3.1 INTRODUCTION

Social security as currently understood, is one of the dynamic concepts of the modern age which is influencing social as well as economic policy. It is the security that the State furnishes against the risks which an individual of small means cannot stand up by himself or even in private combination with his fellow countrymen.\(^1\) The need for social security arose as a sequel to the shift from agrarian economy to an industrial economy because of the associated problems emanating from such a shift. Rapid industrialization resulted in mobility of labor force in search of employment, which contributed to the splitting up of the joint family system, thus loosening the congenital commitments. Coupled with this, the occupational hazards inherent in industrial employment precipitated the development of various social security schemes to counter the adverse eventualities and to aid the subsistence of the family of the employee. Social security schemes aim to guarantee at least long-term sustenance to

\(^1\) V.V. Giri,(1972), "Labour problems in Indian Industry", (Bombay, Asia Publishing House), at 269.
families when the earning member retires, dies, or suffers a disability. Ergo, an employed person becomes a source of social security to the entire family. The term 'social security' refers to programs established by statute that insure individuals against interruption or loss of earning power and against certain special expenditures arising from marriage, birth, or death. In modern society, being a welfare society, State has assumed this responsibility of providing social security against these risks by social insurance supplemented by quasi-social insurance and social assistance or by a combination of all or any of these devices. Social Security measures, introduce an element of stability and protection in the midst of the stresses and strains of modern life.

The social security legislations in India derive their strength and spirit from the Directive Principles of the State Policy as contained in the Constitution of India. These provide for mandatory social security benefits either solely at the cost of the employers or on the basis of joint contribution of the employers and the employees. While protective entitlements accrue to the employees, the responsibility for compliance

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largely rests with the employers. The major enactments which provide a measure of social security benefits in India are the Employees' Compensation Act 1923, the Employees' State Insurance Act 1948, the Employees' Provident Fund and Miscellaneous Provisions Act 1952, the Maternity Benefits Act 1961, the Payment of Gratuity Act 1972, etc. In this chapter an attempt is made to analyse the scope, extent of application of these Acts to unorganised sector workers.

Historically the Common Law Courts in England played a vital role in the development of the law relating to employer's liability. Employer's liability means the personal liability of the employer to pay the compensation for the injuries sustained by his workmen in the course of their employment. This law was developed on the basis of the principle of 'negligence' of the employers at the place of work, plant and machinery. Claiming compensation under common law was difficult, expensive and time consuming process. Further, even if the employer was negligent, he could take shelter under several common law defences like assumption of risk, contributory negligence etc. With increased industrialization when accidents

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became more frequent, workers raised protests against callous employer, and this gradually set in motion the reformatory movement for improving the depressed class of workers. Reforms were started in the Common Law principles. The various enactments passed by the British Government in England also affected reformatory movement in India.

3.2 The Employees' Compensation Act, 1923

With the enactment of the Workmen's Compensation Act, 1923 (hereinafter referred to as 'the Act) the position prevailing under common law was reversed. The new Act favored workmen rather than employer and had made almost imperative for the employer to the payment of compensation to a worker for the injury suffered by him during the course of his employment. This is the first piece of social security legislation enacted in India during the Colonial Regime under the influence of International Labour Organisation, on the premise that State cannot be a mere spectator to the sufferings of industrial workers. The Act was passed with a view to

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6 Originally short title of this Act was the Workmen's Compensation Act, 1923 which was changed to the Employees' Compensation Act, 1923 by the Workmen's Compensation (Amendment) Act, 2009 to give wider coverage.

7 When the Bill published in the Central Legislative Assembly by the then British Government, the Statement of Objects of the Bill read as "The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to the workmen, along with the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible from the hardship arising from accidents."

provide compensation to workmen incapacitated by an injury from an accident out of and in the course of the employment. But compensation is not the only benefit flowing from the 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.\footnote{Report of Royal Commission on Labour in India. Government of India, (New Delhi), at. 298} The Act is a mechanism for providing relief to the victims of work connected injuries. It places the cost of paying compensation to these injuries only upon the employer which ultimately lies on the consumers of product whose wants call his business into existence.\footnote{Fransis H. Bohlen, “A problem in the drafting of Workmen’s Compensation Acts” 25 Har. L.R at 330.}

3. 2. 1 Scope and Applicability of the Act

The Act applies to every industrial establishment and other activities of trade and economic activity irrespective of the number of persons employed therein. The Act applies even to the activities wherein a single worker is employed. Though the Act covers many diverse industries including mines, factories, transport etc., yet certain specified categories of employees like members of armed forces have been exempted from the application of the
Act. The Act, also does not apply to such establishments to which the Employees State Insurance Act, 1948 is applicable.

The Act defines an employee as a person who is employed in railways, ships or aircrafts including masters and captain and also the persons employed by the Indian employer outside the country. The Act is also applicable to those persons employed in such capacity as is specified in the Schedule II of the Act. This restricts application of the Act only to persons employed in specific kind of employments. This restriction has kept millions of unorganised sector workers who work in unsafe working conditions out of the reach of the Act. Even though the National Commission on Labour, (2002) in its Report recommended for removal of restrictive clauses in

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11 Section 2(1) (n) of the Act defines a 'employee' means any person who is-
   (i) A railway servant as defined under clause (34) of section 2 of the Railways Act, 1989 not permanently employed in any administrative, district or sub-divisional office of railway and not employed in any such capacity as is specified in Schedule II, or
   Any person who is-
   a. a master, seaman or other member of the crew of the ship,
   b. a captain or other member of the crew of an aircraft,
   c. a person recruited as driver, helper, or mechanic, cleaner or in any other capacity in connection with a motor vehicle
   d. a person recruited for work abroad by a company And who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle or company, as the case may be, is registered in India or
   i) employed in any such capacity as is specified in Schedule II Whether contract of employment was made before or after passing of this Act and whether such contract is express or implied, oral or in writing but does not include any person working in the capacity of a member of the Armed Forces of union and any reference to a employee who has been injured shall, where the employee is dead, include a reference to his dependents or any of them.

12 Schedule II of the Act provides list of persons who are included in the definition of employee. The list contains 54 descriptions of persons who are covered under the definition of 'employee'.
Schedule II and extension of its coverage to more employments and classes of employees, same is yet to be implemented.

The ‘workman’ is defined in such way to cover vast number of categories of persons employed by an employer to the possible extent. The definition includes not only the workmen who are directly employed by the employer but also such workmen who are hired by the employer through a contractor. This has been well settled by number judicial decisions.\(^\text{13}\)

The Act also covers the workman who is employed to do a work of ‘any nature’ by the employer. After passing of the Workmen’s Compensation (Amendment) Act, 2000, the Act is applicable even to casual workers also. But there exist a contract of employment, either express or implied between such workman and employer. In other words, ‘employment’ means a contract of service between the employer and employee wherein employee agrees to serve the employer under his control and supervision.\(^\text{14}\)

An independent contractor is not a workman under the Act. The relationship of employer and workman is established if the employer has


some measure of control and could regulate the action of the employee during the time he is engaged to do his work. In *Lakshminarayana Shetty v. Shantha Shetty and another* the Supreme Court held that, the person who work as an independent contractor, is not a 'workman' under the Act. In this case, the deceased, who had undertaken the work of painting of a house as an independent contractor, accidentally died while painting the house. On appeal, the Supreme Court held that, as the person was an independent contractor, is not a 'workman' under the Act. In the light of the decision of the Supreme Court, it is very much evident that in case of unorganised sector workmen, who work mostly as contract workers or seasonal workers it is difficult to establish employer-employee relationship hence not entitled to compensation.

