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SOCIAL SECURITY LAW

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I INTRODUCTION

IN THE year 2020 there have been significant developments, both legislative and judicial, in the arena of law relating to social security, wages and minimum standards of employment.While the previous year witnessed the passing of the Code on Wages, 2019 the year 2020 witnessed the passing of three long awaited labour codes, namely (a) the Industrial Relations Code Bill, 2020[1], the Code on Social Security Bill, 2020[2] and the Occupational Safety, Health and Working Conditions Code Bill, 2020,[3] on September 23, 2020, These three labour codes subsequently received the Presidential assent on September 29, 2020. The year 2020, according to the Union Labour Minister Santosh Gangwar, is an year of labour reform.

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1 The Industrial Relations Code, 2020 subsumes three Labour Acts, namely, the Industrial Disputes Act, 1947; the Trade Unions Act, 1926; the Industrial Employment (Standing Orders) Act, 1946.

2 The Code on Social Security, 2020 subsumes nine Labour Acts namely, the Employees' Compensation Act, 1923, the Employees' State Insurance Act, 1948, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, the Maternity Benefit Act, 1961, the Payment of Gratuity Act, 1972, the Cine Workers Welfare Fund Act, 1981, the Building and Other Construction Workers Welfare Cess Act, 1996 and the Unorganised Workers' Social Security Act 2008..

3 The Code on Occupational Safety, Health and Working Conditions, 2020 subsumes thirteen Labour Acts, namely,the Factories Act, 1948(63 of 1948); the Plantations Labour Act, 1951(69 of 1951);the Mines Act, 1952(35 of 1952);the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955(45 of 1955); the Working Journalists (Fixation of Rates of Wages) Act, 1958(29 of 1958); the Motor Transport Workers Act, 1961(27 of 1961); the Beedi and Cigar Workers (Conditions of Employment) Act, 1966(32 of 1966); the Contract Labour (Regulation and Abolition) Act, 1970(37 of 1970); the Sales Promotion Employees (Conditions of Service) Act, 1976(11 of 1976); the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (30 of 1979);the Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981(50 of 1981);the Dock Workers (Safety, Health and Welfare) Act, 1986(54 of 1986) and the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (27 of 1996).

The year also witnessed COVID-19 "the worst global crisis since World War II.". On March 11, 2020 the World Health Organization (WHO) declared COVID-19 a pandemic. However, in India the Central Government on March 24, 2020 declared a nationwide lock down restricting movement of the people as a preventive measure against the COVID-19 pandemic. As a result of lock down over 122 million people lost their job by April, 2020 as per the estimates from Centre for Monitoring Indian Economy. Out of this 75% were small traders and wage-workers, a majority of them were from unorganized sector. Among them the worst affected were interstate migrant workers. who were forced to abandon their cities of work due to the halt in production which cut-off their meagre source of income.[4] On April 20,2020 when some relaxation was made in lockdown by the Central Government some States, having faced with the problem of shortage of labour due to departure of thousands of migrant labourers, amended labour laws, either by suspending them or by making necessary amendment in labour legislation or by exercising administrative powers vested under labour legislation.One such amendment was the suspension of 35 out of the 38 labour laws for a period of three years by the State of Uttar Pradesh by issuance of the Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020. This move was followed by other states as well like Madhya Pradesh, Gujarat and Odisha, among others, though to a smaller extent. However the ordinance issued by the Uttar Pradesh Government did not receive the assent of the President.

Like legislative development there has also been significant development in judicial sphere. In the year under review a number of Supreme Court and high court cases have been reported in various important areas of law relating to social security, wages and minimum standard of employment. The Supreme Court decisions on social security relate to the Employees' Compensation Act, 1923, Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Payment of Gratuity Act ,1972 and the law relating to minimum standards of employment relates to Factories Act, 1948. The high courts' decisions covered almost every important area of social security, wages and minimum standards of employment. The courts generally adopted cautious approach to deal with the provisions of social security, wages and minimum standards of employment legislation. Indeed the apex court at times evolved new strategies to deal with various issues on law governing social security, wages and minimum standards of employment. Moreover in some cases courts gave beneficial interpretation to the provisions of the Act.

This survey seeks to examine important judgments of the Supreme Court and high courts on law relating to social security, wages and minimum standard of employment legislation.

II EMPLOYEES' COMPENSATION

In *K. Sivaraman* v. *P. Sathishkumar*[5] a question arose whether amendment made to sections 4 and 4A of the Employees' Compensation Act (EC Act) by Act 45 of 2009,

4. S.C. Srivastava, "Dilution of Labour Laws Amidst COVID-19: Issues and Challenges" XI-XV *A Journal of Tami; Nadu Dr. Ambedkar Law University* 36 (2016-2020).

5 AIR 2020 SC 954 : (2020) 4 SCC 594.

with effect from January 18, 2010,enhancing the amount of compensation and the rate of interest would also be applicable to cases where the accident took place prior to the coming into force of the amendment?

Factual matrix

In this case Dinesh Kumar, the deceased, who was in the employment of the first respondent as a driver of a trailor lorry while driving the vehicle which was insured with Reliance General Insurance Company, met with an accident on January 31, 2008. On the date of the incident, the deceased was 26 years of age and was engaged as a driver of a Trailor lorry resulting in his death. Before the accident he was working with first respondent for about 3 years and was getting pay of Rs 25,000 but was receiving Rs 32,000 per month (including food expenses) . A claim under the Employees' Compensation Act, 1923 (EC Act) was filed by the the father, mother, sister and brother of Dinesh Kumar, before the Deputy Commissioner for Employee's Compensation, Madurai on 29 April 2013. On March 26 2014, the claim was allowed by an award in the amount of Rs 4,33,060. The Deputy Commissioner, however, had proceeded *ex parte*. The appellants filed an appeal before the High Court of Madras for enhancement of the compensation. The high court, by its judgment dated November 23, 2015, remanded the case to the Deputy Commissioner for determination of the amount of compensation afresh. On remand, the Commissioner for Workmen's Compensation, Madurai, by an order dated March 4, 2016, maintained the award of compensation in the amount of Rs 4,33,060. The finding of the Commissioner was made on the basis that in terms of the notification issued under section 4(1B) of the EC Act, which provided that whatever be the monthly pay received by a person, the jurisdiction of the adjudicating authority was subject to a ceiling of Rs 4,000 per month in computing the monthly wages of the employee. Taking the monthly salary at Rs 4,000, the Commissioner applied a multiplicand of 215.28 in terms of Schedule IV (the deceased being 26 years of age) and arrived at a figure of Rs 4,30,560 to which an additional amount of Rs 2,500 was added towards funeral expenses. A total award in the amount of Rs 4,33,060 was,therefore,awarded as the compensation payable to the appellants.However, the Division Bench took note of the fact that in pursuance of the order of remand, the salary of deceased employee had been proved to be Rs 32,000 per month, though the accident took place on January 31, 2008, the petition for compensation had been lodged on January 28, 2011 and was decided by the Commissioner on March 4, 2016. In the meantime, a notification was issued by the Central Government on May 31, 2010 whereby the amount as monthly wages was increased from Rs 4000 to Rs 8000 with effect from the date of publication.In view of the aforesaid notification the high court held that having due regard to the fact that the legislation in question is a social welfare legislation, the enhanced income of Rs 8,000 per month should form the basis of the computation. Applying the said increase in monthly wage the high court enhanced the compensation to Rs 8,86,120. The high court also awarded interest at the rate of 12% per annum from the date of the accident. Against the aforesaid order an appeal was filed before the Supreme Court.

