LABOUR LAW

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General Introduction

The law relating to labour in India deals mainly with the regulation of the contract of employment under which the servant, or the employee, undertakes to work for his master, or the employer, for hire or reward. Under the concepts of law, which, under British rule, were imported into India from the common law of England, this relationship was treated mainly as a contractual relationship. The Indian Contract Act, 1872 is based mainly on the law of contract as interpreted by courts of law in England. In interpreting the provisions of this Act, the courts in India borrowed heavily from the case law of English courts.

The central doctrine, which runs through the law of contract, is that the parties are free to make their own contracts. The relationship between master and servant is a voluntary relationship into which the parties may enter on terms laid down by themselves within the limitations imposed only by the general law of contract.[1] The law of contract, however, assumes that there is equal freedom in the parties to enter into a contract, but shuts its eyes to the inequality inherent in the employment relationship. It ignores the superior economic strength and the bargaining power of the employer *vis-à-vis* the person who has to make a living getting employment, or perhaps starves. Workers have sought to redress the balance in this sphere through their organizational strength, by forming themselves into trade union and adopting the device of collective bargaining. They have also sought legislative protection and privilages by exercise of their political power, and thus persuaded the state to intervene effectively on their behalf by providing for matters like safety, health and welfare, regulation of hours of work, leave and holidays and social security. And, depending upon their organizational strength, have also sought regulatory legislation for protection and enhancement of their material well-being and security of their employment.

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1. Mansfield Cooper and J.C. Wood, *Outlines of Industrial Law*, 3rd ed., 1958, p. 2.

In India, legislation relating to labour has grown mainly in the twentieth century. Till the First World War, such legislation was scanty. In the inter-war years, that is, between 1919 and 1939, some essential legislation for the protection of labour was introduced. But the law relating to labour, as we know it today, is mostly the product of the legislation passed after, or soon before India achieved political independence in 1947.

It may, broadly, be stated that labour law of India has given the go-bye to the doctrine of freedom of contract, or *laissez-faire*, and has recognized the need for giving adequate legal protection to labour. Labour legislation in India has now become an important part of that social and economic legislation in India, which derived its inspiration for the recognition of the wider responsibilities, which the state has undertaken to protect the economically weaker sections of the community. These are often summed up under the convenient heading of the 'welfare state', whose responsibility it is to assure to its citizens not only physical liberty to pursue their avocations according to their liking, and political liberty to choose their own government at reasonable intervals, but also assure social well-being and economic and material opportunities to make the foregoing liberties meaningful and effective.

The ideals of the welfare state are embedded in the directive principles of state policy enunciated in the Constitution of the Republic of India. These directives principles emphasise the responsibility of the state to secure just and humane conditions of work and maternity relief; public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want; protection of the health and strength of workers, and avoiding circumstances which force citizens to enter avocations unsuited to their age or strength. These directive principles also place the responsibility on the state to strive to secure work, a living wage, a decent standard of living; leisure and social and cultural opportunities for people, which, it is axiomatic, must be available for all sections of people, including the working class. The Constitution of India also protects the right of labour to form associations and unions by enshrining it as a fundamental right. These directive principles and fundamental rights already formed the ethos and commitment of the national movement for political independence, and had found expression in several resolutions of the Indian National Congress and the reports of the National Planning Committee under the Chairmanship of Jawaharlal Nehru. Soon after, and even before, power was formally transferred to Indian hands in 1947; these principles were implemented with vigor in the field of labour legislations in India, adding greatly to the scanty legislation that existed on the subject previous to 1947.

The main source of labour law in India is legislation, but it is supplemented by judgments of courts, delivered particularly in the sphere of adjudication of industrial disputes.

It will be convenient to divide the subject into certain broad categories. It will be wrong, however, to think of these categories as watertight compartments. As a matter of fact, they overlap, and the division of the subject into various heads may at best be considered helpful for the understanding of the main feature of labour law in the country.

The earliest attempt of the government, or the state, to intervene in the field of labour, was through certain protective measures to provide for the health and the safety of the Indian worker, and to regulate hours of work in factories and other places of employment. Improvements have been made in this respect from time to time and are a continuing process. Such legislation may be conveniently dealt with under the heading of legislation relating to health, welfare, working conditions and hours of work including leave and holidays of the Indian worker. The next important heading under which labour legislation can be dealt with is 'social security' under which we shall consider Acts like the Workmen's Compensation Act, the Employees' State Insurance Act, Maternity Benefit Act, and legislation dealing with retrial benefits. Legislation and judicial decisions relating to wages, bonus allowances, fringe benefits, regulation of contract labour and other such matters would be another branch of the labour code of India. Lastly, we shall examine legislation and case law relating to trade unions and trade or industrial disputes, which have assumed greater and greater importance, as the state has sought to encourage trade unions and regulate industrial conflict by providing machinery for settlement, arbitration and adjudication of industrial disputes, and imposed restrictions on strikes and lock out, and the ordinary common law right of the employer to hire and fire employees, taking disciplinary action against them or change their conditions of service at his sweet will.

I

LEGISLATION RELATING TO WORKING CONDITIONS

General

Legislation on working conditions comprises Acts dealing with subjects like hours of work, rest days, restrictions on employment of women and young persons, safety, health and welfare. Such legislation lays down certain standards which are then enforced through appropriate inspection machinery and penal measures. Generally speaking, the standards laid down in the various Acts are minimum standards, with provision for exemptions in suitable cases, leaving scope through collective bargaining or industrial adjudication to improve these standards in appropriate cases.

The basic and the most important legislation, with the longest history, is the legislation relating to factories, now incorporated in the Factories Act,

1948, which regulates working conditions in factories where manufacturing process is carried with or without the aid of power. The next in importance from the point of view of number of workmen employed is the Mines Act, 1952, which regulates working conditions in mines. The Plantation Labour Act, 1951 has also a long history and applies to labour employed on land used for growing tea, coffee, rubber, cinchona, or any other plant and connected offices, *etc.* In addition to the above, there are Acts dealing with special categories of labour like the Motor Transport Workers Act, 1961, which covers all persons employed in transport undertakings engaged in carrying passengers and goods or both by motor vehicles; the Indian Dock Labourers Act, 1934, and the Dock Workers (Regulation of Employment) Act, 1948, which deals with dock labour; the Indian Railways Act, 1890, which deals with rail labour, and the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955, which lays down the conditions of service of a highly specialized class of employees called 'working journalist'. Besides there, the Shops and Establishments Acts of the various states lay down the working conditions of employees in shops and commercial establishments, which generally means places where goods are sold by retail or whole-sale or where business is carried on. In this category of employment will fall employees in places like offices, shops, hostels, cinema halls, theatres *etc.*

Hours of work of adults

The broad pattern in the above Acts with regard to hours of work of adults is 48 hours work in a week, with a maximum of 9 hours work in a day, and a compulsory day of rest in the week which should generally be Sunday. There are also restrictions on spread-over of hours of work, which vary, generally speaking, between 10-1/2 hours to 12 hours in a day depending upon the nature of the industry. If any worker is required to work beyond the above maximum hours, he has to be compensated for such over-time work generally at the rate of twice the ordinary rate of wages. Such overtime work is, however, subject to certain maximum limits during the week.

The above is the general pattern. However, there are special restrictions on hours of work in certain hazardous or more onerous jobs like underground mining, where hours of work are more severally restricted, or in highly intellectual employments, like that of working journalists for whom the hours of work are as low as 144 hours during a period of four consecutive weeks, or 36 hours a week. Plantations have longer permissible hours of work, the normal work allowed in a week being fifty-four hours, with no limit on the number of hours worked on a particular day.

Statutes on the matter of working hours generally lay down only maximum limits. There are industries and particularly offices not attached to factories where the hours of work are less-may be as low as 36 hours per

week- as a result of custom, usage, contract, settlement or award of industrial tribunals. Although statutes generally provide for payment at the overtime rate for hours of work worked in excess of the statutory limits, the general practice in cases where the actual hours of work are below the statutory limit is to pay at a higher rate for any hours of work beyond those prevalent in the establishment, although the rate of overtime payment in such cases upto the statutory limit is generally less, say one and a half or one and a quarter time the ordinary rate, as against twice the ordinary rate for overtime work in excess of the statutory maximum hours of work.[2]

Restrictions on working hours and conditions for women and young persons

There are further restrictions in the matter of hours of work of young persons and women. For example, under the Factories Act, 1948, no woman shall be employed in any factory between 6 p.m. and 7 a.m. and no exemption with regard to daily hours of work can be granted by the chief inspector of factories, as he may grant for male workers. There shall further be no change of shifts in their case except after a weekly holiday or any other holiday. Employment of children below the age of 14 years has been completely prohibited. Further, a child who has completed his fourteenth year or is an adolescent, who has been defined as a person who has completed his fifteenth year of age but has not completed his eighteenth year, shall not be required or allowed to work in a factory unless he is certified to be fit to work by the certifying surgeon appointed under the Act. No child shall be employed or permitted to work in any factory for more than four and a half hours in a day or by night. Further, no adolescent who has not attained the age of seventeen years shall be employed or permitted to work in any factory during night.

In the mines the restrictions on employment or women and children and adolescents are even more stringent. Thus, no woman shall be employed in any mine below ground nor in any mine above ground except between the hours of 6 a.m. and 7 p.m. Moreover, every woman employed in a mine above ground shall be allowed an interval of rest of not less than eleven hours between the termination of employment on any one day and the commencement of the next period of employment. With regard to young persons, it is provided that no child, who is defined as a person who has not completed his fifteen years, shall be employed in a mine nor shall any child to be allowed to be present in any part of a mine which is below ground, or in any open cast working in which any mining operation is being

2. *Workmen of Overseas Airways Corporation* v. *British Overseas Airways Corporation* (1962) I LLJ 257 SC and *Karam Chand Thapar & Bros. Ltd. and Others* v. *Their Workmen* (1964) I LLJ 429.

carried on. An adolescent, who is a person between the ages of fifteen and eighteen years, may, however, be permitted to work in a mine subject to certain restrictions. Thus, no adolescent shall be allowed to work in any part of a mine which is below ground unless he has completed his sixteenth year, and has been certified to be fit for working below ground by the certifying surgeon appointed under the Act. Moreover, he shall not be allowed to work except between 6 a.m. to 6 p. m. and must have an interval of rest of at least half and hour after every four and a half hours of continuous work on any day. With regard to above ground work, it has been provided that no adolescent who has not been granted a medical certificate certifying that he is fit for work as an adult, shall be employed or be permitted to be employed above ground in a mine for more than four and a half hours in any day or between the hours of 6 p.m. and 6 a.m.

On the plantations, the restrictions on employment of women and young persons are less stringent than under the Mines Act, or even the Factories Act, naturally, because they work in the open and the hazard to their health is not so much. Employment of women, except midwives and nurses and of a child worker, that is a person who has not completed his fifteenth year is, however, completely prohibited except with the permission of the state government. No child who has completed his twelfth year or an adolescent, *i.e.*, who has completed his sixteenth year but not completed his eighteenth year, shall be required or allowed to work unless he has been certified as fir to work by the certifying surgeon appointed under the Act.

Restrictions on employment of young persons and their hours of work are also placed in respect of motor transport industry under the Motor Transport Workers Act. The Shops and Establishments Acts of the various states also generally place such restrictions on employment of women and children. With regard to employment of children there was also a special Act called the Employment of Children Act, 1938, which was repealed by the Child Labour (Prohibition and Regulation) Act, 1986. This Act provides that no child who has not completed his fourteen year shall be employed or permitted to work in any occupation connected with transport of passengers, goods or mails by railway. The Act clearly lays down that no child will be allowed to work for more than three hours of work before he has had an interval of rest for at least one hour. Once a week he will be given a holiday. No child will be allowed to work between 7 p.m. and 8 a.m. No over time will be permitted. The Act states that the government can make rules for the health and safety of children who are permitted to work in any establishment. These rules can be provided for matters such as cleanliness, ventilation, dust and fumes, lighting, drinking water and sanitary facilities *etc.* The penalty for violation of the Act will range from three months to one year of imprisonment with a fine of Rs. 10,000 to Rs. 20,000. Part 'B' of the schedule has added one more process into existing list and

that is "building and construction industry". All other provisions are similar to the ones already existing in the Act of 1938. Finally, as early as 1933, the evil of pledging of child labour was outlawed under the Children (Pledging of Labour) Act, 1933, whereby any agreement under which the parent or guardian of a child, in return for any benefit received or to be received by him undertook to cause or allow the services of a child to be utilized in any employment was declared to be void. The ban under the Act does not apply to such agreement as is made without detriment to the child and for reasonable wages and is terminable at not more than one week's notice.

Weekly day of rest, holidays and leave

(i) Weekly rest day

There is a provision in almost all statutes with regard to a weekly day of rest, which generally should be on a Sunday. Workers who are deprived of their day of rest are, generally, to be given a substituted rest day in such manner that they do not work continuously for more then ten days. Although all statutes do not necessarily provide for payment for the rest day—for example, the Factories Act and the Mines Act provide for rest day but not for payment for such rest day. However, the trend in recent legislation is to provide such payment. Even in mines and factories the standing orders framed under the Industrial Employment (Standing Orders) Act, 1946, generally provide for payment for the rest day. Moreover, the Minimum Wages Act, wherever applicable, makes payment for the weekly rest day compulsory. So also do the Shops and Establishments Acts of various states. Wherever payment for rest day is not provided for by legislation, tribunals to whom references may be made in this regard under the Industrial Disputes Act, 1947 have, through their awards, generally speaking, required employers to pay their workmen for the weekly rest day. It would, therefore, be broadly correct to say that the Indian worker is not only entitled to a rest day every week, but also for payment of full wages for the said rest day.

(ii) Holidays

Apart from weekly rest day, through legislation by various states, but more often by practice or through awards of industrial tribunals, provision has also been made for grant of festival holidays to employees, the exact quantum of which, however, varies in accordance with the industry and the region. There has, however, lately been a tendency to reduce the number of such holidays wherever permissible, but without making any drastic changes.[3]

3. *Pfizer (P) Ltd.* v. *Its Workmen* (1962) I LLJ 543: AIR 1963 SC 1103 and *Bijli Cotton Mills* (P) *Ltd.* v. *Presiding Officer, Industrial Tribunal* 1972 (II) LLJ 320: AIR 1972 SC 1903.

(iii) Leave

Practically all statutes provide for minimum annual leave with wages at the rate of one day's leave for every 20 days of work for employees who have worked 240 days or more in the previous year. This does not preclude, however, more generous standards of leave being provided by awards, collective agreements, contracts of service or custom and usage. The Factories Act provides that every worker who has worked for 240 days or more in the previous year, will be allowed leave with wages in the subsequent year at the rate of one day for every 20 days of work performed by him during the previous calendar year. In the case of a child, the quantum of leave allowed is at a higher rate being one day for every 15 days of work performed during the previous calendar year. The Mines Act provides for similar leave benefits, except that persons employed below ground are to be allowed leave at the rate of one day for every 15 days of work performed by them. The leave standards for motor transport workers are the same for adults as under the Factories Act, while an adolescent motor transport worker is entitled to one day of leave for every 15 days of work during the previous year. The Plantation Labour Act, 1951, makes provision for annual leave with wages calculated at the rate of one day for every 20 days of work performed by an adult and one day for every 15 days of work performed by a young person. Similarly, the various Shops Acts also make provision for leave, with wages, or privilege leave, as it is sometimes called, at the rate of one day's leave for 20 days of work performed. Generally speaking, under all statutes, the leave entitlements under them are the minimum and not the maximum. The employees are entitled to more leave, if so allowed under any contract, custom, usage, settlement, agreement or award applicable to them.[4]

Accumulation of leave is generally allowed to the extent of two years' leave entitlement. Encashment of such leave is allowed only at the time of termination of service by the employer, and in case of resignation, only where the employee had applied for leave but had not been granted leave by his employer. Restrictions are generally placed on the manner of availment of such leave so that normal work is not disrupted. Most Acts, therefore, require that sufficient notice of such leave should be given by the employee.

