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SOCIAL SECURITY LAW

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I INTRODUCTION

IN THE year 2014 there have been significant developments, both legislative and judicial, in the arena of social security law. During this year the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 was enacted. The Act seeks to protect the rights of urban street vendors and regulates street vending activities and matters connected therewith or incidental thereto. Quite apart from this three bills were framed, namely, the Apprentices Amendment) Bill, 2014, the Small Factories (Regulation of Employment and Conditions of Services) Bill, 2014 and the Factories (Amendment) Bill, 2014. The most significant bill seeking is the Apprentices (Amendment) Bill, 2014 which seeks to amend the Apprentices Act, 1961 in order to facilitate imparting of skills to youth. The bill aims to make apprenticeship responsive to youth and industry, increase skilled labour, ease rules for employers to recruit apprentices and allow them to undertake demand-driven courses. The amendments include dropping a provision in the existing law for arrest of employers for not adhering to the without the centre's approval. The Bill also seeks to provide apprenticeship to non-engineering provisions and allowing companies to add new trades including information technology-enabled services in the scheme of apprenticeship graduate and diploma holders and allow employers to make their own policy for recruiting apprentices. This Bill was passed in Lok Sabha in June, 2015.

Another significant legislative measure was the framing of the Small factories (Regulation of Employment & Conditions of Service) Bill 2014; this Act will be applicable to those units with less than 40 workers. The Factories Amendment Bill, 2014 provides that if the power is used for running the manufacturing process, instead of existing requirement that 10 or more persons must be employed and if no power is used, then 20 or more persons should be employed raised this limit to 20 where power is used and 40 where power is not used. Further the time a worker is expected to spend in the factory has been increased from 10 1/2 to 12 hours.

During the year under survey the State of Rajasthan has amended three central legislations. The Rajasthan Industrial Disputes Amendment Act; (i) deleted the

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definition of employer under section 2(g); (ii) in chapter VB amended section 2(k) application of chapter VB from existing 100 workmen in an industrial establishment to 300 workmen; 25 N-conditions precedent to retrenchment of workmen-deleted the existing expression 'or the workmen has been paid in lieu of such notice, wages for the period of notice 'in sub-section (a) (i) Section 25-(O) (8) in case an undertaking is permitted to close down the workmen shall be entitled to receive compensation equivalent to 15 days average pay for every completed year of continuous service or any part thereof in excess of 6 months as per amendment also an amount equivalent to 3 months average pay.

Another amendment made by Rajasthan is in the Contract Labour (Regulation & Abolition) Act, 1979. The existing central Act is applicable where the establishment employs 20 or more workers or the contractor employs 20 or more workers. This limit of 20 has been raised to 50. Yet another amendment was made by Rajasthan was in the Factories Act, 1948. As per the present provisions of the (Central) Factories Act, if the power is used for running the manufacturing process, 10 or more persons must be employed and if no power is used, then 20 or more persons should be employed. This limit has been extended to 20 where power is used and 40 where power is not used.

Like legislative development there has also been significant development in judicial sphere. In 2014 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 cases on social security relate to the Contract Labour (Regulation and Abolition) Act, 1970, Employees' Compensation Act, 1923, Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Employees' State Insurance Act, 1948 and the Payment of Gratuity Act, 1972. The high court cases covered almost every important area of social security and minimum standards of employment. The courts generally adopted cautious approach to deal with the provisions of social security and minimum standard legislation. Indeed the apex court at times evolved new strategies to deal with various issues on social security and minimum standard legislation the Courts generally gave beneficial interpretation to the provisions of the Act. This survey seeks to examine important judgements of the Supreme Court and high courts on law relating to social security and minimum standard labour.

II CONTRACT LABOUR

In Balwant Rai Saluja v. *Air India Ltd.*,[1] the Hotel Corporation of India was running canteen as a contractor of Air India (the prin-cipal employer). The canteen workers demanded status of employees of principal employer by raising an industrial dispute which was referred for adjudication to the Central Government Industrial Tribunal which held that the workmen were employees of the Air India Therefore, their claim was justified. On a writ petition filed against this order the single judge of the high court held that the said workmen would not be entitled to be treated to be an employees or deemed employees of the Air India. The division

1 2014 LLR 1009; (2014) 2 SCC (LS)804.

bench of the High Court of Delhi affirmed the order of the single judge. Thereupon an appeal was filed in the Supreme Court. It was contended that since the canteen is maintained as a consequence of a statutory obligation under section 46 of the Factories Act, 1948, and that since by virtue of notification dated 21.01.1991, Rules 65-70 of the Delhi Factory Rules, 1950 ('the Rules, 1950') have become applicable to the re-spondent no. 1, the said workers should be held to be the employees of Air India. The main issue for consideration before the apex court was whether workers, engaged on a casual or temporary basis by a contractor (HCI) to operate and run a statutory canteen, under the provisions of the Factories Act, 1948, on the premises of a factory Air India, can be said to be the workmen of the said factory or corporation? The court answered the question in negative and gave the following reasons in support of its conclusion:[2]