Issues for determination before the Supreme Court

Two issues arose (i) Whether the compensation would be payable from the date of the accident or date of award ? (ii) whether an amendment to section 4 and 4A of the EC Act enhancing the amount of compensation and the rate of interest would be applicable to cases where the accident took place prior to the coming into force of the 2009-amendment in the EC Act?

Judicial response

In order to deal with the aforesaid issues the court examined the obligation for the payment of compensation under section 4A[6] of the EC Act ,rules of Interpretation, objective of 2009- amendment in EC Act and the concept of interest.Let us turn to examine them.

(i) When the obligation for the payment of compensation arises under the EC Act

Dealing with the aforesaid issue the court held that under section 4A of EC Act the obligation to pay compensation arises on the date of the accident. The court, however, added that where an employer disputes the quantum of compensation payable, it is enjoined to make a provisional payment to the Commissioner or to the employee pending the settlement of the claim. This is necessary in order to ensure that an employer does not escape its obligation to make the payment of compensation or does not unduly delay its payment on frivolous grounds.

(ii) Rule of Interpretation

Dealing with the principles of interpretation the court held that EC Act is a social and beneficial legislation and, therefore, provisions and amendments thereto must be interpreted in a manner so as to not deprive the employees of the benefit of the legislation. The court added that the object of enacting the EC Act was to ameliorate the hardship

6 Employees' Compensation Act, 1923, s. 4A provides:

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of the employee to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall—

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification 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 clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.—For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3A) The interest and the penalty payable under sub-section (3) shall be paid to the employee or his dependent, as the case may be.

of economically poor employees who were exposed to risks in work, or occupational hazards by providing a cheaper and quicker machinery for compensating them with pecuniary benefits. Referring to the amendment made in the EC Act in 2009 the court observed that it was made to further this salient purpose by either streamlining the compensation process or enhancing the amount of compensation payable to the employee.

(iii) Objective of 2009- amendment in EC Act and its effect on accident which took place prior to the amendment

Having dealt with the rule of interpretation the court observed that prior to 2009 by virtue of the deeming provision in Explanation II to section 4, the monthly wages of an employee were capped at Rs 4000 even where an employee was able to prove that the payment of a monthly wage was in excess of Rs 4,000. Explaining the amendment in the EC Act the court pointed out that the legislature, in its wisdom and keeping in mind the purpose of the said Act as a social welfare legislation did not enhance the quantum in the deeming provision, but deleted it altogether. The objective of the amendment was to remove a deeming cap on the monthly income of an employee and extend to them compensation on the basis of the actual monthly wages drawn by them. However, there is nothing to indicate that the legislature intended to extend the benefit of such amendment to accidents that took place prior to the coming into force of the amendment. The court also referred to its earlier decision wherein it was held that where (i) a legislation confers a benefit on some persons, (ii) without inflicting a corresponding detriment on some other persons or the public generally and (iii) where the conferral of such benefit appears to be the intention of the legislature, the presumption of prospective application may stand displaced. Having stated the aforesaid principle the court observed that it was presumably for this reason that the three judge bench of this court in *Valsala* and the High Court of Kerala held that the benefit of an amendment enhancing the rate of compensation does not have retrospective application to accidents that took place prior to the coming into force of the amendment. Furtherthere is nothing in 2009-amendment, either express or implied, to denote an intention of the legislature to confer the benefit of the amendment to accidents that took place prior to its coming into force.

(iv) Applicability of the interest

Dealing with the interest payable in the case the court held that once concept of interest has been introduced, principles of Workmen Compensation Act (now Employees Compensation Act) can certainly be applied and judgment of four judge Bench in *Pratap Narain Singh Deo* v. *Srinivas Sabata*[7] will fully apply. However, when it is found that the revised amount of applicable compensation as on the date of award of the tribunal is less than the prescribed amount of compensation as on the date of accident with interest, higher of the two amounts ought to be awarded on the principle of beneficial legislation.

(v) *Findings of the court*

7 (1976) 1 SCC 289.

The Court held that compensation would be calculated with reference to the date of the accident along with interest payable. However, if the amount calculated is less than the amount prescribed as on the date of the award of the tribunal under the 1989-amendment in EC Act, the claimant will be entitled to higher of the two amounts. Consequently, the High Court erred in extending the benefit of 1989- amendment in EC Act and thereby failed to determine the compensation payable on the date of the accident where deemed cap of Rs 4000 as monthly wages was applicable.

III EMPLOYEES PROVIDENT FUND

In *Pawan Hans Limited* v. *Aviation Karmachari Sanghatana*[8] a question arose whether the contractual employees of the Pawan Hans Limited are entitled to provident fund benefits under the Pawan Hans Employees' Provident Fund Trust Regulations or under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act") and the Employees' Provident Fund Scheme, 1952 ("EPF Scheme") framed thereunder?

Factual matrix

Pawan Hans Limited (appellant company) was incorporated under the Companies Act, 1956, and was subsequently registered as a Government of India company with the Registrar of Companies, Delhi. In the appellant company theGovernment of India held 51% shareholding and the remaining 49% was held by Oil and Natural Gas Company Ltd. (ONGC). In the appellant company out of 840 employees570 employees were employed on regular basis and the remaining 270 employees were engaged on contractual basis. On April 4, 1986, the appellant-company framed and notified the Pawan Hans Employees Provident Fund Trust Regulations (PF Trust Regulations) for giving provident fund benefits to all its employees. Under the PF Trust Regulations "employee" means any person who is employed for wages/salary in any kind of work, monthly or otherwise, in or in connection with the work of the Corporation and who gets his wages/salary directly or indirectly from the Corporation, and excludes any person employed by or through a contractor or in connection with the work of the Corporation but does not include any person employed as an apprentice or trainee." However the appellant company implemented the PF Trust Regulations only with respect to the regular employees, even though the term "employee" includes any person employed directly or indirectly. Aggrieved by non-application of PF Trust Regulations to employees engaged on contractual basis the labour union of the appellant company filed a writ petition in the High Court of Bombay contending that the benefits under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) be extended to the members of the Union and other similarly situated employees. Taking into account the points raised by the labour union the aforesaid writ petition was allowed. During the pendency of the writ petition, the Regional Provident Fund Commissioner, Bandra issued a letter dated May 24, 2017 to the company wherein it was stated that even though the EPF Act would not apply to establishments owned/controlled by the Central Government as per section 16(1)(b) and (c),[9] however social security benefits

82020 LLR 289.

such as provident fund should be provided to all "employees/workers who are engaged on contractual/casual/daily wages basis since there is no distinction between a person employed on permanent, temporary, contractual, or casual basis under section 2 (f) of the EPF Act. The High Court of Bombay allowed the writ petition and directed that (i) the benefits under the EPF Act be extended to the members of the respondent-trade union, and other similarly situated employees. (ii) a liberal view must be taken in extending social security benefits to the contractual employees. (iii) the company must enroll all eligible contractual employees under the EPF Scheme, and deposit their contribution with the regional provident fund commissioner from the date they became eligible till remittance, and thereafter till they are in employment of the company latest by December 31, 2018.

Aggrieved by the aforesaid judgment of the high court the appellant-company filed an appeal before the Supreme Court.

Key Issues

(i) whether the exemption made to appellant-companyis permissible under the EPF Act and the EPF Scheme framed thereunder ?

(ii) whether the members of the respondent-trade union are entitled to the benefit of provident fund under the PF Trust Regulations or under the EPF Act ? If so the date from which the benefit of provident fund is to be extended to the contractual employees.

