STUDY MATERIAL

EXECUTIVE PROGRAMME

INDUSTRIAL, LABOUR AND GENERAL LAWS

MODULE II

PAPER 7

THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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EXECUTIVE PROGRAMME
INDUSTRIAL, LABOUR AND GENERAL LAWS

The labour laws derive their origin, authority and strength from the provisions of the Constitution of India. The relevance of the dignity of human labour and the need for protecting and safeguarding the interest of labour as human beings has been enshrined in Chapter-III (Articles 16, 19, 23 & 24) and Chapter IV (Articles 39, 41, 42, 43, 43A & 54) of the Constitution of India keeping in line with Fundamental Rights and Directive Principles of State Policy. Labour law reforms are an ongoing and continuous process and the Government has been introducing new laws and amending the existing ones in response to the emerging needs of the workers in a constantly dynamic economic environment. The Employees' Compensation Act, 1923 (earlier called 'the Workmen's Compensation Act, 1923) was amended w.e.f 18.01.2010. The Payment of Gratuity Act, 1972 was amended through notification dated 31.12.2009 to cover teachers in educational institutions w.e.f. 04.04.1997 and enhance the ceiling on gratuity from Rs.3.5 lakh to Rs.10 lakh w.e.f. 24.05.2010. The subject of General Laws is inherently complicated and is subjected to constant refinement through new primary legislations, rules and regulations made thereunder and court decisions on specific legal issues.

In the light of above developments, this study material has been prepared to provide an understanding of certain industrial, labour and general legislations which have direct bearing on the functioning of companies. The study material has been divided into two parts consisting of twenty five study lessons. Part A consists of Study Lessons 1 to 19, whereas Part B consists of Study Lessons 20 to 25.

This study material has been published to aid the students in preparing for the industrial, labour and general laws paper of the CS Executive Programme. It is part of the education kit and takes the students step by step through each phase of preparation stressing key concepts, pointers and procedures. Company Secretaryship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The material may, therefore, be regarded as the basic material and must be read alongwith the original Bare Acts, Rules, Regulations, Case Law, as well as recommended readings given with each study lesson.

As the area of industrial, labour and general laws undergoes frequent changes, it becomes necessary for every student to constantly update himself with the various legislative changes made as well as judicial pronouncements rendered from time to time by referring to the Institute's journal 'Chartered Secretary' as well as other law/ professional journals.

The legislative changes made upto July 2014 have been incorporated in the study material. However, it may so happen that some developments might have taken place during the printing of the study material and its supply to the students. The students are therefore, advised to refer to the e-bulletin and other publications for updation of the study material.

In the event of any doubt, students may write to the Directorate of Academics and Professional Development in the Institute for clarification at academics@icsi.edu. Although due care has been taken in publishing this study material yet the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

Should there be any discrepancy, error or omission noted in the study material, the Institute shall be obliged if the same are brought to its notice for issue of corrigendum in the 'e-bulletin'.

The Institute has decided that the examination for this paper under new syllabus will be held from December 2014 session in the Optical Mark Recognition (OMR) format, whereby students are required to answer multiple choice questions on OMR sheet by darkening the appropriate choice by HB pencil. One mark will be awarded for each correct answer. There is NO NEGATIVE mark for incorrect answers.

The specimen OMR sheet is appended at the end of the study material. There is practice test paper in the study to acquaint students with the pattern of examination. These are for practice purpose only, not to be sent to the institute.

SYLLABUS

PAPER 7: INDUSTRIAL, LABOUR AND GENERAL LAWS (100 Marks)

Level of Knowledge: Working Knowledge

Objective: *To acquire knowledge and understanding of Industrial, Labour and General Laws.*

Contents:

Part A: Industrial and Labour Laws (70 Marks)

1. **Factories Act, 1948**
    - Object and Scope
    - Application and Major Provisions of the Act
2. **Minimum Wages Act, 1948**
    - Object and Scope
    - Application and Major Provision of Minimum Wages Act
3. **Payment of Wages Act, 1936**
    - Object and Scope
    - Application and Major Provisions of the Act
4. **Equal Remuneration Act, 1976**
    - Object and Scope
    - Application and Major Provisions of the Act
5. **Employees' State Insurance Act, 1948**
    - Object and Scope
    - Application and Major Provisions of the Act
6. **Employees' Provident Funds and Miscellaneous Provisions Act, 1952**
    - Object and Scope
    - Application and Major Provisions of the Act
7. **Payment of Bonus Act, 1965**
    - Object and Scope
    - Application and Major Provisions of Payment of Bonus Act
8. **Payment of Gratuity Act, 1972**
    - Object and Scope
    - Application and Major Provisions of Payment of Gratuity Act
9. **Workmen's Compensation Act, 1923**
    - Object and Scope
    - Application and Major Provisions of the Act

10. **Contract Labour (Regulation and Abolition) Act, 1970**
    - Object and Scope
    - Application and Major Provisions of the Act
11. **Maternity Benefit Act,1961**
    - Object and Scope
    - Application and Major Provisions of the Act
12. **The Child Labour (Prohibition and Regulation) Act, 1986**
    - Object and Scope
    - Application and Major Provisions of the Act
13. **Industrial Employment (Standing Orders) Act, 1946**
    - Object and Scope
    - Application and Major Provisions of the Act
14. **Industrial Disputes Act, 1947**
    - Object and Scope
    - Application and Major Provisions of the Act
15. **Indian Trade Union Act, 1926**
    - Object and Scope
    - Application and Major Provisions of the Act
16. **The Labour Laws (Exemption from Furnishing Returns and Maintaining Register by Certain Establishments) Act, 1988**
    - Object and Scope
    - Application and Major Provisions of the Act
17. **Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959**
    - Object and Scope
    - Application and Major Provisions of the Act
18. **Apprentices Act, 1961**
    - Object and Scope
    - Application and Major Provisions of the Act
19. **Labour Audit covering the above Acts and those Industry Specific Acts**

Part B: General Laws (30 Marks)

20. **Constitution of India**
    - Broad Framework of the Constitution of India: Fundamental Rights, Directive Principles of State Policy
    - Ordinance Making Powers of the President and the Governors
    - Legislative Powers of the Union and the States

- Freedom of Trade, Commerce and Intercourse
- Constitutional Provisions relating to State Monopoly
- Judiciary, Writ Jurisdiction of High Courts and the Supreme Court
- Different Types of Writs - *Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari*
- Concept o*f* Delegated Legislation

21. Interpretation of Statutes

- Need for Interpretation of a Statute
- General Principles of Interpretation
- Internal and External Aids to Interpretation
- Primary and Other Rules

22. An Overview of Law relating to Specific Relief; Limitation and Evidence

23. Code of Civil Procedure

- Elementary Knowledge of the Structure of Civil Courts, their Jurisdiction
- Basic Understanding of Certain Terms - Order, Judgment and Decree, Stay Of Suits, *Res Judicata*
- Suits by Companies, Minors
- Basic Understanding of Summary Proceedings, Appeals, Reference, Review and Revision

24. Indian Penal Code and Criminal Procedure Code

- Important Definitions and Salient Features, *Mens Rea*
- Cognizable and Non-Cognizable Offences, Bail, Continuing Offences, Searches,
- Limitation for taking Cognizance of Certain Offences

25. Right to Information

- Salient Features of the Right to Information (RTI) Act, 2005
- Objective
- Public Authorities & their Obligations
- Designation of Public Information Officers (PIO) and their Duties
- Request for Obtaining Information
- Exemption from Disclosure
- Who is excluded
- Information Commissions (Central & State) and their Powers
- Appellate Authorities
- Penalties
- Jurisdiction of Courts
- Role of Central/State Governments

LIST OF RECOMMENDED BOOKS

PAPER 7 : INDUSTRIAL, LABOUR AND GENERAL LAWS

READINGS

1.	P.L. Malik	:	Industrial Law; Eastern Book Company; 34, Lalbagh, Lucknow.
2.	N.D. Kapoor	:	Handbook of Industrial Law; Sultan Chand & Sons, 23, Darya Ganj, New Delhi – 110002.
3.	S.S. Gulshan & G.K. Kapoor	:	Economic, Labour and Industrial Laws; Sultan Chand & Sons, 23, Daryaganj, New Delhi- 2.
4.	P. L. Malik	:	Labour and Industrial Laws (Pocket Edition); Eastern Book Company, 34, Lalbagh, Lucknow-226 001.
5.	H.L. Kumar	:	Labour Laws; Universal Laws Publishing Co. Pvt. Ltd., G.T. Karnal Road, Delhi – 110033.
6.	Labour & Industrial Laws (Legal Manual)	:	Universal Law Publishing Co. Pvt. Ltd., G.T. Karnal Road, Delhi – 110033.
7.	Relevant Bare Acts.		
8.	N.D. Kapoor & Rajni Abbi	:	General Laws and Procedures; Sultan Chand & Sons. New Delhi.
9.	Durga Das Basu	:	Constitution of India; Prentice Hall of India, New Delhi.
10.	Taxmann's	:	General and Commercial Laws.
11.	A.M. Satalvad	:	Mulla on the Transfer of Property Act, 1882; N.M. Tripathi Private Ltd., Bombay.
12.	M.P. Tandon	:	Civil Procedure Code; Allahabad Law Agency, Allahabad.
13.	Dr. S.C. Banerjee	:	The Law of Specific Relief; Law Book Company, Allahabad.
14.	Ramaswamy Iyer	:	The Law of Torts; N.M. Tripathi, Private Ltd., Bombay.
15.	Dr. D.K. Singh (Ed.)	:	V.N. Shukla's the Constitution of India; Eastern Book Company, Lucknow.
16.	V.P. Sarathi	:	Elements of Law of Evidence, Eastern Book Company, Lucknow.
17.	V.G. Ramachandran	:	Law of Limitation; Eastern Book Company, Lucknow.
18.	G.P. Singh	:	Principles of Statutory Interpretation; Wadhwa Publishing Company, Nagpur.
19.	Eastern Book Company	:	Code of Criminal Procedure.
20.	R.V. Kelkar	:	Lectures on Criminal Procedure, 4th Edn., Revised by Dr. K.N. Chandrasekharan Pillai, Eastern Book Company, Lucknow.
21.	B.M.Gandhi	:	Interpretation of Statutes; Eastern Book Company, 34, Lalbagh, Lucknow-226 001.

JOURNALS

1.	e-bulletin	:	Available on ICSI website - www.icsi.edu
2.	Chartered Secretary (Monthly)	:	The ICSI, New Delhi-110 003.
3.	All India Reporter	:	All India Reporter Ltd., Congress Nagar, Nagpur.

ARRANGEMENT OF STUDY LESSONS

PART A

1. Factories Act, 1948
2. Minimum Wages Act, 1948
3. Payment of Wages Act, 1936
4. Equal Remuneration Act, 1976
5. Employees' State Insurance Act, 1948
6. Employees' Provident Funds and Miscellaneous Provisions Act, 1952
7. Payment of Bonus Act, 1965
8. Payment of Gratuity Act, 1972
9. Workmen's Compensation Act, 1923
10. Contract Labour (Regulation and Abolition) Act, 1970
11. Maternity Benefit Act,1961
12. The Child Labour (Prohibition and Regulation) Act, 1986
13. Industrial Employment (Standing Orders) Act, 1946
14. Industrial Disputes Act, 1947
15. The Trade Union Act, 1926
16. The Labour Laws (Exemption from Furnishing Returns and Maintaining Register by Certain Establishments) Act, 1988
17. Employment Exchanges(Compulsory Notification of Vacancies) Act, 1959
18. Apprentices Act, 1961
19. Audit under Labour Legislations

PART B

20. Constitution of India
21. Interpretation of Statutes
22. An Overview of Law relating to Specific Relief; Limitation and Evidence
23. Code of Civil Procedure
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25. Right to Information

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SPECIMEN OMR ANSWER SHEET

Lesson 1

Factories Act, 1948

LESSON OUTLINE

- Learning objectives
- Object and scope of the Act
- Competent Person
- Prime mover
- Transmission Machinery
- Hazardous Process
- Factory
- Manufacturing Process
- What is not manufacturing process
- Statutory agencies and their powers
- Approval licensing and registration of factories
- Power of inspector
- Notice by Occupier
- General duties of the occupier and manufacturers
- Health, measures
- Safety measures
- Welfare measures
- Special Provisions relating to Hazardous Processes
- Working hours of adults
- Annual Leave with wages
- Employment of women in a Factory
- Employment of young persons and children
- Penalties and Procedures
- Compliances under the Act

LEARNING OBJECTIVES

There are several legislations which regulate the conditions of employment, work environment and other welfare requirements of certain specific industries. The Factories Act, 1948 enacted to regulate the working conditions in factories.

In the case of *Ravi Shankar Sharma* v. *State of Rajasthan*, *AIR 1993 Raj 117*, Court held that Factories Act is a social legislation and it provides for the health, safety, welfare and other aspects of the workers in the factories. In short, the Act is meant to provide protection to the workers from being exploited by the greedy business establishments and it also provides for the improvement of working conditions within the factory premises. An adequate machinery of instructions and strict observance of the directions are provided in the Act. Hence, a beneficial construction should be given and the provisions of the Act should be so construed/ interpreted so as to achieve its object i.e. the welfare of the workers and their protection from exploitation and unhygienic working conditions in the factory premises.

The Factories Act has been enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose, it seeks to impose upon the owner or the occupier certain obligations to protect the workers and to secure for them employment in conditions conductive to their health and safety.

The objective of the study lesson is to familiarize the students with the legal requirements stipulated under the Act.

Factories Act, 1948 is an Act to consolidate and amend the law regulating labour in factories.

OBJECT AND SCOPE OF THE ACT

The main object of the Factories Act, 1948 is to ensure adequate safety measures and to promote the health and welfare of the workers employed in factories. The Act also makes provisions regarding employment of women and young persons (including children and adolescents), annual leave with wages etc.

The Act extends to whole of India including Jammu & Kashmir and covers all manufacturing processes and establishments falling within the definition of 'factory' as defined under Section 2(m) of the Act. Unless otherwise provided it is also applicable to factories belonging to Central/State Governments. (Section 116)

IMPORTANT DEFINITIONS

Adult

"Adult" means a person who has completed his eighteenth year of age. [Section 2(a)]

Adolescent

"Adolescent" means a person who has completed his fifteenth year of age but has not completed his eighteenth year. [Section 2(b)]

Calendar Year

"Calendar Year" means the period of twelve months beginning with the first day of January in any year. [Section 2(bb)]

Child

"Child" means a person who has not completed his fifteenth year of age. [Section 2(c)]

Competent Person

"Competent Person" in relation to any provision of this Act, means a person or an institution recognised as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to

(i) the qualifications and experience of the person and facilities available at his disposal; or

(ii) the qualifications and experience of the persons employed in such institution and facilities available therein.

With regard to the conduct of such tests, examinations and inspections and more than one person or institution can be recognised as a competent person in relation to a factory. [Section 2(ca)]

Test your knowledge

State whether the following statement is "True" or "False"

As per the Factories Act, 1948, "Adolescent" means a person who has completed his 15th year of age but has not completed his 21st year.

- True
- False

Correct answer: False

Hazardous Process

"Hazardous Process" means any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye products, wastes or effluents thereof would

(i) cause material impairment to the health of the persons engaged in or connected therewith, or

(ii) result in the pollution of the general environment;

Provided that the State Government may, by notification in the Official Gazette amend the First Schedule by way of addition, omission or variation of any industry specified in the said Schedule. [Section 2(cb)]

Young Person

"Young Person" means a person who is either a child or an adolescent. [Section 2(d)]

Day

"Day" means under Section 2(e), a period of twenty-four hours beginning at mid-night. [Section 2(e)]

Week

"Week" means a period of seven days beginning at mid-night on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of Factories. [Section 2(f)]

Power

"Power" means electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal agency. [Section 2(g)]

Prime Mover

"Prime" Mover means any engine, motor or other appliance which generates or otherwise provides power. [Section 2(h)]

Transmission Machinery

"Transmission" Machinery means any shaft, wheel, drum, pulley, system of pulleys, coupling, clutch, driving belt or other appliance or device by which the motion of a prime-mover is transmitted to or received by any machinery or appliance. [Section 2(i)]

Machinery

The term includes prime-movers, transmission machinery and all other appliances whereby power is generated, transformed, transmitted or applied. [Section 2(j)]

Factory

"Factory" includes any premises including the precincts thereof

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on; or

(ii) whereon twenty or more workers are working, or were working on a day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on.

But does not include a mine subject to the operation of the Mines Act, 1952 or a mobile unit belonging to the armed forces of the Union or a railway running shed, or a hotel, restaurant or eating place. [Section 2(m)]

Explanation I: For computing the number of workers for the purposes of this clause, all the workers in different groups and relays in a day shall be taken into account.

Explanation II: For the purposes of this clause the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof.

(i) Essential elements of a factory:

(1) There must be a premises.

(2) There must be a manufacturing process which is being carried on or is so ordinarily carried on in any part of such a premises.

(3) There must be ten or more workers who are/were working in such a premises on any day of the last 12 months where the said manufacturing process is carried on with the aid of power. But where the manufacturing process is carried on without the aid of power, the required number of workers working should be twenty or more.

The following are not covered by the definition of factory:

(i) Railway running sheds, (ii) mines, (iii) mobile units of armed forces, (iv) hotels, eating places or restaurants.

(ii) Meaning of words "premises and precincts"

The word "premises" is a generic term meaning open land or land with building or building alone. The term 'precincts' is usually understood as a space enclosed by walls. Expression 'premises' including precincts does not necessarily mean that the premises must always have precincts. It merely shows that there may be some premises with precincts and some premises without precincts. The word 'including is not a term' restricting the meaning of the word 'premises', but is a term which enlarges its scope. All the length of railway line would be phase wise factories (LAB IC 1999 SC 407). Company engaged in construction of railway line is factory. (LAB IC 1999 SC 407).

The Supreme Court in Ardeshir *H. Bhiwandiwala* v. *State of Bombay,* AIR 1962 S.C. 29, observed that the legislature had no intention to discriminate between workers engaged in a manufacturing process in a building and those engaged in such a process on an open land and held that the salt works, in which the work done is of conversion of sea water into crystals of salt, come within the meaning of the word 'premises'.

(iii) Manufacturing process is being carried on or ordinarily so carried on

The word ordinarily came up for interpretation in the case of *Employers Association of Northern India* v. *Secretary for Labour U.P. Govt.* The question was whether a sugar factory ceases to be a factory when no manufacturing process is carried on during the off-season. It was observed that the word 'ordinarily' used in the definition of factory cannot be interpreted in the sense in which it is used in common parlance. It must be interpreted with reference to the intention and purposes of the Act. Therefore, seasonal factories or factories carrying on intermittent manufacturing process, do not cease to be factories within the meaning of the Act.

(iv) Ten or twenty workers

The third essential content of 'factory' is that ten or more workers are employed in the premises using power and twenty or more workers are employed in the premises not using power.

Where seven workers were employed in a premises where the process of converting paddy into rice by mechanical power was carried on and in the same premises, three persons were temporarily employed for repairs of part of the machinery which had gone out of order but the manufacturing was going on, it was held that since three

temporary persons were workers, consequently there were ten workers working in the 'premises' and the premises is a factory (AIR 1959, AII. 794).

According to explanation to Section 2(m), all the workers in different relays in a day shall be taken into account while computing the number of workers.

Bombay High Court held that the fact that manufacturing activity is carried on in one part of the premises and the rest of the work is carried on in the other part of the premises cannot take the case out of the definition of the word 'factory' which says that manufacturing process can be carried on in any part. The cutting of the woods or converting the wood into planks is essentially a part of the manufacturing activity (*Bharati Udyog* v. *Regional Director ESI Corpn.,* 1982 Lab. I.C. 1644).

A workshop of Polytechnic Institution registered under the Factories Act imparting technical education and having power generating machines, was carrying on a trade in a systematic and organised mannerHeld, it will come under the definition of factory as defined under Section 2(m) read with Section 2(k) (1981 Lab. I.C. NOC 117).

Test your knowledge

Which of the following are essential elements of a factory?

(a) There must be premises

(b) There must be a manufacturing process being carried on at the premises

(c) There must be ten or more workers where the manufacturing process is being carried on with the aid of power

(d) There electronic data processing units are installed

Correct answer: (a), (b) and (c)

Manufacturing Process

It means any process for

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise, treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal; or

(ii) pumping oil, water or sewage or any other substance; or

(iii) generating, transforming, transmitting power; or

(iv) composing types for printing, printing by letter-press, lithography, photogravure or other similar process, or book-binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or

(vi) preserving or storing any article in cold storage. [Section 2(k)]

The definition is quite important and it has been the subject of judicial interpretation in large number of cases:

(i) What is manufacturing process

The definition of manufacturing process is exhaustive. Under the present definition even transporting, washing, cleaning, oiling and packing which do not involve any transformation as such which is necessary to constitute manufacturing process in its generic sense, are nonetheless treated as manufacturing process. The definition is artificially projected beyond the scope of natural meaning of what the words might convey thus covering very

vide range of activities. Madras High Court in the case of In re. *Seshadrinatha Sarma,* 1966 (2) LLJ 235, held that to constitute a manufacture there should not be essentially some kind of transformation of substance and the article need not become commercially as another and different article from that at which it begins its existence so long as there has been an indisputable transformation of substance by the use of machinery and transformed substance is commercially marketable.

Division Bench of A.P. High Court held that to determine where certain premises is factory, it is necessary that it should carry on manufacturing process and it does not require that the process should end in a substance being manufactured (*Alkali Metals (P) Ltd.* v. *ESI Corpn.,* 1976 Lab.I.C.186). In another case it was observed that manufacturing process merely refers to particular business carried on and does not necessarily refer to the production of some article. The works of laundry and carpet beating were held to involve manufacturing process. A process employed for purpose of pumping water is manufacturing process. Each of the words in the definition has got independent meaning which itself constitutes manufacturing process.

Following processes have been held to be manufacturing processes:

(1) Sun-cured tobacco leaves subjected to processes of moistening, stripping, breaking up, adaption, packing, with a view to transport to companys main factory for their use in manufacturing cigarette *(V.P. Gopala Rao* v. *Public Prosecutor,* AIR 1970 S.C. 66).

(2) The operation of peeling, washing etc., of prawns for putting them in cold storage is a process with a view to the sale or use or disposal of the prawns (*R.E.DSouza* v. *Krishnan Nair,* 1968 F.J.R. 469).

(3) Stitching old gunny bags and making them fit for use.

(4) In paper factory, bankas grass packed into bundles manually and despatched to the factory.

(5) Work of garbling of pepper or curing ginger.

(6) Process carried out in salt works in converting sea water into salt.

(7) Conversion of latex into sheet rubber.

(8) A process employed for the purpose of pumping water.

(9) The work done on the bangles of cutting grooves in them which later would be filled with colouring, is clearly a stage in ornamentation of the bangle with view to its subsequent use for sale.

(10) Preparation of soap in soap works.

(11) The making of bidies.

(12) The raw film used in the preparation of movies is an article or a substance and when by the process of tracing or adapting, after the sound are absorbed and the photos imprinted, it is rendered fit to be screened in a cinema theatre, then such a change would come within the meaning of the term treating or adapting any article or substance with a view to its use.

(13) Composing is a necessary part of printing process and hence it is a manufacturing process. It cannot be said that the definition should be confined to the process by which impression is created on the paper and to no other process preceding or succeeding the marking of the impression on the paper to be printed. Everything that is necessary before or after complete process, would be included within the definition of the word 'manufacturing process'. The definition takes in all acts which bring in not only some change in the article or substance but also the act done for the protection and maintenance of such article by packing, oiling, washing, cleaning, etc. (*P.Natrajan* v. *E.S.I. Corporation* (1973) 26 FLR 19).

(14) Preparation of food and beverages and its sale to members of a club (*CCI* v. *ESIC,* 1992 LAB IC 2029 Bom.).

(15) Receiving products in bulk, in packing and packing as per clients requirements (LLJ I 1998 Mad. 406).

(16) Construction of railway - use of raw materials like sleepers, bolts, loose rails etc. to adaptation of their use for ultimately for laying down railway line (LAB IC 1999 SC 407; *Lal Mohmd.* v. *Indian Railway Construction Co. Ltd.*).

(ii) What is not a manufacturing process

No definite or precise test can be prescribed for determining the question whether a particular process is a manufacturing process. Each case must be judged on its own facts regard being had to the nature of the process employed, the eventual result achieved and the prevailing business and commercial notions of the people. In deciding whether a particular business is a manufacturing process or not, regard must be had to the circumstances of each particular case. To constitute a manufacturing process, there must be some transformation i.e. article must become commercially known as something different from which it acquired its existence.

Following processes are not manufacturing processes:

(1) Exhibition of films process.

(2) Industrial school or Institute imparting training, producing cloth, not with a view to its sale.

(3) Receiving of news from various sources on a reel in a teleprinter of a newspaper office, is not a manufacturing process in as much as news is not the article or substance to which Section 2(k)(i) has referred.

(4) Any preliminary packing of raw material for delivering it to the factory (AIR 1969 Mad. 155).

(5) Finished goods and packing thereof: *F. Hare* v. *State* AIR 1955, 2710.

Supreme Court has held that the process undertaken in zonal and sub-stations and electricity generating stations, transforming and transmitting electricity generated at the power station does not fall within the definition of manufacturing process and could not be said to be factories … (*Workmen of Delhi Electric Supply Undertaking* v. *Management of D.E.S.U.*, AIR 1973 S.C. 365).

Worker

"Worker" means a person employed directly or by or through any agency (including a contractor) with or without knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in any other kind or work incidental to, or connected with, the manufacturing process or the subject of the manufacturing process but does not include any member of the armed forces of the Union. [Section 2(1)]

The definition contains following ingredients :

(i) There should be an 'employed person'

(a) *Meaning of the word "employed":* The concept of "employment" involves three ingredients, viz. employer, employee, and contract of employment. The 'employer' is one who employs, i.e., one who engages the services of other persons. The 'employee' is one who works for another for hire.

The employment is the contract of service between employer and employee whereunder the employee agrees to serve the employer subject to his control and supervision. The prima facie test for determination of the relationship between the employer and employee is the existence of the right of the employer to supervise and control the work done by the employee not only in the matter of directing what work the employee is to do but also the manner in which he shall do his work (*Chintaman Rao* v. *State of M.P.* AIR 1958 S.C. 388).

Therefore, 'supervision and control' is the natural outcome when a person is employed by another person. Moreover, the 'employment' referred to in the section is in connection with a manufacturing process that is carried on in the factory which process normally calls for a large measure of coordination between various sections inside a factory and between various individuals even within a section. The persons will have to be guided by those placed in supervisory capacity. A certain amount of control is thus necessarily present in such a case.

In *Shankar Balaji Waje* v. *State of Maharashtra,* AIR 1963 Bom. 236, the question arose whether bidi roller is a worker or not. The management simply says that the labourer is to produce bidies rolled in a certain form. How the labourer carried out the work is his own concern and is not controlled by the management, which is concerned only with getting bidies rolled in a particular style with certain contents. The Supreme Court held that the bidi roller is not a worker. The whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master. Where the employer did retain direction and control over the workers both in manner of the nature of the work as 'also its details they will be held as workers.

A day labourer, where there was no evidence to show that he was free to work for such period as he likes, free to come and go whenever he chose and free to absent himself at his own sweet will, was held to be a worker. Similarly, women and girls employed in peeling, washing etc., of consignment of prawns brought on the premises at any time of the day or night, without any specified hours of work and without any control over their attendance or the nature, manner or quantum of their work and who after finishing the work go to other premises in the locality where similar consignment of prawns are received, are not Workers (*State of Kerala* v. *R.E.DSouza*).

(b) *Whether relationship of master and servant necessary:* The expression "employed" does not necessarily involve the relationship of master and servant. There are conceivable cases in which where no such relationship exists and yet such persons would be workers. The expression a person employed, according to Justice Vyas, means a person who is actually engaged or occupied in a manufacturing process, a person whose work is actually utilised in that process. The definition of worker is clearly enacted in terms of a person who is employed in and not in terms of person who is employed by. It is immaterial how or by whom he is employed so long as he is actually employed in a manufacturing process.

(c) *Piece-rate workers—Whether workers:* **Piece-rate workers can be workers within the definition of 'worker in the Act, but they must be regular workers and not workers who come and work according to their sweet will (*Shankar Balaji Waje* v. *State of Maharashtra,* AIR 1967 S.C. 517).** In another case workmen had to work at bidi factory when they liked. The payment was made on piece-rate according to the amount of work done. Within the factory, they were free to work. But the control of the manner in which bidies were ready, by the method of rejecting those which did not come up to the proper standards. In such a case it was exercised which was important (*Birdhi Chand Sharma* v. *First Civil Judge, Nagpur,* AIR 1961 SC 644). Therefore, whatever method may be adopted for the payment of wages , the important thing to see is whether the workers work under supervision and control of the employer. It makes no difference whether the worker employed in the manufacturing process is paid time rate wages or piece rate wages.

(d) *The partners of a concern*, even though they work on premises in the factory cannot be considered to be workers within Section 2(1): (1958 (2) LLJ 252 SC).

(e) *An independent contractor:* He is a person who is charged with work and has to produce a particular result but the manner in which the result is to achieved is left to him and as there is no control or supervision as to the manner in which he has to achieve the work, he is not a worker.

(ii) Employment should be direct or through some agency

The words directly or by or through any agency in the definition indicate that the employment is by the management or by or through some kind of employment agency. In either case there is a contract of employment between the

management and the person employed. There should be a privity of contract between them and the management. Only such person can be classified as worker who works either directly or indirectly or through some agency employed for doing his works of any manufacturing process or cleaning, etc., with which the factory is concerned. It does not contemplate the case of a person who comes and that too without his intervention either directly, or indirectly, and does some work on the premises of factory.

Test your knowledge

State whether the following statement is "True" or "False"

Piece-rate workers are considered workers as per the definition of 'Worker' in the Factories Act, 1948.

- True
- False

Correct answer: True

(iii) Employment should be in any manufacturing process etc.

The definition of "worker" is fairly wide. It takes within its sweep not only persons employed in manufacturing process but also in cleaning any part of the machinery and premises used for manufacturing process. It goes far beyond the direct connection with the manufacturing process by extending it to other kinds of work which may either be incidental to or connected with not only the manufacturing process itself but also the subject of the manufacturing process (*Works Manager, Central Rly. Workshop Jhansi* v. *Vishwanath* and others), the concept of manufacturing process has already been discussed. The meaning of the expression employed in cleaning any part of machinery, etc." and employed in work incidental to..... process, are discussed below:

(a) *Employed in cleaning any part of machinery etc*.: If a person is employed in cleaning any part of the machinery premises which is used for manufacturing process, he will be held as worker.

(b) *Employed in work incidental to process*: This clause is very important because it enlarges the scope of the term, manufacturing process. Following illustrative cases will clarify the meaning of this clause:

(1) In *Shinde* v. *Bombay Telephones,* 1968 (11) LLJ 74, it was held that whether the workman stands outside the factory premises or inside it, if his duties are connected with the business of the factory or connected with the factory, he is really employed in the factory and in connection with the factory.

(2) In *Works Manager, Central Rly. Workshop Jhansi* v. *Vishwanath and others,* it was held that the definition of worker does not exclude those employees who are entrusted solely with clerical duties, if they otherwise fall within the definition of 'worker. Timekeepers employed to maintain attendance of the staff, job cards particularly of the various jobs under operation, and time- sheets of the staff engaged in production of spare parts, repairs, etc.; and head time-keeper who supervise the work of the time-keepers, perform work which is incidental to or connected with the manufacturing process carried on in the factory and would therefore, fall within the definition of the worker in the Act.

(3) Munim in a factory is a worker.

(4) Workmen in canteen attached to a factory are employees.

(5) A person employed by a gas manufacturing works as a coolie for excavating and digging trenches outside the factory for laying pipes for transporting gas to consumers, cannot be held to be a worker (AIR 1961 Bomb. 184).

(6) Person employed to supply material to a mason engaged in construction of furnace will be deemed to be employed by the factory to a work incidental to or connected with manufacturing process.

(7) In a soap-works, a carpenter preparing the packing cases is a worker because he might legitimately be considered to be engaged in a kind of work incidental to or connected with the subject of the manufacturing process, viz., packaging of soap for being sent out for sale.

(8) In the case of *Rohtas Industries Ltd.* v. *Ramlakhan Singh and others,* A.I.R. 1971 SC 849, a person was employed in a paper factory. He was engaged in supervising and checking quality and weighment of waste papers and rags which are the basic raw material for the manufacture of paper. He used to deal with receipts and maintain records of stock and pass the bill of the supplier of waste paper and rags. He used to work in the precincts of the factory and in case of necessities had to work inside the factory. The Supreme Court held that he was working in the factory premises or its precincts in connection with the work of the subject of the manufacturing process, namely the raw material.

(iv) Employment may be for remuneration or not

A person who receives wages as remuneration for his services, a person who receives remuneration on piece-work basis, a person may be working as an apprentice, and a person who is a honorary worker, all come within the definition of a worker. Therefore to be a worker, it is immaterial whether a person is employed for wages or for no wages.

(v) Any member of the armed forces of the Union is excluded from the definition of worker

(vi) Whether all employees are workers?

Since the word employee has not been defined in the Act it follows that all the workers within the ambit of the definition under the Act would be employees, while all employees would not be workers (*Harbanslal* v. *State of Karnataka,* (1976)1 Karnt.J.111). All persons employed in or in connection with a factory whether or not employed as workers are entitled to the benefits of the Act (*Union of India* v. *G.M. Kokil,* 1984 SCC (L&S) 631).

Once it is established prima facie that premises in question is a factory within the meaning of the Act, the provisions of Section 103 as to the presumption of employment are immediately attracted and onus to prove the contrary shifts to the accused (*Prafulbhai Patadia* v. *The State,* 1976 (12) E.L.R. 329).

Occupier

Section 2(n) of the Act defines the term “occupier” as a person who has ultimate control over the affairs of the factory:

Provided that

(i) in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;

(ii) in the case of a company, any one of the directors, shall be deemed to be the occupier;

(iii) in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier.

Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire

(1) the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under (a) Sections 6, 7, 7A, 7B, 11 or 12; (b) Section 17 in so far as it relates to the providing the maintenance of sufficient and suitable lighting in or around the dock; (c) Sections 18, 19, 42, 46, 47 or 49 in relation to the workers employed on such repair or maintenance;

(2) The owner of the ship or his agent or master or other officer-in-charge of the ship or any person who

contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be occupier for the purposes of any matter provided for by or under Sections 13, 14, 16 or 17 (save as otherwise provided in this proviso) or Chapter IV (except Section 27) or Sections 43, 44, or 45, Chapter VI, VII, VIII or IX or Sections 108, 109 or 110, in relation to (a) the workers employed directly by him, or by or through any agency, and (b) the machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person.

The important test whether a person is an occupier or not is the possession or vesting in of the ultimate control of the factory. The control should be an ultimate one, though it may be remote. There was a lot of controversy regarding 'Occupier in case of a company, as the Section 2(n)(ii), provides that any one of the directors of the company shall be deemed to be occupier of the factory. However, the Supreme Court in the case of *J.K. Industries Ltd.* v. *Chief Inspector of Factories* (1997) I-L.L.J. SC722, has held that only a member of Board of Directors of the Company can be occupier of the factory of the Company. The ultimate control of factory owned by company vests in Board of Directors. Ultimate control which vests in Board of Directors cannot be vested in any one else. Company owing factory cannot nominate its employees or officers except Director of the company as occupier of its factory.

Therefore an employee of company or factory cannot be occupier. Proviso (ii) to Section 2(n) does not travel beyond scope of main provision and is not violative of Article 14 of Constitution of India. Proviso (ii) is not *ultra vires* main provisions of Section 2(n). No conflict exists between main provisions of Section 2(n) and proviso (ii). Further, proviso (ii) to Section 2(n) read with Section 92, does not offend Article 21.

Under Section 2(n)(iii), for the purpose of deciding who is an occupier of the factory, the test to be applied is who has ultimate control over its affairs in a government company, in fact the ultimate control lies with government though the company is separate legal entity by having right to manage its affairs. Persons appointed by central government to manage its affairs of factories (of government companies) were therefore deemed to be appointed as occupiers under the Act (*IOC v. CIF, LLJ II SC 1998 604*).

Exemption of occupier or manager from liability in certain cases

Section 101 provides exemptions from liability of occupier or manager. It permits an occupier or manager of a factory who is charged with an offence punishable under the Act to bring into the Court any other person whom he charges actual offender and also proves to the satisfaction of the Court that:

(a) he has used due diligence to enforce the execution of this Act; and

(b) that the offence in question was committed without his knowledge, consent or connivance, by the said other person.

The other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory. In such a case occupier or manager of the factory is discharged from liability. The Section is an exception to principles of strict liability, but benefit of this would be available only when the requirements of this section are fully complied with and the court is fully satisfied about the proof of facts contemplated in (a) and (b) above.

STATUTORY AGENCIES AND THEIR POWERS FOR ENFORCEMENT OF THE ACT

The State Governments assume the main responsibility for administration of the Act and its various provisions by utilising the powers vested in them. Section 3 empowers the State Government to make rules for references to time of day where Indian Standard Time, being 5-1/2 hours ahead of Greenwich Mean-Time is not ordinarily

observed. These rules may specify the area, define the local mean time ordinarily observed therein, and permit such time to be observed in all or any of the factories situated in the area.

The State Government assumes power under Section 4 of the Act to declare different departments to be separate factories or two or more factories to be single factory for the purposes of this Act. This power will be utilised by the State Government either on its own or on an application made to it by the occupier. But no order could be made on its own motion unless occupier is heard in this regard.

In case of public emergency, Section 5 further empowers the State Government to exempt by notification any factory or class or description of factories from all or any of the provisions of this Act except Section 67 for such period and subject to such conditions as it may think fit, however no such notification shall be made exceeding a period of three months at a time. Explanation to Section 5 defines public emergency as a situation whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or internal disturbance.

The State Governments carry out the administration of the Act through:

(i) Inspecting Staff

(ii) Certifying Surgeons

(iii) Welfare Officers

(iv) Safety Officers.

(i) The Inspecting Staff

Appointment: Section 8 empowers the State Government to appoint Inspectors, Additional Inspectors and Chief Inspectors, such persons who possess prescribed qualifications.

Section 8(2) empowers the State Government to appoint any person to be a Chief Inspector. To assist him, the government may appoint Additional, Joint or Deputy Chief Inspectors and such other officers as it thinks fit [Section 8(2A)].

Every District Magistrate shall be an Inspector for his district.

The State Government may appoint certain public officers, to be the Additional Inspectors for certain areas assigned to them [Section 8(5)].

The appointment of Inspectors, Additional Inspectors and Chief Inspector can be made only by issuing a notification in the *Official Gazette.*

When in any area, there are more inspectors than one, the State Government may by notification in the *Official Gazette,* declare the powers which such Inspectors shall respectively exercise and the Inspector to whom the prescribed notices are to be sent.

Inspector appointed under the Act is an Inspector for all purposes of this Act. Assignment of local area to an inspector is within the discretion of the State Government.

A Chief Inspector is appointed for the whole State. He shall in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector throughout the State. Therefore, if a Chief Inspector files a complaint, the court can legally take congnizance of an offence. Even assignment of areas under Section 8(6) does not militate in any way against the view that the Chief Inspector can file a complaint enabling the court to take congnizance. The Additional, Joint or Deputy Chief Inspectors or any other officer so appointed shall in addition to the powers of a Chief Inspector, exercise the powers of an Inspector throughout the State.

Test your knowledge

Which authorities carry out the administration of the Factories Act, 1948, under the supervision of the State Government?

(a) Inspecting Staff

(b) Certifying Surgeons

(c) Labour Officers

(d) Safety Officers

Correct answer: (a), (b) and (d)

Powers of Inspectors

Section 9 describes the powers of the Inspectors subject to any rules made in this behalf for the purpose of the Act. An Inspector may exercise any of the following powers within the local limits for which he is appointed:

1. He can enter any place which is used or which, he has reasons to believe, is used as a factory.
2. He can make examination of the premises, plant, machinery, article or substance. Inquire into any accident or dangerous occurrence whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry.
3. Require the production of any prescribed register or any other document relating to the factory. Seize, or take copies of any register, record of other document or any portion thereof.
4. Take measurement and photographs and make such recordings as he considers necessary for the purpose of any examination.
5. In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is in the circumstances necessary, for carrying out the purposes of this Act) and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination.

Production of documents

The Factories Act requires the maintenance of certain registers and records. Inspectors have been empowered to ask for the production of any such documents maintained under law, and the non-compliance of this has been made an offence.

(ii) Certifying Surgeons

Section 10 provides for the appointment of the Certifying Surgeons by the State Government for the purpose of this Act to perform such duties as given below within such local limits or for such factory or class or description of factories as may be assigned to Certifying Surgeon:

(a) the examination and certification of young persons under this Act;

(b) the examination of persons engaged in factories in such dangerous occupations or processes as may be prescribed;

(c) the exercising of such medical supervision as may be prescribed for any factory or class or description of factories.

(iii) Welfare Officer

Section 49 of the Act imposes statutory obligation upon the occupier of the factory of the appointment of Welfare Officer/s wherein 500 or more workers are ordinarily employed. Duties, qualifications and conditions of service may be prescribed by the State Government.

(iv) Safety Officer

Section 40-B empowers the State Government for directing a occupier of factory to employ such number of Safety Officers as specified by it where more than 1,000 workers are employed or where manufacturing process involves risk of bodily injury, poisoning or disease or any other hazard to health of the persons employed therein. The duties, qualifications and working conditions may be prescribed by the State Government.

APPROVAL, LICENSING AND REGISTRATION OF FACTORIES

Section 6 empowers the State Government to make rules with regard to licensing and registration of factories under the Act on following matters:

(i) submission of plans of any class or description of factories to the Chief Inspector or the State Government;

(ii) obtaining previous permission of the State Government or the Chief Inspector, for the site on which factory is to be situated and for construction or extension of any factory or class or description of factories. However, replacement or addition of any plant or machinery within prescribed limits, shall not amount to extension of the factory, if it does not reduce the minimum safe working space or adversely affect the environmental conditions which is injurious to health;

(iii) considering applications for permission for the submission of plans and specifications;

(iv) nature of plans and specifications and the authority certifying them;

(v) registration and licensing of factories;

(vi) fees payable for registration and licensing and for the renewal of licences;

(vii) licence not to be granted or renewed unless notice specified under Section 7 has been given.

Automatic approval

If an application is made for the approval of site for construction or extension of the factory and required plans and specifications have been submitted by registered post to the State Government or the Chief Inspector and if no reply is received within three months from the date on which it is sent the application stands automatically approved [Section 6(2)]. Where the rules require the licensing authority to issue a licence on satisfaction of all legal requirements/record reasons for refusal. Licence could not be refused only on a direction from Government (*S. Kunju* v. *Kerala,* (1985) 2 LLJ 106).

Appeal against refusal to grant permission

If the State Government or Chief Inspector do not grant permission to the site, construction or extension of a factory, or to the registration and licensing of a factory, the applicant may within 30 days of the date of such refusal appeal to:

(i) the Central Government against the order of the State Government;

(ii) the State Government against the order of any other authority.

Test your knowledge

Choose the correct answer

What is the minimum number of workers required in a factory for the mandatory appointment of a Safety Officer?

(a) More than 100

(b) More than 500

(c) Less than 750

(d) More than 1,000

Correct answer: (d)

NOTICE BY OCCUPIER

Section 7 imposes an obligation on the occupier of a factory to send a written notice, containing prescribed particulars, to the Chief Inspector at least 15 days before an occupier begins to occupy or use a premises as a factory and at least 30 days before the date of resumption of work in case of seasonal factories, i.e. factories working for less than 180 days in a year.

Contents of notice

A notice must contain following particulars:

(1) The name and situation of the factory.

(2) The name and address of the occupier.

(3) The name and address of the owner of the premises or building (including the precincts, etc., thereof referred to in Section 93).

(4) The address at which communication relating to the factory should be sent.

(5) The nature of manufacturing process to be carried on in the factory during next 12 months.

(6) The total rated horse power installed or to be installed in the factory which shall not include the rated horse power of any separate standby plant.

(7) The name of the Manager of the factory for the purpose of this Act.

(8) the number of workers likely to be employed in the factory.

(9) Such other particulars as may be prescribed.

Notice where new manager is appointed

Whenever a new manager is appointed, the occupier shall send to the Inspector a written notice and to the Chief Inspector a copy thereof, within seven days from the date on which such person takes over charge.

When there is no manager – occupier deemed as manager

During a period for which no person has been designated as Manager of a factory or during which the person designated does not manage the factory any person found acting as manager, will be the manager for the purposes of the Act. Where no such person is found the occupier should be deemed to be the manager of the factory.

GENERAL DUTIES OF THE OCCUPIER

Section 7A is inserted by the Factories (Amendment) Act, 1987, as under:

(1) Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

(2) Without prejudice to the generality of the provisions of Sub-section (1) the matters to which such duty extends shall include:

(a) The provision and maintenance of plant and systems of work in the factory that are safe and without risks to health;

(b) the arrangement in the factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provisions of such information, instruction, training and supervision as are necessary to ensure the health and safety of all workers at work;

(d) the maintenance of all places of work in the factory in a condition that is safe and without risks to health and provisions and maintenance of such means of access to, and egress from, such places as are safe and without such risks;

(e) the provision, maintenance or monitoring of such working environment in the factory for the workers that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, every occupier shall prepare, and as often as may be appropriate revise, a written statement of his general policy with respect to the health and safety of the workers at work and organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed.

Test your knowledge

Choose the correct answer:

To which authority can appeals be made if the Chief Inspector does not grant a license to a factory?

(a) State Government

(b) Central Government

(c) State Licensing Appellate

(d) Factories Commissioner

Correct answer: (a)

GENERAL DUTIES OF MANUFACTURERS ETC.

Section 7B provides that every person who designs, manufactures, imports or supplies any article (including plant and machinery) or use in any factory, shall observe the following:

(a) ensure, that the article is so designed and constructed as to be safe and without risks to the health of the workers when properly used;

(b) carry out such tests and examination as may be considered necessary for the effective implementation of the provisions of clause (a);

(c) take such steps as may be necessary to ensure that adequate information will be available:

(i) in connection with the use of the article in any factory;

(ii) about the use for which it is designed and tested; and

(iii) about any condition necessary to ensure that the article, when put to such use, will be safe, and without risks to the health of the workers.

The Section further provides that where an article is designed or manufactured outside India, it shall be obligatory on the part of the importer to see:

(a) that the article (including plant and machinery) conforms to the same standards if such article is manufactured in India, or

(b) if the standards adopted in the country outside for the manufacture of such article is above the standards adopted in India, that the article conforms to such standards.

For the above purpose, the concerned person may carry out or arrange for the carrying out of necessary research with a view to the discovery and so far as is reasonably practicable, the elimination or minimisation of any risk to the health or safety of workers to which design or article (including plant and machinery) may give rise.

The section further provides that if research, testing, etc. has already been exercised or carried out, then no such research is required again.

The above duties relate only to things done in the course of the business carried out by him, and to matters within his control.

However, the person may get relief from the exercise of above duties if he gets an undertaking in writing by the user of such article to take necessary steps that the article will be safe and without risk to the health of the workers.

MEASURES TO BE TAKEN BY FACTORIES FOR HEALTH, SAFETY AND WELFARE OF WORKERS

Such measures are provided under Chapters III, IV and V of the Act which are as follows:

A. HEALTH

Chapter III of the Act deals with the following aspects.

(i) Cleanliness

Section 11 ensures the cleanliness in the factory. It must be seen that a factory is kept clean and it is free from effluvia arising from any drain, privy or other nuisance. The Act has laid down following provisions in this respect :

(1) All the accumulated dirt and refuse on floors, staircases and passages in the factory shall be removed daily by sweeping or by any other effective method. Suitable arrangements should also be made for the disposal of such dirt or refuse.

(2) Once in every week, the floor should be thoroughly cleaned by washing with disinfectant or by some other effective method [Section 11(1)(b)].

(3) Effective method of drainage shall be made and maintained for removing water, to the extent possible, which may collect on the floor due to some manufacturing process.

(4) To ensure that interior walls and roofs, etc. are kept clean, it is laid down that:

(i) white wash or colour wash should be carried at least once in every period of 14 months;

(ii) where surface has been painted or varnished, repair or revarnish should be carried out once in every five years, if washable then once in every period of six months;

(iii) where they are painted or varnished or where they have smooth impervious surface, it should be cleaned once in every period of 14 months by such method as may be prescribed.

(5) All doors, windows and other framework which are of wooden or metallic shall be kept painted or varnished at least once in every period of five years.

(6) The dates on which such processes are carried out shall be entered in the prescribed register.

If the State Government finds that a particular factory cannot comply with the above requirements due to its nature of manufacturing process, it may exempt the factory from the compliance of these provisions and suggest some alternative method for keeping the factory clean. [Section 11(2)]

(ii) Disposal of waste and effluents

Every occupier of a factory shall make effective arrangements for the treatment of wastes and effluents due to the manufacturing process carried on in the factory so as to render them innocuous and for their disposal. Such arrangements should be in accordance with the rules, if any, laid down by the State Government. If the State Government has not laid down any rules in this respect, arrangements made by the occupier should be approved by the prescribed authority if required by the State Government. (Section 12)

(iii) Ventilation and temperature

Section 13 provides that every factory should make suitable and effective provisions for securing and maintaining (1) adequate ventilation by the circulation of fresh air; and (2) such a temperature as will secure to the workers reasonable conditions of comfort and prevent injury to health. What is reasonable temperature depends upon the circumstances of each case. The State Government has been empowered to lay down the standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or parts thereof. It may direct that proper measuring instruments at such places and in such position as may be specified shall be provided and prescribed records shall be maintained.

Measures to reduce excessively high temperature: To prevent excessive heating of any workroom following measures shall be adopted:

(i) Walls and roofs shall be of such materials and so designed that reasonable temperature does not exceed but kept as low as possible.

(ii) Where the nature of work carried on in the factory generates excessively high temperature, following measures should be adopted to protect the workers:

(a) by separating such process from the workroom; or

(b) insulating the hot parts; or

(c) adopting any other effective method which will protect the workers.

The Chief Inspector is empowered to direct any factory to adopt such methods which will reduce the excessively high temperature. In this regard, he can specify the measures which in his opinion should be adopted. (Section 13)

(iv) Dust and fume

There are certain manufacturing processes like chemical, textile or jute, etc., which generates lot of dust, fume or other impurities. It is injurious to the health of workers employed in such manufacturing process.

Following measures should be adopted in this respect:

(1) Effective measures should be taken to prevent the inhalation and accumulation of dust, fumes etc., in the work-rooms.

(2) Wherever necessary, an exhaust appliances should be fitted, as far as possible, to the point of origin of dust fumes or other impurities. Such point shall also be enclosed as far as possible.

(3) In stationery internal combustion engine and exhaust should be connected into the open air.

(4) In cases of other internal combustion engine, effective measures should be taken to prevent the accumulation of fumes therefrom. (Section 14)

It may be pointed that the evidence of actual injury to health is not necessary. If the dust or fume by reason of manufacturing process is given off in such quantity that it is injurious or offensive to the health of the workers employed therein, the offence is committed under this Section.

Lastly the offence committed is a continuing offence. If it is an offence on a particular date is does not cease to be an offence on the next day and so on until the deficiency is rectified.

(v) Artificial humidification

Humidity means the presence of moisture in the air. In certain industries like cotton, textile, cigarette, etc., higher degree of humidity is required for carrying out the manufacturing process. For this purpose, humidity of the air is artificially increased. This increase or decrease in humidity adversely affects the health of workers.

Section 15(1) empowers the State Government to make rules (i) prescribing the standards of humidification, (ii) regulating methods to be adopted for artificially increasing the humidity of the air, (iii) directing prescribed tests for determining the humidity of the air to be correctly carried out, and recorded, and (iv) prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the work-room.

Section 15(2) lays down that water used for artificial humidification should be either purified before use or obtained from a public supply or other source of drinking water.

Where the water is not purified as stated above. Section 15(3) empowers the Inspector to order, in writing, the manager of the factory to carry out specified measures, before a specified date, for purification of the water.

(vi) Overcrowding

Overcrowding in the work-room not only affect the workers in their efficient discharge of duties but their health also.

Section 16 has been enacted with a view to provide sufficient air space to the workers.

(1) Section 16(1) prohibits the overcrowding in the work-rooms to the extent it is injurious to the health of the workers.

(2) Apart from this general prohibition Section 16(2) lays down minimum working space for each worker as 14.2 cubic metres of space per worker in every workroom.

For calculating the work area, the space more than 4.2 metres above the level of the floor, will not be taken into consideration.

Posting of notice: Section 16(3) empowers the Chief Inspector who may direct in writing the display of a notice in the work-room, specifying the maximum number of workers which can be employed in that room. According to Section 108, notice should be in English and in a language understood by the majority of the workers. It should be displayed at some conspicuous and convenient place at or near, the enterance. It should be maintained in clean and legible conditions.

Exemptions : The chief Inspector may by order in writing, exempt any work-room from the provisions of this section, subject to such conditions as he may think fit to impose, if he is satisfied that non-compliance of such provision will have no adverse effect on the health of the workers employed in such work-room.

