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# SOCIAL SECURITY LAW

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## I INTRODUCTION

IN THE year 2021 there have been significant developments, both legislative and judicial, in the arena of law relating to social security, wages and minimum standards of employment.

In s year under survey the Ministry of Labour and Employment,Government of India launched the e-shram portal on 26.08.2021 for creating a National Database of Unorganized Workers (NDUW), seeded with Aadhaar. The portal will provide details such as name, occupation, address, educational qualification, skill types and family etc. for optimum realization of their employability and extend the benefits of the social security schemes to them. The significant feature of the portal is that it provides a comprehensive data base to Government for tackling any National crisis like COVID – 19 in future. Indeed, it is the firstever national database of unorganised workers including migrant workers, construction workers, gig and platform workers, etc.[1] As on 31.12.2021 more than 17 crore workers of unorganised sector have been registered under e-Shram portal. All eligible registered unorganised workers are entitled to get an accidental insurance benefit of Rs. 2.0 lakh in case of death and Rs. 1.0 lakh in case of permanent disability for a one year free of cost.[2]

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, and minimum standard of employment. The Supreme Court decisions on social security relate to the Building and Other Construction Workers' Welfare Cess Act, 1996, Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and Employees' State Insurance Act, 1948, Payment of Gratuity Act, 1972 andRegulation of part time contract workers. The high courts' cases covered almost every important area of social security and minimum standards of employment. This survey seeks to examine

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1 Id at 106.

2 Govt. of India, Ministry of Labour and Employment, 3( *Annual Report* 2021-22) .

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

## II BUILDING AND OTHER CONSTRUCTION WORKERS WELFARE CESS ACT, 1996

The above Act seeks to provide for the levy and collection of a cess on the cost of construction incurred by employers with a view to augmenting the resources of the building and other construction workers' welfare boards constituted under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.The Building and Other Construction Workers Welfare Cess Act,1996 (Cess Act provides that there shall be levied and collected a cess for the purpose of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, at such rate not exceeding two per cent, but not less than one per cent of the cost of construction incurred by an employer, as the Central Government may, by notification in the official gazette, from time to time specify for imposition. However, the rate has been fixed to 1 percent of the construction cost incurred by an employer. Such cess is also required to be collected from all the employersby way of deduction at source relating to the such work being building or other construction work of a government or of a public sector undertaking or advance collection through a local authority.

In the year review the Supreme Court *inUttar Pradesh Power Transmission Corporation Limited* v. *CG Power and Industrial Solutions Limited'*[3] *settled* thecontroversy *(*i) whether cess under the Building and Other Construction Workers' Welfare Cess Act, 1996 read with Building and Other Construction Workers' Act is leviable in respect of a contract for supply and delivery of equipment and materials? (ii) . Whether the availability of an alternative remedy prevent the High Court from entertaining a writ petition?

**Factual matrix**

The facts of the case were as follows: The Uttar Pradesh Power Transmission Corporation Limited entered into an agreement with the contractor, for the construction of a power substation. As per the terms of the said agreement, the work was split into four separate contracts, namely , (i) supply and delivery of equipment, (ii) handling, erection, testing and commissioning works, (iii) civil works and (iv) operation and maintenance for design, engineering, manufacture, testing at works and supply of all required equipment and materials with accessories and auxiliaries, as detailed in the said contract; the second contract covered (ii) erection, testing and commissioning at site including unloading, handling *etc*.(iii) civil works including materials for commissioning and handing over of the substations and (iv) operations and maintenance for three years. In the course of audit of the corporation the Comptroller and Auditor General (CAG) found that there was a lapse on the part of employer in

3 SLP© No. 8630 of 2020 decided on May 12, 2021.

not deducting cess leviable under the Cess Act, from the bills of the contractor. In view of CAG's observations the employer sought to recover the cess on the total value of work provided under all four contracts, including supply, erection, testing, and commissioning. However, no proceedings were passed with reference to the assessment or levy of cess under the Cess Act. But the employer refused to discharge the performance bank guarantee submitted by the contractor, to secure recovery of an amount of INR 2.6 crore towards cess payable on works under all contracts including the supply part. Aggrieved by the aforesaid actions of the employer/ the contractor approached the Lucknow bench of the High Court of Allahabad . The high court held thatin the absence of any order for levy and assessment under the Cess Act of 1996 recovery could not be made pursuant to an audit objection of CAG. Against this order Uttar Pradesh Power Transmission Corporation Limited filed an appeal before the Supreme Court.

**Issues involved**

The Supreme Court was called upon to decide mainly two issues ,namely,(i) whether cess under the Building and Other Construction Workers' Welfare Cess Act, 1996((Cess Act) read with Building and Other Construction Workers' Act (BOCW Act)is leviable in respect of a contract for supply and delivery of equipment and materials? (ii) Whether the availability of an alternative remedy prevent the high court from entertaining a writ petition?

**Response on issue no. 1:**

The Supreme Court ruled that the condition- precedent for imposition of cess under the Cess Act is the construction, repair, demolition or maintenance of and/or in relation to a building or any other work of construction, transmission towers *inter alia*, to generation, transmission and distribution of power, electric lines, pipelines etc. Therefore, mere installation and/or erection of pipelines, equipment for generation or transmission or distribution of power, electric wires, transmission towers *etc.* which do not involve construction work are not amenable to cess under the Cess Act. Accordingly, no intimation or information was was required to be given and no return need be filed with the assessing officer under the Cess Act or the inspector under the BOCW Act in respect of the first contract which covers all works related to design, engineering, manufacturing, testing at works, supply of all required equipment and material with accessories and auxiliaries, as detailed in schedule of quantities and prices to sub-station site. This would also include supply of any other item necessary for completing the of work without any extra cost, if not specified in above schedule. Likewise no intimation or information was required to be given and no return was required to be filed with the assessing officer under the Cess Act or the inspector under the BOCW Act in respect to the second contract which covers unloading, handling at site, erection, testing and commissioning of all the equipment and material.

**Response to issue no.2**

The Supreme Court referred to its earlier decisions[4] and held that it is now well settled by a plethora of decisions of this court that relief under article 226 of the Constitution may be granted in a case arising out of contract. However, it added that the writ jurisdiction under article 226, being discretionary, and the high courts should refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. It added that monetary relief can also be granted in a writ petition.The court accordingly held that the existence of an arbitration clause does not debar the court from entertaining a writ petition. Thus, the high court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) where the vires of an Act is under challenge.

