, section 1 on 31.12.09, it cannot be given retrospective effect from 03.04.97.

In order to deal with the contention it is desirable to understand the factors which led to the amendment. The Supreme Court in *Ahmedabad Private Primary Teachers Association* v. *Administrative Officer*[48] held that the Payment of Gratuity Act, 1972,

46 *Ibid.*
47 2012 LLR 292.
48 AIR 2004 SC 1426.

held that teachers are not covered by the definition of employee under section 2 (e) of the Payment of Gratuity Act, 1972, as was in vogue and observed as under:

> It is for the Legislature to take cognizance of the situation of such teachers in various establishments where gratuity benefits are not available and think of a separate legislation for them in this regard. That is the subject-matter solely of the Legislature to consider and decide.

In view of the aforesaid observations of the Supreme Court and to implement the intention of government of India to provide the benefit of gratuity to all the employees of educational institutions (including teachers),[49] the Parliament decided to give effect to the intention of the government of India as made by notification no. S.O. 1080 dated 03.04.97, and thereby, amended the relevant provisions by substitution of section 2(e) and insertion of section 13-A[50] by the Payment of Gratuity (Amendment) Act, 2009 as evident from the statement of objects and reasons.[51]

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49 S. 2 (e) of the Payment of Gratuity (Amendment) Act, 2009 defines "employee" to mean:
Any person (other than an apprentice) 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.

50 S.13-A was inserted in the Payment of Gratuity (Amendment) Act for validation of payment of gratuity, which reads as under:
13-A. Validation of payment of gratuity.—Notwithstanding anything contained in any judgment, decree or order of any court, for the period commencing on and from the 3rd day of April, 1997 and ending on the day on which the Payment of Gratuity (Amendment) Act, 2009, receives the assent of the President, the gratuity shall be payable to an employee in pursuance of the notification of the Government of India, in the Ministry of Labour and Employment vide Number S.O. 1080, dated the 3rd day of April, 1997 and the said notification shall be valid and shall be deemed always to have been valid as if the Payment of Gratuity (Amendment) Act, 2009 had been in force at all material times and the gratuity shall be payable accordingly. Provided that nothing contained in this section shall extend, or be construed to extend, to affect any person with any punishment or penalty whatsoever by reason of the non- payment by him of the gratuity during the period specified in this section which shall become due in pursuance of the said notification.

51 Prefatory Note – Statement of Objects and Reasons. – The Payment of Gratuity Act, 1972 provides for payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishment and for matters connected therewith or incidental thereto. Cl. (c) of ss. (3) of s. 1 of the said Act empowers the central government to apply the provisions of the said Act by notification in the official gazette to such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day preceding twelve months. Accordingly, the central government had extended the provisions of the said Act to the educational institutions employing ten or more persons by notification of the government of India in the Ministry of Labour and Employment *vide* number S.O. 1080, dated the 03.04.97.

The court then referred to several decisions of the Supreme Court as also the decision in *Mahadeolal Kanodia* v. *The Administrator General of West Bengal* wherein[52] the Supreme Court held that:[53]

> Statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or by necessary implication the Legislature has made them retrospective; and the retrospective operation will be limited only to the extent to which it has been so made by express words or by necessary implication.

Applying the aforesaid principle in the present case, the Gujarat High Court held that no substantive right was neither created in favour of the schools nor any such substantive right has been taken away. Indeed the operation is retrospective which is explicit from the express words used by the legislature in the newly inserted section 13-A of the Payment of Gratuity Act, 1972. Further the intention of the Legislature is clear from the Statement of Objects and Reasons of the Payment of Gratuity (Amendment) Act, 2009. Moreover, the words of section 2(e) and section 13-A being plain, normal and grammatically correct, and the intention of the Legislature being clear, and the provision being unambiguous, and not being capable of two meanings; the strict rule of interpretation is not necessary to be made in the present case.

In view of above the court held that the substituted section 2(e) and the newly inserted section 13-A of the Payment of Gratuity (Amendment) Act, 2009 are neither violative of article 14 nor article 19(1) (g) of the Constitution.