> (i) The statutory obligation created under Sec-tion 46 of the Factories Act, 1948 even though imposes cer-tain liability upon the principal employer towards the workers employed for providing canteen facility, this must be restricted only to the Factories Act, 1948.
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> (ii) The obligations imposed upon the principal employer under section 46 does not govern the rights of employees with reference to appointment, seniority, promotion, dismissal, disci-plinary actions, retirement benefits, etc., which are the subject matter of various other legislations, poli-cies, employees working in the canteen are the Air India's employees.
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> (iii) The Air India no doubt exercises control ,which is in the nature of supervision, but being the primary shareholder in the HCI and shouldering certain financial burdens such as pro-viding with the subsidies as required by law, the Air India would be entitled to have an opinion or a say in ensuring effective utilization of resources, mon-etary or otherwise. The said supervision or control would appear to be merely to ensure due mainte-nance of standards and quality in the said canteen.
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> (iv) The mere fact that the Air India has a certain degree of control over the HCI does not mean that the employees working in the canteen are the Air India's employees.
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> (v) There is no parity in the nature of work, mode of appointment, experience, qualifications, etc., be-tween the regular employees of the Air India and the workers of the given canteen. Therefore, the ap-pellants-workmen cannot be placed at the same footing as the Air India's regular employees, and thereby claim the same benefits as bestowed upon the latter.

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2 *Id.* at para 1-88.

The court accordingly held that the workers engaged by a contractor to work in the statutory canteen of a factory would be the workers of the said factory, but only for the pur-poses of the Act, 1948, and not for other purposes. The court added that in order to be called the employees of the factory for all purposes: (i) they should satisfy the test of employer-employee relationship and (ii) it must be shown that the employer exercises "absolute and effective control" over the employee.

It is submitted that in the aforesaid case the Supreme Court followed the decision in *Petrochemicals Corporation Ltd*. v. *Shramic Sena.*[3] However the court did not consider other cases decided even after the said decision relied upon the court wherein the apex court ruled that the workers working in canteens even if employed through a contractor have to be treated 'workers' and 'no restricted' meaning can be given where in discharge of statutory obligation of maintaining a canteen the principal employer availed the services of the contract labour. [4] Further the court has also not considered its earlier decision that even where the Factories Act,1948 is not applicable to an establishment but canteen facilities is provided as a condition of service the workers working in canteens even if employed through a contractor have to be treated to be the workers.[5]

Quite apart from above the court in the case under review by adopting the test of 'absolute and effective control 'has relaxed the qualitative and quantitative content of the supervision and control while determining whether contract labour in statutory canteen is a worker.[6]

III EMPLOYEES COMPENSATION ACT, 1923

Payment of compensation and interest when due

In *Saberabhai Yakubbhi Shaikh* v. *National Insurance Co. Ltd.*[7] the apex court was called upon to determine the date of commencement of interest in respect to the delayed payment of compensation under the Employees' Compensation Act, 1923.

In this case the commissioner awarded compensation to the appellants, the wife and the relatives of deceased driver who died in a road accident of Rs.2,13,570/- with 12% interest from the date of accident. The commissioner also awarded Rs.1,06,785/- as penalty. Aggrieved by this award of the commissioner, the insurance company filed an appeal before the high court. The high court partly allowed the appeal and directed the insurance company to pay interest on the amount of compensation from the date of adjudication of claim application and not from one month after from the date of accident. The court further directed that the

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3 1999 (6) SCC 439.

4 *National Thermal Power Corporation Ltd*. v. *Karri Poyhuraju* , 2003 LLR 1006.

5 *Barat Fritz Werner Limited* v. *State of Karnataka* 2001 LLR 285.

6 See S.C.Srivastava, Contract Labour : A Review of Contract Labour (Regulation & Abolition) Act,1970 and other Related laws, The Book Line, New Delhi (2015).

7 2014 LLR 119.

excess amount towards interest, if any, deposited by the respondent no.1 – insurance company be refunded to it. In support of its conclusion, the high court relied upon the judgment of this court reported in *Uttar Pradesh State Road Transport Corporation now Uttarakhand Transport Corporation* v. *Satnam Singh*,[8] wherein it has been held that the interest was payable under the Workmen Compensation Act, from the date of the award and not from the date of accident.

Aggrieved by the aforesaid judgment of the high court, the appellants filed an appeal before the Supreme Court. It was contended that the aforesaid judgment of the high court is contrary to the law laid down in the case of *Oriental Insurance Company Limited* v. *Siby George*.[9] Accepting the argument the apex court held that the judgments in *National Insurance Co. Ltd.* v. *Mubasir Ahmed*[10] and *Oriental Insurance Co. Ltd.* v. Mohd. Nasir [11] were *per incuriam* having been rendered without considering the earlier decision in *Pratap Narain Singh Deo* v. *Srinivas Sabata.*[12] In the aforesaid judgment, upon consideration of the entire matter, a four-judge bench of this court had held that the compensation has to be paid from the date of the accident.

The apex court accordingly held that the appellant shall be entitled to interest at the rate of 12% from the date of the accident. The court remarked that even after passage of more than 16 years, the wife and children of the deceased driver had till the hearing of the case before it.