(vii) Lighting

Section 17 of the Factories Act makes following provisions in this respect:

(1) every factory must provide and maintain sufficient and suitable lighting, natural, artificial or both, in every part of the factory where workers are working or passing;

(2) all the glazed windows and sky lights should be kept clean on both sides;

(3) effective provisions should be made for the prevention of glare from a source of light or by reflection from a smooth or polished surface;

(4) formation of shadows to such an extent causing eye-strain or the risk of accident to any worker, should be prevented; and

(5) the state government is empowered to lay down standard of sufficient and suitable lighting for factories for any class or description of factories or for any manufacturing process.

(viii) Drinking water

Section 18 makes following provisions with regard to drinking water.

(1) every factory should make effective arrangements for sufficient supply of drinking water for all workers in the factory;

(2) water should be wholesome, i.e., free from impurities;

(3) water should be supplied at suitable points convenient for all workers;

(4) no such points should be situated within six metres of any washing place, urinals, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination, unless otherwise approved in writing by the Chief Inspector;

(5) all such points should be legible marked Drinking Water in a language understood by majority of the workers;

(6) in case where more than 250 workers are ordinarily employed, effective arrangements should be made for cooling drinking water during hot weather. In such cases, arrangements should also be made for the distribution of water to the workers; and

(7) the State Government is empowered to make rules for the compliance of above stated provisions and for the examination, by prescribed authorities, of the supply and distribution of drinking water in factories.

Test your knowledge

Choose the correct answer

What is the minimum space to be allocated to each worker as per the Factories Act, 1948?

(a) 12.2 cubic metres

(b) 13.2 cubic metres

(c) 14.2 cubic meters

(d) 15.2 cubic metres

Correct answer: (c)

(ix) Latrines and urinals

Every factory shall make suitable arrangement for the provision of latrines and urinals for the workers. These points as stated below, are subject to the provisions of Section 19 and the rules laid down by the State Government in this behalf.

(1) every factory shall make provision for sufficient number of latrines and urinals of prescribed standard. These should be conveniently situated and accessible to all workers during working hours;

(2) separate arrangement shall be made for male and female workers;

(3) all these places shall have suitable provisions for lighting and ventilation;

(4) no latrine or urinal shall communicate with any work-room unless in between them there is provision of open space or ventilated passage;

(5) all latrines and urinals shall be kept in a clean and sanitary conditions at all times;

(6) a sweeper shall be employed whose exclusive job will be to keep clean all latrines and urinals;

(7) where more than 250 workers are ordinarily employed in a factory, following additional measures shall be taken under Section 19(2):

(i) all latrines and urinals accomodation shall be of prescribed sanitary type.

(ii) all internal walls upto ninety centimetres, and the floors and the sanitary blocks shall be laid in glazed tiles or otherwise furnished to provide a smooth polished impervious surface;

(iii) the floors, walls, sanitary pan, etc., of latrines and urinals shall be washed and cleaned with suitable detergents and/or disinfectants, at least once in every seven days.

(8) the State Government is empowered to make rules in respect of following:

(i) prescribing the number of latrines and urinals to be provided to proportion to the number of male and female workers ordinarily employed in the factory.

(ii) any additional matters in respect of sanitation in factories;

(iii) responsibility of the workers in these matters.

(x) Spittoons

Every factory should have sufficient number of spittoons situated at convenient places. These should be maintained in a clean and hygienic condition. (Section 20)

B. SAFETY

Chapter IV of the Act contains provisions relating to safety. These are discussed below:

(i) Fencing of machinery

Fencing of machinery in use or in motion is obligatory under Section 21. This Section requires that following types of machinery or their parts, while in use or in motion, shall be securely fenced by safeguards of substantial construction and shall be constantly maintained and kept in position, while the parts of machinery they are fencing are in motion or in use. Such types of machinery or their parts are:

(1) every moving parts of a prime-mover and flywheel connected to a prime-mover. It is immaterial whether the prime-mover or fly-wheel is in the engine house or not;

(2) head-race and tail-race of water wheel and water turbine;

(3) any part of stock-bar which projects beyond the head stock of a lathe;

(4) every part of an electric generator, a motor or rotary converter or transmission machinery unless they are in the safe position;

(5) every dangerous part of any other machinery unless they are in safe position.

(ii) Safety measures in case of work on or near machinery in motion

Section 22 lays down the procedure for carrying out examination of any part while it is in motion or as a result of such examination to carry out the operations mentioned under clause (i) or (ii) of the proviso to Section 21(1). Such examination or operation shall be carried out only by specially trained adult male worker wearing tight fitting clothing (which shall be supplied by the occupier) whose name has been recorded in the register prescribed in this behalf and who has been furnished with a certificate of appointment and while he is so engaged. No woman or young person shall be allowed to clean, lubricate or adjust any part of a prime-mover or any transmission machinery while the prime-mover or transmission machinery is in motion or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication and adjustment thereof would expose the woman or the young person to risk of injury from any moving part either of that machine or of any adjacent machinery [Section 22(2)].

(iii) Employment of young persons on dangerous machines

Section 23 provides that no young person shall be required or allowed to work at any machine to which this section applies unless he has been fully instructed as to dangers arising in connection with the machine and the precautions to be observed and (a) has received sufficient training in work at the machine, or (b) is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

(iv) Striking gear and devices for cutting off power

Section 24 provides that in every factory suitable striking gears or other efficient mechanical appliances shall be provided and maintained and used to move driving belts to and from fast and loose pullyes which form part of the transmission machinery and such gear or appliances shall be so constructed, placed and maintained as to prevent the belt from creeping back on the fast pulley. Further, driving belts when not in use shall not be allowed to rest or ride upon shafting in motion. Suitable devices for cutting off power in emergencies from running machinery shall be provided and maintained in every work-room in every factory. It is also provided that when a device which can inadvertently shift from ‘off’ to ‘on position in a factory’, cutoff power arrangements shall be provided for locking the devices on safe position to prevent accidental start of the transmission machinery or other machines to which the device is fitted.

(v) Self-acting machines

Section 25 provides further safeguard for workers from being injured by self-acting machines. It provides that no traverse part of self-acting machine in any factory and no material carried thereon shall, if the space over which it runs is a space over which any person is liable to pass whether in the course of his employment or otherwise, be allowed to run on its outward or inward traverse within a distance of forty five centimetres from any fixed structure which is not part of the machines. However, Chief Inspector may permit the continued use of a machine installed before the commencement of this Act, which does not comply with the requirement of this section, on such conditions for ensuring safety, as he may think fit to impose.

(vi) Casing of new machinery

Section 26 provides further safeguards for casing of new machinery of dangerous nature. In all machinery driven by power and installed in any factory (a) every set screw, bolt or key on any revolving shaft, spindle, wheel or pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger; (b) all spur, worm and other toothed or friction gearing which does not require frequent adjustment while in motion, shall be completely encased unless it is so situated as to be so safe as it would be if it were completely encased. The section places statutory obligation on all persons who sell or let on hire or as agent of seller or hire to comply with the section and in default shall be liable to punishment with imprisonment for a term which may extend to 3 months or with fine which may extend to Rs. 500 or with both.

Test your knowledge

State whether the following statement is "True" or "False"

Fencing of machinery in use or in motion is not obligatory under Section 21 of the Factories Act, 1948.

- True
- False

Correct answer: False

(vii) Prohibition of employment of woman and children near cotton openers

According to Section 27, no child or woman shall be employed in any part of factory for pressing cotton in which a cotton opener is at work. However, if the feed-end of a cotton opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the inspector may in any particular case specify in writing, women and children may be employed on the side of partition where the feed-end is situated.

(viii) Hoists and lifts

Section 28 provides that in every factory: (i) every hoist and lift shall be of good mechanical construction, sound material and adequate strength. It shall be properly maintained and thoroughly examined by a competent person at least once in every period of six months and a register shall be kept containing the prescribed particulars of every such examination, (ii) every hoist way and lift way shall be sufficiently protected by an enclosure fitted with gates and the hoist or lift and every such enclosure shall be so constructed as to prevent any person or thing from being trapped between any part of the hoist or lift and any fixed structure or moving part, (iii) the maximum safe working load shall be marked on every hoist or lift and no load greater, than such load shall be marked on every hoist or lift and no load greater than such load shall be carried thereon, (iv) the cage of every hoist and lift shall be fitted with a gate on each side from which access is afforded to a landing (v) such gates of the hoist and lift shall be fitted with interlocking or other efficient device to secure that the gate cannot be opened except when the cage is at the landing and that the cage cannot be moved unless the gate is closed.

(ix) Lifting machines, chains, ropes and lifting tackles

In terms of Section 29, in any factory the following provisions shall be complied with respect of every lifting machine (other than a hoist and lift) and every chain, rope and lifting tackle for the purpose of raising or lowering persons, goods or materials:

(a) all parts including the working gear, whether fixed or movable, shall be (i) of good construction, sound material and adequate strength and free from defects; (ii) properly maintained; (iii) thoroughly examined by a competent person at least once in every period of 12 months or at such intervals as Chief Inspector may specify in writing and a register shall be kept containing the prescribed particulars of every such examination;

(b) no lifting machine or no chain, rope or lifting tackle, shall, except for the purpose of test, be loaded beyond the safe working load which shall be plainly marked thereon together with an identification mark and duly entered in the prescribed register and where it is not practicable, a table showing the safe working loads of every kind and size of lifting machine or chain, rope or lifting tackle in use shall be displayed in prominent positions on that premises;

(c) while any person is employed or working on or near the wheel track of a travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken to ensure that the crane does not approach within 6 metres of that place.

(x) Safety measures in case of use of revolving machinery

Section 30 of the Act prescribes for permanently affixing or placing a notice in every factory in which process of grinding is carried on. Such notice shall indicate maximum safe working peripheral speed of every grindstone or abrasive wheel, the speed of the shaft or spindle upon such shaft or spindle necessary to secure such safe working peripheral-speed. Speed indicated in the notice shall not be exceeded and effective measures in this regard shall be taken.

(xi) Pressure plant

Section 31 provides for taking effective measures to ensure that safe working pressure of any plant and machinery, used in manufacturing process operated at pressure above atmospheric pressure, does not exceed the limits. The State Government may make rules to regulate such pressures or working and may also exempt any part of any plant or machinery from the compliance of this section.

(xii) Floor, stairs and means of access

Section 32 provides that in every factory (a) all floors, steps, stairs passages and gangways shall be of sound construction and properly maintained and shall be kept free from obstruction and substances likely to cause persons to slip and where it is necessary to ensure safety, steps, stairs passages and gangways shall be provided with substantial handrails, (b) there shall, be so far as is reasonably practicable, be provided, and maintained safe means of access of every place at which any person is at any time required to work; (c) when any person has to work at a height from where he is likely to fall, provision shall be made, so far as is reasonably, practicable, by fencing or otherwise, to ensure the safety of the person so working.

(xiii) Pits, sumps, openings in floors etc.

Section 33 requires that in every factory every fixed vessel, sump, tank, pit or opening in the ground or in a floor which, by reason of its depth, situation, construction, or contents is or may be source of danger shall be either securely covered or securely fence. The State Government may exempt any factory from the compliance of the provisions of this Section subject to such conditions as it may prescribe.

(xiv) Excessive weights

Section 34 provides that no person shall be employed in any factory to lift, carry or make any load so heavy as to be likely to cause him injury. The State Government may make rules prescribing the maximum weights which may be lifted, carried or moved by adult men, adult women, adolescents and children employed in factories or in any class or description of factories or in carrying on any specified process.

(xv) Protection of eyes

Section 35 requires the State Government to make rules and require for providing the effective screens or suitable goggles for the protection of persons employed on or in immediate vicinity of any such manufacturing process carried on in any factory which involves (i) risk of injury to the eyes from particles or fragments thrown off in the course of the process or; (ii) risk to the eyes by reason of exposure to excessive light.

(xvi) Precautions against dangerous fumes, gases etc.

Section 36 provides (1) that no person shall be required or allowed to enter any chamber, tank, vat, pit, pipe, flue or other confined space in any factory in which any gas, fume, vapour or dust is likely to be present to such an extent as to involve risk to persons being overcome thereby, unless it is provided with a manhole of adequate size or other effective means of egress.

(2) No person shall be required or allowed to enter any confined space as is referred to in sub-section (1), until all practicable measures have been taken to remove any gas, fume, vapour or dust, which may be present so as to bring its level within the permissible limits and to prevent any ingress of such gas, fume, vapour and unless:

(a) a certificate in writing has been given by a competent person, based on a test carried out by himself that the space is reasonably free from dangerous gas, fume, vapour or dust; or

(b) such person is wearing suitable breathing apparatus and a belt securely attached to a rope, the free end of which is held by a person outside the confined space.

(xvii) Precautions regarding the use of portable electric light

Section 36A of the Act provides that in any factory (1) no portable electric light or any other electric appliance of voltage exceeding 24 volts shall be permitted for use inside any chamber, tank, vat, pit, pipe, flue or other confined space unless adequate safety devices are provided; and (2) if any inflammable gas, fume or dust is likely to be present in such chamber, tank, vat, pit, pipe, flue or other confined space unless adequate safety devices are provided, no lamp or light other than that of flame proof construction shall be permitted to be used therein.

(xviii) Explosive or inflammable dust gas, etc.

Sub-section (1) of section 37 of the Act provides that in every factory where any manufacturing process produces dust, gas, fume or vapour of such character and to such extent to be likely to explode on ignition, all practicable measures shall be taken to prevent any such explosion by (a) effective enclosure of the plant or machinery used in the process (b) removal or prevention of the accumulation of such dust, gas fume or vapour, and (c) exclusion or effective enclosure of all possible sources of ignition.

(xix) Precautions in case of fire

Section 38 provides that in every factory all practicable measures shall be taken to outbreak of fire and its spread, both internally and externally and to provide and maintain (a) safe means of escape for all persons in the event of fire, and (b) the necessary equipment and facilities for extinguishing fire.

Effective measures shall be taken to ensure that in every factory all the workers are familiar with the means of escape in case of fire and have been adequately trained in the outline to be followed in such case.

(xx) Power to require specification of defective parts or test to stability

Section 39 states that when the inspector feels that the conditions in the factory are dangerous to human life or safety he may serve on the occupier or manager or both notice in writing requiring him before the specified date to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, machinery or plant can be used with safety or to carry out such test in such a manner as may be specified in the order and to inform the inspector of the results thereof.

(xxi) Safety of buildings or machinery

Section 40 provides that the inspectors in case of dangerous conditions of building or any part of ways, machinery or plant requires the manager or occupier or both to take such measures which in his opinion should be adopted and require them to be carried out before a specified date. In case the danger to human life is immediate and imminent from such usage of building, ways of machinery he may order prohibiting the use of the same unless it is repaired or altered.

(xxii) Maintenance of buildings

Section 40-A provides that if it appears to the inspector that any building or part of it is in such a state of disrepair which may lead to conditions detrimental to the health and welfare of workers he may serve on the manager or occupier or both, an order in writing specifying the measures to be carried out before a specified date.

(xxiii) Safety officers

Section 40-B provides that in every factory (i) where 1,000 or more workers are ordinarily employed or (ii) where

the manufacturing process or operation involves risk of bodily injury, poisoning or disease or any other hazard to health of the persons employed therein, the occupier shall employ such number of safety officers as may be specified in the notification with such duties and qualifications and conditions of service as may be prescribed by State Government.

(xxiv) Power to make rules to supplement this Chapter

This is vested in the State Government under Section 41 for such devices and measures to secure the safety of the workers employed in the factory.

C. WELFARE

Following provisions under Chapter (v) of the Act, relate to the measures to be taken for the welfare of workers.

(i) Washing facilities

Section 42 provides that every factory should provide and maintain adequate and suitable washing facilities for its workers. For the use of male and female, such facilities should be separate and adequately screened. Such facilities should be conveniently accessible for all workers and be kept in a state of cleanliness. The State Government is empowered to make rules prescribing standards of adequate and suitable washing facilities.

(ii) Facilities for storing and drying clothing

Section 43 empowers the State Government in respect of any factory or class or description of factories to make rules requiring the provision, therein of (i) suitable places for keeping clothing not worn during working hours, and (ii) for drying of wet clothing.

(iii) Facilities for sitting

There are certain operations which can be performed by the workers only in a standing position. This not only affects the health of a worker but his efficiency also.

According to Section 44(1), every factory shall provide and maintain suitable facilities for sitting, for those who work in standing position so that they may make use of them as an when any opportunity comes in the course of their work. If, in the opinion of the Chief Inspector, any work can be efficiently performed in a sitting position, he may direct, in writing, the occupier of the factory, to provide before a specified date such seating arrangements as may be practicable, for all workers so engaged. The State Government, may by a notification in the Official Gazette, declare that above provisions shall not apply to any specified factory or any manufacturing process.

(iv) First aid appliances

As per Section 45, the following arrangements should be made in every factory in respect of first-aid facilities.

(1) Provision of at least one first-aid box or cup-board, subject to following conditions, for every 150 workers ordinarily employed at any one time in the factory.

(2) It should be equipped with prescribed contents and nothing else should be stored in it.

(3) It should be properly maintained and readily accessible during all working hours.

(4) A responsible person who holds a certificate in first-aid treatment, recognised by the State Government should be made the in-charge of such first-aid box or cup-board. Such a person should be readily available during working hours of the factory. Where there are different shifts in the factory, a separate person may be appointed for each shifts provided he is a responsible person and trained in first-aid treatment.

(5) Where more than 500 workers are ordinarily employed in a factory, an ambulance room should be provided and maintained by every such factory. Such room should be of prescribed size containing prescribed equipments and is in charge of such medical and nursing staff as may be prescribed.

(v) Canteens

(1) The State Government may make rules requiring that in any specified factory wherein more than 250 workers are ordinarily employed, a canteen shall be provided and maintained by the occupier for the use of workers.

(2) Such rules may relate to any of the following matter:

(i) the date by which canteen shall be provided;

(ii) the standards in respect of construction, accommodation, furniture and other equipment of the canteen;

(iii) the foodstuffs to be served and the prices to be charged;

(iv) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer;

(v) the constitution of a Managing Committee for the canteen and the representation of the workers in the management of the canteen; and

(vi) the delegation, to the chief inspector, subject to such conditions as may be prescribed, of the power to make rules under clause (iii). (Section 46)

Employees working in canteens in industrial establishments run by Managing Committee are not employees of the Managing Committee, but are employees of occupier (*Kanpur Suraksha Karmachari Union* v. *Union of India*, AIR 1988 SC).

Where the statute casts an obligation to own a canteen in the factory, and the establishment runs a canteen through a contractor who brings the workers for the canteen would be part and parcel of the establishment and the canteen workers would be deemed to be regular employees of the establishment entitled to arrears of salary and other monetary benefits (*Tamil Manila Thozilalar Sangam* v. *Chairman TNEB,* 1994 CLA 34 Mad. 63.)

(vi) Shelters, rest rooms and lunch rooms

The provision of some sort of shelter is a must, where the workers can take their meals brought by them during rest interval. The following provisions under Section 47 of the Act have been made in this respect:

(1) In every factory where more than 150 workers are ordinarily employed, the occupier should make adequate and suitable arrangements for shelters or rest rooms and lunch-room with provision of drinking water where the workers can take rest of or eat meals brought by them. However any canteen which is maintained in accordance with provisions of Section 45 shall be regarded as part of the requirements of this sub-section. Where a lunch room exists no worker shall eat any food in the workroom.

(2) Such places should be equipped with the facility of drinking water.

(3) Such places should be sufficiently lighted, ventilated and kept in cool and clean conditions.

(4) The construction and accommodation, furniture and equipment of such place should conform to the standards, if any, laid down by the State Government.

By a notification in the Official Gazette, the State Government may exempt any factory from the compliance of these provisions. Further, where any canteen is maintained under Section 45, then provision of such shelter room, etc., is not necessary.

(vii) Creches

Following provisions have been made in respect of creches in the factories:

(1) In every factory wherein more than 30 women workers are ordinarily employed, the facility of suitable room or rooms should be provided and maintained for the use of children under the age of six years of such women.

(2) There should be adequate accommodation in such rooms.

(3) These places should be sufficiently lighted and ventilated and kept in clean and sanitary conditions.

(4) Women trained in the case of children and infants should be made incharge of such rooms.

The State Government is empowered to make rules in respect of following matters:

(1) Location and standards in respect of construction, accommodation, furniture and other equipment of such places.

(2) Provisions of facilities for washing and changing clothing of children or any other additional facility for their care.

(3) Provisions of free-milk or refreshment or both for children.

(4) Facilities for the mothers of such children to feed them at suitable intervals in the factory. (Section 48)

Test your knowledge

Choose the correct answer

Which of the following provisions do not come under the 'Welfare Chapter' in the Factories Act, 1948?

(a) Washing facilities

(b) Drinking water

(c) Facilities for sitting

(d) First-aid appliances

Correct answer: (a)

(viii) Welfare officers

According to Section 49(1), in every factory wherein 500 or more workers are ordinarily employed, the occupier should employ such number of welfare officers as may be prescribed. The State Government is empowered to prescribe the duties, qualifications and conditions of service of such welfare officers. The provisions of Section 49 also apply to seasonal factories like sugar factories etc.

The State Government is empowered to lay down rules as to the conditions of service of welfare officers. The conditions of service may include matters in respect of pay grades, period of probation and confirmation, dismissal or termination or retirement etc. In the case of *Associated Cement Cos. Ltd.* v. *Sharma,* A.I.R. 1965 S.C. 1595, the Supreme Court held that Rule 6 of Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, requiring the concurrence of the Labour Commissioner before the management can dismiss or terminate the services of Welfare Officer is not ultra vires.

(ix) Powers to make rules to supplement this chapter

The State Government is empowered to make rules exempting factory or class or description of factories from

the compliance of provisions of this chapter, provided alternative arrangements for workers welfare have been made to the satisfaction of the authorities. Such rules may require that workers representatives shall be associated with the management of the welfare arrangements of the workers. (Section 50)

SPECIAL PROVISIONS RELATING TO HAZARDOUS PROCESSES

Section 41A. ***Constitution of Site Appraisal Committees*****:** (1) The State Government may, for purpose of advising it to consider applications for grant of permission for the initial location of a factory involving a hazardous process or for the expansion of any such factory, appoint a site appraisal committee consisting of

(a) the Chief Inspector of the State who shall be its Chairman;

(b) a representative of the Central Board for the prevention and control of water pollution appointed by the Central Government under Section 3 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(c) a representative of the Central Board for the Prevention and Control of Air Pollution referred to in Section 3 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);

(d) a representative of the state board appointed under Section 4 of the Water (Prevention and Control of Pollution) Act, 1974 (6 or 1974);

(e) a representative of the state board for the prevention and control of air pollution referred to in Section 5 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);

(f) a representative of the Department of Environment in the State;

(g) a representative of the Meteorological Department of the Government of India;

(h) an expert in the field of occupational health; and

(i) a representative of the Town Planning Department of the State Government.

and not more than five other members who may be co-opted by the State Government who shall be

(i) a scientist having specialised knowledge of the hazardous process which will be involved in the factory,

(ii) a representative of the local authority within whose jurisdiction the factory is to be established, and

(iii) not more than other person as deemed fit by the State Government.

(2) The Site Appraisal Committee shall examine an application for the establishment of a factory involving hazardous process and make its recommendation to the State Government within a period of ninety days of the receipt of such application in the prescribed form.

(3) Where any process relates to a factory owned or controlled by the Central Government or to a corporation or company owned or controlled by the Central Government, the State Government shall co-opt in the Site Appraisal Committee a representative nominated by the Central Government as a member of the Committee.

(4) The Site Appraisal committee shall have power to call for any information from the person making an application for the establishment or expansion of a factory involving a hazardous process.

(5) Where the State Government has granted approval to an application for the establishment or expansion of a factory involving a hazardous process. It shall not be necessary for an applicant to obtain a further approval from the Central Board or the State Board established under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), and the Air (Prevention and Control of Pollution) Act, 1981 (14 or 1981).

Section 41B. ***Compulsory disclosure of information by the occupier:*** (1) The occupier of every factory involving a hazardous process shall disclose in the manner prescribed all information regarding dangers, including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials

or substances in the manufacture, transportation, storage and other processes, to the workers employed in the factory, the Chief Inspector, the local authority within whose jurisdiction the factory is situated and the general public in the vicinity.

(2) The occupier shall, at the time of registering the factory involving a hazardous process, lay down a detailed policy with respect to the health and safety of the workers employed therein and intimate such policy to the Chief Inspector and the local authority and, thereafter, at such intervals as may be prescribed, inform the Chief Inspector and the local authority of any change made in the said policy.

(3) The information furnished under Sub-section (1) shall include accurate information as to the quantity, specifications and other characteristics of wastes and the manner of their disposal.

(4) Every occupier shall, with the approval of the Chief Inspector, draw up an on-site emergency plan and detailed disaster control measures for his factory and make known to the workers employed therein and to the general public living in the vicinity of the factory the safety measures required to be taken in the event of an accident taking place.

(5) Every occupier of a factory shall,

(a) if such factory engaged in a hazardous process on the commencement of the Factories (Amendment) Act, 1987, within a period of thirty days of such commencement; and

(b) if such factory proposes to engage in a hazardous process at any time after such commencement, within a period of thirty days before the commencement of such process,

inform the Chief Inspector of the nature and details of the process in such form and in such manner as may be prescribed.

(6) Where any occupier of a factory contravenes the provisions of Sub-section (5), the licence issued under Section 6 to such factory shall, notwithstanding any penalty to which the occupier or factory shall be subjected to under the provisions of the this Act, be liable for cancellation.

(7) The occupier of a factory involving a hazardous process shall, with the previous approval of the Chief Inspector, lay down measures for the handling, usage, transportation and storage of hazardous substances inside the factory premises and the disposal of such substances outside the factory premises and publicise them in the manner prescribed among the workers and the general public living in the vicinity.

Test your knowledge

Choose the correct answer

Who is the Chairman of the Site Appraisal Committee?

(a) Chief Factory Officer of the State

(b) Chief Inspector of the State

(c) Chief Labour Officer of the State

(d) Chief Welfare Officer of the State

Correct answer: (b)

Section 41C. ***Specific responsibility of the occupier in relation to hazardous processes*****:** Every occupier of a factory involving any hazardous process shall

(a) maintain accurate and up-to-date health records or, as the case may be, medical records, of the workers in the factory who are exposed to any chemical toxic or any other harmful substances which are manufactured,

stored handled or transported and such records shall be accessible to the workers subject to such conditions as may be prescribed;

(b) appoint persons who possess qualifications and experience in handling hazardous substances and competent to supervise such handling within the factory and to provide at the working place all the necessary facilities for protecting the workers in the manner prescribed;

Provided that where any question arises as to the qualifications and experience of a person so appointed, the decision of the Chief Inspector shall be final;

(c) provide for medical examination of every worker

(a) before such worker is assigned to a job involving the handling of, a working with, a hazardous substance, and

(b) while continuing in such job, and after he has ceased to work in such job at intervals not exceeding twelve months, in such manner as may be prescribed.

Section 41D. ***Power of Central Government to appoint Inquiry Committee:*** (1) The Central Government may, in event of the occurrence of an extraordinary situation involving a factory engaged in a hazardous process, appoint an Inquiry Committee to inquire into the standards of health and safety observed in the factory with a view to finding out the causes of any failure or neglect in the adoption of any measures or standards prescribed for the health and safety of the workers employed in the factory or the general public affected, or likely to be affected, due to such failure or neglect and for the prevention and recurrence of such extraordinary situations in future in such factory or elsewhere.

(2) The Committee appointed under sub-section (1) shall consist of a Chairman and two other members and the terms of reference of the Committee and the tenure of office of its members shall be such as may be determined by the Central Government according to the requirements of the situation.

(3) The recommendations of the Committee shall be advisory in nature.

Section 41E. ***Emergency standards:*** (1) Where the Central Government is satisfied that no standards of safety have been prescribed in respect of a hazardous process or class of hazardous processes or where the standards so prescribed are in-adequate, it may direct the Director-General of Factory Advice Service and Labour Institutes or any institution specialised in matter relating to standards of safety in hazardous processes, to lay down emergency standards for enforcement of suitable standards in respect of such hazardous processes.

(2) The emergency standards laid down under sub-section (1) shall, until they are incorporated in the rules made under this Act, be enforceable and have the same effect as if they had been incorporated in the rules made under this Act.

Permissible limits of exposure of chemical and toxic substances: (1) The maximum permissible threshold limits of exposure of chemical and toxic substances in manufacturing processes (whether hazardous or otherwise) in any factory shall be of the value indicated in the Second Schedule (may refer to the bare Act).

(2) The Central Government may, at any time, for the purpose of giving effect to any scientific proof obtained from specialised institutions or expert in the field, by notification in the Official Gazette, make suitable changes in the said Schedule. (Section 41F)

Workers participation in safety management: (1) The occupier shall, in every factory where a hazardous process takes place, or where hazardous substances are used or handled, set up a safety Committee consisting of equal number of representatives of workers and management to promote co-operation between the workers and the management in maintaining proper safety and health at work and to review periodically the measures taken in that behalf;

Provided that the State Government may, by order in writing and for reasons to be recorded, exempt the occupier of any factory or class of factories from setting up such Committee.

(2) The composition of the safety Committee, the tenure of office of its members and their rights and duties shall be such as may be prescribed. (Section 41G)

Right of workers to warn about imminent danger: (1) Where the workers employed in any factory engaged in a hazardous process have reasonable apprehension that there is a likehood of imminent danger to their lives or health due to any accident, they may bring the same to the notice of the occupier, agent, manger or any other person who is incharge of the factory or the process concerned directly or through their representatives in the Safety Committee and simultaneously bring the same to the notice of the Inspector.

(2) It shall be the duty of such occupier, agent, manager or the person incharge of the factory or process to take immediate remedial action if he is satisfied about the existence of such imminent danger and send a report forthwith of the action taken to the nearest Inspector.

(3) If the occupier, agent, manager or the person incharge referred to in sub-section (2) is not satisfied about the existence of any imminent danger as apprehended by the workers, he shall, nevertheless, refer the matter forthwith to the nearest inspector whose decision on the question of the existence of such imminent danger shall be final. (Section 41H)

WORKING HOURS OF ADULTS

Chapter VI contains provision for regulating working hours for the adult workers and the same are explained below:

(i) Weekly hours

An adult worker shall be allowed to work only for forty eight hours in any week. (Section 51)

(ii) Weekly holidays

Section 52 provides that there shall be holiday for the whole day in every week and such weekly holiday shall be on the first day of the week. However, such holiday may be substituted for any one of the three days immediately before or after the first day of the week provided the manger of the factory has:

(i) delivered a notice at the office of the Inspector; and

(ii) displayed a notice in the factory to this effect.

The effect of all this is that subject to above said conditions (i) and (ii) there shall be a holiday during ten days. In other words no adult worker shall work for more than ten days consecutively without a holiday for the whole day. It is not possible for an employer to change the weekly off solely on the ground that there was no material available for work to be provided on a particular date, avoiding requirements to be fulfilled under Section 25(m) of Industrial Disputes Act regarding lay off (LAB IC 1998 Bom. 1790).

Such notices of substitution may be cancelled by an appropriate notice but not later than the day of weekly holiday or the substituted holiday whichever is earlier.

(iii) Compensatory holidays

When a worker is deprived of any of the weekly holiday as result of passing of an order or making of a rule exempting a factory or worker from the provisions of Section 52, he is entitled to compensatory holidays of equal number of the holidays so lost. These holidays should be allowed either in the same month in which the holidays became due or within next two months immediately following that month. (Section 53)

(iv) Daily hours

According to Section 54, an adult worker, whether male or female shall not be required or allowed to work in a factory for more than 9 hours in any day. Section 54 should be read with Section 59. In other words, the daily hours of work should be so adjusted that the total weekly hours does not exceed 48. The liability of the employer under this Section cannot be absolved on the ground that the workers are willing to work for longer hours without any extra payment.

The daily maximum hours of work specified in Section 54 can be exceeded provided

(i) it is to facilitate the change of shift; and

(ii) the previous approval of the Chief Inspector has been obtained.

(v) Intervals for rest

No adult worker shall work continuously for more than 5 hours unless a rest interval of at least half an hour is given to him. [Section 55(1)]

The State Government or subject to the control of the State Government the Chief Inspector may, by written order for the reasons specified therein, exempt any factory, from the compliance of above provisions to the extent that the total number of hours worked without rest interval does not exceed six. [Section 55(2)]

(vi) Spreadover

Section 56 provides that the daily working hours should be adjusted in such a manner, that inclusive of rest interval under Section 55, they are not spreadover more than 10-1/2 hours on any day. Thus, we see this Section restricts the practice of forcing the stay of workers in the factory for unduly long periods without contravening the provision of Section 54 relating to daily hours of work.

Proviso to Section 56 provides that the limit may be extended upto 12 hours by the Chief Inspector for reasons to be specified in writing.

(vii) Night shifts

Where a worker in a factory works in night shifts, i.e., shift extending beyond mid-night:

(i) the weekly or compensatory holiday shall be a period of 24 consecutive hours begining when his shift ends;

(ii) the following day shall be deemed to the period of 24 hours beginning when shift ends, and the hours he has worked after mid-night shall be counted in the previous day. (Section 57)

(viii) Prohibition of overlapping shifts

According to Section 58(1), where the work in any factory is carried on by means of multiple shifts, the period of shifts should be arranged in such a manner that not more than one relay of workers is engaged in work of the same kind at the same time.

In case of any factory or class or description of factories or any department or section of a factory or any category or description of workers, the State Government or subject to the control of the State Government, the Chief Inspector may, by written order and for specified reasons, grant exemption from the compliance of the provisions of Section 58(1) on such condition as may be deemed expedient. [Section 58(2)]

Test your knowledge

Choose the correct answer

What is the maximum number of hours in a week that an adult worker is allowed to work for?

(a) 35 hours

(b) 40 hours

(c) 45 hours

(d) 48 hours

Correct answer: (d)

(ix) Extra wages for overtime

The following provisions have been made in respect of overtime wages:

Where a worker works in a factory for more than 9 hours in any day or more than 48 hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages. [Section 59(1)]

Meaning of ordinary rate of wages

According to Section 59(2) ordinary rate of wages means:

(i) basic wages; plus,

(ii) allowances which include the cash equivalent of the advantage accruing through the concessional sale to workers of foodgrains and other articles as the worker is for the time being entitled to, but it does not include a bonus and wages for overtime work.

House rent allowance, though payable to employers who were not provided with accommodation, cannot be taken into account to calculate overtime wages of employees provided with such accommodation (*Govind Bapu Salve* v. *Vishwanath Janardhan Joshi,* 1995 SCC (L&S) 308). An employer requiring the workman to work for more than the maximum number of hours overtime work postulated by Section 64(4)(iv) cannot merely on this ground, deny him overtime wages for such excessive hours (*HMT* v. *Labour Court,* 1994 I LLN 156).

Rate of wages for piece rate workers

Where the workers in a factory are paid on piece rate basis, the time rate shall be deemed to be equivalent to the daily average of their full-time earnings for the days on which they actually worked on the same or identical job during the month immediately preceding the calendar month during which the over-time work was done and such time rates shall be deemed to be the ordinary rates of wages of those workers.

However, in case of a worker who has not worked in the immediately preceding calendar month on the same or identical job, the time rate shall be deemed to be equivalent to the daily average of the earnings of the worker for the days on which he actually worked in the week in which the overtime work was done. [Section 59(3)]

(x) Restriction on double employment

According to Section 60, no adult worker shall be required or allowed to work in any factory on any day if he has already been working in any other factory on that day. However, in certain exceptional circumstances as may be prescribed, the double employment may be permitted.

(xi) Notice of period of work for adults

As per Section 61(1), a notice of period of work, showing clearly for everyday the periods during which adult workers may be required to work, shall be displayed and correctly maintained in every factory. The display of notice should be in accordance with the provisions of Section 108(2).

(2) The periods shown in the notice shall not contravene the provisions of the Factories Act regarding:

(a) Weekly hours, Section 51.

(b) Weekly holidays, Section 52.

(c) Compensatory holidays, Section 53.

(d) Daily Hours, Section 54.

(e) Intervals of rest, Section 55.

(f) Spread over of working hours, Section 56 and

(g) Prohibition of overlapping shifts, Section 58.

(3) The periods of work shall be fixed before hand in any of the following ways:

(i) where all the adult workers work during the same periods, the manager of the factory shall fix those periods for such workers generally; [Section 61(3)]

(ii) where all the adult workers are not working during the same period, the manager of the factory shall classify them into groups according to the nature of their work indicating the number of workers in each group; [Section 61(4)]

(iii) the manager shall fix periods of work for each such group provided they are not working on shift basis; [Section 61(5)]

(iv) where any group is working on a system of shifts, periods shall be fixed, by the manager, during which each relay of the group may work provided such relays are not subject to predetermined periodical changes of shift; [Section 61(6)]

(v) where the relays are subject to predetermined periodical changes of shifts, the manager shall draw up a scheme of shifts, whereunder the periods during which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day. [Section 61(7)]

(4) The form of such notice and the manner in which it shall be maintained, may be prescribed by the State Government. [Section 61(8)]

(5) Any proposed change in the system of work in the factory, which necessitates a change in the notice, shall be notified to the Inspector in duplicate before the change is made. No such change shall be made except with the previous sanction of the Inspector and that too until one week has elapsed since the last change, [Section 61(10)]. This provision intends to prevent sudden variations or casual alterations in the periods of work.

(xii) Register of adult workers

The manager of every factory shall maintain a register of adult workers to be available to the Inspector at all times during working hours containing the following particulars:

(i) the name of worker;

(ii) the nature of his work;

(iii) the group, if any, in which he is included;

(iv) where his group works on shifts, the relay to which he is allotted; and

(v) other particulars as may be prescribed.

Where any factory is maintaining a muster roll or a register which contains the abovementioned particulars, the Inspector may, by order in writing, direct that such muster roll or register shall be maintained in place of and be treated as the register of adult workers in that factory (Section 62). Further, an adult worker shall not be required or allowed to work in the factory unless his particulars have been entered in this register. [Section 62(IA)]

Inspection of the register

Section 62(1) empowers the Inspector to demand the production of register of adult workers at all times during working hours or when any work is being carried on in the factory. It is the duty of the manager to produce the register when demanded at the time of inspection. If the manager does not happen to be on the premises at the time of inspection he should make arrangement that the register is made available to the inspector. The evident intention of the legislature is that the register should be at the place where the work is going on. Thus, where a manager is absent at the time of inspection of the factory by the inspector and the assistant manager, who is present at that time fails to produce register on demand, the manager has committed breach of Section 62.

Effect of entry in the register

If the name of any person is entered in the register of adult workers, it is a conclusive evidence that the person is employed in the factory. In other words, there is a presumption that the person whose name appears in the attendance register, is employed in the factory.

Liability to maintain register

The liability to maintain register of adult workers has been imposed on the manager of the factory. The occupier cannot be held liable for failure of the manager to maintain the register. But if somebody else has been made responsible for maintaining such register, manager can plead under Section 101 that the offence was committed by another person including the occupier.

(xiii) Hours of work to correspond with notice under Section 61 and register under Section 62

No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of period of work for adults displayed in the factory and the entries made before had against his name in the register of adult workers of the factory. (Section 63)

Presence of worker during rest period

Where a worker is merely present during the rest period as notified or is found working during that period, there is no contravention of Section 63 and hence not punishable.

(xiv) Power to make exempting rules

(1) The State Government is empowered under Section 64, to make rules defining certain persons holding supervisory or managerial or confidential positions and granting exemptions to them from the provisions of this chapter except Section 66(1)(b) and proviso to Section 66(1) provided that such person shall be entitled for extra wages in respect of overtime under Section 59 if his ordinary rate of wages is not more than Rs. 750 per month.

ADDITIONAL PROVISIONS REGULATING EMPLOYMENT OF WOMEN IN A FACTORY

We have discussed the provisions relating to working hours of adult workers, both male and female. However, certain additional restrictions have been found necessary on the working hours of female workers. Section 66 makes following provisions in this respect.

(1) No exemption may be granted to female worker, from the provisions of Section 54 relating to daily hours of work.

(2) Women workers shall not be employed except between the hours of 6 a.m. and 7 p.m. However, the State Government may by a notification in the Official Gazette, vary these limits to the extent that no woman shall be employed between the hours of 10 p.m. and 5 a.m.

(3) There shall be no change of shifts except after a weekly holiday or any other holiday.

Exemptions from the above restriction

The State Government has been empowered to make rules granting exemptions from above stated restriction in respect of women working in fish-curing or fish canning factories. This has been done with a view to prevent damage to or deterioration in any raw material. However, before granting any exemption, the State Government may lay down any condition as it thinks necessary. Such rules made by the State Government shall remain in force for not more than three years at a time. [Section 66(3)]

EMPLOYMENT OF YOUNG PERSONS AND CHILDREN

Most of the civilised nations restrict the employment of children in the factories. The Royal Commission on Labour observed that this is based on the principle that the supreme right of the State to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights. Workers as young as five years of age may be found in some of these places working without adequate meal, intervals or weekly rest days at as low as 2 annas in the case of those tenderest years. Therefore, to curb these and other evil practices of employing children, following legislative measures have been adopted.

(i) General prohibition as to employment of children

According to Section 67, a child who has not completed his fourteenth year of age, shall not be employed in any factory.

(ii) Employment of children and Adolescents—Conditions

According to Section 68, children completing their fourteenth year or an adolescent, shall not be required to work in any factory, unless following conditions are fulfilled:

(i) the manager of the factory has obtained a certificate of fitness granted to such young person under Section 69;

(ii) while at work, such child or adolescent carries a token giving reference to such certificate.

(iii) What is a certificate of fitness

Under Section 69 of the Act, before a young person is employed in the factory, a Certifying Surgeon has to certify that such person is fit for that work in the factory. To get this certificate, an application to a Certifying Surgeon has to made either:

(i) by the young person himself; or

(ii) by his parent or guardian; or

(iii) by the manager of the factory.

If the application is made by a person other than the manager, it must be accompanied by a document, signed by the manager, that such young person will be employed in the factory if a certificate of fitness is granted in his favour. [Section 69(1)]

(iv) Certificate of fitness to work as a child

The Certifying Surgeon may grant or renew to any such young person, a certificate of fitness, in the prescribed form to work as a child, if, after examination, he is satisfied that

(i) such young person has completed his 14th year;

(ii) has attained the prescribed physical standards; and

(iii) is fit for such work. [Section 69(2)(a)]

(v) Certificate of fitness to work as an adult

If the Certifying Surgeon, after examination is satisfied that such a young person has completed his 15th year and is fit for a full days work in the factory, he may grant or renew a certificate of fitness, in the prescribed form, to such young person, to work as an adult. [Section 69(2)(b)]

Proviso to Section 69(2) provides that before granting or renewing a certificate of fitness, the Certifying Surgeon must have personal knowledge of the place of the work and manufacturing process wherein such young person will be employed. If he has no personal knowledge, he must examine such place personally.

Other features of certificate of fitness

(i) *Validity:* The certificate is valid for a period of 12 months from the date of issue [Section 69(3)(a)].

(ii) *Conditions of Issue:* It may be issued subject to conditions in respect to (i) the nature of work in which a young person may be employed, or (ii) the re-examination of such young person before the expiry of 12 months. [Section 69(3)(b)]. Such young person shall not be required or allowed to work except in accordance with these conditions. [Section 69(6)]

(iii) *Revocation of the certificate:* The certificate can be revoked by the certifying surgeon, at any time if, in his opinion, the worker is no longer fit to work as such in the factory. [Section 69(4)]

(iv) *Certifying Surgeon to state reasons for refusal or revocation:* Where a Certifying Surgeon refuses to grant or renew a certificate or revokes a certificate he shall state his reasons in writing if requested by any person, for doing so. [Section 69(5)]

(v) *Fee for the certificate:* Any fee payable for a certificate shall be paid by the occupier and it cannot be recovered from the young person, his parents, or guardian. [Section 69(7)]

Test your knowledge

Choose the correct answer

Who is liable to pay the fee for a Certificate of Fitness?

(a) The occupier of the factory

(b) The person himself

(c) The person's guardian

(d) Trade Union

Correct answer: (a)

(iv) Effect of certificate of fitness granted to adolescents

(1) The effect of granting a certificate of fitness to an adolescent and who while at work in a factory carries a

token giving reference to such certificate is that he is deemed to be an adult for the purpose of Chapter VI relating to working hours, and Chapter VIII relating to annual leave with wages. [Section 70(1)]

(2) No female adolescent or a male adolescent who has not attained the age of seventeen years but who has been granted a certificate of fitness to work in a factory as an adult, shall be required or allowed to work in any factory except between 6 a.m. and 7 p.m.

Provided that the State Government may by notification in the Official Gazette, in respect of any factory or group or class or description of factories:

(i) vary the limits laid down in this sub-section, so, however, that no such section shall authorise the employment of any female adolescent between 10 p.m. and 5 a.m.

(ii) grant exemption from the provisions of this sub-section in case of serious emergency where national interest is involved. (Section 70 IA)

(3) Where an adolescent has not been granted this certificate, he shall notwithstanding his age, be deemed to be a child for all the purposes of this Act. [Section 70(2)]

(v) Penalty for using false certificate of fitness

If a certificate of fitness is granted to any person, no other person can use it or attempt to use it. The person granting the certificate, cannot allow its use or attempt to be used by another person. In other words, where a person knowingly uses or attempts to use a false certificate and thus, contravenes above provisions, can be punished with imprisonment extending up to two months or with fine upto Rs. 1000 or with both. (Section 98)

Working hours for children

Section 71, lays down further restrictions on the employment of children in the factories. These restrictions as stated below relate to working hours for children.

(1) A child shall not be employed or permitted to work for more than 4-1/2 hours in any day. [Section 71(1)(a)]

(2) He is not permitted to work during night, i.e., during a period of at least 12 consecutive hours, including intervals, between 10 p.m. and 6 a.m.

(3) The period of work shall be limited to two shifts only. [Section 71(2)]

(4) These shifts shall not overlap.

(5) Shifts should not spreadover more than 5 hours each.

(6) Each child shall be employed in only one of the relays.

(7) The relays should not be changed more frequently than once in a period of 30 days, otherwise previous permission of the Chief Inspector should be sought in writing.

(8) The provision relating to weekly holiday under Section 52, also apply to child workers. But Section 7(3) does not permit any exemption in respect of these provisions.

(9) No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory. [Section 71(4)]

(10) No female child shall be required or allowed to work in any factory except between 8 a.m. and 7 p.m.

The Act not only prohibits the double employment of a child by the occupier or manager, but also prohibits under Section 99 his parent or guardian or person having custody of or control over him or obtaining any direct benefit from his wages, from allowing him to go for double employment. If they contravene this provision, they can be punished with a fine extending upto one thousand rupees unless the child works without the consent or connivance of his parent or guardian or such other person.

Notice of periods of work for children

(1) A notice, showing clearly for every day the period during which children may be required or allowed to work, shall be displayed and correctly maintained as per Section 108(2) in every factory which employs children.

(2) The periods of work shall be fixed beforehand according to the method prescribed for adult workers under Section 61.

(3) The periods of work so fixed shall not contravene the provisions of Section 71 relating to working hours for children. [Section 72(2)]

(4) The provisions of sub-sections (8), (9) and (10) of Section 61 shall apply to such a notice. (Section 72)

Register of child workers

According to Section 73(1), in every factory, in which children are employed, a register of child workers should be maintained and should be available for inspection by the inspector at all times during working hours or when any work is being carried on in the factory.

Hours of work to correspond with notice under Section 72 and register under Section 73

According to Section 74, the employment of any child shall be in accordance with the notice of periods of work for children to be displayed under Section 72 and the entries made beforehand against his name in the register of child workers of the factory maintained under Section 73.

Power to require medical examination

Section 75 empowers the inspector to serve on the manager of a factory, a notice requiring medical examination of a person by a surgeon, if in his opinion, such person is a young person and is working without a certificate of fitness or, such person, though in possession of certificate of fitness, is no longer fit to work in the capacity stated therein.

The inspector may further direct that such person shall not be employed or permitted to work in any factory until he has been examined and also granted a certificate of fitness or fresh certificate of fitness or has been certified by the Certifying Surgeon not to be a young person.

Certain other provisions of law not barred

The provisions relating to the employment of young persons in factories shall be in addition to, and not in derogation of the provisions of the Employment of Children Act, 1938. (Section 77)

Test your knowledge

Choose the correct answer

What is the maximum number of hours that a child can be employed for as per the Factories Act, 1948?

(a) 3½ hours in any day

(b) 4½ hours in any day

(c) 5½ hours in any day

(d) 6½ hours in any day

Correct answer: (b)

ANNUAL LEAVE WITH WAGES

This aspect has been dealt with under Chapter VIII of the Act.

Application of the Chapter

(1) According to Section 78(1), the provisions contained in this chapter shall not operate to the prejudice of any right to which a worker may be entitled under any other law or under the terms of any award, agreement including settlement or contract of service.

(2) Where such award, agreement including settlement or contract of service provides for a longer annual leave with wages than provided in this Chapter, the worker shall be entitled to such longer annual leave but if those provisions are less favourable, then this Chapter shall apply [proviso to Section 78(1)].

(3) The provisions of this chapter do not apply to workers in any factory of any railway administration by the Government, who are governed by leave rules approved by the Central Government.

Annual leave with wages

Under Section 79, the following provisions have been made with regard to annual leave with wages.

Basis of leave

(a) According to Section 79(1), where a worker has worked for a minimum period of 240 days or more in a factory during any calendar year, i.e., the year beginning from 1st January, he is entitled to leave with wages on the following basis–

  (i) for adults – One day for every 20 days of work performed by them during the previous calendar year.

  (ii) for children – One day for every fifteen days of work performed by him during the previous calendar year.

(b) If a worker does not commence his services from 1st January, he is entitled to these leaves at the above mentioned rates provided he has worked for 2/3rd of the total number of days in the remaining part of the calendar year.

(c) These leaves are exclusive of all holidays whether occurring during or at either end of the period of leave.

(d) In calculating leave, fraction of leave of half a day or more shall be treated as one full day's leave and fraction of less than half a day shall be ignored.

(e) Computation of qualifying period of 240 days: For the purpose of calculating the minimum period, following periods are also included:

  (i) any days of lay-off as agreed or as permissible under the Standing Orders.

  (ii) for female workers, period of maternity leave not exceeding 12 weeks.

  (iii) leave earned in the year prior to that in which the leave is enjoyed.

Though the above mentioned days included in calculated the qualifying period, but the worker will not be entitled to earn leave for these days.

A worker who is discharged or dismissed from service or quits his employment or is superannuated or dies while in service during the course of calendar year, he or his heir or nominee as the case may be, shall be entitled to wages in lieu of the quantum of leave to which he was entitled immediately before his discharge, dismissal, quitting of employment, superannuation or death, calculated at the rates specified in sub-section (1), even if he had not worked for the entire period specified in sub-section (1) or (2) making him eligible to avail of such leave and such payment shall be made:

(i) where the worker is discharged or dismissed or quits employment, before the expiry of second working day from the date of such discharge, dismissal or quitting;

(ii) where the worker is superannuated or dies while in service, before the expiry of two months from the date of such superannuation or death. [Explanation to Section 79(1)]

Accumulation or carry forward of leaves

If any worker does not avail any earned leave entitled to him during the calendar year, it can be carried forward to the next calendar year subject to the maximum of 30 days for an adult worker and 40 days for a child worker.

But if a worker applies for leave with wages and is not granted such leave in accordance with any approved scheme under Sections 79(8) and (9), or in contravention of Section 79(10), he can carry forward the leave refused, without any limit. [Section 79(5)]

How to apply for leave with wages

(i) If a worker wants to avail leave with wages earned by him during the year, he must apply in writing, to the manager of the factory at least 15 days before the date on which he wishes to go on leave. [Section 79(6)]

(ii) In case a worker is employed in a public utility service as defined in Section 2(n) of the Industrial Disputes Act, 1947, the application for leave with wages shall be made at least 30 days in advance.

(iii) The annual leave with wages cannot be availed for more than three times during any year.

(iv) The application to avail annual leave with wages for illness purposes can be made at any time. [Section 79(7)]

(v) An application for leave which does not contravene the provisions of Section 79(6) shall not be refused unless the refusal is in accordance with the scheme for the time being in operation under sub-sections (8) and (9) of Section 79. [Section 79(10)]

Scheme of leave

To ensure continuity of work, the grant of leave can be regulated. For this purpose, the occupier or the manager should prepare a scheme in writing, regulating the grant of leave to the workers and lodge it with the Chief Inspector.

The Scheme should be prepared in agreement with the following bodies or persons:

(a) (i) Works Committee formed under Section 3 of the Industrial Disputes Act, 1947, or

(ii) Such other Committee formed under any other Act, or

(iii) In the absence of any of the above Committee, the representatives of the workers chosen in the prescribed manner [Section 79(8)].

(b) The scheme shall be valid for 12 months from the date on which it comes into force. It can be renewed, with or without modification, for a further period of 12 months [Section 79(9)].

A notice of renewal shall be sent to the Chief Inspector.

(c) The Scheme shall be displayed at some conspicuous and convenient places in the factory. [Section 79(9)]

Wages during leave period

According to Section 80(1), for the leave allowed to a worker under Section 78 or 79, he shall be entitled to wages at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the month immediately preceding his leave. Such full time earning will also include the dearness allowance and cash equivalent of the advantage accruing through the concessional sale to the workers of foodgrains and other articles. But will exclude any overtime wages and bonus.