Payment of gratuity for daily wagers

In *Chaudhary Sarwan Kumar Himachal Pradesh Krishi Vishvavidyalaya, Palampur*[54]the division bench of the Himachal Pradesh High Court had an opportunity to decide two important questions, namely:

(i) Is a daily wage employee entitled to gratuity? and,

(ii) Can an employer deny gratuity to an employee on the ground that its pension scheme does not cover such gratuity? In order to answer the first issues the court after referring the provisions of sections 2 (e), 2 (f), 2 (s) and 2A which defines the terms 'employee','employer','wages' and 'continuous service' respectively and the provisions of section 4 relating to payment of gratuity observed:

> A perusal of the statutory provisions, as extracted above, would clearly show that the Act does not make any difference as to whether an employee is paid daily wages or weekly wages or monthly wages. The condition is only that he should be employed by the employer on wages in an establishment covered by the Act and should be in continuous service, as required under Section 2-A of the Act.

52 AIR 1960 SC 936.

53 *Supra* note 1 at 297.

54 (2012) 2 LLJ 458.

Dealing with the second issue the court referred the provisions of section 14 of the Payment of Gratuity Act, 1972 which reads as under: [55]

> In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

The court then referred to the decision of the Supreme Court in *Municipal Corporation of Delhi* v. *Dharm Prakash Sharma*[56] wherein in a similar issue the court observed:

> The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules.

In view of above the court held that even though the petitioner's establishment does not have a scheme for payment of gratuity to daily waged employees the Payment of Gratuity Act, 1972 has an overriding effect over that enactment. Therefore, the daily waged employees of the petitioner's university, subject to their fulfilling other conditions, are entitled for gratuity.

Forfeiture of gratuity

In *Dhanlakshmi Bank Ltd.* v. *Ramchandran*[57] a question arose whether, the gratuity payable to the first respondent stood forfeited automatically with the passing of the order terminating him from service for the commission of an act of misconduct which constitutes an offence involving moral turpitude.

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55 *Id.* at 462.
56 *Id.* at 462-63.
57 2012 LLR 565.

The brief facts of the case are as follows:[58]

> The petitioner bank dismissed the respondent employee, for various charges including stealthily removing the gold ornaments pledged by a customer and re-pledging the same with private financers for raising funds for his personal gains, after holding a domestic enquiry. The departmental appeal filed against this order was dismissed. The petitioner, therefore, forfeited the gratuity payable to him, without passing an order forfeiting the whole or part of gratuity payable to the first respondent. The application under section 7(4) (b) (l) of PGA before the controlling authority (Assistant Labour Commissioner) was also dismissed. The respondent then filed an appeal before the Regional Commissioner (Central). The appellate authority held that as no order of forfeiture was passed with notice to the first respondent he is entitled to receive gratuity for the period during which he had served the bank. Against this over a writ petition was filed before the Kerala High Court.

The court referred to various decisions of the Supreme Court and high courts observed: [59]

> The scheme of the Act and the provisions of section 4(6)(a) and (b) shows that for depriving an employee his statutory right to receive gratuity, an order must be passed forfeiting gratuity, and conscious decisions to be taken with regard to reasons specified in sub-section (a) and to damage or loss so caused. The sub-section (b) after its amendment by Act No. 26 of 1984 (with effect from February 11, 1981) to the effect that gratuity must be wholly or in part forfeited, gives discretion to the employer and thus postulates application of mind and recording of reasons.

The court added: [60]

> The termination of services of an employee on the grounds contemplated under section 4(6)(a) and (b), by itself does not entitle the employer to forfeit gratuity payable to an employee. The right of an employer to terminate the services of an employee under the Certified Standing Orders, or Service Conditions on any such act given in section 4(6)(a) and (b), of the Act of 1972, is circumscribed and restricted to holding a just and fair domestic enquiry serving principles of natural justice, which may be examined and justified in industrial adjudication, in which the proportionality of punishment may be examined under section 11A of the Industrial Disputes Act, 1947. The Industrial adjudicature may find the domestic enquiry and punishment to be just, fair and proper, but these findings by themselves do not serve the requirements of section 4(6)(a) and (b) of the Payment of Gratuity Act, 1972. The right to receive gratuity

58 *Ibid.*
59 *Id.* at 571.
60 *Ibid*.