3.2.2 Employer’s Liability to Pay Compensation—Conditions

The Act provides for payment of compensation by the employer to a workman for any personal injury suffered by him in an accident arising out of and in the course of his employment. A series of judicial pronouncements have provided that a personal injury does not limited only to physical or

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15 *K.R Reddiar Gold Merchant and Jeweller v. Workers, (1956) II L.L.J 139*
17 See Sec 3 of the Act.
bodily injury but includes even psychological injuries like nervous shock, a mental injury or injury because of the stress or strain involved in the employment. In order to claim compensation, the workman also needs to prove that the injury caused is out of and in the course of his employment. Accidents “arising out of and in the course of his employment” envisage such injuries which are either inherent in the employment or incidental to it. The Supreme Court further explained the words “arising out of and in the course of his employment” to mean “during the course of employment injury has resulted from some risk incidental to duties of the service which unless engaged in duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. In other words there must be a casual connection between the accident and employment. The expression arising out of is again not confined to mere nature of the employment. The expression applies to the employment as such to its nature, its conditions, its obligations, and its incidents. If by the reason of any of these factors the workman is brought within the zone of special danger, injury would be one which arises out of his employment. To put it differently if the accident had occurred on

account of a risk which is an incident of the employment, the claim for compensation must succeed.”

The higher courts have further widened the scope of “out of and in the course of employment by evolving the principle of the 'notional extension of time and space' in relation to employment and held that “the employment does not necessarily end when tool down signal is given or when workman leaves actual workshop where he is working. There is notional extension at both entry and exit by time and space. The employment may begin or end not only when the employee begins to work or leaves the tools but also when he used the means of access and egress to and from the place of employment.”

The employer is also liable to pay compensation if workman contacts any ‘occupational disease’ specified in the Schedule III, within the specified period of employment. But if the workman died as a natural result of the disease from which he was suffering then it could not inferred that his death

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was caused out of his employment. The burden of proving that the disease arose out of employment is upon the worker.

However, no compensation is payable in case the injury did not result in total or partial disablement for a period exceeding three days or in respect of any injury not resulting in death caused by an accident which directly attributable to willful disobedience on the part of the worker or willful disregard or removal of any safety guards provided for the safety of the worker or at the time of accident worker was under the influence of drink or drug.

The Act seeks to compensate the worker for the loss of earning capacity due to an accident. The amount of compensation payable depends on the extent of injury suffered by the workman such as death or total/partial disablement. All compensations for death and permanent disablement to be paid in lump sum where as in cases of temporary disablement the compensation is to be paid in half monthly installment. The law provides for the appointment of a 'Commissioner' to settle the claims under the Act.


23 See Sec. 3(b) of the Act.
3.2.3 Claims for Compensation

The Act creates a new type of liability. It is a sort of liability arising out of relationship of employer and employee. An employer under this Act is prima facie liable to pay compensation at a rate fixed as specified in the Act to any workman incapacitated by an accident. The employer’s liability under this scheme is not based on the negligence or fault because this no way lessen his liability.24 Similarly the defences of contributory negligence, inevitable accident or negligence of co-worker are not available in a proceeding for compensation.25 The Act provides that the compensation shall be paid as soon as it becomes due.26 In case of personal injury caused to the workman out of and in the course of his employment the employer becomes liable to pay compensation as soon as the aforesaid personal injury is caused to the workman. There is no suspension of liability for payment of compensation

26 Sec. 4-A. Compensation to be paid when due and penalty for default
(1) Compensation under 4 shall be paid as soon as it falls due.
(2) In case where the employer does not accept the liability for liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.
(3) Where any employer is in default in paying compensation due under this Act within one month from the date it fell due, the Commissioner shall-
(a) direct that the employer shall in addition to the amount of the arrears’ pay interest thereon at the rate of 12% per annum or at higher rate as prescribed on the amount due and
(b) if in his opinion, there is no justification for the delay direct that employer shall in addition to the amount and interest pay a further sum of not exceeding 50% of such amount by way of penalty.
(c) Provided that payment of penalty shall not be passed without giving a reasonable opportunity to the employer to showing cause against the same.
pending determination of claim. If there is any dispute regarding amount of compensation claimed by the workman, where the employer accepts his liability but not to the extent claimed, the employer shall either provisionally pay the amount accepted by him to the workman or deposit the same with the Commissioner. \(^{27}\) It is the duty of the employer to pay compensation at the rate provided under the Act as soon as personal injury is caused to the workman. In case the employer fails to do so and even do not make any provisional payment under section 4(2), is liable to pay interest and penalty.\(^{28}\)

The claim for compensation should be made within two years of accident, before the Commissioner of Employees' Compensation. However, in case employer disputes his liability of payment of compensation, the Commissioner decides the matter according to the provisions of the Act. The decision of the Commissioner is binding on parties, subject to appeal to the High Court.

The Act does not provide for compulsory insurance of the workman. So liability to provide compensation is entirely on the employer. It is difficult for employers of small establishments to pay compensation due to financial

\(^{27}\) See Section 4 (2)

\(^{28}\) See Sec. 4(A) and also Pratap Narain Singh Deo v. Srinivas, A.I.R 1976 S.C. 222.
constraints. Expressing concern over this issue the National Commission on Labour, 1969 expressed “A weak feature of the measure is that the Act places the entire liability for compensation on the employer, there being no liability on the part of the employer to insure his liability. A small employer many cases find it difficult to pay compensation in the event of a heavy liability arising out of a fatal accident. Such defaults tend to into disrepute. Delays and difficulties in effecting compensation under the Act are not unknown.”

Even the National Commission on Labour, 2002 opinioned “the Workmen’s Compensation Act should be converted from an employers’ liability scheme to a social insurance scheme.”

Moreover, in order to claim compensation, the workman should make a claim to the Commissioner within two years of the accident and should prove that the disability has occurred in an accident out of and in the course of employment. Workman, being uneducated rarely can fulfill these legal hurdles.

\[30\text{ Report of the National Commission on Labour (2002), (New Delhi), Ministry of Labour, Government of India, at 292.}\]
In view of hardships experienced as ascertained by putting the Act into practice for two decades, the Government gave a thought to reformation of this law, in order to have an easy application for an industrial worker in claiming social security benefits. With this object the Employees’ State Insurance Act, 1948 was passed.

3.3 The Employees’ State Insurance Act, 1948

The Employees’ State Insurance Act, 1948 is the first and complete measure of social insurance legislation in India. This Act marked the beginning of social insurance for the industrial workers in India.31 The Royal Commission on Labour (1931), recommended for social insurance schemes for working class in India. To draft a health insurance plan for industrial workers, Government of India, appointed Prof. B.P. Adakar Committee. In 1944, Prof. Adakar Committee submitted a comprehensive contributory scheme of social insurance for industrial workers. Some improvements in above scheme were suggested by the members of International Labour Organisation. In 1948, with those modifications the Government of India

passed the Employees' State Insurance Act, 1948. The Employees' State Insurance Act, 1948 is reformatory as compared to the Workmen’s Compensation Act, because this Act does not place liability to pay compensation on the employer. The Employees’ State Insurance Scheme is contributory in nature and provides for compulsory insurance of employees against certain contingencies endangering life. The Act is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, disablement and certain other matters in relation thereto. It is enacted with a view to ensuring social welfare and for providing safe insurance cover to employees who may likely to suffer from various physical illnesses during the course of their employment. The Act confers benefits on employees against sickness, maternity and other disabilities, in situations of distress as is apparent from the preamble.