Most statutes do not provide for casual and sick leave, except for special Acts in various states. Casual and sick leave is, however, generally provided in the certified standing orders which are applicable to establishments which employ 100 workmen or more. Moreover, when disputes with regard to casual or sick leave are referred to tribunals or labour courts, they are generally favorably inclined to provide for such leave, particularly if practice

4. *Alembic Chemical Works Co. Ltd.* v. *Its Workmen* (1961) I LLJ 328: AIR 1961 SC 647.

with regard to the same is prevalent in other establishments in the region and the industry. Several states have also passed legislation for minimum casual and sick leave to be provided to workers working in industrial establishments. As a general rule, it may, therefore, be stated that there is practice in Indian industry for grant of casual and sick leave in addition to earned or privilege leave, although its exact quantum varies according to the industry and the region.

Health, welfare and safety

Almost all the Acts and/or rules framed thereunder make it obligatory on the employers to provide certain minimum welfare facilities for the workers, such facilities varying in detail with the nature of each industry. It is also well accepted that one of the primary duties of the modern industrial state is to protect the worker against physical and health hazards to which he may otherwise be exposed on account of his employment. The law on this subject is contained in the Acts dealing with various employments and differs with each employment. For detailed provisions in this regard, the reader may turn to the statutory provisions contained in the enactments governing various employments.

II

SOCIAL SECURITY

General

Hitherto, we have dealt with certain safeguards that have been provided to labour in matters such as safety, hours of work, leave, health and welfare. Such safeguards are perhaps a general feature in all industrial stages, although the means by which such safeguards are provided may differ from country to country, and the nature of the safeguards also inevitably differs with the economic, social and industrial advancements of the country concerned. We shall, however, now deal with another, and somewhat allied, subject-the subject of social security-in which the ideas and ideals of the 'welfare state' as we know it today have found more concrete expression. In this field, as we shall notice, although a modicum of social security was provided to the Indian worker even before India achieved political independence, most of the progress has been made in the post-independence era only.

We shall now deal briefly with the various Acts bearing on social security for the industrial worker.

The Workmen's Compensation Act, 1923

The earliest legislative measure by which a modicum of social security was

provided to the Indian worker was through the Workmen's Compensation Act, 1923. As originally passed, the Act was limited in its scope, but by subsequent amendments, the scope has been extended, and certain loopholes plugged. The first major amendment in the Act was carried out as a result of the Report of the Royal Commission on Labour in India, which recommended that the Act should be extended to cover as completely as possible the workers in organized industry, and should be gradually extended to workers in less organized employment, beginning with those who are exposed to more risks. As a result of these recommendations, the Act was amended in 1933, thereby substantially modifying the Act of 1923 in scope, title to compensation, amount of compensation, and classes of dependents entitled to compensation and benefits payable under the Act. Since then, amendments have been carried out in the Act from time to time. Large section of the Indian workers earning salary not exceeding Rs. 1,000 a month, are protected by the Workmen's Compensation Act or other ancillary legislation which extends the operation of the Act to other employments or provides for alternative ways of safeguarding the employees who suffer injury, or contract disease, during the course of, and arising out of, their employment. The minimum amount of compensation payable under the Workman's Compensation Act, has been enhanced from Rs. 50,000/- to Rs. 80,000/- in case of death and from Rs. 60,000/- to Rs. 90,000/- in case of permanent total disablement with effect from 8-12-2000.[5] From the same date ceiling of the maximum amount of compensation has been doubled from Rs. 2.28 lakhs to Rs. 4.56 lakhs in case of death and from Rs. 2.74 lakhs to Rs. 5.48 lakhs in case of permanent total disablement.[6]

The Act gives statutory recognition to the need for adequate compensation to workmen, in cases where personal injury is caused to them by accident arising out of, and in the course of, their employment. The employer would not, however, be liable to pay such compensation where the injury does not result in the total or partial disablement of the workman for a period exceeding three days. Ordinarily, the employer is not liable to pay any compensation where the injury complained of is the result of an accident which is directly attributable to the workman having been at the time thereof under the influence of drinks or drugs; or his having willfully disobeyed an order expressly given or a rule expressly framed for the purpose of securing his safety, or having willfully removed or disregarded any safety guard or other device which he knew to have been provided for the purpose of securing the safety of the workmen. Except in such cases, the workman would be entitled to compensation as provided under the Act, provided he is able to establish that the injury was caused owing to an

5. Gazette of India, 8.12.2000 Part II, S. 4 (Extra).
6. See Annual Report 2003-2004 (Ministry of Labour, Government of India), p. 3; also see, Thomas Paul, XXXIX ASIL (2003), p. 537.

accident arising out of, and in the course of, his employment. Even these defences are not open to an employer for avoiding liability in cases where the injury has resulted in the death of the workman. This is for the reason that the deceased workman's dependents must be provided for in any event, and should not undergo acute suffering due to the default of the earning member which brought about his death.

The expression "arising out of" suggests the cause of accident and the expression 'in the course of' points out to the place and circumstances under which the accident takes place at the time when it occurred. A casual connection or association between the injury by accident and employment is necessary. The onus is on the claimant to prove that accident arose out of and in the course of employment.[7]

Where the workman died due to natural lightning while working at the site, it was held by the Supreme Court that in order to succeed in his claim for compensation, it is no doubt, that the accident must have causal connection with the employment and arise out of it; but if the workman is injured as a result of natural force of lightning, though it in itself has no connection with employment of deceased, the employer can still be held liable if the claimant shows that the employment exposed the deceased to such injury. In the present case the deceased was working on the site and would not have been exposed to such hazard of lighting had she not been working so. Therefore, the appellant was held liable to pay compensation.[8]

In another case,[9] a person was employed as a driver of the bus. He died of heart failure at a bus stop where he stepped out to have refreshment. His widow claimed compensation, which was awarded by the Commissioner of Workmen's Compensation against the insured employer and not the insurance company. On appeal, the single judge of the high court held that both the insurance company and the employer are jointly and severally liable to pay compensation. And therefore, two appeals were filed, one by the insurance company and the other by the employer. It was held by the division bench of the high court that the connection between accident and employment might be established if the strain had contributed to or accelerated the accident. If probabilities were in favour of the applicant, then, the Commissioner of Workmen's Compensation was justified in inferring that the accident arose out of and in the course of the employment. In this case there could be no dispute that the driver died in the course of his employment since there was no occasion for him to be at the bus stand

7. *M/s Chowgate and Co. (Pvt.) Ltd.* v. *Smt Felicidate* AIR 1970 Goa 127.
8. *State of Rajasthan* v. *Ram Prasad and Another* (2001) 1 LLJ 177 (SC).
9. *Divisional Manager, United India Insurance Co. Ltd.* v. *Shanmuga Mudliar T. and others* (2003) 1 LLJ. 776 (Mad.).

(where he died) unless he had been driving the bus. The death was capable of being attributed to the strain ordinarily inherent in the discharge of his duty.

The liability of the employer under the Act is conceptually quite different from the liability under the tort. The Act should be construed in a broad and liberal manner. Therefore, the death of a bus driver of a state road transport corporation who sustains heart attack and collapsed while changing destination name board is death arising out of and in the course of employment.[10]

Apart from compensation for personal injury caused to workmen arising out of and in the course of their employment, the Act also provides for compensation to the workmen who contract any occupational disease peculiar to the employment in which they are employed. In the case of certain occupational disease, the law presumes that if a workman has been employed in a particular employment for a continuous period of not less than six months, and the occupational disease is peculiar to that employment, the contracting of the disease must have been caused by his being employed therein unless the contrary is proved. Detailed provisions are made in the Act to deal with situations where the workman may have served with more than one employer, in which case the responsibility of the particular employer for the disease may have to be determined. Except in cases where presumption may arise as aforesaid, in respect of disease peculiar to particular employments for which a schedule is provided under the Act, the workman can claim compensation from the employer for any disease only if he proves that the disease is directly attributable to a specific injury or accident arising out of and in the court of his employment.

The Act makes detailed provisions for determining the employer who is liable to pay compensation under the Act, and places the responsibility for payment of compensation primarily on the person on whose establishment the person concerned was working at the time of his injury or death. Thus, in the case of persons employed through contractors, the owner of the establishment is made responsible for payment of compensation, although he may, in turn, recover the compensation so paid from the contractor. Moreover, the workman is given a double protection for recovery of compensation due to him in such cases. He may choose to recover compensation from the contractor instead of from the principal employer, as there is no bar under the Act for his doing so.

Compensation is provided for under the Act for the following contingencies:

(a) where death results from the injury;

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10. *Zubeda Bano and others* v. *Maharastra S. R.T Corpn and Others* (1991) 1 LLJ 66 (Bom.).

(b) where total disablement, temporary or permanent, results from the injury; and

(c) where there is temporary disablement, total or partial, due to the injury.

The employer is bound to pay the compensation as soon as it falls due. If he does not accept the liability for compensation to the extent claimed, he is bound, under pain of penalty, to make provisional payment to the extent of the liability which he accepts, without prejudice to the right of the workman to make any further claim against him. All claims relating to compensation payable under the Act are to be decided by a commissioner appointed under the Act.

The date of payment of compensation falling due shall be the date of accident.[11] The liability to pay interest arises as soon as the injury is caused to the workman.[12] Further, if the commissioner considers the delay by the employer in payment of any compensation due as unjustified, he may impose a penalty not exceeding fifty percent of the amount of compensation due.

The most usual cases which have gone to the courts relating to compensation under the Workmen's Compensation Act arise out of the controversy as to whether an accident has arisen out of, and in the course of, employment of a workman. In this connection, cases decided by the English courts have often been relied upon by the courts in India. The tests applied relate to time, place and casual relationship. The test of time is applied to find out whether the accident happened while the workman was engaged in duties directly arising out of, or incidental to, his employment. The test of place is applied to determine whether the accident occurred on, or near, the premises which are under the control of the employer, or at which he normally carries on his trade or business. The casual relationship appears to be the most important and controversial matter and has regard to the question whether there is sufficient link between the employment and the injury.

The Employers' Liability Act, 1938

Even when the Workmen's Compensation Act, 1923 was on the statute book, the legislature in 1938 passed the Employers' Liability Act, providing that if personal injury is caused to a workman by reason of the negligence of the employer or his servant, the suit of the employee for damages will not be defeated on this account. Thus, the notorious doctrine of 'common employment' which imputed to the worker an intention to assume certain risks of injury, especially those caused by fellow-workers, was abolished by

11. *Superintending Engineer KEB Hubli* v. *Kadappa Mallappa* (1984) 1 LLJ 179 (Karn.).
12. *Madan Mohan Verma* v. *Mohan Lal* (1983) II LLJ 322 (All).

statute in India as far back as 1938, while in England such abolition took place as late as in 1948 by the Law Reforms (Personal Injuries) Act. 1948.[13]

The Employees' State Insurance Act, 1948

The Employees' State Insurance Act of 1948 seeks to replace the benefits as available to the workmen under the Workmen's Compensation Act, 1923, by a more comprehensive scheme not only of accident benefit, but for other contingencies like sickness, maternity and funeral expenses. The Act applies, in the first instance, to all factories other than seasonal factories, including factories belonging to the government, but the appropriate government is authorized, in consultation with the Employees' State Insurance Corporation, after complying with the needful formalities, to extend the provisions of the Act to any other establishment or classes of establishments- industrial, commercial, agricultural or otherwise.

The definition of 'employee' under the Act is wide so as to include within the ambit of the Act all persons employed in the establishment of the employer, whether directly or through an intermediary and even taken on hire from other employer. There has also been notional extension of the definition to include all employee connected with the administration of the factory or establishment covered by the Act including those concerned with the sales or purchases relating to the factory or establishment.[14] In *Pondicherry State Weaver's Co op. Society* v. *Regional Director, Employees' State Insurance Corporation, Madras*[15] the question was whether the provisions of the Act are applicable to Weavers' Co-operative Society whose workers are shareholders of the society. It was held that a co-operative society, on registration, becomes a body corporate with a perpetual succession and it is legally independent of its members who constitute the society. Once the society is independent of its members and has a separate legal existence apart from its members, then there is no bar for the society employing its members. And if such members are employed, they are entitled to be covered by the Employees State Insurance Act.

In *Kunnathunad C.S. Co-operative Society* v. *Regional Director, E.S.I.C.*[16] it was held that a co-operative society is a separate legal entity distinct from its members. Hence a society employing its members for wage in manufacturing process is liable to be covered under the Act. Further, the branch office of Brooke Bond engaged in buying the exporting tea was held to be covered by the definition of shop for the purposes of notification

13. O. Kahn-Freund, *Labour and the Law*, 1972, p. 17.
14. *Hyderabad Asbestos Cement Products etc.* v. *E.S.I. Court & Others* (1978) I LLJ 181.
15. (1983) I LLJ 17 (Mad.).
16. (1989) I LLJ 27 (Ker.).

under Section 1 (5) of the Act.[17]

The premises where the businesses of undertaking electrical work contracts in the factories and other places of customers was carried on is a shop and the Act applies by virtue of the notification issued by Karnataka Government extending the provisions of the Act to shop.[18]

In *Balachandra Aggrawal and another* v. *Union of India and others*[19] the petitioner's firm was registered under the West Bengal Shops and Establishments Act, 1963 as a commercial establishment. The Employees State Insurance Act, 1948 was made applicable to the firm which was challenged by it. It was held by the high court that the petitioner's establishment is engaged in rendering services to its customers by providing technical services and such selling of services by the firm brings the establishment within the purview of section 1(5) of the Employees' State Insurance Act, 1948.

The provisions of the Act have to be construed liberally.

Where the driver employed by the transport corporation to drive the truck on payment of remuneration for each trip is employed in connection with its business, it was held that he comes within the definition of employee under the Act.[20] In *Jodhpur Vidyut Vitran Nigam Ltd.* v. *Karamchari Rajya Beema Nigam and another*[21] it was observed that the central government by a notification extended the provisions of the Employees State Insurance Act to Hanumangarh Town and therefore the insurance scheme was applicable in this area also. The appellant contended before the high court that it was not a factory and as such its employees were not covered by the Employees State Insurance Scheme. It was held by the high court that the term 'employee' in section 2 (9) of the Act was not confined to those employed in a factory but extended as well to those engaged in work incidental or preliminary to work of establishment. Hence the appellant was held liable under the Act.

