CHAPTER – 6
THE INDIAN LEGAL SYSTEM: LEGAL PROTECTION TO AN INDIAN WORKER

In a previous chapter, we have examined the legal system, with special reference to labour laws, of Saudi Arabia. Whilst doing so, it was mentioned that, it needs to be considered as to what legal protection is available to an Indian worker, if he works in India in the formal sector. This is necessary to put the Saudi legal framework in a comparative perspective – if the Indian legal/statutory position is better than that of Saudi Arabia, then, two issues would become clear; (i) to what extent is the Indian legal system better than the Saudi system, and (ii) to what extent is the Indian migrant worker put in a disadvantaged position in Saudi Arabia. Since it is not possible to examine all the central labour laws, a few major ones would be considered. However, before that we would need to examine in detail, the provisions of The Emigration Act, 1983 [here after referred to as the ‘EA 1983’], which regulates the export of Indian manpower.

6.1 THE EMIGRATION ACT, 1983 – and its appraisal

In a previous chapter we have noted that Indian workers have been working in the Gulf since the early part of the 20th Century. As it was felt that those Indian migrants were not treated properly and that they were exploited by recruiting agents and their employers, the then British Government of India, enacted The Emigration Act of 1922. [7 of 1922]. We have also noted that, after the oil price rise of 1973, there was a tremendous spurt in Indian migration to the Gulf regime; it was obvious that a fifty year old Act, would not adequately meet the demands of the emergent situation. The Supreme Court of India, in the matter of Kanga & Ors. Vs. Union of India,\(^1\) by its order dated 20th March 1979 laid down four basic conditions according to which emigration of Indian workers was to be regulated until the passage of a new legislation on the subject. This order was issued on the basis of

information provided to the Supreme Court that the Government was in the process of introducing a new legislation on the subject which was expected to be finalized by July, 1979. This however, could not be accomplished and on August 21, 1979, the Supreme Court reiterated that emigration applications should be processed in accordance with the conditions laid down earlier and that no new conditions should be imposed by the Government except by new legislation or rules. Following the Supreme Court’s Order of August, 1979, which, in effect took away from the Government the power to scrutinize terms and conditions of Indian workers emigrating abroad for employment, action had to be taken to bring legislation for the purpose. The Emigration Bill, 1983 was passed by both the Houses of Parliament and it received the assent of the President on 10th September, 1983.

The Statement of Objects and Reasons listed the following as the salient features of the Bill:

"(i) No Indian Citizen (unless exempted) can leave India taking up abroad work as defined in the Bill without obtaining a certificate of emigration clearance from the Protector of Emigrants.

(ii) An emigrant worker can be recruited for a job in a foreign country either by a recruiting agent registered under the Act or by an employer, subject to his being permitted to do so under the Act.

(iii) No prior scrutiny of applications for registration of agents is required, registration of recruiting agents has been made subject to an affidavit, an undertaking and an amount of security which shall not be less than rupees one lakh. When a certificate issued to a person has been cancelled, he shall not be eligible to make any application for another certificate until a period of two years from the date of such cancellation.

(iv) The decisions of the specified authorities in regard to cancellation, suspension and rejection of permits, registration and other matters are appealable to the Central Government."
Taking into account the concern expressed at various forums on the matter of exploitation of emigrants by recruiting agents and employers, provision has been made for offences of this nature and punishment by way of imprisonment upto a period of two years and fine upto two thousand rupees have been provided in the Bill . . .”

**Analysis of the E.A. 1983**

In the course of this section, we shall consider whether the above objectives have been met or not, and to what extent.

**(A)** Sub-section (2) of Section 1 of EA 1983 states that the Act extends to the whole of India and applies also to citizens of India outside India. Therefore, it may be construed that, if an Indian, who is abroad, within the frame work of the Act or, otherwise, would be bound by the provisions of the EA 1983, provided, it applied to him. Section 2 of EA 1983 covers various definitions. Sub-section 1 (d) defines an 'emigrant' as any citizen of India who intends to emigrate or emigrates or has emigrated, but, does not include the dependents of emigrant, and, any person who has resided outside India at any time after attaining the age of eighteen years, for not less than five years. Sub-section 1(f) defines 'emigrate' and 'emigration' as the departure out of India of any person with a view to taking up employment in any country or place outside India. This view is consistent with our earlier contention, where we have distinguished between migrants and immigrants – our subject is migrants or emigrants.

**(B)** Sub-section 1 (h) of EA 1983 defines 'employment' as any service, occupation or engagement in any kind of work within the meaning of clause (o) of the same sub-section. In clause (o), 'work' is defined to include (i) any unskilled work – either in industry or agriculture; (ii) any domestic service; (iii) any service, not being in a managerial capacity, in any hotel, restaurant, tea – house or other place of public resort; (iv) work as a driver of a truck or other vehicle, mechanic, technician or skilled labourer or artisan; (v) work as an office assistant or accountant or typist or stenographer or salesman or nurse or operator of any machine; (vi) work in connection with, or for the purposes of, any cinema, exhibition or entertainment;
any such work of a professional or of any other nature as the Central Government may specify by notification. It would be seen that this fairly exhaustive definition includes all the categories of workmen about whom we have been expressing concern in the earlier chapters, viz., labourers, manual workers, semi-skilled workers, etc. This means that the EA 1983 covers all the categories of workmen whom we consider vulnerable; therefore, it may be concluded that statutory provisions exists for the most needed category; – question is – whether the statutory framework is effective.

(C) Section 3 of the EA 1983 provides for the appointment of a Protector General of Emigrants and for a number of Protectors of Emigrants, as may be deemed necessary. Section 4 enumerates the duties of Protectors of Emigrants, as under:

"(a) protect and aid with his advice all intending emigrants and emigrants;
(b) cause, so far as he can, all the provisions of this Act and of the rules made there under to be complied with;
(c) inspect, to such extent and in such manner as may be prescribed –
   (i) any emigrant conveyance, or
   (ii) any other conveyance if he has reason to believe that any intending emigrants or emigrants are proceeding from or returning to, India or from a place outside India by such other conveyance;
(d) inquire into the treatment received by emigrants during their voyage or journey to, and during the period of their residence in the country to which they emigrated and also during the return voyage or journey to India and report thereon to the Protector General of Emigrants or such other authority as may be prescribed;
(e) aid and advise, so far as he reasonably can, emigrants who have returned to India."

A plain reading of the section indicates that, (i) no specific role has been earmarked for the Protector General of Emigrants; (ii) Protectors of Emigrants have a fairly passive role – because, their job is to protect, aid and advice, intending emigrants and returned emigrants, inquire into the treatment meted out to them on the to and fro
journey and during their stay in the host country; their active and specific role pertain to implement the Act and the Rules, and, to inspect conveyances; this is certainly most inadequate, specially in the context of the now fairy well-documented and well-reported condition of Indian migrant workers: (iii) the limited role of the Protectors of Emigrants is further highlighted by the fact that they are not even authorized to play an advisory role vis-a-vis the Government – to suggest what changes are necessary in relevant laws and procedures. The Government of India have no other statutory machinery dealing with emigrants – and even they i.e. the Protectors of Emigrants do not have the statutory right to bring to the notice of the Government, relevant factors in this regard; (iv) the limited duties of the Protectors, are further cloaked in generality and vagueness, by usage of phrases like “so far as he can” or “so far as he reasonably can”: of course, the duties listed in this Section are in addition to his other duties, under the Act, but, besides matters of procedure, no other specific duty or responsibility is enjoined upon the Protectors - these may include grant of licences, issuance of certificates, or holding hearings. Those are all procedural matters; no special and specific role of advisory nature is giving to Protectors, who could be a vital input to the Government in addressing the problems of migrant workers.

(D) Chapter III of EA 1983, covering sections 9 to 14 (both inclusive) deals with Registration of Recruiting Agents, and is important for our purposes. Sections 9 states that the Central Government, may by notification appoint the Protector General of Emigrants, or, any Government officer, higher in rank than a Protector of Emigrants, to be the registering authority under the Act. Section 10 prohibits any recruiting agent, to commence or carry on the business of recruitment, except under a certificate issued under the Act. The procedure for registration of recruitment agents is dealt with in The Emigration Rules, 1983, which shall be examined separately, hereafter. Section 11 prescribes the necessary ingredients for an application for registration. They are :- applicants’ financial soundness, trust worthiness, premises from which he intends to carry on business, facilities at his disposal for recruitment, his antecedents including details of any certificate which may have been cancelled in the past, previous experience, payment of requisite fees, etc. Sub-section (2) of
Section 11 stipulates that, on receipt of the application, the Registering Authority shall, if the application is not in order, return the same to the applicant; or, if on scrutiny the applicant is found to be eligible for grant of certificate, then, after a due hearing, determine the amount of security deposit, that the applicant is obliged to furnish. Sub-section (3) of the Section stipulates that the amount of security will not be less than Rs. 1 lac. This amount is levied, inter alia, to cover the cost of repatriation to India of any emigrant recruited by the applicant; as such, this security amount is ridiculously low, when seen in the context of services and liabilities which is sought to be covered by this security deposit. Be that as it may, the applicant is allowed time of one month during which the security amount may be paid by the applicant – after which the certificate may be issued to him, which, in terms of Section 12, shall be valid for five years, unless otherwise specified. Section 13 provides for the renewal of the certificate of registration.

(E) Section 14 deals with cancellation, suspension of licences. Sub-section (1) specifies the grounds on which a certificate of registration may be cancelled. The conditions contained in (a) to (g) below, are inclusive, and no further ground may be taken for cancellation of a certificate:

“(a) that having regard to the manner in which the holder of the certificate has carried on his business or any deterioration in his financial position, the facilities at his disposal for recruitment, the holder of the certificate is not a fit person to continue to hold the certificate;

(b) that the holder of the certificate has recruited emigrants for purposes prejudicial to the interests of India or for purposes contrary to public policy;

(c) that the holder of the certificate has, subsequent to the issue of the certificate, been convicted in India for any offence involving moral turpitude;

(d) that the holder of the certificate has, subsequent to the issue of the certificate, been convicted by a Court in India for any offence under this Act, the Emigration Act, 1922 (7 of 1922), or any other law relating to passports,
foreign exchange, drugs, narcotics or smuggling and sentenced in respect thereof to imprisonment for not less than six months:

(e) that the certificate has been issued or renewed on misrepresentation or suppression of any material fact;

(f) that the holder of the certificate has violated any of the terms and conditions of the certificate;

(g) that in the opinion of the Central Government it is necessary in the interests of friendly relations of India with any foreign country or in the interest of the general public to cancel the certificate.”

It is notable that, the sub-section, which is a self-contained code, does not provide for cancellation of the certificate, specifically, for any act of omission or commission, by which, emigrants recruited by him, have suffered losses. It may be argued that, clause (d) provides for cancellation of the certificate, if the certificate–holder is convicted by a court of law; this means that an emigrant recruited by the agent, who is cheated by him, would first need to file a First Information Report, in terms of Section 415 of the Indian Penal Code 1860, and, only on successful conviction, can such emigrant approach the registering authority for cancellation of the certificate. Keeping in mind the nature of malpractices, which are committed by recruiting agents, examples of which have been documented in previous chapters, it would have been better, if this Act itself provided necessary relief in such cases. It is possible that, because of such inherent lacunae in the law, malpractices by recruiting agents, goes on unabated and uncontrolled.

Sub-section (2) of Section 14 provides for the temporary suspension of the certificate; sub-section (3) empowers a Court to cancel the certificate. By virtue of sub-section (5) of the Section, the registering authority or the Court, before cancelling or suspending the certificate, shall consider the question as to provisions and arrangements which should be made for safeguarding the interests of emigrants, recruited though the agent concerned; sub-section (6) is a “reprieve” provision, as, it provides that, if an agents certificate is cancelled, he is eligible for applying for a
certificate a fresh after a period of two years, after the cancellation. It appears that the legislature was willing to continue to give unlimited opportunities, to unscrupulous agents whose licences were cancelled, as, no upper limit on number of cancellation of certificates is provided for.

(F) Chapter IV of the EA 1983 deals with permits for recruitment by employers. This is a parallel provision in the Act, enabling employers to directly recruit Indian workers in addition to through agents. Sub-section (1) of Section 15 states that the Central Government may, by notification, appoint the Protector General of Emigrants or any other officer of a rank higher than a Protector of Emigrants to be the competent authority for issuing permits under the Act. Sub-section (2) stipulates that, the Central Government may authorize any person employed under the Central Government in any country or place outside India, to issue permits to foreign employers to recruit any citizen of India, for employment in that country. In other words, the competent authority could be located in India, or, say, in Saudi Arabia; of course, the competent authority located in Saudi Arabia can issue permit only to a Saudi employer, for recruiting Indian nationals for employment in Saudi Arabia. Section 16 of the EA 1983, prohibits foreign employers from recruiting Indian nationals for employment outside India, unless, they are either recruited through recruiting agents or by them, after receipt of valid permits for this purpose.