3.3.1 Scope and Applicability

The Employees’ State Insurance Act, 1948 (here in after referred to as the Act) applies to all factories except seasonal factories. The Act also

36 Sec. 1 (4) of the Act.
confers wide powers to the appropriate Government to apply provisions of the Act, wholly or partially to any industrial unit, commercial, agricultural or other establishment after giving notification in Official Gazette.

The Act defines ‘factory’\(^{37}\) as any premises where ten or more workers are employed and the manufacturing process is carried on with the aid of power or where twenty or more workers are employed and a manufacturing process is carried on without the aid of power. Seasonal factories\(^{38}\) are excluded from coverage under Act. In the beginning, when the scheme was for the first time introduced, it was thought that, keeping in mind financial limitations of governments, it is safe to apply the Act to only to some industrial establishments. Accordingly seasonal factories and small units were kept out of the purview of the Act. Policy maker’s idea was to apply the Act to all establishments at the later stage. The Adakar Report had also expressed the opinion to include the seasonal workers at a later stage.\(^{39}\) Now it is high time that the Parliament need to introduce suitable amendments to make the

\(^{37}\) See Sec. 2(12) of the Act.

\(^{38}\) Sec. 2 (19A) of the Act defines “seasonal factory” means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortications of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year-

(a) in any process of blending, packing or repacking of tea or coffee; or

(b) in such other manufacturing process as the Central Government may, by notification in the Official Gazette, specify.

\(^{39}\) Adakar, B.P “Report for Health Insurance for Industrial Workers” (Delhi: Manager Publications, 1944) at 29.
workers of seasonal factories eligible for being insured under the scheme of the Act. A series of recommendations were also made by various National Commissions to amend the Act to cover small units and seasonal factories and thereby bringing vast segment of unorganised sector workers within the ambit of the Act. But the amendment has not been carried out so far. This deprived majority of unorganised sector workers who work in small establishments and seasonal factories from the benefits of the Act.

Further, the Act defines ‘employee’ as any person employed for wages in or in connection with the work of factory or establishment whether he is directly employed or employed through agent or whose services are temporarily lent or let on hire to the principal employer to do the work on the

40 Section 2 (9) of the Act defines "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-
(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere; or
(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment; but does not include
(a) any member of the Indian naval, military or air forces; or
(b) any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government]:
PROVIDED that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.
premises of the establishment or under the supervision of principal employer or his agent. The definition of employee under the Act has a wider meaning and it covers persons who work outside the premises but whose duties are connected with the business. It also covers employees who are paid daily wages or employed on part time wages. But if a person is neither employed on any work of the factory nor any work incidental or preliminary to or connected with the manufacturing process, he will not be employee within the meaning of the Act.

In *P.M.Patel & Bros v. Union of India* the Supreme Court held that “the definition of the word ‘employee’ shall include any person employed by or through a contractor in or in connection with the work of establishment including the work performed elsewhere than in the factory itself, like the dwelling house of home worker and the manufacturing operation performed by workers is subject to rejection and acceptance by the employer, is itself an effective degree of supervision and control, establishing the relationship of master and servant.” The decision of the apex court makes it clear that this Act, not only applicable to employees directly employed by the principal

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43 See 1986(1) SCC 32
employer but also to the persons employed by the contractor, home based workers who work under the control of employer or their agents.

There should be contract of employment between the two. When there is nothing on record to show that there was contract of employment between the company and the worker, he will not come under definition of employee. Whether a person is a casual labour or an employee depends upon the fact whether there was contract of service resulting in the relationship of master and servant and whether the person employed was under the disciplinary control of other or not. In *E.S.I. Corporation v. Premier Clay Products* the respondent hired some casual coolies for loading and unloading goods; the work itself was sporadic in nature. The coolies on the very day worked for several other employers. The Supreme Court held that these coolies are not 'employees' within the meaning of the Act as respondent had no control over such coolies. Similarly in *Employees' State Insurance Corporation, Hyderabad v. A.P. Electrical Equipment Corporation, Visakhapatnam* the Supreme Court held that the persons engaged in building repairs through contractor are not employees of

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46 1995 SCC (L&S) 162.
47 (2005) II L. L. J 181 (SC)
corporation. In order to hold a person employee the important factor is basic control over employee. As the Corporation had no control over the employees of the contractor, they are not employees of Corporation.

In case of unorganised sector workmen, because of non availability of regular work, they work as casual workers and many times they work under more than one employer on the same day. In view of the said decisions of the Supreme Court it is very much evident that most of the unorganised sector workers remain outside the purview of the Act.

The Act further defines the 'principal employer'\(^48\) as the owner or occupier of the factory and includes the managing agent, legal representative of the owner or occupier. In case of an establishment, the expression covers the authority appointed by the Government in cases of Government establishments or any person responsible for the supervision or control of establishment in cases of any other establishment. The Act defines 'immediate employer'\(^49\) as the person who has undertaken the execution of work of or incidental to the factory or establishment. These definitions of principal employer and immediate employer are relevant for the purposes of

\(^{48}\) See section 2(17) of the Act.  
\(^{49}\) See section 2(13) of the Act.
the Act, because the principal employer is required to pay contribution in respect of every employee, whether directly employed by him or through an immediate employer.

3.3.2 Mechanism under the Act

The Act empowers the Central Government to establish Employees State Insurance Corporation to administer the ESI Scheme.\textsuperscript{50} It is a multipartite body consisting of nominees of Central and State Governments and representatives of employers and employees and medical profession. The Corporation has a three-tier set-up that includes the headquarters, regional offices and primary unit local offices. The Corporation is the highest policy making body. It is responsible for the efficient functioning of the scheme. The Corporation empowered to take decisions on matters like payment of benefits, relaxation of conditions, promote measures for the improvement of health and welfare of insured persons.\textsuperscript{51}

The Act also provides for constitution of Standing Committee to carry out the decisions of the Corporation. The Standing Committee is entrusted

\textsuperscript{50} Section 3 (1) of the Act.
\textsuperscript{51} Section 19 of the Act.
with the responsibility of actual administration of the Scheme subject to general superintendence and control of the Corporation.\textsuperscript{52}

Section 10 of the Act empowers Central Government to constitute a Medical Benefit Council. The main function of the Medical Benefit Council is to advice the government on health matters relating to the administration of medical benefit and for the purpose of the grant of benefits and other concerned matters. It also looks into the complaints against the medical practitioners in connection with the medical treatment and attendance.\textsuperscript{53} The administration of medical benefit is the responsibility of the respective State Governments. The Employees' State Insurance hospitals, dispensaries and panel doctors are under the control of the respective State Governments.