In *Saraswati Films* v. *Regional Director E.S.I. Corporation, Trichur*[22] security guards in cinema hall were employed through another agency which used to send the guards by rotation. The appellant pleaded that these security guards were not their employees. The Supreme Court referring to sub-sections (9), (13), (15) and (17) of Section 2 of the Employees State Insurance Act, 1948 held that the definition of 'employee' in the Act was wide and comprehensive. The appellant was the principal employer of the security

17. *The Brooke Bond India* v. *E.S.I. Corporation* (1980) I LLJ 352 (Ker.).
18. *Reunion Engg. Co. Pvt. Ltd.* v. *E.S.I.C* (1993) 1 LLJ 31 (Karn.).
19. (2000) III LLJ 127 (Cal.).
20. *E.S.I. Corporation* v. *Raj Kamal Transport & Others* (1995) 1 LLJ 94 (A.P.).
21. (2003) 1 LLJ 104 (Raj.).
22. (2002) III LLJ 169 (SC).

guards and they were employees under Section 2 (9) of the Employees State Insurance Act, 1948.

The Act establishes a corporation to implement the scheme of insurance under the Act. The main funds of the corporation are derived from the employers' and employees' contribution, which are specified percentage of their salary or wages. The principal employer is required to pay the employees' contribution in the first instance, with a right to recover the same from the immediate employer. As far as the employees' contribution is concerned, the deduction is to be made from the current wages of the employee, and not otherwise, and paid by the principal employer to the corporation. Recovery of the employer's contribution however, cannot be made from the wages payable to an employee either directly or indirectly. The corporation may also accept donations to augment its funds.

Under the Act, the following benefits are available to an employee:

(a) periodical payments in case of his sickness;

(b) periodical payments to an insured woman worker in case of confinement or miscarriage or sickness arising out of pregnancy (maternity benefit);

(c) periodical payments to an insured person suffering from disablement as a result of an employment injury (disablement benefit);

(d) periodical payments to dependents of an insured person who dies as a result of an injury sustained as an employee under the Act (dependants' benefits);

(e) medical treatment for and attendance on insured person (medical benefit); lastly

(f) funeral benefits towards expenditure on the funeral of the deceased insured person.

Provision is also made for the payment of compensation in case an employee contracts what is called 'an occupational disease'. Protection is given to an employee who is in receipt of sickness or maternity benefit under the Act so that he cannot be dismissed or discharged or otherwise punished during the time he is in receipt of such benefit.

The Maternity Benefit Act, 1961

The Maternity Benefit Act, 1961 provides for a scheme of maternity benefit to women employees employed in factories, mines, plantations and establishments where person are employed for the exhibition of equestrian, acrobatic and other performances. It may be extended by the state government with the approval of the central government to other

establishments, industrial, commercial, agricultural or otherwise. The benefits under the Act are available only to employees in factories and other establishments to whom the provisions of the Employees' State Insurance Act, 1948 do not apply.

To give the woman employee security of service during the period she is drawing benefit of maternity leave, it is provided that if a woman absents herself from work in accordance with the provisions of the Act, it shall be unlawful for her employer to discharge or dismiss her during, or on account of, her absence, or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service. Moreover, any discharge or dismissal of a woman at any time during her pregnancy shall not have the effect of depriving her of the maternity benefit or medical bonus otherwise payable to her under the Act.

In *State of Kerala* v. *N. Ramani*[23] the respondent petitioner, working as senior assistant in the High Court of Kerela applied for maternity leave, which was sanctioned. In continuation thereof, she was sanctioned leave without allowances for one year. She applied for extension of leave for one more year along with a medical certificate, and a letter of recommendation from the high court. The state government while sanctioning the leave imposed the condition that the period of leave will not be counted for any service benefits including pension. The petitioner in the high court challenged this action. Single judge of the high court set aside the part of the order imposing the condition. The division bench affirmed the view taken by the single judge and held that imposition of the condition that the extended period of medical leave would not be included for service benefits including pension was illegal and incorrect.

In *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll)*[24] question before the court was whether the female workers on the muster roll of the appellant were entitled to maternity benefit or not? The respondents were denied the maternity benefit on the ground that their services were not regularized. The tribunal had by its award allowed the claim of the respondent and directed the corporation to extend the benefit under the Maternity Benefit Act, 1961 to all those muster roll female workers who had put in three years of continuous service. Appeal filed in the high court against the award was dismissed by the single judge and the letters patent appeal was also dismissed on the ground of delay. Therefore, special leave was filed in the Supreme Court. The Supreme Court held that the direction issued by the tribunal should be complied with by the appellants.

23. (1999) II LLJ 485.
24. (2000) LLR 499 (SC).

The provisions of the Act have overriding effect over any other law or the terms of any award, agreement or contract of service whether made before or after coming into force of the Act. This is only so far as the woman employee is deprived of any rights under the Act. But there is no bar to any agreement or contract of service, or any award providing to her benefits more favourable to her than those under the Act.

Provident fund and pensionary benefits

Before 1947 very little attention, if at all, was paid by the government to making provision for retiral benefits to the workmen, or for benefits in case of premature termination of their employment for no fault of theirs. The industrial tribunals appointed under the Industrial Disputes Act, 1947, however, even without there being any statutory provisions in that behalf, entertained such claims on a reference being made to them for adjudication. Such claims were allowed by such tribunals having regard to the facts and circumstances of each case, the financial capacity of the employer being given primary importance. Eventually, however, it was felt by the government that a statutory retirement benefit should be laid down for the employees which should be more or less uniform in its terms, so that the employees covered by the scheme could be assured a certain minimum sum or, benefit, on their retirement or premature termination of services. This is intended to provide a modicum of social security to the worker.

Initially, a provident fund scheme was provided for under the Employees' Provident Funds Act, 1952. Later on, through an amendment made in the year 1971, the scope of the Act was extended to cover provision for a family pension scheme also. The Act applies to (a) every establishment which is a factory engaged in any industry specified in scheduled I to the Act and in which 20 or more persons are employed; and (b) any other establishment employing 20 or more persons, or class of such establishments which the central government may, by notification in the official gazette, specify in this behalf. In addition to this, the scheme may be extended to an establishment not otherwise covered by the Act, where the employer and the majority of employees employed in that establishment agree to the same. Further, the Act under section 4 authorises the central government to add to schedule I of the Act so as to cover more establishments and more industries. The Act covers not only the direct employees of the employer to whom the Act applies, but also employees engaged by or through a contractor, or in connection with the work of the establishment. Under the provision of the Act, it is provided that the employer shall make a contribution of 6¼% of the basic wages, dearness allowance and retaining allowance, if any, for the time being, for each of his employees whether employed by him directly and through a contractor. The employees' contribution shall be equal to the contributions payable by the

employer in respect of him, and may, if any employee so desires and if the scheme make provisions therefor, be an amount not exceeding 8⅓% of his basic wages, dearness allowance and retaining allowance, if any. Further, it has also been provided that the central government after making such enquiries as it deems fit may by notification in the official gazette increase the employer's contribution from 6¼% to 8%. No employer to whom the scheme applies is permitted by reason only of his liability under the Act to reduce, whether directly or indirectly, the wages of any employee to whom the scheme applies, or the total quantum of benefits in the nature of old age pension, gratuity or provident fund to which the employee is entitled under the terms of his employment, express or implied. Provision is also made in the Act, so that the amount payable to the employee or his nominees is not attached for discharging other liabilities owed by the employee.

Gratuity benefit

Apart from the statutory provident fund and pension schemes provided for under the aforesaid Act, demands had often been made by the workmen covered under the Industrial Disputes Act, 1947, for additional benefit of gratuity in cases of retirement or premature termination of their service, or even resignation after putting in a certain minimum period of service. The industrial tribunals set up under the Industrial Disputes Act, 1947, considered such demands on the basis of references made to them by the government, and granted the demand in appropriate cases. The award of such a scheme by a tribunal depended, however, on whether the financial capacity of the employer concerned permitted introduction of such a scheme, and also whether such a scheme, existed in other units of the industry in the region. There was also no uniform standard laid down to give guidance to the tribunals as to the quantum of gratuity payable, or the contingencies in which such gratuity should be paid. Decisions of the tribunals with regard to gratuity scheme were often challenged in the high courts but more often in the Supreme Court, which tried to establish certain guidelines for industrial tribunals as to the circumstances in which a gratuity scheme should be framed, the quantum of gratuity and the contingencies in which it should be payable. However, even these decisions of the Supreme Court did not establish any sufficiently definite principles which could avoid disputes in individual cases. Disputes regarding gratuity, therefore, often came up for decision before the industrial tribunals, the high courts as well as the Supreme Court.

Meanwhile, demands were being made on the government for laying down a statutory gratuity scheme which would be uniform, and which would not depend on the financial capacity of the employer or the practice in any particular industry. Certain states like West Bengal and Kerala took initiative in this matter by framing gratuity schemes under Acts applicable to these

states, even before the central government was persuaded to pass the Payment of Gratuity Act, 1972. These state Acts no longer have much relevance in view of section 14 of the Payment of Gratuity Act, 1972, enacted by Parliament, under which it is provided, *inter alia*, that the provisions of the Act or any rule made thereunder, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the central Act under consideration.

The Payment of Gratuity Act, 1972 applies to every factory, mine, oilfield, plantation, coal and railway company, and to every shop or establishment within the meaning of any law for the time being in force in relation to shops or establishments in a state in which 10 or more persons are employed, or were employed, on any day of the preceding 12 months. In addition to this, the provisions of the Act can also be extended by the central government to other establishments, or class of establishments, in which 10 or more employees are employed. The Act applies to only such employees whose wages do not exceed Rs. 1,000 a month and who do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work. The Act is wide enough to bring within its scope, the entire organized sector of industry and commerce. In relation to its application to shop or establishment, in view of clause (b) of section 1(3) it applies to every shop or establishment within the meaning of any law for the time being in force. It has been held in *B. N. Sarda (Pvt.) Ltd* v. *Kishan K. Borade*[25] that there is no justification whatsoever to qualify the words 'any law' by introducing a qualification that the law should be either a Central law or a State law. It does not apply to any person who is employed in managerial or administrative capacity or who holds a civil post under the central government or a state government or who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957.

Municipal Board[26] is held to be an 'establishment' governed by the Payment of Graduity Act, 1972. It is not necessary for a legal heir of an employee to first obtain a succession certificate and then apply for payment of gratuity amount. It will depend upon the facts of the case as to whether such certificate could be necessary or not.

Andhra Pradesh High Court in *Laxmi D. V. A. P. Agricultural University and another*[27] has held that the educational institutions such as university carrying on systematic activity by employing more than ten persons was 'establishment' within the Payment of Gratuity Act, 1972. It was observed that the definition of establishment under section 1 (3) (b) of the Payment

25. (1981) Lab IC 911.
26. *Nagar Palika Moradabad* v. *App. Authority and Addl. Labour Commr. U.P., Kanpur and others* (1990) II LLJ 156 (All).
27. (2002) 1 LLJ 69 (A.P.).

of Gratuity Act, 1972 was comprehensive to include 'establishment' within the meaning of any law, not only law relating to shops and establishments, for the time being in force in a State.

In case of employee drawing wages exceeding Rs. 1000/- per month on the date of coming into force the Payment of Gratuity Act, the gratuity is payable if the termination of the employment is after the date of coming into force of the Act for that period during which the employee came within the definition of "Employment" under Section 2 (e) of the Act. A person whose services are terminated for the reasons mentioned in Section 4 (1) of the Act after coming into force of the Act is entitled to payment of gratuity if he has rendered continuous service for not less than five years for that period during which he satisfied the definition of employee under section 2 (e) of the Act.[28]

In view of provisions of section 4 (3) of the Payment of Gratuity Act, 1972, the amount of gratuity payable shall not exceed on lakh rupees. This ceiling limit has been fixed by the Amendment of the Act of 1994. The maximum amount of gratuity payable was fixed at twenty months wages prior to the amendment of Section 4 (3) when this amount was fixed as Rs. 50,000. In the *Regional Manager, Punjab National Bank, Kanpur* v. *Regional Labour Commissioner (Central) Kanpur & others*[29] the employee was awarded gratuity exceeding twenty months wages by an order dated April 9, 1986. It was held that the employee is not entitled to any amount of gratuity in excess of twenty month's wages.

Gratuity is payable to an employee covered by the Act on the termination of his employment after he has rendered continuous service for not less than five years in the following contingencies: -

(a) on his superannuation;

(b) on his retirement, the word 'retirement' being defined very broadly to mean termination of service of an employee otherwise then on superannuation;

(c) on his resignation

In addition to this, gratuity is also payable to an employee on his death or disablement due to accident or disease. In such a case, there is no requirement of minimum continuous service of 5 years as in other cases mentioned above. An employee so entitled to gratuity shall be paid such gratuity at the rate of 15 days wages based on the rate of wages last drawn by the employee concerned subject to a maximum of 20 months' wages. Wages as defined under the Act include basic wages and dearness allowance but not other allowances. However, if an employee is entitled to receive

28. *The Management of Goodyear India Ltd.* v. *Shri K. G. Devassar* (1986) I LLJ 25 (SC).
29. (1995) I LLJ 852 (All).

better terms of gratuity under any award or agreement or contract with the employer, the employee's right to receive such better terms of gratuity is not affected by the provisions made under the Act.

Retrial benefit for the worker: Summing up

With the adoption of the Payment of Gratuity Act, 1972, therefore, practically all industrial establishments of certain minimum size are required to introduce a double retirement scheme of provident fund and gratuity. As a matter of fact, with the amendment of the Employees' Provident Funds Act, 1952, in 1971, the employees and their nominees covered by the two Acts above may be entitled to triple benefits namely provident fund, gratuity and pensionary benefit. Such retirement benefits are not dependent any more on the financial capacity of the employer, but accrue to an employee after he has satisfied the requirements as laid down under the respective Acts. Provided an employer is covered under the Act and has not been granted exemption, he cannot claim immunity on grounds of financial incapacity. There is also uniformity in this respect between different kinds of industrial establishments, leaving some scope for better retirements benefits under awards or agreements or contracts with the employer. There is not little scope for any industrial dispute arising on the subject of retirement scheme in view of the statutory provisions made under the Employees' Provident Funds Act, 1952, and the Payment of Gratuity Act, 1972. it can now be, more or less, definitely stated that statute has given ample protection and benefits to the employees in the form of retirement benefits, which previously depended on the financial capacity of the employer concerned and the industry-cum-region basis, for which an industrial dispute has to be raised by the employees concerned and, many a time, prolonged litigation took place.

III

CONTRACT OF EMPLOYMENT, JOB SECURITY AND REGULATION OF CONTRACT LABOUR

The general principal or contract, which in India have been incorporated under the Indian Contract Act, 1872, regulated the relation between employers and employees, or between master and servant, before the emergence of modern system of industrial jurisprudence. Under the general law of contract, any one can agree to work for another for hire or reward and thereby put himself under his control and supervision, and in return be paid such remuneration as has been agreed upon mutually. The ordinary courts of the country, in case of disputes between the employers and the employees, enforce the contractual rights of the parties. Such contractual rights need not be incorporated in any written document, in which case the

terms of the contract of employment have to be gathered from the surrounding circumstances, supplemented by certain implied conditions, which are deemed to have been agreed upon between the employer and the employee, unless otherwise stated in writing. Upto 1946, apart from legislation laying down certain safeguards to protect the health and safety of the workmen, and to ensure payment of wages in time and providing for payment of compensation in case of accidents, there was little regulation of the contract of employment with the result that the whole matter was left to the sweet will of the parties. In the absence of effective collective bargaining in most industrial establishments, such bargain used to be, generally speaking, a one-sided matter, because of the superior bargaining position of the employer, and the inability of unorganized individual labourer to hold out for a better bargain. He had either to accept employment on the terms offered by the employer, or to face starvation. With the emergence of modern industrial jurisprudence, which had its birth during theSecond World War and took concrete form only after the achievement of political independence by India, these concepts have undergone drastic changes which have interfered with the contractual relations between employers and employees in favour of the employees, so as to give them protection against the superior economic strength and bargaining position of the employer.