(G) Section 17 of the EA 1983 sets out the procedure for obtaining permits. Sub-section (3) lists the exclusive reasons for which an application for a permit may be refused:

“(a) that the application is not complete in all respects or that any of the material particulars furnished in the application are not true;

(b) that the terms and conditions of employment which the applicant proposes to offer to persons recruited or proposed to be recruited by him are discriminatory or exploitative;

(c) that the employment which the applicant proposes to offer involves work of a nature which is unlawful according to the laws of India or offends
against the public policy of India or is violative of norms of human dignity and decency;

(d) that having regard to the antecedents of the applicant, his financial standing, the facilities at his disposal, the working and living conditions of persons employed by him in the past, it would not be in the public interest or in the interest of persons who may be recruited by him, to issue a permit to him;

(e) that having regard to the prevailing circumstances in the country or in the place the applicant proposes to employ the persons recruited by him, it would not be in the interest of any citizen of India to emigrate for taking up such employment.”

The above conditions would indicate that the rejection of an application for a permit is dependent upon, in material terms, on the type of work being offered, the conditions of work or the host country’s relations with India. How the Central Government or the Competent Authority will come to these conclusions is not specified in the Act. Be that as it may, the provisions of Section 17 are negated by the contents of Section 21, which gives power to the Central Government to “… if satisfied that it is necessary or expedient so to do in the public interest … exempt any class or classes of employers from the requirement of obtaining a permit under this chapter.” It is also not clear as to how the cause of public interest would be furthered, by exempting any employer/s from the requirement of obtaining a permit. Rather, it appears in the context of the realities pictured in the previous chapters that, there should be very stringent provisions for grant of certificates to recruiting agents and permits to employers; on the contrary, the EA 1983 gives overriding and unbridled powers to the Central Government to waive the requirement of a permit.

It appears, that, the complexity and extent of the problem faced by Indian migrant workers has not made sufficient impact on the Central Government, so as to ensure appropriate changes in the legislation. It is hoped that, with this effort, the debate on the subject would receive a fresh impetus.
Chapter VI of the EA 1983, consisting of Section 23 deals with appeals. Sub-section (1) of Section 23 states that an appeal may be preferred against any order, by which, the registering authority rejected the application for registration, or imposed conditions, or refused to renew the certificate; or an order by which an application for a permit was rejected, or conditions were imposed, or the permit was not renewed; an order passed by the Protector of Emigrants rejecting an application for emigration clearance; or an order of the Competent Authority or the Protector of Emigrants requiring furnishing of any security or forfeiting or rejecting any claim for refund etc. The appeal will lie to the Central Government, and must be made within the period stipulated under the provision of the Limitation Act, 1963. Sub-section (5) of Section 23 stipulates that, before disposing of an appeal, the appellant shall be given a reasonable opportunity of representing his case. In other words, the principles of natural justice, as enunciated in the Wednesbury case would need to be complied with. Sub-section (6) of Section 23 states that all appellate orders shall be final. Therefore, since the statute does not provide for any further appeal, then in case the appellant is not satisfied with the appellate order, his only legal remedy would be to challenge the said order by way of a Writ Petition under Article 226 or Article 32 of the Constitution.

The penal provisions of EA 1983 are contained in chapter VII, consisting of Section 24 to 28 (both inclusive). Sub-section (1) of Section 24 states that whoever, interalia, contravenes the provisions of Section 10 (i.e. functioning as a recruiting agent without a valid certificate) or contravenes the provisions of Section 16 (i.e., employer recruiting workers without the intervention of recruiting agents or contrary to the terms of a permit issued to him); makes any illegal alteration in the certificate of registration; or disobeys or neglects to comply with any order of the Protector of Emigrants; or charges any fees in excess of the limits prescribed from any emigrant; or cheats any emigrant, shall be punishable with imprisonment for a term up to two years and a fine up to two thousand rupees. The proviso to this sub-section, further dilutes the penalty, which in any case is quite mild, by stating that, “Provided that in the absence of any special and adequate reasons to the contrary to be mentioned in the judgment of the court, such imprisonment shall not be less than six months and
such fine shall not be less than one thousand rupees.” Therefore, it is statutorily possible for a court to impose lesser penalty than that provided, by recording reasons therefor! It is repeatedly being reiterated that the penal provisions in EA 1983 are wholly inadequate to meet with the demands of the situation. It may be recalled that a manual worker who was interviewed by this researcher claimed that inspite paying of Rs. 60,000 to the agent, he had been cheated by the agent as well as his employer: this coupled with the observation of the functionary of the Gulf Malyali Welfare Association, who said that allegations of cheating against agents could not be proved as no receipts for payments were made, seen in the context of the proviso to Sub-section (1) of Section 24 makes the position even more horrific to the helpless migrant worker. If we take the observation of the manual worker prima facie, and, we presume that on a complaint, the charge of cheating is proved against the agent, then, for a payment of Rs. 60,000, the court can grant a penalty of even Rs. 1000. If we are to search for a deterrent to malpractices committed by agents, then, obviously, we shall have to look at some place else, besides the EA 1983. It is interesting to note that one of the offences specified in Section 24(1) is “cheating”:
section 418 of the Indian Penal Code, 1860 reads as under:

“418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect:- Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

It is nobody’s case that the recruiting agent is not expected to protect the interests to the migrant worker; therefore, the provisions of Section 418 of the IPC 1860 are very relevant to our context. In the IPC, imprisonment of either kind up to three years has been provided for; but, in EA 1983, the maximum term of imprisonment is two years. Atleast, where the provisions a parimateria, there should be a comity of purpose – and, therefore of penalty. However, it appears that, the Central Government is still not alive to the problem on hand. The only redeeming feature is sub-section (5), which states that for continuing offences, double the penalty
provided for, shall be imposed. This is at best, a half-hearted attempt at deterrence. The Times of India, Mumbai, in its edition dated 30th September, 2000, carried a news item as under:-

"BOGUS RECRUITMENT AGENT ARRESTED"

Mumbai: The Economic Offences Wing (EOW) recently arrested a 43-year-old resident of Dahisar for allegedly running an illegal recruitment business. The EOW had received complaint that a certain Krishnan Kutty, Proprietor of Reena Associates on D.N. Road, Fort, had been promising jobs overseas and collecting huge amounts of money from job seekers. The police then raided the office premises and arrested Mr. Krishnan Kutty. A case has registered under Section 10 and 24 of Emigration Act, 1983."

From the above and earlier analysis, we can make a reasonable assumption about the possible outcome of this investigation. 

Section 25 deals with offences by companies. Sub-section (1) stipulates that where any offence under the Act has been committed by a company, then, the company and every person who, at the time the offence was committed was in charge of and was responsible to the company for the conduct of its business shall be liable to be proceeded against and punished. Since no separate penalties are provided for, it is deemed that the provisions of Section 24 would also apply to companies. The proviso to this Sub-section states that in the event a person shall prove that the offence was committed by the company, without his knowledge or despite his due diligence, then, he shall not be proceeded against. This gives rise a peculiar situation. Let us presume that the offence against the company is proved; but, taking advantage of the proviso to Sub-section (1), the senior officers of the company are able to prove that the offence was committed by the company without their knowledge, consent or connivance, then, how the company would be punished? The only reasonable solution to this eventuality would be to cancel the certificate of registration (if the company was a recruiting agency), in terms of Section 14 of EA 1983.
Another limitation to punishment in terms of EA 1983 is contained in Section 27 which states that, "No prosecution shall be instituted against any person in respect of an offence under this Act without the previous sanction of the Central Government or such officer or authority as may be authorized by that Government by order in writing in this behalf." The only exception is, if proceedings are being initiated against an individual emigrant, on the basis of an complaint made by the family members of that emigrant. Therefore, it is not only necessary that the offence against the individual or company would have to be prima facie established, it is necessary to take the consent of the Central Government or any officer authorized in this regard. This adds to the bureaucratic delay in launching prosecution; and the delay may defeat the purpose of the prosecution. It is to be noted that, in normal course, only senior Government servants, enjoy this facility -- that -- before launching proceedings against than, the investigating agency, needs to take the prior sanction of the Competent Authority. This is covered by the provisions of Section 197 of the Code of Criminal Procedure, 1973; it is not clear as to what intent was behind the provisions of Section 27 of EA 1983.

(K) Chapter VIII of EA 1983 deals with miscellaneous provisions and covers Section 29 to 45 (both inclusive). It is not our intention to consider those aspects of the EA 1983, which do not deal with emigrants as a class; [for example, we have not examined the provisions relating to emigration clearance for individual workmen]. Section 30 empowers the Central Government to prohibit emigration to any country for the following reasons: - a) sovereignty and integrity of India; b) security of India; & c) friendly relations of India with any foreign country; the decision to prohibit emigration to any country, if any of the considerations above mentioned are likely to be affected, would have to be made by way of a notification, which would be valid for six months at a time. Section 31 gives powers to the Central Government to prohibit emigration due to out break of epidemics, civil disturbances etc. in a country, and where India does not have diplomatic relations with that country so as to protect the emigrants, then, by a notification, emigration to such countries could be prohibited. Each such notification would be valid for six months at a time.
Section 32 gives powers to the Central Government to prohibit emigration of any class of persons. Sub-section (1) states that, where the Central Government considers that in the interests of the general public, emigration of any class or category of persons, having regard to their age, sex or other relevant factors, to any country should be prohibited, it may do so, by notification. Each notification would be valid for six months at a time. It may be recalled that we have noted in an earlier chapter that the Central Government has prohibited the emigration of women to work as domestic workers in the Kingdom of Kuwait. Since this appears to be a continuing prohibition, it may be presumed that a notification to this effect would need to be issued every six months.

Section 36 provides for the maintenance of returns and registers. Sub-section (1) states that every recruiting agent shall maintain such registers and other records, and shall submit to the prescribed authorities such periodical or other returns as may be prescribed. Sub-section (2) states that the Protector General of Emigrants, the registering authority, the competent authority or a Protector of Emigrants may, by order, call for any other return or information from a recruiting agent. Sub-section (3) states that the Protector General of Emigrants, the registering authority, the competent authority or the Protector of Emigrants or an officer in charge of an emigration check – post may inspect any register or other record maintained by a recruiting agent under Sub-section (1) and for the purpose of such inspection enter at any reasonable hours, the business premises of the recruiting agent. This sub-section needs to be read with the provisions of Section 35, which gives powers to officers of the Customs Department, the Protector General of Emigrants, the Protector of Emigrants, and, an officer in charge of an emigration check post, to exercise all the powers under the Customs Act, 1962, in respect of search and seizure, of any vessel, conveyance, document or arrest of any person, for, inter alia, preventing any offence under the EA 1983. Therefore, in exercise of powers vested by Sub-section (3) of Section 36, a designated/competent official may seize any document or record being maintained by any recruiting agent. From the legislative point of view, it would have been expedient that such powers of search and seizure were expressly provided for under Section 36; this is being suggested in the context of any complaints that
may be made by emigrants for cheating, etc. against recruiting agents, and, they are investigated in terms of Section 36.

Section 37 states that the Protector General of Emigrants, the registering authority, the competent authority and every Protector of Emigrants shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, while trying a suit, in respect of the following matters:- a) summoning and enforcing the attendance of witnesses; b) requiring the discovery and production of any document; c) requisitioning any public record or copy thereof from any Court or office; d) receiving evidence on affidavits and e) issuing commission for the examination of witnesses or documents. Sub-section (2) of Section 37 states that every proceeding before the Protector General of Emigrants, the registering authority or the competent authority or a Protector of Emigrants shall be a judicial proceeding within the meaning of Section 193 and 229 of the Indian Penal Code, 1860, and, the Protector General of Emigrants, the registering authority, the competent authority, and every Protector of Emigrants shall be deemed to be a civil court for the purposes of Section 195 and chapter XXVI of the Code of Criminal Procedure, 1973. These provisions give a fairly comprehensive legal framework to the proceedings, which may be conducted under the EA 1983.

In the present context, the provisions of Section 38 are very relevant and significant; it empowers the Central Government to give directions to the Protector General of Emigrants, the registering authority, the competent authority, or any Protector of Emigrants as to the execution of any provisions of the EA 1983. It is our intention that the Central Government must cause an independent enquiry into the problems that the Indian migrant workers are facing, in India, at the hands of the recruiting agents, and in the host country, because of renegotiations of the contract of employment, or, working and living conditions, etc., and issue necessary and suitable directions to the various authorities mentioned in the section, to better implement and enforce the various provisions of the EA 1983.

Section 39 states that the provisions of EA 1983 are in addition to and not in derogation of, any other law for the time being in force; similar provision is
applicable to all the Rules that may be made under the Act. Section 40 empowers the Central Government to delegate any power or function which may be exercised under the Act or which may be performed by the registering authority, competent authority, or a Protector of Emigrants, to any officer or authority subordinate to the Central Government, or any State Government or officer of the State Government, or, in foreign mission in which we do not have a diplomatic mission, to the foreign consular office. In this context, it is submitted that, delegation of relevant and necessary powers to consular officers in foreign countries, must be extended to even these countries, with whom we have diplomatic relations and embassies exist. In our case, we have noted the poor conditions of some Indian migrants in the Middle East; we have diplomatic missions in all of them; in case, delegation of powers as contemplated in Section 40, is extended to designated officials of Indian Embassies in those countries also, then, the latter could also play a constructive role in improving the conditions of Indian migrant workers in those countries.

