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SOCIAL SECURITY AND LABOUR LAW

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I INTRODUCTION

IN THE year 2022 there has also been significant development injudicial 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 standards of employment. The Supreme Court decisions on social security relate to the Employees' Provident Funds and the Miscellaneous Provisions Act, 1952, Employees' State Insurance Act, 1948, the Employees' Compensation Act,1923. Payment of Gratuity Act, 1972 andContract Labour (Regulation and Abolition) Act,1970. The High Court's caseshave covered almost every important area of social security, wages and minimumstandards of employment. Broadly speaking Courts gave beneficial interpretation tothe provisions of the law relating to social security, wages and minimum standards of employment. This survey seeks to examine important judgments of the Supreme Court on lawrelating to social security and minimum standard of employment.

II EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

Punjab State Cooperative Agricultural Development Bank Limited, Chandigarh v. *Registrar Cooperative Societies*[1] decided an extremely important issue whether the benefit of pension provided by a bank to its employees can be taken away with retrospective effect by amending the pension rules? The Supreme Court answered the question in negative.

In this case the Punjab State Cooperative Agricultural Development Bank Limited, Chandigarh introduced the pension scheme for the employees and officers (who were earlier covered under the Employees Provident Fund Scheme under the Employees Provident Funds and Miscellaneous Provisions Act, 1952*). w.e.f.,* from April1, 1989 with an option that such of the employees who opt for the said

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1 (2022) 4 SCC 363.

scheme shall be covered by these rules and those who do not opt for these rules shall be governed by EPF Act. Accordingly, by amendment Rule 15 (ii) was inserted. On August 17, 2012 the bank resolved to discontinue the pension scheme and instead return to the contributory provident fund scheme. Later on it withdrew the pension scheme by deleting Rule 15(ii) by an amendment dated March 11, 2014 with effect from April 1, 1989. Earlier the the bank also decided that this pension scheme would not not apply to employees employed on or after January 1, 2004. Thereupon the retired employees filed a writ petition before the high court after the appellant bank ceased paying pensions to them. The single judge of the high court held that the employees having served the bank prior to 1989 were covered under the scheme which was applicable at the given time under the EPF Act. On appeal the division bench of the high court held that the decision to frame the pension scheme was a conscious decision of the appellant Bank taken in its own wisdom and corresponding rules were introduced and made applicable from April 1,1989 and Rule 15(ii) was deleted on March 11, 2014. Aggrieved by this order the bank filed an appeal before the Supreme Cout.

Key Issues for determination by the Supreme Court

The Supreme Court was called upon to decide five issues, such as (i) what are rights of an employee who opts for the pension scheme at the given time? (ii) Can such employee be divested to avail pension with retrospective effect by amending the rules? (iii) Whether non-availability of financial resources would justify the bank to amend the rules by deleting Rule 15(ii) and providing for pension schemefor those who opted for it? (iv) Can the employee, not covered under pension scheme,have any right to claim pension under such scheme? (v) Can payment of contribution be adjusted for payment of pension to retirees/ respondents? Let us examine them.

Response of the Supreme Court

Dealing with the issue no. 1 the Supreme Court ruled thatrights stood vested and accrued upon the employees, who opted the pension scheme and availed such benefit introduced with effect from April 1, 1989. Having said so the Court pointed out that there is a distinction between the legitimate expectation and a vested/accrued right in favour of the employees.

On issue no. 2 the court held the amendment made by the bank by deleting clause 15(ii) of the Pension Rule 1978 on March 11, 2014 to take away the right accrued to such retiredemployee with retrospective effect is not only discriminatory and violative of the rights guaranteed under articles 14 but also violative of article 21 of the Constitution.

On issues no.3 the court held that non-availability of financial resources would not be a defence available to the appellant bank in taking away the vested rights accrued to the employees that too when it is for their socio-economic security. It is an assurance that in their old age, their periodical payment towards pension shall remain assured. The court ruled that the pension which is being paid to such employees is not a bounty and it is for the bank to divert the resources from where

the funds can be made available to fulfil the rights of the employees in protecting the vested rights accrued in their favour.[2]

Dealing with issue no. 4 regarding the claim of serving employees the court held that they are excluded from the pension scheme and, therefore, have no locus to question the pension scheme. The court also found their apprehension of denial of retiral benefit to be completely misplaced for the reason that employer/ employee's contribution is being provided to them under the employees' pension scheme under EPF Act. On issue no. 5 the court held that payment of contribution cannot be adjusted for payment of pension to retirees/respondents and it is for the appellant Bank to reserve the resources and make payment to them.

Dealing with arrears which remain outstanding, the court observed that same shall be paid in 12 monthly instalments. However, the appellant Bank is at liberty to pay arrears towards pension up to December 31, 2021 in 12 monthly instalments in the next one year by the end of December, 2022 and those employees who have accepted payment under one time settlement at a given point of time, what is being paid to them is always open for adjustment against arrears of their due pension. A perusal of the aforesaid decision reveals that rights to get pension stood vested and accrued upon the employees, who opted for it under the pension scheme and to take away such right with retrospective effect is not only discriminatory and violative of the rights guaranteed under articles 14 but also violative of article 21 of the Constitution.

III VALIDITY OF THE EMPLOYEES' PENSION (AMENDMENT) SCHEME, 2014

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) originally did not contain any provision for pension scheme. On November 19, 1995 the Employees' Pension Scheme 1995 (EPS) was introduced by inserting section 6A in the EPF Act. The EPS provided that out employers' contribution of 12 % to provident funds 8.33% should be diverted towards the pension scheme.The maximum pensionable salary in 1995 was Rs. 5000/- per month which was subsequently increased to Rs. 6500 per month. In 2014 the Central Government amended the Employees' Pension Scheme (EPS-14),[3] The amended scheme (i) raised the ceiling from Rs. 6500/- per month to Rs. 15000/- per month. However, existing members as on 1 September 2014, who, at the option of the employer and employee, had been contributing on a monthly salary exceeding Rs. 6500/- per month could exercise a fresh option jointly with the employer to contribute on monthly salary exceeding Rs. 15000/- and the pension for such members would be computed accordingly on such higher salary. Such option was required to be exercised by the members within a period of six months from September 1, 2014, which was extendable up to six months on sufficient cause shown by the member. (ii) The

2 *Id*., para 55.