Provided that in the case of a worker who has not worked on any day during the calendar month immediately preceding his leave, he shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the last calendar month preceding his leave, in which he actually worked, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the workers of foodgrains and other articles.

The cash equivalent of the advantage accruing through the concessional sale to the workers of foodgrains and other articles shall be computed as often as may be prescribed, on the basis of the maximum quantity of foodgrains and other articles admissible to a standard family. [Section 80(2)]

"Standard family" means a family consisting of a worker, his/her spouse and two children below the age of 14 years requiring in all three adult consumption units. [Expl. I to Section 80(2)]

"Adult consumption unit" means the consumption unit of a male above the age of 14 years, and the consumption unit of a female above the age of 14 years, and that of a child below the age of 14 years, shall be calculated at the rates of 0.8 and 0.6 respectively of one adult consumption unit. [Expl. II to Section 80(2)]

Payment in advance in certain cases

Section 81 provides that where an adult worker has been allowed leave for not less than 4 days and a child worker for not less than 5 days, wages due for the leave period should be paid in advance, i.e., before his leave begins.

Mode of recovery of unpaid wages

Any unpaid wages due to the workers under this Chapter, can be recovered as delayed wages under the provisions of the Payment of Wages Act, 1936. (Section 82)

Test your knowledge

State whether the following statement is "True" or "False"

The annual leave with wages cannot be availed for more than 3 times during any year.

Correct answer: True

PENALTIES AND PROCEDURES

(1) ***General penalties for offences:*** If there is any contravention of any of the provisions of this Act or any rules or order made thereunder, the occupier and manager shall each be guilty of an offence and punishable with imprisonment for a term which may extend to two years or with fine which may extend to Rs. one lakh or with both and if the contravention is continued after conviction, with a further fine of Rs. one thousand for each, day till contravention continues.

The provisions of Section 92 further provides penalty for contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 which has resulted in an accident causing death or serious bodily injury, the fine shall not be less than Rs. 25,000 in the case of an accident causing death and Rs. 5,000 in case of serious bodily injury. Explanation to this Section defines serious bodily injury, which involves the permanent loss of the use of or permanent injury to any limb or sight or hearing or the fracture of any bone excluding the fracture (not being fracture of more than one) bone or joint of any phalanges of the hand or foot.

Section 94 stipulates for enhanced penalty for any person who has already been convicted under Section 92 of the Act, and is again guilty of an offence involving contravention of the same provisions. Punishment for subsequent conviction includes imprisonment for a term which may extend to three years or with fine which may not be less than Rs. 10,000 but which may extend to Rs. two lakhs or with both. Provided that the Court may, for any adequate and special reasons to to be mentioned in the judgement impose a fine of less than Rs. 10,000. Provided further, that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than Rs. 35,000 in case of death and Rs. 10,000 in the case of an accident causing serious bodily injury.

No cognizance shall be taken of any conviction made more than two years before the commission of the offence for which the person is subsequently convicted.

(2) ***Liabilities of owner of premises in certain circumstances:*** Section 93 provides that where in any premises separate building are being leased out by the owner to different occupiers for use as separate factories, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services such as approach roads, drainage, water-supply, lighting and sanitation. [Section 93(1)]

Where in any premises, independent floors or flats are leased to different occupiers for use as separate factories, the owner shall be liable as if he were the manager or occupier of a factory for any contravention of the provisions of this Act in respect of (i) latrines, urinals, washing facilities and common supply of water for this purpose; (ii) fencing of machinery and plant belonging to the owner and not entrusted to the custody or use of an occupier; (iii) safe means of access to floors or flats and maintenance and cleanliness of staircase and common passages; (iv) precautions in case of fire; (v) maintenance of hoists and lifts; and (vi) maintenance of any other common facilities provided in the premises. [Section 93(3)]

But the liability of the owner [under Section 93(3) arises only wherein any premises, independent rooms with common latrine, urinals and washing facilities are leased to different occupiers for use as separate factories so that the owner should also comply with the provisions of maintaining such facilities. (Section 93(5)]

For the purposes of sub-sections (5) and (7) computing the total number of workers employed, the whole of the premises shall be deemed to be single factory. [Section 93(3)]

The owner is liable for contravention of Chapter III except Sections 14 and 15; Chapter IV except Sections 22, 23, 27, 34, 35 and 36 where in any premises, portions of a room or a shed leased out to different occupiers for use as separate factories: Provided that in respect of the provisions of Sections 21, 24 and 32, the owners liability shall be only in so far as such provisions relate to things under his control and the occupier shall be responsible for complying with the provisions of Chapter IV in respect of plant and machinery belonging to or supplied by him and for contravention of Section 42.

The Chief Inspector has been empowered to issue orders to the owners in respect of the carrying out of the provisions as mentioned above but subject to the control of the State Government.

(3) ***Penalty for obstructing Inspector:*** Section 95 lays down penalty of imprisonment for six months or fine of Rs. 10,000 or with both for wilfully obstructing an inspector in the exercise of any power conferred on him by or under this Act or fails to produce any registers or other documents to him on demand or concealing or preventing any worker from appearing before or being examined by an Inspector.

(4) ***Penalty for wrongfully disclosing of results of analysis under Section 91:*** Section 96 provides imprisonment extending up to a term of six months and fine upto Rs. 10,000 or both for the wrongful disclosure of results of analysts of the analysis done under Section 91 of the Act.

(4A) ***Penalty for contravention of Sections 41B, 41C and 41H:*** Section 96A provides punishment of 7 years imprisonment or fine which may extend to Rs. two lakhs for the non-compliance with or contravention of any of

the provisions of Section 41B, 41C, or 41H or rules made thereunder by any person. In case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention. If such failure, contravention continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to ten years.

(5) Offences by workers and penalties therefor:

(i) Section 97 lays down that if any worker contravenes the provision of this Act or any rules or orders made thereunder imposing any duty or liability on workers he will be punishable with fine which may extend to Rs. 500/-

(ii) Section 98 imposes penalty for using false certificate of fitness. Such punishment involves imprisonment for such a term which may not extend to two months or with fine which may extend to Rs. 1,000/- or with both.

(6) *Penalty for permitting double employment of child by parents or guardians* is stipulated under Section 99. Such an act is punishable with fine extending up to Rs. 1,000 unless it appears to the Court that the child so worked without consent and connivance of such parents, guardian or person.

(7) *Onus of providing limits of what is practicable etc.:* Onus of proving is on the person who is alleged to have failed to comply with such duty etc. to prove that he has taken all measures or it was not reasonable practicable. (Section 104A)

Test your knowledge

Choose the correct answer

What is the penalty payable by parents/ guardian for permitting double employment of a child?

(a) Rs. 500

(b) Rs. 1,000

(c) Rs. 2,000

(d) Rs. 3,000

Correct answer: (b)

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from ……

   Or

   The factory/establishment is covered under the provisions of this Act by a notification dated …….. given by the government in the official gazette.

2. During the year under review, the provisions of this Act continued to have effect notwithstanding any reduction in the employees below the Statutory Minimum.

3. The factory/establishment has submitted to the authorities the returns in the prescribed form containing the particulars relating to the persons employed as per the provisions of the Act, regulation and rules made in this behalf during the said financial year.

4. Establishment employs ……. Number of workers with the aid of power during the financial year.

Or

Establishment employs …… number of workers without the aid of power during the financial year.

5. the establishment has obtained permission from government/Chief Inspector of Factories for the site on which the factory is to be situated vide letter dated …….. during the financial year.
6. The notice intimating occupying or using a premises as a factory with effect from ……. was given to the Chief Inspector on …….
7. During the year under review, there has been a change in the occupier and the occupier has duly complied with the provisions of the Factories Act and has given due notice thereof.
8. The establishment has taken adequate precaution and care for the maintenance of the health of the workers during the financial year.
9. The establishment has taken adequate precaution and care for the maintenance of the safety of the workers during the financial year.
10. The establishment has taken adequate precaution and care for the maintenance of the welfare of workers during the financial year.
11. The establishment had duly complied with the provisions relating to the working hours of the adult workers during the said financial year.
12. The establishment has duly complied with the provisions relating to the employment of children during the financial year.
13. The establishment does not carry-on any manufacturing process or operation which in the opinion of the State Government, exposes any persons employed in it to a serious risk of bodily injury, poisoning or disease during the financial year.
14. The establishment has given due notice to authorities in respect of the accident causing death, or which causes any bodily injury by reason of which the person injured is prevented from working for a period of forty-eight hours or more immediately following the accident during the financial year.
15. The establishment has given due notice to authorities in respect of the dangerous occurrence happened which caused bodily injury or disablement during the financial year.

Or

The establishment has given due notice to authorities in respect of the dangerous occurrence happened during the financial year. However, it caused no bodily injury or disablement.

16. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

THE FIRST SCHEDULE

[*See* Section 2(cb)]

List of Industries involving Hazardous Processes

1. Ferrous Metallurgical Industries
   - Integrated Iron and Steel
   - Ferro-alloys

- Special Steels.

2. Non-ferrous Metallurgical Industries
   - Primary Metallurgical Industries, namely, zinc, lead copper, managanese and aluminium.
3. Foundries (ferrous and non-ferrous).
   - Castings and forgings including cleaning or smoothening/roughening by sand and shot blasting.
4. Coal (including coke) industries
   - Coal, Lignite, Coke, etc.
   - Fuel Gases (including Coal Gas, Producer Gas, Water Gas).
5. Power Generating Industries.
6. Pulp and paper (including paper products) industries.
7. Fertiliser industries
   - Nitrogenous
   - Phosphatic
   - Mixed.
8. Cement Industries
   - Portland Cement (including slag cement, puzzolona cement and their products).
9. Petroleum Industries
   - Oil Refining
   - Lubricating Oils and Greases.
10. Petro-chemical Industries.
11. Drugs and Pharmaceutical Industries
    - Narcoties, drugs and Pharmaceuticals.
12. Fermentation Industries (Distilleries and Breweries).
13. Rubber (Synthetic) Industries.
14. Paints and Pigment Industries.
15. Leather tanning Industries.
16. Electroplating Industries.
17. Chemical Industries
    - Coke Oven-products and Coaltar distillation products.
    - Industrial Gases (nitrogen, oxygen, acetylene, argon, carbondioxide, hydrogen, sulphur dioxide, nitrous oxide, halogenated hydrocarbon, ozone, etc.
    - Industrial carbon.
    - Alkalies and Acids.
    - Chromates and dichromates.

- Leads and its compounds.
- Electrochemicals (metalic sodium, potassium and magnesium, chlorates, perohlorates and peroxides).
- Electrothermal produces (artificial abrasive, calcium carbide).
- Nitrogenous compounds (cyanides, cyanamides, and other nitrogenous compounds).
- Phosphorous and its compounds.
- Halogens and Halogenated compounds (Chlorine, Flourine, Bromine and Iodine).
- Explosives (including industrial explosives and detonators and fuses).

18. Insecticides, Fungicides, Herbicides and other Pesticides Industries.
19. Synthetic Resin and Plastics.
20. Man-made Fibre (Cellulosic and non-cellulosic) industry.
21. Manufacture and repair of electrical accumulators.
22. Glass and Ceramics.
23. Grinding or glazing of metals.
24. Manufacture, handling and processing of asbestos and its products.
25. Extraction of oils and fats from vegetable and animal sources.
26. Manufacture, handling and use of benzene and substances containing benzene.
27. Manufacturing processes and operations involving carbon disulphide.
28. Dyes and dyestuff including their intermediates.
29. Highly flammable liquids and gases.

THE THIRD SCHEDULE

[*See* Sections 89 and 90]

List of Notifiable Diseases

1. Lead poisoning including by any preparation or compound of lead or their sequelae.
2. Lead tetra ethyl poisoning.
3. Phosphorus poisoning or its sequelae.
4. Mercury poisoning or its sequelae.
5. Manganese poisoning or its sequelae.
6. Arsenic poisoning or its sequelae.
7. Poisoning by nitrous fumes.
8. Carbon disulphide poisoning.
9. Benzene poisoning, including poisoning by any of its homologues, their nitro or amino derivatives or its sequelae.
10. Chrome ulceration or its sequelae.

11. Anthrax.
12. Silicosis.
13. Poisoning by halogens or halogen derivatives of the hydro-carbons of the aliphatic series.
14. Pathological manifestation due to
    (a) radium or other radioactive substances.
    (b) x-rays.
15. Primary epitheliomatus cancer of the skin.
16. Toxic anaemia.
17. Toxic jaundice due to poisonous substances.
18. Oil acne or dermatitis due to mineral oils and compounds containing mineral oil base.
19. Byssionosis.
20. Asbestosis.
21. Occupational or contract dermatitis caused by direct, contract with chemicals and paints. These are of two types, that is, primary irritants and allergic sensitizers.
22. Noise induced hearing loss (exposure to high noise levels).
23. Beriyllium poisoning.
24. Carbon monoxide.
25. Coal miners pnuoumoconiosis.
26. Phosgene poisoning.
27. Occupational cancer.
28. Isocyanates poisoning.
29. Toxic nephritis.

LESSON ROUND UP

- The law relating to factories is governed under the Factories Act, 1948.
- The Act has been enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose, it seeks to impose upon the owner or the occupier certain obligations to protect the workers and to secure for them employment in conditions conductive to their health and safety.
- It applies to factories covered under the Factories Act, 1948. The industries in which ten (10) or more than ten workers are employed on any day of the preceding twelve months and are engaged in manufacturing process being carried out with the aid of power or twenty or more than twenty workers are employed in manufacturing process being carried out without the aid of power, are covered under the provisions of this Act.
- The State Governments assume the main responsibility for administration of the Act and its various provisions by utilizing the powers vested in them.
- The State Governments carry out the administration of the Act through Inspecting Staff; Certifying Surgeons; welfare Officers; Safety Officers.

- The Act stipulates measures to be taken by factories for health, safety and welfare of the workers, that apart it also lays down the provisions relating to working hours of adult workers, both male and female. However, certain additional restrictions have been imposed on the working hours of female workers.
- If there is any contravention of any of the provisions of this Act or any rules or order made thereunder, the occupier and manager shall each be guilty of an offence and punishable with imprisonment for a term which may extend to two years or with fine which may extend to Rs. One lakh or with both and if the contravention is continued after conviction, with a further fine of Rs. One thousand for each, day till contravention continues.

SELF TEST QUESTIONS

1. Discuss the object and scope of the Factories Act, 1948.
2. Define the terms: Adult, Adolescent, Manufacturing Process, Factory and Worker.
3. Briefly enumerate provisions of the Act ensuring health and welfare of the workers in a factory.
4. What are the provisions regarding annual leave with wages?
5. Write short notes on:
   (a) Powers of the Inspectors.
   (b) Hazardous processes.
   (c) Occupier.

Lesson 2

Minimum Wages Act, 1948

LESSON OUTLINE

- Learning Objectives
- Object and Scope
- Important Definitions
- Fixation of minimum rates of wages
- Revision of minimum wages
- Manner of fixation/revision of minimum wages
- Minimum rate of wages
- Procedure for fixing and revising minimum wages
- Advisory Board
- Central Advisory Board
- Minimum Wages – Whether to be paid in cash or kind
- Payment of minimum wages is obligatory on employer
- Fixing hours for a normal working day
- Payment of overtime
- Wages of worker who workers less than normal working
- Minimum time – Rate Wages for piece work
- Maintenance of Registers and records
- Authority & claims
- Offences Penalties
- Compliances under the Act

LEARNING OBJECTIVES

The Minimum Wages Act was enacted primarily to safeguard the interests of the workers engaged in the unorganized sector. The Act provides for fixation and revision of minimum wages of the workers engaged in the scheduled employments. Under the Act, both central and State Governments are responsible, in respect of scheduled employments within their jurisdictions to fix and revise the minimum wages and enforce payment of minimum wages.

In case of Central sphere, any Scheduled employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a mine, oil-field or major port, or any corporation established by a Central Act, the Central Government is the appropriate Government while in relation to any other Scheduled employment, the State Government is the appropriate Government. The Act is applicable only for those employments, which are notified and included in the schedule of the Act by the appropriate Governments. According to the Act, the appropriate Governments review/revise the minimum wages in the scheduled employments under their respective jurisdictions at an interval not exceeding five years.

However, there is large scale variation of minimum wages both within the country and internationally owing to differences in prices of essential commodities, paying capacity, productivity, local conditions, items of the commodity basket, differences in exchange rates etc.

The objective of this study lesson is to thoroughly acclimatize the students with the law relating to minimum wages.

The Minimum Wages Act, 1948, is an Act to provide for fixing minimum rates of wages in certain employments. The employments are those which are included in the schedule and are referred to as 'Scheduled Employments'.

OBJECT AND SCOPE OF THE LEGISLATION

The Minimum Wages Act was passed in 1948 and it came into force on 15th March, 1948. The National Commission on Labour has described the passing of the Act as landmark in the history of labour legislation in the country. The philosophy of the Minimum Wages Act and its significance in the context of conditions in India, has been explained by the Supreme Court in *Unichoyi* v. *State of Kerala* (A.I.R. 1962 SC 12), as follows:

> *"What the Minimum Wages Act purports to achieve is to prevent exploitation of labour and for that purpose empowers the appropriate Government to take steps to prescribe minimum rates of wages in the scheduled industries. In an underdeveloped country which faces the problem of unemployment on a very large scale, it is not unlikely that labour may offer to work even on starvation wages. The policy of the Act is to prevent the employment of such sweated labour in the interest of general public and so in prescribing the minimum rates, the capacity of the employer need not to be considered. What is being prescribed is minimum wage rates which a welfare State assumes every employer must pay before he employs labour*".

According to its preamble the Minimum Wages Act, 1948, is an Act to provide for fixing minimum rates of wages in certain employments. The employments are those which are included in the schedule and are referred to as 'Scheduled Employments'. The Act extends to whole of India.

IMPORTANT DEFINITIONS

Appropriate Government [Section 2(b)]

"Appropriate Government" means –

(i) in relation to any scheduled employment carried on by or under the authority of the Central or a railway administration, or in relation to a mine, oilfield or major part or any corporation established by a Central Act, the Central Government, and

(ii) in relation to any other scheduled employment, the State Government.

Employee [Section 2(i)]

"Employee" means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an outworker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale purpose of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises, net being premises under the control and management of that person; and also includes an employee declared to be an employee by the appropriate Government; but does not include any member of Armed Forces of the Union.

Employer [Section 2(e)*]*

"Employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes, except, in sub-section (3) of Section 26 –

(i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person named under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, as manager of the factory;

(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for the supervision and control of employees or where no person of authority is so appointed, the Head of the Department;

(iii) in any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the Chief Executive Officer of the local authority;

(iv) in any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person responsible to the owner of the supervision and control of the employees or for the payment of wages.

The definitions of "employees" and "employer" are quite wide. Person who engages workers through another like a contractor would also be an employer (1998 LLJ I Bom. 629). It was held in *Nathu Ram Shukla* v. *State of Madhya Pradesh* A.I.R. 1960 M.P. 174 that if minimum wages have not been fixed for any branch of work of any scheduled employment, the person employing workers in such branch is not an employer with the meaning of the Act. Similarly, in case of *Loknath Nathu Lal* v. *State of Madhya Pradesh* A.I.R. 1960 M.P. 181 an out-worker who prepared goods at his residence, and then supplied them to his employer was held as employee for the purpose of this Act.

Scheduled employment [Section 2(g)]

"Scheduled employment" means an employment specified in the Schedule or any process or branch of work forming part of such employment.

Note: The schedule is divided into two parts namely, Part I and Part II. When originally enacted Part I of Schedule had 12 entries. Part II relates to employment in agriculture. It was realised that it would be necessary to fix minimum wages in many more employments to be identified in course of time. Accordingly, powers were given to appropriate Government to add employments to the Schedule by following the procedure laid down in Section 21 of the Act. As a result, the State Government and Central Government have made several additions to the Schedule and it differs from State to State.

Wages [Section 2(h)]

"Wages" means all remunerations capable of being expressed in terms of money, which would, if the terms of the contract of employment, express of implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance but does not include:

(i) the value of:

(a) any house accommodation, supply of light, water medical;

(b) any other amenity or any service excluded by general or social order of the appropriate Government;

(ii) contribution by the employer to any Pension Fund or Provides Fund or under any scheme of social insurance;

(iii) any traveling allowance or the value of any traveling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment;

(v) any gratuity payable on discharge.

Test your knowledge

Choose the correct answer

What does 'Appropriate Government' mean in relation to any scheduled employment?

(a) The Central Government

(b) The railway administration

(c) The municipal administration

(d) The State Government

Correct answer: (a), (b) and (d)

FIXATION OF MINIMUM RATES OF WAGES [Section 3(1)(a)]

Section 3 lays down that the 'appropriate Government' shall fix the minimum rates of wages, payable to employees in an employment specified in Part I and Part ii of the Schedule, and in an employment added to either part by notification under Section 27. In case of the employments specified in Part II of the Schedule, the minimum rates of wages may not be fixed for the entire State. Parts of the State may be left out altogether. In the case of an employment specified in Part I, the minimum rates of wages must be fixed for the entire State, no parts of the State being omitted. The rates to be fixed need not be uniform. Different rates can be fixed for different zones or localities: [*Basti Ram* v. *State of A.P.* A.I.R. 1969, (A.P.) 227].

The constitutional validity of Section 3 was challenged in *Bijoy Cotton Mills* v. *State of Ajmer, 1955 S.C. 3*. The Supreme Court held that the restrictions imposed upon the freedom of contract by the fixation of minimum rate of wages, though they interfere to some extent with freedom of trade or business guarantee under Article 19(1)(g) of the Constitution, are not unreasonable and being imposed and in the interest of general public and with a view to carrying out one of the Directive Principles of the State Policy as embodied in Article 43 of the Constitution, are protected by the terms of Clause (6) of Article 9.

Notwithstanding the provisions of Section 3(1)(a), the "appropriate Government" may not fix minimum rates of wages in respect of any scheduled employment in which less than 1000 employees in the whole State are engaged. But when it comes to its knowledge after a finding that this number has increased to 1,000 or more in such employment, it shall fix minimum wage rate.

REVISION OF MINIMUM WAGES

According to Section 3(1)(b), the 'appropriate Government' may review at such intervals as it may thing fit, such intervals not exceeding five years, and revise the minimum rate of wages, if necessary. This means that minimum wages can be revised earlier than five years also.

MANNER OF FIXATION/REVISION OF MINIMUM WAGES

According to Section 3(2), the 'appropriate Government' may fix minimum rate of wages for:

(a) time work, known as a Minimum Time Rate;

(b) piece work, known as a Minimum Piece Rate;

(c) a "Guaranteed Time Rate" for those employed in piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis; (This is intended to meet a situation where operation of minimum piece rates fixed by the appropriate Government may result in a worker earning less than the minimum wage), and

(d) a "Over Time Rate" i.e. minimum rate whether a time rate or a piece rate to apply in substitution for the minimum rate which would otherwise be applicable in respect of overtime work done by employee.

Section 3(3) provides that different minimum rates of wages may be fixed for –

(i) different scheduled employments;

(ii) different classes of work in the same scheduled employments;

(iii) adults, adolescents, children and apprentices;

(iv) different localities

Further, minimum rates of wages may be fixed by any one or more of the following wage periods, namely:

(i) by the hour,

(ii) by the day,

(iii) by the month, or

(iv) by such other large wage periods as may be prescribed;

and where such rates are fixed by the day or by the month, the manner of calculating wages for month or for a day as the case may be, may be indicated.

However, where wage period has been fixed in accordance with the Payment of Wages Act, 1986 vide Section 4 thereof, minimum wages shall be fixed in accordance therewith [Section 3(3)].

MINIMUM RATE OF WAGES (Section 4)

According to Section 4 of the Act, any minimum rate of wages fixed or revised by the appropriate Government under Section 3 may consist of –

(i) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such worker (hereinafter referred to as the cost of living allowance); or

(ii) a basic rate of wages or without the cost of living allowance and the cash value of the concession in respect of supplies of essential commodities at concessional rates where so authorized; or

(iii) an all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.

The cost of living allowance and the cash value of the concessions in respect of supplies essential commodities at concessional rates shall be computed by the competent authority at such intervals and in accordance with such directions specified or given by the appropriate Government.

Test your knowledge

According to Section 3(2), what does the 'Appropriate Government' fix minimum rate of wages for?

(a) Time work

(b) Piece work

(c) Manual work

(d) Guaranteed Time Rate

Correct answer: (a), (b) and (d)

PROCEDURE FOR FIXING AND REVISING MINIMUM WAGES (Section 5)

In fixing minimum rates of wages in respect of any scheduled employment for the first time or in revising minimum rates of wages, the appropriate Government can follow either of the two methods described below.

First Method [Section 5(1)(a)]

This method is known as the 'Committee Method'. The appropriate Government may appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision as the case may be. After considering the advise of the committee or committees, the appropriate Government shall, by notification in the Official Gazette fix or revise the minimum rates of wages. The wage rates shall come into force from such date as may be specified in the notification. If no date is specified, wage rates shall come into force on the expiry of three months from the date of the issue of the notification.

Note: It was held in *Edward Mills Co*. v. *State of Ajmer* (1955) A.I.R. SC, that Committee appointed under Section 5 is only an advisory body and that Government is not bound to accept its recommendations.

As regards composition of the Committee, Section 9 of the Act lays down that it shall consist of persons to be nominated by the appropriate Government representing employers and employee in the scheduled employment, who shall be equal in number and independent persons not exceeding 1/3rd of its total number of members. One of such independent persons shall be appointed as the Chairman of the Committee by the appropriate Government.

Second Method [Section 5(1)(b)]

The method is known as the 'Notification Method'. When fixing minimum wages under Section 5(1)(b), the appropriate Government shall by notification, in the Official Gazette publish its proposals for the information of persons likely to be affected thereby and specify a date not less than 2 months from the date of notification, on which the proposals will be taken into consideration.

The representations received will be considered by the appropriate Government. It will also consult the Advisory Board constituted under Section 7 and thereafter fix or revise the minimum rates of wages by notification in the Official Gazette. The new wage rates shall come into force from such date as may be specified in the notification. However, if no date is specified, the notification shall come into force on expiry of three months from the date of its issue. Minimum wage rates can be revised with retrospective effect. [1996 II LLJ 267 Kar.].

ADVISORY BOARD

The advisory board is constituted under Section 7 of the Act by the appropriate Government for the purpose of co-ordinating the work of committees and sub-committees appointed under Section 5 of the Act and advising the appropriate Government generally in the matter of fixing and revising of minimum rates of wages. According to Section 9 of the Act, the advisory board shall consist of persons to be nominated by the appropriate Government representing employers and employees in the scheduled employment who shall be equal in number, and independent persons not exceeding 1/3rd of its total number of members, one of such independent persons shall be appointed as the Chairman by the appropriate Government.

It is not necessary that the Board shall consist of representatives of any particular industry or of each and every scheduled employment; *B.Y. Kashatriya* v. *S.A.T. Bidi Kamgar Union* A.I.R. (1963) S.C. 806. An independent person in the context of Section 9 means a person who is neither an employer nor an employee in the employment for which the minimum wages are to be fixed. In the case of *State of Rajasthan* v. *Hari Ram Nathwani*, (1975) SCC 356, it was held that the mere fact that a person happens to be a Government servant will not divert him of the character of the independent person.

CENTRAL ADVISORY BOARD

Section 8 of the Act provides that the Central Government shall appoint a Central Advisory Board for the purpose of advising the Central Government and State Governments in the matters of fixation and revision of minimum rates of wages and other matters under the Minimum Wages Act and for coordinating work of the advisory boards. The Central Advisory Board shall consist of persons to be nominated by the Central Government representing employers and employees in the scheduled employment who shall be equal in number and independent persons not exceeding 1/3rd of its total number of members, one of such independent persons shall be appointed as the Chairman of the Board by Central Government.

Test your knowledge

State whether the following statement is 'True' or 'False'

The first method used by the 'Appropriate Government' to fix minimum wages in respect of scheduled employment is called the 'Committee Method'.

Correct Answer : True

MINIMUM WAGE – WHETHER TO BE PAID IN CASH OR KIND

Section 11 of the Act provides that minimum wages payable under the Act shall be paid in cash. But where it has been the custom to pay wages wholly or partly in kind, the appropriate Government, on being satisfied, may approve and authorize such payments. Such Government can also authorize for supply of essential commodities at concessional rates. Where payment is to be made in kind, the cash value of the wages in kind or in the shape of essential commodities on concessions shall be estimated in the prescribed manner.

PAYMENT OF MINIMUM WAGES IS OBLIGATORY ON EMPLOYER (Section 12)

Payment of less than the minimum rates of wages notified by the appropriate Government is an offence. Section 12 clearly lays down that the employer shall pay to every employee engaged in a scheduled employment under him such wages at a rate not less than the minimum rate of wages fixed by the appropriate Government under Section 5 for that class of employment without deduction except as may be authorized, within such time and subject to such conditions, as may be prescribed.

FIXING HOURS FOR A NORMAL WORKING DAY (Section 13)

Fixing of minimum rates of wages without reference to working hours may not achieve the purpose for which wages are fixed. Thus, by virtue of Section 13 the appropriate Government may –

(a) fix the number of work which shall constitute a normal working day, inclusive of one or more specified intervals;

(b) provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such day of rest;

(c) provide for payment of work on a day of rest at a rate not less than the overtime rate.

The above stated provision shall apply to following classes of employees only to such extent and subject to such conditions as may be prescribed:

(a) Employees engaged on urgent work, or in any emergency, which could not have been foreseen or prevented;

(b) Employees engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working in the employment concerned;

(c) Employees whose employment is essentially intermittent;

(d) Employees engaged in any work which for technical reasons, has to be completed before the duty is over;

(e) Employees engaged in any work which could not be carried on except at times dependent on the irregular action of natural forces.

For the purpose of clause (c) employment of an employee is essentially intermittent when it is declared to be so by the appropriate Government on ground that the daily hours of the employee, or if these be no daily hours of duty as such for the employee, the hours of duty, normally includes period of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention.

There is correlation between minimum rates of wages and hours of work. Minimum wages are to be fixed on basis of standard normal working hours, namely 48 hours a week; *Benode Bihari Shah* v. *State of W.B*. 1976 Lab I.C. 523 (Cal).

Test your knowledge

State whether the following statement is 'True' or 'False'

Under this Act, payment of less than the minimum rates of wages notified by the 'Appropriate Government' is an offence.

- True
- False

Correct answer: True

PAYMENT OF OVERTIME (Section 14)

Section 14 provides that when an employee, whose minimum rate of wages is fixed under this Act by the hours, the day or by such longer wage period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or part of an hour so worked in excess at the overtime rate fixed under this Act or under any other law of the appropriate Government for the time being in force whichever is higher. Payment for overtime work can be claimed only by the employees who are getting minimum rate of wages under the Act and not by those getting better wages. (1998 LLJ I SC 815).

WAGES OF A WORKER WHO WORKS LESS THAN NORMAL WORKING DAY (Section 15)

Where the rate of wages has been fixed under the Act by the day for an employee and if he works on any day on which he employed for a period less than the requisite number of hours constituting a normal working day, he shall be entitled to receive wages for that day as if he had worked for a full working day.

Provided that he shall not receive wages for full normal working day –

(i) if his failure to work is caused by his unwillingness to work and not by omission of the employer to provide him with work, and

(ii) such other cases and circumstances as may be prescribed.

MINIMUM TIME – RATE WAGES FOR PIECE WORK (Section 17)

Where an employee is engaged in work on piece work for which minimum time rate and not a minimum piece rate has been fixed, wages shall be paid in terms of Section 17 of the Act at minimum time rate.

MAINTENANCE OF REGISTERS AND RECORDS (Section 18)

Apart from the payment of the minimum wages, the employer is required under Section 18 to maintain registers and records giving such particulars of employees under his employment, the work performed by them, the receipts given by them and such other particulars as may be prescribed. Every employee is required also to exhibit notices, in the prescribed form containing particulars in the place of work. He is also required to maintain wage books or wage-slips as may be prescribed by the appropriate Government and the entries made therein will have to be authenticated by the employer or his agent in the manner prescribed by the appropriate Government.

AUTHORITY AND CLAIMS (Section 20-21)

Under Section 20(1) of the Act, the appropriate Government, may appoint any of the following as an authority to hear and decide for any specified area any claims arising out of payment of less than the minimum rate of wages or in respect of the payment of remuneration for the days of rest or of wages at the rate of overtime work:

(a) any Commissioner for Workmen's Compensation; or

(b) any officer of the Central Government exercising functions as Labour Commissioner for any region; or

(c) any officer of the State Government not below the rank of Labour Commissioner; or

(d) any other officer with experience as a Judge of a Civil Court or as the Stipendiary Magistrate.

The authority so appointed shall have jurisdiction to hear and decide claim arising out of payment of less than the minimum rates of wages or in respect of the payment remuneration for days of rest or for work done on such days or for payment of overtime.

The provisions of Section 20(1) are attracted only if there exists a disputed between the employer and the employee as to the rates of wages. Where no such dispute exists between the employer and employees and the only question is whether a particular payment at the agreed rate in respect of minimum wages, overtime or work on off days is due to an employee or not, the appropriate remedy is provided by the Payment of Wages Act, 1936.

OFFENCES AND PENALTIES

Section 22 of the Act provides that any employer who (a) pays to any employee less than the minimum rates of wages fixed for that employee's class of work or less than the amount due to him under the provisions of this Act or contravenes any rule or order made under Section 13, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.

While imposing any fine for an offence under this section the court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under section 20.

It is further stipulated under Section 22A of the Act that any employer who contravenes any provision of this Act or of any rule or order made thereunder shall if no other penalty is provided for such contravention by this Act be punishable with fine which may extend to five hundred rupees.

Test your knowledge

Choose the correct answer

Under Section 20(1) of the Act, which of the following, may the 'Appropriate Government' appoint as an authority to hear and decide cases related to payment of wages?

(a) Any Commissioner for Workmen's Compensation

(b) Any officer of the Central Government exercising functions as Labour Commissioner for any region

(c) Any officer of the State Government

(d) All the above

Correct answer: (d)

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The Establishment is covered by the definition "Scheduled Employment" with effect from…….
2. The Government revised the minimum wages once/twice/ thrice during the financial year under reference and the Establishment has paid to all its employees minimum wages in accordance with the rates at respective point of time and at the respective rates specified in notification under Section 5 of the MWA.
3. The Establishment has issued wage slips to all its employees in respect of each of the wage period……..
4. Where the services of any employee were terminated for any reason whatsoever, the wages were paid within two working days from the date of such termination.
5. The Establishment did not make any unauthorized deduction from the wages of any of its employees. Further, the deductions if any, made were within the limits of fifty percent (or seventy five percent in case of cooperatives) of wages earned by such employees during the period under reference.
6. Where the Establishment was constrained to impose any fine or deduct wages on account of damages caused by any employee, the latter was given an opportunity of being heard in the presence of a neutral person and was also communicated the amount of fine imposed or deduction made from the wages.
7. The Establishment has eight working hours per day, inclusive of half an hour of interval.
8. All claims under Section 20 of the MWA were paid within the time limit specified in the Order.

LESSON ROUND UP

- The Minimum Wages Act empowers the Government to fix minimum wages for employees working in specified employments. It provides for review and revision of minimum wages already fixed after suitable intervals not exceeding five years.
- It extends to the whole of India and applies to scheduled employments in respect of which minimum rates of wages have been fixed under this Act.
- The appropriate government shall fix the minimum rates of wages payable to employees employed in a scheduled employment.
- It may review at such intervals not exceeding five years the minimum rates of wages so fixed, and revise the minimum rates if necessary.
- The employer shall pay to every employee in a scheduled employment under him wages at the rate not less than the minimum rates of wages fixed under the Act.
- The Act also provides for regulation or working hours, overtime, weekly holidays and overtime wages. Period and payment of wages, and deductions from wages are also regulated.
- The Act provides for appointment the authorities to hear and decide all claims arising out of payment less than the minimum rates of wages or any other monetary payments due under the Act. The presiding officers of the Labour court and Deputy Labour Commissioners are the authorities appointed.

SELF TEST QUESTIONS

1. Discuss the object and scope of the Minimum Wages Act.
2. Who is authorize to fix minimum wages and in what manner?
3. What points should be taken into consideration while fixing minimum wages?
4. Enumerate the procedure fro fixing and revising the minimum wages.
5. Discuss briefly the compliance management under the Minimum Wages Act.

Lesson 3

Payment of Wages Act, 1936

LESSON OUTLINE

- Learning objectives
- Object of the Act
- Employed Person
- Employer
- Factory
- Industrial or other establishment
- Responsibility for payment of wages
- Fixation of wage period
- Time of payment of wages
- Wages to be paid in current coin or currency notes
- Deduction from wages
- Maintenance of registers and records
- Claims
- Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims.

LEARNING OBJECTIVES

The Payment of Wages Act, 1936 is a central legislation which has been enacted to regulate the payment of wages to workers employed in certain specified industries and to ensure a speedy and effective remedy to them against unauthorized deductions and/or unjustified delay caused in paying wages to them. It applies to the persons employed in a factory, industrial or other establishment or in a railway, whether directly or indirectly, through a sub-contractor.

In order to bring the law in uniformity with other labour laws and to make it more effective and practicable, the payment of wages Act was last amended in 2005. The amendment enhancing the wage ceiling per Month with a view to covering more employed persons and substitute the expressions “the Central Government” or “a State Government” by the expression “appropriate Government”. Amendment also strengthening compensation and penal provisions made more stringent by enhancing the quantum of penalties by amending of the Act.

The Central Government is responsible for enforcement of the Act in railways, mines, oilfields and air transport services, while the State Governments are responsible for it in factories and other industrial establishments.

Therefore, students should be well versed in the Payment of Wages Act, 1936 and Rules made thereunder.

The Payment of Wages Act, 1936 regulates the payment of wages of certain classes of employed persons.

OBJECT AND SCOPE

The main object of the Act is to eliminate all malpractices by laying down the time and mode of payment of wages as well as securing that the workers are paid their wages at regular intervals, without any unauthorised deductions. In order to enlarge its scope and provide for more effective enforcement the Act empowering the Government to enhance the ceiling by notification in future. The Act extends to the whole of India.

Definitions

"Employed person" includes the legal representative of a deceased employed person. {Section 2(ia)}

"Employer" includes the legal representative of a deceased employer. {Section 2(ib)}

"Factory" means a factory as defined in clause (m) of section 2 of the Factories Act 1948 (63 of 1948) and includes any place to which the provisions of that Act have been applied under sub-section (1) of section 85 thereof. {Section 2(ic)}

"Industrial or other establishment" means any –

(a) tramway service or motor transport service engaged in carrying passengers or goods or both by road for hire or reward;

(aa) air transport service other than such service belonging to or exclusively employed in the military naval or air forces of the Union or the Civil Aviation Department of the Government of India;

(b) dock wharf or jetty;

(c) inland vessel mechanically propelled;

(d) mine quarry or oil-field;

(e) plantation;

(f) workshop or other establishment in which articles are produced adapted or manufactured with a view to their use transport or sale;

(g) establishment in which any work relating to the construction development or maintenance of buildings roads bridges or canals or relating to operations connected with navigation irrigation or to the supply of water or relating to the generation transmission and distribution of electricity or any other form of power is being carried on;

(h) any other establishment or class of establishments which the Appropriate Government may having regard to the nature thereof the need for protection of persons employed therein and other relevant circumstances specify by notification in the Official Gazette. {Section 2(ii)}

"Wages" means all remuneration (whether by way of salary allowances or otherwise) expressed in terms of money or capable of being so expressed which would if the terms of employment express or implied were fulfilled by payable to a person employed in respect of his employment or of work done in such employment and includes –

(a) any remuneration payable under any award or settlement between the parties or order of a court;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law contract or instrument which provides for the payment of such sum whether with or without deductions but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force,

but does not include –

(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a court;

(2) the value of any house-accommodation or of the supply of light water medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of Appropriate Government;

(3) any contribution paid by the employer to any pension or provident fund and the interest which may have accrued thereon;

(4) any travelling allowance or the value of any travelling concession;

(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d). {Section 2(vi)}

Responsibility for payment of wages

Section 3 provides that every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under the Act. However, in the case of persons employed in factories if a person has been named as the manager of the factory; in the case of persons employed in industrial or other establishments if there is a person responsible to the employer for the supervision and control of the industrial or other establishments; in the case of persons employed upon railways if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned; in the case of persons employed in the work of contractor, a person designated by such contractor who is directly under his charge; and in any other case, a person designated by the employer as a person responsible for complying with the provisions of the Act, the person so named, the person responsible to the employer, the person so nominated or the person so designated, as the case may be, shall be responsible for such payment.

It may be noted that as per section 2(ia) “employer” includes the legal representative of a deceased employer.

Fixation of wage period

As per section 4 of the Act every person responsible for the payment of wages shall fix wage-periods in respect of which such wages shall be payable. No wage-period shall exceed one month.

Time of payment of wages

Section 5 specifies the time payment of wages. The wages of every person employed upon or in any railway factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before the expiry of the seventh day.

The wages of every person employed upon or in any other railway factory or industrial or other establishment shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable. However, in the case of persons employed on a dock wharf or jetty or in a mine the balance

of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded as the case may be shall be paid before the expiry of the seventh day from the day of such completion.

Where the employment of any person is terminated by or on behalf of the employer the wages earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated. However, the employment of any person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or other recognised holiday the wages earned by him shall be paid before the expiry of the second day from the day on which his employment is so terminated.

The Appropriate Government may by general or special order exempt to such extent and subject to such conditions as may be specified in the order the person responsible for the payment of wages to persons employed upon any railway or to persons employed as daily-rated workers in the Public Works Department of the Appropriate Government from the operation of this section in respect of wages of any such persons or class of such persons.

All payments of wages shall be made on a working day.

Wages to be paid in current coin or currency notes

As per section 6 of the Act, all wages shall be paid in current coin or currency notes or in both. However, the employer may, after obtaining the written authorisation of the employed person, pay him the wages either by cheque or by crediting the wages in his bank account.

Deductions from the wages of an employee

Section 7 of the Act allows deductions from the wages of an employee on the account of the following:- (i) fines; (ii) absence from duty; (iii) damage to or loss of goods expressly entrusted to the employee; (iv) housing accommodation and amenities provided by the employer; (v) recovery of advances or adjustment of over-payments of wages; (vi) recovery of loans made from any fund constituted for the welfare of labour in accordance with the rules approved by the State Government, and the interest due in respect thereof; (vii) subscriptions to and for repayment of advances from any provident fund;(viii) income-tax; (ix) payments to co-operative societies approved by the State Government or to a scheme of insurance maintained by the Indian Post Office; (x) deductions made with the written authorisation of the employee for payment of any premium on his life insurance policy or purchase of securities.

Fines

Section 8 deals with fines. It provides that :

(1) No fine shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer with the previous approval of the State Government or of the prescribed authority may have specified by notice under sub-section (2).

(2) A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment carried on or in the case of persons employed upon a railway (otherwise than in a factory) at the prescribed place or places.

(3) No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.

(4) The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to three per cent of the wages payable to him in respect of that wage-period.

(5) No fine shall be imposed on any employed person who is under the age of fifteen years.

(6) No fine imposed on any employed person shall be recovered from him by installments or after the expiry of ninety days from the day on which it was imposed.

(7) Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.

(8) All fines and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed; and all such realisations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as are approved by the prescribed authority.

It may be noted that when the persons employed upon or in any railway, factory or industrial or other establishment are part only of a staff employed under the same management all such realisations may be credited to a common fund maintained for the staff as a whole provided that the fund shall be applied only to such purposes as are approved by the prescribed authority.

Maintenance of registers and records

Section 13A provides that every employer shall maintain such registers and records giving such particulars of persons employed by him, the work performed by them, the wages paid to them, the deductions made from their wages, the receipts given by them and such other particulars in prescribed form. Every register and record required to be maintained shall be preserved for a period of three years after the date of the last entry made therein.

Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims

Section 15 deals with claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims. It provides that the appropriate Government may, by notification in the Official Gazette, appoint-

(a) any Commissioner for Workmen's Compensation; or

(b) any officer of the Central Government exercising functions as,-

  (i) Regional Labour Commissioner; or

  (ii) Assistant Labour Commissioner with at least two years' experience; or

(c) any officer of the State Government not below the rank of Assistant Labour Commissioner with at least two years' experience; or

(d) a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947 or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State; or

(e) any other officer with experience as a Judge of a Civil Court or a Judicial Magistrate, as the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims.

Provided that where the appropriate Government considers it necessary so to do, it may appoint more than one authority for any specified area and may, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

Sub-section (2) of section 15 provides that where contrary to the provisions of the Act any deduction has been made from the wages of an employed person or any payment of wages has been delayed such person himself

or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act or any other person acting with the permission of the authority appointed under sub-section (1) may apply to such authority for a direction under sub-section (3) :

However, every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made as the case may be. Any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

As per sub-section (3) when any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages under section 3, or give them an opportunity of being heard, and, after such further enquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding three thousand rupees but not less than one thousand five hundred rupees in the latter, and even if the amount deducted or delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the authority may think fit, not exceeding two thousand rupees.

A claim under the Act shall be disposed of as far as practicable within a period of three months from the date of registration of the claim by the authority. It may be noted that the period of three months may be extended if both parties to the dispute agree for any bona fide reason to be recorded by the authority that the said period of three months may be extended to such period as may be necessary to dispose of the application in a just manner.

No direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to-

(a) a bona fide error or bona fide dispute as to the amount payable to the employed person; or

(b) the occurrence of an emergency, or the existence of exceptional circumstances, the person responsible for the payment of the wages was unable, in spite of exercising reasonable diligence; or

(c) the failure of the employed person to apply for or accept payment.

As per sub-section (4) if the authority hearing an application under this section is satisfied that the application was either malicious or vexatious the authority may direct that a penalty not exceeding three hundred seventy five Rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application; or in any case in which compensation is directed to be paid under sub-section (3) the applicant ought not to have been compelled to seek redress under this section the authority may direct that a penalty not exceeding three hundred seventy five Rupees be paid to the State Government by the employer or other person responsible for the payment of wages.

LESSON ROUND UP

- The Payment of Wages Act, 1936 is a central legislation which has been enacted to regulate the payment of wages to workers employed in certain specified industries and to ensure a speedy and effective remedy to them against illegal deductions and/or unjustified delay caused in paying wages to them. It applies to the persons employed in a factory, industrial or other establishment or in a railway, whether directly or indirectly, through a sub-contractor.
- Every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under the Act and every person responsible for the payment of wages shall fix wage-periods in respect of which such wages shall be payable. No wage-period shall exceed one month.

– The wages of every person employed upon or in any railway factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before the expiry of the seventh day.

– All wages shall be paid in current coin or currency notes or in both. However, the employer may, after obtaining the written authorisation of the employed person, pay him the wages either by cheque or by crediting the wages in his bank account.

SELF TEST QUESTION

1. Define 'factory' and 'industrial or other establishment' under the Payment of wages Act, 1936.
2. Briefly explain the obligations of employer under the Payment of Wages Act, 1936.
3. Discuss the provisions regarding fixation of wage period under the Payment of Wages Act, 1936.
4. Who is liable for payment of wages under the Act?
5. Discuss about maintenance of Register and Record under the Payment of wages Act, 1936.

Lesson 4

Equal Remuneration Act, 1976

LESSON OUTLINE

- Learning Objectives
- Object and scope of the Act
- Appropriate Government
- Remuneration same work or work of similar nature
- Act having overriding effect
- Duty of employer
- Non Discrimination while recruiting men and women
- Authorities for hearing and deciding claims and complaints
- Maintenance of Registers
- Penalty

LEARNING OBJECTIVES

In today's globalised liberalised scenario, women form an integral part of the Indian workforce. In such an environment, the quality of women's employment is very important and depends upon several factors. The foremost being equals access to education and other opportunities for skill development. This requires empowerment of women as well as creation of awareness among them about their legal rights and duties.

In order to ensure this, the Government of India has taken several steps for creating a congenial work environment for women workers. A number of protective provisions have been incorporated in the various Labour Laws. To give effect to the Constitutional provisions and also ensure the enforcement of ILO Convention the Equal Remuneration Act, 1976 enacted by the Parliament.

The implementation of the Equal Remuneration Act, 1976 is done at two levels. In Central Sphere the Act is being implemented by the Central Government and in State Sphere, the implementation rests with the State Governments.

Therefore, students should know the intricacies involved in the Equal Remuneration Act, 1976.

Article 39 of Constitution of India envisages that the State shall direct its policy, among other things, towards securing that there is equal pay for equal work for both men and women. To give effect to this constitutional provision, the Parliament enacted the Equal Remuneration Act, 1976.

OBJECT AND SCOPE

The Equal Remuneration Act, 1976 provides for payment of equal remuneration to men and women workers for same work or work of similar nature without any discrimination and also prevents discrimination against women employees while making recruitment for the same work or work of similar nature, or in any condition of service subsequent to recruitment. The provisions of the Act have been extended to all categories of employment. The Act extends to whole of India.

Definitions

"Appropriate Government" means –

(i) in relation to any employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a banking company, a mine, oilfield or major port or any corporation established by or under a Central Act, the Central Government, and

(ii) in relation to any other employment, the State Government. {section 2(a)}

"**Man" and "Woman"** mean male and female human beings, respectively, of any age. {section 2(d)}

"Remuneration" means the basic wage or salary, and any additional emoluments whatsoever payable, either in cash or in kind, to a person employed in respect of employment or work done in such employment, if the terms of the contract of employment, express or implied, were fulfilled. {section 2(g)}

"Same work or Work of a similar nature" means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment. {section 2(h)}

Act to have overriding effect

Section 3 of the Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of the Act, or in any instrument having effect under any law for the time being in force.

Duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature

Section 4 of the Act provides that no employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature and employer shall not reduce the rate of remuneration of any worker.

It may be noted that as per Section 2(g) "remuneration" means the basic wage or salary, and any additional emoluments whatsoever payable, either in cash or in kind, to a person employed in respect of employment or work done in such employment, if the terms of the contract of employment, express or implied, were fulfilled and Section 2(h) defines "same work or work of a similar nature" means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those required of woman are not of practical importance in relation to the terms and conditions of employment :

Discrimination not to be made while recruiting men and women

As per section 5 employer while making recruitment for the same work or work of a similar nature, or in any condition of service subsequent to recruitment such as promotions, training or transfer, shall not make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force .

However, above mentioned section shall not affect any priority or reservation for Scheduled Castes or Scheduled Tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in an establishment or employment

Authorities for hearing and deciding claims and complaints

Section 7 of the Act empower the appropriate Government appoint such officers, not below the rank of a Labour Officer, as it thinks fit to be the authorities for the purpose of hearing and deciding complaints with regard to the contravention of any provision of the Act; claims arising out of non-payment of wages at equal rates to men and women workers for the same work or work of a similar nature; and define the local limits within which each such authority shall exercise its jurisdiction.

Maintenance of Registers

As per section 8 it is the duty of every employer, to maintain registers and other documents in relation to the workers employed by him in the prescribed manner.

Penalty

If any employer:- (i) makes any recruitment in contravention of the provisions of this Act; or (ii) makes any payment of remuneration at unequal rates to men and women workers for the same work or work of a similar nature; or (iii) makes any discrimination between men and women workers in contravention of the provisions of this Act; or (iv) omits or fails to carry out any direction made by the appropriate Government, then he/ she shall be punishable with fine or with imprisonment or with both.

LESSON ROUND UP

- Equal Remuneration Act, 1976 provides for the payment of equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto.
- Same work or Work of a similar nature means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.
- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of this Act, or in any instrument having effect under any law for the time being in force.
- The Act provides that no employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature and employer shall not reduce the rate of remuneration of any worker.
- Employer while making recruitment for the same work or work of a similar nature, or in any condition of

service subsequent to recruitment such as promotions, training or transfer, shall not make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

– It is the duty of every employer required to maintain registers and other documents in relation to the workers employed by him in the prescribed manner.

– If any employer:- (i) makes any recruitment in contravention of the provisions of this Act; or (ii) makes any payment of remuneration at unequal rates to men and women workers for the same work or work of a similar nature; or (iii) makes any discrimination between men and women workers in contravention of the provisions of this Act; or (iv) omits or fails to carry out any direction made by the appropriate Government, then he/ she shall be punishable with fine or with imprisonment or with both.

SELF TEST QUESTIONS

1. Briefly explain the object of Equal Remuneration Act, 1976.
2. Define the terms"Remuneration"and **"**Same work or Work of a similar nature".
3. Enumerate the duties of employer under Equal Remuneration Act, 1976.
4. Write short notes on maintenance of Register and Return under the Act.
5. State the provisions regarding offence by companies under Equal Remuneration Act, 1976.

Lesson 5

Employees' State Insurance Act, 1948

LESSON OUTLINE

- Learning Objectives
- Introduction
- Confinement
- Contribution
- Employment Injury
- Immediate Employer
- Registration of Factories and Establishments under this Act
- Employees' State Insurance
- Administration of Employees' State Insurance Scheme
- Employees' State Insurance Corporation
- Wings of the Corporation
- Employees State Insurance Fund
- Contributions
- Benefits
- Employees' Insurance Court (E.I. Court)
- Exemptions
- Compliances under the Act

LEARNING OBJECTIVES

Parliament has enacted a number of legislations in the area of social security for the workers. The Employees' State Insurance Act was promulgated by the Parliament of India in the year 1948. It was the first major legislation on Social Security in independent India to provide certain benefits to the employees in the organized sector in case of sickness, maternity and employment injury.