## III EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS Act, 1952

In *M/S Panther Security Service* **v**. *E.P.F. Organisation*[5] the appellant which was registered under the Private Security Agencies (Regulation) Act, 2005 was engaged in the business of providing private security guards to its clients on payment basis. A squad under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act )visited the appellant's establishment and seized certain records. The assistant provident fund commissioner, Kanpur during raid seized balance sheets and on that basis arrived at the conclusion that the appellant had more than twenty employees on its rolls and thereby covered under "expert services" under the notification dated May 17, 1971. He also noticed that wages were not paid directly by the clients to the security guards deployed by the appellant but were made to the appellant, who in turn disbursed wages to the security guards. He accordingly directed the appellant to comply the provisions of the under section 7A [6] of the EPF Act and to deposit statutory dues within 15 days which was quantified Rs.42,01,941/-, and

4 *Harbanslal Sahnia* v. *Indian Oil Corporation Ltd.* (2003) 2 SCC 107; *Titagarh Paper Mills Ltd.* v. *Orissa,*(1975) 2 SCC 436.; *State of U.P.* v. *Bridge & Roof Co. (India) Ltd.*, (1996) 6 SCC 22; *Kerala SEB* v. *Kurien E. Kalathil* [(2000) 6 SCC 293; *State of Gujarat* v. *Meghji Pethraj Shah Charitable Trust,* (1994) 3 SCC 552 ; *Ankur Filling Station* v. *Hindustan Petroleum Corpn.*, Civil Appeal Nos. 10855 of 2018; *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532; *Sanjana M. Wig*, (2005) 8 SCC 242;[26] *Meghji Pethraj Trust*, (2000) 6 SCC 293. *Sanjana M. Wig*, (2005) 8 SCC 242*.; Whirlpool Corpn.*, (1998) 8 SCC 1; *Harbanslal Sahnia*, (2003) 2 SCC 107 and *Bisra Stone Lime Co. Ltd.* v. *Orissa SEB*, (1976) 2 SCC 167.

5 (2021) 1 SCC 193.

6 S. 7A provides:

statutory interest under section 7Q[7] at Rs.30,44,224/-. Thereupon the appellant instead of availing the remedy of an appeal before the tribunal under section 7- filed a the writ petition directly in the high court. The high court affirmed the decision of the assistant provident fund commissioner, Kanpur. A review petition was also

7 A. Determination of moneys due from employers.—

[(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary;

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:—

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses; and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(3) No order shall be made under sub-section (1), unless the employer concernedis given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Expl.—Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-s. (4) unless notice thereof has been served on the opposite party.

7S. 7Q provides :

The employer shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank

rejected.Thereupon the appellant filed an appeal before the Supreme Court. It was contended on behalf of the appellant that he was not covered by G.S.R. No.805[8] dated May 17, 1971 issued under section 1(3)(B) of the EPF Act, and published in the Gazette on September 25, 1971 wherein the provisions of the EPF Act were made applicable to specified establishment since it was not engaged in rendering any expert services. On the other hand it was argued by the respondent that the appellant rendered expert services by way of providing trained personnel as security guards and therefore covered by the notification dated May 17, 1971.

The Supreme Court held that that the appellant was engaged in the specialized and expert services of providing trained and efficient security guards to its clients on payment basis and therefore the contention that the appellant merely facilitated in providing chowkidars cannot be countenanced. Further the provisions of the Act of 2005 make it manifest that the appellant is the employer of such security guards are its employees and are paid wages by the appellant. The Court added that merely because the client pays money under a contract to the appellant and in turn the appellant pays the wages of such security guards from such contractual amount received by itdoes not make the client the employer of the security guard nor do the security guards constitute employees of the client. Thus the provisions of the EPF Act are applicable to a private security agency engaged in the expert service of providing personnel to its client, if it meets the requirement of the EPF Act.[9] Accordingly, the appellant is squarely covered by the notification dated 17.05.1971.

## IV EMPLOYEES' STATE INSURANCE ACT, 1948

In *Trasport Corporation of India Ltd* v. *Employees State Insurance Corporation*[10] the Employees' State Insurance Corporation issued a notice to the *Trasport Corporation of India Ltd(appellant )*wherein a demand was made under Regulations 29, 31 and 33 of the Employees' State Insurance (General) Regulations, 1950 (Regulations) to pay a sum of Rs.8,01,510/- by way of contribution payable for the period from July 30, 1975 to 31st March 1988. Later on July16, 1990 another notice was issued by the Insurance Corporation by invoking section 45-A of the Employees' State Insurance Act ,1948 (ESI Act)demanding interest at the rate of 6% per annum on the sum of

8 G.S.R. No. 805 read as follows:
In exercise of the powers conferred by clause (b) of sub--s. (3) of s. of the Employees' Provident Funds and Family Pension Fund Act, 1952 (19 of 1952), the Central Government hereby specifies that with effect from the 31 st May, 1971, the said Act shall apply to every establishment rendering expert services such as supplying of personnel, advice on domestic or departmental enquiries, special services in rectifying pilferage, thefts and payroll, irregularities to factories and establishments on certain terms and conditions as may be agreed upon between the establishment and the establishment rendering expert services and employing twenty or more persons."

9 *The question is no more res integra. See Group 4 , 184 (2011) DLT 591, G4S Secure Solutions India Pvt. Ltd.* v. *The Regional Provident Fund Commissioner-I., ILR 2018 Karnataka 2527, 2016 LLR 413, Roma Henney Security Services Private Limited* v. *Central Board of Trustees, EPFOrganisation, 2012 SCC OnLine Del 3597, Sarvesh Security Services Private Limited* v. *University of Delhi, 2017 SCC OnLine Del 12209.*

10 Civil Appeal NO. 3135 OF 2011 decided on 29 October, 2021.

Rs.7,79,491/- up to 19th of October 1989 and interest at the rate of 12% per annum up to July 31, 1990. Aggrieved by this order the appellant filed an application under section 75 of the ESI Act before the Employees' Insurance Court at Ahmedabad challenging the said demand. The Employees' Insurance Court held that the appellant was liable to comply with the provisions of the ESI Act with effect from April 1, 1988 and it was not liable for the period prior to 1st April 1988. Hence, the notices of demand were quashed. Thereupon the insurance corporation filed an appeal against the said decision in the high court. The single judge of the Gujarat High Court by his judgment and order dated July 10, 2006 allowed the said appeal by holding that head office of the appellant was covered by the ESI Act in the year 1975 and, therefore, employees working in branch office of the appellant in Gujarat were covered by the ESI Act hence, the appellant was liable to pay contribution from March 30, 1975. Thereupon by the notice dated July 26, 2006, recovery proceedings were initiated against the appellant. Aggrieved by this order a writ petition was filed by the appellant for challenging the said demand but was withdrawn with liberty to make a representation. On the basis of the representation made by the appellant, the insurance corporation passed an order on November 23, 2006. By the said order, the insurance corporation directed the appellant to pay interest on the delayed payment of contribution for the period from 30th March 1975 to March 31, 1988 amounting to Rs.21,27,087/- and interest of Rs.3,97,722/- at the rate of 12% per annum from 1st March 2006 to 2nd August 2006 within fifteen days. The appellant challenged the said order by filing a writ petition in the high court which was dismissed by the single judge. Being aggrieved by the said order, a letters patent appeal was preferred by the appellant which was also dismissed. Being aggrieved the appellant filed an appeal before the Supreme Court.

