Social Security for Organised Sector -
An Overview of Legislative and Judicial Perspective
Justice implies something which is not only right to do and wrong not to do, but which some individual person can claim from us his moral right. - J.S. Mill
CHAPTER-4

SOCIAL SECURITY FOR ORGANISED SECTOR - AN OVERVIEW OF LEGISLATIVE AND JUDICIAL PERSPECTIVES

INTRODUCTION

The development of human resource, on one side, is an investment which improves the quality of human life by bringing economic gains to society in general but becomes disadvantage to the poorer sections (wage earners) of the population such as women, children on the other. The welfare and development of these weaker sections of the society mainly depend upon suitable policy directions executed through appropriate social security programmes for all workers, has always been a priority in India. So a sound social system of social security is indispensable for social progress in constituting an important constituent in economic stability and development.

The measures of social security in its broad sense is contemplated in terms of Directive Principles Of State Policy. Though India has not ratified all the conventions of the I.L.O. on social security yet there are national laws providing for certain mandatory benefits to the workers.143

The Legislative package for social security is contained in the various enactments which are as follows:


143 ILJ, Vol 37, 1996, P - 1190
Maternity benefit - Maternity Benefit Act, and Employee's State Insurance Act

Sickness benefit - Employee's State Insurance Act

Medical benefit - Employee's State Insurance Act

Old age benefit - Employee's Provident Fund Act

Survivors benefit - Employee's State Insurance Act and Employee's Provident Fund Act

Terminal benefit - Payment of Gratuity Act

Retrenchment Compensation - Industrial Disputes Act.

The overall perspective of social security enactments are discussed in the light of the below mentioned phases with regard to each enactment that prescribes the distinct social security benefit in order to meet or combat against the risks faced by the industrial worker in his work life.

It has been said that laws must be laws in action ie., law must not only speak justice but also deliver justice. So, in this chapter an attempt has been made to discuss the role of judiciary also, as to what extent it has aided to protect the interest of the worker by interpreting the provisions of existing social security laws.

THREE PHASES OF LIFE

The life of workers could be divided into three Phases by considering the risks to which they are exposed. This is for the purpose of understanding the problem of workers and also to discuss the existing measure of legal protection available to them.
The three life-phases are:

1. Childhood and youth till the age of 18 years.
2. Adulthood till the age of retirement at about 60 years of age
3. Old age from about 60 years to death.

Besides, Social Security for women workers with a view to give maternity assistance and to protect from undue exploitation are also discussed in this chapter.

In this chapter an attempt has been made to examine different enactments which has been passed by the parliament in order to provide social security benefits when they are exposed to different types of risks. Though an exhaustive study in regard to the International Scenario could be made, an attempt has been made with a view to have a comparison with respect to Social Security provided to the organised sector and also regarding pensions, unemployment insurance prevailing in various countries depending upon the nature of work carried out by the workmen and also the status enjoyed during the tenure post retirement benefits etc., conferred under various legislations.

4.1 FIRST PHASE OF LIFE

Mankind owes to the children special attention, care and safeguard as childhood should be period of joy, guiltless with healthy, physical and mental growth. A child not at school or in the protective care of the family should be a matter of national disgrace. A child is the future of the nation and so protection is needed against all forms of exploitation. The highest towers

begin only from the ground. So to build a great nation we begin from a child i.e.,
today’s child may be a potential citizen tomorrow.

In our country, millions of families are below the poverty line and so they
are forced to send their children to work in order to eke out a bare subsistance.
With the advent of modern industrialisation there came a
tendency among the employers to have quick profits at low costs. So not only in
India but also, through out the world, Child Labour is existing in large
numbers. Even so, the evidence reveals a Phenomenal Problem found
throughout the world and especially in Africa, Asia and Latin America.

THE CONCEPT OF CHILD LABOUR

The term ‘Child Labour’ is commonly interpreted in two different ways:
First, as an economic practice and secondly, as a social evil. In the first context it
signifies employment of children in gainful occupations with a view of adding to the
labour income of the family. It is in the second context that the term child labour is more
generally used. In assessing the nature and extent of the social evil, it is the necessary to
take into account the character of the jobs on which children are engaged; the dangers to
which they are exposed and the opportunities of development which they have been
denied.

145 Rehman (MM), Kanta Rehman, Maharaj Begum, “Child Labour and Child
146 ibid., P - 22.
147 Giri (V.V.), “Labour Problems in Indian Industry”, (Bombay : Asia Publishing
The International Labour Organisation has provided a more comprehensive definition of child labour as follows:\(^{148}\):

Child labour includes children permanently leading adult lives working long hours for low wages under conditions damaging to their health and to physical and mental development, sometimes separated from their families, frequently deprived of meaningful educational and framing opportunities that could open up for them a better future.

4.1.1 CAUSES OF CHILD LABOUR

The causes of Child Labour can be classified into following categories.

SOCIAL REASONS

Lack of proper understanding and enlightenment among parents that unhappy and undisturbed childhood results not in sound foundation for their future growth and development i.e., it is an unforgivable waste of precious talents and assets for the future growth. Thus it stands in the way of the democratic way of life as children at drudgery cannot grow up to enlightened citizens. Moreover large Prevelance of educated unemployment leads to general frustration among people about the usefulness of education. This cause adds to the dimensions of social thinking and make masses to depute their young children for employment\(^{149}\).


ECONOMIC REASONS

There are many causes for Child Labour. But the main cause is poverty. Child Labourers belong to the socio-economically poor families, the working members are often short of the employment, even when they are employed, low wages, poor working conditions combined with rising prices of essential commodities worsen their already vulnerable economic condition future. So, such families have to push their children to earn in their tender age.

CULTURAL REASONS

The cultural ethos is so penetrating that it contributes to the increasing stock of child labour. For example, in many social commodities, giving education to girl children is looked down upon. This apathy coupled with the exercise of poverty enhances the chances of fostering child labour 150.

EDUCATIONAL REASONS

Many children are also sent to work due to lack of education and awareness of parents. The reason may be the fact that education may not bring only employment as there is large prevalence of educated unemployment.

EMPLOYERS PREFERENCE FOR CHILDREN

Many employers prefer child labour because children could be easily coerced and used for anything without any opposition. Anker and Melkas have given reasons for employers preference which are as follows 151:

AWARENESS AND INNOCENCE

1. More docile and less trouble some
2. Greater willingness to do repetitive, monotonous work.
3. More trustworthy and innocent, so less likely to steal
4. Less absenteeism
5. Donot form trade unions.

TRADITION

6. Tradition of hiring Child Labour by employers.
7. Traditional occupations have children working along side parent (s)
8. Social role of employer to provide jobs to families in the community.
9. Employers need Labourers. Children are available and ask for jobs, so why not him Child Labour.

PHYSICAL CHARACTERISTICS

10. Better health (as young, health is not Spoiled by Work)
11. Irreplaceable Skills (though this notion is not true in fact)

151 Anker (R) and Melkas Halina, “Economic incentives for children and families to eliminate or reduce Child Labour”, (Geneve : ILO), (1996 : 8-9)
EXTENT OF CHILD LABOUR

Children are like innocent flowers so they need to be protected to develop to their full and disperse their sweet fragrance in society. But there are some work-hells such as match and fire works establishment, to prepare crackers with dangerous explosives where nimble fingers are tempered, working in Lock making units is highly hazardous that many child workers will be infected with Tuberculosis. Child Workers of glass factories are exposed to fume, smoke and dust which makes their cute faces ashened and blackened, Sparkling eyes are dimmed which their employers need not bother in case of accident, disease and death of child worker because most of the children are daily wage earners. These are the situations of some of the places where child workers are brutally exploited by way of depriving their legitimate right to basic and primary life-preparatory opportunities such as education, skill developing, training and the most important, the very childhood. This in turn jeoparadises the possibilities of becoming productive adults due to the lack of preparatory opportunities in order to take their legitimate place in the society. The Child Labour is a social reality and its complete eradication does not seem to be possible in near future unless the enforcement machinery must be geared up to ensure effective entitlement of the Child Labour Act.
4.1.2 VARIOUS MEASURES TO COMBAT CHILD LABOUR

4.1.2.1 INTERNATIONAL PROVISIONS

The Child Labour and their problems, being International, the ILO in 1924, took the initiation by making proclamation regarding protection and safeguards to children which have been stated in the Geneva Declaration of the Rights Of The Child 1924. It was also recognised in the Universal Declaration of Human rights which prescribes motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same protection.\textsuperscript{152}

The following provisions imposes legal duty on family, society and state to protect the child from lack of care, assistance and social security which will hamper their normal development:

"Every Child shall have, without any discrimination as to race, colour, sex, language, religion, national or special origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and state.\textsuperscript{153}"

\textsuperscript{152} Article 25 (2) of the Universal Declaration of Human Rights.

\textsuperscript{153} Article 24 (1) of the International Covenants on Civil and Political Rights 1966.
CHILD EMPLOYMENT AND CRIMINAL TENDENCY

Child Labour starts earning at a tender age which develops an attitude that he is not dependent on his parents for his bread and butter. So he starts disobeying them which ultimately results into a hardened criminal due to lack of socialisation or disorganisation of family life. It is more a question of social and economic problem rather than a problem of legal regulation. But legal problem is in no way less important. Thus child needs a special protection under the provisions of Laws because of its tender age, weak physique and inadequately developed mind and understanding.

INTERNATIONAL CONVENTION ON THE RIGHTS OF CHILD 1989.

There are totally 35 Articles in this convention which lays down the norms and objects for the development of child which includes the elimination of child labour. The convention provides that state parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. According to Article 32(2) parties shall take Legislative,

---


Administrative, Social and Educational measures to ensure the implementation of this Article. Convention on the rights of the child gives direction to the state parties with International Standard in order to provide social and economic justice to the children of the society to legislate the provisions to eliminate or abolish the child labour.

Apart from this, there are several important International Instruments on child labour, the most important ones being the ILO's minimum age convention No.138 for regulating work conditions and the recent Osio conference on child labour have favoured the creation of International Awareness about child labour and influenced the formulation of legislation and policies in many countries. The 1990 World Summit For Children and its resulting World Declaration On Survival, Protection and Development of children signed by over150 countries was an important event with bearing on child labour.

4.1.2.2 INDIAN LEGAL PROVISIONS IN COMBATING CHILD LABOUR

India has the largest number of child workers in the world. Before independence though discussion had taken place and opinions were sought about various aspects of child labour, nothing significant was done to abolish the system. But after independence, the framers of the constitution, realising the gravity of the child labour prevailing in the country, have provided in the constitution for its prohibition.


158 It was held in October 1997.

159 On 29-30 September, 1990 the largest gathering of World Leader in history assembled at the United Nations to attend the world summit for children.
CONSTITUTIONAL SAFEGUARDS

Article 23 of the constitution prohibits begar and similar forms of forced labour and exploitation. Though this Article does not specifically speak of children but it is more relevant as it is through economic force only children are driven to the employment. Thus employment of children takes the shade of forced labour. In reference to children, the word “begar” can be given a wide connotation. Begar does not require total absence of payment. Even inadequate payment for the work rendered by the child amount to begar or forced labour. Millions of children are exploited in violation of their fundamental right and no adequate legislative and administrative measures have been taken by the state.

ARTICLE 24 OF OUR CONSTITUTION PROVIDES AS FOLLOWS:

“No child below the age of fourteen years shall be employed in any factory or mine or engaged in any other, hazardous employment”. This above Article clearly specifies that the children and youth have the fundamental rights which is to be protected from exploitation. It also prohibits employment of children below the age of 14 years in hazardous occupation. The Directive Principles of State Policy have been designed to promote the welfare of children either directly or indirectly under Articles 39, 41, 42, 45, 46 etc. Article 41 is supplementary to Article 24 of constitution on the ground that when the child is not to be employed before the age of 14 years, he is to be kept occupied in some education institutions.


STATUTORY CONTROL OF CHILD LABOUR.

Despite the constitutional provisions, there are statutory provisions in India to eliminate abolish, prohibit and regulate the child labour. Legislative Action by the Government against Child Labour practice are as follows:

THE INDIAN FACTORIES ACT, 1948.

It prohibits employment of children below the age of 14 years under section 67. Persons who are between 14 and 15 years can be employed under conditions provided under sections 68, 69 and 71 to 75 of the Act. The Act also prohibits the work to be done for adolescents which are more risky.


It defines a child as a person below 12 years and in some states the minimum age is 14 years which prohibits their employment in shops, commercial establishments, restaurants, hotels etc. This Act regulate the conditions of working establishments.

THE MINES ACT, 1952.

This Act not only prohibits the employment of children in mine, but also prohibits the presence of children in any part of the mine which is below ground or above ground where any mining operation is being carried on. Even an adolescent is not allowed to work in part of a mine which is below ground, unless he has completed his 16th year and has a Medical Certificate of fitness for work.

---

162 The Mines Act, Section 45 (i)
163 ibid., section 40 (i)
THE PLANTATIONS LABOUR ACT, 1951

The Act prohibits the employment of children who has not completed his 14 years. An Adolescent between 15-18 years cannot be employed for work unless he is certified fit for work by a surgeon.

THE MERCHANT ACT, 1958.

The Merchant Shipping Act, 1958 applies to ships registered in India. The Act prohibits the employment of children under 15 years of age subject to certain exceptions and employment of young persons under 15 years as trimmers and strokers except under certain specific conditions. Such persons, if employed are required to produce a certificate of fitness.


The Apprentices Act provides that no person shall be qualified for engaged as an apprentice or to undergo apprenticeship training in any designated trade unless he is atleast 14 years of age and satisfies such standards of education and physical fitness as may be prescribed.


It provides that no child should be required or allowed to work in any industrial premises. The Act defines the child as a person who has not completed his fourteen years of age. The employment of young persons between 14 to 18 years is prohibited between 7-p.m. to 6-00 a.m.