From the above it is evident that the decision of High Court ,against whose order an appeal was filed in the instant case, has resulted into unnecessary litigation and caused great hardship to workers by, in the ignorance or otherwise of the decision of four judge bench of the of apex court in *Pratap Narain Singh Deo* v. *Srinivas Sabata*[13] wherein it was held that the compensation has to be paid from the date of the accident.

Scope and application of the doctrine of notional extension

As a general rule the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment This is now subject to the theory of notional extension .There may be some reasonable extension in both time and place and the workmen may be regarded as in the course of employment even though he had not reached or had left the employers' premises.

In *Manju Sarkar* v. *Mabish Miahd* [14] the apex court applied the principle of notional extention while determining the liability of the employer to pay compensation in case of road accident. Here Sarkar Sajal, a driver of the truck, sustained injuries in the road accident culminating in his death. A question arose

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8 (2011) 14 SCC 758.
9 (2012) 12 SCC 540.
10 (2007) 2 SCC 349.
11 (2009) 6 SCC 280.
12 (1976) 1 SCC 289.
13 *Ibid.*
14 2014 LLR 814.

whether Sajal Sarkar continued to be in course of employment under respondent nos.1 and 2 at the time of sustaining injuries in the accident culminating in his death? In order to answer the question the court, as mentioned earlier, applied the doctrine of notional extension at both the entry and exit by time and space. It pointed out that the scope of such extension must necessarily depend on the circumstances of a given case. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and, egress to and from the place of employment. Applying the aforesaid principle in this case the court held that Sajal Sarkar met with the road in accident the course of his employment under respondent nos.1 and 2.

It is submitted that in order to give legislative approval to the judicial response and to meet the outstanding demands of employees and to bring certainty the 2010 amendment in the Employees' State Insurance Act,1948 has inserted new section 51E which has extended the scope of "accident arising out of and in the course of employment" to include accident happening while commuting to the place of work and *vice versa*; But no such provision has been inserted in the Workmen's Compensation Act, 1923 (which was replaced by Employees' Compensation Act,1923) by 2009 amendment. It is difficult to find any reason for not adopting the same principle when the expression used in both the Acts are 'accident arising out of and in the course of employment. It is high time that there should be similarity in regard to the scope and coverage of the expression 'accident arising out of and in the course of employment'.

Maintainability of appeal against the order of commissioner under the Employees' Compensation Act, 1923

Can the high court, on the basis of evidence adduced before the commissioner for employees' compensation set aside the order passed by the commissioner for workmen's compensation? This issue arose for determination before the Supreme Court in *Smt. T.S. Shylaja* v. *Oriental Insurance Co.*[15] The claim before the commissioner arose out of a motor accident in which the deceased employed as a driver on a monthly salary of Rs.6,000/- by the owner of the vehicle lost his life while driving a vehicle on Mysore highway involving a head on collision with a tipper lorry. The vehicle was insured with the respondent-company. It was alleged that negligence of the deceased which resulted in the accident was caused by the driver would disentitle the claimant to any compensation.

The commissioner, on the pleadings of the parties, held that the driver was entitled to receive an amount of Rs.4,48,000/- towards compensation with interest of 12% per annum having regard to the fact that the deceased was employed as a driver by the owner of the vehicle no matter the owner happened to be his brother. Aggrieved by this award the respondent-company preferred an appeal before the High Court of Karnataka at Bangalore which was allowed by a single judge of that court. The high court held that the relationship between the deceased and his brother, the owner of the vehicle which he was driving, was not satisfactorily proved to be

15 (2014) 2 SCC 587.

that of an employee and an employer and that the only remedy which the appellant, mother of the deceased had, was by way of a claim for payment of compensation under the Motor Vehicles Act 1988. Against this order the claimant-appellant filed an appeal before the Supreme Court. It was argued that the high court was in error in entertaining the appeal and in reversing the view taken by the commissioner by re-appraising the evidence on record. It was also urged that the high court remained oblivious of the provisions of section 30(1) of the Act which clearly stipulate that no appeal shall lie against any order of the commissioner unless a substantial question of law fell for consideration. Further no such question of law arose for consideration nor was the same framed or addressed by the high court in the course of the judgment. Dealing with the contention raised by appellant the Supreme Court observed that section 30[16] of the Employees Compensation Act, 1923 no doubt provides for an appeal to the high court from the orders passed by the commissioner as enumerated in clauses (a) to (e) sub-section (1) of section 30. But the proviso to section 30(1), however, makes it abundantly clear that no such appeal shall lie unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause (b) unless the amount in dispute in the appeal is not less than three hundred rupees. The court ruled:[17]

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16 (S.) 30. Appeals.—

(1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely:—

(a) an order as awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claimin full or in part for a lump sum; 1[(aa) an order awarding interest or penalty under section 4A;]

(b)an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub section (2) of section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions:

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties:

Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.

17 *Supra* note 15 at para 8.