The Central Government established a Corporation to be known as the 'Employees' State Insurance Corporation is the premier social security organization in the country. It is the highest policy making and decision taking authority under the ESI Act and oversees the functioning of the ESI Scheme under the ESI Act.

For the administration of the of Employees' State Insurance scheme , the Employees' State Insurance Corporation Standing Committee and Medical Benefit Council have been constituted. Further, ESI Fund has been created which is held and administered by ESI Corporation through its executive committee called Standing Committee with the assistance, advice and expertise of Medical Council and Regional and Local Boards and Committees

It is important for the students to be thoroughly acclimatized with this branch of law to know its practical significance.

The Employees' State Insurance Act, 1948 provides an integrated need based social insurance scheme that would protect the interest of workers in contingencies such as sickness, maternity, temporary or permanent physical disablement, death due to employment injury resulting in loss of wages or earning capacity. The Act also guarantees reasonably good medical care to workers and their immediate dependants.

INTRODUCTION

The Employees' State Insurance Act, 1948 provides for certain benefits to employees in case of sickness, maternity and employment injury and also makes provisions for certain other matters in relation thereto. The Act has been amended by the Employees' State Insurance (Amendment) Act, 2010 for enhancing the Social Security Coverage, streamlining the procedure for assessment of dues and for providing better services to the beneficiaries.

The Act extends to the whole of India. The Central Government is empowered to enforce the provisions of the Act by notification in the Official Gazette, to enforce different provisions of the Act on different dates and for different States or for different parts thereof [Section 1(3)]. The Act applies in the first instance to all factories (including factories belonging to the Government) other than seasonal factories [Section 1(4)]. According to the proviso to Section 1(4) of the Act, nothing contained in sub-section (4) of Section 1 shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under the Act. Section 1(5) of the Act empowers the appropriate Government to extend any of the provisions of the Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise after giving one month's notice in the Official Gazettee. However, this can be done by the appropriate Government, only in consultation with the Employees' State Insurance Corporation set up under the Act and, where the appropriate Government is a State Government, it can extend the provisions of the Act with the approval of the Central Government.

Under these enacting provisions, the Act has been extended by many State Governments to shops, hotels, restaurants, cinemas, including preview theatres, newspaper establishments, road transport undertakings, etc., employing 20 or more persons. **It is not sufficient that 20 persons are employed in the shop. They should be employee as per Section 2(9) of the Act, getting the wages prescribed therein (*ESIC* v. *M.M. Suri & Associates Pvt. Ltd.,* 1999 LAB IC SC 956).** According to the proviso to sub-section (5) of Section 1 where the provisions of the Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishment within that part, if the provisions have already been extended to similar establishment or class of establishments in another part of that State.

It may be noted that a factory or an establishment to which the Act applies shall continue to be governed by this Act even if the number of persons employed therein at any time falls below the limit specified by or under the Act or the manufacturing process therein ceases to be carried on with the aid of power. [Section 1(6)]

The coverage under the Act is at present restricted to employees drawing wages not exceeding ₹15,000 per month.

Test your knowledge

Which of the following establishments come under the Central Government, with the Central Government acting as the "Appropriate Government"?

(a) Establishments under railway administration

(b) Establishments under a major port

(c) Establishments under an oil-field or mine

(d) Establishments under the state ministry

Correct answer: (a), (b) and (c)

IMPORTANT DEFINITIONS

(i) Appropriate Government

"Appropriate Government" means in respect of establishments under the control of the Central Government or a railway administration or a major port or a mine or oil-field; the Central Government, and in all other cases, the State Government. [Section 2(1)]

(ii) Confinement

"Confinement" means labour resulting in the issue of a living child or labour after 26 weeks of pregnancy resulting in the issue of child whether alive or dead. [Section 2(3)]

(iii) Contribution

"Contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employees and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act. [Section 2(4)]

(iv) Dependent

"Dependent" under Section 2(6A) of the Act (as amended by the Employees' State Insurance (Amendment) Act, 2010) means any of the following relatives of a deceased insured person namely:

(i) a widow, a legitimate or adopted son who has not attained the age of twenty-five years,, an unmarried legitimate or adopted daughter,

(ia) a widowed mother,

(ii) if wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of 25 years and is infirm;

(iii) if wholly or in part dependent on the earnings of the insured person at the time his death:

- (a) a parent other than a widowed mother,
- (b) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and minor or if widowed and a minor,
- (c) a minor brother or an unmarried sister or a widowed sister if a minor,
- (d) a widowed daughter-in-law,
- (e) a minor child of a pre-deceased son,
- (f) a minor child of a pre-deceased daughter where no parent of the child is alive or,
- (g) a paternal grand parent if no parent of the insured person is alive.

(v) Employment Injury

It means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India. [Section 2(8)]

It is well settled that an employment injury need not necessarily be confined to any injury sustained by a person within the premises or the concern where a person works. Whether in a particular case the theory of notional extension of employment would take in the time and place of accident so as to bring it within an employment injury, will have to depend on the assessment of several factors. There should be a nexus between the circumstances of the accident and the employment. On facts no case could be an authority for another case, since there would necessarily be some differences between the two cases. Therefore, each case has to be

decided on its own facts. It is sufficient if it is proved, that the injury to the employee was caused by an accident arising out of and in the course of employment no matter when and where it occurred. There is not even a geographical limitation.

The accident may occur within or outside the territorial limits of India. However, there should be a nexus or casual connection between the accident and employment. The place or time of accident should not be totally unrelated to the employment (*Regional Director, E.S.I. Corpn*. v. *L. Ranga Rao,* 1982 I-L.L.J. 29). Where an employee who is on his way to factory meets with an accident, one K.M. from the place of employment, the Court held that the injury cannot be said to be caused by accident arising out of and in the course of his employment. Mere road accident on a public road while employee was on his way to place of employment cannot be said to have its origin in his employment in the factory (*Regional Director ESI* v. *Francis de Costa*, 1997 LLJ I 34 SC).

In *E.S.I. Corpn. Indore* v. *Babulal,* 1982 Lab. I.C. 468, the M.P. High Court held that injury arose out of employment where a workman attending duty in spite of threats by persons giving call for strike and was assaulted by them while returning after his duty was over. A worker was injured while knocking the belt of the moving pulley, though the injury caused was to his negligence, yet such an injury amounts to an employment injury (*Jayanthilal Dhanji Co*. v. *E.S.I.C.,* AIR AP 210).

The word injury does not mean only visible injury in the form of some wound. Such a narrow interpretation would be inconsistent with the purposes of the Act which provides certain benefits in case of sickness, maternity and employment injury (*Shyam Devi* v. *E.S.I.C.,* AIR 1964 All. 42).

(vi) Employee

"Employee" according to Section 2(9) as amended by the Employees' State Insurance (Amendment) Act, 2010 means any person employed for wages in connection with the work of a factory or establishment to which this Act applies and:

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory or establishment, whether such work is done by employee in the factory or establishment; or elsewhere, or

(ii) who is employed by or through a immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent, on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person, whose services are so lent or let on hire, has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof, or with the purchase of raw materials of, or the distribution or sale of the product of the factory or establishment; or any person engaged as an apprentice, not being an apprentice engaged under Apprentices Act, 1961and includes such person engaged as apprentice whose training period is extended to any length of time, ; but does not include:

(a) any member of the Indian Naval, Military or Air Forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period shall continue to be an employee until the end of that period. The Central Government has since prescribed by a Notification under Rule 50 of the E.S.I. Rules, 1950 the wage limit for coverage of an employee under Section 2(9) of the Act as Rs. 10,000 per month. Further, it is provided that an employee whose wages (excluding remuneration for overtime work) exceed Rs. 10,000 a month at any time after and not before the beginning of the contribution period, shall continue to be an employee until the end of the period.

In the case of *Royal Talkies Hyderabad* v. *E.S.I.C.*, AIR 1978 SC 1476, there was a canteen and cycle stand run by private contractors in a theatre premises. On the question of whether the theatre owner will be liable as principal employer for the payment of E.S.I. contributions, the Supreme Court held that the two operations namely keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre and the workers engaged therein are covered by the definition of employee as given in E.S.I. Act. The Supreme Court observed that the reach and range of Section 2(9) is apparently wide and deliberately transcends pure contractual relationship.

Section 2(9) contains two substantive parts. Unless the person employed qualifies under both, he is not an employee. First, he must be employed in or in connection with the work of an establishment. The expression in connection with the work of an establishment ropes in a wide variety of workmen who may not be employed in the establishment but may be engaged only in connection with the work of establishment. Some nexus must exist between the establishment and the work of employee but it may be a loose connection. The test of payment of salary or wages is not a relevant consideration. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment.

The word employee would include not only persons employed in a factory but also persons connected with the work of the factory. It is not possible to accept the restricted interpretation of the words "employees in factories". The persons employed in zonal offices and branch offices of a factory and concerned with the administrative work or the work of canvassing sale would be covered by the provisions of the Act, even though the offices are located in different towns (*Hyderabad Asbestos Cement Products, etc*. v. *ESIC*, AIR 1978 S.C. 356). The Act is a beneficial piece of legislation to protect interest of the workers. The employer cannot be allowed to circumvent the Act in the disguise of ambiguous designations such as 'trainees, 'apprentices etc. who are paid regular wages, basic wages plus allowances. Such workers also fall under the Act (LLJ-II-1996 389 AP). Managing director could be an employee of the company. There could be dual capacity i.e. as managing director as well as a servant of the company (ESIC v. Apex Engg. Pvt. Ltd., Scale (1997) 6 652).

(vii) Exempted Employee

"Exempted Employee" means an employee who is not liable under this Act to pay the employees contribution. [Section 2(10)]

(viii) Principal Employer

"Principal Employer" means the following:

(i) in a factory, owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the head of the Department.

(iii) in any other establishment, any person responsible for the supervision and control of the establishment. [Section 2(17)]

(ix) Family

"Family" under Section 2(11) as amended by the Employees' State Insurance (Amendment) Act, 2010 means all or any of the following relatives of an insured person, namely:

(i) a spouse;

(ii) a minor legitimate or adopted child dependent upon the insured person;

(iii) a child who is wholly dependent on the earnings of the insured person and who is:

(a) receiving education, till he or she attains the age of twenty-one years,

(b) an unmarried daughter;

(iv) a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues.

(v) dependent parents whose income from all sources does not exceed such income as may be prescribed by the Central Government.

(vi) In case the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependant upon the earnings of the insured person.

(x) Factory

The definition of the factory as amended by the Employees' State Insurance (Amendment) Act, 2010 is a s follows:

"Factory" means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not including a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

It may be noted that the terms manufacturing process, occupier and power, shall have the meaning assigned to them in the Factories Act, 1948. [Section 2(12)]

(xi) Immediate Employer

"Immediate Employer" means a person, in relation to employees employed by or through him, who has undertaken the execution on the premises of a factory or an establishment to which this Act applies or under the supervision of principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on, in or incidental to the purpose of any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor. [Section 2(13A)] It would not be necessary that the work undertaken by immediate employer should be in the premises where the factory of principal employer is situated (1997-II LLJ 31 Pat.).

(xii) Insurable Employment

It means an employment in factory or establishment to which the Act applies. [Section 2(13A)]

(xiii) Insured person

It means a person who is or was an employee in respect of whom contributions are, or were payable under the Act and who is by reason thereof entitled to any of the benefits provided under the Act. [Section 2(14)]

(xiv) Permanent Partial Disablement

It means such disablement of a permanent nature, as reduced the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

Provided that every injury specified in Part II of the Second Schedule to the Act shall be deemed to result in permanent partial disablement. [Section 2(15A)]

(xv) Permanent Total Disablement

It means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part-I of the Second Schedule to the Act or from any combination of injuries specified in Part-II thereof, where the aggregate percentage of the loss of earning capacity, as specified in the said Part-II against those injuries, amounts to one hundred per cent or more. [Section 2(15B)]

(xvi) Seasonal Factory

It means a factory which is exclusively engaged in one or more of the following manufacturing processes namely, cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year:

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

(b) in such other manufacturing process as the Central Government may by notification in the Official Gazette, specify. [Section 2(19A)]

(xvii) Sickness

It means a condition which requires medical treatment and attendance and necessitates, abstention from work on medical grounds. [Section 2(20)]

(xviii) Temporary Disablement

It means a condition resulting from an employment injury which requires medical treatment and renders an employee as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of injury. [Section 2(21)]

(xix) Wages

"Wages" means all remuneration paid or payable in cash to an employee if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration if any, paid at intervals not exceeding two months but does not include:

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment, or

(d) any gratuity payable on discharge. [Section 2(22)]

Wages include other additional remuneration paid at intervals not exceeding two months wages. It is question of fact in each case whether sales commission and incentive are payable at intervals not exceeding two months (*Handloom House Ernakulam* v. *Reg. Director, ESIC,* 1999 CLA 34 SC 10). Travelling allowance paid to employees is to defray special expenses entitled on him by nature of his employment. It does not form part of wages as defined under Section 2(22) of the E.S.I. Act. Therefore, employer is not liable to pay contribution on travelling allowance. [*S. Ganesan* v. *The Regional Director, ESI Corporation,* Madras, 2004 Lab.I.C 1147]

REGISTRATION OF FACTORIES AND ESTABLISHMENTS UNDER THIS ACT

Section 2A of the Act lays down that every factory or establishment to which this Act applies shall be registered within such time and in such manner as may be specified in the regulations made in this behalf.

EMPLOYEES' STATE INSURANCE

Section 38 of the Act makes compulsory that subject to the provisions of the Act all the employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act. Such insured persons shall pay contributions towards Insurance Fund through their employers who will also pay their own contribution. Such insured persons are entitled to get certain benefits from that fund which shall be administered by the Corporation. Any dispute will be settled by the Employees' Insurance Court.

ADMINISTRATION OF EMPLOYEES' STATE INSURANCE SCHEME

For the administration of the scheme of Employees' State Insurance in accordance with the provisions of this Act, the Employees' State Insurance Corporation Standing Committee and Medical Benefit Council have been constituted. Further, ESI Fund has been created which is held and administered by ESI Corporation through its executive committee called Standing Committee with the assistance, advice and expertise of Medical Council, etc. and Regional and Local Boards and Committees.

EMPLOYEES' STATE INSURANCE CORPORATION

Section 3 of this Act provides for the establishment of Employees' State Insurance Corporation by the Central Government for administration of the Employees' State Insurance Scheme in accordance with the provisions of Act. Such Corporation shall be body corporate having perpetual succession and a common seal and shall sue and be sued by the said name.

Constitution

The Central Government appoints a chairman, a vice-chairman and other members representing interests of employers, employees, state governments/union territories and medical profession. Three members of the Parliament and the Director General of the Corporation are its ex-officio members. [Section 4]

Powers and duties of the Corporation

Section 19 empowers the Corporation, to promote (in addition to the scheme of benefits specified in the Act), measures for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured and incur in respect of such measures expenditure from the funds of the Corporation within such limits as may be prescribed by the Central Government.

Section 29 empowers the Corporation (a) to acquire and hold property both movable and immovable, sell or otherwise transfer the said property; (b) it can invest and reinvest any moneys which are not immediately required for expenses and or realise such investments; (c) it can raise loans and discharge such loans with the previous sanction of Central Government; (d) it may constitute for the benefit of its staff or any class of them such provident or other benefit fund as it may think fit. However, the powers under Section 29 can be exercised subject to such conditions as may be prescribed by the Central Government.

Appointment of Regional Boards etc.

The Corporation may appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner, and delegate to them such powers and functions, as may be provided by the regulations. (Section 25)

WINGS OF THE CORPORATION

The Corporation to discharge its functions efficiently, has been provided with two wings:

Standing Committee

The Act provides for the constitution of a Standing Committee under Section 8 from amongst its members.

Power of the Standing Committee

The Standing Committee has to administer affairs of the Corporation and may exercise any of the powers and perform any of the functions of the Corporation subject to the general superintendence and control of the Corporation. The standing Committee acts as an executive body for administration of Employees State Insurance Corporation. Medical Benefit Council

Section 10 empowers the Central Government to constitute a Medical Benefit Council. Section 22 determines the duties of the Medical Benefit Council stating that the Council shall:

(a) advise the Corporation and the Standing Committee on matters relating to administration of medical benefit, the certification for purposes of the grant of benefit and other connected matters;

(b) have such powers and duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with medical treatment and attendance; and

(c) perform such other duties in connection with medical treatment and attendance as may be specified in the regulations.

Test your knowledge

Multiple choice question

Which of the following executives are ex-officio members of the Employees' State Insurance Corporation?

(a) Three members of Parliament

(b) Director General of the Corporation

(c) Chairman of the Board of the Corporation

(d) Vice-president of the Corporation

Correct answer: (a) and (b)

EMPLOYEES' STATE INSURANCE FUND

Creation of Fund

Section 26 of the Act provides that all contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a Fund called the Employees' State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act. The Corporation may accept grants, gifts, donations from the Central or State Governments, local authority, or any individual or body whether incorporated or not, for

all, or any of the purposes of this Act. A Bank account in the name of Employees' State Insurance Fund shall be opened with the Reserve Bank of India or any other Bank approved by the Central Government. Such account shall be operated on by such officers who are authorised by the Standing Committee with the approval of the Corporation.

Purposes for which the Fund may be expended

Section 28 provides that Fund shall be expended only for the following purposes:

(i) payment of benefits and provisions of medical treatment and attendance to insured persons and, where the medical benefit is extended to their families, in accordance with the provisions of this Act and defraying the charge, and costs in connection therewith;

(ii) payment of fees and allowances to members of the Corporation, the Standing Committee and Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;

(iii) payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of officers and other services set up for the purpose of giving effect to the provisions of this Act;

(iv) establishment and maintenance of hospitals, dispensaries and other institutions and the provisions of medical and other ancillary services for the benefit of insured persons and where the medical benefit is extended to their families, their families;

(v) payment of contribution to any State Government, local authority or any private body or individual towards the cost of medical treatment and attendance provided to insured persons and where the medical benefit is extended to their families, their families including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;

(vi) defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of the assets and liabilities;

(vii) defraying the cost (including all expenses) of Employees Insurance Courts set up under this Act;

(viii) payment of any sums under any contract entered into for the purposes of this Act by the Corporation or the Standing Committee or by any officer duly authorised by the Corporation or the Standing Committee in that behalf;

(ix) payment of sums under any decree, order or award, of any court or tribunal against the Corporation or any of its officers or servants for any act done in execution of his duty or under a compromise or settlement of any suit or any other legal proceedings or claims instituted or made against the Corporation;

(x) defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act;

(xi) defraying expenditure within the limits prescribed, on measure for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured; and

(xii) such other purposes as may be authorised by the Corporation with the previous approval of the Central Government.

CONTRIBUTIONS

The contributions have to be paid at such rates as may be prescribed by the Central Government. The present rates of contribution are 4.75 percent and 1.75 percent of workers wages by employers and employees

respectively. The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable. The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations.

Principal employer to pay contributions in the first instance

According to Section 40 of the Act, it is incumbent upon the principal employer to pay in respect of every employee whether directly employed by him or by or through an immediate employer, both the employers contributions and the employees contribution. However, he can recover from the employee (not being an exempted employee) the employees contribution by deduction from his wages and not otherwise. Further Section 40 provides that the principal employer has to bear the expenses of remitting the contributions to that Corporation.

According to Section 39(5) of the Act, if any contribution payable is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of 12 per cent per annum or at such higher rate as may be specified in the regulations, till the date of its actual payment. However, according to proviso to sub-section (5) of Section 39, higher interest specified in the regulations should not exceed the lending rate of interest charged by any scheduled bank. It may be noted that any interest recoverable as stated above may be recovered as an arrear of land revenue or under newly introduced Sections 45-C to 45-I of the Act.

Recovery of contribution from immediate employer

According to Section 41, principal employer who has paid contribution in respect of an employee employed by or through an immediate employer is entitled to recover the amount of contribution so paid (both employers and employees contribution) from the immediate employer either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer. However the immediate employer is entitled to recover the employees contribution from the employee employed by or through him by deduction from wages and not otherwise. The immediate employer is required to maintain a register of employees employed by or through him as provided in the Regulations and submit the same to the principal employer before the settlement of any amount payable. He is not required to have separate account with ESI (LAB IC 1999 Kar 1369).

Method of payment of contribution

Section 43 provides for the Corporation to make regulations for payment and collection of contribution payable under this Act and such regulations may provide for:

(a) the manner and time for payment of contribution;

(b) the payment of contributions by means of adhesive or other stamps affixed to or impressed upon books, cards or otherwise and regulating the manner, times and conditions in, at and under which, such stamps are to be affixed or impressed;

(c) the date by which evidence of contributions having been paid is to be received by the Corporation;

(d) the entry in or upon books or cards or particulars of contribution paid and benefits distributed in the case of the insured persons to whom such books or card relate; and

(e) the issue, sale, custody, production, inspection and delivery of books or cards and the replacement of books or cards which have been, lost, destroyed or defaced.

BENEFITS

Under Section 46 of the Act, the insured persons, their dependants are entitled to the following benefits on prescribed scale:

(a) periodical payments in case of sickness certified by medical practitioner;

(b) periodical payments to an insured workman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement;

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

(d) periodical payment to dependants of insured person;

(e) medical treatment and attendance on insured person;

(f) payment of funeral expenses on the death of insured person at the prescribed rate of.

General provisions relating to Benefits

Right to receive benefits is not transferable or assignable. When a person receives benefits under this Act, he is not entitled to receive benefits under any other enactment.

An insured person is not entitled to receive for the same period more than one benefit, e.g. benefit of sickness cannot be combined with benefit of maternity or disablement, etc.

EMPLOYEES' INSURANCE COURT (E.I. COURT)

Constitution

Section 74 of the Act provides that the State Government shall by notification in the Official Gazette constitute an Employees' Insurance Court for such local area as may be specified in the notification. The Court shall consist of such number of judges as the State Government may think fit. Any person who is or has been judicial officer or is a legal practitioner of 5 years standing shall be qualified to be a judge of E.I. Court. The State Government may appoint the same Court for two or more local areas or two or more Courts for the same local area and may regulate the distribution of business between them.

Matters to be decided by E.I. Court

(i) Adjudication of disputes

The Employees' Insurance Court has jurisdiction to adjudicate disputes, namely, whether any person is an employee under the Act, rate of wages/contribution, as to who is or was the principal employer, right of a person to any benefit under the Act.

(ii) Adjudication of claims

The EI Court also has jurisdiction to decide claims for recovery of contribution from principal employer or immediate employer, action for failure or negligence to pay contribution, claim for recovery of any benefit admissible under the Act.

Proceedings in both the above cases can be initiated by filing application in the prescribed form by the employee or his dependent or employer or the corporation depending who has cause of action.

No Civil Court has power to decide the matters falling within the purview/ jurisdiction of E.I. Court.

EXEMPTIONS

The appropriate Government may exempt any factory/establishment from the purview of this Act, as well as any person or class of persons employed in any factory/establishment, provided the employees employed therein are in receipt of benefits superior to the benefits under the Act. Such exemption is initially given for one year and may be extended from time to time. The applicant has to submit application justifying exemption with full details and satisfy the concerned Government.

Test your knowledge

What is the minimum qualification required for a person to qualify as a judge of the E.I, Court?

(a) Judicial officer with minimum 5 years standing

(b) Legal practitioner with minimum 5 years standing

(c) Chartered Accountant with minimum 5 years standing

(d) Special Legal Officer with minimum 5 years standing

Correct answer: (a) and (b)

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from ……..
2. During the year under review, the provisions of this Act continued to have effect notwithstanding any reduction in the employees below the Statutory Minimum.
3. The factory/establishment had made an application to the regional office within 15 days from the date on which this Act became applicable and the Employer's code number is ……
4. The factory/establishment/class of factory/class of establishment is exempted from complying with the provisions of the Act/any specified area from the operation of this Act vide notification issued by the appropriate government in the official gazette, during the financial year.
5. The factory/establishment has ……. number of employees as defined under section 2 (9) of the Act during the said financial year.
6. All the employees in the factory/establishment to which this Act applies have been insured in the manner provided by the Act.
7. The total contribution (both employer and employee share) at the rates prescribed by the central government was deposited in …… with the designated branches of…….. Bank on or before 21st of the month following the calendar month in which the wages fall due during the financial year.
8. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

LESSON ROUND UP

– The law relating to employees' State Insurance is governed by the Employees' State Insurance Act, 1948.

– The objective of the act is to provide for certain benefits to employees in case of sickness, maternity and employment injury and to provide for certain other matters in relation there to.

– The Act is applicable to all factories including factories belonging to the Government other than seasonal factories. The appropriate Government may after giving a notice of not less than one month and by notification in the official Gazette, extend the application of the Act or any of them, to any other

establishment or class of establishments, industrial, commercial, agricultural or otherwise. Once the Act becomes applicable, the Act shall continue to apply irrespective of the reduction in number of employees or cessation of manufacturing process with the aid of power.

– Every factory or establishment to which this Act applies has to be registered within the specified time and the regulations made in this behalf.

– All the employees in factories or establishments to which this Act applies shall be insured in prescribed manner. Such insured persons shall pay contributions towards Insurance Fund through their employers who will also pay their own contribution.

– The ESI Act authorises Central Government to establish Employees State Insurance Corporation for administration of the Employees State Insurance Scheme. Such Corporation shall be body corporate having perpetual succession and a common seal and shall sue and be sued by the said name.

– All contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a Fund called the Employees State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act.

– The insured persons, their dependants are entitled to various benefits on prescribed scale. Right to receive benefits is not transferable or assignable. When a person receives benefits under this Act, he is not entitled to receive benefits under any other enactment.

– The Act empowers State Government to constitute an Employees Insurance Court. The Employees Insurance Court has jurisdiction to adjudicate disputes, namely, whether any person is an employee under the Act, rate of wages/contribution, as to who is or was the principal employer, right of a person to any benefit under the Act.

– The EI Court also has jurisdiction to decide claims for recovery of contribution from principal employer or immediate employer, action for failure or negligence to pay contribution, claim for recovery of any benefit admissible under the Act.

SELF TEST QUESTIONS

1. Discuss the object and scope of the Employees' State Insurance Act, 1948.
2. What are the different kinds of benefits provided under the E.S.I. Act.
3. How is the Employees' Insurance Court constituted and what are the matters to be decided by such a Court?
4. Write short notes on Principal Employer and Immediate Employer.
5. What are the penalties prescribed by the ESI Act, 1948 for contravention of the provisions of the Act?

Lesson 6

Employees' Provident Funds and Miscellaneous Provisions Act, 1952

LESSON OUTLINE

- Learning Objectives
- Introduction
- Application of the Act
- Appropriate Government
- Basic Wages
- Contribution
- Exempted Employee
- Pension Fund
- Pension Scheme
- Schemes under the Act
- Employees' Provident Fund Scheme
- Class of Employees entitled and required to join provident fund
- Employees' Pension Scheme
- Employees' Deposit-Linked Insurance Scheme
- Determination and Recovery of Moneys due from and by Employers
- Employer not to reduce Wages
- Transfer of Accounts
- Protection against Attachment
- Power to Exempt
- Compliances under the Act

LEARNING OBJECTIVES

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation to provide for the institution of Provident Fund, Pension Fund and Deposit Linked Insurance Fund for employees working in factories and other establishments. The Act aims at providing social security and timely monetary assistance to industrial employees and their families when they are in distress.

Accordingly, three schemes are in operation under the Act. These schemes taken together provide to the employees an old age and survivorship benefits, a long term protection and security to the employee and after his death to his family members, and timely advances including advances during sickness and for the purchase/ construction of a dwelling house during the period of membership.

The Act is administered by the Government of India through the Employees' Provident Fund Organisation (EPFO). EPFO is one of the largest provident fund institutions in the world in terms of members and volume of financial transactions that it has been carrying on.

The Central Government has been constituted Employees' Provident Funds Appellate Tribunal to exercise the powers and discharge the functions conferred on such by Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The Tribunal consist of one person only and appointed by the Central Government.

Students must have knowledge of the provisions of this Act to be aware of the statutory obligations under the Act.

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 provides for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments. It extends to the whole of India except the State of Jammu and Kashmir.

INTRODUCTION

Provident Fund schemes for the benefit of the employees had been introduced by some organisations even when there was no legislation requiring them to do so. Such schemes were, however, very few in number and they covered only limited classes/groups of employees. In 1952, the Employees Provident Funds Act was enacted to provide institution of Provident Fund for workers in six specified industries with provision for gradual extension of the Act to other industries/classes of establishments. The Act is now applicable to employees drawing pay not exceeding Rs. 6,500/- per month. The Act extends to whole of India except Jammu and Kashmir. The term pay includes basic wages with dearness allowance, retaining allowance (if any), and cash value of food concession.

The following three schemes have been framed under the Act by the Central Government:

(a) The Employees' Provident Fund Schemes, 1952;

(b) The Employees' Pension Scheme, 1995; and

(c) The Employees' Deposit-Linked Insurance Scheme; 1976.

The three schemes mentioned above confer significant social security benefits on workers and their dependents.

APPLICATION OF THE ACT

According to Section 1(3), the Act, subject to the provisions of Section 16, applies:

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed; and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months notice of its intention to do so by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.

The Central Government can extend the provisions of the Act to any establishment [including the co-operative society to which under Section 16(1) the provisions of the Act are not applicable by notification in Official Gazette when the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to them [Section 1(4)]. However, before notification is made, parties can opt out of such an agreement (1996 20 CLA 25 Bom.). Once an establishment falls within the purview of the Act, it shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty. [Section 1(5)] Where an establishment to which this Act applied was divided among the partners, the Act would continue to apply to the part of each ex-partner even if the number of persons employed in each part is less than twenty (1986 2 LLJ 137). Where as a result of real and bona fide partition among the owners, an establishment was disrupted and separate and distinct establishments come into existence, allottees with no regular employee, cannot be saddled with liability to pay minimum administrative charges as before (1993 I LLN 698). For compliance with the Act and the scheme, for an establishment there should be an employer and one or more employees are required to be in existence atleast. When there is not even one employee, it would be difficult to contend that the Act continues to apply to the establishment (1998 LLJ I Kar. 780).

The constitutional validity of this Act was challenged on the ground of discrimination and excessive delegation. It was held that the law lays down a rule which is applicable to all the factories or establishments similarly placed. It makes a reasonable classification without making any discrimination between factories placed in the same class or group (*Delhi Cloth and General Mills* v. *R.P.F. Commissioner* A.I.R. 1961 All. 309).

The liability to contribute to the provident fund is created the moment the Scheme is applied to a particular establishment.

On the question whether casual or temporary workmen should be included for the purpose of ascertaining the strength of workmen in terms of Section 1(3) it was held by the Rajasthan High Court in Bikaner Cold Storage Co. Ltd. v. Regional P.F. Commissioner, Rajasthan, 1979 Lab. I.C. 1017, that persons employed in the normal course of the business of the establishment should be considered as the persons employed for the purposes of Section 1(3)(a) and persons employed for a short duration or on account of some urgent necessity or abnormal contingency, which was not a regular feature of the business of the establishment cannot be considered as employees for the purpose of determining the employment strength in relation to the applicability of Section 1(3)(a). In the case of P.F. Inspector v. Hariharan, AIR 1971 S.C. 1519, the Supreme Court held that casual workers are not covered under Section 1(3).

Section 1(3)(b) empowers the Central Government to apply the Act to trading or commercial establishments whether, such establishments are factories or not.

Non-applicability of the Act to certain establishments

Section 16(1) of the Act provides that the Act shall not apply to certain establishments as stated thereunder. Such establishments include (a) establishments registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than 50 persons and working without the aid of power; or (b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or (c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

According to Section 16(2), if the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt that class of establishments from the operation of this Act for such period as may be specified in the notification.

The date of establishment of a factory is the date when the factory starts its manufacturing process. A change in the ownership does not shift the date of establishment. A mere change in the partnership deed, does not mean that a new business has come into existence for the purpose of Section 16(1) (*P.G. Textile Mills* v. *Union of India* (1976) 1 LLJ 312).

Test your knowledge

Which of the following schemes have been framed under the Employees' Provident Funds and Miscellaneous Provisions Act?

(a) The Employees' Provident Fund Schemes, 1952

(b) The Employees' Pension Scheme, 1995

(c) The Employees Gratuity Scheme 1992

(d) The Employees' Deposit-Linked Insurance Scheme, 1976

Correct answer: (a), (b) and (d)

IMPORTANT DEFINITIONS

To understand the meaning of different Sections and provisions thereto, it is necessary to know the meaning of important expressions used therein. Section 2 of the Act explains such expressions which are given below:

(i) Appropriate Government

"Appropriate Government" means:

(i) in relation to those establishments belonging to or under the control of the Central Government or in relation to an establishment connected with a railway company, a major port, a mine or an oil field or a controlled industry, or in relation to an establishment having departments or branches in more than one State, the Central Government; and

(ii) in relation to any other establishment, the State Government. [Section 2(a)]

(ii) Basic Wages

"Basic Wages" means all emoluments which are earned by an employee while on duty or on leave or on holiday with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include:

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house- rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer. [Section 2(b)]

(iii) Contribution

"Contribution" means a contribution payable in respect of a member under a Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. [Section 2(c)]

(iv) Controlled Industry

"Controlled Industry" means any industry the control of which by the Union has been declared by the Central Act to be expedient in the public interest. [Section 2(d)]

(v) Employer

"Employer" means

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and where a person has been named as a manager of the factory under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director, or managing agent, such manager, managing director or managing agent. [Section 2(e)]

(vi) Employee

"Employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under Apprentices Act, 1961 or under the standing orders of the establishment. [Section 2(f)]

The definition is very wide in its scope and covers persons employed for clerical work or other office work in connection with the factory or establishment. The inclusive part of the definition makes it clear that even if a person has been employed through a contract in or in connection with the work of the establishment, he would yet fall within the description of employee within the meaning of the Act.

The dominant factor in the definition of 'employee in Section 2(f) of the Act is that a person should be employed in or in connection with the work of the establishment. Sons being paid wages are employees (*Goverdhanlal* v. *REPC* 1994 II LLN 1354). In case of doubt whether a particular person is an employee or not, both the parties should be heard by the Commissioner before deciding the issue (1976-II Labour Law Journal, 309).

The definition of employee in Section 2(f) of the Act is comprehensive enough to cover the workers employed directly or indirectly and therefore, wherever the word employee is used in this Act, it should be understood to be within the meaning of this definition (*Malwa Vanaspati and Chemical Co. Ltd.* v. *Regional Provident Fund Commissioner, M.P. Region, Indore,* 1976-I Labour Law Journal 307).

The definition of "employee", includes a part-time employee, who is engaged for any work in the establishment, a sweeper working twice or thrice in a week, a night watchman keeping watch on the shops in the locality, a gardener working for ten days in a month, etc. (*Railway Employees Co-operative Banking Society Ltd.* v. *The Union of India, 1980 Lab.* IC 1212). The Government of India, by certain notification extended the application of Act and EPF scheme to beedi industry. It was held that the workers engaged by beedi manufacturers directly or through contractors for rolling beedi at home subject to rejection of defective beedies by manufacturers, were employees (1986 1 SCC 32). But working partners drawing salaries or other allowances are not employees. When members of cooperative society do work in connection with that of society and when wages are paid to them, there would be employer-employee relationship and such member-workers would be covered under the definition (1998 LLJ I Mad. 827).

(vii) Exempted Employee

It means an employee to whom a Scheme or the Insurance Scheme as the case may be would, but for the exemption granted under Section 17, have applied. [Section 2(ff)]

(viii) Exempted Establishment

It means an establishment in respect of which an exemption has been granted under Section 17 from the operation of all or any of the provisions of any Scheme or the Insurance Scheme as the case may be whether such exemption has been granted to the establishment as such or to any person or class of persons employed therein. [Section 2(fff)]

(ix) Factory

It means any premises including the precincts thereof, in any part of which a manufacturing process is being carried on or ordinarily so carried on, whether with the aid of power or without the aid of power. [Section 2(g)]

(x) Fund

It means Provident Fund established under the Scheme. [Section 2(h)]

(xi) Industry

It means any industry specified in Schedule I, and includes any other industry added to the Schedule by notification under Section 4. [Section 2(i)]

(xii) Insurance Fund

It means the Deposit-Linked Insurance Fund established under sub-section (2) of Section 6-C. [Section 2(i-a)]

(xiii) Insurance Scheme

It means the Employees Deposit-Linked Insurance Scheme framed under sub-section (1) of Section 6-C. [Section 2(i-b)]

(xiv) Manufacture or Manufacturing Process

It means any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal. [Section 2(i-c)]

(xv) Member

"Member" means a member of the Fund. [Section 2(j)]

(xvi) Occupier of a Factory

It means the person, who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. [Section 2(k)]

(xvii) Pension Fund

"Pension Fund" means the Employees Pension Fund established under sub-section (2) of Section 6A. [Section 2(kA)]

(xviii) Pension Scheme

"Pension Scheme" means the Employees Pension Scheme framed under sub-section (1) of Section 6A. [Section 2(kB)]

(xix) Scheme

It means the Employees' Provident Fund Scheme framed under Section 5. [Section 2(l)]

(xx) Superannuation

"Superannuation", in relation to an employee, who is the member of the Pension Scheme, means the attainment, by the said employee, of the age of fifty-eight years. [Section 2(ll)]

Different departments or branches of an establishment

Where an establishment consists of different departments or branches situated in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. (Section 2A)

SCHEMES UNDER THE ACT

In exercise of the powers conferred under the Act, the Central Government has framed the following three schemes:

(A) Employees Provident Fund Scheme

The Central Government has framed a Scheme called Employees Provident Fund Scheme. The Fund vests in and is administered by the Central Board constituted under Section 5A.

Administration of the Fund

(a) Board of Trustees or Central Board: Section 5A provides for the administration of the Fund. The Central Government may by notification in the Official Gazette constitute with effect from such date as may be specified therein, a Board of Trustees, for the territories to which this Act extends.

The Employees Provident Fund Scheme contains provisions regarding the terms and conditions subject to which a member of the Central Board may be appointed and of procedure of the meetings of the Central Board. The Scheme also lays down the manner in which the Board shall administer the funds vested in it however subject to the provisions of Section 6AA and 6C of the Act. The Board also performs functions under the Family Pension Scheme and the Insurance Scheme.

Class of employees entitled and required to join Provident Fund

Every employee employed in or in connection with the work of a factory or other establishment to which this scheme applies, other than an excluded employee, shall be entitled and required to become a member of the fund from the date of joining the factory or establishment.

The term "excluded employee" has been defined in para 2(f) of the Employees' Provident Fund Scheme, 1952 as follows:

'Excluded employee' means:

(i) an employee who, having been a member of the Fund, withdraw the full amount of his accumulations in the Fund under clause (a) or (c) of sub-paragraph 69;

(ii) an employee whose pay at the time be is otherwise entitled to become a member of the Fund, exceeds five thousand rupees per month.

Explanation: "Pay" includes basic wages with dearness allowance retaining allowance (if any) and cash value of food concession admissible thereon.

(iii) An apprentice.

Explanation: An apprentice means a person who, according to the certified standing orders applicable to the factory or establishment is an apprentice, or who is declared to be an apprentice by the authority specified in this behalf by the appropriate Government.

Contributions

As per Section 6, the contribution which shall be paid by the employer to the Fund shall be 10%, of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or through a contractor and the employees contribution shall be equal to the contribution payable by the employer. Employees, if they desire, may make contribution exceeding the prescribed rate but subject to the condition that employer shall not be under any obligation to contribute over and above the contribution payable as prescribed by the Government from time to time under the Act. The Government has raised the rate of Provident Fund Contribution from the current 8.33% to 10% in general and in cases of establishments specially notified by the Government, from 10% to 12% with effect from September 22, 1997.

Each contribution shall be calculated to the nearest rupee, fifty paise or more to be counted as the next higher rupee and fraction of a rupee less than fifty paise to be ignored.

Dearness allowance shall include the cash value of any food concession allowed to an employee. Retaining allowance is the allowance payable to an employee for retaining his services, when the establishment is not working.

The Provident Fund Scheme has made the payment of contribution mandatory and the Act provides for no exception under which a specified employer can avoid his mandatory liability (*State* v. *S.P. Chandani,* AIR 1959 Pat. 9).

Investment: The amount received by way of Provident Fund contributions is invested by the Board of Trustees in accordance with the investment pattern approved by the Government of India. The members of the Provident Fund get interest on the money standing to their credit in their Provident Fund Accounts. The rate of interest for each financial year is recommended by the Board of Trustees and is subject to final decision by the Government of India.

Advances/Withdrawals: Advances from the Provident Fund can be taken for the following purposes subject to conditions laid down in the relevant paras of the Employees Provident Fund Scheme:

(1) Non-refundable advance for payment of premia towards a policy or policies of Life Insurance of a member;

(2) Withdrawal for purchasing a dwelling house or flat or for construction of a dwelling house including the acquisition of a suitable site for the purpose, or for completing/continuing the construction of a dwelling house, already commenced by the member or the spouse and an additional advance for additions, alteration or substantial improvement necessary to the dwelling house;

(3) Non-refundable advance to members due to temporary closure of any factory or establishment for more than fifteen days, for reasons other than a strike or due to non-receipt of wages for 2 months or more, and refundable advance due to closure of the factory or establishment for more than six months;

(4) (i) Non-refundable in case of:

(a) hospitalisation lasting one month or more, or

(b) major surgical operation in a hospital, or

(c) suffering from T.B., Leprosy, Paralysis, Cancer, Mental derangement or heart ailment, for the treatment of which leave has been granted by the employer;

(ii) Non-refundable advance for the treatment of a member of his family, who has been hospitalised or requires hospitalisation, for one month or more:

(a) for a major surgical operation; or

(b) for the treatment of T.B., Leprosy, Paralysis, Cancer, mental derangement or heart ailment;

(5) Non-refundable advance for daughter/sons marriage, self-marriage, the marriage of sister/brother or for the post matriculation education of son or daughter;

(6) Non-refundable advance to members affected by cut in the supply of electricity;

(7) Non-refundable advance in case property is damaged by a calamity of exceptional nature such as floods, earthquakes or riots;

(8) Withdrawals for repayment of loans in special cases; and

(9) Non-refundable advance to physically handicapped members for purchasing an equipment required to minimise the hardship on account of handicap.

Final withdrawal: Full accumulations with interest thereon are refunded in the event of death, permanent disability, superannuation, retrenchment or migration from India for permanent settlement abroad/taking employment abroad, voluntary retirement, certain discharges from employment under Industrial Disputes Act, 1947, transfer to an establishment/factory not covered under the Act.

In other cases, with permission of commissioner or any subordinate officer to him, a member is allowed to draw full amount when he ceases to be in employment and has not been employed in any establishment to which the Act applies for a continuous period of atleast 2 months. This requirement of 2 months waiting period shall not apply in cases of female members resigning from service for the purpose of getting married.

Test your knowledge

Choose the correct answer:

What percentage of the basic wage, dearness allowance and retaining allowance of an employee is paid as contribution by the employer?

(a) 8%

(b) 10%

(c) 12%

(d) 13%

Correct answer: (b)

(B) Employees' Pension Scheme

Under Section 6A, Government has introduced a new pension scheme styled Employees' Pension Scheme, 1995 w.e.f. 16.11.1995, in place of Family Pension Scheme, 1971.

The Employees' Pension Scheme is compulsory for all the persons who were members of the Family Pension Scheme, 1971. It is also compulsory for the persons who become members of the Provident Fund from 16.11.1995 i.e. the date of introduction of the Scheme. The PF subscribers who were not members of the Family Pension Scheme, have an option to join this Pension Scheme. The Scheme came into operation w.e.f. 16.11.1995, but the employees, including those covered under the Voluntary Retirement Scheme have an option to join the scheme w.e.f. 1.4.1993.

Minimum 10 years contributory service is required for entitlement to pension. Normal superannuation pension is payable on attaining the age of 58 years. Pension on a discounted rate is also payable on attaining the age of 50 years. Where pensionable service is less than 10 years, the member has an option to remain covered for pensionary benefits till 58 years of age or claim return of contribution/ withdrawal benefits.

The Scheme provides for payment of monthly pension in the following contingencies(a) Superannuation on attaining the age of 58 years; (b) Retirement; (c) Permanent total disablement; (d) Death during service; (e) Death after retirement/ superannuation/permanent total disablement; (f) Children Pension; and (g) Orphan pension.

The amount of monthly pension will vary from member to member depending upon his pensionable salary and pensionable service.

The formula for calculation of monthly members pension is as under:

$$\text{Members Pension} = \frac{\text{*Pensionable Salary} \times (\text{Pensionable Service} + 2)}{70}$$

To illustrate, if the contributory service is 33 years and pensionable salary is

Rs. 5,000 per month, the above formula operates as given below:

$$\text{Members Pension} = \frac{₹5{,}000 \times (33 + 2) = \text{Rs. } 2{,}500 \text{ p.m}}{70}$$

In case where the contributory service is less than 20 years but more than 10 years, monthly pension is required to be determined as if the member has rendered eligible service of 20 years. The amount so arrived shall be reduced at the rate of 3 per cent for every year by which the eligible service falls short of 20 years, subject to maximum reduction of 25 per cent.

* Pensionable Salary will be average of last 12 months pay.

A separate formula for pension has been prescribed for the members of the ceased Family Pension Scheme, 1971. In the case of members who contributed to the Family Pension Scheme for 24 years, the minimum amount of pension will be Rs. 500 per month. Depending upon the retirement date, the amount of pension for such members may go even beyond Rs. 800 per month. The Family Pension members retiring in November, 1995 after having membership of only 10 years will also get a minimum pension of Rs. 265 p.m. In addition such Family Pension members will get back their full provident fund including the employers share along with interest accumulated in their account upto 15.11.1995.

(a) The rate of minimum widow pension is Rs. 450 p.m. The maximum may go upto Rs. 2,500 p.m. payable as normal members pension on completion of nearly 33 years of service. Family pension upto Rs. 1,750 p.m. is also payable to the widow of the member who has contributed only for one month to the pension fund.

(b) In addition to the widow pension, the family is also entitled to children pension. The rate of children pension is 25 per cent of widow pension for each child subject to a minimum of Rs. 115 p.m. per child payable upto two children at a time till they attain the age of 25 years.

(c) If there are no parents alive, the scheme provides for orphan pension @ 75 per cent of the widow pension payable to orphans subject to the minimum of Rs. 170 p.m. per orphan.

The scheme has been amended making dependent parents eligible for pension. Further disabled children are also made eligible for life long pension.

Under the Pension Scheme, the employees have an option to accept the admissible pension or reduced pension with return of capital. In the case of employee opting for 10% less pension than the actual entitlement, the scheme provides for return of capital equivalent to 100 times of the original pension in the event of death of the pensioner. For example, if the monthly pension is Rs. 2,000 p.m. and the employee opts for reduced pension of Rs. 1,800 the family will have refund of the capital amounting to Rs. 2,00,000 on death of the pensioner. In addition, the widow and two children will continue to get pension for life or upto the age of 25 years, as the case may be.

Under the Scheme, neither the employer nor the employee is required to make any additional contribution. A Pension Fund has been set up from 16.11.95, and the employers share of PF contribution representing 8.33% of the wage is being diverted to the said Fund. All accumulations of the ceased Family Pension Fund have been merged in the Pension Fund. The Central Government is also contributing to the Pension Fund at the rate of 1.16% of the wage of the employees.

(C) Employees' Deposit-Linked Insurance Scheme

The Act was amended in 1976 and a new Section 6B was inserted empowering the Central Government to frame a Scheme to be called the Employees' Deposit-Linked Insurance Scheme for the purpose of providing life insurance benefit to the employees of any establishment or class of establishments to which the Act applies.

The Central Government has accordingly framed the Employees' Deposits-Linked Insurance Scheme, 1976. It came into force on the 1st August, 1976.

1. Application of the Scheme: The Employees Deposit-Linked Insurance Scheme, 1976 is applicable to all factories/establishments to which the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 applies.

All the employees who are members of the Provident Funds in both the exempted and the unexempted establishments are covered under the scheme.

2. *Contributions to the Insurance Fund:* The employees are not required to contribute to the Insurance Fund.

The employers are required to pay contributions to the Insurance Fund at the rate of 1% of the total emoluments, i.e., basic wages, dearness allowance including, cash value of any food concession and retaining allowance, if any.

3. *Administrative expenses:* The employers of all covered establishments are required to pay charges to the Insurance Fund, at the rate of 0.01% of the pay of the employee-members for meeting the administrative charges, subject to a minimum of Rs. 2/- per month.

4. *Nomination:* The nomination made by a member under the Employee Provident Fund Scheme 1952 or in the exempted provident fund is treated as nomination under this scheme. Provisions of Section 5 have overriding effect and will override the personal laws of the subscriber in the matters of nominations (LLJ I 1996 All. 236).

5. *Payment of assurance benefit:* In case of death of a member, an amount equal to the average balance in the account of the deceased during the preceding 12 months or period of membership, whichever is less shall be paid to the persons eligible to receive the amount or the Provident Fund accumulations. In case the average balance exceeds Rs. 50,000, the amount payable shall be Rs. 50,000 plus 40% of the amount of such excess subject to a ceiling of Rs. one lakh

6. *Exemption from the Scheme:* Factories/establishments, which have an Insurance Scheme conferring more benefits than those provided under the statutory Scheme, may be granted exemption, subject to certain conditions, if majority of the employees are in favour of such exemption.

DETERMINATION OF MONEYS DUE FROM EMPLOYERS

(i) Determination of money due

Section 7A vests the powers of determining the amount due from any employer under the provisions of this Act and deciding the dispute regarding applicability of this Act in the Central Provident Fund Commissioner, Additional Provident Fund Commissioner, Deputy Provident Fund Commissioner, or Regional Provident Fund Commissioner. For this purpose he may conduct such inquiry as he may deem necessary.

Central Government has already constituted Employees Provident Fund Appellate Tribunal, consisting of a presiding officer who is qualified to be a High Court Judge or a District Judge with effect from 1st July, 1997 in accordance with provisions of Section 7D. The term, service conditions and appointment of supporting staff are governed by Sections 7E to 7H. Any person aggrieved by order/notification issued by Central Government/ authority under Sections 1(3), 1(4), 3, 7A(1), 7C, 14B or 7B (except an order rejecting an application for review) may prefer an appeal. The tribunal shall prescribe its own procedure and have all powers vested in officers under Section 7A.

The proceedings before the tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for Section 196 of Indian Penal Code and Civil, 1908, it shall be deemed to be a Civil Court for all purposes of Section 195 and Chapter XXVI of Code of Procedure. The appellant can take assistance of legal practitioner and the Government shall appoint a presenting officer to represent it. Any order made by the Tribunal finally disposing of the appeal cannot be questioned in any Court.

(ii) Mode of recovery of moneys due from employers

Section 8 prescribes the mode of recovery of moneys due from employers by the Central Provident Fund Commissioner or such officer as may be authorised by him by notification in the Official Gazette in this behalf in the same manner as an arrear of land revenue. Recovery of arrears of Provident Fund cannot be effected from unutilised part of cash-credit of an industrial establishment (1998 LAB IC Kar 3044).

(iii) Recovery of moneys by employers and contractors

Section 8A lays down that the amount of contribution that is to say the employer's contribution as well as the

employee's contribution and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor, may be recovered by such employer from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

A contractor from whom the amounts mentioned above, may be recovered in respect of any employee employed by or through him, may recover from such employee, the employee's contribution under any scheme by deduction from the basic wages, dearness allowance and retaining allowance, if any, payable to such employee. However, notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to above from the basic wages, dearness allowance and retaining allowance payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee.

(iv) Measures for recovery of amount due from employer

The authorised officer under this Act shall issue a certificate for recovery of amount due from employer to the Recovery Officer. The Recovery Officer has got the powers to attach/sell the property of employer, call for arrest and detention of employer, etc. for effecting recovery. The employer cannot challenge the validity of the certificate. The authorised officer can grant time to the employer to make the payment of dues.

The Central Provident Fund Commissioner may require any person, from whom amount is due to the employer, to pay directly to the Central Provident Fund Commissioner/Officer so authorised and the same will be treated as discharge of his liability to the employer to the extent of amount so paid. (Sections 8B to 8G)

(v) Priority of payment of contributions over other debts

Section 11 of the Act provides that the contribution towards Provident Fund shall rank prior to other payments in the event of employer being adjudicated insolvent or where it is a company on which order of winding up has been made. The amount shall include:

(a) the amount due from the employer in relation to an establishment to which any Scheme or Insurance Scheme applies in respect of any contribution payable to the Fund, or the Insurance, damages recoverable under Section 14B, accumulations required to be transferred under sub-section (2) of Section 15 or any charges payable by him under any other provisions of this Act or of any provision of the Scheme or the Insurance Scheme; or

(b) the amount due from employer in relation to an exempted establishment in respect of any contribution to the Provident Fund or any Insurance Fund in so far as it relates to exempted employees under the rules of the Provident Fund, or any Insurance Fund or any contribution payable by him towards the Pension Fund under Sub-section (6) of Section 17, damages recoverable under Section 13B or any charges payable by him to the appropriate Government under any provisions of this Act or any of the conditions specified under Section 17.