The Act empowers the State Governments to constitute the Employees State Insurance Courts to decide claims and disputes under the Act.\textsuperscript{54} This will ensure speedy decisions on disputes by specially designed forums. The civil courts have no jurisdiction to decide any matter which falls under the jurisdiction of the Act. The Employees' Insurance Court decides questions or

\textsuperscript{52} Section 18 of the Act
\textsuperscript{53} Section 22 of the Act.
\textsuperscript{54} Section 74 of the Act.
disputes relating to insurability, rate of wages, rate of contribution, the right to benefit and the amount and duration of benefit and any other matter covered under the Act.\textsuperscript{55}

3.3.3 Benefits available under the Act

To provide benefits under the Act, the Employees' State Insurance Fund is created to which employer and employees need to make regular contribution according to the rate specified under the Act.\textsuperscript{56} The Act imposes liability on the principal employer, at the first instance, to make contribution in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employers' contribution and the employee's contribution.\textsuperscript{57} At present the employer's share of contribution is 4.75\% of the wages payable to employees and employees' share of contribution is 1.75\% of their wages. Central and State Governments also make grants to this fund.

\textsuperscript{55}Section 75 of the Act.
\textsuperscript{56} Section 39 (1) read with Section 39 (2) of the Act.
\textsuperscript{57} Section 40 (1) of the Act
Thus to claim benefits under this Act, the employer and the employees need make regular contributions towards the Employees' State Insurance Fund. Unorganized sector workers, because of non-availability of regular employment, work for more than one employer which makes it difficult to identify the principal employer for the purpose of contribution towards fund. Moreover, because of irregular nature of employment and very low wages, it is not possible for these workers to make regular contributions towards the fund.

3.3.3.1 Medical Benefit

This is the only benefit under the Act, which is not provided in cash but in the form of medical care and treatment without any qualifying condition. The benefit shall be given to in insured person and to his family members where it is extended to his family, whose condition requires medical treatment and attendance. Family, for the purpose of its entitlement, means the spouse and minor legitimate and adopted children, dependent upon the insured person, and his dependent parents.\textsuperscript{58} The benefit may be given in the form of outpatient or inpatient treatment in a hospital, dispensary, clinic or

\textsuperscript{58} Section. 2(11) of the Act.
other institution, or by visits to the place of residence of the insured person by the doctor.

The Government or the Corporation, as the case may be, with whom responsibility of providing medical benefit rests, may determine the quality, kind and scale of the benefit and treatment to be provided in any dispensary, hospital, clinic or other institution to which the insured person and his family are allotted.

3. 3. 3. 2 Sickness Benefit

The benefit is payable to insured person in the form of periodic cash payments during the period of sickness. A person shall be eligible for sickness benefit during any benefit period if the contribution in respect of him were payable for not less than seventy eight days in the corresponding contribution period. An insured person is entitled to receive sickness benefit for a maximum period of ninety one days in any two consecutive benefit periods. The sickness benefit shall be paid in accordance with the section 49

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59 See Rule 55, Employees State Insurance (Central) Rules 1950
of the Act, at standard benefit rate as specified in the Central Rules.\footnote{See Rule 54, Employees State Insurance (Central) Rules 1950} Dealing with the scope of sickness benefit the Supreme Court in \textit{Hindustan Times v. Workmen}\footnote{(1966) I LLJ 108 (SC).} held that the benefit the workman will get under the Act does not affect the question of sickness leave being provided for the workman.

3.3.3 Maternity Benefit

This benefit is payable in form of periodical payments to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy, or premature birth of child or miscarriage. The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery. In case of miscarriage also an insured woman is entitled to maternity benefit for period of six weeks. The Act prohibits the employer from imposing dismissal, discharge, reduction in rank or any other punishment to an insured woman employee during the period when she is in receipt of maternity benefit.\footnote{See sec. 73 of the Act.
Maternity benefit provided under Employees' State Insurance Scheme is an improvement over the maternity benefit provided under and Maternity benefit Act, 1961. The Maternity Benefit Act, 1961 imposes entire liability of payment of maternity benefit solely on employers. The employers either do not employ such women workers or remove them from employment when they are pregnant. This is a big hurdle in the security of employment women worker. On the other hand the Employees' State Insurance Scheme the benefit is payable by the Corporation constituted under the Act. Thus under Employees' State Insurance Act women workers enjoy better security. In this context the Employees’ State Insurance Act, 1948 is more progressive.

3.3. 3.4 Disablement Benefit

Periodical payments are available to an insured person suffering from disablement as a result of an 'employment injury' sustained as an employee under this Act. 'employment injury' means a personal injury to an employee caused by accident or an occupational disease 'arising out of and in the course of his employment', being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.
The phrase 'arising out of and in the course of employment' has been given wider meaning by the E.S.I. Amendment Act, 1966 which providing for certain presumptions under section 51 A\textsuperscript{63}, 51 B\textsuperscript{64}, 51 C\textsuperscript{65} and 51 D\textsuperscript{66} of the Act.

In \textit{Smt Renukabai Gedam v. Manager, Nagpur Times}\textsuperscript{67} it was held that if an accident happens in the course of insured person's employment, it shall deemed to be arisen out of his employment.

\begin{itemize}
\item \textbf{63.} Section 51A of the Act provides that for the purposes of this Act, an accident arising in the course of an insured person's employment shall be presumed, in the absence of evidence to the contrary, also to have arisen out of that employment.
\item \textbf{64.} Section 51B of the Act provides that for the purposes of this Act an accident shall be deemed to arise out of and in the course of an insured person's employment notwithstanding that he is at the time of the accident acting in contravention of the provisions of any law applicable to him, or of any orders given by or on behalf of his employer or that he is acting without instructions from his employer, if:
\begin{enumerate}
\item (a) the accident would have been deemed so to have arisen had the act not been done in contravention as aforesaid or on without instructions from his employer, as the case maybe; and
\item (b) the act is done for the purpose of and in connection with the employer's trade or business.
\end{enumerate}
\item \textbf{65.} Section 51C of the Act provides that for the purposes of this Act
\begin{enumerate}
\item An accident happening while an insured person is, with the express or implied permission of his employer, traveling as a passenger by any vehicle to or from his place of work shall, notwithstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of and in the course of his employment, if:
\begin{enumerate}
\item (a) the accident would have been deemed so to have arisen had he been under such obligation; and
\item (b) at the time of the accident, the vehicle
\begin{enumerate}
\item (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer, and
\item (ii) is not being operated in the ordinary course of public transport service.
\end{enumerate}
\end{enumerate}
\end{enumerate}
\item \textbf{66.} Section 51D of the Act provides that for the purposes of this Act
An accident happening to an insured person in or about any premises at which he is for the time-being employed for the purpose of his employer's trade or business shall be deemed to arise out of and in the course of his employment, if it happens while he is taking steps, on an actual or supposed emergency at those premises, to rescue, succour or protect persons who are, or are thought to be or possibly to be, injured or imperilled, or to avert or minimise serious damage to property.
\end{itemize}

\textsuperscript{67} 1984 Lab IC 943
Judicial decisions have further widened the scope of the term 'arising out of and in the course of employment’ by the application of the principle of notional extension of time and space. *E.S. I. Corporation v Sayeeda Khatoon Donawala and other* a workman standing in the queue waiting for a bus provided by the employer to reach the factory was run over by the same bus. It was held that the workman sustained employment injury and doctrine of notional extension is applicable. In *Regional director, E.S.I Corporation v. Lakshmi* an employee met with an accident while returning home from the factory in a bus which was provided by joint efforts of the management and the employees union. The court held that in such circumstances it would be deemed that, it was an implied condition of employment to use that transportation facility and that the accident must be deemed to have occurred in the course of his employment.