**Contentions of the appellants**

(i) There was uncertainty about the liability of the appellant to pay contribution and the legal position was crystallized for the first time when by judgment and order dated 10 th July 2006, wherein the singlejudge of Gujarat High Court held that the appellant was liable to pay contribution from 30th July 1975. In fact, the liability of the appellant was crystalized only on 10th July 2006 and ,therefore, the arrears of contribution became payable only from that day. Thus, the interest cannot be demanded for the period prior to the said date. (ii) Clause (a) of sub-section (5) of Section 39 of the ESI Act makes the principal employer liable to pay simple interest at the rate of 12% per annum or a such higher rate as may be specified in regulations. However, this provision was brought on the statute book with effect from 20th October 1989. But the interest was demanded for the period prior to the said date by the insurance corporation by invoking regulation 31-A of the said regulations. (iii) Under various clauses of sub-section (2) of section 97 of the ESI Act of 1948, there was no power therein to frame regulations for levy of interest. Further till 28 th January 1968, there was a power to frame regulations for levy of interest at a rate not

exceeding 6% per annum on the overdue contributions and from 20 th October 1989, but there was a power to make regulations prescribing the rate of interest higher than 12% on delayed payment of contributions. Thus,till 20th October 1989, there was no provision in the ESI Act toempower the insurance corporation to levy interest. In absence of any such statutory power, by framing the regulations under section 97, the power to levy interest could not have been conferred on the Insurance Corporation. (iv) Relying upon the decision of the Supreme Court in *Employees' State Insurance Corporation v. Jardine Henderson Staff Association and Ors.* 2006 (6) SCC 581 and *Transport Corporation of India Ltd. v. Employees' State Insurance Corpn. and Ors.*2000 (1) SCC 332 submitted that this is a fit case to exercise jurisdiction of this Court under Article 142 of the Constitution of India for waiver of interest.

**Contention of the respondent**

As per the decision of the Supreme Court in *Goetze (India) Ltd. v. Employees' State Insurance Corporation* 2008 (8) SCC 705 there is no power to waive interest.

**Response of the Supreme Court**

Dealing with the the liability of the appellant to pay contribution as demanded by the ESI Corporation the Court held that in this appeal, the appellant has not challenged the validity of the Regulation 31-A. It added that the judgment and order dated July 10, 2006 of the High Court of Gujarat affirming the liability of the appellant to pay contribution from 30 th March 1975 onwards has attained finality and, therefore, the liability of the appellant to pay contribution as demanded cannot be questioned.

Dealing with the rate of interest the Court observed that forthe period up to October 19, 1989, interest at the rate of 6% per annum was demanded as per Regulation 31-A. Only for the arrears of contribution payable after 19 th of October 1989, interest at the rate of 12% was claimed. Interest at the rate of 12% is payable as per clause (a) of sub-section 5 of section 39 of ESI Act which was brought on the statute book with effect from 20th October 1989. For a period prior to October 20, 1989, interest was claimed at the rate of 6% per annum as per unamended Regulation 31-A. Hence, the demand for interest cannot be faulted with in absence of any challenge to the Regulation 31-A.

Dealing with the question whether interest payable or a part thereof can be waived the Supreme Court observed in *Goetze (India) Ltd.,*2008 (8) SCC 705that there is no power under the ESI Act to waive statutory interest. A perusal of the said decision shows that in that case, it was found that the employer had provided better medical facilities to the employees than what are provided under the said Act of 1948 and there were no complaints by the employees or their Unions about the medical services provided. It was found that without paying contribution, the object of the said Act of 1948 was fulfilled. In this case, no material is brought on record to show that better medical facilities were provided by the appellant to its employees. Hence,

this is not a fit case to exercise the power under article 142 of the Constitution of India.The appeal was therefore dismissed,

*Employees State Insurance Corporation* v. *Texmo Industries*[11] is another case on ESI Act where the Supreme Court was called upon to decide whether conveyance allowance or travelling allowance falls under the definition of 'wages' under the Employees' State Insurance Act, 1948 ("ESI Act") and should be taken into consideration for computing Employees' State Insurance contributions ("ESI Contributions").In this case when the officials of the petitioner-corporation inspected the records of the respondent company for the period from December 2010 to December 2014 they detected discrepancies in the wages, and consequential short payment towards employees state insurance contributions, totalling Rs. 21,52,829/-, out of which Rs. 9,48,517/- was towards conveyance allowance, paid by the respondent-company to its employees. The ESI Corporation thereforecalled upon the respondent -company to pay its outstanding contributions totalling Rs. 21,52,829/-, with interest, within 15 days from the date of the order, failing which the same would be recovered as arrears of land revenue. The respondentcompany was, however given the opportunity of personal hearing, if it disputed the claim of the Corporation, therespondent company made a representation against the claim, pointing out that the corporation had erroneously computed the salary, by including conveyance allowance, leave salary, *etc.* which did not constitute wages as defined in section 2(22) of the ESI Act. Thereafter the petitioner corporation passed an amended order dated 6th July, 2016 under section 45A of the ESI Act, determining the differential contribution payable by the respondent company at Rs. 19,38,300/- as per the break up given in the said amended order, that is, Rs. 9.89,783 towards difference in wages and Rs. 9,48,517/- towards conveyance allowance. The respondent Company duly remitted Rs. 9,89,783/- towards difference in wages. But raised a dispute in the Employees State Insurance Court in respect of the conveyance allowance of Rs. 9,48,517/- paid by it to its employees.The Employees' State Insurance Court set aside the claim of Rs. 9,48,517/- in respect of conveyance allowance, paid by the respondent-company to its employees. Being aggrieved the corporation filed an appeal in the high court under section 82(2) of the ESI Act. The said appeal was dismissed. Thereupon the appellant filed special leave petition before the Supreme Court.

**The Issue**

A question arose whether 'wages', as defined in section 2(22) of the ESI Act, would include conveyance allowance paid by the respondent company to its employees.

11 SLP (C) No. 811/2021. Decided on Mar. 8, 2021,

**Response of the Supreme Court**

In order to deal with this issue, the Supreme Court referred to the provisions of section 2(22)[12] of the ESI Act which defines "wages ". On the basis of the this definition the Supreme Court observed that the it clear that 'wages' means all remuneration paid or payable in cash to an employee, under a contract of employment, express or implied, as consideration for discharging his duties and obligations under such contract of employment, including any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months. The definition of 'wages', however, expressly excludes any contribution paid by the employer to any pension fund or provident fund or under the ESI Act, any travelling allowance or the value of any travelling concession, any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment or any gratuity payable on discharge. In view of this the Supreme Court held that the Employees' State Insurance Court rightly held, that conveyance allowance is in the nature of travelling allowance, the object of which is to enable the employee to reach his place of work and to defray costs incurred on travel from hisplace of residence to his place of work. The Court added that if instead of paying the conveyance allowance, the employer provided free transport to the employee, the monetary value of that benefit of travel from his residence, to his place of work would also not be regarded as forming part of his wages.

The court observed that the reasoning that conveyance allowance cannot be excluded from the definition of 'wages' as it is paid every month to every employee, like house rent allowance, in terms of the contract of employment, so as to meet to and fro conveyance expenses is based on an erroneous construction of section 2(22) of the said Act. Further the definition of wages in section 2(22) of the ESI Act clearly excludes travelling allowance. Moreover, conveyance allowance may or may not be payable to every employee. Quite apart from this the use of the expression "any travelling allowance" in section 2(22)(b) makes it clear that all kinds of travelling allowance are excluded from the definition of wages. The court added:

12 S. 2 (22) of the ESI Act defines wages to mean :

to mean :

all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any paid at intervals not exceeding two months], but does not include—

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge"

> 27. Had it been the intention of Section 2(22) to exclude only occasional long distance travel from one city to another, from the definition of wages, the Act would have specifically provided so. The expression 'travel' is also often used interchangeably with the expression 'commute' which means "to travel regularly by bus, train, car etc. between one's place of work and home, as per the said dictionary. An example given in the said dictionary is "she commutes from Oxford to London everyday". Another example given is "people are prepared to commute long distances if they are desperate for work. The employees State Insurance Corporation Court was right in holding that there was no difference between Conveyance Allowance and Travelling Allowance.