EMPLOYER NOT TO REDUCE WAGES

Section 12 prohibits an employer not to reduce directly or indirectly the wages of any employee to whom the Scheme or the Insurance Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity or provident fund or life insurance to which the employee is entitled under the terms of employment, express or implied, simply by reason of his liability for the payment of any contribution to the Fund or the Insurance Fund or any charges under this Act or the Scheme or the Insurance Scheme.

Test your knowledge

Choose the correct answer:

Which authority has been constituted by the Central Government to preside over the cases regarding determination of monies due from employers?

(a) Employees Provident Fund Appellate Tribunal

(b) Employees Provident Fund Consultancy Tribunal

(c) Employees Provident Fund Helpdesk

(d) Employees Provident Fund Information Centre

Correct answer: (a)

TRANSFER OF ACCOUNTS

Section 17A(1) of the Act provides that where an employee employed in an establishment to which this Act applies leaves his employment and obtain re-employment in another establishment to which this Act does not apply, the amount of accumulations to the credit of such employee in the Fund, or as the case may be, in the Provident Fund of the establishment left by him shall be transferred within such time as may be specified by Central Government in this behalf to the credit of his account in the Provident Fund of the establishment in which he is re-employed, if the employee so desires and the rules in relation to that Provident Fund permit such transfer.

Sub-section (2) further provides that where as employee employed in an establishment to which this Act does not apply, leaves his employment and obtain re-employment in another establishment to which this Act applies, the amount of accumulations to the credit of such employee in the Provident Fund of the establishment left by him, may, if the employee so desires and also rules in relation to such Provident Fund permit, be transferred to the credit of his account in the Fund or as the case may be, in the Provident Fund of the establishment in which he is re-employed.

PROTECTION AGAINST ATTACHMENT

Statutory protection is provided to the amount of contribution to Provident Fund under Section 10 from attachment to any Court decree. Sub-section (1) of Section 10 provides that the amount standing to the credit of any member in the Fund or any exempted employee in a Provident fund shall not in any way, be capable of being assigned or charged and shall not be liable to attachment under any decree or order or any Court in respect of any debt or liability incurred by the member or the exempted employee and neither the official assignee appointed under the Presidency Towns Insolvency Act, 1909 nor any receiver appointed under the Provincial Insolvency Act, 1920 shall be entitled to or have any claim on any such amount.

It is further provided in sub-section (2) that any amount standing to the credit of a member in the Fund or of an exempted employee in a Provident Fund at the time of his death and payable to his nominee under the Scheme or the rules of the Provident Fund shall, subject to any deduction authorised by the said scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of the exempted employee and shall also not be liable to attachment under any decree or order of any Court. There is a statutory vesting of the fund on dependents after the death of the subscriber which on such vesting becomes absolute property of dependent and cannot be held to have inherited by dependent.

The above provision shall apply in relation to the Employees' Pension Scheme or any other amount payable under the Insurance Scheme as they apply in relation to any amount payable out of the fund.

POWER TO EXEMPT

Section 17 authorises the appropriate Government to grant exemptions to certain establishments or persons from the operation of all or any of the provisions of the Scheme. Such exemption shall be granted by notification in the Official Gazette subject to such conditions as may be specified therein.

Test your knowledge

State whether the following statement is "True" or "False":

Statutory protection is provided to the amount of contribution to Provident Fund under Section 12 from attachment to any court decree.

- True
- False

Correct answer: False

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from……..

   Or

   The factory/establishment is covered under the provisions of this Act by a notification dated ……. given by the government in the official gazette.

2. The establishment has duly paid its contribution to Employees' Provident Fund, Employees' Family Pension Scheme, Employees' Deposit Linked Insurance Scheme set up under the Act during the financial year.

3. The establishment has set up a separate Provident Fund Trust and has complied with the provisions of the Act during the financial year.

4. The establishment has sent a consolidated return within fifteen days of the commencement of the Employees' Provident Fund Scheme to the commissioner during the financial year.

   Or

   The establishment has no employees entitled to become members of the Employees' Provident Fund during the financial year. Therefore, the establishment has duly filed the 'NIL' return to the Commissioner.

5. During the year under review, the establishment has duly filed returns with the Commissioner in respect of employees qualifying to become members of the Employees' Provident Fund and employees leaving the service during the financial year.

6. The establishment has sent a consolidated return within three months of the commencement of the Employees' Pension Scheme to the commissioner.

   Or

   The establishment has no employees entitled to become members of the Employees' Family Pension Fund during the financial year. Therefore the establishment has duly filed the 'NIL' return to the Commissioner.

7. The establishment has also duly sent to the commissioner, the consolidated annual contribution statement showing the total amount of recoveries made during the year from the wages of each member and the total amount contributed by the employer in respect of each such member during the financial year.

8. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

LESSON ROUND UP

- The Employee's Provident Funds and Miscellaneous Provisions Act, 1952 is a welfare legislation enacted for the purpose of instituting a Provident Fund for employees working in factories and other establishments.
- The Act aims at providing social security and timely monetary assistance to industrial employees and their families when they are in distress and/or unable to meet family and social obligations and to protect them in old age, disablement, early death of the bread winner and in some other contingencies.
- Presently, the following three Schemes are in operation under the Act : Employees' Provident Funds Scheme, 1952; Employees' Deposit Linked; Insurance Scheme, 1976; Employees' Pension Scheme, 1995.
- The Act is applicable to factories and other classes of establishments engaged in specific industries, classes of establishments employing 20 or more persons.
- The Central Government is empowered to apply the provisions of this Act to any establishment employing less than 20 persons after giving not less than two months notice of its intent to do so by a notification in the official gazette.
- Once the Act has been made applicable, it does not cease to be applicable even if the number of employees falls below 20. An establishment/factory, which is not otherwise coverable under the Act, can be covered voluntarily with mutual consent of the employers and the majority of the employees under Section 1(4) of the Act.
- Thus, membership of the fund is compulsory for employees drawing a pay not exceeding Rs. 6500 per month (at the time of joining). Every employee employed in or in connection with the work of a factory or establishment shall be entitled and required to become a member of the fund from the date of joining the factory or establishment.
- The employees drawing more than Rs.6500/- per month at the time of joining may become member on a joint option of the employer and employee.
- Statutory protection is provided to the amount of contribution to Provident Fund under Section 10 from attachment to any Court decree. The Act authorises the appropriate Government to grant exemptions to certain establishments or persons from the operation of all or any of the provisions of the Scheme.

SELF TEST QUESTIONS

1. Describe the applicability and non-applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to establishments and the employees.
2. Explain the Schemes provided under the Employees' Provident Fund and Miscellaneous Provisions Act.
3. Whether payment of contribution has priority over other debts?
4. Explain the scope and objective of Employees' Provident Fund and Miscellaneous Provisions Act.
5. Write short notes on (i) Employer (ii) Employee.

Lesson 7
Payment of Bonus Act, 1965

LESSON OUTLINE

- Learning Objectives
- Object and Scope
- Application of the Act
- Act not to apply to certain classes of employees
- Allocable Surplus
- Available Surplus
- Establishment in Private Sectors
- Establishment in Public Sectors
- Calculation of Amount Payable as Bonus
- Computation of Gross Profits
- Deductions from Gross Profits
- Calculation of Direct Tax Payable by the Employer
- Computation of Available Surplus
- Eligibility for Bonus and its Payment
- Bonus linked with Production or Productivity
- Power of exemption
- Penalties
- Offences by companies
- Compliances under the Act

LEARNING OBJECTIVES

The term "bonus" is not defined in the Payment of Bonus Act, 1965. Webster International Dictionary defines bonus as "something given in addition to what is ordinarily received by or strictly due to the recipient". The Oxford Concise Dictionary defines it as "something to the good into the bargain (and as an example) gratuity to workmen beyond their wages". The purpose of payment of bonus is to bridge the gap between wages paid and ideal of a living wage.

The Payment of Bonus Act, 1965 applies to every factory as defined under the Factories Act, 1948; and every other establishment in which twenty or more persons are employed on any day during an accounting year. However, the Government may, after giving two months' notification in the Official Gazette, make the Act applicable to any factory or establishment employing less than twenty but not less than ten persons. An employee is entitled to be paid by his employer a bonus in an accounting year subjected to the condition that he/she has worked for not less than 30 working days of that year. An employer shall pay minimum bonus at the rate of 8.33% of the salary or wages earned by an employee in an year or one hundred rupees, whichever is higher.

The students must be familiar with the basic legal framework envisaged under the Act to understand the main principles involved in the grant of bonus to workers.

Payment of Bonus Act, 1965 provides for the payment of bonus to persons employed in certain establishments and for matters connected therewith.

OBJECT AND SCOPE OF THE ACT

The object of the Act is to provide for the payment of bonus to persons employed in certain establishments and for matters connected therewith. Shah J. observed in Jalan Trading Co. (Pvt.) Ltd. v. Mill Mazdor Sabha, AIR 1967 S.C. 691, that the "object of the Act being to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment and prescribing the maximum and minimum rates of bonus together with the scheme of "set-off" and "set on" not only secures the right of labour to share in the profits but also ensures a reasonable degree of uniformity".

On the question whether the Act deals only with profit bonus, it was observed by the Supreme Court in *Mumbai Kamgar Sabha* v. *Abdulbhai Faizullabhai*, (1976) II LLJ 186, that "bonus" is a word of many generous connotations and, in the Lord's mansion, there are many houses. There is profit based bonus which is one specific kind of claim and perhaps the most common. There is customary or traditional bonus which has its emergence from long, continued usage leading to a promissory and expectancy situation materialising in a right. There is attendance bonus and what not. The Bonus Act speak and speaks as a whole Code on the sole subject of profit based bonus but is silent and cannot, therefore, annihilate by implication, other distinct and different kinds of bonuses, such as the one oriented on custom. The Bonus Act, 1965 as it then stood does not bar claims to customary bonus or those based on conditions of service. Held, a discerning and concrete analysis of the scheme of the Bonus Act and reasoning of the Court leaves no doubt that the Act leaves untouched customary bonus.

The provision of the Act have no say on customary bonus and cannot, therefore, be inconsistent therewith. Conceptually, statutory bonus and customary bonus operate in two fields and do not clash with each other (*Hukamchand Jute Mills Limited* v. *Second Industrial Tribunal, West Bengal;* 1979-I Labour Law Journal 461).

APPLICATION OF THE ACT

According to Section 1(2), the Act extends to the whole of India, and as per Section 1(3) the Act shall apply to

(a) every factory; and

(b) every other establishment in which twenty or more persons are employed on any day during an accounting year.

Provided that the appropriate Government may, after giving not less than two months notice of its intention so to do, by notification in the Official Gazette apply the provisions of this Act with effect from such accounting year as may be specified in the notification to any establishment including an establishment being a factory within the meaning of sub-clause (ii) of clause (m) of Section 2 of the Factories Act, 1948 employing such number of persons less than twenty as may be specified in the notification; so, however, that the number of persons so specified shall in no case be less than ten.

Save as otherwise provided in this Act, the provisions of this Act shall, in relation to a factory or other establishment to which this Act applies, have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year:

Provided that in relation to the State of Jammu and Kashmir, the reference to the accounting year commencing on any day in the year 1964 and every subsequent accounting year shall be construed as reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year.

Provided further that when the provisions of this Act have been made applicable to any establishment or class of establishments by the issue of a notification under the proviso to sub-section (3), the reference to the accounting year commencing on any day in the year 1964 and every subsequent accounting year, or, as the case may be,

the reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year, shall, in relation to such establishment or class of establishments, be construed as a reference to the accounting year specified in such notification and every subsequent accounting year [Section 1(4)].

An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein falls below twenty, or, as the case may be, the number specified in the notification issued under the proviso to sub-section (3).

ACT NOT TO APPLY TO CERTAIN CLASSES OF EMPLOYEES

Section 32 of this Act provides that the Act shall not apply to the following classes of employees:

(i) employees employed by any insurer carrying on general insurance business and the employees employed by the Life Insurance Corporation of India;

(ii) seamen as defined in clause (42) of Section 3 of the Merchant Shipping Act, 1958;

(iii) employees registered or listed under any scheme made under the Dock Workers (Regulation of Employment) Act, 1948 and employed by registered or listed employers;

(iv) employees employed by an establishment engaged in any industry called on by or under the authority of any department of Central Government or a State Government or a local authority;

(v) employees employed by

(a) the Indian Red Cross Society or any other institution of a like nature including its branches;

(b) universities and other educational institutions;

(c) institutions (including hospitals, chambers of commerce and social welfare institutions) established not for the purpose of profit;

(vi) & (vii) …..(omitted).

(viii) employees employed by the Reserve Bank of India;

(ix) employees employed by

(a) the Industrial Finance Corporation of India;

(b) any Financial Corporation established under Section 3, or any Joint Financial Corporation established under Section 3A of the State Financial Corporations Act, 1951;

(c) the Deposit Insurance Corporation;

(d) the National Bank for Agriculture and Rural Development;

(e) the Unit Trust of India;

(f) the Industrial Development Bank of India;

(fa) the Small Industries Development Bank of India established under Section 3 of the Small Industries Development Bank of India Act, 1989;

(fb) the National Housing Bank;

(g) any other financial Institution (other than Banking Company) being an establishment in public sector, which the Central Government may by notification specify having regard to (i) its capital structure; (ii) its objectives and the nature of its activities; (iii) the nature and extent of financial assistance or any concession given to it by the Government; and (iv) any other relevant factor;

(x) ……..(omitted).

(xi) employees employed by inland water transport establishments operating on routes passing through any other country.

Apart from the above, the appropriate Government has necessary powers under Section 36 to exempt any establishment or class of establishments from all or any of the provisions of the Act for a specified period having regard to its financial position and other relevant circumstances and if it is of the opinion that it will not be in the public interest to apply all or any of the provisions of this Act thereto. It may also impose such conditions while according the exemptions as it may consider fit to impose.

Test your knowledge

What are the different types of bonus?

(a) Profit based bonus

(b) Customary bonus

(c) Attendance bonus

(d) Voluntary bonus

Correct answer: (a), (b) and (c)

IMPORTANT DEFINITIONS

Accounting Year

"Accounting Year" means

(i) in relation to a corporation, the year ending on the day on which the books and accounts of the corporation are to be closed and balanced;

(ii) in relation to a company, the period in respect of which any profit and loss account of the company laid before it in annual general meeting is made up, whether that period is a year or not;

(iii) in any other case

(a) the year commencing on the 1st day of April; or

(b) if the accounts of an establishment maintained by the employer thereof are closed and balanced on any day other than the 31st day of March, then, at the option of the employer, the year ending on the day on which its accounts are so closed and balanced;

Provided that an option once exercised by the employer under paragraph (b) of this sub-clause shall not again be exercised except with the previous permission in writing of the prescribed authority and upon such conditions as that authority may think fit. [Section 2(1)]

Allocable Surplus

It means –

(a) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of Section 194 of that Act, sixty-seven per cent of the available surplus in an accounting year;

(b) in any other case sixty per cent of such available surplus. [Section 2(4)]

Available Surplus

It means the available surplus under Section 5. [Section 2(6)]

Award

"Award" means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal Constituted under the Industrial Disputes Act, 1947 or by any other authority constituted under any corresponding law relating to investigation and settlement of industrial disputes in force in a State and includes an arbitration award made under Section 10A of that Act or under that law. [Section 2(7)]

Corporation

"Corporation" means any body corporate established by or under any Central, Provincial or State Act but does not include a company or a co-operative society. [Section 2(11)]

Employee

"Employee" means any person (other than an apprentice) employed on a salary or wages not exceeding *Rs. 10,000* per mensem in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work of hire or reward, whether the terms of employment be express or implied. [Section 2(13)]

Part time permanent employees working on fixed hours are employees (1971 (22) FLR 98).

Employer

"Employer" includes:

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as a manager of the factory under Clause (f) of Sub-section 7(1) of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent. [Section 2(14)]

Establishment in Private Sector

It means any establishment other than an establishment in public sector. [Section 2(15)]

Establishment in Public Sector

It means an establishment owned, controlled or managed by:

(a) a Government company as defined in Section 617 of the Companies Act, 1956;

(b) a corporation in which not less than forty percent of its capital is held (whether singly or taken together) by:

(i) the Government; or

(ii) the Reserve Bank of India; or

(iii) a corporation owned by the Government or the Reserve Bank of India. [Section 2(16)]

Salary or Wage

The "salary or wage" means all remuneration (other than remuneration in respect of over-time work) capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living) but does not include:

(i) any other allowance which the employee is for the time being entitled to;

(ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession;

(iv) any bonus (including incentive, production and attendance bonus);

(v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force;

(vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex-gratia payment made to him;

(vii) any commission payable to the employee. [Section 2(21)]

The Explanation appended to the Section states that where an employee is given in lieu of the whole or part of the salary or, wage payable to him, free food allowance or free food by his employer, such food allowance or the value of such food shall, for the purpose of this clause, be deemed to form part of the salary or wage of such employee.

The definition is wide enough to cover the payment of retaining allowance and also dearness allowance paid to the workmen. It is nothing but remuneration (Chalthan Vibhag Sahakari Khand Udyog v. Government Labour Officer AIR 1981 SC 905). Subsistence allowance given during suspension is not wages. However lay-off compensation is wages.

Establishment – Meaning of

Section 3 of the Act provides that the word establishment shall include all its departments, undertakings and branches wherever it has so whether situated in the same place or in different places and the same shall be treated as parts of the same establishment for the purpose of computation of bonus under this Act:

Provided that where for any accounting year, a separate balance-sheet and profit and loss account are prepared and maintained in respect of any such department or undertaking or branch then such department, undertaking or branches shall be treated as a separate establishment for the purpose of computation of bonus under this Act for that year, unless such department, or undertaking or branch was, immediately before the commencement of that accounting year treated as part of establishment for the purpose of computation of bonus.

CALCULATION OF AMOUNT PAYABLE AS BONUS

The Act has laid down a detailed procedure for calculating the amount of bonus payable to employees. First of all, Gross Profit is calculated as per First or Second Schedule. From this Gross Profit, the sums deductible under Section 6 are deducted. To this figure, we add the sum equal to the difference between the direct tax calculated on gross profit for the previous year and direct tax calculated on gross profit arrived at after deducting the bonus paid or payable to the employees. The figure so arrived will be the available surplus. Of this surplus, 67% in case of company (other than a banking company) and 60% in other cases, shall be the "allocable surplus" which is the amount available for payment of bonus to employees. The details of such calculations are given below.

(i) Computation of gross profits

As per Section 4, the gross profits derived by an employer from an establishment in respect of any accounting year shall:

(a) in the case of banking company be calculated in the manner specified in the First Schedule.

(b) in any other case, be calculated in the manner specified in the Second Schedule.

(ii) Deductions from gross profits

According to Section 6, the sums deductible from gross profits include

(a) any amount by way of depreciation admissible in accordance with the provisions of Section 32(1) of the Income-tax Act, or in accordance with the provisions of the Agricultural Income-tax Law, as the case may be:

Provided that where an employer has been paying bonus to his employees under a settlement or an award or agreement made before the 29th May, 1965, and subsisting on that date after deducting from the gross profits notional normal depreciation, then, the amount of depreciation to be deducted under this clause shall, at the option of such employer (such option to be exercised once and within one year from that date) continue to be such notional normal depreciation.

What is deductible under Section 6(a), is depreciation admissible in accordance with the provisions of Section 32(1) of the Income- tax Act and not depreciation allowed by the Income-tax Officer in making assessment on the employer.

(b) any amount by way of development rebate, investment allowance, or development allowance which the employer is entitled to deduct from his income under the Income Tax Act.

(c) subject to the provisions of Section 7, any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during the year.

(d) such further sums as are specified in respect of the employer in the Third Schedule.

(iii) Calculation of direct tax payable by the employer

Under Section 7, any direct tax payable by the employer for any accounting year shall, subject to the following provisions, be calculated at the rates applicable to the income of the employer for that year, namely:

(a) in calculating such tax no account shall be taken of

(i) any loss incurred by the employer in respect of any previous accounting year and carried forward under any law for the time being in force relating to direct taxes;

(ii) any arrears of depreciation which the employer is entitled to add to the amount of the allowance for depreciation for any following accounting year or years under sub-section (2) of Section 32 of the Income-tax Act;

(iii) any exemption conferred on the employer under Section 84 of the Income-tax Act or of any deduction to which he is entitled under sub-section (1) of Section 101 of that Act, as in force immediately before the commencement of the Finance Act, 1965;

(b) where the employer is a religious or a charitable institution to which the provisions of Section 32 do not apply and the whole or any part of its income is exempt from tax under the Income-tax Act, then, with respect to the income so exempted, such institution shall be treated as if it were a company in which the public are substantially interested within the meaning of that Act;

(c) where the employer is an individual or a Hindu undivided family, the tax payable by such employer

under the Income-tax Act shall be calculated on the basis that the income derived by him from the establishment is his only income.

(iv) Computation of available surplus

The available surplus in respect of any accounting year shall be the gross profits for that year after deducting therefrom the sums referred to in Section 6.

Provided that the available surplus in respect of the accounting year commencing on any day in the year 1968 and in respect of every subsequent accounting year shall be the aggregate of–

(a) the gross profits for that accounting year after deducting therefrom the sums referred to in Section 6; and

(b) an amount equal to the difference between

(i) the direct tax, calculated in accordance with the provisions of Section 7, in respect of an amount equal to the gross profits of the employer for the immediately preceding accounting year; and

(ii) the direct tax calculated in accordance with the provisions of Section 7 in respect of an amount equal to the gross profits of the employer for such preceding accounting year after deducting therefrom the amount of bonus which the employer has paid or is liable to pay to his employees in accordance with the provisions of this Act for that year. (Section 5)

ELIGIBILITY FOR BONUS AND ITS PAYMENT

(i) Eligibility for bonus

Every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year. (Section 8)

An employee suspended but subsequently reinstated with full back wages can not be treated to be ineligible for bonus for the period of suspension. [*Project Manager, Ahmedabad Project, ONGC* v. *Sham Kumar Sahegal* (1995) 1 LLJ 863]

(ii) Disqualification for bonus

An employee shall be disqualified from receiving bonus under this Act, if he is dismissed from service for:

(a) fraud; or

(b) riotous or violent behaviour while on the premises or the establishment; or

(c) theft, misappropriation or sabotage of any property of the establishment. (Section 9)

This provision is based on the recommendations of the Bonus Commission which observed"after all bonus can only be shared by those workers who promote the stability and well-being of the industry and not by those who positively display disruptive tendencies. Bonus certainly carries with it obligation of good behaviour".

If an employee is dismissed from service for any act of misconduct enumerated in Section 9, he stands disqualified from receiving any bonus under the Act, and not the bonus only for the accounting year in which the dismissal takes place (*Pandian Roadways Corpn. Ltd.* v. *Preseding Officer, Principal Labour Court*, (1996) 2 LLJ 606).

(iii) Payment of minimum bonus

Section 10 states that subject to the other provisions of this Act, every employer shall be bound to pay to every employee in respect of any accounting year a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees whichever is higher, whether or not the employer has any allocable surplus in the accounting year:

Provided that where an employee has not completed fifteen years of age at the beginning of the accounting year, the provisions of this Section shall have effect in relation to such employee as if for the words one hundred rupees the words sixty rupees were substituted.

Section 10 of the Act is not violative of Articles 19 and 301 of the Constitution. Even if the employer suffers losses during the accounting year, he is bound to pay minimum bonus as prescribed by Section 10 (*State* v. *Sardar Singh Majithia* (1979) Lab. I.C.).

(iv) Maximum bonus

(1) Where in respect of any accounting year referred to in Section 10, the allocable surplus exceeds the amount of minimum bonus payable to the employees under that Section, the employer shall, in lieu of such minimum bonus, be bound to pay to every employee in respect of that accounting year bonus which shall be an amount in proportion to the salary or wage earned by the employee during the accounting year subject to a maximum of twenty per cent of such salary or wage.

(2) In computing the allocable surplus under this Section, the amount set on or the amount set off under the provisions of Section 15 shall be taken into account in accordance with the provisions of that Section. (Section 11)

(iv-A) Calculation of bonus with respect to certain employees

Where the salary or wage of an employee exceeds three thousand and five hundred rupees per mensem, the bonus payable under Section 10 or 11 shall be calculated as if his salary or wage were *three thousand* and five hundred rupees per mensem. (Section 12)

(v) Proportionate reduction in bonus in certain cases

Where an employee has not worked for all the working days in an accounting year, the minimum bonus of one hundred rupees or, as the case may be, of sixty rupees, if such bonus is higher than 8.33 per cent of his salary or wage for the days he had worked in that accounting year, shall be proportionately reduced. (Section 13)

(vi) Computation of number of working days

For the purposes of Section 13, an employee shall be deemed to have worked in an establishment in any accounting year also on the days on which:

(a) he has been laid off under an agreement or as permitted by standing orders under the Industrial Employment (Standing Orders) Act, 1946 or under the Industrial Disputes Act, 1947 or under any other law applicable to the establishment;

(b) he has been on leave with salary or wage;

(c) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(d) the employee has been on maternity leave with salary or wage, during the accounting year. (Section 14)

(vii) Set on and set off of allocable surplus

(1) Where for any accounting year, the allocable surplus exceeds the amount of maximum bonus payable to the

employees in the establishment under Section 11, then, the excess shall, subject to a limit of twenty per cent of the total salary or wage of the employees employed in the establishment in that accounting year, be carried forward for being set on in the succeeding accounting year and so on up to and inclusive of the fourth accounting year to be utilized for the purpose of payment of bonus in the manner illustrated in the Fourth Schedule. (Section 15)

Test your knowledges

Choose the correct answer

What is the minimum amount of bonus payable to an employee?

(a) 8.33% of the salary earned during the accounting year or Rs. 100 whichever is higher.

(b) 8.63% of the salary earned during the accounting year or Rs. 100 whichever is higher.

(c) 8.73% of the salary earned during the accounting year or Rs. 100 whichever is higher.

(d) 8.83% of the salary earned during the accounting year or Rs. 100 whichever is higher.

Correct answer: (a)

(2) Where for any according year, there is no available surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees in the establishment under Section 10, and there is no amount or sufficient amount carried forward and set on under sub-section (1) which could be utilized for the purpose of payment of the minimum bonus, then, such minimum amount or the deficiency, as the case may be, shall be carried forward for being set off in the succeeding accounting year and so on up to and inclusive of the fourth accounting year in the manner illustrated in the Fourth Schedule.

(3) The principle of set on and set off as illustrated in the Fourth Schedule shall apply to all other cases not covered by sub-section (1) or sub-section (2) for the purpose of payment of bonus under this Act.

(4) Where in any accounting year any amount has been carried forward and set on or set off under this Section, then, in calculating bonus for the succeeding accounting year, the amount of set on or set off carried forward from the earliest accounting year shall first be taken into account.

Apart from the provisions contained in Section 15(1), there is no statutory obligation on an employer to set apart any part of the profits of the previous year for payment of bonus for subsequent years.

(viii) Adjustment of customary or interim bonus

Where in any accounting year (a) an employer has paid any puja bonus or other customary bonus to an employee; or (b) an employer has paid a part of the bonus payable under this Act to an employee before the date on which such bonus becomes payable; then, the employer shall be entitled to deduct at the amount of bonus so paid from the amount of bonus payable by him to the employee under this Act in respect of that accounting year and the employee shall be entitled to receive only the balance. (Section 17)

In *Hukam Chand Jute Mills Ltd*. v. *Second Industrial Tribunal, West Bengal,* AIR 1979 SC 876, the Supreme Court held that the claim for customary bonus is not affected by 1976 Amendment Act. In fact, it has left Section 17 intact which refers to puja bonus or other customary bonus. Section 31A (see later) speaks about productivity bonus but says nothing about other kinds of bonuses. The contention that all agreements inconsistent with the provisions

of the Act become inoperative, has no substance vis-a-vis customary bonus. Conceptually statutory bonus and customary bonus operate in two fields and do not clash with each other.

(ix) Deductions of certain amounts from bonus

Where in any accounting year, an employee is found guilty of misconduct causing financial loss to the employer, then, it shall be lawful for the employer to deduct the amount of loss from the amount of bonus payable by him to the employee under this Act, in respect of that accounting year only and the employee shall be entitled to receive the balance, if any. (Section 18)

(x) Time limit for payment of bonus

(a) Where there is a dispute regarding payment of bonus pending before any authority under Section 22, all amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer, within a month from the date from which the award becomes enforceable or the settlement comes into operation, in respect of such dispute;

(b) In any other case, the bonus should be paid within a period of eight months from the close of the accounting year. However, the appropriate Government or such authority as the appropriate Government may specify in this behalf may, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of 8 months to such further period or periods as it thinks fit, so, however, that the total period so extended shall not in any case exceed two years. (Section 19)

(xi) Recovery of bonus from an employer

Where any money is due to an employee by way of bonus from his employer under a settlement or an award or agreement, the employee himself or any other person authorised by him in writing in this behalf, or in the case of the death of the employee, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government or such authority as the appropriate Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:

If may be noted that every such application shall be made within one year from the date on which the money become due to the employee from the employer. Any such application may be entertained after the expiry of the said period of one year,if the appropriate Governmentis satisfied that the applicant had sufficient cause for not making the application within the said period.

Explanation: In this Section and in Sections 22, 23, 24 and 25, employee includes a person who is entitled to the payment of bonus under this Act but who is no longer in employment. (Section 21)

Mode of recovery prescribed in Section 21 would be available only if bonus sought to be recovered is under settlement or an award or an agreement. Bonus payable under Bonus Act is not covered by Section 21 (1976-I Labour Law Journal 511).

Test your knowledge

Choose the correct answer

The bonus should be paid within how many months from the close of the accounting year?

(a) One Month
(b) Two Months
(c) Twelve Months
(d) Eight Months

Correct Answer: (d)

BONUS LINKED WITH PRODUCTION OR PRODUCTIVITY

Section 31A enables the employees and employers to evolve and operate a scheme of bonus payment linked to production or productivity in lieu of bonus based on profits under the general formula enshrined in the Act. However, bonus payments under Section 31A are also subject to the minimum (8.33 per cent) and maximum (20 per cent). In other words a minimum of 8.33 per cent is payable in any case and the maximum cannot exceed 20 per cent. (Section 31-A)

POWER OF EXEMPTION

If the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in public interest to apply all or any of the provisions of this Act thereto, it may, by notification in the Official Gazette, exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose, such establishment or class of establishments from all or any of the provisions of this Act. (Section 36)

Government should consider public interest, financial position and whether workers contributed to the loss, before grant of exemption (J.K.Chemicals v. Maharashtra, 1996 III CLA Bom. 12).

PENALTIES

If any person contravenes any of the provisions of this Act or any rule made thereunder; he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Likewise if any person, to whom a direction is given or a requisition is made under this Act, fails to comply with the direction or requisition, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (Section 28)

OFFENCES BY COMPANIES

If the person committing an offence under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Further, if an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be proceeded against and punished accordingly. (Section 29)

For the purpose of Section 29, 'company' means any body corporate and includes a firm or other association of individuals, and 'director', in relation to a firm, means a partner in the firm.

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The total number of employees who are entitled to bonus in department/ undertaking (a) are ….. and (b) are ……
2. The total number of employees who are not entitled to bonus in view of their having worked for less than thirty days during the accounting year in case of department (a) are …. and (b) are ……
3. The Establishment did not pay bonus to …. employees in view of their dismissal from service for (a)

fraud or (b) riotous behaviour on the premises of Establishment or (c) theft, misappropriation or sabotage of any property of the establishment.

4. The Establishment has made deductions from the amount of bonus payable under PBA in respect of ……. employees in view of their being found guilty of misconduct causing financial loss to the Establishment. The quantum of deduction was only to the extent of amount of loss suffered by the Establishment.
5. The Establishment has computed the gross profit and available surplus in accordance with the provisions of the Act read with the rules made thereunder.
6. In relation to the year ended 31st March 20...., the Establishment paid bonus in cash/cheque(s) or electronic clearance system (ECS) or other electronic mode to its employees at the rate of …… which is not less than the minimum statutory requirement as specified under PBA on 15th January 20...., which is within eight months from the close of the accounting year.
7. During the accounting year, the Establishment opened a separate bank account for transfer of unpaid/ unclaimed bonus in respect of employees who have either not been paid bonus for any reason or not collected their bonus for the accounting year ended on 31st March 20.... with ……. Bank (Branch) ….. The unpaid/unclaimed bonus has been deposited with the concerned welfare Board.
8. During the year, the Establishment transferred on …… to Labour Welfare Fund a sum of Rs. …. being the unpaid/unclaimed bonus of ……. employees, whose entitlement under PBA remained unpaid/ unclaimed since …… being the last date on which the bonus was to be paid to those …. for the year ended 31st March 20....
9. In relation to the year ended 31st March 20...., the Establishment has filed Annual Return with the Inspector appointed under the Act on ……., which is within thirty days from the date of payment of bonus under Section 19 of the PBA.

LESSON ROUND UP

- The Payment of Bonus Act provides for payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith.
- It extends to the whole of India and is applicable to every factory and to every other establishment where 20 or more workmen are employed on any day during an accounting year. The Act does not apply to certain classes of employees specified therein.
- The Act has laid down a detailed procedure for calculating the amount of bonus payable to employees.
- Every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year.
- An employee shall be disqualified from receiving bonus under this Act, if he is dismissed from service for fraud; or riotous or violent behaviour while on the premises of the establishment; or theft, misappropriation or sabotage of any property of the establishment.
- Every employer shall be bound to pay to every employee in respect of any accounting year a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees whichever is higher, whether or not the employer has any allocable surplus in the accounting year.
- In case of newly set up establishments provisions have been made under Section 16 for the payment of bonus.

- If there is a dispute regarding payment of bonus pending before any authority under Section 22, all amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer, within a month from the date from which the award becomes enforceable or the settlement comes into operation, in respect of such dispute.
- In any other case, the bonus should be paid within a period of eight months from the close of the accounting year.
- If any dispute arises between an employer and his employee with respect to the bonus payable under this Act or with respect to the application of this Act to an establishment in public sector, then, such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947, or any corresponding law relating to investigation and settlement of industrial disputes in force in a State and provisions of that Act, shall, save as otherwise expressly provided, apply accordingly.
- The Act enables the employees and employers to evolve and operate a scheme of bonus payment linked to production or productivity in lieu of bonus based on profits under the general formula enshrined in the Act.

SELF TEST QUESTIONS

1. Describe the scope and object of the Payment of Bonus Act, 1965.
2. Write short notes on:
   (a) accounting year;
   (b) allocable surplus;
   (c) employee and employer;
   (d) salary and wages.
3. What is allocable surplus? How does it differ from available surplus?
4. Enumerate the categories of employees who are not covered under the Payment of Bonus Act.
5. What is the eligibility limit for payment of bonus? Who is disqualified from getting bonus under the Act?

Lesson 8

Payment of Gratuity Act, 1972

LESSON OUTLINE

- Learning Objectives
- Introduction
- Application of the Act
- Establishments to which the Act applies
- Who is an 'employee'?
- Continuous Service
- Retirement
- Superannuation
- Wages
- When is gratuity payable?
- To whom is gratuity payable
- Amount of gratuity payable
- Nomination
- Forfeiture of gratuity
- Exemptions
- The Controlling Authority and the Appellate Authority
- Rights and obligations of employees
- Rights and obligations of the employer
- Recovery of gratuity
- Protection of gratuity
- Compliances under the Act

LEARNING OBJECTIVES

Gratuity is an old age retiral social security benefit. It is a lump sum payment made by an employer to an employee in consideration of his past service when the employment is terminated. In the case of employment coming to an end due to retirement or superannuation, it enables the affected employee to meet the new situation which quite often means a reduction in earnings or even total stoppage of earnings. In the case of death of an employee, it provides much needed financial assistance to the surviving members of the family. Gratuity schemes, therefore, serve as instruments of social security and their significance in a developing country like India where the general income level is low cannot be over emphasised.

Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years:- (i) on his superannuation; or (ii) on his retirement or resignation; or (iii) on his death or disablement due to accident or disease, However, the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement. The employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned for every completed year of service or part thereof in excess of six months.

The object of this lesson is to impart knowledge to the students about the legal frame work pertaining to payment of gratuity.

The Payment of Gratuity Act, 1972 provides for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. It extends to the whole of India.

INTRODUCTION

Gratuity is a lump sum payment made by the employer as a mark of recognition of the service rendered by the employee when he retires or leaves service. The Payment of Gratuity Act provides for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments.

The Payment of Gratuity Act has been amended from time to time to bring it in tune with the prevailing situation. Recently the Act has been amended twice to enhance the ceiling on amount of gratuity from Rs.3.50 lakh to Rs.10 lakh as well as to widen the scope of the definition of "employee" under section 2 (e) of the Act. These amendments have been introduced by the Payment of Gratuity (Amendment) Act, 2010 with effect from May 24, 2010.

APPLICATION OF THE ACT

Application of the Act to an employed person depends on two factors. Firstly, he should be employed in an establishment to which the Act applies. Secondly, he should be an "employee" as defined in Section 2(e).

According to Section 1(3), the Act applies to:

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) 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, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day of the preceding twelve months as the Central Government may, by notification specify in this behalf.

In exercise of the powers conferred by clause (c), the Central Government has specified Motor transport undertakings, Clubs, Chambers of Commerce and Industry, Inland Water Transport establishments, Solicitors offices, Local bodies, Educational Institutions, Societies, Trusts and Circus industry, in which 10 or more persons are employed or were employed on any day of the preceding 12 months, as classes of establishments to which the Act shall apply.

A shop or establishment to which the Act has become applicable once, continues to be governed by it, even if the number of persons employed therein at any time after it has become so applicable falls below ten. (Section 3A)

WHO IS AN EMPLOYEE?

The definition of "employee" under section 2 (e) of the Act has been amended by the Payment of Gratuity (Amendment) Act, 2009 to cover the teachers in educational institutions retrospectively with effect from 3rd April, 1997. The amendment to the definition of "employee" has been introduced in pursuance to the judgment of Supreme Court in *Ahmedabad Private Primary Teachers' Association* v. *Administrative Officer, AIR 2004 SC 1426*. The ceiling on the amount of gratuity from Rs.3.50 lakh to Rs.10 lakh has been enhanced by the Payment of Gratuity (Amendment) Act, 2010.

According to Section 2(e) as amended by the Payment of Gratuity (Amendment) Act, 2009 "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed

by any other Act or by any rules providing for payment of gratuity. The wage ceiling of Rs. 3,500/- which was earlier in the Act has been removed. With the removal of ceiling on wage every employee will become eligible for gratuity, irrespective of his wage level w.e.f. 24th May, 1994.

Teacher was held to be not an employee (LAB 1C Pat 365) under the Act. The teachers are clearly not intended to be covered by the definition of 'employee'. [*Ahmedabad Pvt. Primary Teachers Association* v. *Administrative Officer*, LLJ (2004) SC]

Now the controversy has been set at rest. The Payment of Gratuity (Amendment) Act, 2009 has amended the definition of 'employee' including teachers in educational institutions within the purview of the Act retrospectively in pursuance to the judgement of Supreme Court in the above mentioned case.

Test your knowledge

Choose the correct answer

What is the minimum number of employees required in an establishment for it to come under the purview of the Payment of Gratuity Act?

(a) 10

(b) 15

(c) 20

(d) 25

Correct answer: (a)

OTHER IMPORTANT DEFINITIONS

Appropriate Government

"Appropriate Government" means:

(i) in relation to an establishment:

  (a) belonging to, or under the control of, the Central Government,

  (b) having branches in more than one State,

  (c) of a factory belonging to, or under the control of the Central Government.

  (d) of a major port, mine, oilfield or railway company, the Central Government.

(ii) in any other case, the State Government. [Section 2(a)]

It may be noted that many large establishments have branches in more than one State. In such cases the 'appropriate Government' is the Central Government and any dispute connected with the payment or non-payment of gratuity falls within the jurisdiction of the 'Controlling Authority' and the 'Appellate Authority' appointed by the Central Government under Sections 3 and 7.

A Company Secretary should know whether the 'appropriate Government' in relation to his establishment is the Central Government or the State Government. He should also find out who has been notified as the 'Controlling Authority' and also who is the 'Appellate Authority'. It may be noted that any request for exemption under Section 5 of the Act is also to be addressed to the 'appropriate Government'. It is, therefore, necessary to be clear on this point.

Continuous Service

According to Section 2A, for the purposes of this Act:

(1) An employee shall be said to be in 'continuous service' for a period if he has, for that period been in un-interrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), layoff, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1) for any period of one year or six months, he shall be deemed to be in continuous service under the employer:

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than:

(i) one hundred and ninety days in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty, days in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than:

(i) ninety five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days in any other case;

Explanation: For the purpose of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which:

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks.

(3) Where an employee, employed in a seasonal establishment, is not in continues service within the meaning of clause (1) for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent, of the number of days on which the establishment was in operation during such period.

Service is not continuous, in case of legal termination of service and subsequent re-employment.

Gratuity cannot be claimed on the basis of continuous service on being taken back in service after break in service of one and a half year on account of termination of service for taking part in an illegal strike, where the employee had accepted gratuity for previous service and later withdrawn from the industrial dispute (Baluram v. Phoenix Mills Ltd., 1999 CLA Bom.19).

Family

Family, in relation to an employee, shall be deemed to consist of:

(i) in case of a male employee, himself, his wife, his children, whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son, if any,

(ii) in the case of a female employee, herself, her husband, her children, whether married or unmarried, her dependent parents and the dependent parents of her husband and the widow and children of her predeceased son, if any. [Section 2(h)]

Explanation: Where the personal law of an employee permits the adoption by him of a child, any child lawfully adopted by him shall be deemed to be included in his family, and where a child of an employee has been adopted by another person and such adoption is, under the personal law of the person making such adoption lawful, such child shall be deemed to be excluded from the family of the employee.

Retirement

"Retirement" means termination of the service of an employee otherwise than on superannuation. [Section 2(q)]

Superannuation

"Superannuation" in relation to an employee, means the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment. [Section 2(r)]

Wages

"Wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance. [Section 2(s)]

WHEN IS GRATUITY PAYABLE?

According to Section 4(1) of the Payment of Gratuity Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years:

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease.

Note: The completion of continuous service of five years is not necessary where the termination of the employment of any employee is due to death or disablement.

Further, the period of continuous service is to be reckoned from the date of employment and not from the date of commencement of this Act (CLA-1996-III-13 Mad.). Mere absence from duty without leave can not be said to result in breach of continuity of service for the purpose of this Act. [*Kothari Industrial Corporation* v. *Appellate Authority,* 1998 Lab IC, 1149 (AP)]

Test your knowledge

Which of the following are not included in 'wages'?

(a) Dearness allowance

(b) Bonus

(c) House rent allowance

(d) Basic salary

Correct answer: (b) and (c)

TO WHOM IS GRATUITY PAYABLE?

It is payable normally to the employee himself. However, in the case of death of the employee, it shall be paid to his nominee and if no nomination has been made, to his heirs and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Amount of Gratuity Payable

Gratuity is calculated on the basis of continuous service as defined above i.e. for every completed year of service or part in excess of six months, at the rate of fifteen days wages last drawn. The maximum amount of gratuity allowed under the Act is Rs. 10 lakh. The ceiling on the amount of gratuity from Rs.3.50 lakh to Rs.10 lakh has been enhanced by the Payment of Gratuity (Amendment) Act, 2010.

Nomination

An employee covered by the Act is required to make nomination in accordance with the Rules under the Act for the purpose of payment of gratuity in the event of his death. The rules also provide for change in nomination.

Forfeiture of Gratuity

The Act deals with this issue in two parts. Section 4(6)(a) provides that the gratuity of an employee whose services have been terminated for any act of willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, gratuity shall be forfeited to the extent of the damage or loss or caused. The right of forfeiture is limited to the extent of damage. In absence of proof of the extent of damage, the right of forfeiture is not available (LLJ- II-1996-515 MP).

Section 4(6)(b) deals with a case where the services of an employee have been terminated:

(a) for riotous and disorderly conduct or any other act of violence on his part, or

(b) for any act which constitutes an offence involving moral turpitude provided that such offence is committed by him in the course of his employment.

In such cases the gratuity payable to the employee may be wholly or partially forfeited. Where the service has not been terminated on any of the above grounds, the employer cannot withhold gratuity due to the employee. Where the land of the employer is not vacated by the employee, gratuity cannot be withheld (*Travancore Plywood Ind.* v. *Regional JLC, Kerala,* 1996 LLJ-II-14 Ker.). Assignment of gratuity is prohibited, it cannot be withheld for non vacation of service quarters by retiring employees (*Air India* v. *Authority under the Act,* 1999 CLA 34 Bom. 66).

EXEMPTIONS

The appropriate Government may exempt any factory or establishment covered by the Act or any employee or class of employees if the gratuity or pensionary benefits for the employees are not less favourable than conferred under the Act.

The Controlling Authority and the Appellate Authority

The controlling authority and the Appellate Authority are two important functionaries in the operation of the Act. Section 3 of the Act says that the appropriate Government may by notification appoint any officer to be a Controlling Authority who shall be responsible for the administration of the Act. Different controlling authorities may be appointed for different areas.

Section 7(7) provides for an appeal being preferred against an order of the Controlling Authority to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf.

RIGHTS AND OBLIGATIONS OF EMPLOYEES

Application for Payment of Gratuity

Section 7(1) lays down that a person who is eligible for payment of gratuity under the Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer. Rule 7 of the Payment of Gratuity (Central) Rules, 1972, provides that the application shall be made ordinarily within 30 days from the date gratuity becomes payable. The rules also provides that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before 30 days of the date of superannuation or retirement.

A nominee of an employee who is eligible for payment of gratuity in the case of death of the employee shall apply to the employee ordinarily within 30 days from the date of the gratuity becomes payable to him. [Rule 7(2)]

Although the forms in which the applications are to be made have been laid down, an application on plain paper with relevant particulars is also accepted.

The application may be presented to the employer either by personal service or be registered post with acknowledgement due. An application for payment of gratuity filed after the period of 30 days mentioned above shall also be entertained by the employer if the application adduces sufficient cause for the delay in preferring him claim. Any dispute in this regard shall be referred to the Controlling Authority for his decision.

Test your knowledge

Which of the following authorities are the important functionaries in the operation of the Payment of Gratuity Act?

(a) Controlling Authority

(b) Appellate Authority

(c) Concessional Authority

(d) Adjunct Authority

Correct answer: (a) and (b)

RIGHTS AND OBLIGATIONS OF THE EMPLOYER

Employers Duty to Determine and Pay Gratuity

Section 7(2) lays down that as soon as gratuity becomes payable the employer shall, whether the application

has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the Controlling Authority, specifying the amount of gratuity so determined.

Section 7(3) of the Act says that the employer shall arrange to pay the amount of gratuity within thirty days from the date of its becoming payable to the person to whom it is payable.

Section 7(3A): If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at the rate of 10 per cent per annum:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

Dispute as to the Amount of Gratuity or Admissibility of the Claim

If the claim for gratuity is not found admissible, the employer shall issue a notice in the prescribed form to the applicant employee, nominee or legal heir, as the case may be, specifying reasons why the claim for gratuity is not considered admissible. A copy of the notice shall be endorsed to the Controlling Authority.

If the disputes relates as to the amount of gratuity payable, the employer shall deposit with the Controlling Authority such amount as he admits to be payable by him. According to Section 7(4)(e), the Controlling Authority shall pay the amount of deposit as soon as may be after a deposit is made

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the nominee or heir of the employee if the Controlling Authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

Recovery of Gratuity

Section 8 provides that if the gratuity payable under the Act is not paid by the employer within the prescribed time, the Controlling Authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same together with the compound interest thereon at such rate as the Central Government may be notification, specify, from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto:

“Provided that the controlling authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate:

Provided further that the amount of interest payable under this section shall, in no case, exceed the amount of gratuity payable under this Act”.

Protection of Gratuity

Gratuity has been exempted from attachment in execution of any decree or order of any Civil, Revenue or Criminal Court. This relief is aimed at providing payment of gratuity to the person or persons entitled there to without being affected by any order of attachment by an decree of any Court.

Test your knowledge

State whether the following statement is "True" or "False"

Gratuity has been exempted from attachment in execution of any decree or order of any Civil, Revenue or Criminal Court.

- True
- False

Correct answer: True

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The Establishment has observed the following while paying the gratuity to the persons who are entitled to it:

   (a) It has paid gratuity at the rate of fifteen days wages for every completed year of service or part thereof in excess of six months, calculated on the rates of wages last drawn by the employee concerned. Since the employees of the establishment are monthly rated employees, the fifteen days wages were calculated by dividing the monthly rates of wages drawn by him by twenty-six and multiplying the quotient by fifteen.

   OR

   Since the employees were employed on piece rate basis, the gratuity was paid at the rate of fifteen days wages for every completed year of service calculated at an average total wages during a period of three months immediately preceding the termination of employment.

   OR

   Since the Registered Establishment is a seasonal establishment, gratuity was paid at the rate of seven days for each season.

   (b) In the event of death or disablement of any employee due to accident or disease, the gratuity was paid without the requirement of five years of continuous service.

   (c) In the event of death, the gratuity was paid to nominees or legal heir(s) or where the person entitled was a minor, the gratuity was deposited with the Controlling Authority.

   (d) The maximum amount of gratuity paid to any employee did not exceed Rs. 10,00,000/-.

2. The Establishment made deductions from the gratuity in respect of those employees who were liable for any act, wilful omission or negligence, which caused damages or loss to, or destruction of, property of the Registered Establishment. The total deductions were only to the extent of loss or damages so caused.

3. The Establishment also made deductions from the gratuity in respect of an employee whose services were terminated for an offence involving moral turpitude.

4. The Establishment has paid its liability under PGA within thirty days from the date it became payable.

5. The Establishment has deposited with the Controlling Authority the liability under PGA to the extent admitted by it, which was disputed by the person entitled to it. The Establishment has, accordingly, made application to the Controlling Authority for the settlement of dispute.

6. (a) The Establishment sent Notice to the person entitled to gratuity under the PGA within fifteen days from the date of receipt of application for gratuity from such person with the directions to collect the gratuity within thirty days from the date of receipt of application.

   (b) Where the Establishment did not admit its liability under the PGA, it has specified the reasons for the same

   (c) Copies of Notices under clause (a) and (b) were also endorsed to the Controlling Authority.

7. The liability of gratuity was settled in cash or at the request of the person claiming by Demand Draft or Banker's Cheque. Where the amount of gratuity was less than Rs. 1,000/-, the same was sent by Postal Money Order. The Controlling Authority was given details of all payments made.

LESSON ROUND UP

- The Act is applicable to every factory, shop or an establishment, in which ten or more persons are employed, or were employed on any day of the proceeding twelve months.
- A shop or establishment to which the Act has become applicable shall continue to be governed by the Act even if the number of persons employed falls bellow 10 at any subsequent stage.
- An employee is eligible for receiving gratuity payment only after he has completed five years of continuous service. This condition of five years is not necessary if the termination of the employment of an employee is due to death or disablement. The maximum amount of Gratuity payable is Rs. 10 lakhs.
- Each employee is required to nominate one or more member of his family, as defined in the Act, who will receive the gratuity in the event of the death of the employee.
- Any person to whom the gratuity amount is payable shall make a written application to the employer. The employer is required to determine the amount of gratuity payable and give notice in writing to the person to whom the same is payable and to the controlling authority thereby specifying the amount of gratuity payable.
- The employer is under obligation to pay the gratuity amount within 30 days from the date it becomes payable. Simple interest at the rate of 10% p.a. is payable on the expiry of the said period.
- Gratuity can be forfeited for any employee whose services have been terminated for any act, willful omission or negligence causing damage or destruction to the property belonging to the employer. It can also be forfeited for any act which constitutes an offence involving moral turpitude.
- If any person makes a false statement for the purpose of avoiding any payment to be made by him under this Act, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both. If an employer contravenes any provision of the Act, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with a fine, which may vary from ten thousand rupees to twenty thousand rupees.

SELF TEST QUESTIONS

1. State the scope and object of the Payment of Gratuity Act?
2. Define the following terms:
   (i) Continuous service
   (ii) Employee

(iii) Wages.

3. When gratuity becomes payable? To whom gratuity is payable?
4. Who are entitled for payment of gratuity?
5. Whether gratuity is liable to be forfeited? If so, under what circumstances?

Lesson 9

Employees' Compensation Act, 1923

LESSON OUTLINE

- Learning Objectives
- Object and Scope
- Disablement
- Employer's Liability for Compensation in cases of occupational disease
- Employer's Liability for Compensation In cases of personal injuries
- Employer's liability when Contractor is engaged
- Compensation
- Obligations and Responsibility of Employer
- Notice and Claim
- Medical Examination
- Procedure in the proceedings before the Commissioner
- Appeals
- Penalties
- Special provisions relating to Masters and Seamen
- Special provisions relating to captains and crew of aircrafts
- Special provisions relating to workmen abroad of companies and motor vehicles
- Compliances under the Act
- Schedules

LEARNING OBJECTIVES

The passing of the Workmen's Compensation Act renamed as Employees' Compensation Act, 1923 was the first step towards social security of workmen. It aims at providing financial protection to workmen and their dependants in case of accidental injury by means of payment of compensation by the employers.