Disablement may be temporary or permanent. Temporary disablement means a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of injury. Permanent disablement has been classified into permanent partial and permanent total disablement. Permanent partial disablement

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68 (1995) I L.L.J. 173 (Bom)
69 1979 Lab IC 167 Kerala.
means such disablement of permanent nature as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of accident resulting in such disablement. Permanent total disablement means such disablement of permanent nature as incapacitates an employee for all work which he was capable of performing at the time of his accident resulting in such disablement. While explaining the term 'permanent disablement' the court held that the disablement must be of such a nature that person concerned is unable to do any work and not merely "unable to do the work he was performing at the date of accident."

Any question whether the relevant accident has resulted into partial or total disablement or whether the extent of loss of earning capacity can be assessed provisionally or finally, or whether the assessment of the proportion of the loss of earning capacity is provisional or final, shall be determined by a Medical Board constituted under the provisions of regulations.

3. 3. 3. 5 Funeral Benefit:

The Act provides for payment of funeral benefit to the eldest surviving member of the family of the deceased insured person, to meet the expenditure on the funeral of the deceased. However, if the insured person did not leave

70 See G.I.P. Railway v. Shankar AIR 1950 Nag 201
71 Employees' State Insurance (General) Regulations 1950, reg. 75.
any family member at the time of his death, the amount is paid to the person who actually incurred the expenditure on the funeral of the deceased.

3. 3. 3. 6 Dependent's Benefit

If the insured employee who dies as a result of an accident or occupational disease arising out of and in the course of employment, whether he was in receipt of any periodical payment for temporary disablement in respect of an injury or not, his dependents as defined in section 2(6A) of the Act shall be titled to dependents' benefit at the rate and for the time specified in the first Schedule of the Act.

All these benefits except medical benefit are cash benefits. Rates of these benefits, period of benefits and conditions subject to which these benefits are given are according to the rules prescribed by the Central Government from time to time.

3. 4 The Employees' Provident Funds and Miscellaneous Provisions Act, 1952

Prior to 1948, there was no statutory provision for compulsory provident fund benefits to industrial workers. Even though there was the Provident Fund Act, 1925, it was restricted in its application to government
industries and railways. In 1948, the Coal Mine Provident Fund and Bonus Scheme Act, 1948 was enacted to provide provident fund benefits to employees of coal mines. Still vast majority of industrial employees were not covered under any such schemes. During 1948, the 9th session of Indian Labour Conference discussed the question of compulsory provident fund scheme for industrial workers. The subject was once again discussed at the 12th meeting of Standing Labour Committee which unanimously recommended for instituting a provident fund for industrial employees. Thus toeing the recommendation of Indian Labour Conference and Standing Labour Committee, the Government of India enacted the Employees Provident Act, in the year 1952. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, is one of the important social security legislations intended for the better future of industrial workmen on his retirement and also for his dependents in the event of his death in the course of his employment. The Act empowers Central Government, to frame provident fund scheme, pension scheme and deposit linked insurance schemes for employees in factories and other establishments.

The Act contains social security measures, enabling the worker to get some money compatible with his earning capacity on which he can fall back at the time of his retirement. Retiral benefits like provident fund, gratuity, and pension schemes have introduced an element of stability and protection in the midst of stress and strains of modern industrial life. Provident Fund is a form of retiral benefit. But unlike gratuity where the entire financial burden falls on the employer, this is contributory in the sense a worker also has to contribute a part of his wages. In *Andhra University v. R.P.F.C.* the Supreme Court has held that in construing the provisions of the Employees Provident Funds and Miscellaneous Provisions Act 1952, it has to be borne in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing the well-being of the employees and the court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose the Act.

### 3.4.1 Scope and Applicability

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, (here in after referred to as the Act) under Section 1(3) (a) provides that

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73 K.D. Srivastava *"Commentaries on the Employees Provident Fund Act, 1952"* at. 15
74 *Otis Elevator Employees Union Reg. v. Union of India* 2004 (1) LLJ 217 (SC).
76 1985 (51) FLR 605
the Act applies to every establishment which is a factory engaged in any industry specified in Schedule I employing twenty or more persons. The Act also applies to any other establishment employing twenty or more persons as Central Government may specify by issuing notification in the Official Gazette.\textsuperscript{77} While analyzing this section, the Courts have held that for the purpose of application of the Act while ascertaining the strength of the workmen, casual or temporary workmen should not be included. In 	extit{Jyothi Home Industries v. Regional Provident Fund Commissioner},\textsuperscript{78} it was held that it is the employment in the regular course of business of the establishment alone which attracts the provisions of the Act. Same view was reiterated in 	extit{Bikaner Cold Storage Co. Ltd. v. Regional P.F. Commissioner} \textsuperscript{79} wherein it was held that the word ‘employment’ must therefore be construed as employment in the regular course of business of establishment. Such employment obviously would not include employment of a few persons for a short period on account of some pressing necessity or temporary emergency beyond the control of the company.\textsuperscript{80} This certainly would will keep unorganised sector workers who usually work in small establishments out of the purview of the Act.

\footnotesize{\textsuperscript{77} See Sec. 1(3) of the Act. \textsuperscript{78} 1993 LLR 713. \textsuperscript{79} 1981 1 L.L.J. 181 \textsuperscript{80} Ibid.}
However, once the Act made applicable, it does not cease to be applicable even if the numbers of employees falls below 20. The Act also empowers Central Government to apply the provisions of this Act to any establishment employing less than twenty members by issuing notification in the Official Gazette for that purpose.

The Act defines 'employee' as any person who is employed for wages to do any kind of work in connection with the work of the establishment and who gets their wages directly or indirectly from the employer. The definition of employee under section 2(f) of the Act, is very wide. It includes not only persons employed directly by the employer but also persons employed through a contractor. But in order to avail benefits under the Act such employees need to complete minimum number of working days. Persons employed by or through a contractor in or in connection with the work of establishment shall be included as employees provided that they have completed the period of working days as laid down in the scheme for entitling

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81 Annamma v Regional Provident Fund Commissioner, 1993 LLR 287
82 See Sec. 3 of the Act.
83 Section 2 (f) of the Act defines an employee as "any person who is employed for wages, in any kind of work manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer and includes any person (i) employed by or through a contractor in or in connection with the work of the establishment (ii) engage as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 or under the standing orders of the establishment."
84 Enfield India v RPFC 2000 (85) FLR 519 (Mad)
them to the benefits of the fund.\textsuperscript{85} Section 2(f) makes it clear that even if a person has been employed through a contractor in or in connection with the work of the establishment, he would yet fall within the definition of ‘employee’ and even if a person is allowed to work at his own place, and/or at the hours of his choice, for someone else, the master and servant relationship may still exist and he is covered under the definition of an employee.\textsuperscript{86} In \textit{M/s S.K. Nasiruddin Beedi Merchant Ltd.} v. \textit{Central Provident Fund Commissioner}\textsuperscript{87} the Supreme Court held that this Act is applicable even to the home-workers engaged through the contractors. It includes not only persons employed in the factory but also persons employed in connection with the work of the factory. Accordingly a home worker, who rolls beedi at his home, is involved in an activity connected with the work of the factory and is an ‘employee’ under section 2(f) of the Act.\textsuperscript{88}

### 3. 4. 2 Schemes under the Act

The Act contains the following schemes, namely.