The Contract Labour (Regulation and Abolition) Act, 1970 which came into force on 1st February 1971 aims at abolition of contract labour in respect of such categories as may be notified by the appropriate government in the light of certain criteria that have been laid down, and at regulating the service conditions of contract labour where abolition is not possible. It provides for setting up of Advisory Boards of a tripartite character, representing various interests, to advise Central and State Governments in administrating the legislation and regulation of establishments and contractors. Under the scheme of the Act, the provision and maintenance of certain basic welfare amenities for contract labour, like drinking water and first-aid facilities, and in certain cases rest-rooms and canteens, have been made obligatory. Provisions have also been made to guard against delays in the matter of wage payment.

The Industrial Employment (Standing Orders) Act, 1946

The first attempt by the legislature at the central level to interfere with the contract of employment, or at least, to have the terms of employment defined with sufficient precision was the enactment of the Industrial Employment (Standing Orders) Act, 1946. To start with, the object of the Industrial Employment (Standing Orders) Act was a limited one, *viz.*, to require employers in industrial establishments employing 100 workmen or more, formally to define conditions of employment under them. It was not the purpose of the Act at that time to give any powers to the statutory

authorities set up under the Act, to decide what the conditions of employment should be.[30] It was merely intended to deal with malpractices arising from the fact that many employers left the conditions of service indefinite and undefined.[31] By the Industrial Disputes (Amendment & Miscellaneous Provisions) Act, 1956, a radical departure was made from the previous scheme of the Act, inasmuch as it was provided under the aforesaid amending Act that it would be the function of the certifying officer or appellate authority (as hereinafter described) to adjudicate upon the fairness or reasonableness of the provisions of the standing orders submitted to them and make amendments and changes as considered reasonable and fair by them. That these powers would not be used arbitrarily was ensured by providing for appeals against the decisions of the certifying officers to an appellate authority appointed under the Act. The standing orders as finally certified under the procedure as aforesaid are also subject to modification on the application of either party. Provision is made in the Act for the appropriate government to refer disputed arising out of application and interpretation of the standing orders certified under the Act to a labour court for decision, which decision then is made binding on the parties.

The standing orders as certified under the aforesaid procedure acquire the force of law in the sense that there cannot be any individual contract of employment contrary to the standing orders. However, in spite of this fact, industrial disputes can still be raised with respect to matters covered by the standing orders. Till such a dispute is raised and decided, the standing orders hold the field, and it is in accordance with these standing orders that the rights and obligations of the parties, namely, the employer and the workmen, are determined in matters provided for under the standing orders. Where the Standing Order contemplates a notice to be given to the workman for the purpose of enabling him to show cause, within a specified period, against his dismissal, the notice must give a reasonable opportunity to the workman. That is a condition precedent which must be satisfied before an order of dismissal can be validly passed by the employer.[32] The other matters like hours of work, holidays, *etc.*, have been covered under their respective heads. However, one subject which has acquired primary importance in the field of industrial law in India and which is also covered under the certified standing orders to a certain extent, may now be dealt with under the broad heading of security of employment.

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30. See *Guest, Keen Williams (Pvt.) Ltd.* v. *Sterling* (PJ) (1959) II LLJ 405: AIR 1959 SC 1279.
31. *Rohtak Hissar District Electric Supply Co.* v. *State of U.P. and Others* (1966) II LLJ 330: AIR 1966 SC 1471.
32. *Lakshirattan Cotton Mills* v. *Workman* AIR 1975 SC 1689.

The Standing Orders provide for giving opportunities to workers to offer explanation before imposing punishment by dismissal. It was held in *Associated Cement Companies Ltd* v. *T. C. Srivastava and others*[33] that neither under the ordinary law of the land nor under the industrial law a second opportunity to show cause against the proposed punishment is necessary. This does not mean that a standing order may not provide for it, but unless the standing order provides for it, either expressly or by necessary implication, no inquiry which is otherwise fair and valid will be vitiated by non-affording of such second opportunity.

Security of employment

To an industrial worker anywhere, security of employment has a great deal of importance. In the Indian conditions where there is large scale unemployment, security of employment assumes added and overriding importance to the worker. The legislature and the courts, however, have had to look at the problem from a two-fold angle–from the point of view of the employee for whom, of course, it is of utmost importance that he should have security of service. But, as against the employees' legitimate desire for security of employment due consideration has to be given to the requirements of discipline, without which no industry can grow or prosper. Moreover, there may be situations where for economic reasons or on considerations of efficiency, the employer may have to discharge employees and resort to retrenchment of surplus staff. There may also be temporary contingencies due to which he may not be able to provide work to the employees. As a result employees may have to be laid off, or 'played off', as the expression goes in some western countries.

We will divide the subjects under four headings as below:

(i) simple termination of service or 'discharge simpliciter'.

(ii) termination for misconduct generally termed in India as 'dismissal';

(iii) retirement on reaching the age of superannuation; and

(iv) lay off or retrenchment of surplus staff, transfer of undertaking and closure.

(i) Termination of service or discharge simpliciter

Under the Indian Contract Act, contract of service or employment is the result of volitional act of the parties. Under the contract of employment parties are also free to agree as to how the termination of contract of employment may be brought about. Such termination may be without notice or by such notice as may be agreed upon. This has been conveniently

33. (1984) 11 LLJ 105 (SC).

summed up in the expression- "freedom to hire and fire". Under the ordinary civil law there could be no question of the employer being required to retain an employee in service against his wishes, just as the employee could not be forced to continue to serve the employer against his wishes. Any constraints in this connection could only be such as are agreed upon between the parties. Moreover, in the event of breach of obligations by any party, the only remedy the other party would have is a claim for damages. There could be no specific enforcement of a contract of personal service. No employer could be compelled to continue in service any employee against his wishes. Nor, correspondingly, the employee could be compelled to serve a master whom he is unwilling to serve.

However, in India since Independence we have come a long way from the doctrine of freedom to hire and fire. The change has been brought about mainly by the awards of adjudicators while deciding disputes relating to termination of service of workmen under the Industrial Disputes Act, 1947. The principles laid down by such adjudicating authorities have received the final imprint of the Supreme Court of India. In the case of *Western India Automobile Association* v. *Industrial Tribunal*,[34] the Federal Court of India held that in deciding industrial disputes referred to them, industrial tribunals are not merely to enforce the contractual right of the parties. They may modify contracts in the interest of industrial peace so that there is no unfair labour practice or victimization, and order reinstatement of an employee whose services have been dispensed with by the employer although such reinstatement is not permissible under the ordinary civil law. This judgment of the Federal Court has been affirmed and reaffirmed many a time by the Supreme Court. In the case of termination of service by the employer, industrial tribunals are not satisfied by the plea of the employer that he has acted in accordance with his contractual rights. Even where the termination of service is in accordance with the certified standing orders the requirement of *bona fide* is essential, and capricious or arbitrary discharge, or discharge for ulterior considerations like trade union activities of the workmen has been set aside by industrial tribunals. This does not mean, however, that the employers cannot discharge employees under any circumstances except for misconduct. There may be cases where misconduct may not be proved against the employee, and yet the employer may be justified in terminating the services of his employee for good and sufficient reasons like *bona fide* loss of confidence in the employee. However, in each case, the tribunal, to which the dispute is referred, would be entitled to go behind the order of discharge or simple termination of service, and not accept merely the form of such an order as final. If the discharge is really based on misconduct, the employer will have to show that either he conducted a proper enquiry as a

34. (1949) LLJ 245: AIR 1949 FC 111.

result of which he *bonafidely* came to the conclusion that the employee was guilty of such misconduct as warranted such discharge, or satisfy the tribunal about his *bona fides* by leading relevant evidence before it.[35]

Section 11-A of the Industrial Dispute Act 1947 confers power on the labour court to evaluate the severity of misconduct and to assess whether punishment imposed by the employer is commensurate with the gravity of the misconduct. If the labour court after evaluating the gravity of the misconduct held that punishment of termination of service is disproportionately heavy in relation to misconduct and exercised its discretion, the Supreme Court in the absence of any important legal principles would not undertake to re-examine the question of adequacy or inadequacy of material for interference by labour court.[36]

In *Regional Manager, R.S.R.T.C.* v. *Ghanshyam Sharma*[37] the respondent was employed as conductor by the appellant. He was charge- sheeted for not issuing tickets to the passenger. On a reference being made to the labour court it directed his reinstatement without back wages, but the single bench of the high court set aside the award, which was reversed by the division bench of the high court. In appeal, it was held by the Supreme Court that the labour court was not justified in interfering with the punishment of dismissal. Though under section 11 - A the labour court has jurisdiction and power to interfere with the quantum of punishment, but the discretion has to be used judiciously. When the main duty or function of the conductor is to issue tickets and collect fares and then deposit the same with the Road Transport Corporation and when he fails to do so, then it will be misplaced sympathy to order his reinstatement instead of dismissal.

(ii) Retirement on reaching the age of superannuation

The services of an employee may also be dispensed with by the employer on reaching the age of superannuation, provided there is a provision in that behalf in the contract of employment or service rules or the certified standing orders. The tribunals set up under the Industrial Disputes Act are, however, competent, and very often have either laid down the age of retirement for the first time, or modified the age of retirement fixed under the contract of employment or service rules or even under the certified standing orders. In deciding such disputes, the tribunals are mostly guided by what has come to be termed 'the industry-cum-region basis' or 'the region-cum-industry basis'. The tendency lately is for the tribunals to fix the

35. *U.B. Dutt & Co. (P) Ltd.* v. *Its Workmen* (1962) I LLJ 374: AIR 1963 SC 411 and *Michael L.* v. *M/s Johnson Pumps Ltd.* (1975) I LLJ 262: AIR 1975 SC 661.
36. *Hindustan Machine Tools Limited, Bangalore* v. *Mohd. Usman & Anr.* (1983) 11 LLJ 386 (SC).
37. (2002) 1 LLJ 234 (SC).

age of retirement at 58 years or 60 years depending upon the region and the industry with which they are dealing.

Prior to 1972, there was no specific legislation to regulate gratuity. The gratuity was, however, determined by the court. Prior to the Payment of Gratuity Act, 1972, gratuity, on reaching the age of superannuation raised two important questions:

(i) What is the age of superannuation for the purpose of entitlement of gratuity?

(ii) What is qualifying period of service?

As to the first, the tribunals were not unanimous. They took two different views regarding the age of superannuation in different industries. Sometimes, the age of superannuation also varied from region to region. But the controversy was set at rest in *Bengal Chemical and Pharmaceuticals Ltd.* v. *Its Workmen*[38] where the Supreme Court following its earlier decision in *Workmen of Jessop & Co. Ltd.* v. *Jessop and Co. Ltd.*[39] and keeping in view the trend in the area, age of superannuation of an employee for the purpose of claiming gratuity fixed at fifty eight years. This view appears to have been approved and adopted by the Parliament in enacting section 2 (r). Thus, section 2 (r) defines "superannuation" in relation to an employee as:

(i) the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment; and

(ii) in any other case the attainment by the employee of the age of fifty-eight years.

In *Fibre Foam Pvt. Ltd.* v. *K. Kannan Nair*[40] the Kerela High Court has held that where the contract of employment does not specify the age of superannuation, the attainment of age of fifty-eight years by the employee would amount to superannuation.

In *Cawnpore Sugar Works Ltd.* v. *Appellate Authority*[41] the Allahabad High Court has held that where the employee had attained the age of superannuation of sixty years prior to the coming into force of the Act, his employment stood vacated before the commencement of the Act itself so that he could not claim to be entitled to payment of gratuity under the Act on the occasion of termination of employment by his superannuation.

The aforesaid view of the high court created practical difficulties. The Payment of Gratuity (Amendment) Act, 1984, therefore, provides for the substitution of the existing definition by the following:

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38. (1969) 1 LLJ 751.
39. (1964) 6 SCR 15: AIR 1964 SC 1040.
40. (1980) 1 LLJ 421 at 423.
41. (1982) Lab IC 969 (All).

> Superannuation in relation to an employee means the attainment by the employee of such age as is fixed in the contract or condition of service as the age of attainment of which the employee shall vacate the employment.

In the pre-1972 period, there were two views prevailing for the determination of the question of payment of gratuity in case of dismissal of an employee for misconduct resulting in financial loss to the concern: (i) Gratuity should not be paid to the workmen dismissed for misconduct involving financial loss to the management; (ii) The amount of loss may be deducted from the gratuity in case of financial loss to the concern. The Payment of Gratuity Act has made a departure from the practice prevailing prior to 1972. Under sub-section (6), the gratuity payable to an employee can be partially or wholly forfeited if the services of the employee have been terminated for an offence involving moral turpitude.[42]

(iii) Dismissal or discharge for misconduct

The services of an employee may also be dismissed or otherwise terminated for misconduct, or for the employee conducting himself in a way as is inconsistent with the due discharge of his duties to the employer. Industrial establishments which have in their employment 100 workmen or more, are guided in this matter by the certified standing orders, or, in the absence of such standing orders, by the model standing orders framed by the appropriate government. Under these standing orders, a list of misconducts for which an employee may be proceeded against by way of disciplinary action is set out. Where the Standing Orders Act is, however, not applicable and no written or disciplinary rules exist, the matter has to be decided by the general common law relating to master and servant, and has to be seen as to whether the employees' conduct can be termed as such that interferes, or is inconsistent with, the due discharge of his obligations *vis-à-vis* his employer.

If an employee is reported to be guilty of misconduct, the employer is not expected to act hastily or arbitrarily or capriciously in terminating his services for such misconduct. Before such termination he must give a reasonable opportunity to the employee concerned to be heard, or, to put it in legal jargon, comply with the principles of natural justice. Such principles of natural justice have, however, not been exhaustively defined by the Supreme Court. They include, however, the right of the employee to know in advance what are the charges against him, a reasonable time within which to reply to the charges; and if he denies the charges, reasonable opportunity to defend himself in respect of the same. Generally proof of misconduct

42. *District Co-operative Central Bank Ltd.* v. *Vizianagaram, by its General Manager* 1999 LLR 850 (AP).

requires a regular domestic enquiry where all the witnesses in support of the charges are examined in the presence of the person proceeded against, he is then given the opportunity to cross-examine such witnesses and thereafter to produce relevant evidence in his defence. Thereafter, the enquiry officer is expected to make a report discussing the evidence and stating his findings as to whether the charges have been proved against the employee or not. If the enquiry officer has come to the conclusion that the employee is guilty of the charges contained in the charge sheet, and the employer accepts his findings, he has then to determine as to what punishment should be imposed for the charges proved against the employee.