> What is important is that in terms of the 1st proviso, no appeal is maintainable against any order passed by the Commissioner unless a substantial question of law is involved. This necessarily implies that the High Court would in the ordinary course formulate such a question or at least address the same in the judgment especially when the High Court takes a view contrary to the view taken by the Commissioner.

The court then referred to the findings of the Commissioner for Workmen's Compensation that after having appraised the evidence adduced before him the deceased was indeed employed as a driver by the owner of the vehicle no matter the owner happened to be his brother. Taking a note of the finding of the commissioner, the apex court ruled that it could not be lightly interfered with or reversed by the high court. The apex court further remarked that high court overlooked the fact that the respondent-owner of the vehicle had appeared as a witness and clearly stated that the deceased was his younger brother, but was working as a paid driver under him.

According to the apex court the only reason which the high court has given to upset the above finding of the commissioner was that they could not blindly accept the oral evidence without analysing the documentary evidence on record. But the Supreme Court held that the high court failed to appreciate as to what was the documentary evidence which the commissioner had failed to mention and also did not refer to the contradiction, if any, between such documents and the version given by the witnesses examined before the commissioner. In view of this the Supreme Court, remarked that the high court erred to interfere in the finding of facts recorded by the commissioner, without adverting to the documents (vaguely referred to by it have upset the finding of fact. The court added that suffice it to say that apart from appreciation of evidence adduced before the commissioner the high court has neither referred to nor determined any question of law much less a substantial question of law the existence whereof was a condition precedent for the maintainability of any appeal under section 30.

IV EMPLOYEES 'STATE INSURANCE ACT, 1948

The *Bangalore Turf Club* v. *Regional Director, Employees' State Insurance Corporation* [18] decided extremely important issues, namely, (i) whether the decision of the apex court in the *Employees State Insurance Corporation* v. *Hyderabad Race Club*[19] was correct when it held that a 'race-club' is an 'establishment' for the purposes of the Employees' State Insurance Act. 1948 (ESI Act)? and (ii), whether the appellant-turf clubs fall within the purview of the definition of the word 'shop' as categorized in the notifications issued by the state government?

The matter was referred to three-judge bench of the Supreme Court in the case under review as two-judge bench of the Supreme Court was of the view that

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18 (2014) 9 SCC 657.

19 (2004) 6 SCC 191.

the decision of two-judge bench of this court in the case of *Hyderabad Race Club* case may require reconsideration. By the aforesaid judgment, it was observed by this court that race-club' is an 'establishment' within the meaning of the said expression as used under section 1(5) of the ESI Act.

In this case three other appeals involving similar issues were heard along with this appeal. In all these appeals in exercise of the powers conferred by sub-section (5) of section 1 of the ESI Act the state government issued a notification which was published in the state gazette (extraordinary) wherein a date was specified as the date on which all provisions of the said Act shall extend to the classes of establishments and in the area specified in the schedule.

Relevant provisions and scope of sub-sections (4) and (5) section 1

In order to deal with the aforesaid issues the apex court referred to the provisions of sub-section (4) and (5) of section 1 of the ESI Act thus sub-section (4) of section 1 provides that the ESI Act shall apply to all factories including factories belonging to the government other than seasonal factories. Sub-section (5) of section 1 empowers the appropriate government to extend the provisions of the ESI Act to any other establishment or class of establishments- industrial, commercial, agricultural or otherwise. The state government is also empowered, to extend the provisions of the ESI Act, by issuing a notification in the official gazette, to any establishment or class of establishments as specified therein subject to the conditions specified in the aforementioned provisions. The court termed this sub-section to be an enabling conditional legislation.

Meaning of the words 'or otherwise'

The court then explained the meaning of the words 'or otherwise' occurring after the words 'industrial, commercial or agricultural' establishments in sub section (5) of section 1 and observed that said sub-section indicate that the government can extend the ESI Act or any portion thereof to any other establishment or class of establishments. The genus lies in the words 'any other establishment or class of establishment'. The three words industrial, commercial and agricultural represents specie. Since the legislature did not want to restrict the operation of the ESI Act to these three species it has used the catch words 'or otherwise'. Examining the main contentions of the parties.

Contention of the appellant

(i) A shop cannot be said to include a race-club within its definition. For this,the appellant relies upon the definition clause under the Karnataka Shops and Commercial Establishments Act, 1961 and contended that in the absence of a definition of the word 'shop' under the ESI Act, the Court should refer to definitions under the KS&CE Act, 1961 as the two statutes are in *pari materia* with each other.

(ii) The meaning of 'shop' must be understood in common parlance that is as per its traditional meaning.

(iii) The Court should not give a liberal or expansive interpretation to ascertain the meaning of a 'shop', and that the literal rule of construction would be best suited to the given case.

(iv) *ESIC* v. *Hyderabad Race Club*[20] requires reconsideration.

Contention of respondents

(i) In the absence of a definition under the ESI Act, dictionary meaning may be used as an external aid of construction.

(ii) It is inappropriate to refer to the definition of "shop" found in the KS & CE Act, 1961 or the ESI Act, 1948 as neither would be *pari material* with the ESI Act.