- (i) Employees Provident Fund Scheme;
- (ii) Employees Deposit Linked Insurance Scheme

\textsuperscript{85} \textit{Kumar brothers (Bidi) Private Ltd.} v \textit{Regional Provident Fund Commissioner}, 1968 Lab IC 1578 (Pat).
\textsuperscript{87} \textit{AIR 2001 SC 850}
(iii) Employees Pension Scheme.

3.4.2.1 Employees' Provident Fund Scheme

In exercise of powers conferred under section 5 the Act, the Central Government framed Employees' Provident Fund Scheme, 1952 to provide provident fund benefits to the employees covered under the Act.\(^89\) The Act provides for compulsory contribution from employer and employees covered under the Act, towards the Provident Fund. The normal rate of contribution to the Fund, by employers and employees each is 10% of basic wages and the dearness allowance and retaining allowance.\(^90\) However, for some industries, the Central Government if it deems fit, fix the rate of contribution at 12% by giving notification.\(^91\) The initial responsibility for making contribution of the employer as well as of the employee, lies, on the employer. Employers need to deposit the same in the fund within fifteen days of close of every month. A breach in any of these requirements is made a penal offence.\(^92\) Later Employer can recover the same from the wages of the employees.

In case of unorganised sector workers who work with multiple employers because non availability of regular employment, it difficult to fix

\(^{89}\) Vide S.R.O. 1509, dated 2-9-1952.
\(^{90}\) Sec. 6 of the Act.
\(^{91}\) Id.
\(^{92}\) Organo Chemical Association v. Union of India, A.I.R 1979 SC 1803
liability on any employer for making contribution towards the provident fund. Secondly, because of irregular nature of employment, paying regular contributions would be an impracticable task in case of unorganised sector workers. Assuming that they work in regular employment, their contribution to the fund as per the provisions of the Act again put them in a miserable conditions in view of their meager wages.

The member of the Provident Fund is entitled to withdraw the amount accrued in his account on retirement or termination of his services on account of retrenchment, dismissal, or under voluntary retirement schemes. In case of death of the member, the nominee or his dependents are entitled for accumulations in the deceased member's account. The Scheme also provides for partial withdrawal of the amount in cases of construction of house, purchase of sites, serious illness, marriage of children, higher education of children etc. The kinds of benefits available and conditions subject to which such benefits are available are according to the rules framed by the Central Government under the Scheme.

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93 Paragraph 69 of the Employees' Provident Fund Scheme, 1952
94 Paragraph 70 of the Employees' Provident Fund Scheme, 1952.
The Act is applicable even to the workers employed on casual basis or temporary basis. The unorganised sector workers who usually work as casual workers, change their employers or employment because of non availability of regular work or seasonal character of employment. The P.F. Accounts are maintained by the Employees Provident Fund Organisation establishment wise. When a worker changes his employer, his account needs to be transferred to the other establishment accordingly which is not happening in many cases. Because of non transfer, his account will remain ineffective and non operative which will result in worker not getting benefits under the Act for the contribution he has already made. So even though Act is applicable to unorganised sector workers, most of them are not able to reap the benefits under the Act in the real sense. Thus today the unclaimed provident fund amount stands to the tune of crores of rupees.

3. 4. 2. 2 The Employees’ Pension Scheme

In exercise of powers conferred under section 6A of the Act, the Central Government framed the Employees’ Pension Scheme, 1995 \(^{95}\) for providing pension and life assurance benefits to the employees covered under the Act. Under this scheme, out of the contributions payable by the employer

\(^{95}\) See vide G.S.R 748 (E), published in the Gazette of India, Extra., Pt. II, Sec.3(i) dated 16-11-1995.
to the Provident Fund, a part of contribution representing 8.33% of employees’ pay, shall be remitted by the employer to the Employees’ Pension Fund. The Central Government will contribute 1.16% of the pay of the employee to the Pension Fund. The member of the Pension Scheme shall be entitled to superannuation pension, retiring pension, and permanent total disablement pension at the rate prescribed and subject to the conditions specified under the Act. In case of the death of the employee, his beneficiaries are entitled to widow/widower pension, children pension or orphan pension.

3.4.2.3 The Employees’ Deposit Linked Insurance Scheme

In exercise of powers conferred under section 6C of the Act, the Central Government has framed the Employees’ Deposit Linked Insurance Scheme, 1976 by notification in Official Gazette. The scheme provides for insurance cover to the members of Coal Mines Provident Fund and Employees’ Provident Fund without payment of any premium by such members. Under this scheme, a Deposit Linked Insurance Fund is created,

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96 Paragraph 3 of Employees’ Pension Scheme, 1995.
97 Section 6A (a) of the Act.
98 Section 6A (b) of the Act.
100 Statement of Objects and Reasons, the Labour Provident Fund Laws (Amendment) Act, 1976.
to which employer need to contribute regularly such amount not being more than one percent of the aggregate of the basic wages, dearness allowance and retaining allowance if any.101 Apart from this, the employer needs to pay such sums as prescribed by Central Government to meet administrative expenses of the fund.102 In the event of the death of the employee, his dependents are entitled to receive, in addition to accumulations, an amount equal to the average balance in the account of the deceased in the Provident Fund Account during preceding twelve months or during the period of his membership.

3. 5 The Maternity Benefit Act, 1961

Before passing the Maternity Benefit Act, 1961 some of the State governments like Bihar, Kerala, Bombay Madras, Orissa and West Bengal had passed maternity benefit legislations applicable to their respective States. Besides this, there were three Central legislations on this subject. In order to reduce the disparities relating to maternity provisions under various State and Central Acts, the Central Government in 1961, enacted the Maternity Benefit Act, 1961.103

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101 Paragraph 6C(2) of Employees’ Deposit Linked Insurance Scheme, 1976.
102 Paragraph 6C (4) of Employees’ Deposit Linked Insurance Scheme, 1976.
The Act was enacted to regulate the employment of women for certain periods before and after child birth and to provide for maternity benefit and certain other benefits to them. This Act provides for benefits in case of confinement, miscarriage, sickness arising out of pregnancy and premature birth of the child. The benefits not only provide protection of wages and security of employment but also provide for medical care to women workers in the aforesaid situation. It marks an important step in the matter of security for women working in trade, factory, mine, plantation and establishments etc. While emphasizing the significance of the motherhood and importance of the legislation the Supreme Court in *Municipal Corporation of Delhi v. Female Workers (Muster Roll)* observed to become a mother is the most natural phenomenon in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which working woman would face in performing her duties at work place while carrying baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to the working woman in dignified manner so

104 Preamble to The Maternity Benefit Act, 1961.
106 Amit Banerji, “Labour Human Rights And Social Justice” Article Published in 2010 Lab IC Journal at 100
that she may overcome the state of motherhood honourably, peacefully undeterred by the fear of being victimised for forced absence during the pre or post natal period.\textsuperscript{108}

3.5.1 Scope and Application of the Act

The Act applies to every establishment which is a factory, mine, plantation or any establishment where in persons are employed for the exhibition of equestrian acrobatic and other performances.\textsuperscript{109} The Act also applies to such shops or establishments, in which ten more workers are employed.\textsuperscript{110} The State Government with the approval of the Central Government can by giving notification in Official Gazette apply provisions of the Act to any establishment whether industrial, commercial or agricultural. Under this provision, only few State governments have applied the provisions of this Act, to unorganised sector workers like construction workers, agricultural workers, sweepers, scavengers etc. In many States still large numbers of unorganised sector workers are outside the coverage of the Act. Taking note of the same National Commission on Labour (2002) in its report recommended that the application of the Maternity Benefit Act should be

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} Section 2 (a) of the Act.
\item \textsuperscript{110} Section 2 (b) of the Act
\end{itemize}
\end{footnotesize}
extended to all classes of establishments where women are employed in large numbers.