Till the amendment of the Industrial Disputes Act, 1947, by the Amendment Act of 1971, the tribunal's jurisdiction to interfere in cases of dismissal or discharge of employees for misconduct was, however, limited. The tribunal was not supposed to sit in appeal over the findings of the enquiry held by the employer. All that the tribunal could examine was whether the employer's action was *bona fide*, and not actuated by *mala fides*, or taken for ulterior considerations or an act of unfair labour practice or victimization. The tribunal had also to examine whether in discharging or dismissing the employee, the employer had contravened any principles of natural justice or that the findings of the enquiry officer or the employer with regard to the charges were based on legal evidence and were not baseless or perverse in the sense that they were not supported by any legal evidence, or such evidence as would not be acceptable by any reasonable person. With regard to the quantum of punishment, the tribunal's jurisdiction was similarly limited. The tribunal was only to see whether the punishment was imposed *bona fide* and was not such as would shock the conscience or was not an act of discrimination or victimization. However, with the addition of section 11-A in the Industrial Disputes Act, 1947 which has become effective from 16 December 1971, the tribunal's jurisdiction in connection with such cases has been considerably enlarged.[43] The tribunal is now entitled to sit in appeal over the findings of the enquiry officer, and set aside the same in suitable cases. With regard to punishment also, the tribunal is now competent to examine whether the punishment is commensurate with the misconduct or excessive in its view. If it is excessive in its opinion, such opinion being, of course, a judicial opinion and not an arbitrary one, then it has the jurisdiction to interfere, and substitute some other punishment in place of that which has been imposed by the employer, and grant reinstatement or such other relief to the workman as the tribunal deems fit.

The conduct of a domestic enquiry in accordance with the principles of natural justice is desirable and necessary. But if such an enquiry is not

43. See *Workmen of Fire Stone Tyre and Rubber Company* v. *Management* (1973) 1 LLJ 278: AIR 1973 SC 1227.

conducted, or the enquiry is set aside for non-compliance with the standing orders or service rules applicable in this behalf or the principles of natural justice, the action of discharge or dismissal is not void *ab initio* on that account. In such a case, the employer has the right, if he so requests the tribunal, to lead the necessary evidence before the tribunal, in which event, the workman would have the corresponding right to cross-examine the witness produced by the employer and to produce his own evidence in defence. In such cases, the tribunal would be entitled to come to its own conclusion with regard to the alleged misconduct of the employee and pass appropriate orders as it deems fit and proper in the circumstances of the case.

Any discussion with regard to the law of discharge or dismissal would be incomplete without something being said on the question of relief. As is well known, under the ordinary civil law, a contract of personal service cannot be specifically enforced. Thus, if an employee has been illegally and wrongfully discharged or dismissed, he cannot claim reinstatement or re-employment with the employer as a matter or right; he can only claim damages. However, inasmuch as industrial tribunals are not bound by the ordinary civil law or the law of master and servant, they are not fettered by any such limitations. The general rule where the dismissal or discharge of the workman is found illegal or unjustified by the tribunal is to grant reinstatement with full back wages. However, the employer may lead evidence that reinstatement or grant of full back wages would not be the proper relief in a particular case, in which event, the tribunal may in suitable cases grant only monetary compensation to the workman concerned, or even when granting reinstatement may refuse to grant full or even part back wages.

The question of riotous and disorderly misconduct came up before the Supreme Court for consideration in *Management of Touramulla Estate* v. *Workmen.*[44] In this case, the workman was charge-sheeted for riotous and disorderly behaviour for assaulting a tea-maker. In a departmental enquiry he was found guilty of misconduct and dismissed; the management forfeited his gratuity. The Supreme Court considered in detail the circumstances in which the gratuity would be forfeited for misconduct of a particular nature and observed that misconduct could be of three kinds: (a) technical misconduct which leaves no trail of indiscipline; (b) misconduct resulting in damages to the employer's property which might be compensated by forfeiture of gratuity and part thereof; and (c) serious misconduct, such as acts of violence against the management or other employee or riotous or disorderly behaviour in or near the place of employment which though not directly causing damage, may lead to grave indiscipline. The *first* should

44. AIR 1973 SC 2344.

involve no forfeiture, the *second* may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third will entail forfeiture of gratuity due to the workmen. So if the workman is guilty of riotous or disorderly behavior, which is conducive to grave indiscipline the employer can forfeit the gratuity in its entirety.

(iv) Lay off, retrenchment, transfer of undertaking and closure

There may be circumstances where the employer may find that he is not able to give employment to his workman owing to decline in business, temporary shortages, shut downs, lack of supply of electricity and other such reasons. Where his inability to provide employment is merely temporary and likely to be overcome within a reasonable period, it would be unwise of him, and indeed not permissible under law, to terminate the services of his employees. At the same time it would be unfair and unreasonable to compel him to continue to employ persons for whom he has no work. In such cases, the employer may 'lay off' his workmen. Under the Industrial Disputes Act, 1947, except in cases of seasonal establishments or small establishments employing 50 workmen or less, however, the employer is required to pay to his workman during the period of such lay off wages equivalent to half the basic wage and dearness allowance which would otherwise be payable to them. If he eventually finds, however, that the difficulties which he initially thought to be temporary are going to continue and that he has to retrench workmen in accordance with the provisions of law, as discussed hereinafter, he may deduct the lay off compensation paid to such workmen and pay only the balance by way of retrenchment compensation. Such lay off compensation is, however, not payable if the workmen so laid off do not report for work daily at the time fixed or do not accept alternative employment or where they have had to be laid off owing to go slow or strike in another part of the establishment of the employer. The lay off by the employer, however, has to be *bona fide*, must not be for ulterior considerations. If its *bona fides* are not established, the tribunals to whom disputes may be referred in such cases may award even full wages for the period of lay off.

The more serious consequence from the workmen's point of view, however, is when they are thrown out of employment, because the employer finds that they have become surplus to his requirements, or decides to retrench them from service. It is an accepted principle that it is for the employer to decide how to run his business, and , if in the process of reorganization of his business, the services of some of the workmen are rendered surplus, much as industrial adjudication may be sympathetic to the workmen, it would not interfere with the action of the employer unless it finds that the action of the employer is not *bona fide* or has been resorted to without complying with the statutory requirements, which are contained in

section 25 F of the Industrial Disputes Act, 1947. Under this section, no workman who has completed one year of continuous service with the employer can be retrenched by him unless he gives one month's notice stating the reasons for retrenchment or pays to the workmen so retrenched one month's wages in lieu of notice. The employer is further required to pay to such workmen retrenchment compensation equivalent to 15 days' average wages for every completed year of service. The above are conditions precedent to retrenchment and non-compliance with them renders the retrenchment itself void and ineffective.[45] The employer is also required to inform the appropriate government with regard to such retrenchment. Such notice is, however, directory and not mandatory.[46] Even where conditions precedent have been observed, the tribunal is not precluded from examining whether the retrenchment was actually warranted by facts, or is actuated by ulterior motives or is an act of unfair labour practice or victimization on the part of the employer. In the event of the verdict being adverse to the employer in such matters, the tribunal is competent to give appropriate directions which may even be reinstatement with full back wages to those so illegally or unjustifiably retrenched.

In *Nathanial Masih* v. *U. P. Scheduled Caste Finance and Development Corporation Ltd and others*[47] the services of a driver of a corporation was terminated without paying any compensation under Section 25F of the Act. The function of the corporation is to organize and work in various ways for upliftment of down trodden, help them financially for various purposes, including starting industries and help them in getting technical training. It was held that in view of the various activities being carried on by the corporation it is an industry within the meaning of the Industrial Disputes Act and termination of their services amounts to retrenchment which being in violation of section 25F is illegal.

When the service of petitioner who was a chowkidar and had worked for more than 240 days in a year was terminated without complying with section 25F of the Industrial Disputes Act, 1947, it was held that the petitioner has worked for more than 240 days in a year prior to his termination, therefore, he was entitled to reinstatement with full back wages.[48] Similarly, the respondents who had worked in the telecom department as a Mazdoor for about two and half years, was held to be entitled to the benefit of Section 25F of the Industrial Disputes Act.[49]

45. *State of Bombay and Ors.* v. *Hospital Mazdoor Sabha & Ors* (1960) II LLJ 251: AIR 1960 SC 610.
46. *Bombay Union of Journalists* v. *State of Bombay* (1964) I LLJ 351: AIR 1963 SC 1617.
47. (1991) II LLJ 347 (All).
48. *Shern Singh* v. *State of Punjab and others* (2002) III LLJ 210 (P&H).
49. *Divisional Engineer, Telecom Coaxial Cable Project, Rajahmundry* v. *Mamidi Venkata Ramanna and another* (2003) II LLJ 907 (A.P.).

The definition of workmen in section 2 (s) does not make a distinction between a full time employee and a part time employee. The termination of even a part time employee amounts to retrenchment and if provisions of section 25F are not followed the retrenchment will not be valid.[50] In *Alex Fernandes of Bombay* v. *(Smt.) N. A. Kadam and others*[51] the question was whether a workmen who was in service of the employer for about 11 years could be validly retrenched for being absent for more than a year unauthorisedly and being irregular. The workman remained absent in 1974 and 1975 but was retrenched in 1977 without following the rule of last come first go. It was held that the workman was retrenched by way of punishment for his long absence without giving him a reasonable opportunity of being heard to explain his misconduct. The action of the company was not *bonafide* and the retrenchment was *void ab initio*. The employee was entitled to reinstatement with full back wages and continuity of service. In *Deepchandra* v. *State of U.P. and another*[52] it was held that in case of an employee having put in service for more than 240 days in each year for several years would entitle the employee to be reinstated in service on same conditions as before termination.

There may be cases where the undertaking or the management or ownership of an undertaking itself may be transferred. In such an event under section 25FF of the Industrial Disputes Act, by a fiction of law, the workmen employed with the employer who has transferred the undertaking would be deemed to be retrenched by him and he would be liable to give notice or notice pay and retrenchment compensation to his workmen. However, if there is an agreement between such an employer and the transferee of the management or ownership of the undertaking under which the workman would be continued to be employed by the transferee employer with continuity of service and without change in conditions of service to the detriment of the workmen, there would be no liability to pay such compensation. If after the transfer, however, the transferee employer retrenches such workmen, he would have to pay retrenchment compensation to them on the basis of continuity of service of their employment with the previous employer.

It was held in *Gurusharan Thappa* v. *Abdul Khuddus*[53] by the Supreme Court that when a government undertaking was taken over by the company as a going concern the employee working in the undertaking was also taken over and since, in law, the company has to be treated as an entity distinct and separate from the government, the employees as a result of transfer of the undertaking became employees of the company and ceased to be employees of the government.

50. *Yashwant Singh Yadav* v. *State of Rajasthan and ors.* (1991) 1 LLJ 501 (Raj.).
51. (1988) II LLJ 287 (Bom.).
52. (2001) I LLJ 742 (SC).
53. AIR 1969 SC 744.

There may be cases also where the undertaking itself may be closed down by the employer. In such an event, it has been held by the Supreme Court that the definition of retrenchment under the Industrial Disputes Act is not attracted and there is no liability in the employer to give notice or pay compensation as in the case of retrenchment. To remedy this lacuna in the Act, the legislature added section 25FFF to the Industrial Disputes Act, under which it is provided that in cases of such closure workmen would be entitled to the same notice or notice pay and compensation as in the case of retrenchment. By an amendment in 1972, there has been still another addition by which it is not required that the notice of intended closure of undertakings in which fifty workmen or more are employed and which are not engaged in construction work or project work should be given at least 60 days in advance together with the reasons for such closure. In case the employer closes an undertaking, the tribunal cannot direct the employer to re-start the same, provided it comes to the conclusion that the closure is a real closure and not a sham closure. However, the tribunal is not precluded from enquiring whether the closure is genuine or merely a pretence for lock out, in which event, the tribunal can interfere and give the necessary directions and in proper cases award full payment of wages for the period of pretended closure to the workmen affected by it.

By amendments made in the Act in 1976 drastic changes have been carried out in regard to lay off, retrenchment and closure of industrial establishments in which not less than 400 workmen are employed. In such cases, it had been made a condition precedent for lay off, retrenchment or closure of the undertaking that permission of the appropriate authority set up under the Act is obtained before the same are resorted to.

Abolition and regulation of contract labour

Another serious inroad has been made into the sphere of free contractual relations inasmuch as even in cases where there is no employer employee relationship between the owner of an establishment and the persons who work on that establishment, the law interferes to give protection to labour employed on the establishment. Initially, the welfare and social security legislation kept labour employed by the contractor outside its scope. But gradually it was realized that this resulted in gross abuses, and labour employed through such contractors was left without any protection whatsoever. To remedy such a situation, there has been a general tendency on the part of the legislature to extend the benefits of social welfare legislation relating to labour to contract labour also. This would be evidenced by the extended definition given to the definition of employee in various Acts like the Employees' State Insurance Act, 1948, and the Employees' Provident Funds Act, 1952. Even so, the evils of contract labour were not entirely overcome by such legislation. In this context, the

judgment in *Standard Vacuum Oil Co., Ltd.* v. *Their Workmen*[54] has a rather revolutionary significance. In this case, Gajendragadkar, J., (as he then was), speaking on behalf of the Supreme Court, held that an industrial dispute can legitimately be raised under the Industrial Disputes Act, 1947, for abolition of contract labour inasmuch as the direct employees of the employer have a direct and substantial interest in their conditions of service. In this case, the Supreme Court also indicated some criteria for deciding as to the circumstances in which the tribunal may direct abolition of the system of employment of contract labour for certain jobs. In subsequent cases the principles laid down by the Supreme Court in the *Standard Vacuum Company* case were further elaborated and applied, having regard to the circumstances of those cases. Ultimately, in order to bring about uniformity in this matter, the legislature passed the Contract Labour (Regulation and Abolition) Act, 1970. The constitutional validity of this Act was challenged before the Supreme Court, but has been upheld by it in *Gammon India Ltd.* v. *Union of India & Ors.*,[55] it has further been held by the Supreme Court in *Vegoils Private Ltd.* v. *The Workmen*[56] that the Act is a self-sufficient code in respect of regulation and abolition of contract labour. The underlying policy of the Act is to abolish contract labour, wherever possible and practicable and where it cannot be abolished altogether it is to see that the working conditions of contract labour are so regulated as to ensure payment of wages and provisions of essential amenities.

The Contract Labour (Regulation and Abolition) Act, 1970 merely regulates the employment of contract labour in certain establishments and provides for its abolition in certain circumstances. But the Act does not provide for the total abolition of contract labour. It provides for abolition by the appropriate government in appropriate cases.[57]

Regarding application of the Act, the Gujarat High Court in *Food Corporation of India Worker's Union* v. *Food Corporation of India and others*[58] has held that having regard to the provisions of the Act it is evident that (i) principal employer should have a certificate of registration and (ii) the workman can be employed on contract labour basis only through licensed contractor. The certificate of registration is required to be obtained by the principal employer, issued by the appropriate government under the provisions of section 7 of the Act. The license is to be obtained by the contractor under the provisions of section 12 of the Act. The workman can be employed as contract labourer only through licenced contractors. Unless

54. (1960) II LLJ 233.
55. (1974) I LLJ 489.
56. (1972) I LLJ 567.
57. *Dena Nath* v. *National Fertilisers Ltd.* (1992) 1 LLJ 289.
58. (1992) 1 LLJ 257.

both these conditions are complied with, the provisions of the Act would not be attracted. Therefore, in a situation wherein either of these two conditions is not satisfied, the position would be that a workmen employed by an intermediary would be deemed to have been employed by the principal employer.