Judicial Response

(a) Exemption granted to the appellant-company under EPF Act

In order to deal with the aforesaid issue the court examined the following twin conditions, for an establishment to seek exemption from the provisions of the EPF Act, 1952.laid down in *Regional Provident Fund Commissioner* v. *Sanatan Dharam Girls Secondary School:*[10]

(i) The establishment must be either "belonging to" or "under the control of " the Central or the State Government. The phrase "belonging to" would signify "ownership" of the Government, whereas the phrase "under the control of" would imply superintendence, management or authority to direct, restrict or regulate[11].

9 Employees' Provident Funds and Miscellaneous Provisions Act, 1952, s. 16 provides :

[(1) This Act shall not apply:

[(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to 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

(c) 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;

10 2007) 1 SCC 268 : (2007) 1 SCC (L&S) 167.

11 *Shamrao Vithal Coop. Bank Ltd.* v. *Kasargode Panduranga Maliya,* **(1972) 4 SCC 600.**

(ii) the employees of such an establishment should be entitled to 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.

If both the aforesaid tests are satisfied, an establishment can claim exemption/ exclusion under section 16(1)(b) of the EPF Act.

Applying the first test to the instant case, the court held that the Central Government has a 51% ownership in the appellant- company, while the balance 49% is owned by the ONGC, a Central Government PSU and, therefore, the the first test is satisfied as the appellant-company can be termed as a government company under section 2(45) of the Companies Act, 2013.

With respect to the second test, the court observed that the appellant-company restricted the application of the PF Trust Regulations only to the 'regular' employees. Further such Regulation were neither framed by the central or state government, nor were they applicable to all the employees of the company, so as to satisfy the second test. Moreover ,as mentioned above, the Regional Provident Fund Commissioner, Bandra issued a letter dated May 24, 2017 addressed to the Company wherein it was stated that the benefits of contributory provident fund was not being provided to contractual/casual employees of the companyand ,therefore, directed it to implement the provisions of the EPF Act. In view of this the company did not satisfy the second test, since the members of the respondent-union were not getting the benefits of contributory provident fund under the PF Trust Regulations and ,therefore, the exemption under section 16 of EPF Act would not be applicable to the appellant-company.

(b) *Contractual employees are entitled to the benefit of provident fund*

Having held that appellant -company failed to make out a case of exclusion from the applicability of the provisions of the EPF Act the court ruled that the definition of an 'employee' under section 2(f)[12] of the EPF Act, is widely worded to include "any person" engaged either directly or indirectly and, therefore, the members of the respondent-union and all other similarly situated contractual employees, are entitled to the benefit of provident fund under the PF Trust Regulations or the EPF Act.

(c) *Date from which the benefit of provident fund is to be extended to the contractual employees*

The court while dealing with the date from which the benefit of provident fund be extended to the respondent-union, and other similarly situated contractual employees held that such benefit be made available from January 2017, the date when the writ petition was filed before the high court. The court accordingly modified the orders of

12 Employees' Provident Funds and Miscellaneous Provisions Act, 1952,s .2 (f) defines employee to mean any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any person—

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) 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;

the high court. In view of above the court directed : (i) the Regional Provident Fund Commissioner, Bandra (E), Mumbai to determine and compute the amount to be deposited by the company on the one hand, and the members of the respondent-union and other similar situated employees on the other hand;(ii) The computation would be required to be made for the past period *i.e.,* January 2017 to December 2019;(iii) The company shall be liable to pay simple Interest @ 12% p.a. on the amount payable by it towards contribution of provident fund for the past period, *i.e*., January 2017 to December 2019, as per section 7Q of the EPF Act,(iv) The employees will be obligated to deposit their matching contribution for the past period i.e. January 2017 to December 2019, within a period of 12 weeks along with interest @ 6% p.a., after the contribution of the company has been remitted to the PF Trust; (vi) With respect to the period from January 2020 onwards, the company and the members of the respondent-union as also other similarly situated employees, will make their respective contributions as per the PF Trust Regulations ;(vii) The benefit shall not be extended to those employees who have superannuated, expired, resigned, or ceased to be in the employment of the Company on the date of this Judgment.

IV PAYMENT OF GRATUITY ACT, 1972

In *Rajasthan State Road Transport* v. *Mohani Devi*[13] the Supreme Court was called upon to decide (i) whether the husband of the respondent had acquired an indefeasible right to seek voluntary retirement from service? (ii) whether submission of resignation subsequent to filing of application for voluntary retirement by the husband of the widow be considered as an application for voluntary retirement?

Factual background

The respondent's husband had joined the service of the appellant- transport corporation at Alwar Depot as conductor on March 15, 1979. On July 28, 2005 the respondent's husband after serving for more than 25 years of service filed an application seeking voluntary retirement.However the appellant-transport corporation did not consider the application and grant the voluntary retirement. Under the circumstance on May 3, 2006the husband of the respondent submitted his resignation claiming to be under depression and his health condition had deteriorated further. The authorities accepted the resignation on May 31, 2006. Thereafter he was relieved of his duties and the benefits were paid to him.After her husband's death, the respondent filed a writ petition before the high court alleging that her her husband submitted an application pointing out that he had erred in mentioning 'resignation' and , therefore, desired to retire in view of his earlier application for voluntary retirement. It was alleged that her husband moved such an application on the ground of deteriorating health and forcing such employee to work would be an act of oppression. It was also mentioned that since no decision been taken by the authorities on his first application of July 28, 2005 he be treated as having voluntarily retired with consequent retiral benefits.

A single judge of the high court held that (i) the respondent's husband had moved an application indicating deteriorating health and forcing such employee to work would

13 (2020) 5 SCC 741.

be an act of oppression. (ii) the voluntary retirement application was not decided within the period prescribed as per the clause 19-D(2) of the Pension Scheme and as per clause 18-D(2) of the Rajasthan State Road Transport Corporation (RSRTC) Standing Orders an employee of the corporation, who had rendered pensionable service was entitled to seek voluntary retirement. The court accordingly held that the respondent's husband would be deemed to have retired even though he had moved another application terming his retirement as resignation in view of the law laid down in *Sheel Kumar Jain* v. *The New India Assurance Co. Ltd.*[14] The court accordingly directed the appellants to treat respondent's husband as voluntarily retired and to release the retiral benefits to which he was entitled.Being aggrieved, an appeal was filed by the appellants herein before the division bench of the High Court which was dismissed. Thereupon the appellant filed an appeal before the Supreme Court.

The Key Issue

A question arose whethernon acceptance of application for voluntary retirement and subsequent application for resignationby the respondent's husband be deemed to be voluntary retirement?

Response of the Supreme Court

The Supreme Court observed that the High Court failed to notice that on the date when the husband of the respondent had made the application for voluntary retirement the husband of the respondent had already been issued charge-sheets alleging misconduct which were relevant for decision making in the instant case . Further during the course of its order the High Court merely assumed that the voluntary retirement application should be deemed to have been accepted when there was no rejection. The Court added that in the instant case the proceedings relating to the charge sheet was taken forward and completed through the final order of withholding of the increment and in such circumstance the non- consideration of the application for voluntary retirement was justified.

The court also observed that the high court erred when it took into account that Rule 50 of Rajasthan Civil Services Pension Rules, 1996 which provides the qualifying period to for 20 years for seeking voluntary retirement, to take notice that sub--rule (2) thereof provides that the notice of voluntary retirement given by the employee shall require acceptance by the appointing authority. The Court reiterated thatin the instant case there was no acceptance of the application for voluntary retirement and thereafter the husband of the respondent submitted his resignation. The Court added that when the application for voluntary retirement was not been favorably considered by the employer, instead of submitting the resignation on 03.05.2006, the appropriate course was to initiate appropriate legal proceedings. But the respondent's husband instead, had yielded to the position of non-- acceptance of the application for voluntary retirement and has thereafter submitted his resignation. The acceptance of the resignation was acted upon by receiving the terminal benefits. If that be the position, when the writ petition was filed belatedly in the year 2012 and that too after the death of the employee

14 2012 (1) SLR 305.

who had not raised any grievance during his life time, consideration of the prayer made by the respondent was not justified. Thus the High Court, committed an error in passing the concurrent orders.