We have already taken note of the provisions of Section 21 supra; by that section, employers could be exempted from the requirement of obtaining a permit, for the purposes of EA 1983; section 41 gives further powers to the Central Government to exempt foreign dignitaries, foreign employers, public undertakings, approved concerns and Government officers, from any or all the provisions of this Act. Such a decision may be taken only if the Central Government “... is satisfied that having regard to—

(a) the friendly relations with any foreign country; or

(b) the known reputation of any foreign employer or class of foreign employers, for providing to emigrants standard conditions of living and working, and their methods of recruitment and conditions of employment; or

(d) the methods of recruiting followed and the conditions of employment provided by a public undertaking or an approved concern for the execution of its projects abroad; or
(e) the facilities and conditions of service provided by Government officers posted abroad to their domestic servants accompanying such Government Officers, where the expenditure in respect of the passage of such domestic servants is borne by the Government, and

(f) all other relevant considerations.

Sub-section (2) of section 41 empowers the Central Government, if it is so satisfied that it is necessary for implementing any treaty, agreement or convention between India and any foreign country or countries, it may, by notification, and subject to such conditions as may be specified, exempt from operation of any or all the provisions of EA 1983, recruitment by such authorities, agencies or persons as may be specified in the notification. By virtue of this provision, the Central Government may exercise powers which may defeat the purposes of this Act; however, it is expected, that, before doing so, the Central Government would consider the matter in all its relevant aspects. For the purposes of this Section, a “public undertaking” means any undertaking owned and controlled by the Government, or, a statutory corporate, or a Government company within the meaning of Section 617 of the Companies Act, 1956; an “approved concern” means a company registered under the Companies Act, 1956, or a partnership firm registered under the Indian Partnership Act 1932 or a Society registered under the Societies Registration Act, 1860.

Section 43 of EA 1983 empowers the Central Government to make Rules to carry out the provisions of the Act. Sub-section (2) of Section 43, enumerates the matters in respect of which Rules may be made; they are as under:

(a) the powers and duties of officers and employees appointed for the purposes of Act and the terms and conditions of their service;

(b) the form of -

(i) certificate to commence or carry on the business of recruitment, and of an application for the issue or renewal thereof;
(ii) a permit for the recruitment of persons for employment outside India, and of an application for the issue thereof;

(iii) an application for emigration clearance;

(iv) an appeal to be preferred to the Central Government

(c) the manner and form in which an authorization by way of emigration clearance may be given;

(d) particulars to be contained in an application for a certificate or permit or for an emigration clearance;

(e) the manner in which different inquiries required to be held under the Act may be held:

(f) the manner in which the amount of security for securing the due performance of the terms and conditions of the certificate or permit shall be furnished;

(g) the manner of verifying or authenticating documents and copies of documents for the purposes of this Act;

(h) the procedure for hearing of appeals by the Central Government;

(i) the fees to be paid under the Act;

(j) the charges which an agent may recover from an emigrant;

(k) the terms and conditions subject to which a certificate or a permit or an emigration clearance may be issued under this Act;

(l) the period of the validity of a certificate or a permit issued under this Act;

(m) the authority competent to extend the period of validity of a permit or to forfeit security or to require fresh or additional security under the Act;
(n) the accommodation, the provisions, the medical stores and staff, the life-saving and sanitary arrangements etc. which must be provided in an emigration conveyance;

(o) any other matter.

The above is a very extensive area for which the Central Government may make Rules, to achieve the purposes of the EA 1983; but one vital area is not provided for - the manner in which a complaint may be made against a recruiting agent, and, the manner and procedure which needs to be followed to deal with the complaint. We have already noted that the EA 1983 does not make adequate provision in this area, and, compels the complainant or an aggrieved person, to approach the civil police machinery, for redressal of grievances; this is not in the least, a user-friendly situation, considering that the Act has been provided basically, to safeguard the interests of the emigrants. Since proceedings before the various authorities in the Act, in terms of Section 37, are deemed to be judicial proceedings, it would have been expedient to meet the ends of justice, to have provided for a complaint redressal mechanism in the Act, itself.

Finally, in terms of Section 44, all notifications and Rules made under the Act, must be laid in each House of Parliament, at usual terms.

**Comparative analysis of EA 1983 with EA 1922**

Before examining the provisions of the Emigration Rules, 1983, it would be necessary, to compare the provisions of EA 1983 with those of EA 1922, to consider, what changes in statute were made, during the intervening sixty years.

(i) If we begin our comparative analysis with chapter III of both the Acts, we find that in Section 3, which deals with the appointment of Protector of Emigrants, we find that the material difference is that in EA 1983, provision for appointment of Protector General of Emigrants is made, which did not exist in EA 1922; section 4 which deals with the general duties of the Protector of Emigrants, one provision each is missing in both the Acts; viz. in EA 1922, the sub-clause (ii) of clause (c) of
Section 4 is not provided; this deals with the duty of the Protector to inspect any vessel other than an emigrant conveyance, if he has reason to believe that such conveyance is being used for transport emigrants; therefore, this is a welcome addition; however clause (f) of Section 4 of EA 1922, which deals with grant of certificates of non-emigrants, is not provided in EA 1983.

In EA 1922, Section 6 provided for the appointment of Medical Inspectors at any port or airport, from where emigration was permissible; this provision does not exist in EA 1983; instead, Section 6 of EA 1983 deals with emigration checkpoints. Section 7 of EA 1922 provided for the appointment of agents at places outside India, to protect the interests of Indian emigrants; this provision does not exist in EA 1983; in an earlier paragraph, with reference to the analysis of the provision of Section 40 of EA 1983, it was suggested that consular staff of Indian missions be given powers to safeguard the interests of Indian migrants; such a provision existed in EA 1922, but, unfortunately, does not exist today. Section 8 of EA 1922 provided for the Constitution of an Advisory Committee to assist the Protector of Emigrants; this provision is not made in EA 1983. Section 9 of EA 1922 provided for the bar on emigration of unskilled workers from any port except Calcutta, Madras, Bombay, Negapatam, Tuticorin and Dhanushkodi, and any other port, which the Central Government may, by notification, permit; no such limitation exists under EA 1983. It must be stated that this restriction, is beneficial, especially, in respect of unskilled workers; by restricting ports and airports of departure, the question of emigration clearance, for unskilled workers could be better controlled; this would also help in curbing the menace of unauthorized immigration, mostly resorted to by unskilled workers.

(ii) Sections 10 and 11 of EA 1922 dealt with countries to which emigration of unskilled workers was lawful and the power of he Central Government to suspend emigration of unskilled workers, respectively; though, similar corresponding provisions does not exist in EA 1983, but effectively, the similar purposes are served by the provisions of Section 30, 31, and 32 of EA 1983; to that extent the provisions of Section 13 of EA 1922 and Section 30 of EA 1983 are peri materia.
Section 15 of EA 1922 dealt with ports from which emigration of skilled workers was lawful: Section 16 of EA 1922 dealt with the emigration of skilled workers; the provision of Section 16 of EA 1922 are extremely crucial, for our context; notably, a similar provisions does not exist in EA 1983; the said section states that any person who desires to engage any person to emigrate for the purpose of skilled work shall apply to the Central Government and shall state:-

a) the number of persons whom he purposes to engage;
b) the place of employment;
c) the accommodation to be provided;
d) the provisions for health care made;
e) the terms of contract of engagement;
f) the amount of security which he purposes to make in India, for the observance of the such terms of contract.

It must be noted that in EA 1983, Chapter 3 deals with the grant of permits for recruitment by employers; this may be said to be analogous with the provisions of Section 16 of EA 1922; unfortunately, in the new Act, this provision specifically does not exist -- if this would have been continued in the new Act also, then, it is supposed that malpractices in the matter of recruitment of migrant workers would have been lesser; atleast, a safety mechanism in the form of item f) above, would have been available - this could have been developed on the lines of a bank guarantee or an escrow account. It would be suggested that the above stipulation should be made for private/ordinary/direct employment also, as, the malpractices are inherently greater in this sector.

Section 17 of EA 1922 dealt with the manner in which applications for emigration in respect of skilled workmen are to be dealt with; Section 18 of EA 1922 stipulated that before a person departs from India on the basis of the permission granted in terms of Section 17, the employer or his authorized representative shall appear before the Protector of Emigrants along with the workman concerned; however, to implement this provision in today’ context, when thousands of workmen
are emigrating, is neither practical nor feasible; consequently, such a provision does not exist in EA 1983. Section 21 of EA 1922 gave powers to the Central Government to prohibit the emigration of such skilled workmen to specified countries. This runs contrary to the present-day policy of the Central Government, which is keen that its skilled workmen, especially Information Technology professionals go abroad in large numbers to North America, Europe, Japan etc. Consequently, the corresponding provision to Section 21 of EA 1922 may not be feasible in today’s context. Section 24 of EA 1922 gave powers to the Central Government to make Rules, consistent with the provisions of the Act and to carry out its provisions; a corresponding provision is contained in Section 43 of EA 1983.

(vi) Section 26 of EA 1922 is extremely significant for our purposes; it is necessary to reproduce the same for ready reference and better understanding:

"26. Fraudulently inducing to emigrate: - Whoever, by means of intoxication coercion or fraud, causes or induces or attempts to cause or induce any person to emigrate, or enter into any agreement to emigrate, or leave any place with a view to emigrating, shall be punishable [with imprisonment for a term which may extend to three years and with fine: Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgement of the Court, such imprisonment shall not be less that six months and such fine shall not not be less than one thousand rupees". Before analyzing the significance of this section, it is necessary to state that the nearest corresponding provision to this in EA 1983, is Section 24 thereof, which inter alia states that in the event of cheating an emigrant, the punishment shall be upto a term of two years and a fine of upto rupees two thousand. It would be clear that the EA 1983 has reduced the significance of cheating of an emigrant, by two ways; one, the specific provision has been merged with a general provision of offences and penalties; second, the penalty of cheating an emigrant has been reduced from a maximum of three year to two years; of course, the minimum amount of fine has been increased from one thousand rupees to two thousand rupees. It is clear that the Central Government is not alive to the problems being faced by migrant workers, who are routinely cheated
by recruiting agents [as shown in previous chapters]; since EA 1983 is the result of an order of the Hon'ble Supreme Court of India, it may also be necessary, to take this matter there for a mandamus to the Central Government, to atleast maintain the level of deterrence that that existed in the earlier Act.

With this brief analysis, the comparison between EA 1922 and EA 1983 is concluded; it is hoped that the major discrepancies and anomalies would have become clear. What direction this aspect may take in the future, is indicated by the following press report which partially reads as under: 3

"ILO MUST PROTECT MIGRANT WORKER'S RIGHTS: JATIA

New Delhi, June 22: Back in the country after attending the fortnight-long International Labour Conference (ILC) in Geneva, the Union Labour Minister, Dr. Satyanarayan Jatia, today said he had asserted India's position on the rights of workers and hoped the member countries of the International Labour Organization (ILO) would unanimously work out strategies to protect the rights of migrant workers, particularly fundamental and human rights..."

We have examined the role of multilateral organizations, like the ILO in regulating the legal framework of migrant workers; suffice it to be said at this stage that, the ILO cannot by itself, enforce its standards – this is left to member states, through the ratification process. Therefore, the Indian Central Government should talk on specifics with those labour-importing countries which import Indian labour, rather than indulge in generalities within the ILO framework. Obviously, the hint is that the Indian Central Government does not wish to take any specific initiative in this regard. This would obviously run contrary to the role of labour exporting countries, highlighted in an earlier Chapter.

The Emigration Rules, 1983.

It is now necessary to examine the provisions of the Emigration Rules, 1983. [hereinafter referred to as "ER 1983"].

Analysis of the Emigration Rules 1983

It is necessary to consider whether the Rules are sufficient to fulfill the purposes of EA 1983.

(A) Sub-Rule (2) of Rule 1 states that ER 1983 shall be deemed to have come into effect on the day they were published in the Official Gazette, which was on 30 December, 1983. We have noted that in terms of Section 16 of EA 1983, employers may recruit migrant workers either themselves, after getting a valid permit, or through competent recruiting agents. Rule 5 of ER 1983 stipulates that the representation of an employer by a recruiting agent shall be determined with reference to the power of attorney given by the employer to recruiting agent; provided that, the authority shall be limited to the extent of authority given in the said power of attorney, and to remain valid for the period specified in the power of attorney, or, if no period is specified, then, till the validity of the recruiting agent’s certificate. Rule 7 of ER 1983 deals with registration of recruiting agents; it states that, the application for the registration shall be made in Form I, annexed to the Rules; the said form should be accompanied by a bank draft of Rs. 500 only, and an affidavit in Form II, to be sworn before a Metropolitan Magistrate or a Judicial Magistrate giving his latest financial position. It would be apparent that the fees payable for a certificate is ridiculously low at Rs.500, especially, when, the agent would be involved in transactions worth huge amounts of money. Our survey has revealed, as has Woodward, that recruiting agents charge exorbitant rates from prospective employers; it does not appear to be reasonable to fix such a low fee when the expected turnover is expected to be fairly large. As far as the affidavit contemplated in this Rule is concerned, it would have been appropriate to insist for a report from a certified auditor or chartered accountant, to confirm the financial standing of the applicant, rather than depend upon his affidavit solely.