(iii) The ESI Act is a beneficial legislation aimed at ensuring social security to employees and in view of the same the Court must adopt an expansive and liberal interpretation to achieve the objects and purpose of the ESI Act.

Response of the Supreme Court

Rule of Interpretation

After review of long list of cases the Supreme Court observed:

> We may safely conclude that the literal rule of construction may be the primary approach to be utilized for interpretation of a statute and that words in the statute should in the first instance be given their meaning as understood in common parlance. However, the ESI Act is a beneficial legislation. It seeks to provide social security to those workers as it encompasses. In light of the cases referred above, it may be seen that the traditional approach can be substituted. A dictionary meaning may be attached to words in a statute in prefer-ence over the traditional meaning. However, for this pur-pose as well, the scheme, context and objects of the leg-islature must be taken into consideration. Taking into due consideration the nature and purpose of the ESI Act, the dictionary meaning as understood in the context of the said Act, would be preferable to achieve the objects of the legislature.

Dictionary Meaning

The court then examined the dictionary meaning given in various dictionaries which has also been cited and relied upon by the court in various cases. Referring to the term 'establishment' the court said that it would mean the place for transacting any business, trade or profession or work connected with or incidental or ancillary thereto. It added that it is true that the definition in dictionaries is the conventional definition attributed to trade or commerce, but it cannot be wholly valid for the purpose of constructing social welfare legislation in a modern welfare state. Referring to the test to be evolved the court pointed out that the test of finding out whether professional activity falls within the meaning of the expression 'establishment' is whether the activity is systematically and habitually undertaken for production or distribution of the goods or services to the community with the

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20 *Ibid.*

help of employees in the manner of a trade or business in such an undertaking. The court held that if a systematic economic or commercial activity is carried on in the premises, it would follow that the establishment at which such an activity is carried on is a 'shop'.

The court, then referred to its earlier decision in *Hyderabad Race Club* case wherein it was held that keeping in view the systematic commercial activity carried on by the race-club is an establishment within the meaning of the said expression as used in the notification issued under section 1(5) of the ESI Act. In view of this the court in the instant case held that the view expressed by this court is in consonance with the provisions of the ESI Act and also settled legal principles. Accordingly the said decision does not require re-consideration.

Whether shop includes club

The court then considered whether a 'race-club' or turf club would be covered under the definition of a 'shop. In the absence of the definition of the term 'shop', in the ESI Act the court referred to various dictionary meaning and decides cases and observed:

> It can be safely concluded that, the Appellant-Turf Clubs conduct the activity of horse racing, which is an entertainment. The Appellant-Turf Clubs provide various services to the viewers, ranging from providing facilities to enjoy viewership of the said entertainment, to the facilitating of betting activities, and that too for a consideration- either in the form of admission fee or as commission. An argument may be advanced that not all persons who come to the race would avail the services as provided by the Appellant-Turf Clubs, however the same would fail as even in the case of a shop in the traditional meaning, that is to say, one where tangible goods are put for sale, a customer may or may not purchase the said goods. What is relevant is that the establishment must only offer the clients or customers with goods or services. In this light, it is found that a race-club, of the nature of the Appellants, would fall under the scope of the term 'shop' and thereby the provisions of the ESI Act would extend upon them by virtue of the respective impugned notifications issued under sub-section (5) of Section 1 of the ESI Act.

Findings of the court and disposal of the parties' contention. The court rejected the contention of appellant that the term 'shop' must be understood in its 'traditional sense'. The court referred to its earlier decision of *Bombay Anand Bhavan Restaurant*,[21] that the language of the ESI Act may also be strained by this Court, if necessary. Further the scheme and context of the ESI Act must be given due consideration. Thus a narrow meaning should not be attached to the words used in the ESI Act. Further it there is need to keep in mind that the ESI Act seeks to insure the employees of covered establishments against various risks to their life, health and well-being and places the said charge upon the employer. The court

21 (2009) 9 SCC 61.

therefore held that the term 'shop' as urged to be understood and interpreted in its traditional sense would not serve the purpose of the ESI Act. Further in light of the judgments discussed above and in particular the *Cochin Shipping* case [22]and the *Bombay Anand Bhavan* case, the court held that an expansive meaning may be assigned to the word 'shop' for the purposes of the ESI Act.

Kitchen of Gymkhana Club –if covered under ESI Act.

The court then referred to the dictionary meaning of 'establishment' and observed:

Delhi Gymkhana Club Ltd. v. *Employees State Insurance Corporation* [23] is another case on this subject. In this case the Supreme Court was called upon to decide whether kitchen of club and catering section comes within the meaning of 'factory'?

In this case the club catering, provides various services to its members, organises several sports activities and kitchen is an integral part of the club catering to needs of its members and their guests on payment. Food items are put to sale. On these facts the apex court held that the club fall within definition of 'factory' under section 2(12) of the Act and all persons employed for supply and distribution of food prepared in the kitchen and doing incidental duties are to be regarded as employees of the factory. The court further held that absence or existence of profit motive immaterial in that regard. The court ruled that so long as manufacturing process is carried on with or without aid of power by employing more than 20 persons for wages it is covered by section 2(12) of the ESI Act.

V EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

Liability to pay damages in transfer of establishment

In *Mcleod Russel India Ltd.* v. *Regional Provident Fund Commissioner, Jalpaiguri*[24] the Supreme Court was called upon to decide liability to pay damages for default in paying contribution in case of transfer of establishment.

In this case M/s. Mathura Tea Estate, P.O. Mathura Bagan, District Jalpaiguri, West Bengal was owned by Saroda Tea Company Ltd., and was covered by the Employees' Provident Funds and Miscellaneous contributions. The regional provident fund commissioner found that M/s. Mathura Tea Estate had defaulted in payment of dues for the period from March, 1989 to February, 1998.He, therefore, held that damages were recoverable jointly and severally from Saroda Tea Company Ltd. as well as Eveready Industries (India) Ltd. Depending on the period of default, damages were assessed at Rs.70,37,950; He further directed that failure to deposit penal damages within the stipulated period would attract the provisions of section 7Q of the Employee Providend Funds and Miscellances Provisions Act, 1952 thereby would also be liable simple interest at the rate of 12 per cent per annum on the damages. This order was challenge before the single judge of the High Court

22 (1992) 4 SCC 245.

23 2014 (143) FLR 927.

24 AIR 2014 SC 2573.

at Calcutta, who set aside the commissioner's orders and directed the said authority to reconsider the issues within a period of three months.

The decision of the single judge was reversed on the application of the dictum of the special three-judge bench in *Dalgaon Agro Industries Ltd*. v. *Union of India*.[25] The special bench of the High Court of Calcutta held that (a) the transferor and the transferee managements remain jointly and severally liable under sections 14B and 17B of the Act for all sums due including damages; (b) the transferor's indebtedness comes to a halt on the date of the transfer but includes the sums computed under both these sections till the date of transfer; (c) the transfer does not bind either the employees or the fund; (d) the transferee stands cautioned by virtue of sections 1(3) and 17B that the erstwhile as well as the current employer remain responsible for liabilities under both the sections as a consequence of liability being that of the establishment in question of which employers are merely fictional representatives to facilitate recovery of dues; (e) recovery of any amount due is protected under section 11(2) of the Act, which grants priority to the amount so due over all other debts under any other statute as being the first charge on the assets of the establishment; (f) the Act has innovated radical and effective modes of recovery as evident from sections 8B and 8F, which further reinforces the fact that liability to pay dues is of the establishment recoverable through the employer; (g) liability under section 14B admits no waiver except as provided; (h) damages could be recovered regardless of any reasonable period of prescription; (i) the covenants in the transfer deed are irrelevant for determination and recovery of dues and damages; and (j) criminal liability would be attracted only in the event the outstanding are not completely recovered. Against this decision an appeal was filed before the Supreme Court. The appellant contended that the liability was of the erstwhile management and since the petitioner was not the 'employer' at the relevant time, default much less deliberate and willful default on the part of the petitioner was absent. The court rejected this contention and held that once these damages have been levied, the quantification and imposition could be recovered from the party which has assumed the management of the concerned establishment. The court observed that there is no gainsaying that criminal liability remains steadfastly fastened to the actual perpetrator and cannot be transferred by any compact between persons or even by statute damages. The court added:[26]

> (M)odern jurisprudence recognizes that the imposition of punitive damages, quintessentially quasi-criminal in character, can be resorted to even in civil proceedings to deter willful wrongdoing by making an admonished example of the wrongdoer. This is the essential purpose, it seems to us, of Section 14B of the EPF Act, and an imposition within its confines does not assume criminal prosecution so as to stand proscribed insofar as transfer of establishment from one management/ employer to its successor is concerned.

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25 (2006)1CALLT 32 (HC).

26 *Id*., para 10.

The court also rejected the another argument of the appellant that damages as postulated in section 14B would not be transferable under section 17B on the ground that section 17B specifically speaks of 'the contributions and other sums due from the employer under any provision of this Act or the Scheme'. Further the proviso to section 17B indeed clarifies the position inasmuch as it restricts and/or limits the liability of the transferee up to the date of the transfer to the value of the assets obtained by him through such transfer.

The court opined that section 14B is complete in itself so far as the computation of damages is concerned. It is conceivable that the money due from an employer would have to be calculated under section 7A, and in the event the default or neglect of the employer is contumacious and contains the requisite *mens rea* and *actus reus* yet another exercise of computation has to be undertaken under section 14B. Where the authority is of the opinion that damages under section 14B need to be imposed, the computations would come within the purview of section 14B and it would be recoverable jointly and severally from the erstwhile as well as the current managements. The court accordingly approved the findings of the division bench of the high court and the regional provident fund commissioner.

VI PAYMENT OF GRATUITY ACT

In *D.D. Tewari (D) thr. LRs* v. *Uttar Haryana Bijli Vitran Nigam Ltd.*[27] a question arose whether employer would be justified in withholding the payment of gratuity under the Payment of Gratuity Act, 1972 and pension on the alleged ground that some amount was due to employer?