IV

LAW RELATING TO WAGES, ALLOWANCES, BONUS AND OTHER TERMS OF EMPLOYMENT

The Payment of Wages Act, 1936 and other allied legislations

The first attempt to protect industrial workers with respect to their wages was designed to ensure that payment of wages to them is made in time and that unauthorized deductions are not made from their wages. The Royal Commission on Labour in India, which gave its report in June 1931, thought that delayed payment of wages was one of the factors leading to the indebtedness of Indian labour, and it needed protection against unauthorized deductions by employers from its wages. The Payment of Wages Act, 1936 was the direct result of the recommendations made by the Royal Commission. The Act has been modified and amended from time to time. The main provisions of the Act, as it exists on the statute book today, are discussed below.

The Act does not purport to regulate wages or to interfere with the contract of employment, except to the extent necessary to stop unauthorized deductions or delay in payment of wages. The Act initially applied to payment of wages to persons employed in factories, or persons employed in railways, but power was given to the state governments to extend the operation of the Act to persons employed in any other industrial establishment, or group of industrial establishments. By virtue of the powers vested in the governments as above, the provisions of the Act have been extended to various other industrial establishments as defined under the Act including mines and oil fields. They have also been extended to motor transport workers under the Motor Transport Workers Act, 1961 and to shops and commercial establishments under the provisions of the Acts passed by the respective states.

Employers covered by the Act are required to make payment of wages to their employees covered by the Act within certain period and without deductions of any kind, except those authorized under the Act. A list of deductions which may be made from the wages of an employee covered by the Act is laid down under the Act, and detailed provisions are made as to

the conditions subject to which such deductions can be made. Employers covered by the Act are required to maintain registers and records which would show that the provisions of the Act have been duly complied with. Inspectors have also been appointed under the Act, to see to the enforcement of its provisions, and penalties are provided against the employers for non-compliance. Recognizing the weak bargaining position of the employees, it has also been provided that any contract or agreement, whether made before or after the commencement of the Act, whereby an employed person relinquishes any right conferred by the Act shall be null and void in so far as it purports to deprive him of such right.

The procedure under the Act for recovery of delayed wages or of unauthorized deductions is also a summary procedure and special authorities are appointed for expeditious disposal of such cases.

So much for the machinery provided under the Act for recovery of wages due to the employees and of unauthorized deductions. Such machinery, as we have seen was provided much before India achieved political independence. However, far more revolutionary changes have taken place in this field after 1947, when the state has actively intervened to provide not only minimum, but also fair wages, to certain categories of employees. This legislation and case law on the subject we shall now proceed to examine.

The Minimum Wages Act, 1948

Wage regulation by statute has generally a two fold aim–first, to prevent sweating and payment of unduly low wages to sections of workers who have not yet organized themselves into trade unions; and second, to maintain industrial peace by resolving conflicts between employers and employees in this regard. Towards the attainment of the above objectives, the Indian legislature has adopted *two-fold* measures (i) to regulate minimum wages by statute; and (ii) to resolve conflicts of labour and capital on the question, *inter alia*, of wages by providing a machinery for the settlement and adjudication of industrial disputes. The Industrial Disputes Act, 1947 and the legislation in various states for settlement and adjudication of industrial disputes, are meant to meet the latter objective. We shall deal first with regulation of minimum wages under the Minimum Wages Act, 1948, which has been characterized by the first National Commission on Labour, which gave its report in 1969, as a "landmark in the history of labour legislation in the country."

The whole concept of minimum wage as underlying the Minimum Wages Act has been called 'new and revolutionary' by the National Commission on Labour (1969), because it recognizes that wages cannot be left to be determined entirely by market forces, and that it is not open to the

employer to plead inability to pay the wages to its employees. In the absence of such regulation, it would be difficult to prevent sweating or exploitation of labour through payment of unduly low wages. The statement of objects and reasons appended to the Bill emphasis the importance of statutory fixation of minimum wage rates in India, where workers' organizations are yet to fully develop and the workmen's bargaining position is consequently poor. The Act adopted the policy of gradualness which had been so much emphasized by the Royal Commission on Labour in India. Although the coverage of the Act is wide as indicated in the various definitions, the Act in the first instance is confined to what are called 'scheduled employments' with power in the appropriate government to add to the schedule. These powers have been liberally exercised by the appropriate government from time to time, with the consequence that, the list of industries covered by the Act is now much longer than it was when the Act was originally passed and brought into force.

Two alternative procedures have been provided by the Act for the fixation of revision of minimum wages. The appropriate government may either appoint a committee or sub-committees, as it considers necessary, to hold enquiries and advise it in this respect, or it may publish its proposals in the official gazette, and after considering representations by persons likely to be affected by such proposals, and taking the advice of the advisory board, fix or revise the minimum wages in respect of each scheduled employment by notification in the official gazette. All the committees, sub-committees and advisory boards under the Act, have been given a tri-partite character inasmuch as they are to have equal representatives of the employers and employees, and independent persons not exceeding 1/3 of its total number of members.

For fixation and revising minimum wages, wide discretion has been vested in the appropriate government, subject, of course, to compliance with statutory provisions.

The constitutional validity of the Act has been questioned by the employer on grounds of discrimination and interferences with the rights of the employers to carry on their lawful business as well as on the ground that it vests unguided, uncontrolled, and arbitrary discretion in the government. But the Supreme Court has upheld the constitutional validity of the Act including the power vested in the government to add to the list of industries covered by the Act, and fix different wages for different industries and in different local areas, which powers have been held necessary for proper implementation of minimum wages in the light of local conditions and the conditions prevalent in the particular industries.[59]

59. *Edward Mills Co. Ltd.* v. *The State of Ajmer* AIR 1955 SC 25 and *Bijoy Cotton Mills & Others* v. *The State of Ajmer* AIR 1955 SC 33.

Minimum wages payable under the Act are normally to be paid in cash, but the appropriate government may authorize payment of minimum wages either wholly or partly in kind, and may also provide for supply for essential commodities at concessional rates. Once a notification is made under the Act fixing minimum wages the employer is bound to pay such minimum wages without any deductions except such as may be authorized.

The central object of the Act being to prevent exploitation of labour, and to ensure that certain minimum wages are paid to labour, who may not be in a bargaining position for this purpose, it is provided under the Act that any contract or agreement whether made before or after the commencement of the Act, whereby an employee either relinquishes or reduces his right to the minimum rate of wages, or any privilege or concession accruing to him under the Act, shall be null and void insofar as it purports to reduce the minimum rate of wages fixed under the Act.

Fixation of minimum wages by industrial adjudication

Apart from minimum wages fixed under the Minimum Wages Act, 1948, the industrial tribunals to whom disputes may be referred on the subject by the appropriate government have also the jurisdiction to fix minimum wages regardless of whether any particular industrial establishment is covered under the Minimum Wages Act, 1948, or not. Thus, in *Crown Aluminium Company* v. *Their Workmen*,[60] the Supreme Court, while adjudicating an industrial dispute with regard to wage structure observed that "no industry has a right to exist unless it is able to pay workmen at least a bare minimum wage".

Fixation of fair wage by industrial adjudication

While adjudicating industrial disputes relating to wage structure, industrial tribunals have granted in suitable cases more than the bare subsistence wage. In this connection, the concepts adopted as useful tools are the living wage, the fair wage and the minimum wage. The minimum wage has to be paid by an industry irrespective of its capacity to pay, while the living wage represents a standard of living which provides not merely for bare physical subsistence of the worker, but also for the maintenance of his health and decency, a measure of frugal comfort including education for the children, protection against old age, requirements of essential social needs, and some insurance for important misfortunes. The living wage, however, in Indian conditions, has been considered more as an ideal rather than one which can be achieved in actual practice. Even in the case of oil companies, which were paying very high wages to their workmen as compared with the general

60. (1958) I LLJ I.

standard in the country, the Supreme Court held that the wages so paid did not amount to a living wage.[61] Where an industry has the capacity to pay more than the minimum wage, industrial adjudication has attempted to lay down a fair wage which has broadly been termed by the Supreme Court as a means between the living wage and the minimum wage. Such fair wage has to be fixed by striking a balance between the demands of social justice, which require that the workmen should receive their proper share of the national income which they produce, the financial capacity of the employer, the legitimate desire of the employer to make a reasonable profit, the rise in the price structure which may result from the fixation of the wage structure and the reasonableness of the additional burden which may be imposed upon the consumer by the wage structure.[62] All these considerations have carefully to be weighed by adjudicating authorities when laying down the wage structure for a particular industry.

In most cases wage structures have been fixed for individual industries when disputes are referred to the tribunal for adjudication in relation to them, but cases of industry-wise adjudication as in the case of banks, collieries, *etc.*, are not unknown. In certain cases, as in the case of working journalists, statutory provisions have been made for laying down a wage structure through the machinery of wage boards, although in cases of other industries such wage boards have not been set up under statute but through resolutions of the government and their recommendations have often been enforced, either through voluntary acceptance by the parties, or through industrial or governmental pressures, or industrial adjudication.

It is not for the labour court or tribunal to fix the minimum rates of wages. While fixing fair rates of wages the courts or tribunals take into consideration the minimum rates of wages and where the government has not fixed the minimum rates of wages then the courts or tribunals ascertain for themselves what would be the minimum rate of wage. In fact, minimum rate of wages are fixed by the government. Courts or tribunals merely ascertain what are the minimum rates of wages for the purpose of deciding 'fair wages'.[63]

Dearness allowance

One particular feature of the wage structure in Indian industry is the importance of schemes of dearness allowance, which were started during the First World War, but have acquired much greater prominence after the

61. *Standard Vacuum Refinery Company of India Ltd.* v. *Workmen* (1961) I LLJ 227.
62. *Ahmedabad Millowners Association and Others* v. *Textile Labour Association Ahmedabad* (1966) I LLJ I: AIR 1966 SC 497.
63. *Transport Corporation of India Ltd.* v. *State of Maharastra & Ors.* (1993) II LLJ 365 (Bom.).

Second World War. There is an increasing tendency during recent years to link dearness allowance with the cost of living index, the extent of neutralization varying with the circumstances of each case. However, if the case of dearness allowance schemes, as in case of wage structure as a whole, where more than the minimum wage is fixed, the tribunals have given due importance to the financial capacity of the employer, always keeping in mind that, where permissible, the workmen should be provided relief against the rise in cost of living particularly in the lower income brackets.[64]

Dearness allowance depends upon the place of posting of an employee. In a case where the flat and steamer clerks had no definite place of posting because of their playing in the river, it was held that their place of posting should be the place where their families are residing.[65] In view of the Supreme Court, all categories of staff getting the same wages and posted at one place should be given the same scale of dearness allowance irrespective of the fact that they are working as clerks or members subordinate staff or factory workmen.[66]

It was further said that the pressure of high prices is the same on various categories of employees and the subordinate staff and factory workmen these days are as keen to educate their children as clerical staff.[67]

Other allowances and fringe benefits

Apart from the basic wage and dearness allowance, various other allowances have also been granted to employees as a result, mainly, of awards emanating from industrial tribunals. These allowances have been granted to the employees, either due to special circumstances relating to their employment, like some additional burden of work peculiar to a particular category of employees, or to meet certain additional expenses incidental to their employment like transport, or to grant them certain amenities and fringe benefits like medical allowances, vacation allowances or house rent allowance. These allowances go to supplement the earnings of the employees, and in certain cases may form a substantial part of their total earnings. In granting such allowances also, industrial adjudication authorities have had to consider the claims of the employees on the basis of their justifiability, but without ignoring the capacity of the industry to pay on the region-cum-industry basis.

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64. For a full statement of law regarding principles of fixation of dearness allowance, see the judgment of Supreme Court in *Killick Nixon Ltd.* v. *Killik and Allied Companies Employees Union* (1975) II LLJ 53: AIR 1975 SC 1778.
65. *Indian General Navigation and Railway Co. Ltd. Calcutta* v. *Their Workmen* AIR 1960 SC 219.
66. *Greaves Cotton and Co.Ltd.* v. *Their Workmen* AIR1964 SC 689.
67. *Ibid.*

Bonus system

One category of fringe benefits, however, has to be considered separately from wage structure, allowances and other fringe benefits, and that is the system of bonus that has grown up in Indian industry, and is now regulated by the Payment of Bonus Act, 1965.

The Payment of Bonus Act, 1965, applies to every factory, and to every other industrial establishment in which 20 or more persons are employed on any day during an accounting year. It provides for payment of bonus in any industry to employees whose salary or wages do not exceed Rs. 1600 per mensem, the words 'salary' or 'wage' being defined to include basic wage and dearness allowance, but no other allowances. The Act brought about a radical change in the concept of bonus, in so far as it provided for payment of minimum bonus of 4%, or Rs. 40, whichever is more, later on raised to $8\frac{1}{3}\%$. As a counter-balance to payment of such minimum bonus, the Act also provides for a ceiling on bonus payment to the extent of 20% of the total salary or wage earned by an employee during the year. It also provides for a scheme of set-on and set-off, so that the surplus left with the employer after payment of maximum bonus can be added on to the available surplus in future years, and the minimum bonus paid during years of loss can be set off against higher available surplus in future years, account being kept open in this respect for four years only. Exemption is granted to new units for the first five years after they go into production and sell their products, unless they make profits earlier, after wiping out earlier losses. The Act lays down a scheme as to how the gross profits of an establishment are to be computed, and also the items of prior charges which are to be deducted from the gross profit to arrive at the figure of available surplus. Out of the available surplus thus arrived at, the Act provides for payment of 60% of the available surplus to the employees as allocable surplus, which is to be distributed amongst the employees entitled to bonus under the Act subject to the condition, however, that the employees receiving salary above Rs. 750 but not in excess of Rs. 1600 per mensem, and otherwise entitled to bonus, would be paid bonus on their salary as if it is Rs. 750 only and not more.

The provisions of the Act have been applied to establishments in the private sector, and also to establishments in the public sector provided they are competitive public sector undertaking for determination of which a formula is laid down under the Act. Exemptions from the provisions of the Act are, however, provided to undertakings like certain financial institutions, charitable organizations and others. Reference of disputes with regard to bonus can be made under the provisions of the Industrial Disputes Act, 1947, and adjudicated upon under the Act in accordance with the provisions of the Payment of Bonus Act, 1965, and not otherwise. There is, however, no bar to the employers and employees coming to an agreement either

substituting the bonus as provided under the Act by a production bonus scheme.

V

LAW RELATING TO TRADE UNIONS AND TRADE DISPUTES

Law relating to trade unions

No single developments has helped to bring about a more radical change in equation between employers and employees in industry than the growth of collective bargaining. In the hey day of *laissez faire* and the near deification of freedom of contract, it was assumed by the policy makers that full justice would be done to both capital and labour if the parties concerned were left free to settle between themselves the terms on which the servant would work for the master. However, labour refused to accept the assumptions underlying the above dogma. They experienced in their own every day life, the inequity of a bargain struck between the atomized individual workman and the employer who, because of his superior economic position, was a combination in himself. It was this experience which led labour to form itself into combinations, which survived in England—the land where trade union as we know them today were first formed—in spite of relentless persecution. Trade unions in India, however, because they came into existence only in the 20^{th} Century, did not have to pass through the same trials and tribulations as in England, because, by then, opinion all over the western world had crystallized itself in favour of permitting workmen to form trade unions, and against their persecution, as long as they pursued legitimate trade union objectives. The law in India, however, took its own time to adjust itself to the formation of trade unions. Till the Trade Unions Act of 1926 was passed, consequent upon the uproar caused by the injunction and damages awarded against one Mr. Wadia, who in 1918 organized a strike in a leading textile mill in Madras, it was virtually impossible for a trade union to carry on its legitimate activities because of the legal difficulties arising out of the ordinary law of contract, torts and civil and criminal conspiracy, in respect of which the Indian law had borrowed heavily from the common law of England. The Trade Unions Act of 1926, although it fell short of the protection provided to trade union by the Trade Disputes Act of 1906 in Britain still gave certain basic protection to trade unions in pursuit of their objective of organizing labour into trade unions, and carrying on collective bargaining on their behalf. This Act of 1926 has remained virtually in its original form on the statute book ever since 1926, with certain minor amendments, the major amendments made in the Act in 1947 having not been brought into force till date.