(B) Rule 8 of ER 1983 stipulates the level of security deposit payable, in terms of Sub-section (3) of Section 11; the scale is dependent upon the number of workers to

\(^4\) Supra
be recruited by the agent; if the number of workers to be recruited is upto 100, then, only Rs.1 lakh is payable as security deposit, between 101 and 600 workers, the deposit shall be Rs.3 lakhs; for 601 to 1000 workmen, the deposit should be Rs.4 lakhs, and for workers in excess of 1000, the security deposit shall be Rs.5 lakhs. As stated, this stipulation is based on the provisions of Sub-section 3 of section 11; it may be recalled that the said Sub-section states that the security deposit shall be necessary to ensure compliance on the part of the agent of the various provisions of EA 1983, and, to meet contingent expenses, for the repatriation of the workmen; it can be presumed that, in the event of the repatriation of any workmen from the Middle East, then, Rs. 1 lac would be sufficient for meeting the repatriation cost of only a few workers, average cost of one-way air ticket being approximately Rs.20,000; whereas, this limit is proposed for recruitment of upto 100 workmen. It is not being suggested that all the workers would need to be repatriated; yet, the amount of security deposit should have a reasonable connection with the risk involved. That the scale of security deposit should be increased substantially can not be over-emphasized.

(C) Rule 10 deals with the terms and conditions for the issue and continuance of the certificate: it is a cognate provision to Section 11 of the EA 1983, which deals with applications for registration. The said Rule details the terms and conditions, subject to which, a certificate of registration may be issued. They are :-

(i) the certificate would be valid for the period specified in the certificate;

(ii) the certificate shall not be transferable;

(iii) the holder of the certificate shall conduct the business under his own hand and seal;

(iv) a photo copy of the certificate shall be displayed at a conspicuous place in the place of business;

(v) the certificate shall be available for inspection by emigration authorities, enforcement authorities and employers;
(vi) the certificate shall be made available to an emigrant if so demanded for verification;

(vii) the holder of the certificate shall conduct his business from the place specified in the certificate; if he intends to operate from any other place, he shall do so, only after prior permission is sought and granted;

(viii) the holder of the certificate shall not employ sub-agents for the purpose of conducting his business;

(ix) the holder of the certificate shall maintain the following records, viz. –

a) a permanent register of receipt of charges from emigrants recruited containing the signature of each emigrant recruited;

b) a register of record of amounts and pre-paid Ticket Advices received from employers;

c) a register of expenses incurred for each recruitment;

d) individual folders for each employer whose demands of labour have been processed, are being processed or will be processed;

e) bio-data of each emigrant recruited by the certificate holder;

f) copies of employment contracts of each emigrant worker, duly authenticated by the Protector of Emigrants;

g) original demand letter, power of attorney and correspondence with employers;

h) all documents relating to the recruitment of emigrants, including office copies of all advertisements issued, letters of interviews, etc;

i) a register of visas received from the employers giving separate account of block and individual visas;

j) a register of claims for all compensation (injury and death) made by the emigrant or his dependents etc;

k) such other records, as may be prescribed.

(x) the holder of a certificate shall file a return every month on Form IV to the Protector of Emigrants; the information contained in the Form shall include
the following:- number of persons deployed, separately for each country, category, and wages; charges recovered from emigrants; number of persons repatriated by the employer before completion of contract period; number of visas received and utilized; number of pre-paid ticket advises, received and utilized; and, fees received in foreign exchange from employers.

(xi) copy of each advertisement for recruitment shall be endorsed to the Protector of Emigrants;

(xii) the holder of the certificate shall ensure that the employer observes the terms of the contract;

(xiii) the holder of the certificate shall not charge any amount from the emigrant towards his repatriation.

**Observations**

On an analysis of the provisions of this Rule, we conclude that the inspection mechanism of the Office of the Protector General of Emigrants could be made dependent upon two sets of documents – one, which the recruiting agent shall maintain in his office, and two, those documents which are sent by the recruiting agent to the Office of the Protector General of Emigrants. In the first set, documents are listed at item ix) supra; the second set of documents are at items x) and xi), supra.

We have already set out earlier that recruiting agents are liable to indulge in gross malpractices and routinely cheat the poor, uneducated, gullible emigrants; we have also noted that over-charging by agents can not be proved, because, no receipts are given for amounts collected in excess of the stipulated amount. So, the efficacy of the inspection mechanism, provided under the EA 1983 and ER 1983 is doubtful. A few instances of recruitment advertisements, copies of which have to be mandatorily sent to the office of the Protector of Emigrants, are cited.

The Sunday Times of India. Mumbai edition carries a supplement for overseas employment. The large majority of advertisements pertain to vacancies in the Middle East; a large percentage of those are for skilled and semi-skilled workers. If
we analyze some of the advertisements which appeared in the edition dated June 11, 2000. we find the following significant factors:-

a) In one advertisement for vacant positions in Dubai, Oman, Kuwait and UAE, the agent has given his registration number which is in twenty three digits, and the date of validity of the certificate is also mentioned; in another advertisement for vacancies in UAE and Bahrain, the agent has given his registration number, which is in six digits only, and the expiry date is not mentioned; another agent, advertising for vacancies in Saudi Arabia, Sharjah and Dubai, has given his registration number, of twenty three digits, but, date of expiry is not mentioned; there is thus, no uniformity of practice, in this regard.

b) Whereas for some posts, salaries are specified, e.g., for one vacancy of salesman in Saudi Arabia and Dubai, it is specified that salary would be SR 1300 plus, commission; for most other vacancies, no salary is indicated; further, it was seen in the advertisement for construction projects in Abu Dhabi, Qatar and Saudi Arabia, it was mentioned as! “Attractive salary + free food + usual Gulf benefits.” How any prospective emigrant would be able to identify the wage packet, from such advertisements is not clear; what is even more unclear is, what the Office of the Protector of Emigrant, who are duty-bound to receive a copy of every advertisement, do, with such advertisements.

c) The divergence of advertisements is further exemplified by an advertisement issued by on behalf of a Saudi Government organization, seeking to employ 114 technical personnel. It is not clear, who the recruiting agent is; neither any registration number is mentioned. What is however significantly mentioned is the details of fringe benefits available to the prospective personnel; the range of salary shown is from SR 1850 to SR 4800, from technician/ operators to Engineers/ Supervisors; monthly transportation allowance ranging from SR 200 to SR 300; salary increase of 5% every year, depending upon performance; free accommodation or three months basic salary, if accommodation is not provided; free medical facilities at Government hospitals; contract for two years-renewable; 30 days paid leave after 11 months service, with return economy class fare;
higher position would be allowed to bring their families to South Arabia; end of service Gratuity, @ $ month’s salary for the first five years, and one month for each subsequent year. This advertisements makes two statements – one, it reinforces our consistent stand that the position of migrant workers employed in the Government sector is far better compared to those employed in the private sector; and second, it should be made mandatory that all advertisements for recruitment should give complete details of benefits available to migrant workers.

Rule 12 of ER 1983 deals with the issue of permits, issued to employers for direct recruitment. Since, this sector does not pose any specific problem, it is not necessary to examine the provisions in this regard, viz. Rules 11, 12, 13, 14 and 17.

Rules 18, 19, 20 and 21 deal with appeals.

Rule 25 specifies that the maximum amount of service charge which may be levied by the agent is Rs. 2000 for which a receipt is to be given to the emigrant. This amount was fixed in 1986. The economic situation has undergone major changes in the intervening years, and, there is a case for revising this amount upward; this may induce the agents to reduce overcharging/illegal charging of emigrant workers.

This concludes our discussion on the EA 1983 and ER 1983. It is hoped that the major deficiencies, and suggestions for improvement, as stated, would be taken note of, and corrective action would be initiated.


It would be useful, in the context of our analysis, to examine some of the provisions of the Inter–State Migrant Workmen [Regulation of Employment and Conditions of Service] Act, 1979 [hereinafter referred to as the ISMW Act, 1979]. Prima facie, it may appear that the consideration of this Act, is not strictly relevant. However, the reasons for the same would be made clear. Since our subject matter is migrant workers, the ISMW Act, 1979, is the closest cognate Act to the subject of migrant
workers. The reasons for this are indicative in the Statement of Objects and Reasons, which, interalia, reads as under:

"The system of employment of inter-State migrant labour (known in Orissa as Dadan Labour) is an exploitative system prevalent in Orissa and in some other States. In Orissa, Dadan labour is recruited from various parts of the State through contractors or agents called Sardars/Khatadars for work outside the State in large construction projects. This system lends itself to various abuses. Though the Sardars promise at the time of recruitment that wages calculated on piece-rate basis would be settled every month the promise is not usually kept. Once the worker comes under the clutches of the contractor, he takes him to a far-off place on payment of railway fare only. No working hours are fixed for those workers and they have to work on all the days in a week under extremely bad working conditions. The provisions of the various labour laws are not being observed in their case and they are subjected to various malpractices...

The inter-state migrant workmen are generally illiterate, unorganized and have normally to work under extremely adverse conditions and in view of these hardships, some administrative and legislative arrangements both in the State from where they are recruited and also in the State where they are engaged for work are necessary to secure effective protection against their exploitation..."

From the above, we may draw the following conclusions about the inter-state migrant workers: a) the system is exploitative; b) they are engaged through contractors/agents; c) they are usually engaged to work in construction projects; d) payment of wages is neither made in time, nor at the rate settled; e) no working hours are fixed and these migrants are made to work for all days in a week; f) the provisions of various labour laws are not complied with. The above conclusions would match substantially, the conditions of Indian migrant workers working in Saudi Arabia. To that extent, the conditions of both sets of workers is similar; therefore, the ISMW Act, 1979, may be said to be a cognitive provision in our context. In the matter of Labourers Working on Salal Hydro Project vs. State of J&K and Others, AIR 1984 SC 177, a 3 – Judge Bench of the Hon’ble Supreme Court of
India had occasion to treat a news report and letter of the People’s Union for Democratic Rights as a Writ Petition; the news item having appeared in the Indian Express of 26-8-1982, had highlighted the plight of Oriya migrant workmen who were brought by contractors to work on the hydro-electric project on the river Chenab. These workmen worked in “...difficult conditions and they were denied the benefits of various labour laws and were subjected to exploitation by the contractors...” By their interim order dated 2-3-1983, the Hon’ble Supreme Court gave directions to ensure that these migrant workers got the beneficial protection of various labour laws available to such workmen.

(A) By virtue of Sub-section (4) of Section 1 of the ISMW Act, 1979, the provisions of the Act would apply to every establishment where, five or more inter-state migrant workmen are employed or who were employed on any day in the proceedings twelve months, and to every agent who employs or who employed five or more migrant workmen on any day in the preceding twelve months. We have noted that many of the provisions of the Saudi Labour Code, 1969, are made applicable to establishments employing twenty or more workers; to that extent, the applicability of the ISMW Act, 1979, is far stricter. Clause (j) of Sub-section 2(1) defines a "workman" as any person employed in or in connection with the work of any establishment to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward whether the terms of employment be express or implied, but does not include any such person -

(i) who is employed mainly in a managerial or administrative capacity or
(ii) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem, or exercises, either by the nature of duties attached to the office or by reason of the powers vested in him, functions mainly of managerial nature.” This broad definition of 'workman' is analogous to the definition of workman as contained in the Industrial Disputes Act, 1947, or, the Saudi Labour Code, 1969.

(B) Chapter III of ISMW Act, 1979, consisting of Sections 7 to 11 (both inclusive) deals with the licensing of contractors. By virtue of Sub-section (1) of
Section 8, no contractor to whom this Act applies, shall recruit any person in any State for employment in any other state, except in accordance with a license issued in that behalf. Sub-section (2) of Section 8 stipulates that a license issued under Sub-section (1) "may" contain such conditions, including the terms and conditions of the agreement, the remuneration payable, hours of work, other essential amenities to be provided to the workmen. The directory nature of the stipulation, instead of the mandatory "shall" makes a material difference to the efficacy of the Act; if the Act was indeed expected to serve its stated objectives, then, this stipulation should have been mandatory. The proviso to this Sub-section makes provision for the payment of a security for the due performance of the conditions of the licence. This condition is also not mandatory, but, may be invoked only in special circumstances. In other words, if a contractor violates the terms and conditions of the licence, then, the only efficacious remedy available would be to revoke his licence; there is no method by which the loss suffered may be recovered from him; the only remedy then would be filing of a civil suit. but, the chances of a poor migrant worker proceeding against the contractor would be most unlikely.

(C) Section 9 deals with grant of licenses; Section 10 deals with revocation, suspension and amendment of licenses. Both the sections are pari materia with corresponding sections dealing with recruitment agents in the Emigration Act, 1983.