Dealing with the payment of gratuity the Court observed that section 4(1)(b) of the Payment of Gratuity Act, 1972 provides that the gratuity shall be payable if the termination of employment is after 5 years of continuous service and such termination would include resignation as well. In that view, if the gratuity amount has not been paid to the respondent's husband, the liability to pay the same would subsist and the respondent No.1 would be entitled to receive the same in accordance with the provisions of the Act. The Court accordingly directed that the appellants to calculate the gratuity and pay the same to the respondent No.1, if notalready paid. Such payment, if any , shall be made within four weeks from date of the order of the Court.

V MATERNITY BENEFITS

In National Highways Authority of India v. National Commission for Women[15] the High Court of Allahabad was called upon to decide three issues, namely (i) whether the benefit of maternity leave be given to the women employee who was working on contract basis? (ii) Is the National Commission for Women empowered to direct the petitioner to pay maternity benefit to respondent No 2(woman employee)? (iii) Can the jurisdiction of the National Commission for Women be ousted if there is arbitration clause in the employment agreement between the petitioner and the respondent no.2? The Court answered the aforesaid questions in negative.

In order to deal with the aforesaid issues, it would be desirable to state briefly the factsof the case. In this case respondent no.2(a female) was appointed by the *National Highways Authority of India* under the "NHAI/Policy Guidelines/External Professionals & Young Professionals 2017"(Guidelines)on a contractual basis for a period of two years. Clause 3(ii) of the agreement specifically stated that she will be entitled to no leave except 8 days paid causal leave and 15 days paid sick leave in a calendar year. On denial of maternity benefit she filed a complaint in the National Commission for Women.There upon the Commission directed the petitioner to pay all dues including the maternity benefits as per the Maternity Benefits (Amendment) Act, 2017 to the respondent no.2. By the subsequent communication the petitioner was also directed to appear before the respondent no.1 with a detailed action taken report. Aggrieved by this order the petitioner filed a writ petition before the High Court of Delhi.

Dealing with the first issue, namely,whether the benefit of maternity leave be given to the women employee who was working on contract basis the Court held that clause 12 of the Guidelines clearly provides that the petitioner is required to comply with the provisions of the Maternity Benefit Act, 1961 and ,therefore, the petitioner cannot contend that the Maternity Benefit Act, 1961, would not apply to the employment in question. The court added that even otherwise, the said Act is the social welfare legislation and, therefore, it needs to be given full effect.The court, accordingly, relying following the decision of the Supreme Court in *Govt. of NCT of Delhi* v. *Shweta*

15 W.P.(C) 12064/2019 & CM No.49384/2019 decided on Jan. 21, 2020.

Tripathi [16], rejected the contention of the petitioner that the respondent no.2, being a contractual employee was not entitled to the benefits of the Maternity Benefit Act, 1961.

The Court also rejected another contentions of the petitioner that respondent no.1 has no jurisdiction and held that section 10(1)(a)[17] of the National Commission for Women Act, 1990 specifically empowers and, in fact, casts a duty on the respondent no.1 to investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws.

Dealing with the third issue whether the jurisdiction of the National Commission for Women be ousted if there is arbitration clause in the employment agreement the court held that remedy before the respondent no.1is of the alternative nature and, merely because of this reason the jurisdiction of the respondent no.1cannot be ousted.

Dealing with the issue whether the respondent no. 2 has met the requirement of minimum period of employment to avail maternity benefit the Court held that if she is otherwise entitled to the benefits under the Maternity Benefits Act, 1961, she could not have been denied the same only because of her period of employment with the petitioner.

VI MINIMUM WAGE

In *KMJ Public School v. C.M. Ance*[18] *a* question arose whether the Labour Court while considering an application under section 33C (2)[19] of the Industrial Disputes Act, 1947(IDAct) is also empowered to decide the issue whether the workmen was employed on a regular basis or on a part-time hourly basis.The Labour Court answered the question in negative and held that under section 33 C(2) does not envisage an enquiry as to whether the writ petitioners were entitled for the minimum wages. It accordingly held that in the absence of any pre-existing right or admitted liability of the employer, no determination can be made under section 33 C(2) of the I.D. Act. On a writ petition filed against this order the single judge of the High Court set aside an order passed by the Labour Court, Ernakulam and remittedthe matter back to the Labour Court to consider the claim of the petitioner afresh. Against this order an appeal was filed before

16 2014 SCC OnLineDel.7138.

17 National Commission for Women Act, 1990 s. 10 provides :

(1) The Commission shall perform all or any of the following functions, namely:

(a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other law;

18 2020 (9) KLR 279.

19 *Industrial Disputes Act, 1947* s. 33-c(2) provides *:*

Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government; within a period not exceeding three months: Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."

the Division Bench of the Kerala High Court. The Court after examining the three judge bench decision of the Supreme Court in *Municipal Corporation of Delhi v. Ganesh Razak and Another* [20] held that it is settled law that the jurisdiction vested in the Labour Court under section 33C(2) of IDA is akin to that of an execution court. But the execution court cannot adjudicate on the question as to whether the workmen were regularly employed or were working only for a few hours. The Court accordingly set aside the the judgment of the single Judge of the High Court and affirmed the award of the Labour court.

VII INTERVENTION OF THE SUPREME COURT TO DEAL WITH PROBLEMS AND MISERIES OF MIGRANT LABOUR DURING LOCKDOWN

In India,during COVID -19 pandemicand in particular during lockdown , as mentioned earlier,inter-state migrant workers were the worst affectedsection of our society. They were. forced to abandon their cities of work due to the halt in production which cut-off their meagre source of income[21].They therefore proceeded on foot with their family members due to suspension of passenger trains and buses to their home/ villages. In this process hundreds of migrant workers lost their lives due to hunger, road accident and accident at railway platform. In the aforesaid circumstance on May 26, 2020 a three-judge bench of the Supreme Courttook took a *suo motu*[22] cognizanceof newspaper and media reportsabout the aforesaid state of affairs of migrant workers. The court listed the case as *In Re : Problems and Miseries of Migrant Labour*and after issuing the notice to the Central Government, State Government and Union Territories and after due examination of the situation court issued the following directions :

(i) As and when the state governments put in a request for trainsrailways must provide the same.

(ii) No fare for train or bus should be charged from migrant workers.

(iii) The stranded migrant workers should be provided food and water during their railway journey.

(iv) Wherever migrant workers are found walking on the roads, they should be taken to shelter home and be provided food and all facilities.

(v) All concerned States/UTsshould withdraw prosecution/complaints under section 51 of Disaster Management Act and other related offences lodged against the migrant labourers who alleged to have violated measures of

20 In *Municipal Corporation of Delhi* v. *Ganesh Razak and Another* (1995) 1 SCC 235, a threeJudge Bench of the Supreme Court held that the adjudication of a claim of piece rated workers that he be paid wages similar to regular employees on the ground that they were doing the very same work, cannot be undertaken by the Labour Court while exercising jurisdiction under section 33C(2) of the ID Act..

21 S.C.Srivastava, "Dilution of Labour Laws Amidst COVID-19: Issues & Challenges", *A Journal of Tamil Nadu Dr. Ambedkar Law University*, (Vol No. XI to XV) 36 (2016-2020).