The Act provides for registration of trade unions and grants the immunities and privileges contained therein to registered trade unions only. There is no compulsion on a trade union to register under the Act; in that sense the registration is voluntary under the Act. However, inasmuch as certain basic protections required by a trade union in pursuit of its activities are not available except to a registered trade union, it becomes necessary for trade unions to register under the Act, if they wish to pursue their activities with any vigour or seriousness, and still not fall foul of the law.

Any seven or more members of a trade union may apply to the registrar of trade unions for registration under the Act. Certain requirements have been laid down under the Act, like framing of rules, *etc.*, which the trade union must comply with before it is registered. However, once the trade union has complied with all the requirements of the Act in regard to registration, the Registrar is bound to register the trade union; and, on such registration, to issue a certificate of registration. Such certificate may be withdrawn or cancelled by the Registrar only under certain contingencies and protection as laid down under the Act. The order of the Registrar either refusing registration to a trade union, or withdrawing or canceling such registration, is an appealable order. The Act also provides for amalgamation of trade unions and dissolution of trade unions in certain circumstances.

Registered trade unions are required to send annual returns to the Registrar, together with accounts duly audited, and also to send particulars of their office bearers including all changes made in the same periodically. Detailed provisions are made under the Act for inspection of records, and penalties are provided for either giving false information or otherwise not complying with the requirements of the Act relating to supply of information to the Registrar, so as to see that compliance is made with the provisions of the Act.

A trade union registered under the Act is a body corporate by the name under which it is registered. It has perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to enter into contracts. As a corporate body, it can sue and be sued in its name.

Registered trade unions are given immunities against the ordinary law of the land regarding criminal conspiracy and civil liability under the law of torts. Section 17 of the Act provides that no office bearer or member of a registered trade union shall be liable to punishment under sub-section 2 of section 120-B of the Indian Penal Code, in respect of any agreement made between the members for the purpose of furthering any such object of the trade union as is specified in section 15 of the Act; these being objects on which the general funds of a trade union may be spent.

However, such protection against the law of criminal conspiracy does not extend to an agreement to commit an offence. Thus, where, for

example, there is an agreement to go on illegal strike, or to commit any other illegality which constitutes an offence under the law of the land, it would be no defence that such agreement was arrived at for the purpose of conduct of trade disputes on behalf of the trade union or any of its members. Indeed any agreement to commit an offence would, under section 17, make them liable for criminal conspiracy.[68] Section 18 of the Act gives protection to registered trade unions in respect of damages incurred by the employer on account of a trade dispute. Thus, no suit or other legal proceeding is maintainable in any civil court against any registered trade union, or any of its office bearers or members, in respect of any act done in contemplation, or furtherance, of a trade dispute, to which a member of the trade union is a party, on the ground only that such act induces some other person to break a contract of employment, or that it is interference with trade, business or employment of some other person, or with the right of some other person to dispose of his capital or of his labour as he wishes. This is an essential immunity without which it would be impossible for the trade union to conduct its activities in any meaningful manner. Further, a registered trade union is also not liable in any suit or other legal proceeding, in respect of any tortuous act done in contemplation or furtherance of a trade dispute by an agent of the trade union. Such immunity, however, is restricted and circumscribed as compared to the law, for example, in Britain. Such tortuous liability can be avoided by the trade union only if it is able to prove–the burden of proof being upon it–that the person who committed the tortious act acted without the knowledge of, or contrary to express instructions given by, the executive of the trade union. Where the trade union is not able to establish its innocence as aforesaid it cannot escape liability for tortuous acts of its agents.

The last important protection given to the trade union is in respect of agreements arrived at between the members of the registered trade unions by which restrictions are imposed on individual members' right to dispose of their capital or labour as they wish. This becomes necessary in order to make collective bargaining effective. Under section 19 of the Act, it is provided that such agreements shall not be void or voidable merely by reason of the fact that any of the objects of the agreement is in restraint of trade. However, civil courts cannot entertain any legal proceedings for the express purpose of enforcing, or recovering damages for breach of, any agreement concerning the conditions on which any member of a trade union shall or shall not sell his goods, transact business, work employ or be employed.

68. *R.S. Ruikar* v. *Emperor* AIR 1935 Nagpur 149.

Encouragement of collective bargaining and regulation of trade disputes

Apart from removing legal impediments in the way of trade unions carrying on their legitimate activities in pursuit of collective bargaining, legislation in countries wedded to democratic value with free elections, has often interfered more positively in the sphere of employer-employee relations. Such interference has been mainly in a two-fold direction. One, in the direction of giving positive support to collective bargaining and placing restrictions on employers against victimization for trade union activities, outlawing company trade unions or trade unions sponsored and supported by the employers, providing for choosing a proper collective bargaining agent by the workmen, and enforcing obligation on the employer to enter into collective bargaining in good faith with the trade unions or the bargaining agent so nominated or elected. The other direction of legislative and governmental interference has been by regulating trade disputes and providing for contingencies where the two parties concerned–namely, the employers and the employees or the trade unions on their behalf – are not able to settle disputes or controversies through collective bargaining. In such contingencies, the state through legislation, or otherwise, has often lent a helping hand to the parties by providing the services of expert mediators or conciliators, who, with their experience, are often able to thrash out differences between the parties, and persuade them to a settlement. The other mode is to provide for courts of inquiry or investigation, which would conduct comprehensive investigation into the issues which are holding up a settlement and give their report and recommendations on such issues. Such courts of inquiry serve a two-fold purpose. One, to make the facts known to the parties, so that they can then negotiate and settle on the basis of such facts. Two, they help to educate public opinion which may then exert pressure on the parties to settle on a reasonable basis. These two modes of intervention, namely, conciliation or mediation and investigation are almost a universal feature in all democratic countries which permit settlements of terms and conditions of service ordinarily through free collective bargaining. However, there are differences of approach in democratic systems as to whether state intervention should go beyond conciliation and investigation. The tradition in England, and to a lesser extent in the United States, has been for legislation or the state to stop short of compulsion except for requiring a certain 'cooling off' period or a 'strike ballot', so that strikes are not launched in 'hot blood', but only after mature deliberation after exploring all avenues of mutual settlement. There are, however, other countries, like Australia and New Zealand where the industrial disputes machinery established by law interferes more positively in a sphere of employer-employee relations. In these countries, a system of compulsory adjudication has emerged, with concomitant restrictions on the rights of the

parties to declare strikes and lock-outs on issues which are under adjudication or have already been adjudicated upon or may be referred for adjudication.

India, initially, was strongly influenced by the British tradition in the matter of regulation of trade disputes. As a matter of fact, to start with, the state in India was even less interventionist than what it was in Britain. Not until 1929 did the government assume power to set up conciliation boards and courts of inquiry for the settlement or investigation of trade disputes. These were, however, coupled with restrictions on general strikes and restrictions on strikes in public utility industries, without a corresponding machinery for providing justice to the demands or claims of the workmen, and thus considerably angered labour with the consequence that the famous bomb was thrown by Sardar Bhagat Singh in the Legislative Assembly when it passed this Act and the much resented Public Security Act, 1929. During the short-lived period of provincial autonomy from 1937 to 1940, the popular ministries, particularly the Congress ministries, made an attempt to intervene more positively in trade disputes. But apart from the Bombay Industrial Disputes Act, 1938, the period appeared much too short for the other states (then called provinces) to pass legislation on the subject. During the period of the Second World War, however, the thinking on the subject underwent a radical change. Under rule 81 A of the Defence of India Rules, 1939 government assumed the power to refer disputes for adjudication, to make awards of adjudicators binding, and to ban strikes and lock-outs during the period of such adjudication or on the issues covered by the adjudicator's award. The adjudicators, while adjudicating industrial disputes referred to them, made innovations, and directed the employer to give fairer and better conditions of service to their workers than they enjoyed before, and , in that way granted them what they might not have been able to achieve through collective bargaining, because of the weak bargaining position of the trade unions. It was this experience which was to be drawn upon and become the basic foundation of the establishment of a permanent machinery for settlement, investigation and adjudication of industrial disputes in India.

To students of the history of industrial adjudication in India, it is a fascinating study to understand how the very same leaders who previously were dead set against compulsory adjudication or drastic restriction on strikes and lock-outs went through a radical change in their out-look and approach when they took over the reins of government after achievement of political independence by India. In making such a radical departure from their previous approach they appear to have been influenced by the fact that the post-war period was a period of unprecedented industrial unrest and record loss of man-days of production. There was a new sense of urgency regarding industrial development, and it was thought that the country could

not afford loss of production through strikes and lockouts. It was also recognized that left to themselves trade unions in their then state of organization may not be in a position to bargain on equal terms with their employers, and to obtain fair conditions of service through rocess of collective bargaining. All these factors, along with certain othe ubsidiary factors led to the adoption of the Industrial Disputes Act, 1947 which, more or less, has formed the basic legislation for the regulation of trade disputes after independence. The Industrial Disputes Act, 1947 is a complete code for regulation of trade disputes, and with certain modifications and amendments from time to time, has held the field till now. In addition to the central Act, there are also state Acts regulating trade disputes. But these have only local importance and need not be considered in this all India survey.

The coverage of the Industrial Disputes Act, 1947 is confined to such establishments as are covered by the definition of 'industry' under the Act. This definition is contained in section 2 (j) of the Act, according to which 'industry' under the Act means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. The definition has been a subject of much controversy and conflicting judicial interpretations. The Supreme Court in *Bangalore Water Supply and Sewage Board* v. *A Rajappa*[69] gives a broad scope to the definition of industry over ruling earlier judgments. According to this judgment, an 'industry' includes all systematic activity organized by cooperation between employer and employees, the direct and substantial element in which is commercial, and which is carried on for the production and/ or distribution of goods and services calculated to satisfy human wants and wishes. Absence of profit-motive or gainful objective is irrelevant. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relationship. This judgment has further clarified that if the organization is a trade or business, it does not cease to be one because philanthropy animates the undertaking. The Industrial Dispute (Amendment) Act, 1982 enacted altogether a new definition of Industry. This amended definition has not been enforced till now. It nullifies the effect of many judicial decisions and attempts to clarify the conflicting views arising out of different interpretations of the word 'industry' adopted by the Supreme Court in various cases. On account of conflicting judicial decisions it had became difficult to understand the meaning of the word industry. The amended definition, to a great extent, incorporates the views of the Supreme Court expressed in *Bangalore Water Supply* Case.

69. (1978) I LLJ 349.

Another definition which is important in connection with the coverage of the Act, is that of 'workman' under section 2, sub-section (s). Broadly speaking, the sub-section provides that any person employed in any industry to do any skilled or unskilled, manual, clerical, technical or supervisory work for hire or reward would be covered by the definition. However, those employed mainly in managerial or administrative capacity are outside the scope of the Act, as also those who are employed in a supervisory capacity and drawing wages exceeding one thousand and six hundered rupees a month. In the case of *S. K. Maini* v. *Carona Sahu Co. Ltd.*[70] the Supreme Court observed that the designation of an employee is not of much importance. What is important is the nature of duties performed by the employee. Another most essential element is that a person to be a 'workmen' must be employed in any industry. In other words, there must be a '*contract of service*' (*i.e.*, master servant relationship) not a '*contract for service*' (*i.e.*, the position of an independent contractor).

Another definition which may be briefly noticed is that of 'industrial dispute' under section 2 (k) of the Act, which means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, or any person.

In Workmen of *Hindustan Lever Ltd.* v. *Hindustan Lever Ltd.*[71] the question before the court was whether a demand to confirm employees in an acting capacity in a grade is an industrial dispute? It was held that a demand of the workmen to confirm employees employed in an acting capacity in a grade would unquestionably be an industrial dispute without anything more. It was held in *Sarva Shramik Sangh* v. *Indian Hume Pipe Company Ltd.*[72] that the Industrial Dispute Act, 1947 does not limit the power of Industrial Tribunal to grant relief only from the date of raising of Industrial Dispute. The definition of the industrial dispute in Section 2 (k) of the Act does not contain any such limitation. The tribunal has power to grant relief from the date anterior to the date of raising industrial dispute. The words 'any person' used in the definition have been confined by judicial interpretation to such persons in whose terms of employment, *etc.*, the rest of the workmen have a direct and substantial interest. Further, by judicial interpretation industrial disputes were specifically confined to such disputes as are of a collective nature, so that before the amendment of the Act in 1965, any dispute regarding an individual workman could not be an industrial dispute unless espoused by substantial number of workmen of the

70. AIR 1994 SC 1824.
71. (1984) II LLJ 391 (SC).
72. (1993) I LLJ 965 (SC).

establishment or of a union of whom they might be members. The law was, however, changed by the Amendment Act of 1965 according to which any dispute regarding discharge, dismissal, retrenchment or other form of termination of service of an individual workman shall be deemed to be industrial dispute notwithstanding that no other workmen no any union of workmen is a party to the dispute.

Having noticed briefly the definitions under the Act, we might now examine some of the main provisions of the Act which seek to provide for investigation, settlement, arbitration and adjudication of industrial disputes.

The Acts sets up various types of authorities with the aim of maintaining industrial peace. Provision is made under section 3 of the Act for the setting up of works committees consisting of equal number of representatives of the employers and workmen engaged in the establishment. Such works committees, however, are to be formed only in such industrial establishments in which 100 or more workmen are employed. Detailed provisions have been made under the rules framed under the Act for the election of representatives of workmen on the works committee, under the overall supervision of the labour department. It is the duty of the works committees to promote measures for securing and preserving amity and good relations between the employer and workmen, and to that end to comment upon matters of their common interest and concern, and to endeavor to compose any material difference of opinion in respect of such matters. The function of the works committees is mainly recommendatory as was held by the Supreme Court in *Northbrook Jute Company Ltd. and another* v. *Their Workmen*[73] where the court emphasized that the works committee could not take the place of collective bargaining or trade unions, or combinations of workmen, which alone could arrive at a settlement with regard to the terms and conditions of service of the workmen. The expression 'collective bargaining', as such, does not find any mention in the Act, but the importance of collective bargaining is implicit in the Act and has been repeatedly emphasized by the courts while deciding cases under the Act. To emphasize this aspect, settlements arrived at through collective bargaining were given legal force by amendment of the definition of 'settlement' contained in section 2(p) of the Act by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956. Where the parties themselves settle the dispute amicably and a settlement is signed between them, these is no question of the machinery set up under the Act for investigation or settlement of the trade disputes being set in motion. All that they are required to do to make the settlement legally binding on the parties is to sign the settlement in accordance with the form prescribed, and to send copies of the settlement to the prescribed authorities under the Act.

73. (1960) I LLJ 580: 1960 AIR SC 879.