(D) Section 12 deals with the duties of contractors; it is necessary to set them out in detail. The duties include:- i) furnish particulars regarding recruitment and employment of migrant workmen; ii) issue to every migrant worker, a pass book with passport sized photograph, giving details of employment, wage and mode of payment: the displacement allowance payable; the return fare payable to the workmen; the deductions made, and such other particulars, as may be prescribed; iii) furnish returns about disengagement of migrant workmen. This is a very beneficial provision, and, if strictly implemented, it has the potential of removing some of the difficulties faced by migrant workmen; at least the workman's status and wages are set out on paper.
(E) Section 13 stipulates that the wages, holidays, hours of work and other service conditions of service of migrant workers shall be the same as it prevails for the other workmen in that establishment [i.e., it would be governed by statutory rules, or by legislation like the Shops and Commercial Establishments Act, etc.], and, in other cases, as may be prescribed by the appropriate Government. The proviso to this Sub-section states that in no case can an inter-state migrant worker be paid wages less than what is stipulated in the Minimum Wages Act, 1948. Sub-section (2) of Section 13 makes it mandatory that wages to an inter-state migrant workman must be paid in cash. Whilst, it is not our intention to critique the various provisions of the ISMW Act, 1979, but only highlight some of its features which are relevant to our context, the thought does occur that, one of the problems which this Act sought to solve was under-payment of wages; in that event, it could have been considered making payment of wages to inter-state migrant workman, mandatorily either in a bank account or a savings bank account in a Post Office; this would ensure that under-payment does not occur: of course, this could be implemented only if a bank or a post office were available in the vicinity of the site of employment.

(F) Section 16 of the ISMW Act, 1979 makes mandatory stipulations in respect of inter-state migrant workmen, which is akin to the various responsibilities bestowed upon employers in Saudi Arabia, under the Labour Code. The section enjoins upon the contractor, the following responsibilities:- a) ensure timely payment of wages; b) ensure equal pay for equal work, irrespective of gender; c) ensure suitable conditions of work having regard to the fact that they are required to work in a different State [this is extremely analogous to our case of trans-national migration]; d) provide and maintain suitable residential accommodation to such workmen during the period of their employment; e) provide free medical facilities to migrant workmen; f) provide such protective clothing to the workmen, as may be prescribed; and g) in case of fatal accidents or serious bodily injury to report to the specified authorities in both the States, and the next of kin of the workman. These seven stipulations are a fairly comprehensive protective cover, which may be available to any migrant worker, in any context, even, in our context of trans-national migration. Possibly, the major gap in this protective package would relate to family
reunification, and, provisions for the same. It is noted that the provisions of Section 16 are in addition to the provision of Section 13 (payment of wages), Section 14 (displacement allowance) and Section 15 (journey allowance). Therefore, these being supplemental provisions, it is reiterated that the provision of Section 13, 14, 15 and 16 are extremely beneficial to any migrant worker - whether inter-state or transnational.

(G) Section 20 of ISMW Act, 1979 deals with inspection; it may be recalled that the Saudi Labour Code also had a similar provision. The section stipulates that the Inspector may enter, at all reasonable hours, any place where inter-state migrant workmen are employed, and ensure that the provisions of the Act are being complied with, and, for doing so, he may examine any registers, records, etc. in terms of the provisions of the Act.

(H) Section 22 deals with the provision of industrial disputes; we have noted in the context of Saudi Arabia that the Saudi Labour Code does not make proper arrangements for dispute resolution mechanism for migrant workmen; here, we find that ipso facto, the provisions of the Industrial Disputes Act, 1947, are made applicable to inter-state migrant workmen also. In a later section, we shall examine some of the relevant provisions of the ID Act, 1947, in the context of "dispute" resolution.

(I) Section 25 contains the penal provisions, in as much as, it provides for imprisonment upto one year and/or a fine upto Rs.1,000/-, in respect of whoever contravenes any provisions of the Act; for a continuing contravention, an additional fine of Rs.100/- per day shall be levied.

Observations
The above represents a brief analysis of some of the provisions of ISMW Act, 1979; it is again clarified, that, it was not intended to be a review or analysis of the Act; only some relevant sections have been highlighted, which give us an indication, as to the nature of protection that India itself gives to its own indigenous migrant workers; obviously, if we criticize any host country about the nature and extent of legal
protection given to migrants in that country, we would need to set our own house in order first. To that extent, we have already identified and stated that the ISMW Act, 1979, makes adequate protection, at least in the statute, for inter-state migrant workmen; how this translates on the ground, is not the subject-matter of this study and, therefore, no comment thereon can be made at this stage. Suffice to say that, the protective mechanism, as provided for the Act, is adequate, to say the least.

6.3 MAJOR LABOUR LEGISLATION IN INDIA

It is already pointed out in the beginning of this Chapter that this Chapter aims to examine the relative legal status of an Indian worker had he been employed in India or in Middle East countries specially in Saudi Arabia. Thus legal protection to an Indian worker through Indian labour legislations (some of the major laws) is required to be analysed. Some major labour legislations in India may be grouped as:

(1) Laws relating to settlement of disputes between Employers and Employees i.e. Industrial Disputes Act 1947.
(2) Laws relating to Association: i.e. Trade Union Act 1926.
(3) Laws relating to wages and emoluments i.e. the Payment of Wages Act 1936, The Payment of Gratuity Act 1971, The Payment of Bonus Act 1965.
(4) Laws relating to Social Insurance i.e. The Workmen Compensation Act 1923.

Herein after discussion on some of the laws are made for our purpose:

6.3.1 THE INDUSTRIAL DISPUTES ACT, 1947 – Analysis

In our examination of the Industrial Disputes Act, 1947 [hereinafter referred to as "IDA 1947"], we shall concentrate only on one aspect - the dispute resolution mechanism provided by the Act. In doing so, we shall need to examine the following issues:- a) what is an industrial dispute; b) raising of the industrial dispute; c) settlement of industrial dispute; and d) the binding nature of the settlement.

"Experience of the working of the Trades Disputes Act, 1929, has revealed that its main defect is that while restraints have been imposed on the rights of strike and lock-out in public utility services no provision has been made to render the proceedings institable under the Act for the settlement of an industrial dispute, either by reference to Board of Conciliation or to a Court of Enquiry, conclusive and
binding on the parties to the dispute. This defect was overcome during the war by empowering under Rule 81-A of the Defence of India Rules, the Central Government to refer industrial disputes to adjudications and to enforce their awards...” [From the Statement of Objects and Reasons]. Therefore, the basic purpose of the ID Act 1947 is to ensure that awards after adjudication of industrial disputes could be made enforceable.

Whilst analyzing the objectives of the IDA 1947, the Hon’ble Supreme Court of India, in LIC of India vs. D.J. Bahadur, AIR 1980 SC 2181 observed as under :-

“Let us be perspicacious about the purpose and sensitive about the social focus of the ID Act in a developmental perspective. Parliament has picked out the specific subject of industrial disputes for particularized treatment, whether the industry be in the private or public sector or otherwise... To lose sight of the spinal nature of the legislation, viz., industrial disputes and their settlement through law, and to regard it as a mere enactment bearing on terms and conditions of service in enterprises is to miss the distinctive genre, particular flavour and legislative quintessence of the ID Act... [Para 28].

“ To repeat for emphasis, the meat of the statute is industrial dispute, not conditions of employment or contract of service as such...” [Para 29].

“ The soul of the statute is not contract of employment, uniformity of service conditions or recruitment rules, but, conscionable negotiations, conciliations and adjudications of disputes...” [Para 30].

It is in this context that, the Saudi Labour Code appears to be more inadequate in its dispute resolution mechanism.

(A) As a first step, we need to define ‘industrial dispute’; clause (k) of Section 2 of IDA 1947 defines an ‘industrial dispute’ to mean any dispute or difference between, inter alia, employers and workmen, which is connected with the employment or non-employment, or the terms of employment or with the conditions of labour, of any
persons. It may be said that this definition of industrial dispute has four parts: a) factum of dispute; b) parties to dispute; c) subject matter of dispute. and d) Industry.²

Any industrial dispute must rest either on a dispute or a difference. The dispute or difference must be on a matter which is incidental to the employment or non-employment - it could not be a personal grudge or a private quarrel. Additionally, the grievance giving rise to the dispute or difference, provided raised by workmen against the employer, must be such that the employer is capable of remedying the same e.g., in our context, a migrant worker in Saudi Arabia could raise an industrial dispute, hypothetically, regarding service conditions; he obviously cannot raise a dispute, if the airline by which he travelled, rendered deficient service, notwithstanding the fact that the employer had provided the airfare. Obviously, the dispute could not possibly arise, unless the workman raised the demand, and the same was rejected by the employer, either in part or in full; the cause of action, in a manner of speaking would arise, only when the demand is not met by the employer.

(B) Having settled the factum of dispute, it is now necessary to examine who are the necessary parties to an industrial dispute. Though the definition of ‘industrial dispute’ contemplates necessary parties to be employers-employers, employers-workmen, and workmen-workmen, we are essentially concerned with the dispute interse between employers and workmen. Whilst, it is not difficult to ascertain, who is an ‘employer’, the word ‘workmen’ could do with an explanation. ‘Workmen’ has been defined in clause (s) of Section 2 of IDA 1947, to mean any person, including an apprentice, employed in the industry, or was at the material time employed in the industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. Most Indian migrants to Saudi Arabia, would satisfy the requirements of this definition, as, only a small percentage of all emigrants, actually perform managerial functions, taking them outside the purview of the definition of ‘workman.’ Whereas clause (k) of Section 2 gives an indication that only “group” or “class” disputes partake the character of an industrial dispute, but, if this clause is read with the provisions of Section 2A of the IDA 1947, it

becomes clear that, even a dispute raised by an individual worker - but significantly - only relating to his discharge, dismissal etc. from service, shall also be deemed to be an industrial dispute, within the meaning of the IDA 1947. This provision, inserted by an amendment in 1965 mitigates the difficulties of such workmen, whose dismissal etc. is not taken up by the union; that they should not remain without a remedy under the Act, this section was incorporated. Therefore, we may conclude that by a conjoint reading of clause (k) of Section 2 and Section 2A, we find that either an individual workmen, subject to conditions, or an union, could be the other necessary party to an industrial dispute.

(C) What could be the subject matter of an industrial dispute? Suffice to say, if the industrial dispute is raised by an individual workman, then, it could relate only to his discharge, dismissals, retrenchment [it must satisfy the condition of clause [oo] of Section 2], or termination of his service. An union can however raise an industrial dispute, on any matter connected with the employment or non-employment or the terms of employment, or with the conditions of labour. The Second and Third Schedule of IDA 1947 gives an indication as to what could be the areas which could give rise to an industrial dispute. For our limited purpose, it would suffice to say that the causes which an union can legitimately espouse could relate to appointment and removal; the conditions attached with the contract of appointment; or the working conditions. Each of these could be particularized to fall within the ambit of Schedule 2 and Schedule 3 of IDA 1947.

(D) This brings us to the last part of an industrial dispute, i.e., industry. An industrial dispute presupposes that there must first exist an industry; clause (j) of Section 2 of IDA 1947 defines industry to mean any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, industrial occupation or avocation of workmen. Therefore, there must an industry; there must also be employers, and there must be workmen - the master-servant relationship being clearly established. Therefore, whilst a Water Supply and Sewerage Board is an industry, a religious institution may not be an industry. Therefore, in the latter, no industrial dispute could be raised.
Having briefly set out what is an industrial dispute, it is now necessary to take up the question of raising of an industrial dispute. In terms of Rule 10 of the Industrial Disputes (Central) Rules, 1957, [hereinafter referred to as ‘Rules’], where the Conciliation Officer receives any information about an existing or apprehended industrial dispute he may serve notice on the parties of his intention to commence conciliation proceedings. In terms of Rule 10A of the Rules, parties shall set forth their statement before the Conciliation Officer. If the dispute is not resolved at the stage of conciliation, then the Conciliation Officer shall submit a failure report to the appropriate Government [Sec 12(4) of IDA 1947].

On receipt of the failure report, the Appropriate Government shall make a reference to a Labour Court, Tribunal or National Tribunal for the adjudication of the industrial dispute [Sec 10 of IDA 1947]. This shall deem to have completed the process of initiation of the industrial dispute.

On receipt of order of reference, the Labour Court, Tribunal or National Tribunal shall commence the adjudication process, and the same shall be governed, inter alia, by Rule 10B of the Rules. In terms of Section 15 of the IDA 1947, the Labour Court, Tribunal, or National Tribunal shall submit its award to the appropriate Government within the time specified in the order of the reference.

Sub-section (3) of Section 11 of IDA 1947 stipulates that every Board, Labour Court, Tribunal and National Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908, when trying a suit, in respect of – a) enforcing the attendance of any person and examining him on oath; b) compelling the production of documents and material objects; c) issuing commission for the examination of witness; and d) in respect of such other matters as may be prescribed, and that all proceedings before these authorities shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code. Therefore, for every aggrieved workman or trade union, a judicial forum outside the Code of Civil Procedure is available, for agitating grievances and getting appropriate relief.
In terms of Sub-section (2) of Section 16 of IDA 1947, the award of the Labour Court, Tribunal or National Tribunal shall be in writing and shall be signed by the Presiding Officer. Sub-section (1) of Section 17 stipulates that, within thirty days of its receipt, the appropriate Government shall publish the same, in the manner in which it deems fit. Though sub-section (2) of Section 17 provides for the Award to be the final adjudication of the dispute, any aggrieved party may exercise its rights of judicial remedies, available under Articles 32 and 226 of the Constitution. So to that extent, it can not be said that the Award represents the final adjudication of the dispute. The settlement of the industrial dispute could rest either with the Award, or if the Award is challenged, then, by the order of the High Court or the Supreme Court in which the Award merges, and becomes final thereafter.