3 Vide notification G.S.R. 609 (E)] dated 22nd Aug. 22, 2014 to be effective 1 st Sep. 1, 2014, *available at:* https://govtempdiary.com/2014/09/gazette-notification-regarding-increase-in-wage-ceiling-from-rs-6500-to-rs-15000-under-eps1995-epfs1952-edli1995/11382 (last visited on May 25, 2022).

fourth proviso to sub-clause (4) of paragraph 11 provides that if no option is exercised by amember within the aforesaid period, it would be deemed that the concerned member has not opted for contribution over the wage ceiling. In such a case, the contributions to the pension fund madebeyond the wage limit in respect of such a member is to be diverted tothe provident fund account of the member along with interest, as declared under the provident fund scheme from time to time. (iii) Paragraph 3 (ii) of the pension scheme specifies that employees contributing on monthly salary exceeding Rs. 15000/- per month were required to make additional contribute at the rate of 1.16 per cent on monthly salary exceeding Rs. 15000/-.

The legality of the 2014- amendment in EPS Scheme was challenged in the year under review in the matter of *Employees' Provident Fund Organization* v. *Sunil Kumar B.*[4] In this case the Supreme Court was called upon to examine the legality of 2014 -amendment in EPS by the Central Government in 2014, while hearing appeals[5] from different judgments of High Courts of Kerala,[6] Rajasthan[7] and Delhi,[8] which quashed most of the said amendments. The court in the instant case addressed the aforesaid writ petitions as they involve the same questions of law as also heard the intervenors, mostly supported by the employees. Further there were contempt petitions[9] which also formed the subject -matter of the decision. Before we proceed to discuss the findings of the court it is relevant to mention

4 AIR 2022 SC 5634.

5 In this case 54 writ petitions were also filed by the employees themselves or on their behalf under art. 32 of the Constitution of India seeking invalidation of the notification dated Aug. 22, 2014. The writ petitioners are members of both exempted and unexempted establishments.

6 In Writ Petition (C) No. 13120 of 2015, a Division Bench of the High Court of Kerala set aside the Employees' Pension Amendment (Scheme), 2014 conceived in G.S.R. 609 (E).

7 In *Union of India* v. *Jale Singh* Writ No. 436 of 2019 a Division Bench of the High Court of Rajasthan expressed the view similar to High Court of Kerala.

8 In *Bhartiya Khadya Nigam Karamchari Sangh* v. *Union of India a.,* Writ Petition (C) No. 5678 of 2018 delivered on May 22, 2019 the High Court of Delhi quashed a circular issued by the provident fund authorities on May 31, 2017 precluding exempted establishments from the benefits of higher pension.

9 (Contempt Petition (C) Nos. 1917-1918 of 2018 and Contempt Petition (C) No. 619-620 of 2019) in which implementation of a judgment of this court in the case of *R.C. Gupta* v. *Regional Provident Fund Commissioner, Employees Provident Fund Organisation* [(2018) 14 SCC 809] delivered on Oct.4, 2016

that prior to this decision the Supreme Court[10] examined the validity of 2014 - amendment in EPS was when an appeal was filed against the decision of the aforesaid high courts. We will now examine the response of apex court in this case.

Examining the response of the Supreme Court in this case

(i) **Validity of notification no. G.S.R.609(E)**

The Court held that the provisions contained in the notification no. G.S.R.609(E) dated August 22, 2014 are legal and valid.

(ii) **Application of G.S.R. 609(E) dated August 22, 2014 to the employees of the exempted establishments**

The Supreme Court ruled that the amendment to the pension scheme brought about by the notification no. G.S.R. 609(E) dated August 22, 2014 shall apply to the employees of the exempted establishments in the same manner as the employees of the regular establishments. Transfer of funds from the exempted establishments shall be in the manner as we have already directed.

(iii) Effect of exercising the option by the employee

The court held that the employees who had exercised option under the proviso to paragraph 11(3) of the 1995 scheme and continued to be in service as on September 1, 2014, will be guided by the amended provisions of paragraph 11(4) of the pension scheme.

(iv) The rights of the membersto exercise option who did not exercise option and the cut-of date

The Supreme Court held that members of the scheme, who did not exercise option, as contemplated in the proviso to paragraph 11(3) of the pension scheme (as it was before the 2014 Amendment) would be entitled to exercise option under paragraph 11(4) of the post amendment scheme. The court gave three reasons in support of its conclusion, namely. (i) their right to exercise option before September 1, 2014 stands crystalised in the judgment of this court in the case of R.C. Gupta[11]

10 Response of the Supreme Court on 2014 -amendment in EPS prior to case under review In *R.C. Gupta* v. *Regional Provident Fund Commissioner, Employees Provident Fund Organization* (2018) 14 SCC 809. The Supreme Court held that the date provided under the para 11 (3) of the EPS Amendment to avail benefits of the scheme "are not cut-off dates to determine the eligibility of the employer-employee to indicate their option under the proviso to clause 11(3) of the Pension Scheme.In '*Employees Provident Fund Organisation v. Sunil Kumar, Supreme Court upheld* the order of the High Court of Kerala setting aside the 2014 Amendment to the EPS and dismissed the appeal filed by the *Employees Provident Fund Organisation.*

In SLP (C) Nos. 16721-16722 of 2019, the Union of India also appealed against the same judgment. A Review Petition was filed by the EPFO in respect of the order dated Apr. 1, 2019 dismissing their special leave petition. On July 12, 2019, the Supreme Court directed listing of the SLPs filed by the Union of India along with the review petitions in open court. On Jan. 29, 2021, this Court allowed the review petitions and the order of April 1, 2019 was recalled.