However, where the parties are not able to settle the dispute mutually, provision is made under the Act for the appointment of conciliation officers charged with the duty to intervene and promote the settlement of industrial disputes. The conciliation officers are bound to intervene in an industrial dispute, whether existing or apprehended, in cases where the dispute relates to a public utility industry and a notice under section 22 of the Act has been given by either of the parties for strike or lock-out. However, in other cases, it is left to the discretion of the conciliation officer whether or not to intervene in an industrial dispute. Where the conciliation officer decides to so intervene, he is required to take all steps necessary for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. If a settlement is arrived at, he is required to reduce the settlement into writing, and have it signed by the parties in accordance with the rules made under the Act. Such a settlement arrived at through the good offices of the conciliation officer is given a wider coverage than a settlement arrived at outside conciliation proceeding, and binds not only the employers who are parties to the settlement, but also their heirs, successors or assigns in respect of the establishment to which the dispute relates, and, in the case of workmen, not only those who are parties to the settlement, but all those persons who are employed in the establishment, or part of the establishment, to which the dispute relates, on the date of the dispute and all persons who subsequently become employed in that establishment or part.[74] This apparently is for the purpose of bringing about uniformity in the conditions of service of the workmen in the establishment. Before signing the settlement, however, it is the duty of the conciliation officer to satisfy himself that it is fair and reasonable. Thus, for example, where the settlement is not a genuine settlement, and is the result of collusion between the management and a group of workmen and does not have the backing of the majority of workmen or is against their interest, the conciliation officer may refuse to have the same recorded and signed in conciliation proceedings.

Where, however, the conciliation officer fails in bringing about a settlement, he is required to make a report to the government, whereafter the government may either close the matter and inform the parties accordingly along with the reasons why no reference is being made, or make a reference to either of the authorities set out under section 10 of the Act. Thus, if the government feels that there is still scope for a settlement, it may refer the dispute to a conciliation board for settlement. The conciliation board has, more or less, the same function as the conciliation officer, except that the board is required not only to give details as required by the conciliation officer, but also to make recommendations for settlement of the

74. *Ramnagar Cane and Sugar Co.* v. *Jatin Chakravorty* (1961) I LLJ 244.

dispute, which recommendations, however, are not binding on the parties. The constitution of the board is also different, inasmuch as it is composed of equal representatives chosen by the parties with an impartial chairman. The government might also decide that the dispute needs investigation, and for this purpose it may refer the dispute to a court of inquiry for investigation. Such courts of inquiry are required to submit their report to the government ordinarily within a period of six months after the commencement of inquiry. The courts of inquiry, however, merely investigate disputes and cannot make award or give directions which may be binding on the parties.

Before dealing with the provisions in the Act with regard to compulsory adjudication, it is necessary to pause and consider the machinery set up under the Act for voluntary reference of disputes to arbitration. The general criticism of the Act previously was, and in spite of the amendment continues to be, that the Act has discouraged settlement of disputes between the parties, and encouraged them to lean too much on outside held for resolving their disputes. To meet this criticism, at least partially, the Act was amended in 1956, by providing under section 10A for voluntary reference of disputes to arbitration. Thus, employers and workmen may agree to arbitration by an arbitrator of their choice. The awards of such arbitrators are made binding on the parties, and where the reference to arbitration has been made at the instance of parties who represent the majority of the employers and the workmen, as the case may be, the award is made binding even on those who are not parties to the dispute, in a similar manner as a settlement arrived at in conciliation proceedings or the award of an adjudicator. Awards by arbitrators in the latter case, and the proceedings before such arbitrators, are given the same sanctity as adjudication proceedings by placing a ban on strikes and lock-outs during pendency of such proceeding and by imposing restrictions on alteration of conditions of service, to the prejudice of the workmen or discharging or dismissing or punishing the workmen concerned, during such pendency.

The most important feature of the Act is the provision for compulsory adjudication of industrial disputes at the instance of the government. For this purpose, the Act provides for labour courts, tribunals or national tribunals which are all to exercise original jurisdiction in relation to industrial disputes. Labour courts generally deal with individual cases, or matters not having large financial repercussions on the industry, or where the number of workmen affected by the dispute does not exceed 100, whereas industrial tribunals are empowered to deal not only with matter within the jurisdiction of the labour courts, but with regard to other important matters like bonus, classification by grades, wages, allowances, hours of work, *etc.* National tribunals are provided for under the Act for the adjudication of such disputes which in the opinion of the central government involve questions

of national importance, or are of such a nature that industrial establishments situated in more than one state are likely to be interested in or affected by them.

Adjudication authorities set up under the Act, become seized of an industrial dispute only on a reference made to them by the appropriate government under section 10 of the Industrial Disputes Act, 1947. Discretion is conferred on the government under the Act to decide whether or not a reference should be made having regard to the facts and circumstances of each case. Even in public utility services, although seemingly an obligation is cast on the government to refer disputes for adjudication where a notice of strike or lock-out is given by either of the parties, the government may refuse to make a reference where the notice of lock-out or strike has been frivolously or vexatiously given, or the government considers it would be inexpedient to made a reference. However, the discretion vested in the government is not arbitrary and must be exercised *bona fide* and for germane reasons. Thus, if the government refuses to refer the dispute on extraneous considerations or on considerations which are not germane or relevant, the High Courts are competent to issue an appropriate writ or order directing the government to do its duty in accordance with law.[75] Once a reference has been made to the tribunal, the government stands outside the reference and is not permitted to supersede the same.[76] Limited power is given to the government for transferring such disputes to another labour court, tribunal or national tribunal, as the case may be, for disposal. This power is also conditional on the government's stating reasons for such transfer; this condition being fulfilled not only in form but also in substance[77] so that, if the government exercises the power arbitrarily or capriciously or for extraneous reasons, courts are competent to strike down such an order of transfer. Except for this limited power of transfer, once the government has referred the dispute to an adjudicating authority, it is the adjudicating authority which has exclusive control over the proceedings and the government thereafter stands completely outside the proceedings.

The powers of the tribunal under the Act are quasi-judicial, as held by the Supreme Court in the *Bharat Bank Ltd., Delhi* v. *The Employees of the Bharat Bank Ltd., Delhi and Bharat Bank Employees Union.*[78] Although the tribunal is not restricted by the same rules of procedure as a civil court, because it is not a court in the strict sense of the term, the tribunal has all trappings of a

75. *State of Bombay* v. *Krishman (KP) and Others* (1960) II LLJ 592.
76. *State of Bihar* v. *D. N. Ganguli* (1958) II LLJ 634.
77. *Associated Electrical Industries (India) Ltd.* v. *Its Workmen* (1961) II LLJ 122.
78. (1950) LLJ 921.

court and is not allowed to act arbitrarily or like a benevolent despot.[79] It must give a fair hearing to the parties before making its award. Once it pronounces its award, the same has to be published in the appropriate gazette and the award becomes enforceable 30 days after the date of such publication. The award so pronounced and published is binding not only on the parties to the dispute, but on other parties summoned to appear in the proceedings as well as on the heirs, successors and assigns in respect of the establishment to which the dispute relates, in the case of employers, and to all workmen employed in the establishment or part of the establishment on the date of the dispute and those employed even thereafter as far as the workmen are concerned. Such award remains in operation for a period of one year except in cases where the government in accordance with the procedure set up under the Act chooses to reduce or extend the period. However, even after the expiry of the period of the award, and termination of the same by either of the parties, which can be done on giving two months' notice, the rights conferred on conditions of service under the award continue to govern the relations between the parties, unless substituted by a new award or settlement.[80] In the case of continuing obligations, courts are reluctant to reopen an issue which has already been decided in adjudication proceedings unless there is a change of circumstances after the last award was passed. Thus, although the principle of *res judicata* as applicable to civil disputes is in terms not applicable to industrial adjudication, the principle is applicable to industrial adjudication subject to qualifications and modifications due to the nature of industrial adjudication itself which is dynamic in character, and is not concerned with merely enforcing existing rights between the parties but also laying down new rights and modifying contracts in the light of prevailing conditions and circumstances.

The central government is empowered to appoint National Industrial Tribunals for adjudication of Industrial Disputes involving questions of national importance or involving an establishment situated in more than one state. The National Tribunal shall consist only of one person, who shall not be qualified for appoint unless he is, or has been, a judge of a high court. The central government, if it so thinks fit, can appoint two assessors to advise the Tribunals in the proceedings before it.

There is little guidance under the Act as to the right and obligations of the employers and workmen towards each other. The principles regulating employer-employee relations have been evolved by industrial adjudication in course of time while deciding individual cases. In doing so, the tribunals

79. *J. K. Iron & Steel Co.* v. *Iron & Steel Mazdoor Union* (1956) I LLJ 227: 1956 AIR SC 237.

80. *South Indian Bank* v. *A. R. Chacko* (1964) I LLJ 19: AIR 1964 SC 1552.

have tried to balance the rights of labour and employer with a view to establishing and maintaining industrial peace by ensuring security of service and a contented labour force, but at the same time protecting discipline in industry and encouraging industrial growth.

Early in the history of industrial adjudication, intervention of the Supreme Court was sought to set aside awards which were arbitrary or where there was no fair trial by the tribunal. The Supreme Court held in the *Bharat Bank case*[81] that it had jurisdiction to entertain petitions for special leave to appeal against such awards where interference was required in the interest of justice or where issues of general importance or issues of law were raised. As a result of this jurisdiction exercised by the Supreme Court under article 136 of the Constitution of India, a large body of case law has been built up in which the Supreme Court has pronounced almost on every aspect of industrial law particularly the rights and obligations of the capital and labour towards each other in various affairs connected with employer-employee relations and relating to employment or non-employment or conditions of service of the workmen.

Apart from conferring jurisdiction on industrial tribunals for adjudicating industrial disputes, the Act has also placed severe restrictions on strikes and lock-outs. For example, no strike in a public utility industry can take place without 14 days' notice. As soon as a notice is given, conciliation proceedings are deemed to start in such a public utility service and no strikes are allowed during the pendency of conciliation proceedings. Where a conciliation proceeding was pending and one of the unions of the workmen was a party to it was held by the Supreme Court that the settlement according to section 18 (3) will bind not only those workmen who are members of this union but to all workmen working in the establishment. Therefore, if the proceeding relates to a matter concerning all the employees its pendency would bar against all the employees.[82] In case, the government decides to refer the disputes for adjudication arising out of the aforesaid notice, no strike is permitted during the pendency of such proceedings. Once the award of the industrial tribunal is pronounced, no strike is possible on any of the issues settled under the award. The restrictions on strike and lockouts in ordinary industries, that is, industries which are not public utility services, although not so severe as on strikes in public utility services, are all the same quite far-reaching. No strike is permitted while the dispute is pending before an adjudicating authority on whatever issue nor is any strike permitted on any of the matters covered by a settlement of award. Strikes are also not permitted while proceedings are pending before a conciliation board for settlement. Severe penalties are

81. 1950 LLJ 921.

82. *Ram Nagar Cane and Sugar Co. Ltd.* v. *Jatin Chakravarty and Others* (1961) LLJ 244 (SC).

provided for going on illegal strike or inciting or instigating the same. Even financial aid to those participating in illegal strike constitutes an offence under the Act and those guilty of such offence are liable to penalties provided under the Act. Although, such severe penalties have been provided, criminal proceedings can only be started either by or on sanction by the government.

Apart from restrictions on strikes and lockouts, the Act also attempts to preserve the *status quo* during the pendency of proceedings before a tribunal by providing for restrictions on change of conditions of services to the prejudice of the workmen as well as on discharge or dismissal or punishment of employees during the pendency of such proceedings. With regard to matters connected with the dispute, prior permission is necessary before any such change or discharge, dismissal or punishment of workmen can be resorted to, while on matters not connected with the dispute, there is no such restriction save and except in the case of protected workmen who are officers of registered trade unions and who have been recognized as such in accordance with the rules made under the Act. However, even while discharging or dismissing workmen for misconduct not connected with the dispute, the employer is required to make an application for the approval of the tribunal and tender one month's wages simultaneously with the order of discharge or dismissal, as the case may be. Contravention of these provisions which are contained in section 33 of the Act is punishable under the Act. Aggrieved employees also have the right to move the labour court or the tribunal before whom the dispute is pending by way of complaint under section 33 A of the Industrial Disputes Act without asking for a reference by the government in this behalf. On such complaint being made, the tribunal is competent to grant complete relief to the aggrieved workman in the same manner as it would do in a regular reference.

In order to claim protection under section 33 A a workman must satisfy the Tribunal by evidence that he is a workman concerned in a pending dispute and aggrieved by the contravention of section 33 by the employer.[83] The complaint must be filed by the workman himself or by a registered trade union with the written authorization by the aggrieved workman.[84] A registered trade union of which the aggrieved workman is a member has no right to file a complaint under section 33 A unless there is authorization by the aggrieved workman.[85]

We might finally notice section 33C of the Industrial Disputes Act, under which workmen entitled to benefits under a settlement or award or under the provisions of chapter V A of the Act or under their existing

83. *Digwadih Colliery* v. *Ramji Singh* (1964) II LLJ 43 (SC).
84. *National Power Supply Corporation Ltd.* v. *State of Assam* (1963) II LLJ 10 (Assam).
85. *K.L. Reddi* v. *A.S.P.R.T. Corpn.* AIR 1971 AP 57.

conditions of service, may move the appropriate government where the monetary benefit is already quantified, and the labour court where it is not so quantified, for realization of their dues and computation of their benefits. In such cases, there is no necessity for workmen to apply for a reference to the industrial tribunal. Such computation of benefits of money due can be made by any labour court which has been specified in this behalf without any specific reference being made to it by the appropriate government of any particular claim provided a particular court has been specified for the entertainment of such claims.

The machinery for regulation, investigation and settlement of industrial disputes has been subject matter of much discussion and there has been a serious controversy as to the utility of compulsory adjudication which, it is complained, has discouraged collective bargaining and encouraged a litigious attitude between the employees and employers. One of the failings of the existing legislation is the omission to provide proper bargaining agent in the absence of which industrial relations have often been disturbed. Criticism has also been voiced of the wide discretion vested in the government to refer or not to refer disputes for adjudication under the Act. The first National Commission on Labour which gave its report in 1968 has suggested some far-reaching changes in the machinery for regulations of trade disputes as provided under the Industrial Disputes Act. But opinion on this subject particularly among the trade unions is very much divided. Indian government in 1977 took up seriously the matter of passing a comprehensive Industrial Relations Act to replace the present Industrial Disputes Act, 1947, the Trade Unions Act, 1926, and the Industrial Employment (Standing Orders) Act, 1946 by more satisfactory method for regulation of industrial disputes, particularly in the matter of designation of a collective bargaining agent, about the modalities of which there has been acute controversy between trade unions, and making other changes considered desirable for dealing with multiplicity of trade unions and dilatory adjudication proceedings which have often stood in the way of establishing a proper industrial relations system. Meanwhile, it is through the Industrial Disputes Act, 1947, mainly that the industrial relations in the country will continue to be regulated.

The Government of India appointed the Second National Commission on Labour to investigate the whole question of rationalization of existing labour laws in the organized sector so as to make them more relevant in the changing economic conditions under the impact of globalization. The Commission submitted its report in 2002 to the Central Government. The Commission has recommended for consolidation of all existing labour laws into a single law called the Labour-Managements Relations Law or the Law on Labour Management Relations.

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