The court, therefore did not find any infirmity in the concurrent findings of the high court and the Employees' State Insurance Court and accordingly dismissed the appeal.

## V PAYMENT OF GRATUITY ACT, 1972

The Payment of Gratuity Act, 1972 provides for a Scheme of compulsory payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, motor transport undertakings, shops or other establishments on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation, or on his retirement or registration, or on his death or disablement due to accident or disease, provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employees is due to death or disablement. Payment of Gratuity is an employer's liability under the extant provisions of the PGAct.

**Applicability of the Payment of Gratuity (Amendment) Act, 2010**

In *Krishna Gopal Tiwary v. Union of India*[13] the Supreme Court was called upon to decide whetherthe date of commencement fixed by the executive in exercise of power delegated by the Payment of Gratuity (Amendment) Act, 2010 can be treated to be retrospective as the benefit of higher gratuity is one-time available to the employees only after the commencement of the Amending Act. In this case the Government of India approved enhancement of gratuity to the executives and non-unionized supervisors of central sector enterprises such as the Coal India Limited where the appellants were employed. The ceiling of the gratuity was raised to Rs.10 lakhs *w.e.f.*, January 1, 2007 in terms of office memorandum of Government of India dated November 26, 2008. The appellants were paid such gratuity in terms of such office memorandum. However, later the Payment of Gratuity Act was amended by

13 Civil Appeal No. 4744 of 2021 arising out of S.L.P. (Civil) No. 10622 of 2017].

Payment of Gratuity (Amendment) Act, 2010[14] which received the assent of the President of India on May 17, 2010. The grievance of the appellants is that the tax had been deducted at source when the gratuity was paid to the appellants before the commencement of the Amending Act. The appellants, therefore, challenged the date of commencement as May 24, 2010 but asserted that it should be made effective from January 1, 2007 and consequently they would not be liable for deduction of tax on the gratuity amount. It was contended that the amendment of the Payment of Gratuity Act is to grant liberalized benefits. Therefore, it would be retrospective.

On the other hand it was argued by the respondent that D.S. Nakara's case (1983) 1 SCC 305 deals with pensioners, who get recurring benefit every month whereas, the gratuity is one-time payment. The Supreme Court held that the cut-off date is to grant benefit of pension to the retirees and after the cut-off date to deny the retirees pension is arbitrary. It was thus argued that benefit of gratuity stands on different footing, then recurring right of payment of pension.

**Response of the Supreme Court**

The Supreme Court referred to its earlier decisions in*Andhra Pradesh State Government Pensioners' Association case*[15] and *N.L. Abhyankar case*[16] and observed that the observations made in these two cases are binding on us insofar as the applicability of the rule in *D.S. Nakara* case[17] to the liability of the Government to pay gratuity on retirement. In view of this the tribunal was, in error in upholding that gratuity was payable in accordance with the government notification No. 33/12/73-AISC(ii) dated 24-1- 1975 to all those members of the All-India Services who had retired prior to 1-1-1973.". Consequently, there was no error in the order passed by the High Court. The appeal was accordingly dismissed.

14 Central Act No. 15 of 2010.The relevant provisions of the Amending Act read as under:
"1(1). This Act may be called the payment of Gratuity (Amendment) Act, 2010.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
2. In S. 4 of the Payment of Gratuity Act, 1972, in subsection (3), for the words "three lakhs and fifty thousand Rupees", the words "ten lakh rupees" shall be substituted."
4. In terms of sub-section (2) of Section 1 of the Amending Act, a notification was issued by the Government of India on 24.5.2010 appointing the said date as the date on which the Amending Act came into force.xx xx xx
(3) The amount of gratuity payable to an employee shall not exceed ten lakh rupees.xx xx xx
(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer."
The Income Tax Act, 1961
10. Incomes not included in total income. - In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included -
1. xx xx xx
10 (ii). any gratuity received under the Payment of Gratuity Act, 1972 (39 of 1972), to the extent it does not exceed an amount calculated in accordance with the provisions of subsections (2) and (3) of section 4 of that Act;"

15 [(1986) 3 SCC 501 : 1986 SCC (L&S) 676].

16 [(1984) 3 SCC 125 : 1984 SCC (L&S) 486].

17 [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165 : 1983 UPSC 263].

VI REGULATION OF PART TIME CONTRACT WORKERS

In the year under review *Union of India* v. *Ilmo Devi* [18] is a leading case on regularization of part time *workers* .

The facts of the case were as follows,the respondents were working as contingent paid part-time sweepers (safai karamcharies working for less than five hours a day) in a post office at Chandigarh even though there was no sanctioned posts of safai walas in the Post Office. Further there was no documentary evidence to show that they were working continuously. Even otherwise as they were working as contingent paid part-time sweepers. Even their appointments were notmade after following due procedure of selection. However, the respondents approached the Central Administrative Tribunal seeking directions to frame a regularization/absorption policy for regularization of their service. Alternatively, they pleaded that a direction be issued for grant of temporary status *w.e.f*. November 19, 1989. The said application was opposed by the department on the ground that the respondents-original applicants are contingent paid safai walas working for less than five hours and, therefore, they are not entitled for temporary status. It was further stated that there is no regular sanctioned post of safai wala in that particular Post Office in Chandigarh and to that extent, their appointments were not irregular.

The tribunal rejected the claim of the respondents for their regularization. However, it observed that since the department need the continuous service of safai walas, they shall advertise this post to appoint regular safai wala through proper process of selection positively within three months. The tribunal also directed that (i) the respondents herein may also be considered for such selection after providing age relaxation to them under the relevant rules keeping in view that they have been working for last so many years without interruption (ii) Till selection is made the respondents be allowed to continue to perform their duties with the present status (as part-time), (iii) in case a one-time scheme is formulated by the department/government in exercise of the directions of this court in the case of *Umadevi* (supra), the respondents' cases may also be considered for regularization, if they fulfil the required conditions as prescribed in the said scheme.

Feeling aggrieved and dissatisfied with order passed by the tribunal both, the Union of India and the respondents herein – part-time employees filed their respective writ petitions before the High Court of Punjab and Haryana at Chandigarh Here it may be mentioned that pursuant to the judgment and order passed by the tribunal, the department/government was required to formulate the regularization scheme, which was not formulated and, therefore, the contempt proceedings were also initiated. The High Court issued a notice in the contempt proceedings to the Secretary (Post) and directed to place the scheme before the court by July 4, 2014. Accordingly, the department formulated a policy for regularization of casual labourers considering the observations made by this court in the case of *Umadevi* (supra) and subsequent to the O.M. of DoPT dated December 11, 2006 for the welfare of the casual labourers. The high court further directed the appellants to reconsider the claim of the respondents

18 Civil Appeal No. 5689 of 2021.

as per the new policy dated 30.06.2014. The authorities rejected the claim on the ground that (i) there are no sanctioned posts and (ii) employees have not completed 10 years of service as on 10.04.2006 namely, the date of decision of this court in *Umadevi* (supra). By the impugned common judgment and order, the high court has disposed of the aforesaid writ petitions with the following directions:

"[22] We, thus, direct the petitioner-authorities to re-visit the whole issue in its right perspective and complete the exercise to re-formulate their policy and take a decision to sanction the posts in phased manner within a specified time schedule. Let such a decision be taken within a period of six months from the date of receiving a certified copy of this order.