11 *R.C. Gupta* v. *Regional Provident Fund Commissioner, Employees Provident Fund Organization* (2018) 14 SCC 809.

.(ii) The scheme as it stood before 1st September 2014 did not provide for any cut-off date and thus those members shall be entitled to exercise option in terms of paragraph11(4) of the scheme, as it stands at present. Their exercise of option shall be in the nature of joint options covering reamended paragraph 11(3) as also the amended paragraph 11(4) of the pension scheme. (iii) There was uncertainty as regards validity of the post amendment scheme, which was quashed by the aforesaid judgments of the three High Courts. Thus, all the employees who did not exercise option but were entitled to do so but could not due to the interpretation on cut-off date by the authorities, ought to be given a further chance to exercise their option.

(v) Time limit for exercise of option

Dealing with the time limit for coverage beyond the ceiling amount the Supreme Court held that it should be extended by a further period of four months from today to enable all the members of the pension fund drawing more than Rs.6500/- to exercise the joint option as contemplated in paragraph 11(4) of the pension scheme (post 2014 amendment). Once such joint option is exercised, the transfer of fund from the provident fund corpus to the pension fund shall be effected in terms of the scheme.

In view of above the Court held that the time to exercise option under paragraph 11(4) of the scheme, under these circumstances, shall stand extended by a further period of four months. We are giving this direction in exercise of our jurisdiction under Article 142 of the Constitution of India. Rest of the requirements as per the amended provision shall be complied with.

(vi) Retired employees are not entitled to the benefits of the judgment

The court held that the employees who had retired prior to Sep 1, 2014 without exercising any option under paragraph 11(3) of the pre--amendment scheme have already exited from the membership thereof. They would not be entitled to the benefit of this judgment. The court further held that the employees who have retired before September1, 2014 upon exercising option under paragraph 11(3) of the 1995 scheme shall be covered by the provisions of the paragraph 11(3) of the pension scheme as it stood prior to the amendment of 2014.

(vii) Validity of the contribution of an additional 1.16% from members, its suspension and operation

The court ruled that the requirement in the scheme for employee's contribution to the extent of 1.16 per cent for option members is illegal because (i) there is nothing in the EPF Act which requires payment to the pension fund by an employee. (ii) Section 6A of EPF Act also does not have any such stipulation. (iii) Since the EPF Act does not contemplate any contribution to be made by an employee to remain in the scheme, the Central Government under the scheme itself cannot mandate such a stipulation. In such a situation the court opined a legislative amendment of the EPF Act would have been necessary, providing for contribution to be made by an employee. In the absence such legislative amendment the

provision of the scheme requiring contribution of 1.16 per cent by an individual employee is *ultra vires* the EPF Act.

(viii) Call for legislative Amendment

The court suggested legislative amendment of the EPF Act would have been necessary when a member is required to make an additional contribution of 1.16 per cent where contribution to pension scheme is beyond Rs. 15000/

IV EMPLOYEES' COMPENSATION ACT, 1923

Section 4A (1) of the Employees' Compensation Act,1923 (EC Act) provides that compensation under section 4 shall be paid as soon as it falls due. Section 4A (3) says that 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.

In the year under review the Supreme Court in *Shobha* v. *The Chairman, Vithal Rao Shinde Sahakari Sakhar Karkhana Ltd.*[12] was called upon to decide the scope of section 4A (3) of the EC Act.

In this case the deceased, who was engaged as a labourer by the labour contractor, died of a snake bite while cutting the sugarcane. The dependents of the deceased filed a claim petition before the commissioner workmen's compensation, and claimed Rs. 5 lakhs. The commissioner allowed the said application and directed the respondent nos. 1 to 3 therein jointly and severally to pay the compensation amount of Rs.3,06,180/- along with simple interest @ 12% p.a. from the date of accident, i.e., 29.11.2009 till its full realization. The commissioner also imposed the penalty of 50% on the compensation amount, i.e., Rs. 1,53,090/. Feeling aggrieved the respondent nos. 1 to 3 filed an appeal before the high court. The high court although dismissed the appeal insofar as the amount of compensation awarded by the Commissioner but set aside the penalty and modified the interest awarded @ 12% p.a. from the date of incident and directed that the interest @ 12% p.a. shall become payable from the period after expiry of one month from January 25, 2017. Against this order of the high court the heirs of the deceased filed an appeal before the Supreme Court. The Supreme Court ruled that the liability to pay the compensation under section 4A(1) would arise from the date on which the deceased died and ,therefore, the liability to pay the interest on the amount of arrears/compensation shall be from the date of accident and not from the date of the order passed by the Commissioner. The court added that the commissioner is

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empowered to direct the employer, in addition to the amount of the arrears and interest thereon, to pay a further sum not exceeding 50% of such amount by way of penalty. Having said so the court pointed out that the provision for interest and provision for penalty are different. While the provision for levy of interest would be under section 4A(3)(a) and the provision for levy of penalty would be under section 4A(3)(b).However, the high court only considered section 4A(3)(b) and not at all considered section 4A(3)(a).Therefore, the order passed by the High Court directing the employee to pay the interest on the amount of compensation as leviable under section 4A(3)(a) from the date of the order passed by the Commissioner, *i.e.,* January 25, 2017 is unsustainable. The court accordingly set aside the order of the High Court and held that theheirs of the deceased shall be entitled to the interest @ 12% p.a. on the amount of compensation as awarded by the Commissioner from the date of the incident i.e., November 29, 2009.