164 Section 2(c) of the Plantations Labour Act, 1951,
165 The Plantations Labour Act, 1951, Section 26
166 The Apprentices Act, 1961, Section 3
167 Section 24 of Beedi and Cigar workers (Conditions and employment) Act, 1966.
168 ibid., Section 2(b)
169 ibid., Section (25)
THE MOTOR TRANSPORT WORKERS ACT 1961

The Act defines a child as a person who has not completed his 14 years and their employment is prohibited. The adolescent (between 15 and 18 years) are prohibited to work unless a certificate of fitness is granted which is valid for 12 months and can work only 6 hours a day with a half hour rest period and not between 10 p.m. and 6 a.m.

THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986.

This Act has been enacted to prohibit the engagement of children (those who have not completed their 14 years) in certain employments and to regulate the conditions of work of children in certain other employments where they are not prohibited from working. It prescribes a procedure to decide modifications to schedule to banned occupations or processes. It also brings about uniformity in the definition of “Child” in related laws.

4.1.2.3 ROLE OF JUDICARY TO ABOLISH CHILD LABOUR.

Our Indian judiciary plays its active role to eliminate child labour is commendable one. It has given landmark judgements for eliminating the problem of child labour and the conditions of working children so as to respond to the aspirations of framers of our constitution.

Mr. Justice Subha Rao the former Chief Justice of India, rightly remarked, “Social Justice must begin with child unless tender plant is

---


properly nourished, it has little chance of growing into strong and useful tree. So first priority in the scale of social justice should be given to the welfare of children”

The Supreme Court has made the doctrine of locus standi flexible in promoting the Public Interest Litigation for safeguarding the interest of weaker section including children 172. It suggested the voluntary organisation should take active steps in identifying the cases of exploitation of children in different sectors and to provide exact relief to working children by facing Public Interest Litigation.

Justice P.N. Bhagwati held that Article 24 of the constitution embodies a fundamental right which is plainly and inevitably enforceable against everyone and by reason of its compulsive mandate. No one can employ a child below the age of 14 years in a hazardous employment and so construction work is hazardous employment and therefore it is the duty of the contractors under constitutional mandate not to employ any child below the age of 14 years 173.

In one of the cases,174 the court held that childhood and youth are protected against exploitation and against rural and material abandonment. The spirit of the constitution is that children should not be employed in factories. Childhood is the formation period and therefore they should be subjected to free and compulsory education until they complete 14 years of age 175.

173 People’s union and democratic rights Vs Union of India, AIR 1982 SC 1473.
174 Lakshmikant V Union of India AIR 1984 SC 469.
The Supreme Court has also displayed a creative attitude to protect the interests of the child workers by directing the Delhi Labour Commissioner, Mr. Ashok Kapoor, to issue notices to all industries found employing child labour to show cause why they should not be made to pay compensation to the children concerned or their parents. Mr. Kapoor also informed the court that the department has launched prosecution against 940 industries for employing child labour 176.

4.2 SECOND PHASE OF LIFE

Most people in India, as in other parts of the world satisfy their basic needs (food, clothing and shelter) by labouring their capacity with sweat on his brows. So it is reasonable to suppose that a person gets employed in some factory or establishments between his eighteenth and twenty fourth years of age. The worker has to face multifarious risks during the time he is engaged in productive process. These risks may arise from biological and / or economic causes. The most recurrent biological contingencies are sickness, incapacity, invalidity due to accident and maternity in case of females.177 Due to these contingencies, he faces the risk of losing his strength, his work-days and his wages.

Besides, a victim of such a contingency needs both medical and financial assistance. In case of accident, the victim may be disabled or the accident may


even be fatal ending in the death of the worker who is the bread winner of the family. In this case, it is not only a contingency for the worker but it is a risk which put the living of the dependents of the deceased in distress too.

There may also economic contingencies like (unemployment) risk of being thrown out of employment during his job tenure. In our industries there are various reasons such as shortage of raw materials or short supply of power, machine breakage and other relevant causes, to put working men and women out of their jobs for varying periods. This condition of being thrown out of jobs for varying periods is known as “Lay off”. When there is surplus labour in the factory, workers are sent home for very long periods with feeble hopes or with no guarantee of re-employment. This phenomenon of rendering labour force is called retrenchment.

To sum up, work-injury due to accidents, sickness, maternity, death and retirement are serious contingencies for an industrial worker in his work life. All these risks are covered by the following social security enactments which provides security to the workers are discussed one by one under the following heads:

4.2.1. WORKMEN’S COMPENSATION ACT - 1923.

The Workmen’s Compensation Act-1923 represents the beginning of social security legislation in India. The Act provides for payment of compensation for injury by accident arising out of and in the course of
employment. It is based on the principle of employer’s liability whereby the liability for payment of the various benefit admissible under the Act is that of the employer. He may insure the liability but the ultimate responsibility rests with the employer. \(^{178}\) But compensation is not the only benefit flowing from this Act; it has important effects in furthering work on the prevention of accidents, in giving workmen greater freedom from anxiety and in rendering industry more attractive \(^{179}\).

SCOPE AND COVERAGE

The Act extends to the whole of India and it applies to railways and other transport establishments, factories, establishments engaged in making, altering, repairing, adapting, transport or sale of any article mines, docks, establishments engaged in constructions, fire brigade, plantations, oilfields and other employments listed in schedule II of the Act. Establishments which are covered by the Employees State Insurance Act, are outside the purview of this Act.

WORKMEN ENTITLED

To come within the definition of “Workman” under section 2(1) (n), it has to be ascertained whether the two ingredients mentioned within the brackets are on the facts of the case conjunctively excluded in relation to the respondent. Those are

i) Whose employment is of casual nature and

ii) Who is employed otherwise than for the purpose of the employer’s trade or business.


\(^{179}\) Report of the Royal Commission on Labour in India, P-298.
It is only when both the ingredients are together present does the exclusion operate. If the person was employed for the purpose of employer's trade or business, he would be a workman even if his employment was of a casual nature. Likewise, if the employment was of a regular nature, the person concerned would be a workman even if he has not employed for the purpose of trade or business. In other words, the following conditions should be fulfilled simultaneously to take a person outside the scope of definition:

i) His employment is of a casual nature and

ii) He is not employed for the purpose of the employer’s trade or business.

Now a near unanimous judicial opinion is that the two limbs there of (casual and unconnected with employers trade and business) cannot be read disjunctively. Thus a well digger employed by a farm owner a Mill Sweeper, a truck cleaner, a house-repairer employed for employer’s business have been held to be workmen. The wage limit for coverage of workers under the Act, has been removed by an amendment in 1984.

---

180 Kochappan Vs Krishnan LLJ II 1987 P-174.
183 Rammik Singh V Rambadan (1961-62) 21 FLR 14 (Punj)
184 Ramsarup V Gurdeusingh 1969 Lab.I.C 371 (Punjab)
185 Jeethala Sharma V Saradambal AIR 1936 Mad 941.
But recently the Workmen’s Compensation Amendment Act 2000, which came into effect on 8th December 2000, the words ‘other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business’ have been omitted in section 2 in subsection (1) in clause (n) of the Act.

WORKMEN’S COMPENSATION SCHEME: CONDITIONS OF LIABILITY.

The liability of an employer under the Act is limited and is subject to the provisions of the Act. Under section 3(1) the liability to pay compensation relies on four conditions

1. Personal Injury
2. Caused by accident
3. Arising out of and in the course of employment
4. and the injury must have resulted either in death of workman or in his total or partial disablement for a period exceeding three days.

A person below the age of 16 years would also be entitled to get compensation under the category of workman if he fulfills the above conditions.

It is essential to examine the conceptual dimension of some important notions which would enable us to identify and set certain goals and standards to be achieved through the scheme in order to protect the employment injury victims. The important notions such as personal injury, accident, arising out of and

---

186 Oriental Insurance Company Ltd., Vs Rathnamma and another 2000 (86) FLR 330
in the course of employment, occupational disease etc. are discussed as follows with the help of decided cases:-

PERSONAL INJURY

Personal injury means both "Physical and Mental" injury i.e., a hurt to body or mind\(^{187}\). Thus a person suffering from nervous shock will be covered by the Act. The distinction between mental shock is presumably in all cases the result of or atleast accompanied by, some physical disturbance in the sufferer’s system\(^{188}\).

It was argued that personal injury meant exclusively and only a blow to the human flesh. If a coal driver fell from his truck and broke his wooden leg and had no other injury, then it was property damage and not personal injury. In California it took an amendment to the state constitution or and express legislation to overcome this argument\(^{189}\). But most state courts today support the employer’s views on this phrase and such damage is held to be surely property damage, not personal injury\(^{190}\).

In California, the mere breaking of eye-glasses, which are not a substitute for a ‘natural part of the human body’ without physical injury is still property damage\(^{191}\).

---

\(^{187}\) Per Lord Simon, Jones Vs Secretary of state for social services (1972) Ac 944 at 1020.

\(^{188}\) Per Lord Mackmillan in Bour hill Vs young (1943) AC 92

\(^{189}\) Pacific indemnity co. Vs Industrial Accident Boards 11 P 2d 1 (cal 1932)

\(^{190}\) London Guaranty and Accident Co. Vs. Industrial Commission, 80 colo 162 (1926)

\(^{191}\) California Casualty Indemnity Exch Vs Industrial Accident Board of California 90 P 2d 289 (1939) - “Eye glasses are in no sense a substitute or replacement for a natural part of the body, they are merely aids to the eyesight”
Under India Law, although no formal definition of personal injury has generally been given, the term may lead to death, or disablement or impairment of the powers of the body or mind in either of which event the employer is liable to pay compensation if the conditions laid down in section 3 (1) are satisfied 192.

Besides, personal injury includes psychological injuries like nervous shock strain eventhough there is no bodily injury 193.

ACCIDENT

An accident is described by Fridman as “an event or an occurrence which happens in such a away as to be totally unexpected by the person suffering the injury in question 194. Accident may also include occurrences internationally caused by others for example, personal injury resulting from an assault is caused by accident 195.

As the term has not defined statutorily, it must be interpreted carefully to test whether an occurrence is unexpected or not. Under section 3, accident in-

192 Smt. Mariambai Vs Mackinnon mackenzie and co (private) Ltd. AIR 1968 Bom 187 at P-190.

193 News Chronicle vs Mrs Laxarus AIR 1951 (Punj) 102.


cludes not only such occurrence as collisions, tripping over floor obstacles falls of
roof but also less obvious ones causing injury like strain, causing rupture, expos-
sure to draught, causing chill etc 196. If a workman collapses and dies of heart
failure as result of the ordinary strain or exertion of his employment, the em-
ployer is liable to pay compensation for personal injury by accident 197.

INTENTIONAL AND WILFUL INJURY : WHETHER ACCIDENT

If accident is contemplated and without design on the part of the
accident victim it may still be accident, although caused intentionally and
willfully by another person. Atiyah correctly observes that 198.

"The notion of an 'accident' is not perhaps entirely self-evident. Indeed
the term accident, is, in a sense, a relative term. An international assault
committed by A against B may not be an accident from A's point of view but it
would not be odd to call the resultant injuries 'accidental' injuries from B's point
of view. Moreover, even from A's point of view the consequences of the assault
may be 'accidental' eventhough the assault itself was deliberate.

Therefore, in order to decide whether a particular occurrence is
accident or not, it must be looked upon not only from the point of view of the person who
causes it but also from the point of view of the person who suffers it 199.

196 Pillai, Madhavan, "Labour and Industrial Laws", (Allahabad : Allahabad Law
197 Oriental Fire and General Insurance Co. Vs Sunderbai Ramji 1992
Lab IC1020.
198 Accident compensation and the Law 3 (1975) quoted in Dr. Singh, Veer
"Loc.cit.", P -70.
199 Union of India Vs Gopaldas Virandmal 1955 II LLJ 635.
In many cases, incidents like murder of a bank cashier 200, injuries sustained in bomb explosion at work place as a result of time-bomb placed by some unknown persons 201, Murder of a gang-zamadar while going to collect the wages of labourers from P.W.D. office 202 have been held to be accidents.

SELF INFLECTED INJURIES - WHETHER ACCIDENT

Self-inflicted injuries cannot be said to have been caused by an accident. The mishap or accident must be looked at from the workmen’s point of view i.e., personal injury not by design but by accident 203. But suicide resulting from insanity or mental derangement consequent on personal injury by accident has been held to the death resulting from injury. The claimant must show that the death is due to accident and that insanity is the direct result of injury 204.

COMPENSATION FOR WORKER’S SUICIDE 205 - IN JAPAN.

In Japan, a district Court in the Western part of Okayama accepted a plaintiffs claim that Junichiwatanabe, then 41, an employee at the Kawasaki Steel Corporation, committed suicide in 1991 after being made to work for exclusive hours. The presiding judge ruled that Kawasaki Steel Corporation failed

200 Nishbet Vs Rayne and Burn (1910) 2K.B., 689
201 Trustees of port of Bombay Vs Yamunabhai, AIR 1952 Bom 382.
to take appropriate measures to his work load and order the corporation to pay 4,06,000 U.S. Dollars as damages to the family of the employee who killed himself due to over workload.

4.2.1.1 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

To come within the Act, the injury by accident must arise both out of and in the course of employment 206. Thus Indian Courts have given an wider meaning to the term employment. These twin conditions must co-exist before it can be said that the employer has incurred the liability.

ARISING OUT OF EMPLOYMENT

The expression “arising out of” suggests the cause of accidents i.e., it should convey the idea that there must be some sort of connection between the employment and the injury caused to the workmen as a result of the accident. This expression applies to employment as such - to its nature, its conditions, its obligations and its incidents and if by reason of any of those factors, the workman is brought within the zone of special danger, the injury would be one which arises out of employment 207.