In this case the appellant retired from service on attaining the age of superannuation on 31.10.2006 but the retiral benefits of the appellant were withheld by the respondents on the alleged ground that some amount was due to the employer. No disciplinary proceedings were pending against the appellant on the date of his retirement. There upon, the appellant approached the high court seeking for issuance of a direction to the respondents regarding payment of pension and release of the gratuity amount which are retiral benefits with an interest at the rate of 18% on the delayed payments. The single judge allowed the writ petition after setting aside the action of the respondents in withholding the amount of gratuity and directed the respondents to release the withheld amount of gratuity within three months. On appeal the division bench of the high court passed a 'cryptic' order in which it adverted to the fact that is no order was passed by the single judge with regard to the payment of interest and the appellant has not raised any plea which was rejected by him, Aggrieved by this decision the appellant filed an appeal before the Supreme Court. On these facts the Supreme Court held that the respondents have erroneously withheld payment of gratuity amount for which the appellants are entitled in law for payment of penal amount on the delayed payment of gratuity under the provisions of the Payment of Gratuity Act, 1972. In view of this the court awarded interest at the rate of. The court accordingly approved the findings of the division bench of the high court and the regional provident fund commissioner.

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27 2014 LLR 964.

In view of this the court awarded interest at the rate of 9% on the delayed payment of pension and gratuity amount from the date of entitlement till the date of the actual payment However if this amount is not paid within six weeks from the date of receipt of a copy of this order, the same shall carry interest at the rate of 18% per annum from the date of amount falls due to the deceased employee.

VII FACTORIES ACT, 1948

In J.J. Irani v. State of Jharkhand [28] a question arose whether the complaint was filed by the inspector of factories against the appellant within three months of the date on which the alleged commission of the offence came to his knowledge, as required by section 106[29] of the Factories Act, 1948?

The facts of the case were as follows, on March 3rd , 1989, the Tata Iron and Steel Company Limited (TISCO) celebrated the 150th birthday of Mr. J.N. Tata, as foundation day. For the purposes they constructed temporary pandals at the main gate of the factory premises. However all of a sudden a fire broke out and two of the pandals, where guests were seated, were badly gutted. As a result several persons mainly employees of TISCO, its officers and their family members died on the spot and a larger number were injuries. A formal notice of intimation of the accident, as required by section 88(1)[30] of the Act read with Rule 96 of the Bihar Factories Rules, 1950 was given to the inspector of factories. On receipt of the intimation Chief Inspector of Factories of the then State of Bihar and the Deputy Chief Inspector of Factories, Jamshedpur, conducted a preliminary investigation. These officers submitted a report to the Commissioner of Labour, Patna on 08.03.1989. Before submitting the report a preliminary inquiry was conducted. The chief inspector of factories, who signed the preliminary report, recommended to the

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28 2014 LLR 897.

29 No Court shall take cognizance of any offence punishable under this Act unless thereof is made within three months of date on which the alleged commission of the offence came to the knowledge of an Inspector:

Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

[Explanation, —For the purposes of this section,—

a) in the case of continuing offence, the period of limitation shall be computed with reference to every point of time during which the offence continues;

b) where for the performance of any act time is granted or extended on an application made by occupier or manager of a factory, the period of limitation shall be computed from the date on which the time so granted or extended expired.

30 S. 88 (1) provides that where in any factory an accident occurs which causes death ,or which causes any bodily injury by reason of which the person injured is prevented for working for a period of forty-hours or more immediately following the accident or which is of such a nature as may be prescribed in this behalf ,the manager of the factory shall send notice thereof to such authorities and in such form and within such time, as may be prescribed.

state government that a committee be constituted under section 90 of the Act for conducting a detailed investigation into the cause of the accident. In pursuance of the recommendation of the preliminary report, the state government constituted a three member committee under section 90 of the Act consisting of (i) Chief Inspector of Factories, Bihar (Ranchi) as Chairman; (ii) Dy. Chief Inspector of Factories (Jamshedpur) as Member; and (iii) Chief Safety and Fire Officer (Begusarai) as Member. The government further directed the committee to submit its report within two months. The report was handed over to the inspector of factories on 23.04.1990. On 07.05.1990, three criminal complaints were filed under the Factories Act, 1948 by the Inspector of Factories, Jamshedpur.

The chief judicial magistrate, who heard the complaint, found that the factory inspector complainant, had knowledge of the occurrence at least on 5.3.1989 when a detailed inquiry was conducted by the chief inspector of factories. The chief judicial magistrate, therefore, dismissed the complaint as being barred by limitation holding that the offence was not a continuing offence and that the limitation be reckoned from 5.3.1989 *i.e*., the date of knowledge.

The high court accepted that the starting point for limitation was the date of knowledge of the commission of offence but took the view that in the present case the date of accident and the date of knowledge of the commission of the offence are different. The high court relied on the decision of this court in *P.D. Jambekar* v. *State of Gujarat*.[31]

The high court observed that the complainant could have known of the breach only when the cause of accident, which was inquired into, was reported by the chief inspector of factories in his report, which was received by the complainant on 23.04.1990; and it was only from the inquiry report that the complainant came to know of the commission of the offence in the preliminary inquiry conducted on 5.3.1989 by the chief inspector of factories.