[23] Till the exercise as directed above, is undertaken, the respondents shall continue in service with their current status but those of them who have completed 20 years as part-time daily wagers, shall be granted 'minimum' basic pay of Group 'D' post(s) w.e.f. 1.4.2015 and/or the date of completion of 20 years contractual service, whichever is later."

Against the aforesaid direction of the High Court the Union of India and other filed an appeal before the Supreme Court. The Supreme Court while issuing notice in the appeals on 22.07.2016, directed that paragraph 22 of the impugned order shall remain stayed until further orders."

**Contention of the appellant**

(i) The High Court has not properly appreciated the facts that in the post office where the respondents were working, there are no sanctioned posts and therefore, in absence of the sanctioned posts in the post office where the respondents were working as part-time Safaiwalas, their services cannot be regularized. (ii) the directions issued by the High Court to sanction the posts can be said to be a policy decision, and, therefore, the High Court is not justified in issuing the mandamus and/or direction to create and sanction the posts. (iii) In *Secretary, State of Karnataka & Others Vs. Uma Devi*[19] it has been specifically observed that the High Court, in exercise of jurisdiction under article 226 of the Constitution, should not ordinarily issue direction for absorption, regularization or permanent continuance unless the recruitment was itself done regularly and in terms of constitutional scheme.(iv) As per the dictum of the Supreme Court in *Umadevi* (supra), the services of only those employees are to be regularized as a one-time measure, who are irregularly appointed and otherwise who are duly qualified persons in terms of the statutory requirement rules for the post and who have worked for 10 years or more in duly sanctioned posts but not under cover of the orders of courts or tribunals. Thereafter, the department came out with the

19 2006) 4 SCC 1.

regularization policy dated 30.06.2014. [20] (v) Even the High Court has also in the impugned judgment observed that there are no sanctioned posts in the office where the respondents were working. (vi) The High Court has directed to create and sanction the posts, which is beyond the jurisdiction of the High Court in exercise of power under Article 226 of the Constitution.(vii) The High Court has not taken note of the Recruitment Rules, 2002, which were replaced by 2010 Rules and the same shall not be applicable to the postal department as specifically mentioned in the said rules. (viii) Even the High Court has observed that a part-time employee cannot seek parity with full-time worker but despite the same the High Court has observed that whatever benefits, authorities decide to confer on the full-timers, the same can be extended to part-timers as well, of course, on such additional and stringent conditions like double the length of contingent service and/or other reasonable and fair conditions which the authorities may deem fit. The aforesaid observations are also beyond the scope and ambit of exercise of the power under Article 226 of the Constitution. (ix) Even the High Court has also materially erred in observing that though the respondents are working for four to five hours as part-time daily wagers, they must have worked for full day. It is absolutely without any basis and the same is not supported by any evidence. (x) Even the observations made by the High Court in paragraph 9 that it is true that these employees are working on "part-time basis only", the ground realities of which a court can take judicial notice, leave no room to doubt that once the respondents come to their respective work place to perform duties, may be for four to five hours, it is nearly impossible for them to secure another job for the rest of the day. Thus, the entire observations made in paragraph 9, are on surmises and conjunctures, which has no factual basis at all. Further in support of her submission that in judicial review, a court has no right to direct the government to review the policy of appointment; in judicial review the Court cannot interfere in the administrative matters and that in the absence of a regular sanctioned post, the Court cannot direct to create one.[21]

20 The Supreme Court in *Secretary, State of Karnataka & Others Vs. Uma Devi*21observed:

44. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

21 *Union of India* v. *A.S. Pillai*, (2010) 13 SCC 448; *State of Rajasthan* v. *Daya Lal*, (2011) 2 SCC 429 and *Secretary, Ministry of Communications* v. *Sakkubai* (1997) 11 SCC 224 in support of her submission that services of a part-time worker working on the post of a full-time worker cannot be regularized. She has also relied upon the decision of this Court in the cases of *Dr. Ashwani Kumar* v. *Union of India*, (2020) 13 SCC 581; *State of Karnataka* v. *Dr. Praveen Bhai Thogadia*, (2004) 4 SCC 684; *Anuradha Bhasin* v. *Union of India*, (2020) 3 SCC 637; *Oil and Natural Gas Corporation* v. *Krishan Gopal*, (2020) SCC OnLine SC 150; *State of Maharashtra* v. *R.S. Bhonde*, (2005) 6 SCC 751 .

**Contentions of the respondents**

(i) By the impugned judgment and order the High Court has decided as many as nine petitions, however, two out of nine are being challenged before the Supreme Court. In view of this other seven writ petitions, the Union of India has accepted the verdict and it has become final as the same have not been challenged. (ii) While issuing notice in the present appeals on 22.07.2016, this Hon'ble Court made it clear that it was not inclined to interfere with the directions of the High Court in paragraph 23 of the judgment and, therefore, the scope of present case now confines to the directions contained in paragraph 22 of the impugned judgment. (iii) the respondent No. 1 – Ilmo Devi, who was working continuously since 1982 as a sweeper has already attained the age of retirement and the other respondent Babli, who was working continuously since 1991 as a sweeper is of around 53 years of age and, therefore, this Court may not interfere with the impugned judgment and order passed by the High Court and the present appeals be dismissed keeping the question of law open.

**Response of the Supreme Court**

The Supreme Court observed that as of now, fresh engagements on contingent or daily wage basis have been completely stopped. If that is so, it can be safely inferred that only a small group of daily wage part-time employees engaged before 10.04.2006 are still working. If their eligibility of 10 years daily wage service is determined in the year 2014-15 on the basis of cut-off date of 10.04.2006, such a policy would be an exercise in futility. The petitioners themselves have taken more than 8 years in giving effect to one of the directions in *Uma Devi's case* (supra), hence, they cannot reject the claim of daily-wage employees with an ante-date cut off date as the compliance of such an eligibility condition is nearly impossible. This would render the policy totally ineffective and a brutumfulmen without percolating even a drop of benefit to those for whom it has been formulated.

The Court added :

Surely, the respondents cannot be made regular in the absence of sanctioned posts, but then what is the public purpose sought to be achieved through the policy dated 30.06.2014? The Executive who has authored the policy is also competent to create or sanction the posts. Depending upon the total expenditure now being incurred on the retention of respondents, we have no reason to doubt that the petitioners can rationalize their resources and sanction some regular posts every year so that the respondents can be adjusted on regular basis without any unbearable additional financial burden on the Department, but before they leave the department on attaining the age of superannuation.

Commenting on the observation made by the High Court the apex Court observed:

25. The observations made in paragraph 9 are on surmises and conjunctures. Even the observations made that they have worked continuously and for the whole day are also without any basis and for which there is no supporting evidence. In any case, the fact remains that the respondents served as part-time employees and were

contingent paid staff. As observed above, there are no sanctioned posts in the Post Office in which the respondents were working, therefore, the directions issued by the High Court in the impugned judgment and order are not permissible in the judicial review under Article 226 of the Constitution. The High Court cannot, in exercise of the power under Article 226, issue a Mandamus to direct the Department to sanction and create the posts. The High Court, in exercise of the powers under Article 226 of the Constitution, also cannot direct the Government and/or the Department to formulate a particular regularization policy. Framing of any scheme is no function of the Court and is the sole prerogative of the Government. Even the creation and/or sanction of the posts is also the sole prerogative of the Government and the High Court, in exercise of the power under Article 226 of the Constitution, cannot issue Mandamus and/or direct to create and sanction the posts.