DIRECT OR INDIRECT CAUSES

Even when there is only an indirect relationship between the employment and the accident, the accident has been held to have arisen out of


207 Nawab Ali Vs Hanuman Jute Mills AIR 1933 Cal 513.
employment. It is wide enough to cover the circumstances attending the employment which would go to show that the workman received personal injury as a result of the accident arising out of his employment.

PROXIMATE OR REMOTE CAUSE

For an accident to arise out of employment, it requires some casual connection between the accidents and the employment but the cause should be proximate cause and not a very remote cause. But at the sametime the doctrine of position risks has been applied by the courts to consider that the accident is one arose out of employment. The Doctrine of Positional Risk means that if the conditions or obligations of workman's employment require him to be in a particular place, an accident, due to some special risk or danger to which his presence in that place exposes him, arises out of the employment which has been applied by courts in cases of work-place accidents.

---


209 Upton Vs Great Central Railway Co. (1924) AC 302.

210 Shyama Devi Vs ESI Corporation AIR 1964 All 427 held : Death of an employee, due to stacked bund falling on him whole at work was an accident arose out of employment. Bai Devi Kaluji V Silver Cotton Mills Ltd AIR 1956 Bom, 464 held : Workman suffering from heart disease died at work place after working of 8 hours on a hot day due to accident arising out of employment. Shmt Nanjamma V the City Municipal Council, Mysore, 1982 Lab. I.C.1208: where Mahadevappa was required to assist the Health Inspector when the latter took rollcall of sweepers assembled for work on a part of the road, knocked down by a passing jeep and killed, held : death arose out of employment.
THE DOCTRINE OF STREET RISKS

The Doctrine of Street risk is a variant of positional risk principle only. When a workman while acting reasonably in the course of employment, make use of public streets and meets an accident due to the common dangers there, the same is deemed as arise out of employment 211.

In early American Law 'Street risks' were not compensable. But exceptions were made for tea masters, those repairing roads, and for an insurance collector because for as to them there was a commulative risk - the road was their workshop 212.

In Katz v Kadans Co. 213 the Newyork Court Said “Particularly in the crowded streets of a great city, not only do vehicles collide, pavements become out of repair and crowds jostle but mad and biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets which are peculiar to the use of the streets and do not commonly happen indoors.” Thus the mere fact that an accident happens on a public road and the danger is one to which the general public is likewise exposed, does not prevent the existence of a causal relationship between the accident and employment, if the danger is one to which the employee, by reason of and inconnection with his employment, is subjected to in an abnormal degree. On the other hand, if a workman meets with an


212 Horovitz : Injury and Deaths quoted in Chakravarti (S),” Loc. Cit.”, P-153.

213 (1922) 232 NY 420.
accident on a public road with no evidence to show that the nature of employment of the deceased required his presence at the place of accident, it must be held that the accident does not arise out of employment 2\textsuperscript{14}

TEST TO DETERMINE THE SCOPE OF "ARISING OUT OF EMPLOYMENT"

The Full Bench of the Assam High Court in Assam Railway and Trading Co. Vs Saraswathi Devi\textsuperscript{15} laid down the following tests for determining whether an accident arose "Out of employment"

(i) The Workman was in fact employed on or performing the duties of his employment at the time of the accident 2\textsuperscript{16}.

(ii) The accident occurred at or about the place where he was performing these duties or where the performance of these duties required him to be present\textsuperscript{217} and

(iii) The immediate act which lead to or resulted in the accident had some form of casual relations with the performance of these duties and such casual connection could be held to exist if the immediate act which led to the accident is not so remote from the sphere of his duties or the performance thereof as to be regarded as something foreign to them 2\textsuperscript{18}.

---

\textsuperscript{214} Commissioner for the port of Calcutta Vs Kaniz fatema AIR 1961 Cal. 310.

\textsuperscript{215} AIR 1963 Ass. 127 (F.B.)

\textsuperscript{216} Janki Ammal V Divisional Engineer Highway, Kozhikode (1956) 2 LLJ 233.

\textsuperscript{217} Trustees, Bombay Port Vs. Yamunabhai AIR (1952) Bom 382.

\textsuperscript{218} Simpson Vs Sinclair, 1917 AC 127.
All the above cases indicate that by and large judiciary has been liberal in interpreting the phrase arising out of employment and has devised a number of very flexible principles to widen the scope of the phrase.

ACCIDENTS - IN THE COURSE OF EMPLOYMENT.

In the course of employment means during the currency of employment. In order to succeed in his claim a worker must show that he was at the time of accident engaged in the employer’s business or in furthering with business and was not doing something for his own benefit or accommodation. He must prove that he was doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service. The distinction between “arising out of” and arising in the course of employment is that the former conveys the idea that there must be some sort of connection between the employment and the injury caused to workman as a result of accidents and the latter suggests the point of time i.e., the injury must be caused during currency of employment.

4.2.1.2 DOCTRINE OF NOTIONAL EXTENSION

The widening of the phrase ‘course of employment’ has been done primarily through the principle of notional extension of factory premises by the courts, particularly in the content of commuting accident. Some jurists too have advocated that

---

219 Trustees, port of Bombay V Yamunabhai AIR 1952 Bom 382.


221 Sakinabibi V Gujarat State Road Transport Corporation Lab IC 365.

there is no reasonable principle why employers should not be protected "for a reasonable distance before reaching or after leaving the employer's premises" 223.

As a general rule the employment of a workmen does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. But under this doctrine of notional extension of time and place, the employee's premises is expanded so as to include an area in which the workman passes and repasses in going and in leaving from the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment eventhough he had not reached or had left his employer's premises 224.

In B.E.S.T. undertakings Vs. Mrs. Agnes our Supreme Court has applied this doctrine and held that when a driver returning home or reporting for work uses the transport provided by his employer sustains any accident during such a journey is considered to be happened in the course of his employment 225.

In another case a deceased workman was standing in the queue waiting for the bus provided by the employer for reaching the place of work and was run over by the bus by which he was to travel, it was held that the workman had died as a result of employment injury 226.

223 Horoujitz, Workmen's Compensation, P-161.
225 AIR 1964 SC 193.
226 ESIC Vs Sayeeda Khatton Danaawal (1995)I LLJ 173 (Bom)
The ILO also adopted a convention in 1964, which defines the kinds of journey to be covered under the Workmen’s Compensation Laws as follows:

The trips between the place of work and

1. The employees permanent or temporary residence
2. The place where the employee takes his meals
3. Place where the employee ordinarily receives his salary.

From the above discussions it can be observed that principal of notional extension has been applied generally to cover the following situations:

1. Journey to and from place of work
2. Use of employer’s transport
3. Journey as a part of service

EMPLOYER’S LIABILITY IN CASE OF OCCUPATIONAL DISEASES:

The fundamental duty of the state is the protection of health because disease in most cases attack most important organs of the body. Injuries due to occupational disease are of more serious than the injury by accident both from the aspect of the individual and society. In fact, disease in most cases attack the whole system of the body and so legislative provisions are made to provide compensation not only for industrial accidents but also for occupational diseases.

227 Blomme V Sawyer (1904) 1 K.B. 271; Knight V Howard Wall Ltd. (1938) 4 All ER 667
According to ILO "Any disease which occurs frequently only to persons employed in certain occupations or is a poisoning caused by a substance used in certain occupations, should, if the person suffering from such a disease was engaged in such an occupation, be presumed to be of occupational origin and give rise to compensation". Thus it reflects the Disease-Employment Nexus 228.

In Indian Law certain specified occupational diseases are also included by the Act for the purposes of fixing liability on the employer with a view to pay compensation under section (3) of the Act. Occupational diseases have been categorised in parts A, B and C of schedule III which is deemed to be personal injury caused by accident arising out of and in the course of employment.

The following conditions should be satisfied for claiming compensation:

i) The disease is directly attributable to a specific injury by accident and

ii) It has arisen out of and in the course of his employment.

WORKMEN'S COMPENSATION SCHEME: BENEFITS

With increasing use of machinery and mechanical power in organised industries, the number of industrial accidents has become common in India also. Workers need protection against industrial accidents and hence this Act provides for cash payment as benefit for the injuries resulting in death or disablement.

228 Income Security Recommendation, 1944 (No.67) at Paragraph 16 (3)
DEATH

In spite of provisions for safety devices to be used in industrial establishments, mines, etc., have been incorporated in various labour laws, there is always some possibility of accidents when the machines are huge and complicated. Hence payment of compensation can be supported on both humanitarian and economic ground by recognising the value of human life. This Act provides compensation in case of death under all circumstances. The amount of compensation where death results from the injury shall be 50% of the monthly wages multiplied by the relevant factor or Rs. 80,000 whichever is more.

DISABLEMENT:

Disablement means the loss of earning capacity due to injury caused to a workman by an accident arising out of and in the course of employment. Disablement can be classified as (1) Total and (2) Partial. It can further be classified as permanent and temporary. Disablement whether permanent or temporary is said to be total when it incapacitates a worker for a work he was capable of doing at the time of accident resulting in such disablement.

Total disablement is considered to be permanent if a workman, as a result of an accident, suffers from every injury specified in part I of the

---

229 Relevant Factor for calculation of the amount of compensation have been specified in schedule IV of the Act.

230 Section 2 (l)

231 Section 2 (g)
schedule 1 or from any combination of injuries specified in part II of Schedule I as would be the loss of earning capacity when amounts to one hundred percent or more. Disablement is said to be permanent partial when it reduces for all times, the earning capacity of a workman in every employment which he was capable of undertaking at the time of the accident. Every injury specified in part II of schedule I shall be deemed to result in permanent partial disablement. Temporary partial disablement is, where the disablement is of a temporary nature and reduces the earning capacity of a workman in the employment in which he was engaged at the time of accident.

The extent of disablement under the Act has not to be assessed in terms of loss of physical capacity but should be assessed in terms of loss or reduction in earning capacity with reference to the nature of job the workman was doing. So if a workman continues to do the same work with difficulty in spite of liability it would not be proper or correct to hold that he suffers from 100% disability.

AMOUNT OF COMPENSATION

The amount of compensation payable by the employer shall be calculated in terms of loss or reduction in earning capacity. But if the physical defect or disfigurement renders workman’s labour unsaleable in the labour market, there

---

232 Agent, East Indian Railway Vs Rayan 1937 cal 526.

233 Pratap Narain Singh Deo Vs Shrinivas (1976) 1 SCC 289.

234 G.V. Venkatesh Babu and another Vs Krishnakumar 2002 (93) FLR 126.
would either be partial disablement or total disablement even though such physical defect or disfigurement may not impair the workman's capacity to work.\textsuperscript{235}

CONDITIONS OF NON-LIABILITY

Though the workmen's compensation Act, 1923 hold the employers liable statutorily for the injuries suffered by the workman due to employment in industrial accidents, the employers are liable not for any/every injury caused a workman due to work related accidents during employment. The employer will not be liable to pay compensation under the situation mentioned in proviso to section 3 (1) which are as follows:

WAITING PERIOD

If the injury didnot result in total or partial disablement for a period exceeding three days exempts the employer from the liability of paying compensation.

DRINK OR DRUG

In order to disown any claim for compensation the employer has to show that the workmen having been at the time of accident under the influence of drink or drug exempts the employer from the liability.

WILFUL DISOBEDIENCE

In case of wilful disobedience, a man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or as easy way of doing a piece of work and so forth.\textsuperscript{236}


\textsuperscript{236}Bhurangya Coal Co. Ltd. V Sahebjan Mian (1957) 2 LLJ 552.
Any wilful removal or disregard by the workman of any safety guards or other device which he knows to have been provided for the purpose of securing the safety of the workman exempts the employer from his liability if the workmen suffers injury out of it.

The term 'wilful disobedience' shows that mere disobedience is not sufficient because it may be the result of forgetfulness or the result of the impulse of the moment. The statute only exempts the employer from liability when the disobedience is wilful, i.e., deliberate and intended.

The above exceptions do not apply in the case of accident resulting in death unless the employer proves that the fatal accident was not arising out of and in the course of employment.

ADMINISTRATION OF THE SCHEME

Workmen’s Compensation Act, 1923 is a Central Act. But its day-to-day administration is entrusted to the State Governments. Under section 20, the State Government may appoint any person/persons as compensation commissioner for a specified area/areas. The Workmen’s Compensation Commissioner performs the function of administrative adjudicators and settles disputed claims, revises periodic payment and registers agreements regarding mutual settlement of compensation claims under the provisions of the Act. It was held that person having legal background should be appointed as
commissioner. So that Public confidence may be maintained and proper judicial verdicts be delivered 237.

4.2.2. EMPLOYEE’S STATE INSURANCE ACT, 1948.

The Employee’s State Insurance Act, provides for medical care and Income Security benefits in respect of health related contingencies such as sickness, maternity and occupational injuries on a contributory basis. This scheme is a social insurance scheme in which the benefits are related to contributions by the employers as well as the employees. The State Government also make a small contribution towards medical benefit 238.

SCOPE AND COVERAGE

This Act extends to the whole of India. It applies to all factories 239 (including Government factories but excluding seasonal factories) employing 10 or more persons and carrying on a manufacturing process with the aid of power or employing 20 or more persons and carrying on a manufacturing process without the aid of power and such other establishments as the Government may specify 240. Even where the main factory is not covered by the Act, its branches employing 20 or more person can be brought under the


239 Section 2(K) of the Factories Act - 1948.

240 Section 1 of the Act
provisions of the Act by virtue of section 1(5) 241. Establishments where in 20 or more persons are employed, such as hotels 242 clubs 243 cinemas 244, News Paper establishments 245 and shops are also covered by the provisions of the ESI Act.

Once the Act is applied to a factory or establishment it shall continue to be governed by its provisions even if the number of workers employed therein falls below the specified limit or the manufacturing process therein ceases to be carried on with the aid of power subsequently 246.