Against this order the appeal was filed before the Supreme Court. A question arose whether the filing of complaint on 07.05.1990 was within three months of the date on which the alleged commission of the offence came to the knowledge of the inspector under section 106 of the Act. The Supreme Court held that it was not necessary for the Inspector to have waited to receive the report on 23.04.1990

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31 (1973) 3 SCC 524, in which the court observed as follows:

> As section 106 makes the date of knowledge of the commission of the offence the starting point of the period of limitation, we find it difficult .to read the section so as to make the date on which the Inspector would or ought to have acquired knowledge of the commission of the offence had he been diligent, the starting point of limitation, especially where, as here the statute does not provide for an inquiry into the accident much less the period with which the inquiry has to be made. It is only in the jurisprudence of Humpty Dumpty that we can equate the "date on which the alleged offence came to the knowledge of an Inspector" with the date on which the alleged offence *ought to have come to his knowledge.* We think that the High Court was right in its conclusion.

from the government under cover of the letter dated 21.04.1990 directing him to file a complaint for the prosecution of the appellants. The court accordingly affirmed the finding of the chief judicial magistrate and set aside the orders of the high court.

VIII MINES ACT, 1952

G.N. Verma v. *State of Jharkhand*,[32] raises not only a question of law, namely, whether the appellant would be deemed agent of mine and whether the cognizance taken by the chief judicial magistrate against the appellant G.N. Verma should be set aside but involves a wider issue of 'process re-engineering and case management In this case a criminal complaint was filed against the appellant, chief general manager alleging that since there were signs of engagement of persons for mining operation and coal production in contravention of prohibitory order issued by the Director Mines Safety, Ranchi. A criminal complaint was, therefore filed in the court of chief judicial magistrate who took cognizance of the criminal complaint. However the criminal complaint did not contain any allegation against appellant chief general manager as to the role of the appellant in the running of the colliery, as to how and in what manner the appellant was in charge of or was responsible to the colliery for the conduct of its business, which is the requirement of law to fasten vicarious liability upon an officer of a company. On the other hand the complaint only contains a general statement, which does not contain any allegation, specific or otherwise against the appellant - mine or otherwise. Further there is nothing on record to show that any such statement was furnished by the owner of the mine to chief inspector or regional inspector appointed under the Mines Act, 1952. Moreover the appellant had not been appointed as an agent of any mine. On these facts the Supreme Court held that (i) appellant was a person who was neither authorised to act on behalf of owner nor who purported to act on behalf of owner (ii) in absence of any statement having been made or any indication having been given by owner enabling appellant to act or purport to act on his behalf no case is made out against him (iii)In the absence of any role of the appellant in the running of the Colliery which would make him vicariously liable for the fatal accident in one of the mines, no case for proceeding against him has been made out (iv) it is not possible to assume without any specific allegations or averments in this regard, that apart from performing administrative duties, he was also involved in technical matters related to the mine.

The court accordingly held that, appellant was not an agent or deemed agent of mine concerned, and hence could not be proceeded against on that basis either. This view has been consistently adopted by the Supreme Court.

IX CONCLUSION

The apex court took a strong note that even after passage of more than 16 years, the wife and children of the deceased driver who met with accident in the

32 (2014) 4 SCC 282.

course of employment did not receive any compensation till the hearing of the case before the apex court. This is so when sections 3, 4 and 4A (1) of the Employees' Compensation Act, 1923 specifically provides that compensation shall be paid as soon as it falls due. Two reasons may be accounted for the same namely, (i) there is a general tendency on the part of insurance company to approach the superior court on one ground or the other sometimes without any valid reason; (ii) The high courts time and again accept the petition despite the ruling of the Supreme Court. Further the Supreme Court gave liberal interpretation to the word 'shop' for the purposes of the Employees' State Insurance Act. Moreover the apex court recognized that the imposition of punitive damages, quintessentially quasi-criminal in character, can be resorted to even in civil proceedings to deter willful wrongdoing by making an admonished example of the wrongdoer. This court emphasized that it is the essential purpose of section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to penalize defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is only a warning to employers in general not to commit a breach of the statutory requirements of section 6,but at the same time it is meant to provide compensation or redress to the beneficiaries *i.e*., to recompense the employee for the loss sustained by them. The Supreme Court deprecated the tendency of the employer to erroneously withhold the amount of gratuity without any valid reason and be subject to penal payment. The apex court emphasized the need for strict compliance of the provisions of section 106 of the Factories Act, 1948 which requires that the court shall not take cognizance of any offence punishable under the aforesaid Act unless complaint thereof is made within three months of the date on which the offence is alleged to have been committed came to the knowledge of inspector. While dealing with Mines Act, 1952 the Supreme Court held that a person who was not authorized to act on behalf of owner or purported to act on behalf as the owner cannot be prosecuted under the Act.