22 Writ Petition (Civil) No(s). 6/2020

lockdown by moving on roads during the period of lockdown enforced under the Disaster Management Act, 2005.[23]

Again on June 9, 2020[24] the Supreme Court issued following directions to the State Government and union territories :

(i) Once migrant workers arrive at their destinations all States and Union Territories shall give details of all schemes which are then in operation in the State and apprise them the benefit which can be availed by them including different schemes for providing employment.

(ii) All States and Union Territories should gather details of migrant workers, the nature of their skill, and place of their earlier employment at the village level, block level and district level.

(iii) All States and Union Territories shall establish counselling centres and help desk at block and district level to provide all necessary information regarding schemes of the Government and to extend helping hand to migrant labourers to identify avenues of employment and benefits which can be availed by them under the different schemes.

(iv) The list of migrant labourers shall be maintained village wise, block wise and district wise to facilitate the administration to extend benefit of different schemes which may be applicable to such migrant workers.

VIII EMPLOYER'S OBLIGATION TO PAY WAGES TO WORKERS WITHOUT ANY DEDUCTION DURING LOCKDOWN

In *Ficus Pax Private Ltd.* v. *Union of India*[25] several writpetitions were filed by different employers and employers' associations (except one[26]) challengingthe D.O. dated 20.03.2020 issued by the Secretary, Government of India, Ministry of Labour and Employment and order dated Mar. 29, 2020 issued by the Government of India, Ministry of Home affairs under section 10(2)(l) of Disaster Management Act, 2005directing all the employers to make payment of wages to their workers at their workplace without any deduction for the period their establishments are under closure during the lockdown.The petitioner challenged the order dated Mar. 29, 2020 and the D.O. dated Mar. 20, 2020 as being violative of Articles 14 and 19(1)(g) of the Constitution. Referring to article 14 it was alleged that the notifications are arbitrary,

23 Supreme Court took suo moto cognizance of 'problems and miseries' of migrant labourers Read more *available at*: https://www.aninews.in/news/national/general-news/supreme-court-takes-suo-moto-cognizance-of-problems-and-miseries-of-migrant-labourers20200526191127/

24 Times of India.com June 9, 2020 http://timesofindia.indiatimes.com/articleshow/76276596.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

25 2020 LLR 579.

26 In *Aditya Giri* v. *Union of India & others*W.P.(civil) D.No.10981 of 2020, , a petition was filed by an individual as a Public Interest Litigation to espouse the cause of employees and employers who were laid off and were on the verge of bankruptcy due to lockdown. In the writ petition, directions were sought to the respondent to frame policy to mitigate the problems of employees of the private sector as well as of the employers who were financially not in position to maintain the employees.

illegal, irrational and unreasonable and contrary to the provisions of law including Article 14 of the Constitution.[27] In regard to article 19(1)(g) of the Constitution it was contended that the notifications are unreasonable and arbitrary interference with the rights of petitioner-employers under article 19(1)(g) of the Constitution. Notifications were are also alleged to be contrary to the principles of "equal work equal Pay" and "no work no pay", for it does not differentiate between the workers who are working during the lockdown period in establishment such as the petitioner who had been permitted to operate during the lockdown period and the workers who had not worked at all.It was also argued that the ultimate onus for any compensation towards workers shall ultimately be of the Government and, therefore, the said liability cannot be shifted upon the employers in the private establishment. The impugned notifications according to them had the effect of completely negating the statutory provisions under the Industrial Disputes Act, 1947. They accordingly pleaded thatrespondent should not compel the employers to pay the wages for lockdown period but instead should utilise the funds collected by Employees' State Insurance Corporation (ESIC) to make periodical payment to workers[28].

On the other hand in the counter affidavit filed by the respondent it was stated that the order dated Mar. 29, 2020 was fully in conformity with the provisions of the Disaster Management Act, 2005. Further the direction dated Mar. 29, 2020 was issued in public interest by the competent authority and are neither arbitrary nor capricious. It

27 The petitioner in W.P.(C)Diary No.10983 of 2020 is a company incorporated under the Companies Act and is engaged in the business of packaging with eleven factories spread across seven states. The petitioner is registered as Medium Industry (manufacturing) under Micro, Small, Medium Enterprises Development Act, 2006. The petitioner company before the lockdown employed 176 permanent workers and 939 contract workers across all its factories, warehouses and offices. The petitioner's case is that after the lockdown period although petitioner being in a supply chain of several essential items such as pharmaceuticals, food products has been permitted to operate but its business has been reduced to the level of near 5-6 percent They also challenged theconstitutional validity of section 10(2)(1) of the Disaster Management Act 2005 and other consequential orders issued by different States where directions were were issued that all the employers be it in the industries or in the shops, commercial establishment to makepayment of wages to their workers, at their workplace, on thedue date, without any deduction, for the period their establishments are under closureduring the lockdown. In few of the writ petitions, directions have also been sought to subsidise 70 to 80 percent of the wages for the lockdown period by utilising funds collected by Employee State Insurance Corporation or the PM Cares Fund or through any other Government funds/schemes.

28 It was also contended on behalf of petitioners that (i)the order dated 29.03.2020 was not a direction to the employer but it is an order to the State/UT Government and other statutory bodies to take necessary action. The violation of Article 14 and Article 19(1)(g) and Article 300A has also been alleged by the impugned orders.(ii)if the impugned order is read in the manner contended by the respondent, it would mean that the employer should be compelled to not only continue to retain their migrant workers but also their regular workers and also pay full wages at a time when the business is effectively closed, and there is no income. Failure to comply for any reason, including the complete absence of funds, would render them liable to prosecution. Such order is ex facie arbitrary and unreasonable. (iii) all industries and private establishments have different financial capacity, circumstances and all establishments cannot be grouped in one category for issuing a direction to pay wages to its employees during lockdown period and in possibility cannot be directed by any executive action.

was also asserted that the aforesaid direction was issued as a temporary measure to mitigate the financial hardship of the employees and workers especially for contractual and casual workers during the lockdown period. The measure was proactively taken by the respondent to prevent perpetration of financial crisis within the lower strata of the society, labourers and employees. Moreover,all orders passed under section 10(2)(l) of the Disaster Management Act, 2005, had been withdrawn w.e.f. May 18, 2020 vide an order dated May 17, 2020. It was also contended that that D.O. dated Mar. 20, 2020 issued by Secretary, Ministry of Labour and Employment, to the Chief Secretaries of all the States was an advisory and the order issued on Mar. 29, 2020 by National Executive Committee in exercise of powers under section 10(2)(l) of Disaster Management Act, 2005, directing all the employers to make payment of wages of their workers at their workplace without any deduction for the period their establishments was madeonly in regard to closure during the lockdown.Applications for interventions were also filed by employees, different employees' unions, namely, All India Central Council of Trade Union, Trade Union Centre of India and few other employees' organizations in the writ petition. The intervenors in their applications and affidavits supported the order dated 29.03.2020 and stated that under the Disaster Management Act, 2005, the Central Government has full authority to issue such directions.Further right to wages is a pre- existing right which flows,inter alia, from the contract of employment as well as broader constitutional and statutory scheme flowing from articles 14 and 21 of the Constitution and encompassing the Payment of Wages Act, 1936 the Minimum Wages Act, 1948 the Contract labour (Regulation and abolition) Act, 1970 and the Industrial Disputes Act, 1947. Moreover,nationwide lockdown and resultant closure of the workplace directly affected the sustenance and livelihood of members of the employee'sunion. According to them the said measures taken by the Government of India fell within its legislative competence. The prayer of the petitioner to utilise the funds under the Employees State Insurance Act ,1948was also refuted by them.

Let us examine the response of the Supreme Court. This may be dealt with under six broad heads.