A perusal of the aforesaid decision reveals that compensation under section 4 of EC Act shall be paid as soon as it falls due. The liability of the employer to pay the compensation under the 4- A arises from the date of accident and not from the date of the order passed by the Commissioner. Further the liability to pay the interest on the amount of compensation due and payable would be under section 4A(3)(a) and the penalty would be leviable under section 4A(3)(b) of EC Act.

V EMPLOYEES' STATE INSURANCE ACT, 1948

In *Employees State Insurance Corporation v. Union of India* [13] the Supreme Court was called upon to determine the the applicable rules/regulations for promotion of the contesting respondents from the post of Assistant Professor to Associate Professor namely, the ESIC Recruitment Regulations 2008, the DACP Scheme or the ESIC Recruitment Regulations 2015.

The facts leading to the present appeal in a nutshell are as under: Respondent 3 to 25 joined the appellant as Assistant Professors at ESIC Model Hospital, Rajajinagar, Bengaluru. They joined service between 7 February 2012 and 26 June 2014. After two years of service as Assistant Professor, they sought promotion under the DACP Scheme and instituted proceedings before the Central Administrative Tribunal (CAT).The CAT relying on the submission made by the counsel for the appellant and theletter dated 23 September 2014 addressed by the Joint Director of ESIC to the Dean of ESIC (which mentioned the implementation of the DACP Scheme to the Medical Officer Cadres directed the appellant to consider the contesting respondents for promotion under the Dynamic Assured Career Progression Scheme (DACP Scheme). The appellant challenged the order of the CAT in a writ petition before the High Court of Karnataka. The high court dismissed the petition by holding that:(i) Since the contesting respondents were recruited before the ESIC Recruitment Regulations 2015 came into effect, they would get the benefit of the DACP Scheme. Being aggrieved the Employees' State Insurance Corporation filed an appeal before the Supreme Court.

13 2022 Latest Caselaw 72 SC.

Key Issue for determination by the Supreme Court

Whe*ther the* Employees' State Insurance Corporation (Medical Teaching Faculty Posts) Recruitment Regulations 2015 or Dynamic Assured Career Progression Scheme (DACP Scheme) is applicable for promotion from the post of the Assistant Professor to Associate Professor?

Main contentions of the parties

It was contended by the appellant that Employees State Insurance Corporation (ESIC) is a statutory body constituted under the Employees' State Insurance Act 1948 (ESI Act)and Section 97 of the ESI Act empowers it to frame its own regulations. The terms and conditions of service of Assistant Professors are governed by the ESIC Recruitment Regulations 2015 and not by DACP Scheme. The ESIC Recruitment Regulations 2008 stipulated four years of qualifying service for promotion from Assistant Professor to Associate Professor. Therefore, none of the contesting respondents would have completed four years of service before the ESIC Recruitment Regulations 2015 came into force *w.e.f.* from July 3, 2015.

On the other hand, it was contended on behalf of the respondent that (i) the office memorandum dated 29 August 2008 extended the DACP Scheme to all medical doctors including the teaching cadre. Thus, the DACP Scheme is binding on the appellant. (ii) The ESIC Recruitment Regulations 2008, which stipulate four years of qualifying service for promotion from Assistant Professor to Associate Professor, were issued without the approval of the Central Government; (iii) The appellant issued advertisements for the post of Assistant Professor by stating "promotional avenues in the Department under DACP guidelines of Govt. of India" and the respondents joined the services of the appellant as Assistant Professors pursuant to aforesaid advertisements of the appellant. (iv) On September 23 2011, the appellant addressed a letter to the Dean of ESIC Dental College by stating that "the existing recruitment regulations are under active process of revision *vis-à-vis* provisions of the DACP Scheme."

Response of the Supreme Court

In order to deal with the aforesaid aforesaid contentions of the appellant and respondents the Supreme Court laid down the following principles:

(i) Section 97 of the ESI Act empowers the ESIC to frame its own regulations, and such regulation have the same effect as statutory provisions.[14]

(ii) The ESIC Recruitment Regulations 2008 were issued by the ESIC in the exercise of its powers under Section 97(1) and Section 17(3) of the ESI Act. These regulations governed all appointments to the teaching faculty posts in ESIC Medical Colleges. The ESIC Recruitment Regulations 2008 embodied a requirement of four years' service as Assistant Professor for promotion as an Associate Professor. But on 5 July 2015 the Regulation stipulated a requirement of five years' service as Assistant Professor for promotion to the post of Associate Professor. [15]

14 *Id*.,para 11.

15 *Id*., para 12.

(iii) On the dates when the contesting respondents joined the service of the appellant - 07 February 2014 till 26 June 2016 - their promotions were governed by the ESIC Recruitment Regulations 2008 which came into effect on 2 May 2009 and mandated four years of qualifying service for promotion from Assistant Professor to Associate Professor. When the contesting respondents had completed two years of service, they were governed by the ESIC Recruitment Regulations 2015 which came into effect on 5 July 2015 and mandated five years of qualifying service for promotion from Assistant Professor to Associate Professor. Thus, the DACP Scheme facilitating promotion on the completion of two years of service is not applicable to the contesting respondents.[16]

(iv) The DACP Scheme is applicable to employees of the Ministries and Departments of the Central Government, but not a statutory body like the ESIC. The text of the DACP Scheme makes it clear that the office memorandum applies to employees of the Ministry of Health, subject to an appropriate amendment in Part B the recruitment rules. Thus, the DACP Scheme does not override or supersede statutory regulations made under the ESI Act.