(F) The last question remaining for being answered is, on whom is the award binding? Sub-section (3) of Section 18 of IDA 1947 states that an Award shall be binding on – a) all parties to the dispute; b) all other parties summoned to appear, unless it is held that they were summoned without proper cause; c) in respect of the employer his heirs, successors, assigns; and, d) in respect of workmen, all workmen in employment on the date of the dispute and those subsequently employed. A few issues need to be highlighted. One, the Award is binding only when it becomes enforceable, i.e., when parties have decided to comply with the Award; two, the binding nature of the Award, is in relation to the whole Award, and not to a part of it; therefore, the binding effect on the workmen would differ from case to case, depending upon the subject matter of the dispute and the type of workmen who were parties to the dispute.

Observations

This brief examination of the dispute resolution mechanism, as provided by the IDA 1947, was merely meant to highlight the efficacious remedy available under the IDA 1947; the Saudi Labour Code does not carry any similar provision. So to that extent, an Indian migrant worker in Saudi Arabia, would be severely prejudiced in the cause of settlement of disputes, as, no such self-contained code exists there.
6.3.2 THE TRADE UNIONS ACT, 1926 – its appraisal

We have already noted in Chapters 3 & 4 supra, that, Saudi Arabia does not permit any trade union activity; the Saudi Labour Code specifically forbids strikes, or abetting any action similar to strikes, and provides for stringent penalties against them. In the absence of a trade union, most workmen especially those with low skills, uneducated, etc. are at a great disadvantage in the matter of redressal of their grievances; also, in the absence of trade unions, there is no scope for collective bargaining for wages, conditions of works, etc.; absence of a trade union works as a prejudice to the cause of the workman. In India of course, the Constitution guarantees right to association; but, even before that the Trade Unions Act. 1926 [hereinafter referred to as the “TUA 1926] provided for the registration of Trade Unions.

The Statement of Object & Reasons says as under:-

“This Bill has been prepared in response to the following Resolution which was adopted by the Legislature Assembly on 1st March, 1924: ‘This Assembly recommends to the Governor-General in Council that he should take steps to introduce, as soon as practicable, in the Indian Legislature such legislation as may be necessary for the registration of Trade Unions and for the protection of Trade Unions.’

Therefore, one of the stated objectives of this Act, is to afford protection to Trade Unions. In the matter of Uttar Pradesh Shramik Maha Sangh, Lucknow and Another vs. State of Uttar Pradesh and Others, AIR 1960 All. 145, it was held that “The right to form association or unions, guaranteed under Article 19(c) of the Constitution include the sought of workmen to form trade unions for a lawful purpose. The purpose of an association is an integral part of the right, and, if the purpose is restricted, the right is inevitably restricted.” Therefore, the right of the unions and its purposes have to be pari materia.
(A) In terms of Sub-section (1) of Section 4 of the TUA 1926, any seven members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by complying with the various other provisions of the Act, apply for the registration of the Trade Union under the Act. In terms of Sub-section (1) of Section 5, every application for registration of a Trade Union shall be made to the Registrar and should be accompanied by a copy of the rules of the Trade Union and other matters as provided.

(B) Section 6 deals with the mandatory requirement of rules, which must provide for the following matters:- a) the name of the Trade Union; b) the objects for which the Trade Union has been established; (c) the purposes for which the general funds of the Trade Union shall be applicable, which should be lawful under the Act; d) the maintenance of list of members, and provision for the inspection of such list. e) the admission of ordinary members who shall be persons ordinarily engaged or employed in the industry, and for the admission of honorary and temporary members as office bearers, as required in terms of Section 22 of the Act; f) the payment of monthly subscription not less than twenty five naye paise by members; g) the condition under which either benefits accrue or fines are imposed on members; h) the manner in which rules are rescinded, etc; i) the manner of appointment of executive and other office bearers of the Union; j) the safe custody of the funds of the Unions and its audit; k) the manner in which the Union may be dissolved.

This would represent the entire gamut of activities of a registered trade union. As an example, if we consider item b) above – the broad objectives of any trade union would be to further the interests of the members; in the absence of such a provision, who would further the cause of the workers? We have noted that under the Saudi Labour Code, the State tries to take the role of the trade union – but, we have not approved of this proposition – the State has a distinct role as regulator, and there should not be any overlap of this function.

It is thus seen that, an Indian worker, in the organized, or sometimes even in the unorganized sector has the facility of membership of a registered trade union; we have briefly noted, how the working of a trade union may be regulated by a rules, in
terms of section 6 of the TUA 1926. It is inconceivable that the role of a trade union could be played by any other entity – least of all by the State, no matter however benevolent it may be. Therefore, the absence of a registered, representative trade union is not only an infringement of the basic human rights of a worker. It’s absence also causes great prejudice to him, as there is none to plead his case.

6.3.3 **THE PAYMENT OF WAGES ACT, 1936 – Protective Measures**

Our examination of the Payment of Wages Act, 1936 (hereinafter referred to as the “PW Act. 1936”), shall be restricted to only those provisions which aid the cause of the workman.

The Note on Objects and Reasons attached to the Amending Act 38 of 1982, gives an indication as to the purpose of the Act: “The Payment of Wages Act. 1936 regulates the payment of wages to certain classes of persons employed in industry. It was enacted to ensure that the wages payable to employees covered by the Act are disbursed by the employers within the prescribed time limit and that no deductions other than those authorized by law are made by the employers. The Act applies proprio vigore to the payment of wages to persons employed in any factory or to persons employed in a railway by a railway administration either directly or through a sub-contractor. Further, the State Governments are empowered to extend the provisions of the Act to cover persons employed in any industrial establishments or any class or group of industrial establishments as defined in the Act.” In the matter of Krishan Prasad Gupta vs. Controller, Printing & Stationery, AIR 1996 SC 408, the Hon’ble Supreme Court of India, in Para 23 of their judgement quote this extract in extenso. In Para 27 of their judgement, it was held as under:-

“If the ‘Wages’ are not paid within the prescribed time limit or deductions, other than those authorized by law, are made by the employers, the employee can recover it under the Payment of Wages Act…”

Therefore, the two broad objectives of the PW Act 1936 are to – ensure timely payment of wages, and, to ensure that unauthorized deductions are not made from the salary payable to workers.
(A) Sub-section (6) of Section 1 of the PW Act, 1936, stipulates that the Act shall not apply to wages payable for any wage period which exceed Rs.1600; therefore, in addition to the establishments to which the Act applies, a further limitation is imposed on its applicability or terms of wages exceeding Rs.1600. It may be said in passing that the amount of Rs.1600 was fixed in 1982; in the intervening years, wages have risen, and this amount also needs to be revised upward; it is possible that in some States, this may not be able to cover the minimum daily wage prescribed, even.

(B) Sub-Clause (ib) of Section 2 defines a “factory” to mean a factory so defined in clause (m) of Section 2 of the Factories Act, 1948; clause (ii) of Section 2 defines “industrial or other establishment” to mean any tramway service or motor transport service engaged in carrying goods or passengers; private air port service; dock, wharf or jetty; inland vessel, mechanically propelled; mine, quarry or oil field; plantation; workshop or other establishment in which articles are produced etc; establishment in which any work relating to construction, development etc. of buildings, bridges, etc; and any other establishment to which the appropriate Government decides to extend the provisions of this Act. If we read this sub-clause with sub-sections (4) and (5) of Section 1, we find that, it is not specified as to the minimum of workmen which must be employed in these establishments, for the Act to apply; therefore, the presumption is that the Act would apply to any of these establishments, irrespective of the number of persons employed therein.

We had seen in our discussion of the Saudi Labour Code, that, various provision of the code applied to different establishments, depending upon the number of employed therein, no such limitation is imposed here.

(C) The term “Wages” is defined by clause (vi) of Section 2; the clause as it stands was substituted for the original clause by an Amendment Act of 1957; the Objects and Reasons for that Amendment Act reads as under: “The existing definition of the term ‘wages’ has given rise to certain practical difficulties particularly in regard to interpretation of certain words used in the definition. In
some cases the High Courts have ruled that the word 'wages' did not mean 'potential wages' but 'wages earned.' Now-a-days the terms of payment under contracts of employment are frequently modified by the award of tribunals or by the terms of binding settlements. The wages received statutorily through adjudication, arbitration, conciliation or similar statutory process should also be deemed to be wages for the purposes of the Act.” Consequently, the term ‘wage’ has been defined to include all remuneration whether by way of salary, allowances or otherwise expressed in terms of money or capable of being so expressed and includes any remuneration payable under any settlement or award or orders of a court; remuneration payable in respect of overtime work; any additional remuneration payable under the terms of contract, whether called a bonus or not; any sum payable on the termination of the employment, but for which the period of payment is not specified; any sum to which a person is entitled to, under any scheme framed under any law; but, wage does not include any bonus which does not form part of the remuneration; the value of house-accommodation, water, electricity, medical facilities supplied; any contribution and interest thereon to the Provident Fund; any travelling allowance; any sum paid to defray any special expenses; any gratuity payable at the termination of employment. The inclusive nature of the definition of ‘wage’ ensures that there should not be any scope for any misunderstanding as to what constitutes wage and what is excluded.

(D) Section 3 of PW Act 1936 deals with responsibility for payment of wages, and states that every employer shall be responsible for the payment to persons employed by him to all the wages required to be paid under the Act; provided that in the case of persons employed (otherwise than by a contractor), in factories, if a person has been named as a Manager under Clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948; in industrial and other establishments, if any supervisor is made responsible for supervision and control; or in the case of railway establishment, if any person who has been made responsible for any local area, then, the person so designated and named, shall also be responsible for the payment of wages. Therefore, it is not as if, the employer delegates the duty of payment of wages, then,
he shall not be liable; the primary responsibility for payment of wages still vests with the employer; his delegates “shall also be responsible” for the same.

Sub-section (1) of Section 4 states that every person responsible for payment of wages shall fix wage-periods for which wages shall be paid; sub-section (2) prohibits in keeping the wage-period in excess of one month.

(F) Section 5 deals with the period within which wage must be paid. Sub-section (1) states that in any establishment where less than one thousand persons are employed, the wage must be paid before the expiry of the seventh day and in all other establishments, before the expiry of the tenth day, after the last day of the wage period in respect of which wages are payable. Therefore, it may be stated that in case where the number of persons employed is up to 1000, then, wage must be paid within thirty seven days of the commencement of the wage period. and, in other cases, within forty days of the commencement of the wage period. In such a situation, it would not be possible to replicate the situation that we have noted in Chapter 3 supra, where, we noted that either workmen were not paid the contracted wages or they were not paid at all, of course. subject to the condition that those establishments would correspond to those to which the provisions of this Act apply.

(F) Section 7 of PW Act 1936 deals with deductions which may be made from the wages; Sub-section (1), Explanation II gives the exceptions to those deductions, to which the provisions of this Act does not apply, i.e., those deductions which are made on account of any penalty imposed on the workman. Sub-section (2) details the permissible deductions allowed under the Act – fines; deductions for absence from duty; deduction for loss caused; deduction for house accommodation; deductions for facilities supplied by the employer; deduction for recovery of advances; deductions for recovery of loans; deduction for recovery of housing loans; deduction of income-tax; deduction as compliance to court orders; deduction towards provident fund; deduction for payments to approved cooperative societies; deduction of life insurance premia to the Life Insurance Corporation of India; deduction for contribution towards registered trade unions; deduction towards the Prime Minister’s National Relief Fund, etc. Sub-section (3) stipulates that where the deductions are
wholly or partly made for payments to Cooperative Societies, the maximum permissible level of deduction is 75%, and, in other cases, it is 50% of the wages payable. This would ensure that the entire wage payable is not apportioned for the recovery of dues, but, a bare minimum living wage is available to the workman, so that his minimum, basic needs could also be met.

So far, in this Act, we have noted that the workmen has been able to secure the following benefits for himself, viz. – a) the Act applies to a large number of establishments – very definitely, the organized sector in India; b) the limitation of minimum number of workmen of workmen to be employed, for the Act to be applicable is not there, so, avoidance of the Act by artificially keeping the number of workmen low is not there; c) what constitutes wage is clearly, unambiguously defined; d) who is responsible for the payment of wages, is also clearly defined; e) when wages are liable to be paid is also clearly stipulated; and f) what deductions may be made from the wage is also clearly defined. Therefore his cause may not be prejudiced on any of these counts.

(G) To ensure compliance of the various provisions of the Act, Sections 13A, 14, 15, 17A and 18, make adequate arrangements. Section 13A stipulates that every employer shall maintain necessary records, registers, etc. of persons employed by him, work performed by them, deductions made from their wages, etc. Such records are to be preserved for three years from the date of the relevant entry. Such records would form the basis of inspection by Inspectors, whose appointment and powers are governed by Section 14 of the PW Act, 1936. Ordinarily, Inspectors appointed under the Factories Act, 1948 shall also double up as an Inspector under this Act. The Inspector shall be empowered, inter alia, to conduct an inquiry, inspect the premises, supervise payment of wages, take copies or seize documents maintained by the employer.