(i) Impact of lockdown on employer and workers

Dealing with the aforesaid contentions the Court observed that it cannot be disputed that the lockdown measures enforced by the Government of India under the Disaster Management Act, 2005, had adversely affected both the employers and employees. Further various industriesand establishments were not allowed to function during the said period and even those allowed to function also could not function to their capacity. Moreover, there can be no denial that lockdown measures which were enforced by the Government of India had serious consequences both on employers and employees. Thus,the period of unlock having begun from 01.06.2020 and even prior to that some of the industries were permitted to function by the Government of India by different guidelines, most of the industries and establishments have re-opened or are re-opening, require the full workforce.

(ii) Need to balance between these two competitive claims.

Examining the impact of lockdown to industries/establishments the Court observed that all industries/establishments are of different nature and of different capacity,

including financial capacity. Some of the industries and establishments may bear the financial burden of payment of wages or substantial wages during the lockdown period to its workers and employees. Some of them may not be able to bear the entire burden. In view of this a balance has to be struck between these two competitive claims.

(iii) Impact of lockdown upon workers and employees

Dealing with the impact of lockdown upon workers/employees theCourt felt that although theywere ready to work but they could not workdue to closure of industries and thereby suffered. In view of this the Court felt that for smooth running of industries with the participation of the workforce, it is essential that a via media be found out. However the Court added that the orders issued on 29.03.2020 were withdrawn w.e.f. 18.05.2020 and thus in between there had been only 50 days during which period, the statutory obligation was imposed. Thus, the wages of workers and employees which were required to be paid as per the order dated 29.03.2020 and other consequential notification was during these 50 days.

(iv) Obligations of the State

Dealing with the obligation of the State the Court pointed out that it is also under obligation to ensure that there is smooth running of industrial establishment and the disputes between the employers and employees may be conciliated and sorted out.

(v) Need to arrive at amicable settlement of disputes arising out of lockdown

The Court having dealt with the impact of lockdown upon employer and employees and the obligations of the State pointed out that both Industry and labourers need each other. No Industry or establishment can survive without employees/labourers and vice versa. In view these efforts should be made to sort out the differences and disputes between the workers and the employers regarding payment of wages of aforesaid period of 50 days and if any settlement or negotiation can be entered into between them without regard to the order dated 29.03.2020, the said steps may restore congenial work atmosphere.

(vi) Interim measures

In view of above the Court directed that the following interim measures may be taken by all the private establishment, industries, factories and workers trade unions/ employees associations etc. which may be facilitated by the state authorities:

i) The private establishment, industries, employers who are willing to enter into negotiation and settlement with the workers/employees regarding payment of wages for 50 days or for any other period as applicable in any particular State during which their industrial establishment was closed down due to lockdown, may initiate a process of negotiation with their employees organization and enter into a settlement with them and if they are unable to settle by themselves submit a request to concerned labour authorities who are entrusted with the obligation under the different statute to conciliate the dispute between the parties and on receipt of such request, may call the concerned employees/ Trade Union/workers Association/ workers to appear on a date for conciliation and settlement. In event a settlement is arrived at, that may be acted upon by the employers and workers irrespective of the order dated 29.03.2020 issued by the Government of India, Ministry of Home Affairs.

ii) Those employers' establishments, industries, factories which were working during the lockdown period although not to their capacity can also take steps as indicated in direction No.(i).

iii) The private establishments, industries, factories shall permit the workers/ employees to work in their establishment who are willing to work which may be without prejudice to rights of the workers/employees regarding unpaid wages of above 50 days. The private establishments, factories who proceed to take steps as per directions (i) and (ii) shall publicise and communicate about their such steps to workers and employees for their response/participation. The settlement, if any, as indicated above shall be without prejudice to the rights of employers and employees which is pending adjudication in these writ petitions.

iv) The Central Government, all the States/Union Territories through their Ministry of Labour shall circulate and publicise this order for the benefit of all private establishment, employers, factories and workers/employees.

The Court also directed that in case any settlement is entered between the employers and employees in the establishments in this case an affidavit giving details should be filed by next date of hearing.

IX EXEMPTION IN HOURS OF WORK AND DILUTION IN OVERTIME RATE OF WAGES UNDER THE FACTORIES ACT DURING PANDEMIC

Gujarat Mazdoor Sabha v. *The State of Gujarat*[29] is a landmark judgment of the Supreme Court on minimum standards of employment. Here the Court was called upon to decidethe validity of a notification issued by the State of Gujarat under section 5[30] of the Factories Act, 1948 to exempt all factories registered under the said Act from various provisions relating to working hours and rate of payment of overtime wages.

Factual Background

A nationwide lockdown was declared by the Central Government from March 24, 2020 to prevent the spread of the COVID-19 pandemic. The lockdown was extended on several occasions. On April 14, 2020 some relaxation was made in the lockdown. On April 17, 2020, the department of Labour and Employment of the State of Gujarat issued a notification under section 5 of the Factories Act to exempt all factories registered under the Act "from various provisions relating to weekly hours, daily hours, intervals

29 Writ Petition (Civil) No. 708, 2020.

30 Factories Act, 1948 s. 5, which deals with power to exempt during public emergency provides : In any case of public emergency, the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act except section 67 for such period and subject to such conditions as it may think fit:

Provided that no such notification shall be made for a period exceeding three months at a time. 5 [Explanation. —For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.]

for rest etc. for adult workers" under Sections 51[31], 54[32], 55[33] and 56[34] , *inter alia*, with the following conditions from 20 April 2020 till 19 July 2020 which was later extended from 20 July 2020 till 19 October 2020:

(1) No adult worker shall be allowed or required to work in a factory for more than twelve hours in any day and Seventy-Two hours in any week.

(2) The Periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval of rest of at least half an hour.

(3) No Female workers shall be allowed or required to work in a factory between 7:00 PM to 6:00 AM.

(4) (Overtime) Wages shall be in a proportion of the existing wages (e.g. If wages for eight hours are 80 Rupees, then proportionate wages for twelve hours will be 120 Rupees).

Key Issues

(i) Whether the notifications fall within the ambit of the power conferred by section 5 of the Factories Act?

(ii) Whether the existence of a public emergency is a pre-requisite to the exercise of the power?

(iii) When proclamation of emergency may be made?

(iv) How 'public emergency' be interpreted insection 5 of the Factories Act?

(v) Can workers cannot contract out of receiving double the rate for overtime as a way of industrial settlement?

31 51 which deals with weekly hours s. provides:
No adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week.

32 54 which deals with daily hours s. provides:
Subject to the provisions of section 51, not adult worker shall be required or allowed to work in a factory for more than nine hours in any day:
Provided that, subject to the previous approval of the Chief Inspector, the daily maximum specified in this section may be exceeded in order to facilitate the change of shifts.

33 55 which deals with Intervals for rest s. provides:
(1)] The periods of work] of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than five hours before he has had an interval for rest of at least half an hour.
(2) The State Government or, subject to the control of the State Government, the Chief Inspector, may, by written order and for the reasons specified therein, exempt any factory from the provisions of sub-section (1) so, however, that the total number of hours worked by a worker without an interval does not exceed six.

34 56 which deals with spread over s. provides :
The periods of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest under section 55, they shall not spread over more than ten and a half hours in any day:
Provided that the Chief Inspector may, for reasons to be specified in writing increase the 2 [spread over up to twelve hours.