(iv) The advertisements issued by the appellant mentioned that the DACP Scheme would be applicable for its recruits. However, it is a settled principle of service jurisprudence that in the event of a conflict between a statement in an advertisement and service regulations, the latter shall prevail.[17]

(v) A letter to the Dean of ESIC Dental College is similar to the office memorandum and would not have the force of law.[18]

(vi) The statement made and concession given by appellant counsel was without proper instructions and there can be no estoppel against a statute or regulations having a statutory effect.[19]

The Supreme Court, therefore, set aside the orders passed by the division bench of the High Court of Karnataka . Accordingly, seniority list of the teaching cadre at the appellant corporation should be revised and reflect the promotions of the contesting respondents in accordance with the ESIC Recruitment Regulations 2015 and not the DACP Scheme.

Regional Director / Recovery officers v. *Nitinbhai Vallabhbhai*[20] is another case under ESI Act. Here the Supreme Court was called upon to decide the issue as to whether the court have any authority to waive and/or reduce the interest for the period during which the interest is payable under the ESI Act.

In this case the authority by an order brought the respondent within the purview of the ESI Act with effect from April 1, 1988. Accordingly, the respondent was allotted the ESI Code.The notice was also issued to the respondent demanding

16 *Id.,* para 19.
17 *Id*.,para 20.
18 *Id*.,para 18.
19 *Id*.,para 23.
20 2022 Live Law (SC) 983.

Rs.17,295/- for the period from April 1988 to April, 1990 and Rs.4,195/- for the period from April, 1990 to September, 1990. Aggrieved by these orders the respondent filed an application before the ESI Court. The ESI Court rejected the application and held that the ESI Act applies to has been made applicable to the respondent organization *w.e.f.* April 1, 1988.Thereafter, the respondent started paying ESI contribution *w.e.f.* April 1, 1988. However, as there was delay in making the payment of ESI contribution, the authority in exercise of powers under section 39(5)(a) of the ESI Act issued notices and raised the demand of Rs.10,486/- for the period between April 1, 1988 to March, 1990 and interest thereon @12% (interest component of Rs..6,333/-). This order was also challenged in an application by the respondent before the ESI Court.The ESI Court relying upon the decision of this court in *Employees State Insurance Corporation* v. *HMT Ltd*. [21]partly allowed the said application and restricted the amount of interest to two years only. On dismissal of appeal by the High Court of Gujarat an appeal was filed before the Supreme Court. A question arose whether the ESI Court was justified in restricting the levy of interest under section 39(5)(a) of the ESI Act for a period of two years only?" In order to deal with this issue, the Court referred the the provisions of section 39(5)(a) of the ESI Act which reads as under:

> If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he 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 regulations till the date of its actual payment.

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

In view of the aforesaid provision the court observed that organisation/ employer in default is liable to pay the simple interest @ 12% per annum or, as such, higher rate as may be specified in the regulations till the date of its actual payment. Referring the word "shall"occurring in section 39(5)(a) the court concluded that the interest leviable/payable is a statutory liability to pay the interest and,therefore, neither the authority nor the court have any authority to either waive the interest and/or reduce the interest and/or the period during which the interest is payable. The court further observed that the order passed by the ESI Court is not supported by any statutory provision. The court accordingly held that the ESI Court was not justified at all in reducing the period of interest to two years only. The respondent was therefore directed to pay the interest from the date on which the contribution became due and payable till the date of actual

21 2008) 3 SCC 35.

payment. The apex court clarified that while in 85-B[22] of the ESI Act the word used is "may" the word used in section 39(5)(a) of the ESI Act is "shall".Therefore,the ESI Court erred in relying upon the decision in *Employees State Insurance Corporation* v. *HMT Ltd.*. The court accordingly set aside the order passed by the ESI Court and high court.

VI PAYMENT OF GRATUITY ACT, 1972

Maniben Maganbhai Bhariya v. *District Development Officer Dahod* [23] is an epoch-making judgment on payment of gratuity. In this case the Supreme Court was called upon to decide whether Anganwadi workers(AWWs) and Anganwadi helpers (AWHs) appointed to work in Anganwadi centres set up under the Integrated Child Development Scheme (ICDS") are entitled to gratuity under the Payment of Gratuity Act, 1972. (PG Act).

Factual matrix

In this case five appellants joined as Anganwadi workers (AWWs) / Anganwadi helpers (AWHs) during 1982- and 1985 , served for 21 to -31 years and retired between February 2006 and February 2012. When gratuity was not paid to them, each of them filed their applications before the controlling authority under the PG Act, The Controlling held that Anganwadi workers authority are entitled to gratuity. On appeal the the Appellate authority affirmed the decision of controlling authority. Being aggrieved the respondent filed a writ petition before the high court. The single judge of the high court dismissed the writ petitions. In letters patent appeals, a division bench of High Court of Gujarat set aside the orders passed by the high court, Controlling Authority and the appellate authority and held that AWWs and AWHs could not be said to be employees under section 2(e) of the PG Act, and the ICDS project cannot be said to be an industry. The Court further held that as the remuneration or honorarium paid to them are not wages within the meaning of section 2(s) of the PG Act. The Court accordingly held thatAWWs and AWHsare disentitled to gratuity. Against this order the appellant filed an appeal before the Supreme Court.

22 S. 85-B of ESI Act provides:

(1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover (from the employer by way of penalty such damages, not exceeding the amount of arrears as may be specified in the regulations]:

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard: [Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations].

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue [or under section 45-C to section 45-I]."

23 2022 LiveLaw (SC) 408 .

Following a detailed analysis of the relevant facts Abhay S Oka J. with whom Rohatgi Jagreed, wrote separate but concurring judgment.