> is a statutory right. It is not subservient to the common rights of the employer to terminate the services of an employee. In order to forfeit the statutory right of gratuity, qualified by expression 'to the extent of damage or loss so caused' in sub-section (6)(b). The quantum of forfeiture has to be determined, and thus it requires an order, which can only be passed after giving opportunity to the employee. When the forfeiture, even if by an express and reasoned order is challenged before the Controlling Authority under the Act, the employer must satisfy the authority in proceedings under section 7(4) of the Act, with the justification of forfeiture.

In view of above the court upheld the order appellate authority.

Vithal Rangnath Darekar v. *New India Insurance Company Ltd. through its General Manager*[61] is another case on the subject. In this case the petitioner was convicted in sessions case, for an offense under section 363 and 344 of the IPC, directing to undergo rigorous imprisonment for four years and fine which was confirmed by High Court. Thereupon the respondent company terminated the services of the petitioner, who had rendered services of 19 years and 2 months. He then moved an application in form N under sub-rule (1) of rule 10 under Payment of Gratuity Act, 1972 (PGA) however, the same was declined by the controlling authority. Against this order he preferred a writ petiion before the Bombay High Court. The court referred to various decisions of Indian and English Court and observed: [62]

> This legal position being made quite clear with the intention of the Legislature, the term "in the course of his employment" employed in sub-clause)ii) will have to be restricted to involvement of moral turpitude while at the place or in the course of employment. Consequently, rejection of claim for gratuity by interpreting that such criminal act was during the course of employment, being illegal, is set aside. The act of kidnapping a girl had nothing to do with the act of employment. The nature of duties which the petitioner a sub-staff was discharging also does not warrant a specific discipline or pursuit amounting to a riotous or disorderly behaviour, while in the employment.

The court added that by using the words, "provided that such offense is committed by him in the course of his employment" the legislature wanted period of duty. Further the term "in the course of his employment" in the light of beneficial legislation of the Payment of Gratuity Act, 1972 will have to be given plain meaning, such act involving moral turpitude should be restricted while on duty. The court accordingly set aside the order refusing gratuity by the controlling officer.

VII MATERNITY BENEFIT

The judicial policy to apply the provisions of the Maternity Benefit Act, 1961 to women employees employed on contract basis even in the absence of any term

61 2012 LLR 1027

62 *Id.* at 1031.

of appointment or rules and regulations regulating the maternity benefit is best depicted in *C Vidya Murty (Smt)* v. *Bangalore Metro Rail Corporation Ltd.*[63]

> In this case the petitioner was appointed by the Metro Rail Corporation Ltd. (respondent) as contract basis for a period of 3 years. After about 8 months she became pregnant. She remained absent for a period of 106 days when she had only 17 days of leave at credit. However this period was treated as leave without allowance. On expiry of the said leave she applied for maternity leave for a period of 180 days which was refused by the respondent on the ground that the terms of the contract did not provide for sanction of maternity leave applied for an that the provisions of the government of India are not automatically applicable to the employees. The respondent accordingly terminated her services after giving one month's notice pay as per the terms and conditions of appointment. Thereupon the petitioner filed a writ petition in the Karnataka High Court. It was, *inter alia,* contended by the petitioner that (i) the action of the respondent in not granting maternity leave as well as regularizing the period of absence on different dates between 27.6.2008 & 10.11.2008, as leave without allowance was in violative of the mandatory provisions of the Maternity Benefit Act, 1961 and is patently ill-legal and (ii) the termination of the petitioner's service during the period of maternity leave is in violation of the specific prohibition, which is in the nature of a protection under section 12 of the Maternity Benefit Act and the termination of the service of the petitioner is not 'termination simplicities' and hence was illegal and void *ab initio.*

On the other hand it was *inter alia* contended by the respondent that the petitioner being well aware of terms of appointment and having joined duty in the respondent corporation, is bound by the terms and conditions of the contract, which does not provide for maternity leave benefits.

The Maternity Benefit Act is applicable only to an establishment being a factory, mine, plantation or any other establishment notified under the Act and since the respondent is not notified as required under section 2 of the Act, the provisions of the Act are not applicable to the respondent.