The Employees' Compensation Act, 1923 provides for payment of compensation to the employees' and their dependents in the case of injury by industrial accidents including certain occupational diseases arising out of and in the course of employment resulting in death or disablement.

This Act applies to certain railway servants and persons employed in hazardous employments such as factories, mines, plantations mechanically propelled vehicles, construction work etc,. The Workmen's Compensation Act,1923 has been renamed as the Employees' Compensation Act, 1923. For the words "workman" and "employee" and "employees" have been substituted respectively for making the Act gender neutral. The amendment has been brought about by the Workmen's Compensation (Amendment) Act, 2009 came into force on January 18, 2010. For the purpose of calculation of compensation under the Employees' Compensation Act, 1923 monthly wages has been increased by the Government and minimum rates of compensation for permanent total disablement and death are increased from ₹ 80, 000/- and ₹ 90,000/ to ₹ 1,20,000/- and ₹ 1,40, 000/- respectively.

Therefore, it is essential for the students to be familiar with the general principles of employee's compensation stipulated under the Act.

Employees' Compensation Act, 1923 provides for the payment by certain classes of employers to their employees of compensation for injury by accident.

OBJECT AND SCOPE

The Employees' Compensation Act is social security legislation. It imposes statutory liability upon an employer to discharge his moral obligation towards his employees when they suffer from physical disabilities and diseases during the course of employment in hazardous working conditions. The Act also seeks to help the dependents of the employee rendered destitute by the 'accidents' and from the hardship arising out from such accidents. The Act provides for cheaper and quicker mode of disposal of disputes relating to compensation through special proceedings than possible under the civil law. The Act extends to the whole of India.

DEFINITIONS

Some important definitions are given below:

(i) Dependant

Section 2(1)(d) of the Act defines "dependant" as to mean any of the following relatives of a deceased employee, namely:

(i) a widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter, or a widowed mother, and

(ii) if wholly dependent on the earnings of the employee at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm; and

(iii) if wholly or in part dependent on the earnings of the employee at the time of his death:

(a) a widower,

(b) a parent other than a widowed mother,

(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or illegitimate or adopted if married and a minor, or if widowed and a minor,

(d) a minor brother or an unmarried sister, or a widowed sister if a minor,

(e) a widowed daughter-in-law,

(f) a minor child of a pre-deceased son,

(g) a minor child of a pre-deceased daughter where no parent of the child is alive or

(h) a paternal grandparent, if no parent of the employee is alive.

Explanation – For the purpose of sub-clause (ii) and items (f) and (g) of sub-clause (iii) references to a son, daughter or child include an adopted son, daughter or child respectively.

(ii) Employee

The definition of workmen has been replaced by the definition of employee. The term "employee" has been inserted by the Workmen's Compensation (Amendment) Act, 2009 under a new clause (dd) in Section 2 of the Act. Clause (n) defining "workman" has been omitted.

Under Section 2(dd) "employee" has been defined as follows:

"Employee" means a person, who is –

(i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II; or

(ii) (a) a master, seaman or other members of the crew of a ship,

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle.

(d) a person recruited for work abroad by a company,

and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India; or

(iii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to any employee who has been" injured shall, where the employee is dead, include a reference to his dependants or any of them;

(ii) Employer

The following persons are included in the definition of "employer":

(a) any body of persons incorporated or not;

(b) any managing agent of the employer;

(c) legal representative of a deceased employer. Thus, one who inherits the estate of the deceased, is made liable for the payment of compensation under the Act. However, he is liable only upto the value of the estate inherited by him;

(d) any person to whom the services of a employee are temporarily lent or let on hire by a person with whom the employee has entered into a contract of service or apprenticeship. [Section 2(1)(e)]

A contractor falls within the above definition of the employer. Similarly, a General Manager of a Railway is an employer (*Baijnath Singh* v. *O.T. Railway,* A.I.R. 1960 All 362).

(iii) Seaman

"Seaman" under Section 2(1)(k) means any person forming part of the crew of any ship but does not include the master of the ship.

(iv) Wages

According to Section 2(1)(m), the term "wages" include any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer to an employee towards any pension or provident fund or a sum paid to employee to cover any special expenses entailed on him by the nature of his employment.

Wages include dearness allowance, free accommodation, overtime pay, etc. (*Godawari Sugar Mills Ltd.* v. *Shakuntala; Chitru Tanti* v. *TISCO;* and *Badri Prasad* v. *Trijugi Sitaram).*

The driver of a bus died in an accident. On a claim for compensation made by widow it was held that line allowance and night out allowance came under the privilege or benefit which is capable of being estimated in money and can be taken into consideration in computing compensation as part of wages (*KSRTC Bangalore* v. *Smt. Sundari,* 1982 Lab. I.C. 230). The claim of bonus being a right of the workman is a benefit forming part of wages and the same can be included in wages (LLJ-II 536 Ker.).

Test your knowledge

Which of the following terms are defined in the Workmen's Compensation Act, 1923?

(a) Dependant

(b) Disablement

(c) Workman

(d) Seaman

Correct answer: (a), (c) and (d)

DISABLEMENT

The Act does not define the word Disablement. It only defines the partial and total disablement. After reading the partial or total disablement as defined under the Act one may presume that disablement is loss of earning capacity by an injury which depending upon the nature of injury and percentage of loss of earning capacity will be partial or total. The Act has classified disablement into two categories, viz. (i) Partial disablement, and (ii) Total disablement.

(i) Partial disablement

Partial disablement can be classified as temporary partial disablement and permanent partial disablement.

(a) *Where the disablement is of a temporary nature:* Such disablement as reduces the earning capacity of an employee in the employment in which he was engaged at the time of the accident resulting in the disablement; and

(b) *Where the disablement is of a permanent nature:* Such disablement as reduces for all time his earning capacity in every employment which he was capable of undertaking at the time. [Section 2(1)(g)] But every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement.

Schedule I contains list of injuries deemed to result in Permanent Total/Partial disablement.

In case of temporary partial disablement, the disablement results in reduction of earning capacity in respect of only that employment in which he was engaged at the time of accident. This means the employee's earning capacity in relation to other employment is not affected. But in case of permanent partial disablement, the disablement results in reduction in his earning capacity in not only the employment in which he was engaged at the time of accident but in all other employments.

Whether the disablement is temporary or permanent and whether it results in reduction of earning capacity, the answer will depend upon the fact of each case, except when the injury is clearly included in Part II of Schedule I.

In the case of *Sukhai* v. *Hukam Chand Jute Mills Ltd*., A.I.R. 1957 Cal. 601, it was observed:

"If a workman suffers as a result of an injury from a physical defect which does not in fact reduce his capacity to work but at the same time makes his labour unsaleable in any market reasonably accessible to him, there will be either total incapacity for work when no work is available to him at all or there will be a partial incapacity when such defect makes his labour saleable for less than it would otherwise fetch. The capacity of a workman may remain quite unimpaired, but at the same time his eligibility as an employee may be diminished or lost if such a result ensure by the

reason of the results of an accident, although the accident has not really reduced the capacity of the workman to work. He can establish a right to compensation, provided he proves by satisfactory evidence that he has applied to a reasonable number of likely employers for employment, but had been turned away on account of the results of the accident visible on his person."

If after the accident a worker has become disabled, and cannot do a particular job but the employer offers him another kind of job, the worker is entitled to compensation for partial disablement (*General Manager, G.I.P. Rly.* v. *Shankar,* A.I.R. 1950 Nag. 307).

Deemed to be permanent partial disablement: Part II of Schedule I contains the list of injuries which shall be deemed to result in permanent partial disablement.

Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent to the loss of that limb or member.

Note to Schedule I – On the question whether eye is a member or limb as used in the note to Schedule I it was held that considering the meaning as stated in the Oxford Dictionary as also in the Medical Dictionary, it could be said that the words limb or member include any organ of a person and in any case it includes the eye (*Lipton (India) Ltd.* v. *Gokul Chandran Mandal;* 1981 Lab. I.C. 1300).

Test your knowledge

State whether the following statement is "True" or "False":

In case of permanent partial disablement, the disablement does not result in reduction in his/her earning capacity.

- True
- False

Correct Answer: False

(ii) Total disablement

Total disablement can also be classified as temporary total disablement and permanent total disablement.

"Total disablement" means, such disablement whether of a temporary or permanent nature, which incapacitates an employee for all work which he was capable of performing at the time of accident resulting in such disablement. Provided further that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or similarly total disablement shall result from any combination of injuries specified in Part II of Schedule I, where the aggregate percentage of loss of earning capacity, as specified in the said Part II against these injuries amount to one hundred per cent or more. [Section 2(1)(l)]

Some judicial interpretations on the subject are as follows:

The expression incapacitates a workman for all work does not mean capacity to work or physical incapacity. If due to any physical defect, a workman is unable to get any work which a workman of his class ordinarily performs, and has thus lost the power to earn he is entitled to compensation for total disablement (*Ball* v. *William Hunt & Sons Ltd*., 1912 A.C. 496). It is immaterial that the workman is physically fit to perform some work. Thus, where a workman, though physically capable of doing the work cannot get employment in spite of his best efforts, he becomes incapacitated for all work and hence entitled to compensation for total disablement.

Loss of physical capacity is co-extensive with loss of earning capacity but loss of earning is not so co-extensive with loss of physical capacity as he may be getting the same wages even though there may be loss of physical capacity. In a case permanent partial disability caused to a workman in accident while working on ship, e.g. getting pain in his left hand and experiencing difficulty in lifting weights, it was held that workman can be said to have lost his earning capacity even though getting same amount of wages as before *Mangru Palji* v. *Robinsons,* 1978 Lab. I.C. 1567 (Bom.). Where it is not a scheduled injury the loss of earning capacity must be proved by evidence.

Where the worker lost his vision of one eye permanently in an accident in course of his employment in colliery, the compensation should be assessed in accordance with item 26 Part II in Schedule I(*Katras Jherriah Coal Co.* Ltd. v. *Kamakhya Paul,* 1976 Lab.I.C.751).

In an injury the workman, had amputated his left arm from elbow, who was a carpenter. It was held by the Supreme Court in *Pratap Narain Singh Deo* v. Sriniwas *Sabata*,1976 ILab.L.J.235, that it is a total disablement as the carpenter cannot carry his work with one hand and not a partial permanent disablement.

Where the workman, a driver of bus belonging to the employer was involved in an accident which resulted in an impairment of the free movement of his left hand disabling him from driving vehicles, it was held that this is not one of the injuries mentioned in the 1st Schedule which are accepted to result in permanent total disablement. In the present case the workman was also capable of performing duties and executing works other than driving vehicles. Nature of injury to be determined not on the basis of the work he was doing at the time of accident (*Divisional Manager KSRTC* v. *Bhimaiah*, 1977 II L.L.J. 521).

Test your knowledge

Which of the following types of injuries are listed in Part II of Schedule I?

(a) Permanent total disablement

(b) Temporary disablement

(c) Permanent partial disablement

(d) Temporary partial disablement

Correct answer: (a) and (c)

EMPLOYER'S LIABILITY FOR COMPENSATION

Section 3 of the Act provides for employers liability for compensation in case of occupational disease or personal injuries and prescribes the manner in which his liability can be ascertained.

(a) In cases of occupational disease

(i) Where an employee employed in any employment specified in Part A of Schedule III contracts any disease specified therein, as an occupational disease, peculiar to that employment, the contracting of disease shall be deemed to be an injury by accident arising out of and in the course of employment.

(ii) Where the employee employed in any employment specified in Part B of Schedule III, for a continuous period of not less than six months under the same employer, and whilst in the service contracts any disease specified in the Part B of Schedule III, the contracting of disease shall be deemed to be an

injury by accident arising out of and in the course of employment. The employer shall be liable even when the disease was contracted after the employee ceased to be in the service of the employer, if such disease arose out of the employment.

(iii) If an employee whilst in service of one or more employers (not necessarily the same employer) in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify, contracts any disease, even after he ceased to be in the service of any employer and disease arose out of such employment, specified in the Schedule, the contracting of disease shall be deemed to be an injury by accident arising out of and in the course of employment.

However, where the employment was under more than one employer, all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may in circumstances deem just. [Section 3(2A)]

(iv) If it is proved:

(a) that the employee whilst in the service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment, and

(b) that the disease has arisen out of and in the course of the employment;

the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section.

(v) The Central Government or the State Government after giving, by notification in the Official Gazette, not less than three months notice of its intention so to do, may, by a like notification, add any description of employment to the employments specified in Schedule III, and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and thereupon the provisions of Sub-section (2) shall apply in the case of a notification by the Central Government, within the territories to which this Act extends or, in case of a notification by the State Government, within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

(vi) Except as mentioned above no compensation shall be payable to an employee in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment.

(b) In case of personal injury

As regards personal injury, the employer becomes liable if the injury is caused to an employee by accident arising out of and in the course of his employment.

(i) Personal injury

There must be personal injury caused to an employee.

Normally, Injury implies physical or bodily injury caused by an accident. However, such personal injury will also include nervous shock or break-down or mental strain**.** In the case of *Indian News Chronicle* v. *Mrs. Lazarus,* A.I.R. 1961, Punj. 102, an electrician who had to go frequently to a heating room from a cooling plant, contracted pneumonia which resulted in his death. It was held that the injury caused by an accident is not confined to physical injury and the injury in the instant case was due to his working and going from a heating room to a cooling plant as it was his indispensable duty.

(ii) Accident

The personal injury must be caused by an "accident".

The term "accident" has not been defined in the Act but its meaning has been sufficiently explained in number of decided cases.

The expression accident must be construed to its popular sense. It has been defined as a mishap or an untoward event which is not expected or designed. What the Act intends to cover is what might be expressed as an accidental injury.

In the case of *Smt. Sunderbai* v. *The General Manager, Ordinance Factory Khamaria, Jabalpur*, 1976 Lac. I.C. 1163 (MP), the Madhya Pradesh High Court has clarified the difference between accident and injury. Accident means an untoward mishap which is not expected or designed by workman, 'Injury' means physiological injury. Accident and injury are distinct in cases where accident is an event happening externally to a man, e.g., where a workman falls from the ladder and suffers injuries. But accident may be an event happening internally to a man and in such cases accident and injury coincide. Such cases are illustrated by failure of heart and the like, while the workman is doing his normal work. Physiological injury suffered by a workman mainly due to the progress of disease unconnected with employment may amount to an injury arising out of and in the course of employment if the work, that the workman was doing at the time of the occurrence of the injury contributed to its occurrence. The connection between employment must be furnished by ordinary strain of ordinary work if the strain did in fact contribute to accelerate or hasten the injury. The burden of proof is on applicant to prove the connection of employment and injury.

(iii) Arising out of employment and in the course of employment

To make the employer liable, it is necessary that the injury is caused by an accident which must be raised out of and in the course of employment.

Arising out of employment

The expression "arising out of employment" suggests some causal connection between the employment and the accidental injury. The cause contemplated is the proximate cause and not any remote cause. Thus, where a workman suffers from heart disease and dies on account of strain of work by keeping continuously standing or working, held that the accident arose out of employment (*Laxmibai Atma Ram* v. *Bombay Port Trust,* AIR 1954 Bom.180). Generally if an employee is suffering from a particular disease and as a result of wear and tear of his employment he dies of that disease, employer is not liable. But if the employment is contributory cause or has accelerated the death that the death was due to disease coupled with the employment, then the employer would be liable as arising out of the employment.

In the case of *Mackenzie* v. *I.M. Issak*, it was observed that the words arising out of employment means that injury has resulted from risk incidental to the duties of the service which unless engaged in the duty owing to the master, it is reasonable to believe that the workman would not otherwise have suffered. There must be a casual relationship between the accident and the employment.

If the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed unless of course the workman has exposed himself to do an added peril by his own imprudence.

The Supreme Court in *Mackinnon Mackenzie and Co.* (*P.*) *Ltd.* v. *Ibrahim Mohammed Issak*, AIR 1970 S.C. 1906 approving the observation of Lord Summer made in *Lancashire and Yorkshire Railway Co.* v. *Highley*, 1917 A.C. 352, observed that the test is: was it part of the injured persons employment to hazard, to suffer or to do that which caused his injury? If yes, the accident arose out of his employment, if not it did not.

Test your knowledge

Which of the following injuries come under the definition of the term 'personal injury'?

(a) Nervous shock

(b) Mental strain

(c) Loss of money

(d) Breakdown

Correct answer: (a), (b) and (d)

Arising in the course of employment

The expression "in the course of employment" suggests the period of employment and the place of work. In other words, the workman, at the time of accident must have been employed in the performance of his duties and the accident took place at or about the place where he was performing his duties.

The expression "employment" is wider than the actual work or duty which the employee has to do. It is enough if at the time of the accident the employee was in actual employment although he may not be actually turning out the work. Even when the employee is resting, or having food, or taking his tea or coffee, proceeding from the place of employment to his residence, and accident occurs, the accident is regarded as arising out of and in the course of employment.

Employment – The word "employment" has a wider meaning than work. A man may be in course of his employment not only when he is actually engaged in doing something in the discharge of his duty but also when he is engaged in acts belonging to and arising out of it (*Union of India* v. *Mrs. Noorjahan,* 1979 Lab. I.C. 652).

For the expression "accident arising out of and in the course of employment" the basic and undispensable ingredient is unexpectedness. The second ingredient is that the injury must be traceable within reasonable limits, to a definite time, place or occasion or cause. The Act should be broadly and liberally constructed in order to effectuate the real intention and purpose of the Act.

(iv) Theory of notional extension of employment

To make the employer liable it is necessary that the injury caused by an accident must have arisen in the course of employment. It means that the accident must take place at a time and place when he was doing his master's job.

It is well settled that the concept of "duty" is not limited to the period of time the workman actually commenced his work and the time he downs his tools. It extends further in point of time as well as place. But there must be nexus between the time and place of the accident and the employment. If the presence of the workman concerned at the particular point was so related to the employment as to lead to the conclusion that he was acting within the scope of employment that would be sufficient to deem the accident as having occurred in the course of employment (*Weaver* v. *Tradegar Iron and Coal Co. Ltd.,* (1940) 3 All, ER 15).

It is known as doctrine of notional extension of employment; whether employment extends to the extent of accident depends upon each individual case.

A workman while returning home after duty was murdered within the premises of the employer. It was held that there was casual and proximate connection between the accident and the employment. Since the workman was on spot only for his employment and his wife is entitled for compensation (*Naima Bibi* v. *Lodhne Colliery* (1920) Ltd., 1977 Lab. I.C. NOC 14). If an employee in the course of his employment has to be in a particular place by reason where he has to face a peril which causes the accident then the casual connection is established between the accident and the employment (*TNCS Corporation* v. *Poonamalai,* 1994 II LLN 950).

(v) When employer is not liable

In the following cases, the employer shall not be liable:

(i) When the injury does not result in disablement for a period exceeding 3 days.

(ii) When the injury not resulting in death or permanent total disability is due to any of the following reasons:

(a) the employee was at the time of accident, under the influence of drink or drugs, or

(b) the employee wilfully disobeyed an order expressly given or a rule expressly framed for the purpose of securing safety of workers, or

(c) the employee, wilfully disregards or removes any safety guards or safety devices which he knew to have been provided for the safety of the employee.

Thus, where a employee dies due to an accident arising out of and in the course of employment, it cannot be pleaded that death was due to any of the reasons stated from (a) to (c)(*R.B. Moondra & Co.* v. *Mst. Bhanwari,* AIR, 1970 Raj. 111).

(c) Suit for damages in a Court barred

Under Section 3(5), an employee is not entitled to any compensation under the Workmen's Compensation Act, 1923, if he has instituted, in a Civil Court, a suit for damages against the employer or any other person.

Similarly, an employee is prohibited from instituting a suit for damages in any court of law, (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or (b) if the employee and the employer have entered into an agreement for the payment of compensation in accordance with the provisions of this Act.

EMPLOYER'S LIABILITY WHEN CONTRACTOR IS ENGAGED

Section 12 of the Act envisages the employer's liability to pay compensation to a contractor.

(i) Sometimes, employer may engage a contractor instead of employing his own employee for the purpose of doing any work in respect of his trade or business. Such a contractor then executes the work with the help of the employee engaged by him. If any injury is caused by an accident to any of these employees, the employer cannot be held liable because they are not employed by him and hence are not his employees. But now Section 12(1) makes the employer liable for compensation to such employees hired by the contractor under following circumstances:

(a) The contractor is engaged to do a work which is part of the trade or business of the employer (called principal).

(b) The employee were engaged in the course of or for the purpose of his trade or business.

(c) The accident occurred in or about the premises on which the principal employer has undertaken or undertakes to execute the work concerned.

The amount of compensation shall be calculated with reference to the wages of the employee under the employer by whom he is immediately employed.

(ii) According to Section 12(2), where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor or any other person from whom the employee could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section, he shall be entitled to be indemnified by any person standing to him in relation of a contractor from whom the employee could have recovered compensation and all questions as the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

(iii) The above provision, however, does not prevent an employee from recovering compensation from the contractor instead of the employer, i.e., the Principal. [Section 12(3)]

(iv) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken, or usually undertakes, as the case may be to execute the work or which are otherwise under his control or management. [Section 12(4)]

Following illustrative cases will further clarify the law did laid down in Section 12:

(a) A Municipal Board entrusted the electrification work of the town to State employees. A employee received injuries while performing his work. *Held,* it is the State and not the Board, liable to pay compensation because execution of electrical project is not the ordinary business of the Municipal Board (A.I.R. 1960 All 408).

(b) A contractor was entrusted with the repairs of a defective chimney. A employee engaged by him was injured while carrying out repairs. *Held,* mill was not liable for compensation as the repairing of chimney is not the part of companys trade or business, whether ordinarily or extraordinarily.

(c) A cartman was engaged by a Rice Mill to carry rice bags from mill to railway station. The cartman met with an accident on a public road while returning back from railway station and this resulted in his death. There was no evidence to show that employee was engaged through a contractor. In a suit for compensation against the mill owner, it was observed that Section 12 is not applicable where the accident arise out of and in the course of employment. Even assuming that the deceased was in the employment of contractor engaged by the employer, the liability of the owner was clear from Section 12(1) and it had not been excluded by reason of Section 12(4).

Test your knowledge

Under Section 5(5) of the employee's Compensation Act, 1923, an employee is not entitled to any compensation if he/she has instituted in a Civil Court, a suit for damages against the employer or any other person.

- True
- False

Correct answer: False

COMPENSATION

(i) Meaning of compensation

"Compensation" has been defined under Section 2(1)(c) of the Act to mean compensation as provided for by this Act. The meaning of the term will be more clear in the following paragraphs.

(ii) Amount of compensation

Amount of compensation is payable in the event of an employee meeting with an accident resulting into temporary or permanent disability or disease as stated in Schedule II and III in terms of Section 4 of the Act, read with Schedule IV.

Schedule II contains a list of persons engaged in different employments/ operations specified therein who are covered by the definition of employee and entitled to compensation e.g. a person employed for loading/unloading of materials in a factory or ship, persons employed in work incidental or connected with manufacturing process. Schedule III contains a list of occupational diseases which if contracted while in employment entitles a employee to compensation such as disease caused by lead, mercury, etc. Schedule IV lays down the relevant factor (a certain figure) related to the age of the employee at the time of death, injury or accident by which wages are multiplied to arrive at compensation.

(iii) Compensation to be paid when due and penalty for default

Time of payment of compensation: Section 4A of the Act provides that compensation under Section 4 shall be paid as soon as it falls due. Compensation becomes due on the date of death of employee and not when Commissioner decides it (*Smt. Jayamma* v. *Executive Engineer, P.W.D. Madhugiri Division,* 1982 Lab. I.C. Noc 61).

The employer is required to deposit or to make provisional payment based on the extent of liability which he accepts with the Commissioner or hand over to the employee as the case may be even if the employer does not admit the liability for compensation to the extent claimed.

Where an employer is in default in paying compensation, he would be liable to pay interest thereon and also a further sum not exceeding fifty percent of such amount of compensation as penalty. The interest and the penalty stated above is to be paid to the employee or his dependent as the case may be.

(iv) Method of calculating wages

Monthly wages mean the amount of wages deemed to be payable for a months service and calculated as follows:

(a) Where the employee has, during a continuous period of not less than 12 months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the employee shall be 1/12th of the total wages which have fallen due for payment to him by the employer in the last 12 months of that period.

(b) Where the whole of the continuous period of service was less than one month, the monthly wages of the employee shall be the average monthly amount which during the 12 months immediately preceding the accident was being earned by an employee employed on the same work by the same employer, or, if there was no employee so employed, by an employee employed on similar work in the same locality.

(c) In other cases, including cases in which it is not possible to calculate the monthly wages under clause (b), the monthly wages shall be 30 times the total wages earned in respect of the last continuous period of service, immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period. (Section 5)

A period of service shall be deemed to be continuous which has not been interrupted by a period of absence from work exceeding 14 days.

(v) Review of half-monthly payment

Section 6 of the Act provides that any half-monthly payment payable under this Act, either under an agreement between the parties or under the order of a Commissioner may be reviewed by the Commissioner on the application either of the employer or of the employee accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the employee or subject to rules made under this Act, an application made without such certificate.

Any half monthly payment, may on review, under the above provisions be continued, increased, decreased or ended, or if the accident is found to have resulted in permanent disablement, be converted to the lump sum to which the employee is entitled less any amount which he has already received by way of half-monthly payments.

(vi) Commutation of half monthly payments

Section 7 of the Act provides that any right to receive half-monthly payments may, by agreement between the parties or if the parties cannot agree and the payments have been continued for not less than 6 months on the application of either party to the Commissioner, be redeemed by the payment of a lump sum of such amount as may be agreed to by the parties or determined by the Commissioner as the case may be.

(vii) Distribution of compensation

No compensation has to be paid in respect of an employee whose injury has resulted in death and no payment of lump sum compensation to a woman or a person under a legal disability except by deposit with the Commissioner. The employer cannot make payment of compensation directly to the deceased legal heirs. It is the Commissioner who decides on the distribution of compensation to the legal heirs of the deceased employee. (Section 8)

Right to claim compensation passes to heirs of dependant as there is no provision under the Act to this effect (*AIR 1937 Cal. 496*). Payment of *ex-gratia* or employment on compassionate grounds will not be employers' liability (LAB IC 1998 JK 767).

(viii) Compensation not to be assigned etc.

Save as provided by this Act, no lump sum or half-monthly payment payable under this Act can be assigned, or charged or attached or passed to any person other than the employee by operation of law nor can any claim be set-off against the same. (Section 9)

(ix) Compensation to be first charge

The compensation money shall bear the first charge on the assets transferred by the employer. It says that where an employer transfers his assets before any amount due in respect of any compensation, the liability whereof accrued before the date of transfer has been paid, such amount shall, notwithstanding any thing contained in any other law for the time being in force, be a first charge on that part of the assets so transferred as consists of immovable property. (Section 14A)

(x) Insolvency of employer and the compensation

Following provisions under Section 14 of the Act have been made in this respect:

(i) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any employee, then in the event of the employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the employee, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the employee than they would have been under the employer.

(ii) If the liability of the insures to the employee is less than the liability of the employer to the employee, the employee may prove for the balance in the insolvency proceedings or liquidation.

(iii) Where in any case such as is referred to in sub-section (1) the contract of the employer with the insurers is void or voidable by reason of non-compliance on the part of the employer with any terms or conditions of the contract (other than a stipulation for the payment of premia), the provisions of that sub-section shall apply as if the contract were not void or voidable, and the insurers shall be entitled to prove in the insolvency proceedings or liquidation for the amount paid to the employee.

But the employee is required to give notice of accident and resulting disablement therefrom to the insurers as soon as possible after he becomes aware of the insolvency or liquidation proceedings otherwise the above provisions shall not be applied.

(iv) There shall be deemed to be included among the debts which under Section 49 of the Presidency Towns Insolvency Act, 1909, or under Section 61 of the Provincial Insolvency Act, 1920 or under Section 530 of the Companies Act, 1956, are in the distribution of property of an insolvent or in the distribution of

the assets of a company being wound up to be paid in priority to all other debts, the amount due in respect of any compensation the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of the commencement of the winding up, as the case may be, and those Acts shall have effect accordingly.

(v) Where the compensation is half-monthly payment, the amount due in respect thereof shall, for the purposes of this Section, be taken to be the amount of the lump sum for which the half-monthly, payment could, if redeemable be redeemed if application were made for that purpose under Section 7, and a certificate of the Commissioner as to the amount of such sum shall be conclusive proof thereof.

(vi) The provisions of sub-section (iv) shall apply in the case of any amount for which an insurer is entitled to prove under sub-section (iii) but otherwise those provisions shall not apply where the insolvent or the company being wound up has entered into such a contract with insurers as if referred to in sub-section (i).

(vii) This Section shall not apply where a company is wound up voluntarily merely for purpose of reconstruction or of amalgamation with another company.

(xi) Contracting out of compensation

Section 17 provides that any contract or agreement whereby an employee relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Act. (Section 17)

OBLIGATIONS AND RESPONSIBILITY OF AN EMPLOYER

(i) Power of Commissioner to require from employers statements regarding fatal accidents

(a) Where a Commissioner receives information from any source that an employee has died as a result of an accident arising out of and in the course of his employment, he may send by registered post a notice to the employee's employer requiring him to submit, within thirty days of the service of the notice, a statement, in the prescribed form giving the circumstances attending the death of the employee, and indicating whether, in the opinion of the employer, he is or is not liable to deposit compensation on account of the death.

(b) If the employer is of opinion that he is liable to deposit compensation, he shall make the deposit within thirty days of the service of the notice.

(c) If the employer is of opinion that he is not liable to deposit compensation, he shall in his statement indicate the grounds on which he disclaims liability.

(d) Where the employer has so disclaimed liability, the Commissioner, after such inquiry as he may think fit, may inform any of the dependents of the deceased employee, that it is open to the dependents to prefer a claim for compensation and may give them such other further information as he may think fit. (Section 10A)

(ii) To submit reports of fatal accidents and serious bodily injuries

(i) Where by any law for the time being in force, notice is required to be given to any authority, by or on behalf of an employer, of any accident occurring in his premises which results in death or serious bodily injury, the person required to give the notice shall, within seven days of the death or serious bodily injury, send a report to the Commissioner giving the circumstances attending the death or serious bodily injury in the prescribed form (Form EE of the Workmen's Compensation Rules: Rule 17).

"Serious bodily injury" means an injury which involves, or in all probability will involve, the permanent loss of the use of, or permanent injury to, any limb, or the permanent loss of or injury to the sight or hearing, or the fracture of any limb, or the enforced absence of the injured person from work for a period exceeding twenty days. [Expl. to Section 10B(1)]

(ii) The State Government may, by notification in the Official Gazette, extend the provisions of sub-section (i) to any class of premises other than those coming within the scope of that sub-section, and may, by such notification, specify the persons who shall send the report to the Commissioner.

(iii) Nothing in this section shall apply to the factories to which the Employees' State Insurance Act, 1948, applies. (Section 10B)

NOTICE AND CLAIM

(a) No claim for compensation shall be entertained by a Commissioner unless the notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or, in case of death, within two years from the date of death. (Section 10)

Provided that:

(i) where the accident is the contracting of a disease the accident shall be deemed to have occurred on the first of the days during which the employee was continuously absent from work in consequence of the disablement caused by the disease;

(ii) in case of partial disablement due to the contracting of any such disease and which does not force the employee to absent himself from work, the period of two years shall be counted from the day the employee gives notice of the disablement to his employer;

(iii) if an employee who, having been employed in an employment for a continuous period specified under sub-section 3(2) in respect of that employment ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected.

(iv) The want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim:

  (a) if the claim is preferred in respect of the death of an employee resulting from an accident which occurred in the premises of the employer, or at any place where the employee at the time of the accident was working under the control of the employer or of any person employed by him, and the employee died on such premises, or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

  (b) if the employer or any one of several employers or any persons responsible to the employer for the management of any branch of the trade or business in which the injured employee was employed had knowledge of the accident from any other source at or about the time when it occurred.

(v) The Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure to give the notice or prefer the claim, as the case may be, was due to sufficient cause.

(b) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon any one of several employers, or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured employee was employed.

(c) The State Government may require that any prescribed class of employers shall maintain at their premises at which employees are employed a notice-book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured employee employed on the premises and to any person acting *bona fide* on his behalf.

(d) A notice under this section may be served by delivering it at, or sending it by registered post addressed to the residence or any office or place of business of the person on whom it is to be served or, where a notice-book is maintained, by entry in the notice-book.

The Commissioner can initiate *suo motu* proceedings and can waive the period of limitation under this Section (*1997-II-LLJ 292 All*.).

Test your knowledge

Choose the correct answer:

What is the period within which an employer must make a deposit with the Commissioner if he is liable to pay compensation?

(a) Within 10 days of being served the notice

(b) Within 20 days of being served the notice

(c) Within 30 days of being served the notice

(d) Within 40 days of being served the notice

Correct answer: (c)

MEDICAL EXAMINATION

According to Section 11 of the Act:

(i) Where an employee has given notice of an accident, he shall, if the employer, before the expiry of 3 days from the time at which service of the notice has been effected, offers to have him examined free of charge by a qualified medical practitioner, submit himself for such examination, and any employee who is in receipt of half-monthly payment under this Act shall, if so required, submit himself for such examination from time to time as per the rules under the Act.

(ii) If an employee refuses to submit himself for examination by a qualified medical practitioner or in any way obstructs the same, his right to compensation shall be suspended during the continuance of such refusal, or obstruction unless, in the case of refusal, he was prevented by any sufficient cause from so submitting himself.

(iii) If an employee, voluntarily leaves without having been so examined the vicinity of the place in which he was employed, his right to compensation shall be suspended until he returns and officers himself for such examination.

(iv) Where an employee, whose right to compensation has been suspended under sub-section (ii) or sub-section (iii), dies without having submitted himself for medical examination as required by either of those sub-sections, the Commissioner may, if he thinks fit, direct the payment of compensation to the dependants of the deceased employee.

(v) Where under sub-section (ii) or sub-section (iii) a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension, and, if the period of suspension commences before the expiry of the waiting period referred to in clause (d) of sub-section (i) of Section 4, the waiting period shall be increased by the period during which the suspension continues.

(vi) Where an injured employee has refused to be attended by a qualified medical practitioner whose services have been offered to him by the employer free of charge or having accepted such offer has deliberately disregarded the instructions of such medical practitioner, then, if it is proved that the employee has not thereafter been regularly attended by a qualified medical practitioner or having been so attended had deliberately failed to follow his instructions and that such refusal, disregard or failure was unreasonable in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting disablement shall be deemed to be of

the same nature and duration as they might reasonably have been expected to be if the employee had been regularly attended by a qualified medical practitioner, whose instructions he had followed, and compensation, if any, shall be payable accordingly.

The Allahabad High Court in *Burhwal Sugar Mills Ltd.* v. *Ramjan,* observed that Section 11 confers a right and not an obligation on employer to have workmen medically examined. If he does not do so it will not debar employer from challenging medical certificate produced by employee. The court held that where the award of compensation was passed on basis of medical certificate without examination of doctor on oath, the award was liable to be quashed since there was no evidence on oath on which compensation could be awarded.

PROCEDURE IN THE PROCEEDINGS BEFORE THE COMMISSIONER

(i) Appointment of Commissioners

Section 20 as amended by the Workmen's Compensation (Amendment) Act, 2009 provides that the State Government may, by notification in the Official Gazette, appoint any person who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been for not less than five years an advocate or a pleader or is or has been a Gazetted Officer for not less than five years having educational qualifications and experience in personal management, human resource development and industrial relations to be a Commissioner for Employee's Compensation for such area as may be specified in the notification. Where more than one Commissioner has been appointed for any area, the Government may by general or special order regulate the distribution of business between them.

Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code. Section 20(3) empowers the Commissioner to appoint or choose any person, possessing special knowledge of any matter relevant to the matter under inquiry, to assist him in holding the inquiry.

(ii) Reference to Commissioner and his jurisdiction

Section 19(1) lays down jurisdiction of a Commissioner to entertain a claim in respect of payment of compensation to an employee. The Commissioner is empowered in default of an agreement to settle any question which may arise in any proceeding under this Act as to the liability of any person to pay compensation, and in particular, the Commissioner has jurisdiction over following matters:

(a) Liability of any person to pay compensation.

(b) Whether a person injured is or is not an employee?

(c) The nature and extent of disablement.

(d) The amount or duration of compensation.

If an application is made under the Employee's Compensation Act to the Commissioner, he has, by virtue of Section 19(1) of the Act, jurisdiction to decide any question as to the liability of any person including an insurer to pay compensation. Section 19(2) further provides that the enforcement of that liability can only be made by him. The Commissioner's jurisdiction is wide enough to decide the tenability of the objections; the consequential direction of the Commissioner to the insurer to pay is also covered under Section 19(1). In any event in execution of the order against the insured, namely, the employer, the Commissioner can enforce his liability against the insurer under Section 31. In the light of Section 19 read along with Section 31, the order of the Commissioner can never be challenged as being without jurisdiction (*United India Fire & General Insurance Co. Ltd.* v. *Kamalalshi,* (1980) 2 LLJ 408).

(iii) Jurisdiction of Civil Court barred

No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act.

[Section 19(2)] However, where the Commissioner has no jurisdiction to decide any matter and even fails to decide when raised, thereby leaving a party without any defence the Civil Court will have jurisdiction to entertain such suits (*Madina Saheb* v. *Province of Madras*, AIR1946 Mad. 113).

(iv) Venue of proceedings and transfer

Section 21 dealing with venue of proceedings and transfer of cases under the Act provides that:

(1) Where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before the Commissioner for the area in which:

(a) the accident took place which resulted in the injury; or

(b) the employee or in case of his death, the dependent claiming the compensation ordinarily resides; or

(c) the employer has his registered office:

Provided that no matter shall be processed before or by a Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned:

Provided further that, where the employee, being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or an employee in a motor vehicle or a company, meets with the accident outside India any such matter may be done by or before a Commissioner for the area in which the owner of agent of the ship, aircraft or motor vehicle resides or carries on business or the registered office of the company is situate, as the case may be.

(1A) If a Commissioner, other than the Commissioner with whom any money has been deposited under Section 8, proceeds with a matter under this Act, the former may for the proper disposal of the matter call for transfer of any records or money remaining with the latter and on receipt of such a request, he shall comply with the same.

(2) If a Commissioner is satisfied that any matter arising out of any proceedings pending before him can be more conveniently dealt with by any other Commissioner, whether in the same State or not, he may, subject to rules made under this Act, order such matter to be transferred to such other Commissioner either for report or for disposal, and, if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and, where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hands or invested by him for the benefit of any party to the proceedings:

Provided that the Commissioner shall not, where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependants of a lump sum without giving such party an opportunity of being heard.

(3) The Commissioner to whom any matter is so transferred shall, subject to rules made under this Act, inquire thereto and, if the matter was transferred for report, return his report thereon or, if the matter was transferred for disposal, continue the proceedings as if they had originally commenced before him.

(4) On receipt of a report from a Commissioner to whom any matter has been transferred for report under Sub-section (2), the Commissioner by whom it was referred shall decide the matter referred in conformity with such report.

(5) The State Government may transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it.

The section deals with territorial jurisdiction of Commissioner under the Act. Further, for the first time the procedure for deciding case under the Act regarding accident having place outside India [second proviso to Sub-section (1)

of Section 21] has been provided for. This is further clear from the fact that a Commissioner can transfer the matter to another Commissioner under Section 21(2) of the Act under specified circumstances.

Test your knowledge

Which of the following matters are under the jurisdiction of the Commissioner?

(a) Liability of any person to pay compensation

(b) Appointment of a substitute employee

(c) The nature and extent of disablement

(d) The amount or duration of compensation

Correct answer: (a), (c) and (d)

(v) Form of application

All claims for compensation subject to the provision of the Act shall be made to the Commissioner. But such applications other than the applications made by dependant or dependants can only be submitted when the parties have failed to settle the matter by agreement.

An Application to a Commissioner may be made in such form and shall be accompanied by such fee, if any, as may be prescribed and shall contain, in addition to any particulars which may be prescribed, the following particulars namely:

(a) a concise statement of the circumstances in which the application is made and the relief of order which the applicant claims;

(b) in the case of a claim for compensation against an employer, date of service of notice of the accident on the employer and, if such notice has not been served or has not been served in due time, the reason for such omission;

(c) the names and addresses of the parties; and

(d) except in the case of an application by dependents for compensation, a concise statement of the matters on which agreement has and of those on which agreement has not been come to.

If the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner. (Section 22)

However, any defect in the application, e.g., when it is not in the prescribed form cannot be fatal to the claim. Any such irregularity can be rectified with the permission of the Commissioner at any stage (*M.B. & G. Engineering Factory* v. *Bahadur Singh,* AIR 1955 All 182).

(vi) Power of the Commissioner to require further deposit in case of fatal accident

Where the Commissioner is of the opinion that any sum deposited by the employer as compensation payable on the death of an employee, is insufficient, he is empowered to call upon, by a notice in writing stating his reasons, the employer to show cause why he should not make a further deposit within a stipulated period. If the employer fails to show cause to the satisfaction of the Commissioner, the Commissioner may make an award determining the total amount payable and requiring him to deposit the deficiency. (Section 22A)

(vii) Powers and procedure of Commissioners

The Commissioner shall have for the following purposes, all the powers of a Civil Court under the Code of Civil Procedure, 1908 for the purpose of:

(a) taking evidence on oath;

(b) enforcing the attendance of witnesses; and

(c) compelling the production of documents and material objects.

Further, for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, he shall be deemed to be a Civil Court. (Section 23)

(viii) Appearance of parties

Any appearance, application or act required to be made or done by any person before or to a Commissioner other than an appearance of a party which is required for the purpose of his examination as a witness, may be made or done on behalf of such person, by a legal practitioner or by an official of an Insurance Company or registered Trade Union or by an Inspector appointed under Section 8(1) of the Factories Act, 1948, or under Section 5(1) of the Mines Act, 1952 or by any other officer specified by the State Government in this behalf, authorised in writing by such person, or, with the permission of the Commissioner by any other person so authorised. (Section 24)

(ix) Method of recording evidence

The Commissioner shall make a brief memorandum of the substance of the evidence of every witness as the examination of the witness proceeds, and such memorandum shall be written and signed by the Commissioner with his own hand and shall form a part of the record.

Provided that:

If the Commissioner is prevented from making such memorandum, he shall record the reason of his inability to do so and shall cause such memorandum to be made in writing from his dictation and shall sign the same and such memorandum shall form a part of the record.

Further, the evidence of any medical witness shall be taken down as nearby as may be word for word. (Section 25)

In the case of *M.S.N. Co. Ltd.* v. *Mohd. Kunju,* AIR 1956 Trav. Co. 935, it was held that the Commissioner should not make a medical certificate the basis of his award unless he has examined the concerned medical officer.

Time Limit for disposal of cases relating to compensation

A new Section 25A has been inserted by the Workmen's Compensation (Amendment) Act, 2009 providing for the time Limit for disposal of cases relating to compensation. As per Section 25A, the Commissioner shall dispose of the matter relating to compensation within a period of three months from the date of reference and intimate the decision in respect thereof within the said period to the employee.

(x) Costs

All costs, incidental to any proceedings before a Commissioner, shall subject to rules made under this Act, be in the discretion of the Commissioner. (Section 26)

However, the Commissioner must use his discretion judiciously.

(xi) Power to submit cases

A Commissioner may, if he thinks fit, submit any question of law for the decision of the High Court and, if he does so, shall decide the question in conformity with such decision. (Section 27)

(xii) Registration of agreements

Section 28 makes it obligatory for the employer to send a memorandum to the Commissioner where amount of any lump sum payable as compensation has been settled by agreement:

(a) whether by way of redemption of a half-monthly payment or otherwise, or

(b) where an compensation has been settled as being payable to a woman or a person under a legal disability.

The Commissioner shall record the memorandum in a register in the prescribed manner, after he has satisfied himself as to its genuineness provided that the Commissioner has given at least 7 days notice to the parties concerned before recording such memorandum. The Commissioner may at any time rectify the register.

The Commissioner may refuse to register the memorandum on the following grounds:

(a) Inadequacy of the sum or amount settled; or

(b) Agreement obtained by fraud or undue influence or other improper means.

The Commissioner may in such a situation make such order including an order as to any sum already paid under the agreement, as he thinks just in the circumstances.

An agreement which has been registered as aforesaid shall be enforceable under this Act notwithstanding anything contained in the Indian Contract Act, 1872, or in any other law for the time being in force.

(xiii) Effect of failure to register agreement

Where a memorandum of any agreement, the registration of which is required by Section 28 is not sent to the Commissioner as required by that Section, the employer shall be liable to pay the full amount of compensation which he is liable to pay under the provisions of this Act, and notwithstanding anything contained in the proviso to sub-section (1) of Section 4, shall not unless the Commissioner otherwise directs, be entitled to deduct more than half of any amount paid to the employees by way of compensation whether under the agreement or otherwise. (Section 29)

Test your knowledge

State whether the following statement is "True" or "False":

The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908.

- True
- False

Correct Answer: True

APPEALS

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

(a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(aa) an order awarding interest or penalty under Section 4A;

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

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

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

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions. (Section 30)

Such appeal should be filed within 60 days of order. The section empowers appellate Court to infer with findings recorded by commissioner only in case of substantial error of law (*LLJ II 1998 Kar. 764*). The provisions of Section 5 of Limitation Act, 1963 shall be applicable to appeals under the Section.

No appeal shall lie unless the following requirements are fulfilled:

(i) A substantial question of law is involved in the appeal.

(ii) In case of order, other than order refusing to allow redemption of a half-monthly payment, unless the amount in dispute in the appeal is not less than three hundred rupees;

(iii) The memorandum of appeal should be accompanied by a certificate by the Commissioner to the effect that the applicant has deposited with him the amount payable under the order appealed against. Deposit of compensation amount is alone contemplated: deposit of penalty or interest is not condition precedent for filing appeal (*LLJ I 1999 Kar. 60*).

(iv) The appeal does not relate to any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties.

Jurisdiction conferred on High Court being special any further appeal against the judgement is barred. No. leave petition was therefore held maintainable (*LLJ I 1998 1122 Pat.*). Finding whether the claimant was a employee arrived by commissioner on material on record is a fact hence no further appeal is allowed (*LAB IC 1998 Ori. 3254*).

Withholding of certain payments pending decision of appeal

Where an employer makes an appeal under clause (a) of sub-section (1) of Section 30, the Commissioner may, and if so directed by the High Court, shall, pending the decision of the appeal, withhold payment of any sum in deposit with him. (Section 30A)

Recovery

The Commissioner may recover, as an arrear of land revenue, any amount payable by any person under this Act, whether under an agreement for the payment of compensation or otherwise, and the Commissioner shall be deemed to be a public officer within the meaning of Section 5 of the Revenue Recovery Act, 1890. (Section 31)

PENALTIES

Section 18A of the Act prescribes penalties for the contravention of the provisions of the Act which include fine up to Rs. 5,000. The following omissions attract this punishment under the Act:

(a) Whosoever fails to maintain a notice book which he is required to maintain under Section 10(3); or

(b) Whosoever fails to send to the Commissioner a statement of fatal accidents which he is required to send under Section 10A(1); or

(c) Whosoever fails to send a report of fatal accidents and serious bodily injuries which he is required to send under Section 10B; or

(d) Whosoever fails to make a return of injuries and compensation which he is required to make under Section 16.

No prosecution under Section 18A shall be instituted except by or with the previous sanction of the Commissioner and no court shall take cognizance of any offence under this section unless complaint is made within 6 months of the date on which the alleged commission of offence comes to the knowledge of the Commissioner.

Test your knowledge

Choose the correct answer:

Within how many days should an appeal be filed to the High Court as per the Employee's Compensation Act, 1923?

(a) Within 15 days of order being passed

(b) Within 20 days of order being passed

(c) Within 45 days of order being passed

(d) Within 60 days of order being passed

Correct answer: (d)

SPECIAL PROVISIONS RELATING TO MASTERS AND SEAMEN

According to Section 15, the Act shall apply in the case of employees who are masters of ships or seamen subject to the following modifications, namely:

(a) The notice of the accident and the claim for compensation may, except where the person injured is the master of the ship, be served on the master of the ship as if he were the employer, but where the accident happened and the disablement commenced on board the ship, it shall not be necessary for any seaman to give any notice of the accident.

(b) In the case of the death of a master or seaman, the claim for compensation shall be made within one year after the news of the death has been received by the claimant or, where the ship has been or is deemed to have been lost with all hands, within eighteen months of the date on which the ship was, or is deemed to have been, so lost:

Provided that the Commissioner may entertain any claim to compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(c) Where an injured seaman or master is discharged or left behind in any part of India or in any other foreign country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claim, be admissible in evidence:

(i) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(ii) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness; and

(iii) if the deposition was made in the course of a criminal proceedings, on proof that the deposition was made in the presence of the person accused;

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceedings was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

(d) No half-monthly payment shall be payable in respect of the period during which the owner of the ship is,

under any law in force for the time being relating to merchant shipping liable to defray the expenses of maintenance of the injured master or seaman.

(e) No compensation shall be payable under this Act in respect of any injury in respect of which provisions are made for payment of a gratuity, allowance or pension under the War Pensions and Detention Allowances (Mercantile Marine, etc.) Scheme, 1939, or the War Pensions and Detention (Navy, Army, Air Force and Mercantile Marine) Act, 1939, or under War Pensions and Detention Allowances (Indian Seamen) Scheme, 1942, made by the Central Government.

(f) Failure to give a notice to make a claim or commence proceedings within the time required by this Act shall not be a bar to the maintenance of proceedings under this Act in respect of any personal injury, if:

(i) an application has been made for payment in respect of that injury under any of the schemes referred to in the preceding clause, and

(ii) the State Government certifies that the said application was made in the reasonable belief that the injury was one in respect of which the scheme under which the application was made makes provisions for payments, and that the application was rejected or that payments made in pursuance of the application were discontinued on the ground that the injury was not such an injury, and

(iii) the proceedings under this Act are commenced within one month from the date on which the said certificate of the State Government was furnished to the person commencing the proceedings.

SPECIAL PROVISIONS RELATING TO CAPTAINS AND OTHER MEMBERS OF CREW OF AIRCRAFTS

These provisions have been stipulated under Section 15A of the Act. As per Section 15A, this Act shall apply in the case of employees who are captains or other members of the crew of aircrafts subject to the following modifications, namely:

(1) The notice of the accident and the claim for compensation may, except where the person injured is the captain of the aircraft, be served on the captain of the aircraft as if he were the employer, but where the accident happened and the disablement commenced on board the aircraft it shall not be necessary for any member of the crew to give notice of the accident.

(2) In the case of the death of the captain or other member of the crew, the claim for compensation shall be made within one year after the news of the death has been received by the claimant or, where the aircraft has been or is deemed to have been lost with all hands, within eighteen months of the date on which the aircraft was, or is deemed to have been so lost:

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(3) Where an injured captain or other member of the crew of the aircraft is discharged or left behind in any part of India or in any other country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence:

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(b) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness;

(c) if the deposition was made in the course of a criminal proceeding, on proof that the deposition was made in the presence of the person accused,

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

SPECIAL PROVISIONS RELATING TO EMPLOYEES ABOARD OF COMPANIES AND MOTOR VEHICLES

This Act according to Section 15B shall apply:

(i) in the case of employee who are persons recruited by companies registered in India and working as such abroad, and

(ii) persons sent for work abroad along with motor vehicles registered under the Motor Vehicles Act, 1988 (59 of 1988) as drivers, helpers, mechanics, cleaners or other employees:

(1) The notice of the accident and the claim for compensation may be served on the local agent of the company, or the local agent of the owner of the motor vehicle, in the country of accident, as the case may be.