Submissions of the appellants

The appellant submitted that the provisions of the PG Act apply to AWWs and AWHs for the following reasons:

a) PG Act is a social security legislationwhich recognizes that all persons in the society need protection arising out of incapacity to work due to invalidity, old age, etc.

b) Anganwadi centres set up under ICDS are 'establishments' within the meaning of clause (b) of ection 1(3) of the PG Act and as there is a systematic and organized activity carried out therein with the cooperation of the employer and employees it should also be treated as 'industry as per decision of the Supreme Court in *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*[24]

(c) Even if clause (b) of section 1(3) of PG Act does not specifically include Anganwadi centres, but because PG Act applies to educational institutions as per the notification issued by the Government of India it should be made applicable to Anganwadi centres which provides pre-school non-formal education to children in the age group of 3 to under the ICDS scheme, [25]

d) Although the Supreme Court in the *State of Karnataka* v. *Ameerbi*[26] held that AWWs and AWHs are not the employees of Anganwadi centres or the ICDS scheme the said the said decision is not relevant in this case because case in that case the dispute was confined to an issue of whether AWWs can be said to be holding civil posts to attract the jurisdiction of the Karnataka State Administrative Tribunal established under Section 15 of the Administrative Tribunals Act, 1985.,

e) Merely because the monthly remuneration paid to AWWs is styled as honorarium, it cannot be concluded that it is not a "wage" because under section 2(s) of the PG Act, the definition of 'wages' is very wide to include honorarium as per the decision of *Jaya Bachchan* v. *Union of India*.[27]

In rejoinder the appellants submitted that Anganwadi centres are performing the statutory duty of implementing provisions of Sections 4, 5 and 6 of the National Food Security Act, 2013. AWWs and AWHs, not only perform the duties of running Anganwadi centres but are also running pre-primary schools in Anganwadis. Apart from that, they are obligated to make home visits for various purposes. Indeed, they are doing full-time jobs and are discharging onerous responsibilities.

Submissions of the respondents

The respondents adopted the line of approach followed by the division bench and submitted as under:

24 1978 (2) SCC 213.

25 See also *Ahmedabad Pvt. Primary Teachers' Assn*. v. *Administrative Officer*.

26 2007 (11) SCC 681.

27 2006 (5) SCC 266.

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i. ICDS is a Central Government scheme which the State Governments are implementing by appointing AWWs and AWHs from amongst local inhabitants. usually women on a yearly basis. They are being paid an honorarium and not wages.

ii. Though the share of the Central Government in the honorarium has not been increased, under the Government Resolution dated March 21 2020, the State Government has increased its contribution, and now the remuneration of AWWs is Rs.7,800/- per month. Further a number of other benefits have been made available by the State Government to AWWs,

iii. There are 53,029 Anganwadi centres established under the ICDS in the State of Gujarat, and presently there are about 51,560 AWWs and 48,690 AWHs in the entire State. If gratuity is held to be payable to them, there will be a substantial financial burden on the State exchequer as the amount payable towards gratuity will be more than Rs 25 crores.

The Additional Solicitor General of India also submitted that while the Government of India acknowledges the important role of Anganwadi centres in implementing the ICDS scheme and consequently the role of AWWs and AWHs but the provisions of the PG Act do not apply to them. Moreover section 1(3)(b) refers to 'establishments' within the meaning of any law for the time being in force in relation to shops and establishments in a State and therefore, in this case, the provisions of Gujarat Shops and Establishments Act, 1948 is applicable.

The most important issues involved here, Whether those who are working as Anganwadi workers/helpers are eligible to claim gratuity under the provisions of the Act, 1972?

Response of the Supreme Court[28]

(i)Applicability of the Payment of Gratuity Act,1972

Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it.

(ii) Applicability of the Contract Labour (Regulation and Abolition) Act, 1970

The Contract Labour Act is applicable to establishments as provided in sub-section (4)(a) of Section 1. In view of sub-section (2) of Section 1, the Contract

28 The judgment was delivered byAbhay S Oka J.Ajay Rohatgi J, however, wrote a separate but concurring judgment.

Labour Act is applicable to the State of Gujarat. Therefore, it is legislation in relation to establishments in the State of Gujarat. As stated above, under the said Rules, now the selection and appointments of AWWs and AWHs are being made by the Government of Gujarat.

(iii) *Legislative policy under the Code of Wages, 2019 and Code on Social Security, 2020*

The court referred to the Code of Wages, 2019 which received the assent of the President on August 8, 2019 which has not yet come into force . However, only a few provisions therein have been brought into force so far. Clause (m) of Section 2 thereof defines establishment which means any place where any industry, trade, business, manufacture, or occupation is carried out and it includes the Government establishments. The court also referred to the the definition of establishment under clause 29 of Section 2 of the Code on Social Security, 2020 which received the assent of the President on September 28, 2020. These provisions show the legislative intent to include the various government establishments in the category of establishments in the welfare state.

(iv) *Definition of wages includes honorarium*

The definition of 'wages' means all emoluments which are earned by an employee on duty. Thus, the honorarium paid to AWWs and AWHs will also be covered by the definition of wages.

(v) *AWWs and AWHs are employees of the state government*

The court held that as AWWs and AWHs are employed by the state government for wages in the establishments to which the PG Act applies, they are employees within the meaning of the PG Act.

(vi) State Government will be an appropriate government

In view of the said Rules of the Gujarat Government, the Anganwadi centres are not under the control of the Central Government. Therefore, the state government will be an appropriate Government within the meaning of clause (a) of Section 2 of the PG Act.

(vii) Authority appointed by the appropriate Government will be the employer

Accordingly, a person or authority appointed by the appropriate Government for the supervision and control of AWWs and AWHs will be the employer within the meaning of clause (f) of Section 2 of PG Act .

(viii) Appointments of AWWs and AWHs are governed by the said Rules

As far as the State of Gujarat is concerned, the appointments of AWWs and AWHs are governed by the said Rules. In view of the 2013 Act, AWWs and AWHs are no longer a part of any temporary scheme of ICDS.

(ix*) PG Act applies to Anganwadi centres running a preschool for the children*

The Government of India by a notification dated April 3, 1997 has notified educational institutions as establishments under clause (c) of sub-section (3) of Section 1 of the 1972 Act. In the Anganwadi centres, the activity of running a

preschool for the children in the age group of 3 to 6 years is being conducted. It is purely an educational activity. The job of teaching is done by AWWs and AWHs. The state government is running pre-schools in Anganwadi centres in accordance with section 11 of the RTE Act.