Dealing with the rival contentions the Karnataka High Court referred to the provisions of articles 39 and 42 of the Constitution and the decisions of the Supreme Court in *Air India* v. *Nergesh Meerza*,[64] *Consumer Education & Research Centre* v. *Union of India*,[65] *Kirloskar Brothers Ltd.* v. *ESIC*,[66] *Muncipal Corporation of Delhi*[67] *and B. Shah* v. *Presiding Officer, Labour Court*[68] the court held that in not extending the benefits of the Maternity Benefit Act, 1961 to the petitioner, the

63 2012 LLR 602.
64 AIR 1981 SC 1829.
65 AIR 1995 SC 222.
66 AIR 1966 SC 3261.
67 AIR 2000 SC 1274
68 AIR 1978 SC 12.

respondent has acted most arbitrarily and illegally. When the nation is moving forward to achieve the constitutional guarantee of equal rights for women and the empowerment of the women, unfortunately, the respondent seems to be not adopting such a course.[69]

VIII CONCLUSION

The survey of cases of the apex court and high courts pertaining to social security and labour law reported during 2012 reveals some new development. Thus after one and a half decade of the enactment of the Building and other Construction Workers Welfare Cess Act, 1996 its constitutional validity was challenged mainly on the ground of lack of legislative competence. However, the apex court keeping in view the statement of objects and reasons of the Cess Act, upheld its validity.

Another noticeable development relates to the issue as to when the payment of compensation under the Employees' Compensation Act, 1923 (ECA) become due and what is the point of time from which interest would be payable on the amount of compensation. While deciding this issue the Supreme Court and high courts have taken into account the decisions of 2 or 3 judge bench but failed to take notice the decision of the four judge bench of the apex court in *Pratap Narain Singh Dev* v. *Shrinivas Sabata*,[70] a cases decided about three and half decades ago. In view of this the Supreme Court in *Oriental Insurance Co. Ltd.*[71] case observed that the several decisions have been rendered in ignorance of *Pratap Narain Singh Dev* case and they do not express the correct view and also do not make binding precedent.

The Gauhati High Court,[72] however while dealing with the liability of the employer to pay compensation to workmen who died due to consumption of excessive drink failed to take notice of clause (1) of proviso (b) of section 3 of ECA and thereby denied, compensation to the dependents of the deceased.

Quite apart from aforesaid development the court gave beneficial interpretation. Thus, the High Court of Delhi[73] while determining the scope of the ESI Act keeping

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69 *Supra* note 60 at 607. The court added:
19. In terms of Sections 4 &5 of the Act, the women employee is entitled to 6 weeks' maternity leave prior to delivery and 6 weeks thereafter. The petitioner applied for maternity leave on 6.12.2008 arid had pre-mature labour and delivered twins on 28.1.2009. As per Sections 4&5 of the Act, the petitioner has the right to claim maternity leave 6 weeks before 28.1.2009 i.e. from 14.12.2009 to 12.3.2009. The respondent gave notice of termination on 20.2.2009, which was to take effect on 23.3.2009. The absence of the petitioner from duty on the dates shown in the officer order of the respondent dated. 28.1.2009 (Annexure J) and after 6.12.2008 till her service was terminated by invoking Clause 27 of the terms & conditions of the contract agreement; is due to the reasons of her pregnancy and the state of affairs in which she was placed. In the circumstances, the respondent ought to have examined the request keeping in view the humane conditions of work, women's dignity and the provisions of the Act. The action taken being otherwise cannot be upheld.

70 *Supra* note 11.

71 *Supra* note 5.

72 *Supra* note 14.

73 *Supra* note 32.

in view the preamble of the Act ruled that a narrow or restricted meaning cannot be assigned to the coverage of ESI Act as it would defect the very purpose of the enactment itself. Likewise the Chhatisgarh High Court gave a beneficial interpretation to section 2(8) of ESI Act while determining the question whether death of the deceased employee amounted to employment injury.

Another positive trend is to protect the interest of daily wagers in respect to payment of gratuity. Thus the Himachal Pradesh High Court[74] ruled that even where the establishment does not have a scheme for payment of gratuity to daily waged employee the Payment of Gratuity Act, 1972 has an overriding effect over the enactment of the university (subject to fulfilment of other conditions) and they would be entitled for gratuity.

74 *Supra* note 51.