FACTORY OR ESTABLISHMENT

The definition of factory is given under section 2 (12) of the Act. The definition of factory does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

ESTABLISHMENT EMBRACES FACTORY ALSO

Establishment is a wide term which is capable of including even a factory. The use of words “any other” preceding “establishment” in section 1(5) of the Act favours the view that a factory is also an establishment. So an establishment which is not a factory in view of the definition can be brought within the

241 Modi Rubber Ltd. V Regional Director, ESIC 1986 Lab I.C. 273.
242 Ritz (Private) Ltd. and others Vs Shivram and others 1994 - I - LLN 15 (SC)
243 Cricket Club of India Ltd and others Vs ESI Corpn. and another 1993 - I-LLJ 642 (Bom)
244 Royal Talkies Vs ESI Corpn., AIR 1978 SC 1478
245 Sri Narakesari Prakashan Ltd. and others and ESI corpn. etc., Vs News Paper (Adm & editorial sec) (1985) I LLJ I (SC)
246 Section 1(6) inserted by ESI (Amendment) Act, 1989 w.e.f. 20-10-89.
fold of the power to extend the application of the statute 247.

SHOPS

It was held that a shop is a place where activities relating to sale of goods are carried on even though without actual storing and delivering of goods 248.

In the words of Judiciary ‘shop’ means 249:

i) a place especially a small building for the retail sale of goods and services, and

ii) a place for the performance of a specified type of work; workshop.

Even if the sale of services rendered for price are restricted, nevertheless, it would be a shop, if 20 or more persons are employed in the establishment 250.

EMPLOYEES ENTITLED

As regards the category of employees covered under the scheme, a broader definition of employee is given under section 2 (9) of the Act. Giving the reasons of wider and comprehensive coverage of the ESI Act Justice Ramachandra Iyer of the Madras High Court in case of E.S.I. Corporation Vs. Sriramulu Naidu 251 observed:


249 Hind Jea Band Vs Regional Director, ESI Corpn. (1987) I LLJ 502 (SC)

250 ESIC Vs Oxford University Press (1993) XXIV LLR 450 (Mad)

251 AIR 1960 Madras 248.
"The ESI Act is the outcome of a policy to provide a remedy for the widespread evils arising from the consequences of National poverty. It is a piece of social security legislation, conceived as a means of extinction of the evils of society named by Lord Beveridge namely, want, disease, dirt, ignorance and indigence"

WORK INCIDENTAL OR PRELIMINARY OR ANCILLARY OR CONNECTED WITH THE FACTORY OR ESTABLISHMENT:

It was held that Clerical Labour even though not actually working at manufacturing process shall be an employee as he was employed for the work incidental or preliminary or connected with the work of the factory or establishment 252. The Madras High Court, on similar ground, extended the coverage of the E.S.I. Act to builders, to persons who maintain factories or building 253 and also to Watchmen, Officeboys and Gardeners 254. The Supreme Court also opined that all the workers including clerks and administrative staff engaged in connection with the work of the factory are all employees within the meaning of section 2 (9) (i) of the Act 255.

252 ibid.

253 E.S.I. Corpn. Vs. Canapatia Pillai AIR 1961 Madras 176

254 Thyagarajan Chettiar Vs ESI Corpn. 1963 (I) LLJ 207.

CASUAL LABOUR

The definition of the word employee under section 2(9) of the ESI Act does not make any difference between a casual or temporary or permanent employee. So it is wide enough to include a casual employee employed for wages on any work connected with the work of the factory or establishment to which the Act applies.

The Karnataka High Court and the Punjab High Court have also held that casual employees are employees within the meaning of the term ‘employee’ as defined under the Act.

APPRENTICE

An apprentice is not an employee within the meaning of section 2(9) of ESI Act, 1948. They are engaged by a company merely as trainees for a particular period for a distinct purpose. The object of apprenticeship is learning under certain agreed terms. Simply because certain payment is made to him and he has to be under certain rules of discipline do not convert him to a regular employee by virtue of clause (b) of section 18 of the Apprentices Act.

256 A.P. State Electricity Board Vs ESI Corpn. 1977 Lab IC 316 (A.P.)
259 ESI Corpn Chandigarh Vs Oswal Woollen Mills Ltd. (1980) 2 Lab IC1064
260 ESI Corpn. V Tata Eng. and Co. AIR 1976 SC 66
261 ESIC Vs Harrison Malayalam Pvt Ltd, LLR 846 (SC): 1993 (67) FLR 689
So every employee including casual and temporary employees whether employed directly or through a contractor, who is on receipt of wages upto Rs. 6,500 p.m. is entitled to be insured under the ESI Act. A home worker rolling beedies at home also covered under this Act 262.

EXEMPTION

The Act does not apply to the following:

1) Factories working with the aid of power wherein less than 10 persons are employed 263.

2) Factories working without the aid of power wherein less than 20 person are employed 264.

3) Seasonal Factories 265.

4) A factory which was exempted from the provision of the Act as being a 'seasonal factory' will not lose the benefit of the exemption on account of the amendment of the definition of seasonal factory 266.


6) Railway Running Sheds 268.

262 P.M. Patel & sons Vs Union of India AIR 1987 SC 447.

263 2(12) (a)

264 2 (12) (b)

265 Section 1(4)

266 1991 (79) FJR 281 (Sc)

267 Section 2 (12)

268 Section 2 (12)
7) Government factories or establishments where employees are in receipt of benefits similar or superior to the benefits provided under the Act 269.

8) Indian Naval, Military and Air forces 270.

Besides, the appropriate Government may exempt any factory or establishments or class of factories or establishments or employees or class of employees from the provisions of this Act 271.

EXEMPTION FROM MATERNITY BENEFIT ACT, 1961 AND WORKMEN’S COMPENSATION ACT 1923.

Section 53 and 61 specifically provide that when a person is entitled to any of the benefits provided by the Act, then he shall not be entitled to recover any similar benefits admissible under the provisions of any other enactment. So an employer or establishment covered under the ESI Act is exempted from the provisions of maternity benefit Act and Workmen’s Compensation Act.

4.2.2.1 BENEFITS UNDER THE ACT

The ESI Act being a social piece of legislation is directly intended to secure the interest and welfare of the employees of the factories and other establishments272. The scheme provides the following six major benefits to the insured employees or their dependents:

269 Provision to Section 1 (4)

270 Section 2 (9)

271 Sections 87, 88, 89, 90 and 91.

272 ESI Corpn. Vs. Oswal Woollen Mills Ltd. 1980 Lab IC 1064 (Punj)
i) Sickness benefit

ii) Maternity benefit

iii) Disablement Benefit

iv) Dependent benefit

v) Medical Benefit and

vi) Funeral expenses

The ESI scheme, however, does not cover various other types of contingencies such as old age and unemployment. The scope has been enhanced from time to time.

SICKNESS BENEFIT

Sickness benefit represents periodical cash payments to an injured person occurring during any benefit period and certified by a duly appointed Medical Practitioner or any person having such qualifications and experience as may be specified by regulations of the corporation. Sickness means a condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds. The employer is entitled to deduct the benefit received by the employee from the leave salary payable to him but it was not possible to accept the contention that he is not entitled to receive the wages for the period during which he was on sick leave.273

The qualification of the person to claim sickness benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government. No sickness benefit shall be payable for the first two days except in cash where the worker falls sick for a second time within 15 days. Thus it excludes very short illness to claim sickness Benefits 274.

DEPENDENT’S BENEFIT

When an insured employee dies as a result of an employment injury, his dependants become eligible for payment of dependent’s benefit at the rate and time specified in schedule I. Dependents are specified in section (6A). In the absence of any such dependents at the time of the death of the insured person the dependent’s benefit is payable to other dependents of the deceased as stated in the first schedule.

DISABLEMENT BENEFIT

An injured person shall be entitled to periodical payment. If he suffers from disablement due to employment injury. The claimants have to observe certain conditions laid down for recipient of sickness benefit regarding treatment and rest as directed by the physician 275. The amended Section 51 makes provisions for the diablement benefit in two contingencies:

---

274 Section 63 and Rule of 55 of ESI (Central) Rules

275 Section 64 of ESI Act, 1948
i) Where a person sustains temporary disablement for not less than 3 days.

ii) Where a person sustains permanent disablement whether total or Partial

The Central Government has been empowered to prescribe rates, periods and conditions subject to which such benefit is payable.

MEDICAL BENEFIT

Sections 56 and 59A deal with medical benefit. Sub-clause (2) of section 46 empowers the corporation at the request of appropriate government to extend the medical benefit to the family of an insured person. This is the only benefit provided not in cash but in the forms of medical care and treatment without any qualifying conditions.

MATERNITY BENEFIT

A periodical cash benefit is payable to an insured woman employee, in case of confinement, miscarriage, medical termination of pregnancy, premature birth of a child or sickness arising from pregnancy, miscarriage etc., occurring or expected to occur in a benefit period, if contributions, in respect of her were payable for at least 70 days in the two immediately preceding contribution periods 276.

The benefit is payable only if the women employee does not work during the said period, and the prescribed medical certificate and other information are furnished.

FUNERAL EXPENSES

This benefit comprises the payment towards the expenditure on the funeral of an insured person. The sum of benefit is payable to the eldest surviving member of the deceased person's family. If the insured person did not have a family or was not living with his family, then the benefit is payable to the person who actually incurs the expenditure of the funeral. Any claim for the funeral benefit shall be made within three months of the death of the insured person.

EMPLOYER NOT TO REDUCE WAGES, BENEFITS, ETC.

The employer shall not reduce wages or discontinue or reduce any benefits conferred under the conditions of services payable to an employee, on account of his liability for contributions payable under the Act. The purpose of section 72 is to discourage employers from using the benefits provided under the Act as an excuse or justification for reducing or discontinuing the benefit available to the workman under their conditions of service on the ground of similarity between the two types of benefits.

4.2.2.2 ESI SCHEME AND PREVENTION OF EMPLOYMENT ACCIDENT

The concept of Employment Injury, Accident, Arising out of and in the course of employment, Notional Extension, Occupational Diseases which have been discussed under the Workmen's Compensation Act applies to this Act also.

277 Section 46 (6)

278 Section 72

279 Bareilly Holdings Ltd. v Workman (1979) 3 SCC 257 : 1979 (L&S) 262.
LEGISLATIVE RECOGNITION OF NOTIONAL EXTENSION THEORY

The Amending Act, 1966 has introduced new section 51A, 51B, 51C, and 51D, enhancing the scope of employment injury. These provisions in effect give legislative recognition to the theory of notional extension which are as follows:

SECTION 51A - PRESUMPTION AS TO ACCIDENT ARISING IN COURSE OF EMPLOYMENT.

The phrase "arising out of and in the course of employment has been given an extended meaning on the basis of certain presumptions provided in the Act. Section 51A provides that if it is shown that the accident arose in the course of employment of an insured person, in the absence of evidence to the contrary, would be presumed also to have arisen out of employment.²⁸⁰

Section 51-B, Accidents happening while acting in breach of regulation

This section provides an explanation to the expression "Out of and in the course of employment. An accident shall be deemed to arise out of and in the course of employment if the act is done for the purpose of and in connection with employers trade or business unless:

i) The insured person is at the time of accident in contravention of the provisions of any law applicable to him; or

ii) The insured person is acting contravention of any orders given by or on behalf of his employer, or

²⁸⁰ Renukabai Gedam Vs Manager, Nagpur Times, 1984 Lab IC 943.
iii) He is acting with instructions from his employer.

Section 51-C Accident happening while travelling in employer’s transport.

It incorporates the principle of notional extension of employer’s premises which lays down the liability of the employer for the payment of benefit for accidents arising while an employee is travelling in any transport provided by the employer while going or coming from work.

The conditions for holding the employer liable are as follows:

i) an insured person must be travelling by any vehicle with the express or implied permission of his employer;

ii) he must be going to or coming from his place of work.

iii) the vehicle must be operated by or on behalf of his employer or some other person in pursuance of an agreement made with the employer;

iv) the vehicle is not being operated in the ordinary course of public transport service. It is evident from the provisions of this section that a case of travelling by a vehicle which is operated in the ordinary course of public transport is not covered by this section.

Section 51-D Accident happening while meeting emergency.

An accident happening to an insured person on the premises of his employment shall be deemed to arise out of and in the course of his employment if :-

i) the insured person is on such premises employed for the purpose of his employer’s trade or business

ii) the accident happens while he is taking steps to rescue, succour or protect person who might be injured or imperilled.
iii) The steps may also be taken to avert or minimise serious damage to property. Thus this section clearly overrides the principle of added peril performance of duty 281.

As regards prevention of employment accidents, the Act does not provide any statutory safeguards. The employer or manager of the factory is however, responsible for providing safety measures under the provisions of the Factories Act.

ESI SCHEME AND FINANCIAL ARRANGEMENT

The scheme is financed by the tripartite contributions - the contributions of employers, employees and the state. The Government of India does not make any contributions. The State Government share the cost of medical benefit to the extent of one eighth of the expenditure 282. If the employer fails to pay the contribution the employees will become dis-entitled to any benefit. In such circumstances, the Corporation may however pay the benefit to the employee at the admissible rate and recover the same from the employer.

281. The principle of ‘added peril performance of duty’ means no compensation shall be payable if a workmen while doing his master’s work undertakes to do something which involves extra danger to him.

ESI SCHEME: ADMINISTRATION

The administration of the scheme under the Act is entrusted to a body corporate known as ESI corporation set up by the Central Government. The function of the corporation is the administration and enforcement of the scheme of ESI in accordance with the provisions of this Act. It is tripartite body consists of nominees of Central and State Governments and representatives of employers and employees. ESI corporation is the democratic machinery which is to function under the general supervision and control of the Central Government.