In view pf above the PG Act will apply to Anganwadi centres and in turn to AWWs and AWHs.

(x) *Anganwadi centres and in turn AWWs and AWHs perform statutory duties.*

Dealing with the duties and responsibilities of Anganwadi centres the apex court observed that they have been entrusted with the onerous responsibility of implementing provisions of the 2013 Act. Thus, in view of the provisions of the 2013 Act and section 11 of the RTE Act, Anganwadi centres also perform statutory duties.[29] Therefore, even AWWs and AWHs perform statutory duties under the said enactments. Indeed,

> Anganwadi workers/helpers also function as a bridge between the government and the targeted beneficiaries in delivering a bouquet of services stipulated under the NFSA.[30]

(xi) *Ameerbi judgment not applicable*

The Supreme Court while dealing with its earlier decision in *State of Karnataka* v. *Ameerbi,*[31]on which the Division Bench of the high court placed reliance observed that in that case the question for consideration was as to whether those who were appointed as Anganwadi workers/helpers are holders of civil posts and are entitled to seek protection of article 311 of the Constitution. It was in thatcontext, it was held that they were not holders of civil posts and protection of article 311 of the Constitution and that was the reason for which the application which was filed at the behest of Anganwadi workers/helpers under Section 15 of the Administrative Tribunal Act, 1985 was held to be not maintainable. Hence, the said decision is not relevant in this case.[32] Further when the said decision was rendered by this court, the National Food Security Act, 2013 (2013 Act) was not on the statute book.

(xii) Recommendation to the Central Government/State Governments

The court keeping in view the existing working conditions of Anganwadi workers/helpers coupled with lack of job security which albeit results in lack of motivation to serve in disadvantaged areas with limited sensitivity towards the delivery of services to such underprivileged groups recommended that the Central Government/state governments should find out modalities in providing better service conditions of the voiceless commensurate to the nature of job discharged by them.[33]

29 *Id.*,para 18.

30 *Id.*, para 39 per Ajay Rustgi.

31 2007 (11) SCC 681.

32 *Id.,* para 49 , per Ajay Rusogi J.

33 *Id.*,para 52 , per Ajay Rusogi J.

The court accordingly set aside the orders of the division bench of the High Court of Gujarat and directed the concerned authorities in the State of Gujarat under the PG Act shall take necessary steps within a period of three months from April 25, 2022, (the date of the judgment) to extend benefits of the said Act to the eligible AWWs and AWHs. The court further directed that all eligible AWWs and AWHs shall also be entitled to get interest @ 10% per annum from the date specified under sub--section 3A of Section 7 of the PG Act.

The aforesaid decision is a turning point in providing legal protection and social security to Anganwadi workers and helpers at least in ensuring gratuity to such workers. At the same time,it is likely to openseveral issues relating to other social security benefits, occupational safety, health and working conditionsand jobsecurity. Here it may be mentioned that apex court itself has pointed out that" lack of job security which albeit results in lack of motivation to serve in disadvantaged areas with limited sensitivity towards the delivery of services to such underprivileged groups, still being the backbone of the scheme introduced by ICDS". In view of this the Court recommended that time has come to find out modalities in providing better service conditions to voiceless which should commensurate to the nature of job discharged by them. On similar lines, the provisions of the EPF and MP Act, ESI Act, EC Act and other social security and labour welfare legislation be made applicable to them.

VII MATERNITY BENEFIT ACT, 1961

The Maternity Benefit (Amendment) Act 2017*, interalia*, provides that where the nature of work assigned to a woman is of such a nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period and on such conditions as the employer and the woman may mutually agree.[34] Further every establishment with 50 or more employees is required to provide crèche facilities within a prescribed distance.[35]

In *Prachi Sen v. Ministry of Defence* [36] the High Court of Karnataka was called upon to delineate the scope of section 5(5) of Maternity Benefit (Amendment) Act 2017 and grant of child care leave to women employees having minor children below the age of 18 years providedto central government employees is also applicable to women employees of publicsector, namely, Semi-Conductor Technology and Applied Research Centre (STARC).

Briefly the facts of the case were as follows, the petitioner who was employed as an executive engineer at the STARC did not return to work after her maternity leavefollowed by the period during which she was allowed towork from home during the lockdown period and other sanctioned leave. However, when the petitioner did not join duty after the sanctioned leave was exhausted, the impugned communication dated August 7, 2021 was issued to the petitioner stating that she was staying away from duty without sanction of leave and the such overstay

34 Maternity Benefit Act,1961, S.5(5)

35 *Id*., s.11.

36 Writ petition no. 22979 of 2021 decided on Mar. 3, 2022.

would be treated as unauthorized absence. The petitioner was also informed that she would not be entitled for leave salary for the unauthorized period of absence and disciplinary action could be initiated against her. Instead, she requested childcare leave from STARC and also sought to work from home in accordance with the two Official memoranda issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Government of India, which provides for grant of child care leave to women employees having minor children below the age of 18 years. However, ignoring such contentions, the petitioner was once again called upon to join duties immediately. Nevertheless, the petitioner filed a writ petition before the High Court of Karnataka challenging the communication and seeking benefits under the Act.

It was contended that the petitioner like the employees of the Government of India is entitled for child care leave. It was also contended that under section 5(5) of the Maternity Benefits Act (MB Act), the petitioner should be allowed to carry on her work from home after availing the maternity benefit for the period as provided under the MB Act. It was further contended that notifications have been issued by the Central Government, directing all the public sector undertakings, which include the respondent- organization, to ensure that as far as possible, provisions should be made to lactating mothers to work from home, in view of the prevalence of COVID- 19 pandemic. On examining the response of the high court to these contentions.