(H) Section 15 provides for the adjudication process under the Act. Sub-section (1) stipulates that the State Government may appoint a Presiding Officer of any Labour Court or Industrial Tribunal constituted under the ID Act, 1947, or any Commissioner for Workmen’s Compensation or any other appropriate judicial
officer to be the authority to hear and decide all claims arising out of deductions from wages or delay in payment of wages. In terms of Sub-section (4B), all proceedings before the authority shall be deemed to be judicial proceedings within the meaning of Section 193, 219 and 228 of the Indian Penal Code. Therefore, in the PW Act, 1936 also, the aggrieved workman is provided with an opportunity of approaching a judicial forum, for the enforcement of the terms of contract of employment, within the framework of the Act itself. Section 17 provides for appeals against orders passed in proceedings held under Section 15, before the Court of Small Causes in Presidency Towns, and before the District Court, else where. In terms of Section 18, every authority appointed under Sub-section (1) of Section 15 shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence, enforcing attendance of witnesses and compelling production of documents.

(I) Section 17A is an unusual provision, which we have not encountered so far. Sub-section (1) states that where proceedings under Section 15 or Section 17 have been instituted, and the authority or Court, as the case may be, is satisfied that the employer or the person responsible for payment of wages is likely to evade payment, then, after giving due opportunity to the employer or the person concerned, may direct attachment of so much of the property of the employer or the other person, as would be sufficient to cover the amount which may be payable by them. This is a very stringent period provision of the Act, and a similar provision in other similar Acts would be a great deterrent to violations, therein also.

(J) Observations
It is thus seen from the above examination of some of the relevant, beneficial provisions of the PW Act, 1936, that the Act provides adequate protection to a worker in the organized sector in India, where the Act is applicable; it would be seen that such protection is not available to an Indian migrant worker, working in Saudi Arabia and in Middle East countries.
6.3.4 **THE PAYMENT OF GRATUITY ACT, 1972**

One of the beneficial legislation which would have been available to the Indian migrant worker, if he had taken up employment in the organized sector in India, is the Payment of Gratuity Act, 1972 [hereinafter referred to as the “PG Act, 1972”]. It needs to be reiterated that, it is not intended to analyze the individual provisions of this Act – our intention is to highlight the objectives which this Act seeks to fulfil, and, to what extent, it’s provisions, achieve the stated purpose.

The Statement of Objects and Reasons, attached to the Act states that for no category of workmen, except working Journalists, did the provision for payment of Gratuity exist till 1971; in that year, first, the State of Kerala, and thereafter, the State of West Bengal enacted laws, whereby Gratuity become payable to workers in various types commercial establishments. As other States were also showing keenness to make similar enactment, the Central Government proposed that a Central Act, with uniform applicability across the country be enacted – therefore this Act. In the matter of Mrs. Usha Hamilton and Another Vs. State of U.P. and Ors., 1989 LabIC NOC (73) All. a Division Bench of the Allahabad High Court has held that the provisions of the PGA are applicable only to commercial and industrial establishments; teachers of schools are not covered by this Act.

**A**  Seen in the backdrop of these objectives, it is a necessary to identify those aspects of the PG Act, 1972, which are beneficial to workmen. Sub-section (3) of Section 1 stipulates that the PG Act, 1972 would apply to every factory, mine, oilfield, plantation, port, railway company; every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State where ten or more persons are employed or were employed on any day in the proceeding twelve months; such other establishments as may be notified by the Central Government. It would thus be seen that, virtually every type of organized activity in the country attracts the provisions of the PG Act, 1972; the only way to circumvent the provisions of this Act, would be, to keep the number of recorded employees on roll, at all times, below ten. Presuming that this does not happen, it would be fair to conclude that nearly all types of commercial, organized
activity, which employ ten or more persons, are liable to abide by the provision of this Act.

(B) Clause (e) of Section 2 defines an “employee” to mean any person employed on wages, interalia, to do any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work, but, excludes Government servants. Clause (5) of Section 2 defines “wages” as to impliedly mean basic salary and dearness allowance.

(C) Section 4 of PG Act, 1972 states that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for at least five years, either on his superannuation, or on his retirement or resignation or on his death or disablement due to accident or disease; it is provided that the stipulation of minimum service of five years shall not be applicable in case of cessation of service is due to death or disablement. We have already noted above, the definition of the word ‘employee’ to mean any person who works for wages in any designated establishment, but excluding persons working for the State or Central Government, and those who are covered by Rules in this regard. We have therefore established two issues: - (i) to whom gratuity is payable, and (ii) when it is payable. Sub-section (2) of Section 4 stipulates that the amount of Gratuity payable shall be at the rate of fifteen days wages, based upon the last drawn wage, for each completed year of service. Sub-section (5) however provides that nothing shall prevent an employee from receiving better terms of Gratuity under any award, agreement or contract with the employer. So in effect, the PG Act 1972, only stipulates the minimum amount of Gratuity receivable by an employee.

(D) Sub-section (1) of Section 5 empowers the appropriate Government to exempt any establishment etc. to which this Act applies, if in the opinion of the appropriate Government, the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred by the Act.; such an exemption has to be made by notification, and it may be subject to such conditions as may be specified therein. This provision reinforces the condition stipulated in Sub-section (5) of Section 4 (supra). Sub-section (2) of Section 5 empowers the appropriate Government to exempt any employee or class of
employees employed in any establishment etc. to which this Act applies, if in the opinion of the appropriate Government, the employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred by the Act; such an exemption has to be made by notification, and it may be subject to such conditions as may specified therein.

This provision also reiterates the general proposition made in respect of this Act, that the Act merely stipulates the minimum condition in respect of benefits available under its aegis – if the employer is willing to make a more beneficial arrangement than the stipulated minimum, then, the Act, would not work as an obstacle – but, this saving power granted to appropriate Governments is meant for removing difficulties.

(E) So far, we have identified to whom gratuity is payable, when it is payable, and, how much is payable by way of gratuity. It is now necessary to examine the provisions as to determination of amount of gratuity [Section 7 of the PG Act, 1972]. Sub-section (3) of Section 7 states that the employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable, to the person to whom gratuity is payable. In Section 4 (supra) we have noted the three contingencies when gratuity becomes payable; therefore, in terms of Sub-section (3) of Section 7, gratuity must be arranged to be paid within thirty days of the cause of action as contemplated in Section 4, having arisen. Sub-section (3A) stipulates that in case gratuity is not paid within thirty days as specified, then, the employer shall be liable to pay simple interest, not exceeding the rate fixed by the Central Government, from the due date till the date of payment, on the amount of gratuity; provided however, that no such delayed payment interest shall be payable, if the delay arise on account of any fault on the part of the employee, and, the employer had obtained permission in writing from the controlling authority, in this regard.

(F) Clauses (4)(a) to (e) of Section 7 deal with the powers of the Controlling Authority and the procedure to be followed by him, in case any dispute is referred to him. Vide Section 3 of the PG Act 1972, the Controlling Authorities are provided for, who shall have the responsibility for the administration of the Act. In terms of
clause (4)(a), if there is any dispute as to the amount of gratuity payable, or the admissibility of any claim, or to the person to whom it is payable, the employer shall deposit the amount as admitted by him as being payable; clause (4)(b) stipulates that the party, i.e. either employee, the employer or any other person, may make an application to the controlling authority for deciding the matter raised in dispute; clause (4)(c) stipulates that the Controlling Authority shall, after due inquiry, and after giving the parties a reasonable opportunity, determine the matter in dispute and if, as a result of such inquiry, any amount is held to be payable, then, the Controlling Authority shall direct the employer to pay the amount decided. In terms of sub-section 5 of Section 7, the Controlling Authority, for the purpose of holding the inquiry as stipulated, shall have the powers of a Civil Court for enforcing the attendance of any person or examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavits; and, issuing Commission for examination of witnesses. Sub-section (6) of Section 7 stipulates that any inquiry under the Section shall be deemed to judicial proceedings.

Therefore, it is apparent that the PG Act, 1972, provides an adequate and efficacious remedy to the employee or his heirs, to get their rights guaranteed under the Act, enforced without the necessity of approaching any court of law. This is indeed a beneficial provision which would bring succor to the employees or their heirs, in case of any default by the employer.

The provisions of this Act, in this regard are self-contained, in as much as, it also provides for appeals, against orders passed by the Controlling Authority. Sub-section (7) of Section 7 of PG Act, 1972 states that any person who is aggrieved by an order of the Controlling Authority may, within sixty days from the date of receipt of the order, prefer an appeal to the appropriate Government or to the Appellate Authority; the second proviso to this Sub-section stipulates if the appeal is preferred by the employer, then, his appeal can be considered only after depositing the amount of gratuity ordered to be paid by the Controlling Authority, with the latter. Sub-section (8) of Section 7 states that the appropriate Government or the appellate authority may, after giving the parties to the appeal a reasonable opportunity to be heard, confirm, modify or reverse the decision of the controlling authority. It may be
presumed that, any party aggrieved by any order of the appellate authority, can challenge the appellate order by way of a Writ Petition filed under Articles 226 and 227 of the Constitution.

In other words, the self-contained provisions of the PG Act, 1972, also provide the mechanism by which, largely, aggrieved workmen/employees may get their statutory rights, provided by the Act, enforced.

(G) The Act also provides, by virtue of Section 7A and 7B, for the appointment of Inspectors; Section 7B stipulates that an Inspector, for the purpose ascertaining whether any of the provision of this Act etc. have been complied with, may exercise any or all of the following powers:- a) require an employer to furnish information; b) enter and inspect at all reasonable times in any establishment to which this Act applies, for the purpose of examining any record, document, etc; c) examine any person, including the employer, for the aforesaid purposes; d) make copies, extracts, etc. of records, documents, etc; e) exercise any or other powers as may be prescribed.

(H) The Act not only gives an employee the provision to seek a judicial forum for the redressal of his grievances, but also, has its own machinery, in the form of Controlling Authority and Inspectors, to ensure that the various provisions of the Act are implemented.

(I) It is now necessary to consider the penal provision in the Act; it has been stated more than once, that, the real test of an Act's efficacy depends upon the premium put on its enforceability - if the penal provisions are weak, then, persons liable to comply with the various provisions, may take a chance, to avoid compliance; however, if a strong deterrent is built into the Act, then, to that extent, compliance may be forthcoming. Section 9 of the PG Act 1972 deals with penalties. Sub-section (1) of Section 9 states that any person to avoid payment of gratuity, knowingly makes, or causes to be made, any false statement or false presentation, shall be punishable with imprisonment for a term upto six months, or, a fine upto Rs.10,000 or both. Sub-section (2) of Section 9 states that an employer who contravenes, or makes default in complying with any of the provisions of the Act or
any Rule or Order, shall be punishable with imprisonment for a term between three months to one year or with a fine between Rs.10,000 to Rs.20,000, or with both. The proviso to this Sub-section states that, where the offence relates to non-payment of gratuity payable under the Act, the employer shall be punishable with imprisonment for a term not less than six months, but extendable up to two years, unless the court trying the offence, for reasons to be recorded in writing, is of the opinion that a lesser term or imposition of a fine would meet the ends of justice.

It is seen that three types of defaults have been specified in the Section - making a false statement (Sub-section (1)); not complying with the provisions of the Act, Rules or Orders (Sub-section (2)); and non-payment of gratuity (proviso to Sub-section (2)); as the offence becomes more grave, the penalty also rises in commensurate fashion. Therefore, it would be expedient to conclude that the penal provisions contained in the Act are prima facie, efficacious.

(J) It is necessary to consider a supplemental provision, as contained in Section 11 here. Sub-section (1) of Section 11 states that no court shall take cognizance of any offence punishable under the Act, save on a complaint made by or under the authority of the appropriate Government. The proviso to this Sub-section states that where the amount of gratuity payable has not been paid/recovered within six months from the expiry of the prescribed time, the Appropriate Government shall authorize the Controlling Authority to make a complaint to a Magistrate having jurisdiction, within fifteen days of receipt of authorization. Sub-section (2) of Section 11 states that no Court inferior to a Metropolitan Magistrate or a Judicial Magistrate First Class, shall try any offence under the Act.

Therefore, Section 9 and 11 are supplemental provisions - the former specifies the penalty for violation/non-compliance, and the latter stipulates the procedure to be followed to enforce the provisions of Section 9.

(K) Before concluding our discussion on the PG Act, 1972, it is necessary to consider, one last protection, which is extremely significant for the workman.
Section 13 of the Act states that no gratuity payable under the Act and no gratuity payable under the provisions of Section 5 [i.e. exempted establishments], shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court. Therefore, neither the amount of gratuity payable can be attached, nor, any deductions therefrom may be made; there are but two eventualities when this protection shall not operate, viz; a) when the "employee" concerned falls within the exception provided in clause (e) of Section 2 i.e., employees of State or Central Governments etc.; and b) when the provisions of sub-section (6) of Section 4 become operative; in that event, in effect, the liability to pay gratuity itself does not arise. However, the above exceptions have been mentioned, only for the purposes of removal of doubts.