The Court then examined theregularization policy and observed :

26. Even the regularization policy to regularize the services of the employees working on temporary status and/or casual labourers is a policy decision and in judicial review the Court cannot issue Mandamus and/or issue mandatory directions to do so. In the case of *R.S. Bhonde* (supra), it is observed and held by this Court that the status of permanency cannot be granted when there is no post. It is further observed that mere continuance every year of seasonal work during the period when work was available does not constitute a permanent status unless there exists a post and regularization is done.

The Court relied upon its earlier decision in*Daya Lal* (supra) wherein in paragraph 12, it was observed and held as under:—

**"**12. We may at the outset refer to the following well-settled principles relating to regularisation and parity in pay, relevant in the context of these appeals:

(*i*) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(*ii*) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment

cannot be grounds for passing any order of regularisation in the absence of a legal right.

(*iii*) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(*iv*) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(*v.*) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.[22]

Applying the law laid down in the aforesaid decisions, the Supreme Court observed that the directions issued by the High Court in the impugned judgment and order, more particularly, directions in paragraphs 22 and 23 are unsustainable and beyond the power of the judicial review of the High Court in exercise of the power under Article 226 of the Constitution. Even otherwise, it is required to be noted that in the present case, the Union of India/Department subsequently came out with a regularization policy dated 30.06.2014, which is absolutely in consonance with the law laid down by this Court in the case of *Umadevi* (supra), which does not apply to the part-time workers who do not work on the sanctioned post. As per the settled preposition of law, the regularization can be only as per the regularization policy declared by the State/Government and nobody can claim the regularization as a matter of right dehors the regularization policy. Therefore, in absence of any sanctioned post and considering the fact that the respondents were serving as a contingent paid part-time Safai Karamcharies, even otherwise, they were not entitled for the benefit of regularization under the regularization policy dated 30.06.2014.

The Court accordingly held thatpart-time employees are not entitled to seek regularization as they are not working against any sanctioned post and there cannot be any permanent continuance of part-time temporary employees. Further part-time temporary employees in a Government run institution cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work.

22 [See *State of Karnataka* v. *Umadevi (3)* [(2006) 4 SCC 1], *M. Raja* v. *CEERI Educational Society* [(2006) 12 SCC 636], *S.C. Chandra* v. *State of Jharkhand* [(2007) 8 SCC 279], *Kurukshetra Central Coop. Bank Ltd.* v. *Mehar Chand* [(2007) 15 SCC 680] and *Official Liquidator* v. *Dayanand* [(2008) 10 SCC 1.].

VII EMPLOYEES' COMPENSATION ACT,1923

**Section 12 of Employee's Compensation Act imposes the liability of payment of compensation.**

*In Anshul Traders* v. *The Commissioner, Labour Welfare Centre.*[23] Ram Kishan, aged 22 was employed by AnshulTraders as labour, He was posted on the truck and was drawing as a labourer paid wages of Rs.10,000/- per month including allowances. On the night of 23rd/24th May, 2016 , when the vehicle reached capital market, shamliroad, Panipat at about 10.00 P.M., the upper portion of the goods loaded on the vehicle came in contact with transmission line of the electricity department due to which Ram Kishan, who was on duty on the said truck, was electrocuted and suffered injuries on the right leg and his right shoulder. He was taken to the Government Hospital, Panipat where his right leg was amputated. Thereafter Ram Kishan filed an application under Order I Rule 10 read with Order VI Rule 17 of Code of Civil Procedure to implead the registered owner of the vehicle, namely Gagan and United India Insurance Company Ltd. as respondents No.2 and 3. The Commissioner, Employee's Compensation held that there was an employer – employee relationship between Ram Kishan and Anshul Traders at the time of accident and Ram Kishan was entitled to the compensation. The Commissioner, Employee's Compensation computed the compensation of Rs.7,11,614/- on the basis of the age.This order was challenged by the appellant in the appeal before the High Courtmainly on three grounds, namely, (i) the order dated 12th October, 2018 passed by the commissioner, employee's compensation was not received by him; (ii) the respondent No. 3 was not placed any evidence on record pertaining to his employment with the appellant and (iii) the date of payment of compensation should have been 12th October, 2018 and not 23rd June, 2016. Ram Kishan also challenged the order dated 12th October, 2018 mainly on two grounds, namely, (i) that the Commissioner, Employee's Compensation took the permanent disability as 70% whereas it should have been taken as 100% and(ii) the penalty of 10% be enhanced to 50%.

The High Court held that Ram Kishan has been rightly awarded compensation as Anshul himself admitted the accident and employment of Ram Kishan. The Court upheld the impugned order insofar as the commissioner, employee's compensation and awarded the compensation of Rs.7,11,614/- along with simple interest @ 12% per annum from 23rd June, 2016 and penalty of 10%.

VIII FACTORIES ACT,1948

*Hemant Madhusudan Nerurkar* v. *State of Jharkhand*[24] *the High Court of Jharkhand was called to* take cognizance against the occupier of the factory for

23 FAO 193/2019 & CM APPLs.17224/2019, 43531/2019, 26992/2020 & 30265/2020] decided on 18th June 2021.

24 Cr.M.P. No. 810 of 2013 with I.A. No. 2623 of 2019 decided on 23.08.2021.

allegedly committing an offence in terms of Section 92 [25]of the Factories Act for violation of Rule 55(A)(2)[26] of the Bihar (now Jharkhand) Factories Rules, 1950.

In the instant case when Shri Jagdish, a worker employed in the factory, was greasing of outer bearing of down quarter thin slab caster roll, someone switched on the machinefrom the control room and thereupon the machine started while greasing was being carried which resulted in serious injury to his left leg causing fracture. Thereupon a complaint was filed by the factory inspector in the court of chief judicial magistrate, Jamshedpur in connection with the aforesaid accident arraying the petitioners, an occupier of the factory as accused with a prayer to take cognizance against them for allegedly committing an offence under section 92 of the Factories Act for violation of rule 55(A)(2) of the Bihar (now Jharkhand) Factories Rules, 1950. Thereupon the petitioners filed a criminal miscellaneous petition in the High Court of Jharkhand for quashing of the entire criminal proceedings initiated against them in this connection including the order taking cognizance taken by the Judicial Magistrate, 1st Class, Jamshedpur.

25 Section 92.which deals with general penalty for offences. provides :

Save as is otherwise expressly provided in this Act and subject to the provisions of section 93 , if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rules made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to 2 [two years] or with fine which may extend to one lakh rupees]or with both, and if the contravention is continued after conviction, with a further fine which may extend to one thousand rupees for each day on which the contravention is so continued:

Provided that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than 6 twenty-five thousand rupees] in the case of an accident causing death, and 7 five thousand rupees] in the case of an accident causing serious bodily injury.