Response of the high court

Child Care Leave

The court held that childcare leave cannot be granted to the petitioner consequent to the advisory issued by the DOPT and the resolution of the Board of Governors of the third respondent-society that they would not implement the child care leave facility in the organisation as it would affect the production schedules and delivery timelines.

Work from home

The Court observed that although section 5(5)[37] of MB Act makes a provision for a woman to work from home after availing of the maternity benefit but it could be given only in case where the nature of work assigned to the women is such that it is possible for her to work from home and for such period and on such conditions as the employer and the woman may mutually agree. However, the court found that the employee was involved in research work, which was both sensitive as well confidential which could not be carried out from home.

37 Maternity Benefits Act,1961, s. 5(5) as amended in 2017 provides:
In case where the nature of work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period and on such conditions as the employer and the woman may mutually agree.''

Crèche facility

The court observed that crèche facility will be made available for the petitioner's child in the adjacent ITI premises as contended by the respondent - employer.

Judicial notice of the fact that there was a third wave of COVID -19

The high court took judicial notice of the fact that there was a third wave during November-December 2021 and, therefore, if the petitioner was unable to join duties in STARC the respondent should take sympathetic view towards the petitioner. The accordingly directed that as and when representations are given by the petitioner, after she joins duty, the fourth respondent-Organization should consider such representations sympathetically.

VIII CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

Kirloskar Brothers Limited v. *Ramcharan*[38] the Supreme Court was called upon to decide whether contract labour provided by the contractor to the principal employer would become the employee of principal employer on termination of labour contract.

In this case the respondents were contract labourers, provided by contractor to the appellant in terms of contract dated April 22, 1995. Such contract was renewed from time to time, including on August 1, 1995. The labour contract came to an end on October 7, 1996 and accordingly the services of the respondents were dispensed with by the contractor, after necessary compliance under the CLRA Act was also completed by the appellant and all statutory payouts, including the salary of the workmen were paid by the contractor since under the CLRA Act, the appellant informed the contractor about deducting an amount of Rs. 7,224/- from the bill payable, for non-deposit of PF contribution for May,1995.Thereafter, the respondents approached the labour court praying, *inter alia* that they were employees of the appellant, whose services were orally terminated by the contractor and sought to be re- instated in service. The Labour Court heldthat the contractor had obtained license under the CLRA Act and that the contesting respondents were the employees of the contractor and not of the appellant. On appeal the Industrial Tribunal directed reinstatement byholding that a contract labourer automatically becomes an employee under in sections 2(13)) of the Madhya Pradesh Industrial Relations Act, 1960 (MPIR Act).Being aggrieved the appellant filed a writ petition before the high court. The single judge of the high court dismissed the petition and upheld the order of the Industrial tribunal. The writ appeal filed against the judgment and order passed by the single judge was also dismissed. Against this order the appellant filed an appeal before the Supreme Court. The Supreme Court held that the respondents were the contractual labourers of the contractor who were engaged by the appellant under a contract which was renewed from time to time.Further no notification was issued by an appropriate government under section 10, prohibiting employment of contract labour, in any process,

38 2022 Latest Caselaw 946 SC; (2023)1 SCC 463.

operation or other work in any establishment. Even so neither Section 10 of the CLRA Act, nor any other provision in the Act, whether expressly or by necessary implication, provides for absorption of contract labour. Even otherwise, the court ruled that in the absence of a notification issued by the appropriate government prohibiting the contract labour system under section 10 of the CLRA Act unless there are allegations or findings with regard to a contract being sham the workmen/ employee of the contractor, cannot be held to be employees of the appellant and not of the contractor. Therefore, merely because sometimes the payment of salary was made and/or PF contribution was paid by the appellant, which was due to non-payment of the same by the contractor, the contesting respondents shall not automatically become the employees of the principal employer (appellant).

IX CONCLUSION

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

i. The apex apex court made a significant contribution when it ruled that once the employer introduce a pension scheme and the employee availed benefit of such a scheme the right stood vested and accrued to them andan amendment to the contrary made with retrospective effect is not only violative article 14but also of article 21 of the Constitution.

ii. The courts adopted cautious approach to deal with the constitutional validity of amendment made inthe Employees' Pension Scheme in 2014 when it observed.that the scope of judicial scrutiny to test the constitutionality of the amendment becomes narrow when the amendment in the the Employees' Pension Scheme in 2014, was made on the basis of certain relevant materials and not whimsically. The court also recommended legislative amendment of the EPF Act when a member is required to make an additional contribution of 1.16 per cent where contribution to pension scheme is beyond Rs. 15000/.

iii.Another major contribution of the apex court relates to payment of gratuity to Anganwadi workers and helpers. The court recommended that time has come to find out modalities in providing better service conditions of the voiceless which should commensurate to the nature of job discharged by them.

iv.Like provident funds the apex court also made a significant contribution on the Employees' State Insurance Act 1948 (EC Act) when it clarified that the liability of the employer to pay the compensation under the 4- A of the EC Act arises from the date of accident and not from the date of the order passed by the Commissioner. Further the liability to pay the interest on the amount of compensation due and payable would be under Section 4A(3)(a) and the penalty would be leviable under Section 4A(3)(b) of EC Act.

v.The sensitivity and human approach has not been displayed by the apex court when it took judicial notice of the third wave of COVID -19 during November-December 2021 and therefore directed the employer that as and when representations are made by the woman -petitioner, who stayed away from duty without sanction of leave after availing maternity leave, should take sympathetic view towards the petitioner.

vi. Another notable decision relates to the employment status of contract labour. The court ruled that merely because sometimes the payment of salary was made and/or provident fund contribution was paid by the principal employer, which was due by the contractor, the employees of the contractor shall not automatically become the employees of the principal employer.