3.5.2 Benefits available under the Act

The Act provides that every eligible woman worker is entitled to maternity benefit at the rate of the average daily wage\textsuperscript{111} for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.\textsuperscript{112} The maximum period for which any woman entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery.\textsuperscript{113} Such woman is also entitled to medical bonus of Rs 1000, if the employer does not provide free medical care to the woman.\textsuperscript{114} The Act also provides for an additional leave with pay up to one month, if the woman shows proof of illness due to the pregnancy, delivery, miscarriage or premature birth of child.\textsuperscript{115} In case of miscarriage, she is entitled to six weeks leave with average pay from the date of miscarriage. The Act also allows two nursing breaks to woman worker, in the course of her

\textsuperscript{111} Explanation to section 5(1) provides that, the average daily wage means the average of the woman’s wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity.

\textsuperscript{112} Section 5 (1) of the Act.

\textsuperscript{113} Section 5 (3) of the Act

\textsuperscript{114} Section 8 of the Act

\textsuperscript{115} Section 10 of the Act
daily work, until the child attains 15 months. The Act prohibits dismissal or
discharge of the woman worker on account of her maternity leave and ensures
that, conditions of her service shall not be altered to her disadvantage during
her absence.

The benefits provided in the Act makes provision only for maternity
leave and cash benefits and does not look into the nutritional and health
needs of women, which is very crucial for a woman during pregnancy.

3. 5. 3 Claim for Maternity Benefits

To be eligible for maternity benefit, the employee should have actually
worked in that the establishment of the employer from whom she claims
maternity benefit, not less than eighty days in the twelve months immediately
preceding the date of her expected delivery. 116 Naturally, most of the
unorganized sector workmen who work as casual labours loose the benefits
under the Act.

To claim benefits under the Act, employee should give a written notice
to the employer. On receiving the notice employer shall make arrangement
for the payment of maternity benefit and permit her to take maternity leave

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116 Section 5 (2) of the Act.
during that period according to the provisions of the Act. The Act provides for the appointment of 'Inspectors' for the enforcement of provisions of the Act. These Inspectors are empowered to conduct enquiries in cases of complaints of nonpayment of maternity benefit or wrongful dismissal of such women employee. Any person aggrieved by the decision of the Inspector may appeal to the prescribed authority provided under the Act. The decision of the prescribed authority is final.

Under the Act, as the liability to pay maternity benefit is solely on employer, which is main cause for frequent evasion of the Act. The National Commission on Labour, 1969 has observed that, the responsibility for maternity benefit induces a tendency among employers not to employ women or having employed them, to discharge them when pregnant. Therefore Commission had recommended for the setting up of a Central Fund for maternity benefit.¹¹⁷ A similar view was expressed by the National Commission on Self Employed Women Commission which felt that no solution to the problems of women at work would be complete without taking into account their reproductive functions, which can be effectively facilitated through maternity benefit and childcare. Maternity benefits, on the scale

provided under the Maternity Benefit Act, should be universally available to all women. The responsibility for this should be borne by all employers, irrespective of whether or not they employed women, through a levy, which should be placed in a separate fund from which maternity benefit could be provided. In the case of a large number of women like home-based workers and others, where the employer is not identifiable, the responsibility for providing maternity benefits must lie with the State governments. Further, National Commission on Labour (2002) commenting on the Act, recommended that “It is, therefore, very essential that the scheme of the Act should be converted into social insurance. This object can be achieved if the Maternity Benefit Act is integrated with the ESI Act. If that is not feasible, the question of introducing a separate social insurance scheme exclusively for maternity benefit or in combination with the employment injury benefit may be considered. So far as women in the unorganised sector are concerned, there is undoubtedly a need for a separate legislation for providing maternity benefits. Its implementation is possible through Welfare Boards or area-based schemes. But these recommendations of high power Committees are to be considered by the Government.

119 Report of the National Commission on Labour (2002), (New Delhi), Ministry of Labour, Government of India. at. 174
3.6 The Payment of Gratuity Act, 1972

Before passing the Payment of Gratuity Act, 1972 there was no Central Act to regulate payment of gratuity to industrial workers except the Acts passed by Kerala and West Bengal States. In 1970, the State of Kerala passed the Industrial Employees Payment of Gratuity Act, 1970. This was followed by West Bengal Employees Payment of Compulsory Gratuity Act, 1971. Some other States in India also expressed the desire & urgency to pass such legislation in those States as well. In order to ensure uniform pattern of payment of gratuity to the employees through out the country, the enactment of central legislation was felt. Accordingly the Payment of Gratuity Act was passed in 1972.\textsuperscript{120} The Act was passed to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto.\textsuperscript{121}

The concept of gratuity has undergone tremendous change over the years. Earlier gratuity was considered as a ‘gift’ from the employer to the workman at his pleasure to keep them contended. With the efflux of time the judiciary has transformed this right in to legitimate claim which workers

\textsuperscript{120} Madhavan Pillai “Labour and Industrial Law” (1994) Allahabad: Allahabad Law Agency, at. 83
\textsuperscript{121} For objects and reasons : See Preparatory Note- Statement of objects and Reasons, published in the Gazette of India. Extra Pt. II, dated 22-8-1972, at. 661-70
could demand after rendering meritorious service to the employer for certain period. Such a view was further reiterated by the apex court in *Indian Hume Pipe Co Ltd v. Workmen* where Court held that at one time gratuity was treated as payment gratuitously made by the employer at his pleasure, but as a result of long series of decisions of the industrial tribunals, be regarded as a legitimate claim which workmen can make and which in a proper case gives rise to an industrial dispute. Gratuity is a retiral benefit to employees for their long and continuous service. It is designed to help the workers on their retirement, whether it is due to superannuation, physical disability or otherwise. The principle underlying the payment of gratuity is that, by virtue of the length of their services the workmen is entitled to claim certain amount as retiral benefit.

Similar view was expressed in *State of Kerala v. M Padmanabhan Nair* wherein it was observed that Pension and Gratuity are no longer any bounty to be distributed by the government to the employees on their retirement, but have become under the decisions of this court, valuable rights and property in their hands and any culpable delay in settlement and

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122 *Express News Papers v. Union of India*, (1961) 1 LLJ 334 (SC)
123 1959 II LLJ 830 S.C.
disbursement thereof must be visited with penalty of interest at the current market rate till actual payment.