(2) In the case of death of the employee in respect of whom the provisions of this section shall apply, the claim for compensation shall be made within one year after the news of the death has been received by the claimant:

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(3) Where an injured employee is discharged or left behind in any part of India or in any other country any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence:

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(b) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness;

(c) if the deposition was made in the course of a criminal proceeding, or proof that the deposition was made in the presence of the person accused,

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. There are ……. workers and contractors, employed by the establishment who are covered under the provisions of this Act.
2. The factory/establishment has submitted to the ESI Corporation returns in the prescribed form containing the particulars relating to the persons employed as per the provisions of the Act, regulation and rules made in this behalf.
3. The establishment has paid compensation to the employee for the personal injury caused to him by an accident arising out of and in the course of his employment as per the provisions contained in the Act during the financial year.
4. During the year under review, there was no dispute in respect of any bonafide claims of the employees.
5. During the year under review, every bonafide claim was duly settled by the establishment.
6. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act

SCHEDULE I

[*See* Section 2(1) and (4)]

PART I

List of Injuries Deemed to Result in Permanent Total Disablement

Sl. No.	**Description of injury**	**Percentage of loss of earning capacity**
(1)	(2)	(3)
1.	Loss of both hands or amputation at higher sites	100
2.	Loss of a hand and foot	100
3.	Double amputation through leg or thigh, or amputation through leg or thigh on one side and loss of other foot	100
4.	Loss of sight to such an extent as to render the claimant unable to perform any work for which eye sight is essential	100
5.	Very severe facial disfigurement	100
6.	Absolute deafness	100

PART II

List of Injuries Deemed to Result in Permanent Partial Disablement

Amputation Cases – Upper limbs – Either arm

1.	Amputation through shoulder joint	90
2.	Amputation below shoulder with stump less than 20.32 cms. from tip of acromion	80
3.	Amputation from 20.32 cms. from tip of acromion to less than 4" below tip of olecranon	70
4.	Loss of a hand or of the thumb and four fingers of one hand or amputation	60

	from 11.43 cms. below tip of olecranon	
5.	Loss of thumb	30
6.	Loss of thumb and its metacarpal bone	40
7.	Loss of four fingers of one hand	50
8.	Loss of three fingers of one hand	30
9.	Loss of two fingers of one hand	20
10.	Loss of terminal phalanx of thumb	20
10A.	Guillotine amputation of tip of thump without loss of bone	10
	Amputation Cases—Lower limbs	
11.	Amputation of both feet resulting in end-bearing stu	90
12.	Amputation through both feet proximal to the metatarso – phalangeal joint	80
13.	Loss of all toes of both feet through the metatarso – phalangeal joint	40
14.	Loss of all toes of both feet proximal to the proximal inter phalangeal joint	30
15.	Loss of all toes of both feet distal to the proximal inter – phalangeal joint	20
16.	Amputation at hip	90
17.	Amputation below hip with stump not exceeding 12.70 cms. in length measured from tip of great trenchanter	80
18.	Amputation below hip with stump exceeding 12.70 cms. from tip of great trenchanter but not beyond middle thigh in length measured	70
19.	Amputation below middle thigh to 8.89 cms. below knee	60
20.	Amputation below knee with stump exceeding 8.89 cms. but not exceeding 12.70 cms.	50
21.	Amputation below knee with stump exceeding 12.70 cms.	50
22.	Amputation of one foot resulting in end-bearing	50
23.	Amputation through one foot proximal to the metatarso-phalangeal joint	50
24.	Loss of all toes of one foot through the metatarso- phalangeal joint	20
	Other injuries	
25.	Loss of one eye, without complications, the other being normal	40
26.	Loss of vision of one eye without complications or disfigurement of eye-ball, the other being normal	30
26A.	Loss of partial vision of one eye	10
	Loss of – A. Fingers of right or left hand Index finger	
27.	Whole	14
28.	Two phalanges	11
29.	One phalanx	9
30.	Guillotine amputation of tip without loss of bone	5

	Middle finger	
31.	Whole	12
32.	Two phalanges	9
33.	One phalanx	7
34.	Guillotine amputation of tip without loss of bone	4
	Ring or little finger	
35.	Whole	7
36.	Two phalanges	6
37.	One phalanx	5
38.	Guillotine amputation of tip without loss of bone	2
	B. Toes of right or left foot great toe	
39.	Through metatarso-phalangeal joint	14
40.	Part, with some loss of bone	3
	Any other toe	
41.	Through metatarso-phalangeal joint	3
42.	Part, with some loss of bone	1
	Two toes of one foot, excluding great toe	
43.	Through metatarso-phalangeal joint	5
44.	Part, with some loss of bone	2
	Three toes of one foot, excluding great toe	
45.	Through metatarso-phalangeal joint	6
46.	Part, with some loss of bone	6
	Four toes of one foot, excluding great toe	
47.	Through metatarso-phalangeal joint	9
48.	Part, with some loss of bone	3

Note: Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be equivalent to the loss of that limb or member.

LESSON ROUND UP

- The Employee's Compensation Act, 1923 is one of the important social security legislations. It imposes statutory liability upon an employer to discharge his moral obligation towards his employees when they suffer from physical disabilities and diseases during the course of employment in hazardous working conditions.
- The Act provides for cheaper and quicker mode of disposal of disputes relating to compensation through special proceedings than possible under the civil law.
- The Act provides for employers liability for compensation in case of occupational disease or personal injuries and prescribes the manner in which his liability can be ascertained.

- Amount of compensation is payable in the event of an employee meeting with an accident resulting into temporary or permanent disability or disease as stated in Schedule II and III in terms of Section 4 of the Act, read with Schedule IV. Compensation shall be paid as soon as it falls due.
- Where an employer is in default in paying compensation, he would be liable to pay interest thereon and also a further sum not exceeding fifty percent of such amount of compensation as penalty. The interest and the penalty stated above is to be paid to the employee or his dependent as the case may be.
- Under the Act, the State Governments are empowered to appoint Commissioners for Employee's Compensation for (i) settlement of disputed claims, (ii) disposal of cases of injuries involving death, and (iii) revision of periodical payments.
- The Act prescribes penalties for the contravention of the provisions of the Act which include fine up to Rs. 5,000.

SELF TEST QUESTIONS

1. Explain the following terms under the Employees' Compensation Act, 1923: (i) Employer; (ii) Dependent; (iii) Disablement and (iv) Wages.
2. Explain employers liability to pay compensation to an employee.
3. Define an 'accident'. When it is said to arise out of and in the course of an employment?
4. Explain the theory of notional extension of employment.
5. State the special provisions relating to employee abroad of companies under the Act.

Lesson 10

Contract Labour (Regulation and Abolition) Act, 1970

LESSON OUTLINE

- Learning Objectives
- Scope and Application
- Act not to apply to certain establishments
- Contract Labour
- Contractor
- Controlled Industries
- Establishment
- Principal Employer
- Workman
- The Advisory Boards
- Registration of establishments employing Contract Labour
- Effect of non-registration
- Prohibition of Employment of Contract Labour
- Appointment of Licensing Officer and Licensing of Contractors
- Welfare and Health of Contract Labour
- Rules framed under the Act by the Central Government on the question of wages
- Penalties and Procedure
- Inspectors
- Maintenance of Records and Registers
- Compliances under the Act

LEARNING OBJECTIVES

Contract Labour is a significant and growing form of employment. It is prevalent in almost all industries and allied operations and also in service sector. It generally refers to workers engaged by a contractor for user enterprise. Contract labour have very little bargaining power, have little or no social security and are often engaged in hazardous occupations endangering their health and safety. The exploitation of workers under the contract labour system has been a matter of deep concern for the Government. The Government enacted the Contract Labour (Regulation and Abolition) Act in 1970 and it came into force on 10.2.71.

The Act applies to every establishment/ contractor in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour. Every establishment and contractor, to whom the Act applies, have to register themselves or obtain a license for execution of the contract work.

Under the Act, interests of contract workers are protected in terms of wages, hours of work, welfare, health and social security. The amenities to be provided to contract labour include canteen, rest rooms, first aid facilities and other basic necessities at the work place like drinking water etc. The liability to ensure payment of wages and other benefits is primarily that of the contractor, and in case of default, that of the principal employer.

In this lesson, students will be acclimatized with the legal frame work stipulated under the Contract Labour (Regulation and Abolition) Act, 1970.

Recognizing the need for protecting the interest of contract labour, the Contract Labour (Regulation and Abolition) Act, 1970 was enacted to regulate the employment of Contract Labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

SCOPE AND APPLICATION

The Contract Labour (Regulation and Abolition) Act, 1970 regulates the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

The Act extends to the whole of India. According to Section 1(4), it applies:

(a) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour;

(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen.

The appropriate Government may, after giving not less than two months notice of its intention to do so, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification.

ACT NOT TO APPLY TO CERTAIN ESTABLISHMENTS

According to Section 1(5), the Act shall not apply to establishments in which work only of an intermittent or casual nature is performed.

If a question arises whether work performed in an establishment is of an intermittent or casual nature, the appropriate Government shall decide that question after consultation with the Central Board or, as the case may be, as State Board, and its decision shall be final.

Test your knowledge

State whether the following statement is "True" or "False"

The Act applies to every establishment in which 10 or more workmen are employed as contract labour or were so employed on any day of the preceding 12 months.

- True
- False

Correct answer: False

IMPORTANT DEFINITIONS

(a) Appropriate Government

"Appropriate Government" means

(i) in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947 is the Central Government, the Central Government;

(ii) in relation to any other establishment, the Government of the State in which that other establishment is situated. [Section 2(1)(a)]

(b) Contract Labour

A workmen shall be deemed to be employed as contract labour in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer. [Section 2(1)(b)]

(c) Contractor

"Contractor" in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor. [Section 2(1)(c)]

Test your knowledge

Choose the correct answer

Which establishments are exempt from the purview of the Contract Labour (Regulation and Abolition) Act, 1970?

(a) Establishments where work of an intermittent nature is performed

(b) Establishments where embroidery work is performed

(c) Establishments where metal work is performed

(d) Establishments where manufacturing work is performed

Correct answer: (a)

(d) Controlled Industry

"Controlled industry" means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest. [Section 2(1)(d)]

(e) Establishment

"Establishment" means

(i) any office or department of the Government or local authority, or

(ii) any place where any industry, trade, business, manufacture or occupation is carried on. [Section 2(1)(e)]

(f) Principal Employer

"Principal Employer" means

(i) In relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf.

(ii) In a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named.

(iii) In a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named.

(iv) in any other establishment, any person responsible for the supervision and control of the establishment. [Section 2(1)(g)]

Explanation: For the purpose of sub-clause (iii) of this clause, the expressions mine, owner and agent shall have the meanings respectively assigned to them in clause (j) clause (l) and clause (c) of sub-section (l) of Section 2 of the Mines Act, 1952.

(g) Workman

"Workman" means 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 expressed or implied, but does not include any such person-

(a) Who is employed mainly in a managerial or administrative capacity, or

(b) Who, being employed in a supervisory capacity draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature; or

(c) who is an out-worker, that is to say, a person to whom any articles or materials are given out by or on behalf of the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the out worker or in some other premises not being premises under the control and management of the principal employer. [Section 2(1)(i)]

Test your knowledge

State whether the following statement is "True" or "False"

A workman shall be deemed to be employed as contract labour in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer.

- True
- False

Correct answer: True

THE ADVISORY BOARDS

Central Advisory Board

Section 3 requires the Central Government to constitute a Central Advisory Contract Labour Board to advise the Central Government on such matters arising out of the administration of the Act as may be referred to it and to carry out other functions assigned to it under the Act. (Section 3)

State Advisory Boards

Section 4 similarly requires the State Government to constitute the State Advisory Contract Labour Board to advise the State Governments on such matters arising out of the administration of the Act as may be referred to it and to carry out other functions assigned to it under the Act. (Section 4)

REGISTRATION OF ESTABLISHMENTS EMPLOYING CONTRACT LABOUR

In order to secure its objectives and purposes the Act contains provisions for Registration of establishments employing contract labour.

Appointment of registering officer

Section 6 empowers the appropriate Government appoint by notification in the Official Gazette, persons being gazetted officers of Government, to be registering officers and define the limits within which a registering officer shall exercise the powers conferred on him by or under the Act. (Section 6)

Registration of certain establishments

Every establishment covered by the Act, if it wants to engage twenty or more persons through a contractor has to get itself registered. Section 7 of the Act lays down that every principal employer of an establishment to which the Act applies shall make an application to the registering officer in the prescribed manner for registration of the establishment within the prescribed time limit. A registration fee varying from Rs. 20 to Rs. 500 which is related to the number of workmen employed as contract labour, is payable. If the application is complete in all respects

the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration in the prescribed form. (Section 7)

Revocation of registration in certain cases

The registration can be revoked in the following circumstances.

(1) If the registering officer is satisfied, either on a reference made to him in his behalf or otherwise, that the registration has been obtained by mis-representation or suppression of any material fact, or

(2) that the registration has become useless and become ineffective for any other reason and, therefore, requires to be revoked.

In both the cases, the registering officer shall give an opportunity to the principal employer of the establishment to be heard. He will also obtain previous approval of the appropriate Government in case the registration is to be revoked. (Section 8)

EFFECT OF NON-REGISTRATION

No principal employer of an establishment to which the Act applies can employ contract labour, if

(a) he has not obtained the certification of registration; or

(b) a certificate has been revoked after being issued. (Section 9)

PROHIBITION OF EMPLOYMENT OF CONTRACT LABOUR

This is the most significant provision in the Act. It empowers the appropriate Government to prohibit employment of contract labour in any process, operation or other work in any establishment by issuing a notification in the Official Gazette. The following steps are, however, required to be taken before such a notification is issued:

(1) the appropriate Government shall consult the Central Board or as the case may be, the State Board,

(2) the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors such as:

(a) whether the process, operation or other work incidential to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment.

(b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

(c) whether it is done ordinarily through regular workmen in that establishment similar thereto;

(d) whether it is sufficient to employ considerable number of wholetime workmen. (Section 10)

Explanation: If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final.

But where the government fails to disclose the basis for refusing to abolish contract labour, it amounts to non-application of mind to the requirements of Section 10(2) and the court can order abolition of contract labour (*GEA* v. *Union of India,* 1997 Lab IC 1701 Bom.).

Test your knowledge

Choose the correct answer

Whose approval does the Registering Officer require in a case of revocation of a particular establishment's registration?

(a) Commissioner of Labour

(b) Central Government

(c) State Government

(d) Appropriate Government

Correct answer: (d)

Jurisdiction of Industrial Tribunals to abolish contract labour

It has been held by the Supreme Court in *Vegolis Private Ltd*. v. *The Workmen, (1971)II-LLJ p. 567*, that after enforcement of the Contract Labour (Regulation and Abolition) Act, 1970, the sole jurisdiction for abolition of contract labour in any particular operation vested with the appropriate Government and thereafter the Tribunals have no jurisdiction to abolish contract labour. Supreme Court cannot under Article 32 of the Constitution order for abolition of Contract Labour System in any establishment (1985 1 SCC 630).

In Gujarat Electricity Board case, AIR 1995 SC 2942, the Supreme Court held that:

(a) all undertakings on their own discontinue the contract labour who satisfy the factors mentioned in classes (a) to (d) of Section 10(2) of the Act, and abolish as many of the labour as is feasible as their direct employees.

(b) both the Central and State Governments should appoint a committee to investigate the establishments in which the contract labour is engaged and were on the basis of criteria laid down in clauses (a) to (d) of Section 10(2) of the Act, the contract labour system can be abolished and direct employment can be given to the contract labour.

The appropriate Government on its own should take initiative to abolish the labour contracts in the establishments concerned by following the procedure laid down under the Act.

(c) the Central Government should amend the Act by incorporating a suitable provision to refer to industrial adjudicator the question of the direct employment of the contract workers of the ex-contractor in principal establishments, when the appropriate Government abolishes the contract labour.

After-effect of abolition of contract labour

At present there is no provision in the Act for absorption of contract labour in the event of prohibition of employment of contract labour in any category of work/jobs under Section 10 of the Act. There have been complaints that contract workers are being thrown out of employment in the jobs covered by the relevant notification.

On the crucial question as to after effect of abolition of contract labour under Section 10 of the Act, the Supreme Court in *Air India Statutory Corporation* v. *United Labour Union*, AIR 1997 SC 645, held that a High Court in exercise of its jurisdiction under Article 226 of the Constitution, can direct a principal employer in an appropriate case to absorb the workman concerned after abolition of the contract labour. It overruled its earlier decision of two member bench of the Court (*Dena Nath* case 1991 AIR SC 3026). In this case, it was held that High Court in exercise of its power under Article 226 could not drive at the absorption of contract labour (on its abolition) as direct employees of the principal employer. The Court also overruled another important case (*Gujarat Electricity Board*, AIR 1995 SC 2942) wherein it was held that on abolition of contract labour their employees are free to

raise their cause for reference under Section 10 of Industrial Disputes Act, 1947 seeking absorption of contract labour. After abolition of contract labour system, if the principal employer omits to abide by the law and fails to absorb the contract labour worked in the establishment on regular basis, the workmen have no option but to seek redress under Article 226 of the Constitution.

Judicial review being the basic feature of the constitution, the High Court is to have the notification enforced at the first instance. Further, the affected employees have a fundamental right to life. Meaningful right to life springs from continued work to earn their livelihood. The right to employment, therefore, is an integral facet of right to life. When they are engaged as contract labour and were continuously working in the establishment of the appellant to make their right to social and economic justice meaningful and effective, they are required to be continuously engaged as contract labour, so long as the work is available in the establishment. When the work is of perennial nature and on abolition of contract labour system, they are entitled, per force to be absorbed on regular basis.

Thus, in *Air India Statutory Corporation* case, the Supreme Court has held though there exists no express provision in the Act for absorption of employees in establishments where contract labour system is abolished by publication of notification under Section 10(1) of the Act, the principal employer is under obligation to absorb the contract labour. The linkage between the contractor and employee stood snapped and direct relationship stood restored between the principal employer and contract labour as its employees. Where the contract labour through a contractor engaged in keeping industrial premises clean and hygiene, but no licence was obtained by principal employer nor contractor and the contract itself stipulating number of employees to be engaged by contractor and overall control of working of contract labour including administrative control remaining with principal employer, it was held by the Court that the contract is a camouflage which could be easily pierced and the employee and the employer relationship could be directly visualised. Employees who have put in 240 days of work is ordered to be absorbed (1999 LAB IC SC 1323 *HSEB* v. *Suresh*).

In Steel Authority of India v. National Union of Water Front Workers and others, AIR 2001 SC 3527, the Supreme Court overruled the judgement delivered in the Air India Statutory Corporation case. The Apex Court held that neither Section 10 of the Act nor any other provision in the Act whether expressly or by necessary implication provides for automatic absorption of contract labour on issuing a notification by the Appropriate Government under Section 10(1) prohibiting employment of contract labour in any process or operation or other work in any establishment. Consequently, the principal employer cannot be required to order absorption of contract labour working in the concerned establishment.

APPOINTMENT OF LICENSING OFFICER AND LICENSING OF CONTRACTORS

Apart from registration of establishments employing contract labour, the Act contains provisions for licensing of contractors. Section 11 empowers the appropriate Government to appoint Gazetted Officers to be licensing officers and define the limits of their jurisdiction. Orders regarding appointment of licensing officers and the limits of their jurisdiction are to be notified in the Official Gazette.

Licensing of contractors

Under Section 12 of the Act, no contractor to whom the Act applies can undertake or execute any work though contract labour except under and in accordance with the license issued in that behalf by the licensing officer. The license may contain such conditions including, in particular, conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules framed under the Act.

The license shall be issued on the payment of prescribed fee and on the deposit of security, if any, for the due performance of the conditions prescribed in the license. The licensee fee ranges from Rs. 5 to Rs. 125 depending on the number of workmen employed by the contractor. The license is not-transferable.

Grant of license

An application for the grant of license has to be made in the prescribed form. It should contain particulars regarding the location of establishment, nature of process, operation or work for which contract labour is to be employed and such other particulars as may be prescribed. The license is issued after necessary investigation by the licensing officer. It is valid for the period specified therein (12 months under the Central Rules) and may be renewed from time to time for such period and on payment of such fees and on such conditions as may be prescribed. (Section 13)

Revocation, suspension and amendment of license

If the licensing officer is satisfied, either on a reference made to him in this behalf or otherwise, that(a)the license has been obtained by misrepresentation or suppression of any material fact or that (b) the holder of license has, without reasonable cause, failed to comply with the conditions subject to which the license has granted or has contravened of any of the provisions of the Act or the rules made thereunder, the licensing officer may revoke or suspend the license. He has also the powers to forfeit the sum, if any, or any portion thereof deposited as security for the due performance of the conditions subject to which the license was granted. (Section 14)

However, before revoking or suspending the license or ordering forfeiture of the security deposit by the contractor, the licensing officer has to give the holder of the license an opportunity of showing cause. The Licensing Officer may vary or amend a license subject to the rules that be made in this behalf.

Appeals

The Act makes provision for appeals against orders relating to grant of registration to establishments, revocation of registration and revocation/suspension of licences. The aggrieved person may within 30 days from the date on which the order is communicated to him prefer an appeal to an appellate officer who shall be a person nominated in this behalf by the appropriate government. The appellant officer may entertain an appeal even after the expiry of 30 days, if he is satisfied that there was sufficient cause for the delay. The appellant officer shall after giving the appellant an opportunity of being heard dispose of the appeal as expeditiously as possible. (Section 15)

WELFARE AND HEALTH OF CONTACT LABOUR

The contractors are required to take certain specific measures for the welfare and health of contract labour. This, of course, arises in those employments in which the system of contract labour has not been abolished. The relevant provisions are as follows:

(i) ***Canteens:*** As per Section 16, the appropriate Government has powers to make rules requiring that in every establishment to which the Act applies and wherein contract labour numbering 100 or more is ordinarily employed by a contractor and the employment of the contract labour is likely to continue for such period as may be prescribed, one or more canteens shall be provided and maintained by the contractor for the use of such contract labour. The rules may provide for the date by which the canteen shall be provided, the number of canteens and the standards in respect of construction, accommodation, furniture and other equipment of the canteens, the food stuffs which may be served therein and the charges which may be made therefor.

(ii) ***Rest rooms:*** Section 17(1) makes the following provisions. In every place where contract labour is required to halt at night in connection with the work of an establishment to which the Act applies and in which work requiring employment of contract labour is likely to continue for such period as may be prescribed, there shall be provided and maintained by the contractor for the use of the contract labour such number of rest rooms or such of the suitable alternative accommodation within such time as may be prescribed. Section 17(2) says that the rest room or alternative accommodation to be provided under Sub-section (1) shall be sufficiently lighted and ventilated and shall be maintained in a clean and comfortable condition.

(iii) Other facilities: It shall be the duty of every contractor employing contract labour in connection with the work of an establishment to which the Act applies, to provide and maintain:

(a) a sufficient supply of wholesome drinking water for the contract labour at convenient places;

(b) a sufficient number of latrines and urinals of the prescribed types conveniently situated and accessible to the contract labour; and

(c) washing facilities. (Section 18)

First Aid facilities: The contractor is required to provide and maintain a first aid box equipped with the prescribed contents at every place, where contract labour is employed by him. The first aid box should be readily accessible during working hours. (Section 19)

Liability of the principal employer in certain cases: If the prescribed amenities (canteens, rest rooms and other facilities, first aid box) are not provided by the contractor within the prescribed time, then such amenities shall be provided by the principal employer within such time as may be specified. According to Section 20(2), all expenses incurred by the principal employer in providing the amenity may be recovered by him from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. (Section 20)

Responsibility for payment of wages: A common complaint against the contractors has been that some of them do not pay proper wages to the contract labourers or that payments are not made in time or that arbitrary deductions are made from wages. To take care of such malpractices, Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, lays down that the Contractor shall pay wages in the presence of the authorised representative of the Principal employer. An obligation is also cast on the principal employer to nominate a representative duly authorised by him to be present at the time of disbursement of wages.

The text of Section 21 is reproduced below:

"Section 21. (1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every principal employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorised representative of the principal employer.

(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor."

Test your knowledge

Choose the correct answer

Which of the following measures are to be undertaken for the welfare and health of contract labour?

(a) Canteens

(b) Rest Rooms

(c) Creche

(d) Drinking Water

Correct answer: (a), (b) and (d)

RULES FRAMED UNDER THE ACT BY THE CENTRAL GOVERNMENT ON THE QUESTION OF WAGES

Rules 63 to 73 of the Contract Labour (Regulation and Abolition) Central Rules, 1971 are reproduced below:-

63. The contractor shall fix wage periods in respect of which wages shall be payable.

64. No wage period shall exceed one month.

65. The wage of every person employed as contract labour in an establishment or by a contractor where less than one thousand such persons are employed shall be paid before the expiry of tenth day after the last day of the wage period in respect of which wages are payable.

66. Where the employment of any worker is terminated by or on behalf of the contractor the wages earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated.

67. All payments of wages shall be made on a working day at the working premises and during the working time and on a date notified in advance and in case the work is completed before the expiry of the wage period, final payment shall be made within 48 hours of the last working day.

68. Wages due to every worker shall be paid to him direct or to other authorised by him in his behalf.

69. All wages shall be paid in current coin or currency or in both.

70. Wages shall be paid without any deductions of any kind except those specified by the Central Government by general or special order in this behalf or permissible under the Payment of Wages Act, 1936.

71. A notice showing the wage-period and the place and time of disbursement of wages shall be displayed at the place or work and a copy sent by the contractor to the Principal Employer under acknowledgement.

72. The Principal Employer shall ensure the presence of his authorised representative at the place and time of disbursement of wages by the contractor to workmen and it shall be the duty of the contractor to ensure the disbursement of wages in the presence of such authorised representative.

73. The authorised representative of the principal employer shall record under his signature a certificate at the end of the entries in the Register of Wages-cum-Muster Roll, as the case may be in the following form:

"Certified that the amount shown in columns No.....has been paid to the workmen concerned in my presence on.....at....."

PENALTIES AND PROCEDURE

The Act refers to the following types of offences and provide for penalties as shown against each.

Section 22

(a) Obstructing an inspector in the discharge of his duties under the Act or refusal or wilful neglect to afford the inspector any reasonable facility for making any inspection, examination, enquiry or investigation authorised by or under the Act in relation to an establishment to which, or a contractor to whom, this Act applies [Section 22(1)].	Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 500 or both.
(b) Wilful refusal to produce on the demand of an inspector any register or other document kept in pursuance of this Act or prevention or attempted prevention or doing anything which the inspector has reason to believe is likely to prevent any	Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 500/- or both.

person from appearing before or being examined by an Inspector acting in pursuance of his duties under the Act [Section 22(2)].	

Section 23

Contravention of any provision of the Act or any rule made thereunder prohibiting or restricting or regulating employment of contract labour or contravention of any condition of a license granted under the Act.	Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 1,000 or both.

In case of a continuing contravention an additional fine which may extend to Rs. 100/- per day during which the contravention continues after conviction for the first such contraventions, may be imposed.

Section 24

Contravention of any of the provisions of the Act or of any rule made thereunder for which no penalty is elsewhere provided.	Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 1,000/- or both.

Offences by companies

(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against any punished accordingly:

Provided that nothing containing in this Sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section(1) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of any director, manager, managing agent or any other officer of the company, such director, manager, managing agent or such other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. (Section 25)

Explanation: For the purpose of this Section

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm means a partner in the firm.

Cognizance of offence: Section 26 provides that no Court shall take cognizance of any offence under this Act except on a complaint made by, or with the previous sanction in writing of, the inspector and no Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

***Limitation of prosecutions*:** Section 27 prescribing limitation of prosecutions stipulates that no Court shall take cognizance of an offence punishable under this Act unless the complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of an inspector:

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

It has been held by the Patna High Court in *Padam Prasad Jain* v. *State of Bihar and another,* (1979) I LLJ p. 111, that executing contract labour without a licensee, constituted a fresh offence every day on which it continued and, therefore, the limitation prescribed under Section 27 for taking cognizance of an offence does not apply.

INSPECTORS

Under Section 28 of the Act, appropriate Governments have been given powers to appoint inspectors for the purposes of the Act and to define the local limits within which they shall exercise their powers. Sub-section (2) of Section 28 dealing with powers of Inspectors, read as follows:

(2) Subject to any rules made in this behalf, an inspector may, within the local limits for which he is appointed:

(a) enter, at all reasonable hours, with such assistance (if any), being in the service of the Government or any local or other public authority as he thinks fit, any premises or place where contract labour is employed, for the purpose of examining any register or record or notices required to be kept or exhibited by or under this Act or rules made thereunder, and require the production thereof for inspection;

(b) examine any person whom he finds in any such premises or place and who, he has reasonable cause to believe, is a workmen employed therein;

(c) require any person giving out work and any workmen, to give any information, which is in his powers to give with respect to the names and addresses of the persons to, for an from whom the work is given out or received, and with respect to the payments to be made for the work;

(d) seize or take copies of such register, record of wages or notices or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by the principal employer or contractor; and

(e) exercise such other powers as may be prescribed.

Sub-section (3) of Section 28 provides that any person required to produce any document or thing to give any information required by an inspector under Sub-section (2) shall be deemed to be legally bound to do so within the meaning of Section 175 and Section 176 of the Indian Penal Code.

Sub-section (4) lays down that the provisions of the Code of Criminal Procedure shall, so far as may be, apply to any search or seizure under Sub-section (2) as they apply to any search or seizure under the authority of a warrant issued under the Code.

Test your knowledge

Choose the correct answer

Which Section of the Contract Labour (Regulation and Abolition) Act, 1970, deals with cognizance of offence?

(a) Section 26

(b) Section 27

(c) Section 28

(d) Section 29

Correct answer: (a)

MAINTENANCE OF RECORDS & REGISTERS

Section 29 states that every principal employer and every contractor shall maintain such registers and records in such forms as may be prescribed.

The registers and records to be maintained, the notices to be displayed and the returns to be submitted by the contractors and the principal employer to the registering officers or/and licensing officer are explained in detail in the rules framed under the Act by the Central Government and the State Government.

The principal employers and the contractors are also required to keep exhibited in such manner as may be prescribed within the premises of the establishment where the contract labour is employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

Labour Laws (Exemption from furnishing returns and maintaining Registers by certain Establishments) Act, 1988 provides for exemptions of employers in relation to establishments employing a small number of persons from furnishing returns and maintaining registers under certain labour laws including Contract Labour (Regulation and Abolition) Act, 1970 (as given in Schedule I). The Act has come into effect on 1st May, 1989.

As per this Act "small establishments" (establishments employing not less than 10 persons and not more than 19 persons) are required to furnish a core Return in Form A and maintain Registers Form B, Form C, and Form D and "very small establishments" (establishments employing not more than 9 persons) are required to furnish return in Form A and maintain Register in Form E prescribed under this Act. This requirement is in lieu of furnishing of such returns/maintaining of such registers prescribed under various labour laws mentioned in Schedule I to this Act.

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from…..

   Or

   The factory/establishment is covered under the provisions of this Act by a notification dated ……. given by the government in the official gazette.

2. The factory/establishment has ……. number of workmen employed during the said financial year.
3. The factory/establishment has duly submitted all returns to the Commissioner/Regional Commissioner as per the provisions of the Act, regulations and rules made in this behalf.
4. The establishment has duly applied for and obtained the certificate of registration before the employment of any contract labour.
5. All the contractors engaged by the establishment to supply workmen do posses valid licence.
6. The establishment has duly complied with the provisions of the Act in respect of welfare and health of contract labour during the financial year.
7. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

LESSON ROUND UP

- The objective of the Contract Labour (Regulation and Abolition) Act, 1970 is to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.
- The Act empowers the Central or State Governments to prohibit the employment of contract labour in any process or operation.
- It applies to every establishment or contractor wherein 20 or more workmen are or were employed on any day of the preceding 12 months as contract labour.

- The appropriate government is empowered to extend the application of the Act to any establishment or contractor employing even less than 20 workers as contract labour.
- The Act is not applicable to an establishment in which work is only of an intermittent or casual nature. Work performed in an establishment for more than 120 days in the preceding 12 months or work of a seasonal nature and performed for more than 60 days in a year, shall not be deemed to be work of an intermittent nature.
- The Act provides for constitution of Contract Labour Advisory Board to advise the Government on such matters arising out of the administration of this Act as may be referred to it, and to carry out other functions assigned under the Act.
- The Act provides for grant of licence to the contractors and registration to the Principal Employers.
- The penalty provided for violation of the provisions of the Act and Rules made thereunder, is the fine, which may extend to Rs. 1000/- or imprisonment for a term which may extend to three months or with both.

SELF TEST QUESTIONS

1. To which establishments the Contract Labour (Regulation and Abolition) Act, 1970 applies, and which establishments are excluded?
2. Give the definitions of –
   (a) Contract Labour;
   (b) Contractor;
   (c) Principal Employer;
   (d) Workmen.
3. What amenities are to be provided by contractors to other workmen in terms of the Contract Labour (Regulation and Abolition) Act, 1970? What are the liabilities of the Principal Employer if the contractor fails to provide the above amenities?
4. Explain the powers of Inspectors appointed under the Act.
5. What provisions have been made under the Act regarding payment of wages of contract labour?

Lesson 11

Maternity Benefit Act, 1961

LESSON OUTLINE

- Learning Objectives
- Introduction
- Appropriate Government
- Establishment
- Wages
- Maternity benefit
- Employment of or work by women prohibited during certain period
- Right to payment of maternity benefits
- Notice of claim for maternity benefit
- Nursing breaks
- Abstract of Act and Rules there under to be exhibited
- Maintenance of Register and Record
- Penalty

LEARNING OBJECTIVES

Article 42 of the Constitution of India states that the State shall make provision for securing just and humane conditions of work and for maternity relief.

The Maternity Benefit Act, 1961 regulates the employment of women in factories, mines, the circus industry, plantations and shops or establishments employing 10 or more persons except the employees who are covered under the Employees' State Insurance (ESI) for certain periods before and after child-birth and provides for maternity and other benefits. The Employees' State Insurance Act, 1948 (ESI Act) which also provides for maternity and certain other benefits. The coverage under the ESI Act is, however, at present restricted to factories and certain other specified categories of establishments located in specified areas. The Maternity Benefit Act, 1961 still applicable to women employees employed in establishments which are not covered by the ESI Act, as also to women employees, employed in establishments covered by the ESI Act, but who are out of its coverage because of the wage-limit.

Under the Maternity Benefit Act, 1961, women employees are entitled to maternity benefit at the rate of average daily wage for the period of their actual absence up to 12 weeks due to the delivery. In cases of illness arising due to pregnancy, etc., they are entitled to additional leave with wages for a period of one month. They are also entitled to six weeks maternity benefit in case of miscarriage. The Maternity Benefit Act, 1961 provides that every woman entitled to maternity benefit shall also be entitled to receive from her employer medical bonus. The Maternity Benefit Act, 1961 also makes certain other provisions to safeguard the interest of pregnant women workers.

Therefore, it is essential for the students to be familiar with the general principles of maternity benefit stipulated under the Act.

The Maternity Benefit Act, 1961 regulates employment of women in certain establishments for a certain period before and after childbirth and provides for maternity and other benefits. It extends to the whole of India.

INTRODUCTION

Article 39(e) &(f) of the Constitution of India provides that the State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Maternity Benefits are aimed to protect the dignity of motherhood by providing for the full and healthy maintenance of women and her child when she is not working. The Maternity Benefit Act, 1961 is applicable to mines, factories, circus industry, plantations, shops and establishments employing ten or more persons. It can be extended to other establishments by the State Governments.

Definition

"Appropriate Government" means in relation to an establishment being a mine or an establishment wherein persons are employed for the exhibition of equestrian acrobatic and other performances the Central Government and in relation to any other establishment the State Government. { Section 3(a)}

"Child" includes a still-born child. { Section 3(b)}

"Employer" means –

(i) in relation to an establishment which is under the control of the government a person or authority appointed by the government for the supervision and control of employees or where no person or authority is so appointed the head of the department;

(ii) in relation to an establishment under any local authority the person appointed by such authority for the supervision and control of employees or where no person is so appointed the chief executive officer of the local authority;

(iii) in any other case the person who or the authority which has the ultimate control over the affairs of the establishment and where the said affairs and entrusted to any other person whether called a manager managing director managing agent or by any other name such person; { Section 3(d)}

"Establishment" means –

(i) a factory;

(ii) a mine;

(iii) a plantation;

(iv) an establishment wherein persons are employed for the exhibition of equestrian acrobatic and other performance;

(iva) a shop or establishment; or

(v) an establishment to which the provisions of this Act have been declared under sub-section (1) of section 2 to be applicable{ Section 3(e)};

"Maternity benefit" means the payment referred to in sub-section (1) of section 5 { Section 3(h)};

"Wages" means all remuneration paid or payable in cash to a woman if the terms of the contract of employment express or implied were fulfilled and includes -

(1) such cash allowances (including dearness allowance and house rent allowances) as a woman is for the time being entitled to

(2) incentive bonus and

(3) the money value of the concessional supply of foodgrains and other articles but does not include –

(i) any bonus other than incentive bonus;

(ii) over-time earnings and any deduction or payment made on account of fines;

(iii) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the woman under any law for the time being in force; and

(iv) any gratuity payable on the termination of service; { Section 3(n)}

Employment of or work by women prohibited during certain periods

Section 4 of the Act provides that no employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy. It also specifies that no women shall work in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

It may be noted that if a pregnant women makes request to her employer, she shall not be given to do during the period of one month immediately preceding the period of six weeks, before the date of her expected delivery, any work which is of an arduous nature or which involves long hours of standing, or which in any way is likely to interfere with her pregnancy or the normal development of the foetus, or is likely to cause her miscarriage or otherwise to adversely affect her health.

Right to payment of maternity benefits

Every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

The average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, the minimum rate of wage fixed or revised under the Minimum Wages Act, 1948 or ten rupees, whichever is the highest.

A woman shall be entitled to maternity benefit if she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery.

The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery. If a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death. Where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period. If the child also dies during the said period, then, for the days up to and including the date of the death of the child.

Notice of claim for maternity benefit

Section 6 deals with notice of claim for maternity benefit and payment thereof. As per the section any woman employed in an establishment and entitled to maternity benefit under the provisions of this Act may give notice in writing in prescribed form, to her employer, stating that her maternity benefit and any other amount to which she may be entitled under this Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.

In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery. Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after the delivery.

On receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit. The amount of maternity benefit for the period preceding the date of her expected delivery shall be paid in advance by the employer to the woman on production of such proof, that the woman is pregnant, and the amount due for the subsequent period shall be paid by the employer to the woman within forty-eight hours of production of such proof as may be prescribed that the woman has been delivered of a child.

Nursing breaks

Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months.

Abstract of Act and rules there under to be exhibited

As per section 19 an abstract of the provisions of this Act and the rules made there under in the language or languages of the locality shall be exhibited in a conspicuous place by the employer in every part of the establishment in which women are employed.

Registers

Every employer shall prepare and maintain such registers, records and muster-rolls and in prescribed manner under section 20 of the Act.

Penalty for contravention of Act by employer

Section 21 provides that if any employer fails to pay any amount of maternity benefit to a woman entitled under this Act or discharges or dismisses such woman during or on account of her absence from work in accordance with the provisions of the Act, he shall be punishable with imprisonment which shall not be less than three months but which may extend to one year and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees. However, the court may, for sufficient reasons to be recorded in writing, impose a sentence of imprisonment for a lesser term or fine only in lieu of imprisonment.

If any employer contravenes the provisions of the Act or the rules made thereunder, he shall, if no other penalty is elsewhere provided by or under the Act for such contravention, be punishable with imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both. Where the contravention is of any provision regarding maternity benefit or regarding payment of any other amount and such maternity benefit or amount has not already been recovered, the court shall, in addition, recover such maternity benefit or amount as if it were a fine and pay the same to the person entitled thereto.

LESSON ROUND UP

- The Maternity Benefit Act, 1961 regulates employment of women in certain establishments for a certain period before and after childbirth and provides for maternity and other benefits. Such benefits are aimed to protect the dignity of motherhood by providing for the full and healthy maintenance of women and her child when she is not working.
- Maternity benefit means the payment referred to in sub-section (1) of section 5 .
- Employer shall not knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.
- Every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

- The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery.
- Any woman employed in an establishment and entitled to maternity benefit under the provisions of the Act may give notice in writing in prescribed form, to her employer, stating that her maternity benefit and any other amount to which she may be entitled under the Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.
- Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months.
- Every employer shall prepare and maintain such registers, records and muster-rolls and in prescribed manner under the Act.

SELF TEST QUESTIONS

1. Explain the scope and object of the Maternity Benefit Act, 1961
2. What do you mean by maternity benefit?
3. State the provision regarding nursing break under the Act.
4. Is it necessary for a working woman to give notice to its employer for maternity benefit?
5. Is it mandatory for maintainance of Register under the Maternity Benefit Act, 1961?

Lesson 12

The Child Labour (Prohibition And Regulation) Act, 1986

LESSON OUTLINE

- Learning Objectives
- Object, scope of the Act
- Appropriate Government
- Child
- Day
- Establishment
- Workshop
- Occupier
- Prohibition of employment of children in hazardous occupations
- Prohibition of employment of children in hazardous processes
- Regulation of Conditions of Work of Children
- Hours and Period of work
- Weekly holidays
- Maintenance of register
- Penalties

LEARNING OBJECTIVES

Child labour is a concrete manifestation of violations of a range of rights of children and is recognised as a serious social problem in India. Working children are denied their right to survival and development, education, leisure and play, and adequate standard of living, opportunity for developing personality, talents, mental and physical abilities, and protection from abuse and neglect. Even though there is increase in the enrolment of children in elementary schools and increase in literacy rates, child labour continues to be a significant phenomenon in India.

As per Article 24 of the Constitution, no child below the age of 14 years is to be employed in any factory, mine or any hazardous employment. Further, Article 39 requires the States to direct its policy towards ensuring that the tender age of children is not abused and that they are not forced by economic necessity to enter avocations unsuited to their age or strength. Recently, with the insertion of Article 21A, the State has been entrusted with the task of providing free and compulsory education to all the children in the age group of 6-14 years.

Consistent with the Constitutional provisions, Child Labour (Prohibition and Regulation) Act was enacted in 1986. The Act regulates employment of children in non-hazardous occupations and processes. There are at present 18 hazardous occupation and 65 processes, where employment of children is prohibited.

In this lesson, students will be acclimatized with the legal frame work stipulated under the Child Labour (Prohibition and Regulation) Act, 1986.

The Child Labour (Prohibition and Regulation) Act , 1986 prohibits employment of children below 14 years in hazardous occupations and processes and regulates the working conditions in other employments.

OBJECT AND SCOPE

The Child Labour (Prohibition & Regulation) Act, 1986 enacted to prohibit the engagement of children below the age of fourteen years in factories, mines and hazardous employments and to regulate their conditions of work in certain other employments. It extends to whole of India.

Definition

Section 2 of the Act defines various terms used in the Act, some of the definitions are given here under:

Appropriate Government means, in relation to an establishment under the control of the Central Government or a railway administration or a major port or a mine or oilfield, the Central Government, and in all other cases, the State Government. [Section 2 (i)]

Child means a person who has not completed his fourteenth year of age. [Section 2(ii)]

Day means a period of twenty-four hours beginning at midnight. [Section 2 (iii)]

Establishment includes a shop, commercial establishment, workshop, farm, residential hotel, restaurant, eating-house, theatre or other place of public amusement or entertainment. [Section 2(iv)]

Occupier in relation to an establishment or a workshop, means the person who has the ultimate control over the affairs of the establishment or workshop. [Section 2 (vi)]

Workshop means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of Sec. 67 of the Factories Act, 1948 (63 of 1948), for the time being, apply. [Section 2 (x)]

Prohibition of employment of children in certain occupations and processes

Section 3 provides that no child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on . However, prohibition of employment of children is not applicable to any workshop wherein any process is carried on by the occupier with the aid of his family, or to any school established by, or receiving assistance or recognition from, Government.

Occupations set forth in Part A of the Schedule are as follows:

- Transport of passengers, goods or mails by railways;
- Cinder picking, clearing of an ash pit or building operation in the railway premises;
- Work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from the one platform to another or in to or out of a moving train;
- Work relating to the construction of a railway station or with any other work where such work is done in close proximity to or between the railway lines;
- A port authority within the limits of any port;
- Work relating to selling of crackers and fireworks in shops with temporary licenses;
- Abattoirs/Slaughter House;
- Automobile workshops and garages;
- Foundries;
- Handling of toxic or inflammable substances or explosives;
- Handloom and power loom industry;
- Mines (underground and under water) and collieries;

- Plastic units and fiberglass workshops;
- Domestic workers or servant
- Dhabas, restaurants, hotels, motels, tea shops, resorts, spas or other recreational centers
- Diving
- Circus
- Caring of elephant

Processes set forth Part B of the Schedule are as follows:

- Beedi-making.
- Carpet-weaving.
- Cement manufacture, including bagging of cement.
- Cloth printing, dyeing and weaving.
- Manufacture of matches, explosives and fire-works.
- Mica-cutting and splitting.
- Shellac manufacture.
- Soap manufacture.
- Tanning.
- Wool-cleaning.
- Building and construction industry.
- Manufacture of slate pencils (including packing).
- Manufacture of products from agate.
- Manufacturing processes using toxic metals and substances such as lead, mercury, manganese, chromium, cadmium, benzene, pesticides and asbestos.
- "Hazardous processes" as defined in Sec. 2 (cb) and 'dangerous operation' as notice in rules made under section 87 of the Factories Act, 1948 (63 of 1948)
- Printing as defined in Section 2(k) (iv) of the Factories Act, 1948 (63 of 1948)
- Cashew and cashewnut descaling and processing.
- Soldering processes in electronic industries.
- 'Aggarbatti' manufacturing.
- Automobile repairs and maintenance including processes incidental thereto namely, welding, lathe work, dent beating and painting.
- Brick kilns and Roof tiles units.
- Cotton ginning and processing and production of hosiery goods.
- Detergent manufacturing.
- Fabrication workshops (ferrous and non ferrous)
- Gem cutting and polishing.
- Handling of chromite and manganese ores.
- Jute textile manufacture and coir making.
- Lime Kilns and Manufacture of Lime.
- Lock Making.

- Manufacturing processes having exposure to lead such as primary and secondary smelting, welding and cutting of lead-painted metal constructions, welding of galvanized orzinc silicate, polyvinyl chloride, mixing (by hand) of crystal glass mass, sanding or scraping of lead paint, burning of lead in enameling workshops, lead mining, plumbing, cable making, wiring patenting, lead casting, type founding in printing shops. Store type setting, assembling of cars, shot making and lead glass blowing.
- Manufacture of cement pipes, cement products and other related work.
- Manufacture of glass, glass ware including bangles, florescent tubes, bulbs and other similar glass products.
- Manufacture of dyes and dye stuff.
- Manufacturing or handling of pesticides and insecticides.
- Manufacturing or processing and handling of corrosive and toxic substances, metal cleaning and photo engraving and soldering processes in electronic industry.
- Manufacturing of burning coal and coal briquettes.
- Manufacturing of sports goods involving exposure to synthetic materials, chemicals and leather.
- Moulding and processing of fiberglass and plastic.
- Oil expelling and refinery.
- Paper making.
- Potteries and ceramic industry.
- Polishing, moulding, cutting, welding and manufacturing of brass goods in all forms.
- Processes in agriculture where tractors, threshing and harvesting machines are used and chaff cutting.
- Saw mill – all processes.
- Sericulture processing.
- Skinning, dyeing and processes for manufacturing of leather and leather products.
- Stone breaking and stone crushing.
- Tobacco processing including manufacturing of tobacco, tobacco paste and handling of tobacco in any form.
- Tyre making, repairing, re-treading and graphite benefication.
- Utensils making, polishing and metal buffing.
- 'Zari' making (all processes)'.
- Electroplating;
- Graphite powdering and incidental processing;
- Grinding or glazing of metals;
- Diamond cutting and polishing;
- Extraction of slate from mines;
- Rag picking and Scavenging
- Processes involving exposure to excessive heat & cold
- Mechanized fishing
- Food processing
- Beverage industry
- Timber handling & loading

- Mechanical lumbering
- Warehousing
- Processes involving exposure to free silica

Regulation of Conditions of Work of Children

Part III of the Act containing sections 6 to 13 deals with Regulation of Conditions of Work of Children. The provisions of the Part III shall apply to an establishment or a class of establishments in which *none of the* occupations or processes referred to in Section 3 is carried on.

Hours and Period of work

Section 7 provides that no child shall be required or permitted to work in any establishment in excess of such number of hours, as may be prescribed for such establishment or class of establishments.

The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour. The period of work of a child shall be so arranged that inclusive of his interval for rest, it shall not be spread over more than six hours, including the time spent in waiting for work on any day.

This section also stipulates that:

- No child shall be permitted or required to work between 7 p.m. and 8 a.m.
- No child shall be required or permitted to work overtime.
- No child shall be required or permitted to work in, any establishment on any day on which he has already been working in another establishment.

Weekly holidays

As per section 8 every child employed in an establishment is entitled in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.

Notice to Inspector

Section 9 provides that every occupier in relation to an establishment who employs, or permits to work, any child shall, within a period of thirty days from the date of such employment, send to the Inspector within whose local limits the establishment is situated, a written notice containing the particulars namely :

- The name and situation of the establishment;
- The name of the person in actual management of the establishment;
- The address to which communications relating to the establishment should be sent; and
- The nature of the occupation or process carried on in the establishment.

Maintenance of register

Every occupier in respect of children employed or permitted to work in any establishment, maintained a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment showing –

- the name and date of birth of every child so employed or permitted to work;
- hours and periods of work of any such child and the intervals of rest to which he is entitled;
- the nature of work of any such child; and
- such other particulars as may be prescribed

Display of notice containing abstract of sections 3 and 14

Every railway administration, every port authority and every occupier shall cause to be displayed in a conspicuous and accessible place at every station on its railway or within the limits of a port or at the place of work, as the case may be, a notice in the local language and in the English language containing an abstract of Sections 3 and 14.

Penalties

Section 14 provides that whoever employs any child or permits any child to work in contravention of the provisions of Section 3 shall be punishable with imprisonment for a term which shall not be less than, three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both. Whoever, having been convicted of an offence under Section 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years.

Whoever fails to give notice or fails to maintain a register or makes any false entry in any such register; or fails to display a notice containing an abstract of Section 3 and14 or fails to comply with or contravenes any other provisions of the Act or the rules made there under, shall be punishable with simple imprisonment which may extend to one month or with fine .

LESSON ROUND UP

- As per Article 24 of the Constitution of India , no child below the age of 14 years is to be employed in any factory, mine or any hazardous employment. Further, Article 39 requires the States to direct its policy towards ensuring that the tender age of children is not abused and that they are not forced by economic necessity to enter avocations unsuited to their age or strength.
- No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on . However, prohibition of employment of children is not applicable to any workshop wherein any process is carried on by the occupier with the aid of his family, or to any school established by, or receiving assistance or recognition from Government.
- A child shall not permit to work in any establishment in excess of such number of hours, as may be prescribed for such establishment or class of establishments.
- Every child employed in an establishment is entitled in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.
- Every occupier in relation to an establishment who employs, or permits to work, any child shall, within a period of thirty days from the date of such employment, send to the Inspector within whose local limits the establishment is situated, a written notice .
- Every occupier in respect of children employed or permitted to work in any establishment, maintained a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment.
- Contravention of the provisions of Section 3 of the Act shall be punishable with imprisonment for a term which shall not be less than, three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.

SELF TEST QUESTIONS

1. Enumerate the constitutional provisions on Child Labour Prohibition .
2. List out the Occupations set forth in Part A of the Schedule to the Act.
3. List out the Processes set forth in Part B of the Schedule to the Act.
4. State the provisions regarding prohibition of employment of children in certain occupations and processes under the Act.
5. Write short notes on "workshop'' and "establishment".

Lesson 13

The Industrial Employment (Standing Orders) Act, 1946

LESSON OUTLINE

- Learning Objectives
- Object and Scope of the Act
- Appropriate Government
- Certifying Officer
- Industrial Establishment
- Wages and Workmen
- Certification of Draft Standing Orders
- Appeals
- Date of Operation of Standing Orders
- Posting of Standing Orders
- Duration and Modification of Standing Orders
- Payment of Subsistence Allowance
- Interpretation of Standing Orders
- Temporary Application of Model Standing Orders
- Compliances under the Act
- The Schedule to the Act

LEARNING OBJECTIVES

'Standing Orders' defines the conditions of recruitment, discharge, disciplinary action, holidays, leave, etc., go a long way towards minimising friction between the management and workers in industrial undertakings. The Industrial Employment (Standing Orders) Act requires employers in industrial establishments to clearly define the conditions of employment by issuing standing orders duly certified. It applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months.

Model standing orders issued under the Act deal with classification of workmen, holidays, shifts, payment of wages, leaves, termination etc. The text of the Standing Orders as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed.

Students must be conversant with the terms and conditions of the industrial employment standing orders which the employees must know before they accept the employment.

The Industrial Employment (Standing Orders) Act, 1946 requires employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them.

OBJECT AND SCOPE OF THE ACT

The objects of the Act are: Firstly, to enforce uniformity in the conditions of services under different employers in different industrial establishments. Secondly, the employer, once having made the conditions of employment known to his employed workmen cannot change them to their detriment or to the prejudice of their rights and interests. Thirdly, with the express or written conditions of employment, it is open for the prospective worker to accept them and join the industrial establishment. Fourthly, for maintaining industrial peace and continued productivity, the significance of the express written conditions of employment cannot be minimised or exaggerated.

The object of the Act is to have uniform standing orders in respect of matters enumerated in the Schedule to the Act, applicable to all workers irrespective of their time of appointment (*Barauni Refinery Pragati Sheel Parishad* v. *Indian Oil Corporation Ltd.* (1991) 1 SCC 4).

The Act extends to the whole of India and applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months. Further, the appropriate Government may, after giving not less than 2 months notice of its intention to do so, by notification in the Official Gazette, extend the provisions of this Act to any industrial establishment employing such number of persons less than 100 as may be specified in the notification.

However, the Act does not apply to (1) any industry to which provisions of Chapter VII of the Bombay Industrial Relations Act, 1946, apply; or (2) any industrial establishment to which provisions of Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 apply. Notwithstanding anything contained in the said Act, the provisions of this Act shall apply to all industrial establishments under the control of the Central Government.

Certified standing orders become part of the statutory and not contractual terms and conditions of service and are binding on both the employer and the employees (*Derby Textiles Ltd.* v. *Karamchari and Shramik Union* (1991) 2 LLN 774).

Apart from the above stated provisions of Section 1 of the Act limiting the scope, extent and application of the Act, the following Sections further limit its application:

Section 13-B of the Act specifically exempt certain industrial establishments from the purview of the Act, viz., the industrial establishment in so far as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Service (Temporary Services) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Service (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette apply.