Contentions of the appellants

The validity of the aforesaid notifications was challenged by the registered trade unions of workmen and federation of registered trade unions, *inter alia* , on the grounds namely: (i) Section 5 of the Factories Act, 1948 enables government to exempt any factory, or a class of factories, from its provisions only in case of a 'public emergency' which according to them mean a "grave emergency" which threatens the security of India or of any part of the territory by war, external aggression or internal disturbance[35]. Applying the interpretative principle of *noscitur a sociis*, it was contendedthat the expression 'internal disturbance' must derives itscontent from 'war' and 'external aggression' which endangers the security of India and, therefore, itwould not include a pandemic or a lockdown; (ii) Though both section 5 and the provisions of Article 352 of the Constitution[36] contain a reference to the expression 'internal disturbance', there is a crucial difference. While article 352 was premised on the satisfaction of the President the power under section 5 can be exercised only upon the objective existence of the conditions prescribed.(iii)Even if a threat to the security of India were to exist as an objective fact, the notifications in order to be validmust ameliorate the threat;(iv) Factories were open from April 21, 2020, which was the very next day after the first notification came into force. The purported justification of an economic chaos is a smokescreen to extract more work from the workers without paying them their overtime wages in onerous working conditions; (v) Section 5 contemplates an exemption only to an individual factory or to a class of factories, and not a blanket exemption that extends to all factories; (vi) Section 65(2), and not section 5, of the Factories Act enables suspension of sections 51, 52, 54 and 56 to a class of factories owing to `exceptional pressure of work';(vii) Even if section 65(2) were to apply in order to ensure labour welfare including a limit on weekly overtime and intervals between work which the notifications fail to adopt;(viii) The notifications do not specifically exempt the application of section 59 of the Factories Act which mandates payment of double the wages for overtime. Yet they make overtime wages proportionate to the existing wages, which also violates the spirit of the Minimum Wages Act, 1948 and amounted to forced labour violating the workers' fundamental rights under Articles 23, 21 and 14 of the Constitution.. Quite apart from this the appellant also pointed out that three industrial accidents were reported to have occurred on 7 May 2020 at Vishakhapatnam, Chhattisgarh and Nayeli in hazardous industries which were re-opened after the lockdown with a skeletal workforce and apprehended that the notifications in question may also lead to similar disasters.

Contentions of the respondent-state

The State of Gujarat opposed the contention of the appellant on the following grounds, namely : (i) The State is empowered to issue the notificationsunder section 5 of the Factories Act and thereby may exempt any factory or class of factories from all or any provisions of the Act in a public emergency; (ii) The COVID-19 pandemic is a 'public emergency' as defined in section 5 of the Factories Act as It has disturbed the

35 See Explanation to section 5.

36 Prior to its amendment in 1978.

"social order of the country" and has also threatened the even tempo of life in the State of Gujarat. As a result of the outbreak, emergency measures were required to be adopted to protect the existence and integrity of the State of Gujarat; (iii)The COVID-19 pandemic has caused "extreme financial exigencies" in the State as the lockdown caused a slowdown in economic activities, leading to an 'internal disturbance' in the State within the meaning of Section 5. Under this circumstancethe Statetemporarily exempted factories and establishments from the operation of labour laws such as the Factories Act to overcome the financial crisis. (iv) The notifications did not violate section 59 of the Factories Act as they impose the condition of payment of wages for overtime work in proportion to the existing wages. (v)Section 5 of the Factories Act empowers the State Government to exempt any factory or class of factories from its provisions and to determine whether all or only a class or description of factories were to be exempted. (vii) The purpose of the notifications is to deal with the COVID-19 pandemic and to ensure that the core functions of the economy continue to operate;(viii) Under the notifications, workers are only allowed to work for three additional hours than the normal work day and accordingly factories were directed to compensate the workers proportionately for the extra working hours. Thus, there was no exploitation of labour and (ix) The notifications are not violative ofArticles 14, 21 and 23 of the Constitution.

Judicial response

In order to deal with the aforesaid contentions, the Court reproduced the provisions of section 5 of the Factories Act which is as follows:

In any case of public emergency, the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act 4 except section 67 for such period and subject to such conditions as it may think fit: Provided that no

such notification shall be made for a period exceeding three months at a time.

Explanation. —For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.

Interpreting the expression "public emergency" in the aforesaid section the Court observed:

Section 5 of the Factories Act provides for the power of exemption from certain provisions of the Act due to the occurrence of a public emergency. The explanation speaks of a grave emergency where the security of India is threatened by war, external aggression or internal disturbance. The power conferred by the provision by its very nature, must be used only where there is a grave emergency implicating an actual threat to the security of the state. The purpose of exercising emergency powers is to avert the threat posed by war, external aggression or internal disturbance and such powers must not be used for any other purpose.[37]

The Court then delineated the scope of aforesaid section 5 and pointed out that it requires examination of the following:

37 *Supra* note 29 para 22.

(i) When an exemption can be granted?

(ii) Who can exercise the power to grant an exemption?

(iii) Who can be exempted?

(iv) What are the conditions subject to which an exemption can be granted?

(v) What are the provisions from which an exemption can be allowed?

(vi) What is the period of time over which the exemption may operate? and

(vii) What is the manner in which the exemption has to be notified?

We now turn to examine the judicial response on key issues raised in this case.

1. When an exemption can be granted under section 5

While dealing with the aforesaid issue the Court having held that an exemption under section 5[38] can be granted "in any case of public emergency".[39] ruled that a situation can qualify as a 'public emergency', only if the following conditions are fulfilled:

(i) there must exist a "grave emergency";

(ii) The emergency must be of such a nature as to threaten the security of India or a part of its territory and

(iii) the cause of the threat must be war, external aggression or internal disturbance.

The Court added that the co-relationship between the cause and effect must exist.

2. Whether the COVID-19 pandemic and the ensuing lockdown have created a public emergency under the explanation to section 5 of the Factories Act?

Dealing with the aforesaid issue the court observed that the global pandemic caused by COVID-19 is an unprecedented situation with which countries all over the world are grappling. In India, the Court added that the Central Government imposed a nationwide lockdown and during the lockdown, economic activity in the country was brought to a standstill. Further there was a widespread migration of labour from the cities, where all avenues for work had closed. But the Court remarked that under section 5 the State cannot permit workers to be exploited in a manner that renders the hard-won protections of the Factories Act, 1948. The Court added that it is ironical that this result should ensue at a time when the state must ensure their welfare. This is all the more so in an economy where the State is not the dominant employer of workers. In the given situation the Court felt that COVID-19 pandemic opens up unforeseen challenges in securing true equality and dignity to them. Further workers both in the organized and unorganized sectors face basic questions about survival and security. The Court

38 The originating causes of a 'public emergency' in section 5 of the Factories Act are similar to those which Article 352 of the Constitution embodied, prior to its amendment by the Constitution (Forty-fourth Amendment) Act, 1978.

39 The existence of a public emergency is a pre-requisite to the exercise of the power. Whether there exists a public emergency is not left to the subjective satisfaction of the state government. The absence of the expression "subjective satisfaction" in Section 5 is crucial. The existence of a public emergency must hence be demonstrated as an objective fact, when its existence is questioned in a challenge to the exercise of the power. Left to itself, the expression `public emergency' may have a wide and, as we say in law, an elastic meaning. But the statute as it stands does not leave the expression `public emergency' undefined.[2020 Latest Caselaw 535, para 8.

then pointed out thateven if we were to accept the respondent's argument at its highest, that the pandemic has resulted in an internal disturbance, the economic slowdown created by the COVID-19 pandemic does not qualify as an internal disturbance threatening the security of the State. However, the economic hardships caused by COVID-19 certainly pose unprecedented challenges to governance.But, such challenges according to the Court need to be resolved by the State Governments within the domain of their functioning under the law, in coordination with the Central Government. The Court added :

(U)nless the threshold of an economic hardship is so extreme that it leads to disruption of public order and threatens the security of India or of a part of its territory, recourse cannot be taken to such emergency powers which are to be used sparingly under the law. Recourse can be taken to them only when the conditions requisite for a valid exercise of statutory power exists under section 5. That is absent in the present case.[40]