OBJECTIVES OF ESI CORPORATION

The objectives of the corporation have been to provide benefits, to promote health, welfare, rehabilitation and re-employment of insured persons and also to provide extensive medical care in case of sickness of an injured employee or his family. The corporation is empowered to spend the funds towards the welfare of the insured employees.

For a claim of benefit admissible under the Act, the insured person has to approach the corporation and cannot straight away approach the insurance court before make a claim for such benefit in accordance with the Act, Rules and Regulations framed there under 283.

283 Radhey Shyem Chintaman Vs ESIC (1989) 1 LLN 931.
RIGHT TO RECOVER CONTRIBUTION

If the employer neglects or fails to pay the contribution as required, the corporation has the right to recover the amount specified in that section as arrears of land revenue from him under section 68 of the ESI Act.

STANDING COMMITTEE

It is the chief executive body of the corporation to carryout the decisions of the corporation and is entrusted with the responsibility of the general administration of the scheme subject to the general superintendence and control of the corporation.

The Central Government is empowered under section 16 to appoint the following principle officers for the day-to-day administration and working of the scheme:

1) A Director General of the ESI
2) An Insurance commissioner
3) A Medical Commissioner
4) A Chief Accounts Officer and
5) Actuary

---

284 Regional Director, ESI Corpn. Vs Fibre Bangalore Pvt. Ltd. 1980 II LLJ 301.
Section 45 empowers the corporation to appoint Inspector for the purposes of enquiring into the correctness of any of the particulars stated by the principal employer in any return referred to in section 44.

ESI Corporation has a right to institute prosecution against any person in the following cases:

i) Failure to pay contribution

ii) Dismissal, discharge or punishment of an employee.

iii) Failure or refusal to submit any return or making false return.

iv) Obstruction to any inspector or any other official of the corporation in the discharge of his duties.

v) Making false statement for the purpose of obtaining benefit not admissible or for avoiding payment of contributions 285.

ESI COURTS

Section 74 empowers the State Governments to establish one or more ESI Court(s) specifying their territorial jurisdiction to decide questions or disputes arising under the scheme. The Civil Court has no power to adjudicate any such disputes.

4.2.3. THE MATERNITY BENEFIT ACT, 1961.

Maternity creates temporary disablement for every working women. A number of legislations have been passed in India to provide social security to the

pregnant working women which is a boon for every woman. In order to reduce disparities amongst various state and central legislation for maternity benefits, it was felt that a uniform legislation should be passed. As the coverage under the ESI Act is centrewise or areawise, it was decided to have a separate Maternity Benefit Act instead of various such Acts in the states and in the Mines etc., and so this the Maternity Benefit Act was enacted in 1961.

OBJECT

The object of the Act is to grant rest and maternity benefits to expectant mothers, for that the provisions of the Act has been enacted to regulate to the employment of workmen in certain establishments for certain periods (before and after child birth)

As this Act claims to achieve the object of doing social justice to women workers, the provisions of this Act should be interpreted in such a way that would enable the woman not only subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output 286.

SCOPE AND COVERAGE

This Act has been adopted by all the states except Manipur, Nagaland and Sikim. In the case of Manipur and Nagaland, it is claimed that there are hardly any factories or establishments, which are coverable 287. The Act applies in the first instance to every

286 B. Shah Vs. Labour Court, Coimbatore, AIR 1978 SC 12
establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian acrobatic and other performance.

The Act also provides that the State Government with the approval of Central Government is empowered under section 2(1) to extend the application of the Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise provided after giving not less than two month's notice by notification in the official Gazette.

By the Maternity Benefit (Amendment) Act 1998, the application of the Act has been further extended to every shop or establishment in which ten or more persons are employed or were employed on any day of the preceding twelve months. The Act however, does not apply to any such factory or other establishment to which the provisions of ESI Act are applicable for the time being.

But where the factory or establishment is governed under the ESI Act and if the women employee is not qualified to claim maternity benefit under section 50 of the Act because her wages exceed Rs. 3000/- per month (the amount so specified U/s. 2 (9) of the ESI Act) or for any other reason, then such women employee is entitled to claim maternity benefit under this Act, still she becomes qualified to claim under ESI Act.

---

288 Ibid., P-149 (d).

289 Section 5-A and 5-B.
QUALIFYING CONDITIONS FOR ENTITLEMENT.

Every woman employee whether employed directly or through an agent for wages in any establishment is entitled to claim maternity benefit, if she has actually worked in the establishment for a period of at least 80 days during the 12 months immediately preceding the date of her expected delivery. The qualifying period of 80 days shall not apply to a workmen who has immigrated into the state of Assam and was pregnant at the time of immigration. While calculating the number of days on which a woman has actually worked during the preceding 12 months, the days on which she has been laid off or was on holidays with wages shall also be calculated.

NO WAGE CEILING

There is no wage ceiling for coverage under the Act and also there is no restriction as regards the type of work a woman is engaged in.

CASUAL WORKERS

Female workers engaged on casual basis or on muster roll on daily wages are also entitled to benefit under the Act since there is nothing in the Act which confers the benefit only on regular women employees.

290 Section 5 (2)
291 Ram Bahadur Thakur (P) Ltd Vs Chief Inspector of Plantations (1989) 2 Lab LJ 20 (Kerala)
292 Municipal Corpn. of Delhi Vs Female Workers (Muster roll) 2000 (2) SC. Almanac 269.
BENEFITS.

MATERNITY LEAVE

A women employee who could avail of the six weeks leave preceding the date of her delivery was entitled to only six weeks leave following the day of her delivery. But after the amendment of 1989, if a women employee does not avail six weeks leave preceding the date of her delivery, can avail of that leave following her delivery provided the total leave should not exceed 12 weeks.

MEDICAL BONUS

Every woman is entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of Rs. 250 in case no pre natal and post natal care is provided for by the employer free of charge.²⁹³

PAYMENT OF BENEFIT IN CASE OF DEATH

If the woman entitled to maternity benefit or anyother amount under the Act, dies before the recovery of that amount, then it shall be payable by the employer to her nominees or legal representatives as the case may be.²⁹⁴

RIGHT TO MATERNITY BENEFIT

The employer is bound to pay the amount of maternity benefit in advance for the period before the delivery on production of proof of pregnancy in a prescribed form. The balance of amount due for the

²⁹³ Section 8

²⁹⁴ Section 7
subsequent 6 weeks must be paid within 48 hours of the production of proof that she delivered a child 295.

LEAVE FOR MISCARRIAGE

In case of miscarriage or medical termination of pregnancy, a woman shall be entitled to leave with wages at the rate of maternity benefit for a period of 6 weeks immediately following the day of her miscarriage or medical termination of pregnancy 296.

LEAVE FOR TUBECTOMY OPERATION

A woman shall be entitled to leave with wages at the rate of maternity benefit for a period of 2 weeks immediately following the day of operation 297 provided she should produce prescribed proof.

LEAVE FOR PREGNANCY ILLNESS

Section 10 provides leave for a maximum period of one month with wages at the rate of maternity benefit are allowable in case of illness arising out of pregnancy, delivery, premature birth of a child, miscarriage and medical termination of pregnancy or tubectomy operation.

295 Section 6 (5)

296 Section (9)

297 Section 6(5)
NURSING BREAKS

For every woman who returns to duty after the delivery of child, section 11 of the Act provided two breaks of the prescribed duration in addition to the interval of rest allowed to her, be allowed in the course of her daily work until child attains the age of fifteen months.

NO DEDUCTION OF WAGES

The employer should not make any deduction from the normal and usual daily wages of a woman entitled to maternity benefit on account of the light nature of work assigned to her or for the nursing breaks allowed to her.

NO DISMISSAL OR DISCHARGE

Section 12 prohibits the employer from discharging or dismissing woman worker due to her absence which has been permitted by this Act. She will not be deprived of her right to maternity benefit on account of such dismissal or discharge. But if the dismissal is due to the proved misconduct of the woman then she will be deprived of the said right.

FORFEITURE OF MATERNITY BENEFIT

If a woman worker who has been permitted by her employer to go on maternity leave under the provisions of section 6, works in any other establishment for any period during such authorised absence, then her claims to the maternity benefit for such period worked shall be forfeited.

---

298 By virtue of Section 4(3) of the Act
299 Section 13.
300 Section 18.
FINANCING

This Act intended to achieve the object of doing social justice to women workers and the payment of maternity benefit under the Act is the liability of the respective employers and hence the scheme is totally financed by the employer. The employee or the Government do not contribute anything.

ADMINISTRATION OF THE SCHEME.

The administration of the Act lies with the employers and the central Government. The appropriate Government, through the inspectors and prescribed authorities to enforce the provisions of the Act. The inspector is conferred with certain powers such as directing the employer to make payment to any woman claiming the maternity benefit which has been improperly withheld, on receipt of complaint or may of his own motion make an enquiry regarding the wrongfully withheld payment. Any person aggrieved by the decision of the Inspector may appeal to the prescribed authority.

4.2.4 LAY-OFF AND RETRENCHMENT COMPENSATION

Apart from the various social security measures which are drawn exclusively to provide for different contingencies, some measures of social security has been provided through the amendment of the Industrial Disputes Act 1947, in the year of 1953 which provides for payment of compensation to workers in the event of lay-off or retrenchment.

NO HIRE AND FIRE AT WILL

An employer has the freedom to select anybody according to his requirement but he does not have the liberty to fire a workman as per his will i.e., the
traditional right of an employer to hire and fire his workman has been subjected to many restraints because one who invests capital is no more a master and one who puts in labour is no more a servant i.e., they are employer and employees in which employer may hire the latter but cannot fire them at his will. The interest of the employees thus have been protected by legislation.

Labour law has two objectives one is regulatory and the other is industrial peace and harmony. If Labour Laws provide a reasonable amount of social security and protection to workers, they also give right to employers which can be exercised for maintaining the harmony in the establishment. If, however, any employer becomes incorrigible, the law provides ways and means to an employer to retrench him, but the employer will have to observe certain procedures and his acting should not contain any malafide intention, otherwise that will not stand the scrutiny of the court. The Act also provides for certain unemployment benefits such as lay-off and retrench compensation to industrial workers.

4.2.4.1 LAY-OFF

Lay-off means discontinuance of work or activity, or dismissal or discharge temporarily from services. It results in immediate unemployment though temporary in nature 301.

The term Lay-off is defined under the Act as follows 302 "It means the failure, refusal or inability of an employer on account of shortage of coal, power, or raw

301 Priya Laxmi Mills Ltd. Vs. Mazdoor Mahajan AIR 1976 SC 2548

302 Section 2 (KKK)
materials or the accumulation of stock or the break down of machinery to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched."

ESSENTIALS OF A LAY-OFF

i) There must be failure, refusals or inability of the employer to give employment to a workman

ii) The failure, refusal or inability to give employment must be on account of one or more of the following reasons:

   a) Shortage of Coal
   b) Shortage of Power
   c) Shortage of raw materials
   d) Accumulation of stocks
   e) Breakdown of Machinery or
   f) Natural Calamity or for any connected reason.

iii) The workman’s name must be borne on the muster rolls of the industrial establishment on the date of which they have been laid off.

iv) The workman in question must not have been retrenched.

RIGHT OF WORKMEN TO LAID-OFF FOR COMPENSATION

The workman should fulfill the following conditions while claiming compensation.

---

1) His name must be borne on the muster rolls of an industrial establishment

2) He must have completed at least one year’s continuous service 304.

COMPENSATION

When the employer is unable to provide work to his workman for reasons beyond his control, then he owes a duty to pay lay-off compensation to such workman (Who has fulfilled the above conditions). Under section 25-C of the Act which entitles to get compensation from the employer for the period he is laid-off. The compensation payable shall be for all days during which he is so laid off at the rate of 50% of basic wages and dearness allowance for all days of lay-off except weekly holidays 305.

The maximum period for which compensation payable is 45 days during any period of 12 calendar months, in the absence of a contrary agreement. If the lay-off exceeds 45 days during a period of 12 months, then the workmen is entitled to the same rate of compensation for such period beyond the 45 days, whether in continuation of it or subsequently, on other occasions. However such period of lay-off beyond 45 days should be for minimum of one week or more to entitle the compensation there of. But in such situations the employer may either:

---

304 Section 25-B.

305 Section 25-C
i) Go on paying on lay-off compensation for such subsequent periods.

ii) Retrench the workman after the expiry of 45 days of lay-off on paying the retrenchment compensation as in section 25F,

BADLI WORKMAN

Badli workman is not entitled to lay-off compensation. But such a workman ceases to be a badli workman if he has completed one year’s continuous service in the establishment. If the name of the workman, even if he is a badli workman, is found on the muster rolls, he is entitled to lay-off compensation. The factor which relevant for deciding the rights of compensation is his name being found on the muster rolls and not how he is described there in.

DUTIES OF EMPLOYER

i) He must maintain a muster roll of workmen and to provide for the making of entries therein by workmen who may present themselves of work at the establishment at the appointed time during normal working hours not with standing that workman in any industrial establishment have been laid off.

306 Badli workman is employed in the place of another whose name is borne in the muster rolls. The badli workmen’s name should find a place in the muster roll.

307 Vijay Kumar Mills Vs Labour Court (1960) 2 LLJ 567 Mad.

308 ibid.

309 Section 25(D) of the I.D. Act.
ii) It must be a justified lay-off effected bonafide and not malafide. Malafides of the employer in declaring a lay-off really mean that no lay-off has taken place within the meaning of section 2 (KKK). So the Lay-off in question should not be by way of malafide or victimisation or with other ulterior motives.

3) The stoppage of work if resorted to during working hours must be notified by notice, put on the notice board and must be in accordance with the standing orders.

4) If the unemployment caused by lay-off is for a short period, the unemployment should be treated as compulsory leaver either with or without wages.