3. 6. 1 Scope and Applicability

The Payment of Gratuity Act, 1972 (here in after referred to as the Act), applies to every factory, mine, oil field, plantation and railway company. The Act also applies to shops or establishments within the meaning of any law, where ten or more workers are employed.\footnote{Section 3 of the Act.} The Central Government has been empowered to extend the provisions of this Act by notification to such other establishments or class of establishments in which ten or more persons are employed, or were employed on any day of the preceding twelve months. The Act restricts its coverage on the basis of the number of persons employed. In 1994, the Act was amended to remove wage ceiling of Rs. 3,500 for applicability. Now the Act is applicable to all employees, irrespective of the salary. The Act is very wide in its application covering entire organised sector of industry and commerce. The Act also applies to the employees including the teachers in private unaided educational institutions in the country.\footnote{See the Payment of Gratuity Amendment Act, 2009}
The Act does not define the terms 'shop' or 'establishment'. While deciding on the issue whether the term 'establishment' includes commercial and non-commercial establishments the Gujarat High Court in *Indian Red Cross Society v. Uidyaben H Vyas*\(^ {127}\) held that the term 'establishment' includes commercial as well as non-commercial establishments. So even non-profit establishments are also covered under the Act.

The Act defines 'employee'\(^ {128}\) means any person employed on wages in any establishment, factory, mine, oilfield, plantation, port, railway company or shops to do any skilled and unskilled manual, supervisory, technical or clerical work, managerial or administrative work, whether terms of employment are expressed or implied. This implies that in order to claim gratuity under the Act, the existence of contract of employment must be established. In *Patel Hiralal Ramlal & Co. v. Smt. Chandbibi Pirubhai*\(^ {129}\), it was held that the workman carrying raw materials from employer's premises to their home and rolling up beedies at their own home for

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\(^{127}\) 2004 LLR 288.

\(^{128}\) Section 2 (e) of the Payment of Gratuity Act 1972, defines employee as any person (other than and apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are expressed or implied, and whether or not such person is employed in managerial or administrative capacity, but does not include any such person who holds a post under the central government or state government and is governed by any other Act or by any rules providing for payment of gratuity.

\(^{129}\) 1981 Lab IC 790 (Guj).
manufacturer is an are 'employee' under Sec. 2(e) and as such are entitled to payment of gratuity.

3. 6. 2 Payment of Gratuity

Gratuity shall be paid to an employee on the termination of his employment because of superannuation, retirement, resignation, death or disablement due to accident or disease, provided he/she has rendered 'continuous service' of not less than five years. But if the termination of employment is due to death or disablement of employee, completion of five years of continuous service is not necessary to claim gratuity. In case of death the amount is paid to the legal heirs.

In *Jogendra Lal Malakar v Reiginal Labour Commissioner(Central)* the Court while dealing with minimum period of service to claim gratuity under the Act, held that it is a piece of social welfare legislation providing for payment of gratuity to all workers who have rendered continuous service of not less than five years.

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130 Section 4 (1) of the Act.
132 1977 Lab IC 1308.
In *Cawnpore Sugar Works Ltd. v. Appellate Authority*, the Allahabad High Court held that the Act has provided the qualifying period of five years. In order to claim gratuity in case of resignation or retirement, the employee must have rendered a minimum of five years continuous service.

### 3. 6. 2. 1 Scope of 'Continuous Service'

Section 2 (c) of the Act defines 'continuous service' means continuous service as defined in Section 2 A of the Act. The expression is to be read along with Section 4(1) of the Act, which provides that gratuity shall be payable to the employee after he has rendered continuous service for not less than five years. In this context, the expression 'continuous service' assumes significance.

Section 2 A (1) provides that an employee shall be in continuous service for a period if such employee for that period, has been in uninterrupted service. However, a break in service on account of sickness, accident, leave, absence from duty without leave, layoff, strike or lock out or cessation of work not due to any fault of the employee is permitted. In other words, in spite of such interruptions, the employee will be presumed to be in continuous service.

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133 1982 Lab IC 969.
134 See Section 2(c) read with Section 2A of the Act.
The requirement of continuous service is further under by in subsection (2) of Section 2 A, which presumes that an employee in various classes of establishments, is in continuous service under certain circumstances, namely -

(i) For employees employed in a non seasonal establishment: An employee is deemed to be in continuous service for a period of one year or six months, if during such period he has actually worked for 240 days or 120 days respectively.

(ii) For employees employed below the ground (surface) in a mine or in an establishment, which works less than six days in a week: An employee is deemed to be in continuous service of one year or six months, if during such period he has actually worked for 190 days and 95 days respectively.

(iii) For employees employed in seasonal establishments: An employee is deemed to be in continuous service, if he has worked for not less than seventy 75% of the number of days on which the establishment was in operation during such period.
In Ram Chandra Ganpat Dalvi v. Phoenix Mills Ltd., the Bombay High Court has held that even an interrupted service on account of strike or lockout without any fault of the employee is not treated as break in service and the employee is deemed to be in continuous service.

3. 6. 3 Computation of Gratuity

The rate of gratuity payable is 15 days wages for every 'completed year of service' or part thereof of in excess of six months. In the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account. In case of any employee who is employed in a seasonal employment and who is not so employed throughout the year, the employer shall pay gratuity at the rate of seven days wages for each season.

Section 2 (b) of the Act defines 'completed year of service' means continuous service for one year. The term is relevant for the purposes of interpretation of sub section (2) of Section 4 dealing with computation of

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135 1997 LLR 958.
136 Section 4 (2) of the Act
137 Id.
138 Id.
gratuity to eligible employees. The Orissa High Court, in *Shree Jagannath Temple, Puri v. Jagannath Padhi*,\(^{139}\) held that the expression ‘completed year of service’ means continuous service for one year i.e., 240 days service in a period of 12 calendar months.

### 3. 6. 4 Claims for Gratuity

The employee who is eligible for gratuity shall make a written application to claim gratuity under the Act. The Act requires employers to make payments within 30 days from the date it becomes due. The Act provides for appointment of ‘Controlling Authority’ to conduct inquiry and to decide claims relating to payment of gratuity. Orders of Controlling Authority are final subject to appeal.

To claim benefits under the Act, the person must be an ‘employee’ as defined under section 2(e) of the Act i.e. employer-employee relationship is required to be proved. It is difficult to prove the same in case of unorganised sector workman. In addition to that, to claim benefits under the Act, employee needs to put up at least five years of continuous service under that

\(^{139}\) 1992 LLR 737
employer. In *Velukutty Achary v. Harrisons Malayalem Ltd.* an employee, was retrenched from service. Subsequently such retrenched employee was engaged for wages for broken period whenever work was available. The Kerala High Court held that, such person is not an employee within the meaning of the Act and cannot claim his services to be continuous. In this situation most of the unorganised sector workers are deprived of the benefit because of casual nature of their employment.

A perusal of content and frame work of the primary social security legislations indicates that, to a large extent these legislations confine to the workers employed in the industrial establishments where the regular employer-employee relationship exists leaving out vast segment of workforce who are employed on casual, temporary and adhoc basis. Understandingly, this left over segment of work force faces the difficulty of getting the social security benefits under said legislations which are enacted exclusively for the organized workers. However, the Central and State Governments have made some pragmatic efforts in extending the social security measures for these workers by bringing some sector specific legislations which are discussed in next Chapters.

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