3. Whether the exemption may be allowed under section 5 in the "extreme financial exigencies arising due to the spread of COVID-19 pandemic"

The Court answered the aforesaid question in negative and held that the impugned notifications do not serve any purpose, apart from reducing the overhead costs of all factories in the State, without regard to the nature of their manufactured products. The Court added that during a pandemic, if the factories producing medical equipment such as life-saving drugs, personal protective equipment or sanitisers, they would be exempted by way of section 65(2)[41], while justly compensating the workers for supplying their valuable labour in a time of urgent need. But even in such a case a blanket notification of exemption to all factories, irrespective of the manufactured product cannot be permitted and that too while denying overtime wage at the rate permissible under the Act to the workers. The Court felt that the action taken by the State under section 5 such action is indicative of the intention to capitalize on the pandemic to force an already worn-down class of society, into the chains of servitude**.**

4. Whether the payment of wages for overtime work at a rate less than double the rate of wages permissible

While dealing with the above issue the Court observed that there was no rational to pay overtime wages at a rate less than double the rate of wages which the worker actually received. Indeed, it should be considered to be outside the purpose and object of the Act. The Court then observed that the principle of paying for overtime work at double the rate of wage is a bulwark against the severe inequity that may otherwise pervade a relationship between workers and the management. The workers, therefore,

40 *Supra* note 29 para 28.

41 S. 65 (2) provides:

(2) The State Government or, subject to the control of the Stale Government, the Chief Inspector may by written order exempt, on such conditions as it or he may deem expedient, any or all of the adult workers in any factory or group or class or description of factories from any or all of the provisions of sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work.

cannot contract out of receiving double the rate for overtime as a way of industrial settlement. The Court further pointed out that an interpretation which restricts or curtails benefits admissible to workers under the Factories Act has to be avoided**.** Since the provisions contained in the Factories Act, particularly those contained in Chapter VI, are intended to protect the workmen against exploitation on account of his uneven position qua the employer, employer cannot be permitted directly or indirectly to infringe upon the rights of the workers. Likewise, the employee cannot be permitted to volunteer to work beyond the prescribed hours. If the employer was given permission to contract out of the provisions of 1948 Act, the whole object with which these provisions have been enacted will be frustrated.Applying the aforesaid principle in this case the Court observed that having taken advantage by violating the provisions of law, the employer cannot now plead that the workmen should be denied benefit of their extra work." The Court remarked:[42]

A workers' right to life cannot be deemed contingent on the mercy of their employer or the State. The notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and right against forced labour that are secured by Articles 21 and 23 of the Constitution.

The court accordingly held that section 5 of the Factories Act could not have been invoked to issue a blanket notification that exempted all factories from complying with humane working conditions and adequate compensation for overtime, as a response to a pandemic that did not result in an 'internal disturbance' of a nature that posed a 'grave emergency' whereby the security of India is threatened. Further in any event, no factory/ classes of factories could have been exempted from compliance with provisions of the Factories Act, unless an 'internal disturbance' causes a grave emergency that threatens the security of the state, so as to constitute a 'public emergency' within the meaning of section 5 of the Factories Act. The Supreme Court accordingly struck down the Gujarat government 's notification which allowed all factories in the state to extend work shifts to up to 12 hours. The court further directed that overtime wages shall be paid, in accordance with the provisions of section 59[43] of the Factories Act to all eligible workers who have been working since the issuance of the notification.

X. CONCLUSION

An analysis of the aforesaid decisions leads us to the following conclusions:

1. The apex apex court made a significant contribution in a landmark judgment[44] in the area of law relating to social security and minimum standards of employment.

42 *Supra* note 29 para 44,

43 S. 59 of the Factories Act which deals with extra wages for overtime. *inter alia*, provides

(1) Where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

(2) For the purposes of sub-section (1), "ordinary rate of wages" means the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work.

44 *Gujarat Mazdoor Sabha* v. *The State of Gujarat*, *supra* note 29.

Commenting on the notification issued by the State of Gujrat the court remarked that it has made a significant departures from the mandate of the Factories Act by (i)increasing the daily limit of working hours from 9 hours to 12 hours; (ii) increasing weekly work limit from 48 hours to 72 years, which translates into 12 hour work-days on 6 days of the week; (iii) negating the spread over of time at work including rest hours, which is typically fixed at 10.5 hours; (iv) enabling an interval of rest every 6 hours, as opposed to 5 hours; and (iv) providing payment of overtime wages at a rate proportionate to the ordinary rate of wages, instead of overtime wages at the rate of double the ordinary rate of wages as provided under Section 59.

Dealing with the notification issued under section section 5 of the Factories Act the court ruled that it could not have been invoked to issue a blanket notification that exempted all factories from complying with working conditions and adequate compensation for overtime after relaxation of lockdown during pandemic. Moreover, exemption made under section 5 did not result in an 'internal disturbance' of a nature that posed a 'grave emergency' whereby the security of India is threatened. In any event, the court ruled that no factory/ classes of factories could have been exempted from compliance with provisions of the Factories Act, unless an 'internal disturbance' causes a grave emergency that threatens the security of the state, so as to constitute a 'public emergency' within the meaning of section 5 of the Factories Act, 1948. The Court also ruled that under section 5, the State cannot permit workers to be exploited in a manner that renders the hard-won protections of the Factories Act, 1948 illusory and the constitutional promise of social and economic democracy into paper-tigers.

2. Another major contribution of the apex court[45] is conferment of the right to receive provident fund upon contractual employees. Accordingly, the court directed that the Company to enroll all eligible contractual employees under the EPF Scheme, and deposit their contribution with Regional Provident Fund Commissioner from the date they became eligible till remittance, and thereafter till they are in employment of the Company when the writ petition was filed before the high court. However no such benefit shall not be extended to those employees who have superannuated, expired, resigned, or ceased to be in the employment of the company on the date of this judgment.

3. Like provident fund the apex court[46] also made a significant contribution in regard to payment of compensation under the Employees' Compensation Act, 1923. Thus, the court held that where the accident took place prior to the amendment made therein in 2009 providing for higher amountthe compensation should be calculated with reference to the date of the accident along with interest payable as per settled law but if the amount calculated is less than the amount prescribed as on the date of the award of the tribunal the claimant will be entitled to higher of the two amounts.

4. The apex courtalso played a significant contribution during COVID -19 epidemic which witnessed an unprecedented human migration to rural areas on foot in search of the bare necessities to sustain life by taking a *suo motu*[47] cognizance directing the

45 *Pawan Hans Limited* v. *Aviation Karmachari Sanghatana, supra note 8.*

46 *K. Sivaraman* v. *P. Sathishkumar,* supra *note 5.*

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Central Government, all States and Union Territories to provide relief to interstate migrant workers and their families.

5. While dealing the obligation imposed by the government in exercise of powers under section 10(2) of Disaster Management Act, 2005the apex Court[48]adopted pragmatic approach when it observed that a balance has to be struck between these two competitive claims. In view of this it asked employers to allow their workers to resume their duties without prejudice to the rights of the employees regarding unpaid wages of 54 days. Further it asked both the parties to arrive at a settlement through the help of conciliation officer or otherwise. The Court observed that lockdown had equally affected both employers and employees.

Before we conclude it may be mentioned that a blanket notification of exemption to all factories, even under section 65 of the Factories Act, 1948, should not be used with the intention to capitalize on the pandemic to force workers into the chains of servitude. Moreover, workers should be denied overtime rate other than those permissible under the Factories Act 1948.[49]

48 In *Ficus Pax Private Ltd.,* v. *Union of India, supra note 25.*

49 *Supra* note 21 at 35.