5) If the lay-off is for an indefinitely long period, the services may be terminated by due notice or payment of notice pay in lieu of notice.

6) Employees must be informed of the following things:
   a) Whether the employees are to remain on place of work or leave it.
   b) When work shall be resumed
   c) The time when the workmen are to present themselves for work during normal working hours. The period of lay-off should not be left indefinite. Where the workman did not suffer any loss because of his irregularity, it was held that the employer could not be penalised.

310 Tata Nagar Foundary Vs Workman (1962) 1 LLJ 382 (S.C.)
312 Raza Textiles Ltd Vs Their Workmen (1952) I LLJ 247.
313 Singh Engineering Works Ltd. Vs Iron and Steel Mazdoor Union (1951) II LLJ 82.
CONDITIONS TO BE FULFILLED FOR ENTITLEMENT OF LAY-OFF COMPENSATION

Laying-off a workman is an action of the employer which results in depriving the workman who had been laid-off the opportunity to work and earn wages. So the employer is required to pay compensation to the laid-off workmen if he falls within the provisions of section 25-C, otherwise the employer is absolved from the obligation to pay lay-off compensation if the provisions of any of the three clauses of section 25-E apply, even though it is the action of the employer which are as follows:

i) If he refuses to accept any alternative employment in the same establishment or in another which belongs to the same employer situated nearby and does not require any special skill or previous experience.

2) If he does not report to work at the establishment every day at the appointed time during normal working hours at least once in a day (or)

3) If such a lay-off is due to strike or go-slow on the part of the workmen in another part of the establishment 315.

I LLJ 560, 562 (Bom H.C.)

315 Section 25(E), Associated Cement Companies Ltd Vs. Their Workmen (1960) I SCR 703.
4.2.4.2 RETRENCHMENT - REMOVAL OF THE DEAD WEIGHT OF UNECONOMIC SURPLUS 316.

Retrenchment would ordinarily mean cutting down expenses on labour strength i.e., the discharge of surplus labour for effecting economy.

Section 2 (00) of I.D. Act, 1947, defines retrenchment in which there are four essential requirements as follows:

1. Termination of the service of a workman;
2. by the employer;
3. For any reason whatsoever; and
4. Otherwise than as a punishment inflicted by way of disciplinary action 317.

The second part of the definition consists of three sub-clauses (a) (b) (bb) and (c) which exclude certain categories of termination of service from the ambit of the definition which are as follows.

a) Voluntary retirement
b) retirement on reaching the age of superannuation
bb) Termination as a result of non-renewal of contract of the contract of employment.

316 State Transport Controller Vs I.T. 1965 II LLJ Orissa H.C. (D.B.)
317 Ramprasad and others Vs State of Rajastan and others (1993) XXIV LLR 59 (Raj)
c) termination of the service of a workmen on the ground of continued ill health. 318

The words for any reason whatsoever occurring in the definition, were held to mean that when a portion of the staff or labour force is discharged as a surplusage in a running or continuing business 319, the termination of the service which follows may be due to variety of reasons (eg.) for economy, rationalisation in industry, installation of a new labour saving machinery etc. The legislature in using that expression says in effect that it does not matter why you are discharging the surplus labour and if the other requirements of the definition are fullfilled, then it is retrenchment 320 i.e., the words "for any reason whatsoever are undoubtedly words of wide import and hence termination of service by the employer shall amount to retrenchment unless it is shown to be as falling within one of the exclusive clauses stated earlier 321.

SOME SPECIFIC CASES WHICH AMOUNTS TO RETRENCHMENT

1) Striking of the name of workman from the rolls by the managements 322 in accordance with standing orders

318 Anand Bihari and others Vs Rajasthan State Road Transport Corporation AIR 1991 SC 1003.

319 Hari Shivshankar Shukla Vs A.D. Divakar AIR 1957 SC121

320 Rajasthan State Electricity Board V Labour Court AIR 1966 Raj 56


322 Delhi Cloth and General Mills Vs Sambunath 1978 SC 8
2) Termination of service on the ground of reduction in volume of work.

3) Termination of service of a temporary employee on the ground of surplus labour.

4) Discharge of the workman on the ground that the worker did not pass the test which would have enabled him to be confirmed.

5) Bonafide reorganisation of the business results in surplusage of employees.

SOME SPECIFIC CASES WHICH DONOT AMOUNT TO RETRENCHMENT

1) The termination of the services of workmen on the closure of the business is not retrenchment.

2) If the termination of service as a result of disciplinary proceedings is not retrenchment within meaning of section 2(00) of the Act but is punitive.

---

323 Gammon India Ltd Vs Niranjan Dass AIR 1984 SC 500
325 Santosh Gupta Vs State Bank of Patiala AIR 1980 SC 1219.
327 Pipraich Sugar Mills Ltd. Vs Pipraich Sugar Mills Mazdoor Union AIR 1957 SC 95.
328 State Bank Of India, Appellant Vs the workmen of SBI and another respondent AIR 1990 SC 2034
3) Terminations under expressly stipulated contracts or non renewal of contracts of employment on expiry of such contract 329.

4) Termination of services of person appointed in leave vacancy would not amount to retrenchment 330.

5) Termination of service for very long unauthorised absence from duty does not amount is retrenchment 331.

From the above analysis, we can infer that the management can retrench its employees only for bonafide reasons by interpreting retrenchment as discharge of surplus labour or staff in a continuing industry. It is not necessary that removal of surplus must only be when the establishment runs is losses and it may operate at any level of profits 332.

AMOUNT OF COMPENSATION

The amount of compensation is to be calculated in accordance with the provisions of clause (b) of section 25-F of the Act. The amount of retrenchment compensation may be enhanced by the High Court and again by the Supreme Court in appropriate cases if the court thinks fit in given circumstances 333.

329 Uptron India Ltd Vs Shammi Bhan (1998) 1 Lab LJ 1165 (SC)
330 The Haryana State Federation of Consumers Co-operative whole sale store Ltd. Vs Presiding Officer, Industrial Tribunal 1995 II LLJ 1054.
331 Managing Director Vs Baba Sahib Devgonda Patil, 1987 Lab IC 288 (Bom)
332 Indian Tyre and Rubber Co. (India) Pvt. Ltd. Vs Their Workmen, 1957 II LLJ 506.
333 Workmen of Coimbatore Pioneers B Mills Ltd. Vs Presiding Officer Labour Court, AIR (1980) SC
LAST COME FIRST GO

Section 25 - G lays down procedure for retrenchment embodying 'Last come first go' rule. The employer shall retrench any workman who was the last person to be employed in that category unless there is an agreement to the contrary or for reasons to be recorded by the employer. If there is failure in complying with the principle of 'last come first go' for effecting retrenchment will render it invalid. The judicial policy is to protect the interest of retrenched workers by following the said principle. But it is not an inflexible rule and extraordinary situations may justify variations. The employer may deviate that said rule on the grounds of inefficiency, unrealiability or habitual irregularity character of workmen, but the employer must prove existence of such valid reasons.

4.2.4.3 RELIEF IN CASE OF UNJUSTIFIED RETRENCHMENT.

REINSTATEMENT AND BACKWAGES

A workmen who is not properly retrenched has a right to reinstatement even if some one has been engaged in his place and an order for payment of remuneration for the period the employee remained unemployed may be made by the Tribunal.

---

334 Municipal Corpn. of Delhi Vs Shrikhancheru (1993) XXIV LLR 5 (Del); Superintending Engineer, Urdwa Painganga Project Circle and another (1993)

335 Jorhaut Tea Co. Ltd. Vs. Management 1980 Lab IC 742 (SC)

336 Swadesmitran Ltd. Vs their Workmen (1960) 3 SCR 144.

337 Brohankumar Vs Barauni Oil Refineries AIR 1971 Page 174.
ENGLISH LABOUR LAW

People claiming unemployment benefit must not have become unemployed voluntarily. They should be available for work and must have proper reasons for rejecting any job that is offered. The circumstances in which he may be disqualified from benefit are as follows:-

a) losing employment through misconduct;
b) Voluntarily leaving employment without just cause;
c) without good cause, refusing or facing to take a reasonable opportunity to secure employment 338

SOME ILLUSTRATIVE CASES :-

In Taylor Vs Kent county council339, it has been held that if an employee is offered suitable employment for termination of service on the ground of redundancy and the offer is unreasonably refused, the employee is not entitled to a redundancy payment.

In Arnold V Thomas, Harrington Ltd 340. The plaintiff, a motor fitter was given work in addition to operate emergency service and provided with residential flat. The work of emergency service was stopped and the plaintiff was offered a substantive job of fitter, but he refused. It was held that the dismissal of the plaintiff was not due to redundancy, because the

339 (1969) 3 WLR 156 (QBD)
340 (1966-67) 1 Knights Industrial Reports 493 (QBD)
work of fitter had not ceased. Thus the plaintiff was not entitled to claim redundancy payment.

According to the English Labour Law, it is the duty of the retrenched employee to mitigate the damages and thus for claiming full compensation, the burden is on him to prove that he was not gainfully employed elsewhere 341. But current flows in the reverse direction in India. Sri D.A. Desai J. said, in Hindustan Tin works Ltd Vs its employees 342 that the doctrine of mitigation does not haunt this branch of the law. If the employer is found to be in the wrong as a result of which the employee has been directed to be reinstated then the employer cannot shirk his responsibility of paying wages of which he has been deprived on account of wrongful dismissal, invalid or void action. If the termination is on account of ulterior motives and amounts to unfair labour notice then the reinstatement should be followed by the award of full backwages for the idle period.

4.2.5 UNEMPLOYMENT BENEFIT SCHEMES - GLOBAL SCENARIO

Unemployment Benefit in the form of unemployment insurance is prevalent mainly in industrialised countries and rarely in developing countries 343.


342 1978 II 474 (477) SC.

POSITION IN ASIA AND THE PACIFIC

15 countries in the region provide for unemployment benefits but they are mostly the former USSR Republics and the developed countries of Australia, Japan, Hong Kong and New Zealand. In Thailand this benefit is provided for under the 1990 Social Security Act but implementation is pending. The Labour Laws in Bangladesh, India, Iraq, Philippines Solomon Islands and Turkey require employers to pay severance or dismissal indemnity to their separated employees 344.

In New Zealand, short term employment opportunities have been provided to encourage unemployed people. The statutory two week stand down or waiting period for unemployment benefits is waived in cases where an unemployed beneficiary undertakes temporary or casual work for 13 weeks 345.

POSITION IN CHINA

The Government of China has introduced a three tiered programme for dealing with the problem of unemployment.

a) The unemployed persons may report themselves to reemployment centres for retraining and for re-employment.

344 ibid.
345 ibid., 185.
b) If they are unable to get alternative jobs, they will put on unemployment subsidy

c) After two years they will be handed over to the third line of Urban Poverty Alleviation Programme nearly 10 million persons were covered by the state unemployment scheme at the end of 1999. In 1997, 878,836 persons were under the poverty alleviation programme.  

POSITION IN EUROPE

Countries like Denmark, Sweden, Norway, Germany, Finland, The Netherlands, France and in UK three types of cash benefits are provided which are as follows:

1) Unemployment benefits
2) Social Assistance
3) Unemployment Support

All eight countries have unemployment insurance schemes that pay cash benefits for unemployment to insured unemployed claimants who satisfy certain qualifying conditions. All eight countries also have social assistance schemes for unemployed workers who are not entitled to unemployment benefits nor have access to other resources. Unemployment support is typically paid to particular group of unemployed workers, for example, people who are not entitled to unemployment benefits. These grant benefits at a level below the unemployment benefit but above social assistance levels. In Sweden, Finland, Germany, The Netherlands and France have this type of cash benefit.

346 ibid.

4.3 THIRD LIFE PHASE - OLD AGE FROM ABOUT 60 YEARS TO DEATH

It is indispensable to make provision for safeguarding the future of the workers if they retire or become unfit for work or for their dependents if they die, by way of provident fund or gratuity schemes or pension schemes. The economists regard old age as that age at which worker should retire from employment as he is no longer fit to play a normal and effective role in the production process. The need for some sort of provision for old age was very much felt and so for safeguarding the interest of the working class against old age, invalidity or death, schemes like provident fund, pension and gratuity have been introduced by the Government.

The scheme of old age pensions or provident funds for industrial workers exist in Government factories and in the Indian Railways, whereas in case of private employers, provident funds have been most common, gratuities have been in some cases and pensions have been rather rare.

4.3.1 THE EMPLOYEE’S PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952.

Provident Fund schemes are designed to be provided as a valuable measures of economic security to bread winners and their family in the event of old age and their death. The scheme of provident fund has till now made a headway and a good number of employees have been brought within the purview of Employee’s Provident Funds and

348 Saxena (R.C.), "Loc . Cit.", P-311.
349 ibid., P-313.
Miscellaneous Provisions Act, 1952 as also its counterpart for coal industry namely the Coal Mines Provident Fund Bonus Scheme 1948. The Tea Plantations Workers in Assam receive the benefit of provident fund under the Assam Tea Plantations Provident Fund Scheme Act 1955. The seamen receive the benefit under the seamens provident fund Act, 1966.

OBJECTIVES

The Employees Provident Fund and Miscellaneous Provisions Act instituted a compulsory contributory fund for the future of the employee after his retirement or for his dependents in case of his early death. Contribution to the provident fund is designed to induce thrift so that the employee may save from his present earnings, a portion for a rainy day or for his old age. As workmen could not be expected to spare very much, regard being had to the gap between what he earns and what he must spend the employer is expected to make a contribution. Thus it cultivates among workers a spirit of saving something regularly and also encourages stabilisation of a steady labour force in the industrial centres.

In the Annual Report of the EPF organisation for 1985-86 says.