Explanation.—In this section and in section 94 "serious bodily injury" means an injury which involves, or in all probability will involve, the permanent loss of the use of, or permanent injury to, any limb or the permanent loss of, or injury to, sight or hearing, or the fracture of any bone, but shall not include, the fracture

26 Rule 55(A(2) of the Bihar (now Jharkhand) Factories Rules, 1950 reads as follows:-

(1) No building, wall, chimney, bridge, tunnel, drain, road gallery, passage, walkway or gage-way, ladder, stair-case, ramp floor, platform, staging, scaffolding or any other structure of bricks, masonary, cement, concrete, steel or any other material whether of a permanent or temporary character shall be constructed, situated, maintained or allowed to remain or be used in a factory and no machine, plant, equipment including electric lines, wiring, fitting and apparatus [apparatus as defined in clause (c) of rule 2 of the Indian Electricity Rules, 1956 made under the Indian Electricity Act, 1910], shall be constructed, provided, situated, maintained or allowed to be used or operated in a factory, in such manner as may, or is likely to, cause any accident or any bodily injury.

(2) No process or work shall be carried on in any factory and no person shall be allowed to work on any process or any machinery, plant or equipment or in any part of a factory or in any other work in such manner as may, or is likely to cause any accident or any bodily injury.

(3) No materials, articles or equipments shall be kept stacked or stored in such manner as may or is likely to cause any accident or any bodily injury.

It was contended on behalf of the petitioner that (i) the complaint was filed in violation of rule 55(A)(2) of the Bihar (now Jharkhand) Factories Rules, 1950 (ii) there was no casualty and only injury took place (iii) the petitioners are the occupier and manager of M/s Tata Steel Ltd. He submitted that there no application of mind by the judicial magistrate, 1st Class, Jamshedpur in passing the cognizance order. (iv) the liability and inquiry was required to be looked into in the light of Sections 97 and 111 of the Factories Act. (v) the cognizance order dated 31.10.2012 was also made without application of mind, as no sections have been indicated in that order of taking cognizance. These contentions were denied by the respondent-State.

**Response of the High Court of Jharkhand**

The High Court observed:

15. On perusal of the complaint, it transpires that there is no material on record to prima facie suggest that the Occupier or Manager are in any manner responsible for the unfortunate accident. Sections 97[27] and 111[28] was not looked into by the Inspector, as admitted in the complaint itself that the workman concern has gone up upon the machine. No case was made out against the petitioners in terms of the Factories Act, 1948. Further in the judgment rendered in the case of *J.K. Industries Ltd*. (1996) 6 SCC 665.), Hon'ble Supreme Court has rightly come to the conclusion that *mens rea* is not the necessity in invoking the provisions of Factories Act. In that case the Supreme Court was examining the certain sections of the Factories Act, which are not under challenge in this case.

The Court added that there was no specific violation of any provision of the Act or the Rules in the complaint and in absence of such illegal act or omission to fasten the occupier and manager on the strength of the alleged contravention of the general duties would be a dangerous proposition of law. Further the provisions of sections 97 and 111 were ignored by the inspector of the factories while submitting the report and at the time of filing the complaint.

27 S. 97 of the Factories Act provides about the offence by the workers as under:

(1) Subject to the provisions of section 111, if any worker employed in a factory contravenes any provision of this Act or any rules or orders made thereunder, imposing any duty or liability on workers, he shall be punishable with fine which may extend to 1[five hundred rupees].

(2) Where a worker is convicted of an offence punishable under sub-section (1) the occupier or manager of the factory shall not be deemed to be guilty of an offence in respect of that contravention, unless it is proved that he failed to take all reasonable measures for its prevention.

28 S.111which deals with obligations of workers. provides :-

(1) No worker in a factory—

(a) shall wilfully interfere with or misuse any appliance, convenience or other thing provided in a factory for the purposes of securing the health, safety or welfare of the workers therein;

(b) shall wilfully and without reasonable cause do anything likely to endanger himself or others; and

(c) shall wilfully neglect to make use of any appliance or other thing provided in the factory for the purposes of securing the health or safety of the workers therein. (2) If any worker employed in a factory contravenes any of the provisions of this section or of any rule or order made thereunder, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.

Dealing with cognizance order the High Court observed that the cognizance was taken in a format, in which, the magistrate has filled up only the sections and names of the persons and cognizance has been taken which suggest that the magistrate had not considered the facts and he in a mechanical way took cognizance vide order dated 31.10.2012 by way of filling up vacant lines.

In view of above the Jharkhand High Court, quashed the entire criminal proceedings initiated against the petitioners including the order taking cognizance dated 31.10.2012, passed by the judicial magistrate, 1st Class, Jamshedpur.

It is submitted that the High Court of Jharkhand did not consider the effect of the provisions of section 22[29] of the Factories Act which seeks to regulate workon or near machinery in motion. Further the Court laid too much emphasis on specific violation of any provision of the Act or the Rules.

**Effect of denial to woman to participate in selection for appointment as Safety Officer and application section 66 of the Factories Act,1948**

*In Treasa Josfine v. State Of Kerala*[30] the High Court of Kerala was called upon to decide (i) whether embargo contained in the notification inviting application that

29 22. Work on or near machinery in motion.—(1) [Where in any factory it becomes necessary to examine any part of machinery referred to in section 21, while the machinery is in motion, or, as a result of such examination, to carry out—

(a) in a case referred to in clause (i) of the proviso to sub-section (1) of section 21, lubrication or other adjusting operation; or lubrication or other adjusting operation, while the machinery is in motion, such examination or operation shall be made or carried out only by a specially trained adult male worker wearing tight fitting clothing (which shall be supplied by the occupier) whose name has been recorded in the register prescribed in this behalf and who has been furnished with a certificate of this appointment, and while he is so engaged,— (a) such worker shall not handle a belt at a moving pulley unless—

(i) the belt is not more than fifteen centimetres in width;

(ii) the pulley is normally for the purpose of drive and not merely a fly-wheel or balance wheel (in which case a belt is not permissible);

(iii) the belt joint is either laced or flush with the belt;

(iv) the belt, including the joint and the pulley rim, are in good repair;

(iv) there is reasonable clearance between the pulley and any fixed plant or structure;

(vi) secure foothold and, where necessary, secure handhold, are provided for the operator; and (vii) any ladder in use for carrying out any examination or operation aforesaid is securely fixed or lashed or is firmly held by a second person;]

(b) without prejudice to any other provision of this Act relating to the fencing of machinery, every set screw, bolt and key on any revolving shaft, spindle, wheel or pinion, and all spur, worm and other toothed or friction gearing in motion with which such worker would otherwise be liable to come into contact, shall be securely fenced to prevent such contact.

[(2) No woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery.] (3) The State Government may, by notification in the Official Gazette, prohibit, in any specified factory or class or description of factories, the cleaning, lubricating or adjusting by any person of specified parts of machinery when those parts are in motion.

30 WP(C).No.25092 OF 2020(J) decided on 9 April, 2021.

only male candidates can apply' for permanent post of safety officer available in the company. is violative of the provisions of articles 14, 15 and 16 of the Constitution . (ii) Whether exclusion of women from applying for the post of Safety Officer permissible under section 66(1)(b) [31] of the Factories Act ?

The facts of the case were as follows:the petitioner,an engineering graduate in safety and fire Engineering was employed by the 2nd respondent, a public sector undertaking under the State of Kerala, as graduate engineer trainee (Safety) She worked as such for the period from 19.11.2018 to 18.11.2019 and from 26.11.2019 to 25.5.2020at the time when a permanent post of Safety Officer was notified inviting applications therefor wherein it was stated that only male candidates need apply for the post. Being aggrieved the petitioner approached the High Court of Kerala challenging the said provision in theadvertisement-notification on the ground that it is discriminatory and that the right of the petitioner for being considered for appointment as Safety Officer is violated due to the said provision. The petitioner further contended that any provision as contained in section 66(1)(b) of the Factories Act, 1948 to the extent it denies the right of the petitioner to participate in the selection for appointment as safety officer is violative of the articles 14, 15 and 16 of the Constitution and therefore, liable to be set aside.