(L) Observations

Barring these two conditions, gratuity payable under the Act, is totally protected and constitute the exclusive estate of the employee. This is indeed a very beneficial provision. It would be seen that such protection is not available to an Indian migrant workers working in Middle East countries.

6.3.5. THE PAYMENT OF BONUS ACT, 1965 – Beneficial Provisions

The Payment of Bonus Act, 1965 (hereinafter referred to as the "PB Act, 1965") is another piece of beneficial legislation, which would be available to an Indian migrant worker, had be got employment, in an establishment, where the provisions of the PB Act, 1965 are applicable. The Statement of Objects and Reasons of the Act said: “A Tripartite Commission was set up by the Government of India by their Resolution No.WB-20(9)/61, dated 6th December, 1961, to consider in a comprehensive manner, the question of payment of bonus based on profits to employees employed in establishments and to make recommendations to the Government. The Commission’s Report containing their recommendations was received by the Government on 24th January, 1964. In their Resolution No.43-20(3)/64 dated the 2nd September, 1964, the Government announced acceptance of the Commission’s recommendations subject to a few modification as were mentioned therein. With a view to implement the recommendation of the Commission as accepted by the
Government, the Payment of Bonus Ordinance, 1965, was promulgated on 29th May, 1965. The object of the Bill is to replace the said Ordinance.

Therefore, the Act seeks to make provision for payment of bonus based on profits to employees, employed in establishments. The Objects of Act came to be considered by the Hon'ble Supreme Court of India in the matter of M/S Sanghavi Jeevraj Ghewarchand & Ors. Vs. Secretary, Madras Chillies, Grains, and Kirana Merchants’ Workers Union & Another AIR 1969 SC 530, and in Para 3 of their judgement, it was held that:

“Bonus was originally regarded as a gratuitous payment by an employer to his employees... Thus, bonus which was originally a voluntary payment acquired under the Full Bench Formula the character of a right to share in the surplus profits enforceable through the machinery of the Industrial Disputes Act, 1947 and other corresponding Acts. Under the Act, liability to pay bonus has now became a statutory obligation imposed on the employers. From the history of the legislation it is clear (1) that the Government set up a Commission to consider comprehensively the entire question of bonus in all its aspects; and (2) that the Commission accordingly considered the concept of bonus, the method of computation, the machinery for enforcement and a statutory formula in place of the one evolved by industrial adjudication.”

(A) By virtue of sub-section (3) of Section 1 of the PB Act, 1965, the Act shall apply to every factory and to every other establishment in which twenty or more persons are employed on any day during an accounting year; the proviso to the Sub-section provides that the provisions of this Act may be made applicable by the appropriate Government after giving at least two month's notice of its intention to do so, to any establishment where not less than ten persons are employed. Therefore, we may say that, though in the ordinary course, the Act is applicable to only those establishments where at least twenty persons are employed, but it is possible to make it applicable to an establishment in which at least ten persons are employed.
Section 8 of the PB Act 1965 states that every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of the Act, provided he has worked in the establishment for not less than thirty working days in that year. We find that Sub-section (13) of Section 2 defines an "employee" to mean any person (other than an apprentice) to do any skilled, unskilled, managerial, technical, etc. jobs, for salary or wage, not exceeding Rs.3500 per month. Interestingly, the qualification for receiving bonus is not vested on the nature and type of employment, but, on the monthly salary. It is not necessary that the work must be of full-time - it could even be part-time work.

Section 9 gives right to the management to forfeit bonus if the employee is dismissed from service for fraud, riotous behaviour in the business premises, theft, misappropriation or sabotage; of course, the forfeiture would relate to only the year when the order of dismissal is passed; if for earlier years, bonus remained unpaid, then, the same would have to be settled in favour of the employee.

Section 10 of the PB Act, 1965 creates a statutory right in favour of the employee and a statutory liability upon the employer to pay a minimum bonus of 8.33% of the salary or wage earned by the employee during the accounting year, or Rs.100/- whichever is higher, irrespective whether the employer has any allocable surplus in an accounting year. Sub-section (21) of Section 2 defines "salary or wage" to mean all remuneration, excluding overtime remuneration, including dearness allowance. By virtue of Section 11, the rate at which maximum bonus is payable is 20% of the wage or salary.

Section 18 permits the deduction of amount of loss suffered by the employer, on account of misconduct of an employee, from the bonus payable to him. Section 19 stipulates that bonus shall be paid in cash by the employer; if in case of dispute, the matter is settled by an Award, within a month of the day the award becomes enforceable, and, in all other cases, within a period of eight months from the close of the accounting year; this period, however may be extended, up to a maximum of twenty four months, by an order of the appropriate Government.
(F) By virtue of sub-section (2) of Section 20, the provisions of the PB Act, 1965 do not apply to employees in the public sector; however, by virtue of Sub-section (1), if any public sector undertaking works in competition with the private sector, and not less than 20% of its gross income accrues from sale of goods or services rendered in competition, then, the provision of the Act shall apply to such public sector undertakings. Therefore, if a State Road Transport Corporation works in competition with private transporters, and at least 20% of its gross income accrues from such services, then, the provisions of the PB Act 1965 shall be applicable; but, Port Trust employees are not covered, as, one Port Trust does not compete inter se with any other company.

(G) Section 21 provides for the recovery of amount of bonus due from an employer, as if it were arrears of land revenue. Section 22 states if there is any dispute between an employer and his employees with respect to bonus payable, or, with respect to the application of this Act to an establishment of the public sector, then, such dispute shall be deemed to be an industrial dispute, within the meaning of the Industrial Dispute Act, 1947, and, therefore, such dispute would need to be settled as such. This section given the employees the right to agitate their grievances, within the machinery set up under the I.D. Act, 1947.

(H) We may now consider the provisions relating to compliance and penalties, provided in the PB Act, 1965. Section 26 stipulates the maintenance of registers, records and other documents in such form and in such manner, as may be prescribed. Section 27 provides for the appointment of Inspectors; sub-section (2) details their powers. Section 28 states that if any person contravenes any of the provisions of the Act or Rules made thereunder, or fails to comply with any direction or requisition, shall be punishable with imprisonment for a term which may extend up to six months or with fine which may extend up to Rs.1,000/- or with both. Section 29 provides that in the event the 'person' committing an offence is a company, then, every person, who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business, shall be deemed to be guilty of the offence. Section 30 states that no court shall take cognizance of any offence under
the Act, unless the complaint is made by the Regional Labour Commissioner or Labour Commissioner, as the case may be; further no Court subordinate to that of a Presidency Magistrate or First Class Magistrate, shall try any offence, under the Act.

(I) Observations

The above was a brief examination of some of the relevant provisions of the PB Act. 1965; it may be recalled that the provision of payment of bonus to migrant workers in Saudi Arabia was extremely informal and unregulated; it often depended upon the personal whims of the employer. In India, we have tried to show the position is vastly different. If to any establishment, the provisions of the PB Act, 1965 are applicable, then, payment of bonus, at least minimum bonus, has been made mandatory. It may even be concluded that payment of bonus, or of at least minimum bonus, is as protected, as payment of wages.

6.3.6. THE WORKMEN'S COMPENSATION ACT, 1923 – Application

We have already noted in Chapter 3 supra that migrant workers, generally, and specially in Saudi Arabia, are called upon to do the jobs - which are dangerous, and which the local workforce, avoid, because of the risks involved. and, facilitated by easy availability of alternative sources of labour. Consequently, incidence of occupational accidents tends to be high amongst migrant workers. It is in this context that we need to examine some of the relevant provisions of the Workmen's Compensation Act, 1923. [hereinafter referred to as "WCA 1923"].

The Statement of Objects and Reasons attached to the Act, states: "The general principles of workmen's compensation command almost universal acceptance, and India is now nearly alone amongst civilized countries in being without legislation embodying those principles... The growing complexity of industry in this country with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves renders it advisable that they should be protected, as far as possible, from the hardships arising from accidents..."
An additional advantage of legislation of this type is that by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection..."

The purpose and objectives which the Act sought to achieve are clear from the above statement. In the matter of Kochu Velu vs. Purakattu Joseph, 1980 Lab. IC 902 Ker, a Division Bench of the Kerala High Court held that the Act is intended to provide for payment of compensation by certain classes of employers to their workmen. Such measure has to be construed giving the widest scope to the ameliorative and beneficial provision intended by the legislature. A pedantic approach to the statute to give a construction which does not serve its object should be avoided. The Act is intended to provide for the payment by certain classes of employers to their workmen to compensate them for occupational accidents, causing injury, or death.

(A) Section 3 of WCA 1923 deals with the employer's liability for compensation. Sub-section (1) of Section 3 states that if personal injury is caused to a workman by accident arising out of and in the course of employment, then, the employer shall be liable to pay compensation in accordance with the provisions of Chapter II of WCA, 1923; the proviso to this Sub-section lists the exceptions to the main proposition. Sub-section (2) of Section 3, extends the scope of injury to diseases, which may be contracted by the workman, in the course of employment; such diseases shall be deemed to be injuries, within the meaning of this Chapter. Sub-section (5) of Section 3 operates as a limitation of the workman, who is barred from approaching the Civil Court for damages for injury; as a corollary, no Civil Court may entertain any suit for damages, if any claim has already been filed before the Commissioner for Workmen's Compensation.

(B) Section 4 of WCA 1923, read with Schedule IV thereof, deals with the amount of compensation payable, in different eventualities. See 4 of WCA 1923 provides for Compensation for (a) Death, (b) Permanent total disablement (c) Permanent partial disablement (d) Temporary disablement. Clause (g) of Section 2 of WCA 1923 defines partial disablement to mean, where the disablement is of a temporary nature, such disablement which reduces the earning capacity of a
workman in any employment, in which he was engaged in at the time of the accident, and where the disablement is of a permanent nature, the workman is incapable of every employment which he was capable of undertaking at the time of the accident, provided the injury is specified in Part II of Schedule I of the Act. Clause (1) of Section 2 defines "total disablement", as a disablement which could be either temporary or permanent, which either results from the permanent total loss of sight of both eyes or from any combination of injuries specified in Schedule I where the aggregate percentage of the loss of earning capacity as specified in that schedule against those injuries, amounts to 100%. Section 4A deals with when compensation is payable and penalty for default. Sub-section (1) of Section 4A states that compensation payable under Section 4 shall be paid as soon as it falls due. Sub-section (3) of Section 4 states that, when the employer is in default in pay the compensation within one month from the date it fell due, the Commissioner shall order payment of simple interest, an amount of penalty which shall not exceed 50% of the amount in arrears and interest thereon; provided, no order for payment of penalty may be made, without giving a reasonable opportunity to the employer to show cause why such an order may not be passed.

(C) Another protection to the injured workman is provided by Section 9 which states that, except in terms of the provisions of this Act, no lump-sum or half-yearly payment payable under the Act shall in any way be capable or being assigned or charged or liable for attachment or pass on to any person other than the workman by operation of law, nor shall any claim be set-off against the same. This provision is pari materia with the protection available to gratuity under the PGA 1972. Since the purpose of the Act is to compensate the injured workman, this is an attempt to ensure that monies available under the Act, are used only for the beneficial interest on the injured workman, or his family.

(D) Another protection to the funds available to the injured workman is provided by Section 14A of WCA 1923, which states that, if an employer transfers his assets before meeting his liability under the Act, then, that unpaid amount shall enjoy the first charge on the transferred assets. Therefore, it is not possible for an employer to avoid his liability, simply by transferring his assets to any third party.
Before concluding our examination of the WCA 1923, it is necessary to refer to the provision regarding Commissioners of Workmen's Compensation. Sub-section (1) of Section 19 states that if any question arises as to the liability of any person to pay compensation or the amount of compensation payable, or the duration for which compensation is payable, or whether the injured person is a workman or not, the question shall be settled by the Commissioner. Sub-section (2) bars the jurisdiction of Civil Courts, on question which are within the jurisdiction of the Commissioner, or within his powers. Therefore, the WCA 1923, provides an efficacious and quick remedy to the injured workman who does not have to approach a Civil Court, with its costs and delays in built, to realize his claim for compensation. A similar benefit is not available to an Indian migrant worker in Saudi Arabia.

6.4 Conclusion

In this Chapter, we have sought to highlight some major labour laws, which provide beneficial protection to Indian workmen; however, no such protection is available to the Indian worker in Saudi Arabia. In an earlier Chapter, we had raised a question - why does an Indian immigrate to Saudi Arabia? Is it only because of high wages? If yes, then what cost is he "paying" for this high wage? At the end of this Chapter, we can say that one major cost which the Indian migrant pays, or "trades-off" is the absence of a protective umbrella of labour laws, which regulate his employment in India. However, one question still remains unanswered - is this "trade-off" a reasonable one, which benefits the Indian migrant worker? Migrant workers may be attracted to jobs abroad because of getting high wage or ills of unemployment or under-employment, but the State can not remain a silent spectator. The State must extend its hands giving a protective umbrella through legislative measures.