It was felt after considering the possible alternatives that the most appropriate course for this purpose was the institution of compulsory

---

350 Burhanpur Tapti Mills Ltd. Vs Burhanpur Tapti Mills Mazdoor Sangh 1965 - 1 LLJ 453 (SC)


contributory provident funds to which both the worker and the employer would contribute. It was organised that such a scheme would have, apart from others, the obvious advantage to cultivation among the workers the spirit of saving something regularly and would also encourage the stabilisation of steady force in industrial establishments.

APPLICATION OF THE ACT

The Act extends to the whole of India except the state of Jammu & Kashmir. It applies to every factory 353 engaged in any industry specified in schedule 1 and wherein 20 or more persons are employed.

The provisions of the Act are attracted even if the establishment is run by a large organisation carrying on other additional activities falling outside the Act 354.

APPLICATION OF THE ACT TO COMMON FUND

Under section 3, the Central Government is competent enough to have the application of the provisions of this Act to any other establishment, the employee of which establishment have a provident fund common with the employees of the establishment to which this Act has application. Since a notification has to be issued by the Central Government in this direction, the existence of such a provident fund in the establishment immediately before the application of this Act is vital.

353 As defined under section 2(g) of the Act.

POWER TO ADD TO SCHEDULE I

The Central Government has been empowered under section 4 to add to the first schedule, any other industry and cover the employees thereof under this Act, provided the Central Government thinks that a provident fund should be framed under this Act. The industry so added shall be deemed to be an industry specified in schedule I for the purpose of this Act. However in such a case the Central Government is required to issue a notification in the official gazette under section 4(1). The Central Government is thus quite competent to extend the provisions of the provident fund scheme to any industry. As it is a social enactment such power is always desirable.355

EMPLOYEES ENTITLED

The expression covers all persons who are employed for wages to do any kind of work, manual or otherwise, in or in connection with the work of the establishment or working in some manner in connection with the work of establishment. It includes persons employed by contractors and who is in receipt of wages upto Rs. 6,500. But excluding Apprentices engaged under the Apprentices Act or under the standing orders of the establishment.

Persons whether employed by or through a contractor in or in connection with the work of the establishment shall be included as employee provided that they should have completed the period of working days laid down in the scheme. Thus the definition embraces part time and Home workers also.

COVERAGE OF CASUAL AND TEMPORARY WORKERS

According to para 26 (a) of the E.P.F. Scheme, All employees employed in or in connection with the work of a factory or other establishment to which the scheme applies shall be entitled and required to become a member of the funds from the very first day of his employment. This para has brought workers employed on casual or temporary basis within the scope of the Act.

EXEMPTIONS

Once this Act applies to any establishment, it shall continue to be governed by the Act, irrespective of the fact that the number of employees working therein has subsequently fallen below 20 provided the establishment continues.

---

356 Kumar Brothers Bidi (Pvt.) Ltd. Vs Regional Provident Fund Commissioner 1968, Lab I.C. 1578 Pat.

357 Rly Employee’s co-op Banking Society Ltd Vs Union of India 1980 Lab I.C. 1212 (Raj H.C.)

358 Bagi Beedi Factory Vs Appellate Authority (1997) 77 FLR 971 (Kant)


360 Section 1(5)

361 Venkatesh V Union of India (1982) 2 LLJ 163
The Act however does not apply to a

1) Co-operative society employing less than 50 Persons and working without the aid of power.

2) Any central / State Government establishment having its own scheme of provident fund or pension.

Section 17 of the Act provides that the appropriate government, may, by notification in the official gazette and subject to such condition as may be specified exempt from the operation of all or any of the provisions of any scheme in any establishment to which the Act applies.

As per annual report of the E.P.F. organisation for the year 1999-2000, 2805 establishments with over 43.40 lakhs subscribers had been granted exemption upto March 2000.

4.3.1.1 SCHEMES AND BENEFITS

The Central Government has framed three schemes under this Act, Viz.

The EPF Scheme, 1952 - for establishment of provident funds for the em-

362 Section 16
ployees

The Employee’s Pension Scheme 1995- to provide family pension.

Employee’s Deposit Linked Insurance Scheme, 1976 - to provide life insurance benefit to the employees.

EMPLOYEE’S PROVIDENT FUND SCHEME

The Central Government is authorised under section 5 of the Act for the establishment of provident fund. The Central Government shall have to issue a notification in the official gazette before framing any such scheme.

This scheme shall apply to employees or any class of employees of an establishment or class of establishments as specified in it. The word ‘specify’ means that there should be no room for uncertainty in mentioning or naming the establishment to which the scheme is to be applied 364. Any such scheme shall take effect either prospectively or retrospectively on the date which is specified in the schedule.

ELIGIBILITY TO BECOME MEMBER OF THE SCHEME

The position upto 31st October 1990 was that as per para 26 of the EPF scheme, an employee was eligible to become a member of the scheme. Only when he has completed 60 days or three months service whichever was earlier 365. But after the amendment employee was to be covered under the scheme from the date of joining.


EMPLOYEE’S PENSION SCHEME 1995

The Government has framed the EPF scheme 1995 w.e.f. 16-11-1995. The existing Employee’s Pension scheme has been merged under the new scheme which shall be compulsory for all the existing members of the family pension scheme and those who become members of the EPF scheme on or after 16-11-1995.

Besides, the following employees shall have an option to join the new scheme:-

a) Employees who ceased to be members of the family pension fund between 1-4-1993 to 15-11-1995.

b) Employees who are members of the provident fund as on 16-11-1995 and not members of pension fund.

Members who have died between 1-4-1993 to 15-11-1995 shall be deemed to have joined and exercised the option of joining the scheme on the date of the death 366.

ELIGIBILITY TO CONTINUE AS A MEMBER

Till the earliest happening of any of the following events, every member of the Employee’s Pension scheme shall remain as a member 367.

i) he attains the age of 58 years or

ii) he avails the withdrawal benefit to which he is entitled vide para 14 of the scheme; or

366 Para 17 of the Employee’s pension scheme 1995
367 Vide Employee’s pension (Amend.) Scheme 1999, w.e.f. 22.2.1999
iii) he dies; or

iv) the pension is vested in him;

EMPLOYEE’S DEPOSIT - LINKED INSURANCE SCHEME

The Central Government may, by notification frame a scheme to be called as the Employee’s Deposit-Linked Insurance Scheme. The employee members are not required to contribute to the Insurance fund but the employers are required to contribute to the fund.

BENEFITS UNDER PROVIDENT FUND SCHEME

PARTIAL WITHDRAWAL

A member can withdraw a certain extent, from his provident fund for any of the following purposes which are non-refundable withdrawals:

a) Financing of life insurance policies

b) Purchase or construction of houses

c) Illness

d) Repayment of Loans

e) Marriages

f) Education of children

g) Abnormal Conditions

h) Cut in Supply of Electricity
i) Purchase of equipment by the physically handicapped

j) Lockout or closure of establishment

The advances are non-refundable and therefore are in the nature of part final payments. During the year 1999-2001 there were 3.94 lakh part final withdrawal amount to Rs. 782 crores.

FINAL WITHDRAWAL

EPF Scheme provides final withdrawal in the following cases.

1) Death
2) Resignation
3) Retrenchment
4) Superannuation
5) Permanent Invalidation

It has been reported that during the year 16, 30 lakh claims by final withdrawal were settled.

BENEFITS UNDER FAMILY PENSION SCHEME (FOR CASES ARISING PRIOR TO 16-11-1995)

---


369 ibid., 173.

370 ibid.

371 Cases arising after 16-11-1995 shall be covered under the Law Pension scheme.
FAMILY PENSION

If a member dies during the period of reckonable service, before the age of 60 years then family pension is payable at the specified rate mentioned under the scheme, provided he has contributed to the fund for at least 3 months.

ENHANCED FAMILY PENSION

If a person had been a member of the fund for 7 years or more, family pension is payable at enhanced rate.

LIFE ASSURANCE BENEFIT

A lump-sum of Rs. 5,000 \(^{372}\) is payable on the death of a member who has contributed to the fund for at least three months to the eligible member of his family.

REFUND

In case of death or cessation of membership members own share together with interest @ 8.5% p.a is refundable to him or to his family if he has contributed to the fund less than minimum period of three months.

RETIREMENT CUM WITHDRAWAL BENEFIT

Amount ranging from Rs. 110 to Rs. 9000 is payable when a member attains the age of 60 years or ceases to be a member for reasons other than death.

\(^{372}\) Para 28 of the EPF Scheme.
PENSION FUND SCHEME 1995

If a member has rendered eligible service of 20 years or more and retires before the age of 58 years then he shall be entitled to retirement pension and for short service pension if he has rendered eligible service of 10 years a more but less than 20 years.

MONTHLY WIDOW PENSION

A monthly widow pension ranging from Rs. 450 p.m. to an amount equal to monthly members pension is payable from the date of member’s death to the date of death of widow or her remarriage, whichever is earlier. Incase of deceased member is unmarried, an equal amount of monthly pension shall be paid to the nominee. But if there is no nominee then in the first instance it shall be paid to the dependant father and after his death the admissible pension shall be payable to the surviving mother life long.

WITHDRAWAL BENEFIT

A member shall be entitled to return of contribution at the prescribed rate, if a member has not rendered the minimum eligible service of 10 years on the date of retirement or on superannuation.

PERMANENT AND TOTAL DISABLEMENT PENSION

Para 9 to 16 of scheme

(a) Incase of a New Entrant the ‘actual service’ rendered from 16-11-1995 or the date of joining any establishment, whichever is later, to the date of exit from the employment.

b) Incase of an existing member the aggregate of the past service rendered from the date of joining, the Employees family pension fund to 15-11-1995, and the actual service rendered from 16-11-1995 to the date of exit from the employment.

As per G.S.R. 41 dt / 2/1/2000 w.e.f. 29-1-2000
A monthly member’s pension is payable to permanently and totally disabled member during the employment which is subject to a minimum of Rs. 250 p.m. The pension will commence from the date of diablement for the life-time of the member and is available irrespective of the member’s pensionable service.\(^{376}\)

CHILDREN PENSION

A monthly children pension equal to 25% of monthly widow pension subject to a minimum of Rs. 150\(^{377}\) p.m. per child for a maximum of 2 children at a time is allowed, till the child attains the age of 25 years\(^{378}\).

MONTHLY ORPHAN PENSION

If the deceased member is not survived by any widow or widow’s pension is not payable, then the child shall be entitled to a monthly orphan pension equal to 75% of monthly widow pension subject to a minimum of Rs. 250 p.m. per child\(^{379}\).

BENEFITS UNDER DEPOSIT - LINKED INSURANCE FUND SCHEME

On the death of a member while in service, an amount equal to the average balance in his provident fund account during the preceding 12 months\(^{380}\) or during the period of his membership, whichever is less, except where the average balance exceeds Rs.35,000 the amount payable shall

\(^{376}\) Pensionable service means the service rendered by the member for which contributions have been received or receivable in the Employee’s pension fund.

\(^{377}\) Subs for Rs 115 by GSR 41, dt: 12-1-2000 w.e.f. 29-1-2000

\(^{378}\) As per Employee’s Pension (Amdt.) Scheme, 1996, w.e.f. 28-2-1996.

\(^{379}\) Ibid.

\(^{380}\) As per notification No. GSR dated 22-5-1990 w.e.f. 1-3-1990.
be Rs. 35,000 plus 25% of the amount in excess of Rs. 35,000, subject to a maximum of Rs. 60,000 is payable to the eligible member of his family.

FINANCING

Section 6 of the Act provides that the rate of contribution for the provident fund by the employees and the employers should be 10% of the basic wages and dearness allowance.

For employees pension scheme, by diverting eight and one third percent of the pay of the employees from out of their contributions towards provident fund with an equal amount from the employer's share of provident fund contributions.

In case of Deposit Linked Insurance, the significant feature is that the employees covered under the Act are not required to pay contribution but the employers are required to pay contributions to the fund from time to time in respect of every such employee in relation to whom he is the employer, such amount not being more than one percent of the aggregate of the basic wages, dearness allowance and retaining allowance.

\[\text{Vide F.No. G. 20012/2000 - SS-1 dated 13-6-2000 issued by the ministry of Labour} \]

\[\text{ibid.}\]
EMPLOYER TO DEDUCT EMPLOYEE’S CONTRIBUTION FROM WAGES

The employer is required to deduct the employee’s contribution from his wages and deposit the same in the provident fund account along with his own contribution. If the employer fails to collect the workmen’s share, he shall be liable to pay workmen’s contribution. But the wages or other benefits such as pension, gratuity of an employee cannot be reduced on account of the employer’s contribution or administrative charges payable by him.

ADMINISTRATION

This Act provides for the establishment of central board of trustees for the administration of the schemes. The central Government is empowered under section 5-B of the Act to constitute to any state, a board of Trustees in such manner as may be prescribed for in the scheme.

The Central Board Of Trustees is tripartite in nature and having representation of employers, employees and Central Government. It is empowered to appoint Central Provident Fund Commissioner and who is to be chief executive officer of the central board. He is to function under the control of the Central Board. The Central Government may also appoint

---

383 S.K. Nasiruddin Beedi Merchant ltd Vs Central Provident Fund Commissioner 2000 (1) Scale 490.

Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner and other officers to assist the Central Provident Fund Commissioner.

POWERS OF ADMINISTRATIVE MACHINERY.

Section 7-A empowers the Central Provident Fund Commissioner, any additional Central Provident fund commissioner, or any other commissioners mentioned under section 7-A, to determine after due enquiry to decide a dispute regarding applicability of this Act to an establishment or to determine, the amount due from any employer under any provisions of this Act, regarding the pension scheme or the insurance scheme as the case may be. Section 7-A does not provide that the authority holding must act judicially. But as the authority has certain powers of a civil court and the proceedings before it are judicial for certain purposes. So having regard to the rights involved and likely to be affected, the authority exercises quasi-judicial functions and his procedure must conform the rules of natural justice. Denial to the employer of the opportunity to represent his case before final order is passed, amounts to violation of natural justice \(^{385}\). Section 7-A is attracted only when the employer fails in his legal obligation to make contribution \(^{386}\). Section 7-D has been inserted for providing a remedy of an appeal before an Appellate Tribunal. By notification dated June 30, 1997 the tribunal is already constituted and is functioning at Delhi \(^{387}\).