In a counter affidavit the 2nd respondent stated that(i) the post of safety officer is a statutory post and the provisions of the Factories Act have to be complied with while issuing notification for filling up the said post(ii) as per section 66(1)(b) of the Factories Act, 1948, women employees shall not be required or permitted to work except between 6 a.m. and 7 p.m. (iii)While graduate engineer trainee (safety) is required to work only from 9 a.m. to 5 p.m. safety officer post is round the clock post and that the person engaged as safety officer will have to work even during night time, if required. (iv)the company had, vide letter dated 22.7.2020, sought the opinion of the Director of Factories and Boilers, Kerala about the possibility of including women candidates in the recruitment process for selection to the post of safety officer. However, the Director had clarified that women cannot be engaged in factories beyond 7 p.m. and that, therefore, permission cannot be accorded for considering women for the appointment. It was, therefore, contended that there was no illegality in excluding women from applying for the post of safety officer. (v) the vires of section 66(1)(b) was considered by a division bench of Kerala High Court in *Leela* v. *State of Kerala* [2004 (5) SLR 28] wherein it was held that the provision is only a protective measure intended for the welfare of women and that it does not deny opportunity or livelihood to women employees.

31 Section 66 (1) (b) reads as follows :

(b) no woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M.:

Provided that the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorize the employment of any woman between the hours of 10 P.M. and 5 A.M.

**Response of the High Court**

*The court observed*

Having considered the contentions advanced, I find that the basic contention urged by the respondent is that the provisions of Section 66(1)(b) are beneficial in nature and are intended to protect women from exploitation. In the factual situation involved, we have to consider the fact that Factories Act, 1948 was enacted at a time when requiring a woman to work in an establishment of any nature, more so in a factory, during night time could only be seen as WP(C).No.25092 OF 2020(J) exploitative and violative of her rights. Apparently, the World has moved forward and women who were relegated to the roles of home makers during the times when the enactment had been framed have taken up much more demanding roles in society as well as in economic spheres. We have reached a stage where the contributions made by women in the spheres of economic development cannot be ignored by any industry. Women are being engaged to work during all hours in several industries including Health Care, Aviation and Information Technology. Women have been engaged in several professions requiring round the clock labour and have proved themselves quite capable of facing the challenges of such engagement. The apex court in *Secretary, Ministry of Defence* v. *Babita Puniya and others* [(2020) 7 SCC 469] has declared that an absolute bar on women seeking command appointment violates the guarantee of equality under Article 14 of the Constitution. It was held that submissions based on stereotypes premised on assumptions about socially ascribed roles result in gender discrimination against women and violate their fundamental rights.

The court added, True, a Division Bench of this court considered the issue and held that Section 66(1)(b) is only a protective provision. If that be so, it can be operated and exercised only as a protection and cannot be an excuse for denying engagement to a woman who does not require such protection any more. The decision in *Hindustan Latex Ltd.'s* case1994 (2) KLT 111] and the subsequent laying down of the law by the Apex Court would make it abundantly clear that a woman who is fully qualified cannot be denied of her right to be considered for employment only on the basis of her gender. It is the bounden duty of the respondents who are Government and Government functionaries to take all appropriate steps to see that a woman is able to carry out the duties assigned to her at all hours, safely and conveniently. If that be so, there would be no reason for denying appointment to a qualified hand only on the ground that she is a woman and because the nature of the employment would require her to work during night hours.

The court accordingly held that the embargo contained that 'only male candidates can apply' is violative of the provisions of articles 14, 15 and 16 of the Constitution and is, therefore, set aside.It, therefore, directed the 2nd respondent to consider the application submitted by the petitioner for appointment to the post of safety officer, notwithstanding the provisions of section 66(1)(b) of the Factories Act, 1948.

VIII CONCLUSION

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

i. The courts generally adopted cautious approach to deal with the provisions of social security and minimum standards of employment legislation when it held that

mere installation and/or erection of pipelines, equipment for generation or transmission or distribution of power, electric wires, transmission towers etc. which do not involve construction work are not amenable to cess under the Building and Other Construction Workers Welfare Cess Act, 1996 .Likewise, the apex court held thatpart-time employees are not entitled to seek regularization as they are not working against any sanctioned post and there cannot be any permanent continuance of part-time temporary employees. Further part-time temporary employees in a Government run institution cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work.

ii. The Supreme Court adopted the policy of non-interference when it observed that the high court's writ jurisdiction under article 226 of the Constitution being discretionary, they should refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. Similar approach has been adopted bythe apex court when it held that there is no power under the Employees' State InsuranceAct to waive statutory interest.

iii. The apex court while dealing with Building and Other Construction Workers Welfare Cess Act, 1996 ruled that the existence of an arbitration clause does not debar the court from entertaining a writ petition. Thus, the high court may, entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) where the vires of an Act is under challenge.

iv. The apex court adopted beneficial approach while dealing with the application of the provisions of the Employees' Provident Funds and Miscellaneous Act, 1952 when it held that merely because the client pays money under a contract to the appellant and in turn the appellant pays the wages of such security guards from such contractual amount received by it, it does not make the client the employer of the security guard nor do the security guards constitute employees of the client. Thus the provisions of the EPF Act are applicable to a private security agency engaged in the expert service of providing personnel to its client, if it meets the requirement of the EPF Act[32].But'wages', as defined in section 2(22) of the ESI Act, would not include conveyance allowance paid by the respondent company to its employees.

v. The sensitivity and human approach has not been displayed by the High Court of Jharkhand while dealing the liability of occupier where a factory worker received serious injury to his left leg causing fracture while greasing of outer bearing

32 *The question is no more res integra . See Group 4 Securitas Guarding Ltd. v. Employees Provident Fund Appellate Tribunal &Ors., 184 (2011) DLT 591, G4S Secure Solutions India Pvt. Ltd. v. The Regional Provident Fund Commissioner-I and Ors., ILR 2018 Karnataka 2527, Orissa State Beverages Corporation Limited v. Regional Provident Fund Commissioner &Ors., 2016 LLR 413, Roma Henney Security Services Private Limited v. Central Board of Trustees, EPFOrganisation, 2012 SCC OnLine Del 3597, Sarvesh Security Services Private Limited v. University of Delhi, 2017 SCC OnLine Del 12209*

of down quarter thin slab caster roll due to negligence someone obviously an employee who switched on the machine from the control room.However the court observed that there was no specific violation of any provision of the Act or the Rules in the complaint

vi. The High Court of Kerala adopted a pragmatic approach when it held that the embargo contained in the notification to fill a vacancy that 'only male candidates can apply' is violative of the provisions of articles 14, 15 and 16 of the Constitution. Indeed, it added that it is the bounden duty of the respondents who are government functionaries to take all appropriate steps to see that a woman is able to carry out the duties assigned to her at all hours, safely and conveniently. The court added that if that be so, there would be no reason for denying appointment to a qualified hand only on the ground that she is a woman and because the nature of the employment would require her to work during night hours.