\(^{385}\) Gunvantrai Vs R.P.F.C. AIR 1970 MP 221.

\(^{386}\) Prakash kothari V R.P.F. Commissioner Maharashtra and Goa (1990) 2 Lab LJ 217 (Bom)

\(^{387}\) 2002 - II LLJ P-12 (Journal Section)
4.3.1.2 POSITION IN EUROPEAN COUNTRIES

The old age pensions can be classified into five pension models almost in all European countries. They are Assistance, citizenship, Employment record, Group Insurance and Individual Insurance.

ASSISTANCE MODEL

Economic need is the most important factor in entitlement to a benefit. Means-testing used in order to determine whether a claimant is entitled to a pension. Typically this test of resources is made on income. Its primary objective is to ensure subsistence levels for those without adequate resources. This model can be found in the German system.

THE CITIZENSHIP MODEL

Citizenship model’s objective is to secure a basic income for the entire population as its entitlement is based on citizenship or residence, which has the objective to secure a basic income for the entire population.

EMPLOYMENT RECORD

Employment is the most important criterion for entitlement to benefits in the model based on employment record. The benefits are earnings-related and it is typi-

---

cally the number and amount of contributions from employees and employers that determine the levels of benefit. The aim is to maintain the living standards of those engaged in active employment into the retirement period.

GROUP INSURANCE MODEL

Previous occupation is the basis of entitlement in this model which covers various labour market groups according to previous attachments to profession, firm, branch of industry, region etc. Benefits are determined in relation to previous earnings or premiums paid. The main objective of group insurance is to maintain the living standards of the group concerned.

THE INDIVIDUAL INSURANCE MODEL

It differs from the group insurance model in that individual contracts are the basis of entitlements. This model only covers the contracting individual, although family members are often included within the contract. The benefits are related to the premiums paid and objective is to serve to maintain certain living standards. Life insurance and personal pension plans are examples of schemes in the field of old-age pension which follows the individual insurance model.

4.3.2 THE PAYMENT OF GRATUITY ACT 1972

OBJECT OF THE ACT

The payment of Gratuity Act 1972 envisages to provide a retirement ben-
enefit to the workman who have rendered long and unblemished service to the employer. Gratuity is a reward for long and meritorious service. It is paid to workmen with a view to help them after retirement, whether the retirement is a result of rules of super annuation or physical disability and the general principle is that by their length of service, workmen are entitled to claim a certain amount as retirement benefits.

APPLICATION OF THE ACT

According to section 1(3), this Act apply to every factory or mine, oilfield, Plantation, port and railway company and to every shop or establishment within the meaning of any law in force in relation to shops and establishment in a state in which 10 or more persons are employed or were employed on any day of preceding 12 months. It also applies to such other establishment wherein 10 or more persons are employed or were employed on any day of the preceding 12 months and which is so notified by the Central Government.

---

389 Delhi cloth and General Mills Co. Ltd. Vs their Workmen (1968) 36 FJR 247

390 Bombay Union Dyeing and Bleaching Mills Vs Narayan Tukaram More (1980) II LLJ 424 (D.B.) (Bom)

391 Indian Hume Pipe Company Vs the Workmen, AIR 1960 Sc 251.

392 1 (3) (a)

393 1(3) (b)

394 1 (3) (c)
ESTABLISHMENT UNDER SECTION 1 (3) (B) AND 1(3) (C)

APPLICATION OF THE ACT SECTION 1 (3) (C)

The Central Government has made the Act applicable to motor transport undertakings, Clubs, Chamber of Commerce and Industry, Local bodies, Solicitor’s Offices, Educational institutions.

The word establishment under section 1(3) (b) and 1(3) (c) of the Act connotes as organised body of men and women employed where the relationship of employer and employees comes into existence.

---

395 w.e.f. 8-4-1974 G.S.R. 415 dt. 8-4-1974
396 w.e.f. 8-10-1979 G.S.R. 1255, dt 17-9-1979
397 w.e.f. 15-11-1980 SO. 3203 dt 30-10-1980
398 w.e.f. 23-1-1982 S.O. 239 dt 8-1-1982
399 w.e.f. 9-1-1982 S.O.111, dt 28-12-1982


401 U.P. Co-operative Unions and others Vs Prabhu Dayal Srivastava and others 1988 (57) FLR 70
Various courts have held the following types as establishments governed under this Act:

Municipal Board \(^{402}\)

Educational Institutions \(^{403}\)

Society registered under Societies Registration Act \(^{404}\)

Temple \(^{405}\)

Office of Regional Commissioner \(^{406}\),

In State of Punjab Vs Labour Court Jullundur,\(^{407}\) it was held that the payment of gratuity Act applies to an establishment in which work relating to the construction, development of maintenance of buildings, roads, bridges or Canals or relating to operations connected with navigation, irrigation or the supply of water or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on.

---

\(^{402}\) Nagar Palika Moradabad Vs Appellate Authority (1990) 2 Lab LJ 156 (All)

\(^{403}\) Ramgopal Vs Mahesh Shikshan Sansthan, Jodhpur (1997) 1 LLJ 26

\(^{404}\) Shri Gurudeo Ayurved Mahavidyalaya and another Vs Madhav Narayan Mahakode and others (1996) 1 LLJ 515 (Bom)

\(^{405}\) Shri Jaganathan Temple Puri Vs Jagannathar Padhi 1992 Lab IC 1621.

\(^{406}\) Regional PF Commr. Vs Regional Labour Commr. (Central) (1985) 2 LLJ 63

\(^{407}\) (1981)1 Lab LJ 354 (SC)

\(^{408}\) ibid.
The scope of section 1 (3) (b) of the Act has been considered by the Supreme Court and held that section 1(3) (b) applies to every establishment within the meaning of any law for the time being in force in relation to an establishment would include industrial establishment within the meaning of section 2(ii)(g) of the payment of wages Act, 1936. The expression “Law” under section 1(3) (b) is so comprehensive and it can mean a law in relation to shops as well as separately, a law in relation to establishments, or law in relation to shops and commercial establishments and the law in relation to non-commercial establishments.

SECTION 1 (3-A)

Once this Act applies to any establishment, it shall continue to be governed by the Act, even though the number of employees working therein has subsequently fallen below 10. Thus from the above discussion it is crystal clear that the Act is wide enough to bring the entire organised sector of industry and commerce within its scope.

EMPLOYEES ENTITLED

Every employee employed on wages (irrespective of his wages) 409 is entitled to receive gratuity after he has rendered continuous service for 5 years or more. The “Expression on wages” brings in the concept of contract of employment between the employer of an industrial establishment and the

409 The Monetary Ceiling of Rs. 3,500/- p.m. on wages for qualifying to receive the gratuity has been deleted vide payment of gratuity (Amendment) Act 1994 w.e.f. 24-5-1994.
definition “employee” will not come into play under the Act, in the absence of employer and employee relationship.

TEMPORARY AND CASUAL EMPLOYEES

One can observe that the legislature intended to cover temporary and casual employees also within the ambit of the Act as section 2-A (2) brings in a deeming provision that, if an employee also is not employed for the entire 365 days and who is actually employed during period of 12 calender months only for 190 days in a mine or in an establishment which works for less than 6 days in a week or 240 days in any other establishments, is deemed to have put in one completed years of service. So it is not necessary that a person should be supposed to work continuously from day-to-day under an employer to come within the definition of employee under the payment of gratuity Act, 1972 provided he should satisfy section (4) of this Act 410.

DAILY PAID WORKERS

The Act does not bar the daily rated workers from claiming gratuity under the Act. The view is strengthened by the decision in Associated cement co. Ltd Kistna cement Vs Apellate Authority 411 under the payment of Gratuity Act wherein the court allowed the payment of gratuity for employees working on daily wage basis. Moreover section 2(e) does not make any distinction between, temporary, casual, daily rate or permanent employee.

410 Section 4 requires employee to render continuous service of not less than 5 years

411 (1976) I LLJ 222
APPRENTICE

Section 2 (e) of the Act excludes an apprentice but does not exclude a trainee employed under the contract of employment. A trainee outside the Apprentices Act is covered by the definition of the term employee and is entitled to gratuity while the apprentice under Apprentices Act is excluded from the definition.\(^{412}\)

HOME WORKER

Home worker who is working in any establishment can be called an employee for an entitlement of gratuity \(^{413}\) within the meaning of section 2(e) of the Gratuity Act. Since the place where he rolls the beedis, though situated away from the beedi factory, is nevertheless apart of the establishment within the meaning of section 2 (h) of the Beedi Act.

ELIGIBILITY FOR PAYMENT OF GRATUITY

Gratuity is payable at the time of termination of employment after he has rendered continuous service of not less than 5 years.

1) On his superannuation (or)
2) On his retirement or resignation (or)
3) On death or disablement due to accidents or diseases.

---

\(^{412}\) Orissa mining corp. Ltd. Vs Controlling Authority under the payment of gratuity Act, (1995) ILLJ 381 (Ori) (D.B.)

\(^{413}\) M/s. Bagi Beedi Factory Vs Appellate Authority and others, 1977 (77) FLR 971 (Kant), S. Arunachalam Vs Managing Director and others 2002 Lab IC at 431.
Termination of services included retrenchment. However, the conditions of 5 years continuous service shall not be necessary where the termination of the employment of any employee is due to death or disablement.

RATE OF GRATUITY

Section 4(2) and 4(3) provides the rate of gratuity payable to an eligible employee. The intention of the legislature enacting the above said sub-sections of section 4 to achieve uniformity and to create and bring into force a self-contained all embracing, complete and comprehensive one relating to gratuity as a compulsory retirement benefit. The whole object is to ensure that the employee concerned must be paid gratuity at the rate of 15 days wages for 365 days in a year of service.

NON-SEASONAL ESTABLISHMENT

The amount of gratuity will be fixed by calculating 15 days wages for every completed year of service of part there of in excess of 6 months i.e., 15 days wages multiplied by number of completed years of service (Part of a year in excess of 6 months is counted as one year).

---


415 Wages for the purpose of calculating gratuity shall be the wages last drawn by the employee.

416 Completed year of service means continuous service for 1 year section 2(b)

417 Section 4 (2)
SEASONAL ESTABLISHMENT

In the case of seasonal establishments the employer shall pay gratuity at the rate of 7 days wages to his employees for each season \(^418\) i.e., 7 days wages multiplied by number of seasons for which employed.

The amount of gratuity should not exceed Rs. 3,50,000 in any case \(^419\).

BETTER TERMS OF GRATUITY SAVED

Section 4(5) saves better terms of gratuity which are available to an employee under any award or agreement or contract with the employer and does not appear to be controlled by section 14 of those Act as there is no provision in this Act which debars the employees and employers from entering into agreement or contract awarding better terms of gratuity in future. This is a beneficial provision which can be involved only by the employee and not by the employer. The employer has no right to insist that the employee must accept the terms of gratuity under the agreements. It is for the employee to decide whether the terms of gratuity under the agreement is beneficial to him \(^420\).

4.3.2.1 PROTECTION OF GRATUITY AGAINST NON-PAYMENT OF GRATUITY.

When services of an employee are terminated on the grounds specified in section 4(1) and not on account of wilful omission or loss caused to employer, gratuity

\(^418\) Second proviso of Section 4(2)

\(^419\) Section 4 (3)

\(^420\) Raveendranath prabhu Vs Rajappan (1998) 1 LLJ 216 (Ker)
could not be withheld. It is depriving a citizen from his legitimate dues. For non-payments of gratuity payable to the employee under the Act, the employer shall be punishable with imprisonment up to two years (minimum 6 months) or fine up to Rs 20,000 (minimum Rs. 10,000) or both.

PROTECTION AGAINST ATTACHMENT

Gratuity payable under the gratuity Act cannot be attached in execution of any degree or order of civil, revenue or in criminal court; But if it is payable to the heirs of the employee, it may be attached.

TIME LIMIT FOR PAYMENT

The employer should pay the gratuity within 30 days from the date it becomes payable or after such date along with simple interest @ 10% p.a. (or as notified by the Government from time to time) on the amount of gratuity, unless the delay is on the part of the payee.

PERMISSIBLE DEDUCTION FROM GRATUITY

Employer has right to make certain deductions from the gratuity payable to an employee if his services have been terminated for any wilful omission or negligence causing any damage, loss or destruction of employers property with respect to the extent of such damage or loss.

---

423 Section 7 (3A) w.e.f. 1-10-1987
424 Section 4 (6) (a)
FORFEITURE OF GRATUITY

The gratuity may be wholly or partly forfeited if the termination of services is due to employees riotous or disorderly conduct or any other act of violence or any offence including moral turpitude committed in the course of his employment 425.

If the service terminated for committing theft is an offence under law involving moral turpitude and so gratuity stands wholly forfeited in view of section 4(6) (b)(ii)426.

FINANCING

This is wholly financed by the employer. The workers or the Government make no contribution towards running this scheme.

ADMINISTRATION

EMPLOYER

The administration of the scheme rests first in the hands of the employer. He is required to pay the gratuity in time when it becomes due and also to register nomination.

THE GOVERNMENT

The Government appoints inspectors, controlling authorities and appellate authorities to decide the disputes in order to run the scheme smoothly. The recoveries have to be carried out by the collectors and the courts have to levy the penalties in respect of the various offences.

425 Section 4 (6) (b)

426 Bharat Gold Mines Ltd. Vs. Regional Labour Commissioner (1987) 70 FJR 11 (Kar)