Further, Section 14 provides that the appropriate Government may by notification in the Official Gazette exempt conditionally or unconditionally any industrial establishment or class of industrial establishments from all or any of the provisions of this Act.

Test your knowledge

Choose the correct answer

What is the minimum number of employees required in an establishment which comes under the purview of the Industrial Employment (Standing Orders) Act, 1946?

(a) 50

(b) 100

(c) 150

(d) 200

Correct answer: (b)

IMPORTANT DEFINITIONS

Appellate Authority

It means an authority appointed by the appropriate Government by notification in the Official Gazette, to exercise in such area, as may be specified in the notification the functions of an appellate authority under this Act. [Section 2(a)]

Appropriate Government

"Appropriate Government" means in respect of industrial establishments under the control of the Central Government or a Railway administration or in a major port, mine or oilfield, the Central Government, and in all other cases the State Government:

Provided that where any question arises as to whether any industrial establishment is under the control of the Central Government, that Government may, either on a reference made to it by the employer or the workman or a trade union or other representative body of the workmen or on its own motion and after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties. [Section 2(b)]

Certifying Officer

"Certifying Officer" means a Labour Commissioner or a Regional Labour Commissioner, and includes any other officer appointed by the appropriate Government by notification in the Official Gazette, to perform all or any of the functions of a Certifying Officer under this Act. [Section 2(c)]

Employer

"Employer" means the owner of an industrial establishment to which this Act applies and also includes the following persons:

(i) A manager so named under Section 7(1)(f) of the Factories Act, 1948.

(ii) The head of the department or any authority appointed by the Government in any industrial establishment under its control.

(iii) Any person responsible to the owner for the supervision and control of any other industrial establishment which is not under the control of Government. [Section 2(d)]

Industrial Establishment

It means

(i) an industrial establishment defined by Section 2(ii) of the Payment of Wages Act, 1936, or

(ii) a factory as defined by Section 2(m) of the Factories Act, 1948, or

(iii) a railway as defined by Section 2(4) of the Indian Railways Act, 1890, or

(iv) the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen. [Section 2(e)]

Standing Orders

"Standing Orders" means rules relating to matters set out in the Schedule to the Act. [Section 2(g)]

Wages and Workmen

The terms "Wages" and "Workmen" have the meanings respectively assigned to them in clauses (rr) and (s) of Section 2 of the Industrial Disputes Act, 1947. [Section 2(i)]

CERTIFICATION OF DRAFT STANDING ORDERS

Submission of draft Standing Orders by employers to the certifying officer

Section 3 provides that within six months from the date on which this Act becomes applicable to an industrial establishment, the employer of that establishment shall submit to the Certifying Officer five copies of the draft Standing Orders proposed by him for adoption in that establishment.

Such draft Standing Orders shall be in conformity with the Model Standing Orders if any, and, shall contain every matter set out in the Schedule which may be applicable to the industrial establishment.

The draft Standing Orders shall be accompanied by a statement containing prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

If the industrial establishment are of similar nature, a group of employers owning those industrial establishment may submit a joint draft of Standing Orders subject to such conditions as may be prescribed.

Conditions for certification of Standing Orders

According to Section 4 of the Act, Standing Orders shall be certifiable if

(a) provision is made therein for every matter stated in the Schedule to the Act which is applicable to industrial establishment; and

(b) the Standing Orders are otherwise in conformity with the provisions of the Act.

Test your knowledge

Choose the correct answer

Which of the following documents must a Standing Order be in conformity with?

(a) Standard Standing Orders

(b) Model Standing Orders

(c) Uniform Standing Orders

(d) Form Standing Orders

Correct answer: (b)

Fairness or reasonableness of Standing Orders

It is further provided in Section 4 that it shall be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders.

The Act, has imposed a duty on the Certifying Officer, to consider the reasonableness and fairness of the Standing Orders before certifying the same. The Certifying Officer is under a legal duty to consider that the Standing Orders are in conformity with the Act. If the Certifying Officer finds that some provisions, as proposed by the employer relate to matters which are not included in the Schedule, or if he finds some provisions are unreasonable he must refuse to certify the same. Certification of any such Standing Order would be without jurisdiction. The Certifying Officer has a mandatory duty to discharge and he acts in a quasi-judicial manner. Where a matter is not included in the Schedule and the concerned appropriate Government has not added any such item to the Schedule, neither the employer has a right to frame a Standing Order enabling him to transfer his employees nor the Certifying Officer has jurisdiction to certify the same. The consent of the employees to such standing orders would not make any difference (*Air Gases Mazdoor Sangh, Varanasi* v. *Indian Air Gases Ltd.,* 1977 Lab. I.C. 575).

Certification of Standing Orders

Procedure to be followed by the Certifying Officer : Section 5 of the Act lays down the procedure to be followed by Certifying Officer. On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in such manner as may be prescribed, together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders. These objections are required to be submitted to him within 15 days from the receipt of the notice. On receipt of such objections he shall provide an opportunity of being heard to the workmen or the employer and will make amendments, if any, required to be made therein and this will render the draft Standing Orders certifiable under the Act and he will certify the same. A copy of the certified Standing Orders will be sent by him to both the employer and the employees association within seven days of the certification.

Effect of certification: The Act is a special law in regard to matters enumerated in the Schedule and the regulations made by the employer with respect to any of those matters. These are of no effect unless such regulations are notified by the Government under Section 13B or certified by the Certifying Officer under Section 5 of the Act.

Register of Standing Orders: Section 8 empowers the Certifying Officer to file a copy of all the Standing Orders as certified by him in a register maintained for the purpose in the prescribed form. He shall furnish a copy of the same to any person applying therefor on payment of the prescribed fee.

Test your knowledge

State whether the following statement is "True" or "False"

Workmen are not entitled to apply for modification of the Standing Orders.

- True
- False

Correct answer: False

APPEALS

According to Section 6 of the Act, the order of the Certifying Officer can be challenged by any employer, workman, trade union or any other prescribed representatives of the workmen, who can file an appeal before the appellate authority within 30 days from the date on which copies are sent to employer and the workers representatives. The appellate authority, whose decision shall be final, has the power to confirm the Standing Orders as certified by the Certifying Officer or to amend them. The appellate authority is required to send copies of the Standing Orders as confirmed or modified by it, to the employer or workers representatives within 7 days of its order.

The appellate authority has no power to set aside the order of Certifying Officer. It can confirm or amend the Standing Orders (*Khadi Gram Udyog Sangh* v. *Jit Ram,* 1975-2 L.L. J. 413). The appellate authority can not remand the matter for fresh consideration. [*Kerala Agro Machinery Corporation*, (1998) 1 LLN 229 (Ker)]

DATE OF OPERATION OF STANDING ORDERS

Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives. (Section 7)

POSTING OF STANDING ORDERS

The text of the Standing Orders as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed. (Section 9)

DURATION AND MODIFICATION OF STANDING ORDERS

Section 10 prohibits an employer to modify the Standing Orders once they are certified under this Act except on agreement between the employer and the workmen or a trade union or other representative body of the workmen. Such modification will not be affected until the expiry of 6 months from the date on which the Standing Orders were last modified or certified as the case may be. This Section further empowers an employer or the workmen or a trade union or other representative body of the workmen to apply to the Certifying Officer to have the Standing Orders modified by making an application to the Certifying Officer. Such application should be accompanied by 5 copies of the proposed modifications and where such modifications are proposed to be made by agreement between the employer and the workmen or a trade union or other representative body of the workmen, a certified copy of such agreement should be filed along with the application.

Workmen are entitled to apply for modification of the Standing Orders. (1977-II Labour Law Journal 503). Section 10(2) does not contain any time limit for making modification application. It can be made at any time. [*Indian Express Employees Union* v. *Indian Express (Madurai) Ltd.* (1998) 1 Cur LR 1161 (Ker)]

Test your knowledge

Choose the correct answer

What is the period within which any employer or workman can challenge an order given by the Certifying Officer and thus file an appeal before the Appellate Authority?

(a) Within 10 days from the date on which copies are sent to the employer and workers representatives

(b) Within 15 days from the date on which copies are sent to the employer and workers' representatives

(c) Within 20 days from the date on which copies are sent to the employer and workers' representatives

(d) Within 30 days from the date on which copies are sent to the employer and workers representatives

Correct answer: (d)

PAYMENT OF SUBSISTENCE ALLOWANCE

Statutory provision for payment of subsistence allowance has been made under Section 10A of the Act which was inserted by the amending Act (No. 18) of 1982. Section 10A provides as follows:

Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such a workman the subsistence allowance

(a) at the rate of fifty per cent of the wages which the workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension: and

(b) at the rate of seventy five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

Any dispute regarding subsistence allowance may be referred by the workman or the employer, to the Labour Court constituted under the Industrial Disputes Act, 1947.

However, if the provisions relating to payment of subsistence allowance under any other law for the time being in force are more beneficial, then the provisions of such other law shall be applicable.

INTERPRETATION OF STANDING ORDERS

Section 13-A of the Act provides that the question relating to application or interpretation of a Standing Order certified under this Act, can be referred to any Labour Court constituted under the Industrial Disputes Act, 1947 by any employer or workman or a trade union or other representative body of the workmen. The Labour Court to which the question is so referred, shall decide it after giving the parties an opportunity of being heard. Such decision shall be final and binding on the parties.

Test your knowledge

Choose the correct answer

What is the subsistence allowance payable to a workman for the first 90 days when he has been suspended pending an inquiry against him?

(a) 25% of the wages

(b) 50% of the wages

(c) 75% of the wages

(d) No wages

Correct answer: (b)

TEMPORARY APPLICATION OF MODEL STANDING ORDERS

Section 12-A provides that for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the Standing Orders as finally certified under this Act come into operation in that establishment, the prescribed model Standing Orders shall be deemed to be adopted in that establishment and the provisions of Sections 9, 13(2) and 13-A shall apply.

Where there are two categories of workers, daily rated and monthly rated but the certified Standing Orders are in respect of daily rated workmen only, then Model Standing Orders can be applied to monthly rated workmen (*Indian Iron and Steel Co. Ltd.* v. *Ninth Industrial Tribunal,* 1977 Lab. I.C. 607).

In case where there are no certified Standing Orders applicable to an industrial establishment, the prescribed Model Standing Orders shall be deemed to be adopted and applicable (1981-II Labour Law Journal 25).

THE SCHEDULE

[*See* Sections 2(g) and 3(2)]

Matters to be provided in Standing Orders under this Act

1. Classification of workmen, e.g., whether permanent, temporary, apprentices, probationers or badlis.
2. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.
3. Shift working.
4. Attendance and late coming.

5. Conditions of, procedure in applying for, and the authority which may grant leave and holidays.
6. Requirement to enter premises by certain gates, and liability to search.
7. Closing and reopening of sections of the industrial establishment, and temporary stoppage of work and the rights and liabilities of the employer and workmen arising therefrom.
8. Termination of employment, and the notice thereof to be given by employer and workmen.
9. Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
10. Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.

10A. Additional matters to be provided in Standing Orders in coal mines.

1. Medical aid in case of accident.
2. Railway travel facilities.
3. Method of filling vacancies.
4. Transfers.
5. Liability of manager of the establishment or mine.
6. Service Certificate.
7. Exhibition and supply of Standing Orders.

10B. Additional matters to be provided in Standing Orders relating to all industrial establishments.

1. Service record-matters relating to service card, token tickets, certification of services, change of residential address of workers and record of age.
2. Confirmation.
3. Age of retirement.
4. Transfer.
5. Medical aid in case of accidents.
6. Medical examination.
7. Secrecy.
8. Exclusive services.
9. Any other matter which may be prescribed.

In a significant judgement on gender justice, the Supreme Court has ordered that employers should include strict prohibitions on sexual harassment of employees and appropriate penalties against the offending employees in Standing Orders.

LESSON ROUND UP

- The Act requires the employers in industrial establishment to define with sufficient precision the conditions of employment under them and make the said conditions known to workmen employed by them.
- It applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months.

- The appropriate Government may, after giving not less than 2 months notice of its intention to do so, by notification in the Official Gazette, extend the provisions of this Act to any industrial establishment employing such number of persons less than 100 as may be specified in the notification.
- Within six months from the date on which this Act becomes applicable to an industrial establishment, the employer of that establishment shall submit to the Certifying Officer five copies of the draft Standing Orders proposed by him for adoption in that establishment.
- Such draft Standing Orders shall be in conformity with the Model Standing Orders if any, and, shall contain every matter set out in the Schedule which may be applicable to the industrial establishment.
- On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in the prescribed manner together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders.
- These objections are required to be submitted to him within 15 days from the receipt of the notice.
- On receipt of such objections, he shall provide an opportunity of being heard to the workmen or the employer and will make amendments, if any, required to be made therein and this will render the draft Standing Orders certifiable under the Act and he will certify the same.
- A copy of the certified Standing Orders will be sent by him to both the employer and the employees association within seven days of the certification.
- The Certifying Officer has been empowered to file a copy of all the Standing Orders as certified by him in a register maintained for the purpose in the prescribed form. He shall furnish a copy of the same to any person applying therefor on payment of the prescribed fee.
- Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives.

SELF TEST QUESTIONS

1. Define the term Standing Orders and explain their importance in the light of decided cases.
2. Explain the Object and Scope of the Industrial Employment (Standing Orders) Act, 1946.
3. Explain the procedure for certification of Standing Orders.
4. Whether the certified Standing Orders could be modified? Explain.
5. List out the matters to be provided in Standing Orders under the Industrial Employment (Standing Orders) Act, 1946.

Lesson 14

Industrial Disputes Act, 1947

LESSON OUTLINE

- Learning Objectives
- Introduction
- Object and significance of the Act
- Important Definitions
- Types of Strike and their Legality
- Legality of Strike
- Dismissal etc. of an Individual workman to be deemed to be an Industrial Dispute
- Authorities under the Act and their Duties
- Reference of Disputes
- Voluntary Reference of Disputes to Arbitration
- Procedure and Powers of Authorities
- Strikes and Lock-outs
- Justified and unjustified strikes
- Wages for Strike period
- Dismissal of workmen and illegal strike
- Justification of Lock-out and wages for Lock-out Period
- Change in Conditions of Service
- Unfair Labour Practices
- Penalties
- Schedules

LEARNING OBJECTIVES

Industrial disputes are the disputes which arise due to any disagreement in an industrial relation. Industrial relation involves various aspects of interactions between the employer and the employees. In such relations whenever there is a clash of interest, it may result in dissatisfaction for either of the parties involved and hence lead to industrial disputes or conflicts. These disputes may take various forms such as protests, strikes, demonstrations, lock-outs, retrenchment, dismissal of workers, etc

Industrial Disputes Act, 1947 provides machinery for peaceful resolution of disputes and to promote harmonious relation between employers and workers. The Act is a benign measure which seeks to pre-empt industrial tensions, provide the mechanics of dispute resolutions and set up the necessary infrastructure so that the energies of partners in production may not be dissipated in counter productive battles and assurance of industrial may create a congenial climate. The Act enumerates the contingencies when a strike or lock-out can be lawfully resorted to, when they can be declared illegal or unlawful, conditions for laying off, retrenching, discharging or dismissing a workman, circumstances under which an industrial unit can be closed down and several other matters related to industrial employees and employers.

Under the Act various Authorities are established for Investigation and settlement of industrial disputes. They are Works Committee; Conciliation Officers; Boards of Conciliation; Court of Inquiry; Labour Tribunals; Industrial Tribunals and National Tribunals.

The knowledge of this legislation is a must for the students so that they develop a proper perspective about the legal frame work stipulated under the Industrial Disputes Act, 1947.

The Industrial Disputes Act, 1947 is the legislation for investigation and settlement of all industrial disputes.

INTRODUCTION

The first enactment dealing with the settlement of industrial disputes was the Employers' and Workmen's Disputes Act, 1860. This Act weighed much against the workers and was therefore replaced by the Trade Disputes Act, 1929. The Act of 1929 contained special provisions regarding strikes in public utility services and general strikes affecting the community as a whole. The main purpose of the Act, however, was to provide a conciliation machinery to bring about peaceful settlement of industrial disputes. The Whitely Commission made in this regard the perceptive observation that the attempt to deal with unrest must begin rather with the creation of an atmosphere unfavourable to disputes than with machinery for their settlement.

The next stage in the development of industrial law in this country was taken under the stress of emergency caused by the Second World War. Rule 81-A of the Defence of India Rules was intended to provide speedy remedies for industrial disputes by referring them compulsorily to conciliation or adjudication, by making the awards legally binding on the parties and by prohibiting strikes or lock-outs during the pendency of conciliation or adjudication proceedings and for two months thereafter. This rule also put a blanket ban on strikes which did not arise out of genuine trade disputes.

With the termination of the Second World War, Rule 81-A was about to lapse on 1st October, 1946, but it was kept alive by issuing an Ordinance in the exercise of the Government's Emergency Powers. Then followed the Industrial Disputes Act, 1947. The provisions of this Act, as amended from time to time, have furnished the basis on which industrial jurisprudence in this country is founded.

OBJECT AND SIGNIFICANCE OF THE ACT

The Industrial Disputes Act, 1947 makes provision for the investigation and settlement of industrial disputes and for certain other purposes. It ensures progress of industry by bringing about harmony and cordial relationship between the employers and employees. Definitions of the words 'industrial dispute, workmen and industry' carry specific meanings under the Act and provide the framework for the application of the Act.

In the case of *Workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate*, AIR 1958 S.C. 353, the Supreme Court laid down following objectives of the Act:

(i) Promotion of measures of securing and preserving amity and good relations between the employer and workmen.

(ii) Investigation and settlement of industrial disputes between employers and employers, employers and workmen, or workmen and workmen with a right of representation by registered trade union or federation of trade unions or an association of employers or a federation of associations of employers.

(iii) Prevention of illegal strikes and lock-outs.

(iv) Relief to workmen in the matter of lay-off and retrenchment.

(v) Promotion of collective bargaining.

This Act extends to whole of India. The Act was designed to provide a self-contained code to compel the parties to resort to industrial arbitration for the resolution of existing or apprehended disputes without prescribing statutory norms for varied and variegated industrial relating norms so that the forums created for resolution of disputes may remain unhampered by any statutory control and devise rational norms keeping pace with improved industrial relations reflecting and imbibing socio-economic justice. This being the object of the Act, the Court by interpretative process must strive to reduce the field of conflict and expand the area of agreement and show its preference for

upholding agreements sanctified by mutuality and consensus in larger public interest, namely, to eschew industrial strife, confrontation and consequent wastage (*Workmen, Hindustan Lever Limited* v. *Hindustan Lever Limited,* (1984) 1 SCC 728).

Test your knowledge

Choose the correct answer

Which was the first enactment that dealt with the settlement of industrial disputes?

(a) Employers' and Workmen's Disputes Act, 1850

(b) Employers' and Workmen's Disputes Act, 1860

(c) Trade Disputes Act, 1860

(d) Trade Disputes Act, 1929

Correct answer: (b)

The Act applies to an existing and not to a dead industry. It is to ensure fair wages and to prevent disputes so that production might not be adversely affected. It applies to all industries irrespective of religion or caste of parties. It applies to the industries owned by Central and State Governments too (*Hospital Employees Union* v. *Christian Medical College,* (1987) 4 SCC 691).

IMPORTANT DEFINITIONS

(i) Industry

"Industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen. [Section 2(j)]

The Supreme Court carried out an indepth study of the definition of the term industry in a comprehensive manner in the case of *Bangalore Water Supply and Sewerage Board* v. *A Rajiappa*, AIR 1978 SC 548 (hereinafter referred to as Bangalore Water Supply case), after considering various previous judicial decisions on the subject and in the process, it rejected some of them, while evolving a new concept of the term "industry".

Tests for determination of "industry"

After discussing the definition from various angles, in the above case, the Supreme Court, laid down the following tests to determine whether an activity is covered by the definition of "industry" or not. It is also referred to as the triple test.

I. (a) Where there is (i) systematic activity, (ii) organised by co-operation between employer and employee, (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g., making, on a large scale, prasad or food) prima facie, there is an "industry" in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant wherever the undertaking is whether in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organisation is a trade or business, it does not cease to be one because of philanthrophy animating the undertaking.

II. Although Section 2(i) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to over-stretch itself. Undertaking must suffer a contextual and associational shrinkage, so

also, service, calling and the like. This yields the inference that all organised activity possessing the triple elements in (i) although not trade or business, may still be "industry", provided the nature of the activity, viz., the employer - employee basis, bears resemblance to what we find in trade or business. This takes into the fold of "industry", undertaking, callings and services, adventures analogous to the carrying on of trade or business. All features, other than the methodology of carrying on the activity, viz., in organising the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms, there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition, nothing less, nothing more.

Hence, the Supreme Court observed that professions, clubs, educational institutions. co-operatives, research institutes, charitable projects and other kindred adventures, if they fulfil the triple tests listed in (1), cannot be exempted from the scope of Section 2(j). A restricted category of professions, clubs, co-operatives and gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

If in a pious or altruistic mission many employ themselves, free or for small honoranum or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants, manual or technical, are hired. Such undertakings alone are exempt - not other generosity compassion, developmental compassion or project.

Criteria for determining dominant nature of undertaking

The Supreme Court, in *Bangalore Water Supply* *case* laid down the following guidelines for deciding the dominant nature of an undertaking:

(a) Where a complex of activities, some of which qualify for exemption, others not, involves the employees on the total undertaking. Some of whom are not "workmen" or some departments are not productive of goods and services if isolated, nature of the department will be the true test. The whole undertaking will be "industry" although those who are not "workmen" definition may not be benefit by the status.

(b) Notwithstanding with previous clause, sovereign functions strictly understood alone qualify for exemption and not the welfare activities or economic adventures undertaken by Government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove an undertaking from the scope of the Act.

The above decision of the Supreme Court has a wide sweep. The triple test along with dominant nature criteria will cover almost the entire labour force in the country. The charitable or missionary institutions, hospital, educational and other research institutions, municipal corporations, firms of chartered accountants, solicitors' firms, etc., which were not held to be "industry" earlier will now are covered by the definition of "industry".

Now let us see whether the following activities would fall under industry or not:

1. *Sovereign functions:* Sovereign functions strictly understood alone qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies. Even in departments discharging

sovereign functions, if there are units which are industries and they are substantially severable then they can be considered to come within Section 2(j). (*Bangalore Water Supply case*). If a department of a municipality discharged many functions, some pertaining to "industry" and other non-industrial activities, the predominant function of the department shall be the criterion for the purposes of the Act (*Corpn. of City of Nagpur* v. *Employees,* AIR 1960 SC 675).

2. *Municipalities:* Following Departments of the municipality were held, to be "industry" (i) Tax (ii) Public Conveyance (iii) Fire Brigade (iv) Lighting (v) Water Works (vi) City Engineers (vii) Enforcement (Encroachment) (viii) Sewerage (ix) Health (x) Market (xi) Public Gardens (xii) Education (xiii) Printing Press (xiv) Building and (xv) General administration. If a department of a municipality discharges many functions some pertaining to industry and others non-industrial, the predominant function of the department shall be the criterion for the purpose of the Act.

3. *Hospitals and Charitable institutions:* Exemptions to charitable institutions under Section 32(5) of Payment of Bonus Act is not relevant to the construction of Section 2(j), *FICCI* v. *Workmen,* (1972) 1 SCC 40, there is an industry in the enterprise, provided the nature of the activity, namely the employer-employee basis bears resemblance to what is found in trade or business. This takes into the fold of industry undertakings, callings, services and adventures 'analogous to the carrying on of trade or business'. Absence of profit motive or gainful objective is irrelevant for "industry", be the venture in the public, joint, private or other sector. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

If the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking. Charitable institutions fall into three categories: (a) those that yield profit but the profits are siphoned off for altruistic purposes; (b) those that make no profit but hire the services of employees as in any other business, but the goods and services which are the output, are made available at a low or at no cost to the indigent poor; and (c) those that are oriented on a humane mission fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution. The first two are industries but not the third, on the assumption that they all involve co-operation between employers and employees (*Bangalore Water Supply case*). The following institutions are held to be "industry": (1) State Hospital (*State of Bombay* v. *Hospital Mazdoor Sabha,* AIR 1960 SC 610); (2) Ayurvedic Pharmacy and Hospital (*Lalit Hari Ayurvedic College Pharmacy* v. *Workers Union,* AIR 1960 SC 1261); (3) Activities of Panjrapole (*Bombay Panjrapole* v. *Workmen*, (1971) 3 SCC 349).

4. *Clubs:* A restricted category of professions, clubs, co-operatives and even Gurukulas may qualify for exemption if, in simple ventures, substantially and going by the dominant nature criterion substantively, no employees are entertained, but in minimal matters marginal employees are hired without destroying the non-employee character of the unit. But larger clubs are "industry" (*as per Bangalore Water Supply case*).

5. *Universities, Research Institutions etc.:* As regards institutions, if the triple tests of systematic activity, cooperation between employer and employee and production of goods and services were to be applied, a university, a college, a research institute or teaching institution will be "industry". The following institutions were held to be "industry": Ahmedabad Textile Industries Research Association, Tocklai Experimental Station. Indian Standard Institute, and Universities. However Physical Research Laboratory, Ahmedabad was held not to be an Industry by the Supreme Court (1997 Lab. IC 1912 SC). Since it is carrying on research not for the benefit of others and moreover, it is not engaged in commercial or industrial activity.

6. *Professional Firms:* A solicitors establishment can be an "industry" (as per *Bangalore Water Supply case*). Regarding liberal professions like lawyers, doctors, etc., the test of direct cooperation between capital and labour in the production of goods or in the rendering of service or that cooperation between employer and employee is essential for carrying out the work of the enterprise. The personal character of the relationship between a doctor or a lawyer with his professional assistant may be of such a kind that requires complete confidence and harmony in the productive activity in which they may be cooperating.

7. *Voluntary services*: If in a pious or altruistic mission, many employ themselves free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the Holiness, divinity or Central personality and the services are supplied free or at a nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants manual or technical are hired. Such eleemosynary or like undertakings alone are exempted. (*Bangalore Water Supply case*)

Following are held to be "industry": Co-operative Societies, Federation of Indian Chamber of Commerce, Company carrying on agricultural operations, Bihar Khadi Gramodyog Sangh, Indian Navy Sailors Home, Panchayat Samiti, Public Health Department of the State Government, Forest Department of Govt., Zoo; Primary Health Centres, and Indian Institute of Petroleum. Some other instances of 'Industry are: Rajasthan Co-operative Credit Institutions Cadre Authority (1985 Lab IC 1023 (Raj.), A trust for promoting religious, social and educational life but also undertaking commercial activities (1987) 1 LLJ 81, M.P. Khadi and Village Industries Board, Housing Board, Dock Labour Board, Management of a private educational institution (*R.C.K. Union* v. *Rajkumar College,* (1987) 2 LLN 573).

But the following are held to be not "Industry": Posts and Telegraphs Department (*Union of India* v. *Labour Court,* (1984) 2 LLN 577), Telecom Deptt. (*Bombay Telephones Canteen Employees Association* v. *Union of India*), Central Institute of Fisheries (*P. Bose* v. *Director, C.I.F.,* 1986 Lab IC 1564), and Construction and maintenance of National and State Highways (*State of Punjab* v. *Kuldip Singh and another,* 1983 Lab IC 83), Trade Unions (*RMS* v. *K.B. Wagh,* 1993(2) CLR 1059).

Section 2(j) shall stand amended by Amendment Act of 1982.

Section 2(j) under Amendment Act, 1982 [date of effect is yet to be notified]

2(j) "Industry" means any systematic activity carried on by co-operation between an employer and his workmen (Whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not:

(i) any capital has been invested for the purpose of carrying on such activity; or

(ii) such activity is carried on with a motive to make any gain or profit, and includes:

(a) any activity of the Dock Labour Board established under Section 5A of the Dock Workers (Regulations of Employment) Act, 1948, (9 of 1948);

(b) any activity relating to the promotion of sales or business or both carried on by an establishment,

but does not include:

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation: For the purpose of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act, 1951; or

(2) hospitals or dispensaries; or

(3) educational, scientific, research to training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research atomic energy and space; or

(7) any domestic service; or

(8) any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by the individuals or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten.

Test your knowledge

Which of the following institutions are not considered "Industry"?

(a) Posts and Telegraphs Department

(b) Central Institute of Fisheries

(c) Construction and maintenance of National and State Highways

(d) Dock Labour Board

Correct answer: (a), (b) and (c)

(ii) Industrial Dispute

"Industrial Dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. [Section 2(k)]

The above definition can be analysed and discussed under the following heads:

(i) There should exist a dispute or difference;

(ii) The dispute or difference should be between:

(a) employer and employer;

(b) employer and workmen; or

(c) workmen and workmen.

(iii) The dispute or difference should be connected with (a) the employment or non-employment, or (b) terms of employment, or (c) the conditions of labour of any person;

(iv) The dispute should relate to an industry as defined in Section 2(j).

(a) Existence of a dispute or difference

The existence of a dispute or difference between the parties is central to the definition of industrial dispute. Ordinarily a dispute or difference exists when workmen make demand and the same is rejected by the employer. However, the demand should be such which the employer is in a position to fulfil. The dispute or difference should be fairly defined and of real substance and not a mere personal quarrel or a grumbling or an agitation. The term "industrial dispute" connotes a real and substantial difference having some element of persistency, and likely, and if not adjusted, to endanger the industrial peace of the community. An industrial dispute exists only when the same has been raised by the workmen with the employer. A mere demand to the appropriate

Government without a dispute being raised by the workmen with their employer regarding such demand, cannot become an industrial dispute (*Sindhu Resettlement Corporation Ltd.* v. *Industrial Tribunal 1968*-I L.L.J. 834 S.C.). However, in *Bombay Union of Journalists* v. *The Hindu,* AIR, 1964 S.C. 1617, the Supreme Court observed that for making reference under Section 10, it is enough if industrial dispute exists or is apprehended on the date of reference. Therefore, even when no formal demands have been made by the employer, industrial dispute exists if the demands were raised during the conciliation proceedings. When an industrial dispute is referred for adjudication the presumption is that, there is an industrial dispute (*Workmen* v. *Hindustan Lever Ltd., (*1984) 4 SCC 392).

Unless there is a demand by the workmen and that demand is not complied with by the management, there cannot be any industrial dispute within the meaning of Section 2(k). Mere participation by the employer in the conciliation proceedings will not be sufficient (*W.S. Insulators of India Ltd.* v. *Industrial Tribunal, Madras* 1977-II Labour Law Journal 225).

(b) Parties to the dispute

Most of the industrial disputes exist between the employer and the workmen and the remaining combination of persons who can raise the dispute, has been added to widen the scope of the term “industrial dispute”. So the question is who can raise the dispute? The term “industrial dispute” conveys the meaning that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides. The disputes can be raised by workmen themselves or their union or federation on their behalf. This is based on the fact that workmen have right of collective bargaining. Thus, there should be community of interest in the dispute.

It is not mandatory that the dispute should be raised by a registered Trade Union. Once it is shown that a body of workmen either acting through their union or otherwise had sponsored a workmen’s case, it becomes an industrial dispute (*Newspaper Ltd., Allahabad* v. *Industrial Tribunal,* A.I.R. 1960 S.C. 1328). The dispute can be raised by minority union also. Even a sectional union or a substantial number of members of the union can raise an industrial dispute. However, the members of a union who are not workmen of the employer against whom the dispute is sought to be raised, cannot by their support convert an individual dispute into an industrial dispute. In other words, persons who seek to support the cause must themselves be directly and substantially interested in the dispute and persons who are not the employees of the same employer cannot be regarded as so interested. But industrial dispute can be raised in respect of non-workmen (*Workmen* v. *Cotton Greaves & Co. Ltd.* 1971 2 SCC 658). Industrial dispute can be initiated and continued by legal heirs even after the death of a workman (LAB 1C 1999 Kar. 286).

Individual dispute whether industrial dispute?

Till the provisions of Section 2-A were inserted in the Act, it has been held by the Supreme Court that an individual dispute per se is not industrial dispute. But it can develop into an industrial dispute when it is taken up by the union or substantial number of workmen (*Central Province Transport Service* v. *Raghunath Gopal Patwardhan,* AIR 1957 S.C. 104). This ruling was confirmed later on in the case of *Newspaper Ltd.* v. *Industrial Tribunal*. In the case of *Workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate* (1958) I. L.L.J. 500, the Supreme Court held that it is not that dispute relating to “any person” can become an industrial dispute. There should be community of interest. A dispute may initially be an individual dispute, but the workmen may make that dispute as their own, they may espouse it on the ground that they have a community of interest and are directly and substantially interested in the employment, non-employment, or conditions of work of the concerned workmen. All workmen need not to join the dispute. Any dispute which affects workmen as a class is an industrial dispute, even though, it might have been raised by a minority group. It may be that at the date of dismissal of the workman there was no union. But that does not mean that the dispute cannot become an industrial dispute because there was no such union in existence on that date. If it is insisted that the concerned workman must be a member of the union on the date of his dismissal, or there was no union in that particular industry, then the dismissal of such a workman can never be an industrial dispute although the other workmen have a community

of interest in the matter of his dismissal and the cause for which on the manner in which his dismissal was brought about directly and substantially affects the other workmen. The only condition for an individual dispute turning into an industrial dispute, as laid down in the case of *Dimakuchi Tea Estate* is the necessity of a community of interest and not whether the concerned workman was or was not a member of the union at the time of his dismissal. Further, the community of interest does not depend on whether the concerned workman was a member or not at the date when the cause occurred, for, without his being a member the dispute may be such that other workmen by having a common interest therein would be justified in taking up the dispute as their own and espousing it. Whether the individual dispute has been espoused by a substantial number of workmen depends upon the facts of each case.

If after supporting the individual dispute by a trade union or substantial number of workmen, the support is withdrawn subsequently, the jurisdiction of the adjudicating authority is not affected. However, at the time of making reference for adjudication, individual dispute must have been espoused, otherwise it will not become an industrial dispute and reference of such dispute will be invalid.

Test your knowledge

State whether the following statement is "True" or "False"

Payment of pension cannot be a matter of an industrial dispute.

- True
- False

Correct answer: False

(c) Subject matter of dispute

The dispute should relate to employment or non-employment or terms of employment or conditions of labour of any person.

The meaning of the term "employment or non-employment" was explained by Federal Court in the case of *Western India Automobile Association* v. *Industrial Tribunal*. If an employer refuses to employ a workman dismissed by him, the dispute relates to non-employment of workman. But the union insists that a particular person should not be employed by the employer, the dispute relates to employment of workman. Thus, the "employment or non-employment" is concerned with the employers failure or refusal to employ a workman. The expression "terms of employment" refers to all terms and conditions stated in the contract of employment. The expression terms of employment would also include those terms which are understood and applied by parties in practice or, habitually or by common consent without ever being incorporated in the Contract (*Workmen* v. *Hindustan Lever Ltd.,* 1984 1 SCC 392).

The expression "condition of labour" is much wider in its scope and usually it was reference to the amenities to be provided to the workmen and the conditions under which they will be required to work. The matters like safety, health and welfare of workers are also included within this expression.

It was held that the definition of industrial dispute in Section 2(k) is wide enough to embrace within its sweep any dispute or difference between an employer and his workmen connected with the terms of their employment. A settlement between the employer and his workmen affects the terms of their employment. Therefore *prima facie,* the definition of Industrial dispute in Section 2(k) will embrace within its sweep any fraudulent and involuntary character of settlement. Even a demand can be made through the President of Trade Union (1988 1 LLN 202). Dispute between workmen and employer regarding confirmation of workman officiating in a higher grade is an industrial dispute (1984 4 SCC 392).

Employer's failure to keep his verbal assurance, claim for compensation for loss of business; dispute of workmen who are not employees of the Purchaser who purchased the estate and who were not yet the workmen of the Purchaser's Estate, although directly interested in their employment, etc. were held to be not the industrial disputes. Payment of pension can be a subject matter of an industrial dispute (*ICI India Ltd.* v. *Presiding Officer L.C.,* 1993 LLJ II 568).

(d) Dispute in an "Industry"

Lastly, to be an "industrial dispute", the dispute or difference must relate to an industry. Thus, the existence of an "industry" is a condition precedent to an industrial dispute. No industrial dispute can exist without an industry. The word "industry" has been fully discussed elsewhere. However, in *Pipraich Sugar Mills Ltd.* v. *P.S.M. Mazdoor Union,* A.I.R. 1957 S.C. 95, it was held that an "industrial dispute" can arise only in an "existing industry" and not in one which is closed altogether.

The mere fact that the dispute comes under the definition of Section 2(k) does not automatically mean that the right sought to be enforced is one created or recognised and enforceable only under the Act (*National and Grindlays Bank Employees' Union, Madras* v. *I. Kannan* (Madras), 1978 Lab. I.C. 648). Where the right of the employees is not one which is recognised and enforceable under the Industrial Disputes Act, the jurisdiction of the Civil Court is not ousted.

(iii) Workman

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be expressed or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes:

(a) any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or

(b) any person whose dismissal, discharge or retrenchment has led to that dispute,

but does not include any such person:

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950 or the Navy Act, 1957; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who is employed in a supervisory capacity drawing more than Rs. 1,600 per month as wages; or

(v) who is exercising either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature. [Section 2(s)]

Some of the expressions used in the definition of "workman" have been the subject of judicial interpretation and hence they have been discussed below:

(a) Employed in "any industry"

To be a workman, a person must have been employed in an activity which is an "industry" as per Section 2(j). Even those employed in operation incidental to such industry are also covered under the definition of workman.

In the case of *J.K. Cotton Spinning and Weaving Mills Co. Ltd*. v. *L.A.T.*, AIR 1964 S.C. 737, the Supreme Court held that 'malis' looking after the garden attached to bungalows provided by the company to its officers and directors, are engaged in operations incidentally connected with the main industry carried on by the employer. It observed that in this connection it is hardly necessary to emphasise that in the modern world, industrial operations have become complex and complicated and for the efficient and successful functioning of any industry, several incidental operations are called in aid and it is the totality of all these operations that ultimately constitutes the industry as a whole. Wherever it is shown that the industry has employed an employee to assist one or the other operation incidental to the main industrial operation, it would be unreasonable to deny such an employee the status of a workman on the ground that his work is not directly concerned with the main work or operation of the industry.

(b) Person employed

A person cannot be a workman unless he is employed by the employer in any industry. The relationship of employer and workman is usually supported by a contract of employment which may be expressed or implied. This is also a must for regarding an apprentice as a worker (*Achutan* v. *Babar,* 1996-LLR-824 Ker.). But such a question cannot be derived merely on the basis of apprenticeship contract (*R.D. Paswan* v. *L.C.,* 1999 LAB 1C Pat 1026). The employee agrees to work under the supervision and control of his employer. Here one must distinguish between contract for employment or service and contract of employment or service. In the former, the employer can require what is to be done but in the latter, he can not only order what is to be done, but also how it shall be done. In the case of contract for employment, the person will not be held as a 'workman' but only an 'independent contractor'. There should be due control and supervision by the employer for a master and servant relationship (*Dharangadhara Chemical Works Ltd.* v. *State of Saurashtra*, AIR 1957 SC 264). Payment on piece rate by itself does not disprove the relationship of master and servant (1983 4 SCC 464). Even a part time employee is a worker (*P.N. Gulati* v. *Labour Commissioner* 1977 (35) FLR 35). Since he is under an obligation to work for fixed hours every day, jural relationship of master and servant would exist. A casual worker is nonetheless a workman (*G.Yeddi Reddi* v. *Brooke Bond India Ltd.,* 1994 Lab 1C 186).

(c) Employed to do skilled or unskilled etc.

Only those persons who are engaged in the following types of work are covered by the definition of "workman":

(i) Skilled or unskilled manual work;

(ii) Supervisory work;

(iii) Technical work;

(iv) Clerical work.

Where a person is doing more than one work, he must be held to be employed to do the work which is the main work he is required to do (*Burma Shell Oil Storage & Distributing Co. of India* v. *Burma Shell Management Staff Association,* AIR 1971 SC 922). Manual work referred in the definition includes work which involves physical exertion as distinguished from mental or intellectual exertion.

A person engaged in supervisory work will be a workman only if he is drawing more than Rs. 1,600 per month as wages. The designation of a person is not of great importance, it is the nature of his duties which is the essence of the issue. If a person is mainly doing supervisory work, but incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and conversely, if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally, will not convert his employment as a clerk into one in supervisory capacity (*Anand Bazar Patrika (P) Ltd.* v. *Its Workmen,* (1969) II L.L.J. 670). In other words, the dominant purpose of employment must be taken into account at first and the gloss of additional duties to be rejected, while determining status and character of the job (*AGR Rao* v. *Ciba Geigy* AIR 1985 SC 985). The work of labour officer in jute mill involving exercise of initiative, tact and independence is a supervisory work. But the work of a teller in a bank does not show any element of supervisory character.

Whether teachers are workmen or not

After amendment of Section 2(s) of the Act, the issue whether "teachers are workmen or not" was decided in many cases but all the cases were decided on the basis of definition of workman prior to amendment. The Supreme Court in *Sunderambal* v. *Government of Goa* [AIR (1988) SC 1700. (1989) LAB 1C 1317] held that the teachers employed by the educational institution cannot be considered as workmen within the meaning of Section 2(s) of the Act, as imparting of education which is the main function of the teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. The Court in this case also said that manual work comprises of work involving physical exertion as distinct from mental and intellectual exertion. The teacher necessarily performs intellectual duties and the work is mental and intellectual as distinct from manual.

A person doing technical work is also held as a workman. A work which depends upon the special training or scientific or technical knowledge of a person is a technical work. Once a person is employed for his technical qualifications, he will be held to be employed in technical work irrespective of the fact that he does not devote his entire time for technical work. Thus, the person doing technical work such as engineers, foreman, technologist, medical officer, draughtsman, etc., will fall within the definition of "workman". A medical representative whose main and substantial work is to do convassing for promotion of sales is not a workman within the meaning of this Section (1990 Lab IC 24 Bom. DB). However, a salesman, whose duties included manual as well as clerical work such as to attend to the customer, prepare cash memos, to assist manager in daily routine is a workman (*Carona Sahu Co. Ltd.* v. *Labour Court* 1993 I LLN 300). A temple priest is not a workman (1990 1 LLJ 192 Ker.).

Test your knowledge

State whether the following statement is "True" or "False"

A medical representative whose main and substantial work is to do canvassing for promotion of sales is a workman.

Correct answer: False

Person employed mainly in managerial and administrative capacity

Persons employed mainly in the managerial or administrative capacity have been excluded from the definition of "workman". Development officer in LIC is a workman (1983 4 SCC 214). In *Standard Vacuum Oil Co.* v. *Commissioner of Labour,* it was observed that if an individual has officers subordinate to him whose work he is required to oversee, if he has to take decision and also he is responsible for ensuring that the matters entrusted to his charge are efficiently conducted, and an ascertainable area or section of work is assigned to him, an inference of a position of management would be justifiable. Occasional entrustment of supervisory, managerial or administrative work, will not take a person mainly discharging clerical duties, out of purview of Section 2(s).

(iv) Strike

"Strike" means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment. [Section 2(q)]

Strike is a weapon of collective bargaining in the armour of workers. The following points may be noted regarding the definition of strike:

(i) Strike can take place only when there is a cessation of work or refusal to work by the workmen acting in combination or in a concerted manner. Time factor or duration of the strike is immaterial. The purpose behind the cessation of work is irrelevant in determining whether there is a strike or not. It is enough if the cessation of work is in defiance of the employers authority.

Proof of formal consultations is not required. However, mere presence in the striking crowd would not amount to strike unless it can be shown that there was cessation of work.

(ii) A concerted refusal or a refusal under a common understanding of any number of persons to continue to work or to accept employment will amount to a strike. A general strike is one when there is a concert of combination of workers stopping or refusing to resume work. Going on mass casual leave under a common understanding amounts to a strike. However, the refusal by workmen should be in respect of normal lawful work which the workmen are under an obligation to do. But refusal to do work which the employer has no right to ask for performance, such a refusal does not constitute a strike (*Northbrooke Jute Co. Ltd.* v. *Their Workmen,* AIR 1960 SC 879). If on the sudden death of a fellow-worker, the workmen acting in concert refuse to resume work, it amounts to a strike (*National Textile Workers' Union* v. *Shree Meenakshi Mills,* (1951) II L.L.J. 516).

(iii) The striking workman, must be employed in an "industry" which has not been closed down.

(iv) Even when workmen cease to work, the relationship of employer and employee is deemed to continue albeit in a state of belligerent suspension. In *Express Newspaper (P) Ltd.* v. *Michael Mark,* 1962-II, L.L.J. 220 S.C., the Supreme Court observed that if there is a strike by workmen, it does not indicate, even when strike is illegal, that they have abandoned their employment. However, for illegal strike, the employer can take disciplinary action and dismiss the striking workmen.

TYPES OF STRIKE AND THEIR LEGALITY

(i) Stay-in, sit-down, pen-down or tool-down strike

In all such cases, the workmen after taking their seats, refuse to do work. Even when asked to leave the premises, they refuse to do so. All such acts on the part of the workmen acting in combination, amount to a strike. Since such strikes are directed against the employer, they are also called primary strikes. In the case of *Punjab National Bank Ltd.* v. *All India Punjab National Bank Employees' Federation,* AIR 1960 SC 160, the Supreme Court observed that on a plain and grammatical construction of this definition it would be difficult to exclude a strike where workmen enter the premises of their employment and refuse to take their tools in hand and start their usual work. Refusal under common understanding not to work is a strike. If in pursuance of such common understanding the employees enter the premises of the Bank and refuse to take their pens in their hands that would no doubt be a strike under Section 2(q).

(ii) Go-slow

Go-slow does not amount to strike, but it is a serious case of misconduct.

In the case of *Bharat Sugar Mills Ltd.* v. *Jai Singh,* (1961) II LLJ 644 (647) SC, the Supreme Court explained the legality of go-slow in the following words: "Go-slow which is a picturesque description of deliberate delaying of production by workmen pretending to be engaged in the factory, is one of the most prenicious practices that discontented and disgruntled workmen sometimes resort to. Thus, while delaying production and thereby reducing the output, the workmen claim to have remained employed and entitled to full wages. Apart from this, 'go-slow' is likely to be much more harmful than total cessation of work by strike. During a go-slow much of the machinery is kept going on at a reduced speed which is often extremely damaging to the machinery parts. For all these reasons, 'go-slow' has always been considered a serious type of misconduct."

In another case, it was observed that slow-down is an insidious method of undermining the stability of a concern and Tribunals certainly will not countenance it. It was held that 'go slow' is a serious misconduct being a covert and a more damaging breach of the contract of employment (*SU Motors* v. *Workman* 1990-II LLJ 39). It is not a legitimate weapon in the armoury of labour. It has been regarded as a misconduct.

(iii) Sympathetic strike

Cessation of work in the support of the demands of workmen belonging to other employer is called a sympathetic strike. This is an unjustifiable invasion of the right of employer who is not at all involved in the dispute. The management can take disciplinary action for the absence of workmen. However, in *Ramalingam* v. *Indian Metallurgical Corporation, Madras,* 1964-I L.L.J. 81, it was held that such cessation of work will not amount to a strike since there is no intention to use the strike against the management.

(iv) Hunger strike

Some workers may resort to fast on or near the place of work or residence of the employer. If it is peaceful and does not result in cessation of work, it will not constitute a strike. But if due to such an act, even those present for work, could not be given work, it will amount to strike (*Pepariach Sugar Mills Ltd*. v. *Their Workmen*).

(v) Work-to-rule

Since there is no cessation of work, it does not constitute a strike.

Test your knowledge

Which of the following types of strikes are called 'primary strikes'?

(a) Stay-in

(b) Tool-down

(c) Pen-down

(d) Go-slow

Correct answer: (a), (b) and (c)

LEGALITY OF STRIKE

The legality of strike is determined with reference to the legal provisions enumerated in the Act and the purpose for which the strike was declared is not relevant in directing the legality. Section 10(3), 10A(4A), 22 and 23 of the Act deals with strike. Sections 22 and 23 impose restrictions on the commencement of strike while Sections 10(3) and 10A(4A) prohibit its continuance.

The justifiability of strike has no direct relation to the question of its legality and illegality. The justification of strike as held by the Punjab & Haryana High Court in the case of *Matchwell Electricals of India* v. *Chief Commissioner,* (1962) 2 LLJ 289, is entirely unrelated to its legality or illegality. The justification of strikes has to be viewed from the stand point of fairness and reasonableness of demands made by workmen and not merely from stand point of their exhausting all other legitimate means open to them for getting their demands fulfilled.

The Supreme Court in *Gujarat Steel Tubes Ltd*. v. *Gujarat Steel Tubes Majdoor Sabha*, AIR 1980 SC 1896 held that justifiability of a strike is purely a question of fact. Therefore, if the strike was resorted to by the workers in support of their reasonable, fair and bona fide demands in peaceful manner, then the strike will be justified. Where it was resorted to by using violence or acts of sabotage or for any ulterior purpose, then the strike will be unjustified.

As regards the wages to the workers strike period are concerned, the Supreme Court in *Charakulam Tea Estate* v. *Their Workmen,* AIR 1969 SC 998 held that in case of strike which is legal and justified, the workmen will be entitled to full wages for the strike period. Similar view was taken by the Supreme Court in *Crompton Greaves Ltd. case* 1978 Lab 1C 1379 (SC).

The *Supreme Court in Statesman Ltd.* v. *Their Workman,* AIR 1976 SC 758 held that if the strike is illegal or unjustified, strikers will not be entitled to the wages for the strike period unless considerate circumstances constraint a different cause. Similar view was taken by the Supreme Court in *Madura Coats Ltd.* v. *The Inspector of Factories, Madurai,* AIR 1981 SC 340.

The Supreme Court has also considered the situation if the strike is followed by lockout and vice versa, and both are unjustified, in *India Marine Service Pvt. Ltd.* v. *Their Workman,* AIR 1963 SC 528. In this case, the Court evolved the doctrine of "apportionment of blame" to solve the problem. According to this doctrine, when the workmen and the management are equally to be blamed, the Court normally awards half of the wages. This doctrine was followed by the Supreme Court in several cases. Thus, the examination of the above cases reveal that when the blame for situation is apportioned roughly half and half between the management and workmen, the workmen are given half of the wages for the period involved.

A division bench of the Supreme Court in the case of *Bank of India* v. *TS Kelawala,* (1990) 2 Lab 1C 39 held that the workers are not entitled to wages for the strike period. The Court observed that "the legality of strike does not always exempt the employees from the deduction of their salaries for the period of strike". The Court, further observed, "whether the strike is legal or illegal, the workers are liable to lose wages does not either make the strike illegal as a weapon or deprive the workers of it".

(v) Lock-out

"Lock-out" means the temporary closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him. [Section 2(l)]

Lock out is an antithesis to strike. Just as "strike" is a weapon available to the employees for enforcing their industrial demands, a "lock out" is a weapon available to the employer to persuade by a coercive process the employees to see his point of view and to accept his demands (*Express Newspapers (P) Ltd.* v. *Their Workers* (1962) II L.L.J. 227 S.C.).

In lock out, the employer refuses to continue to employ the workman employed by him even though there is no intention to close down the unit. The essence of lock out is the refusal of the employer to continue to employ workman. Even if suspension of work is ordered, it would constitute lock out. But mere suspension of work, unless it is accompanied by an intention on the part of employer as a retaliation, will not amount to lock out.

Locking out workmen does not contemplate severance of the relationship of employer and the workmen. In the *case Lord Krishna Sugar Mills Ltd.* v. *State of U.P.,* (1964) II LLJ 76 (All), a closure of a place of business for a short duration of 30 days in retaliation to certain acts of workmen (i.e. to teach them a lesson) was held to be a lock out. But closure is not a lock out.

(vi) Lay-off

"Lay-off" (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer to give employment due to following reasons, to a workman whose name appears on the muster-rolls of his industrial establishment and who has not been retrenched:

(a) shortage of coal, power or raw materials, or

(b) accumulation of stocks, or

(c) break-down of machinery, or

(d) natural calamity, or

(e) for any other connected reason. [Section 2(kkk)]

Explanation: Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause.

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during this second half of the shift for the day and is given employment, then, he shall be deemed to have been laid-off only for one-half of that day.

Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day.

From the above provisions, it is clear that lay-off is a temporary stoppage and within a reasonable period of time, the employer expects that his business would continue and his employees who have been laid-off, the contract of employment is not broken but is suspended for the time being. But in the case of *M.A. Veirya* v. *C.P. Fernandez,* 1956-I, L.L.J. 547 Bomb., it was observed that it is not open to the employer, under the cloak of "lay-off", to keep his employees in a state of suspended animation and not to make up his mind whether the industry or business would ultimately continue or there would be a permanent stoppage and thereby deprive his employees of full wages. In other words, the lay-off should not be *mala fide* in which case it will not be lay-off. Tribunal can adjudicate upon it and find out whether the employer has deliberately and maliciously brought about a situation where lay-off becomes necessary. But, apart from the question of *mala fide,* the Tribunal cannot sit in judgement over the acts of management and investigate whether a more prudent management could have avoided the situation which led to lay-off (*Tatanagar Foundry* v. *Their Workmen,* A.I.R. 1962 S.C. 1533).

Further, refusal or inability to give employment must be due to (i) shortage of coal, power or raw materials, or (ii) accumulation of stock, or (iii) break-down of machinery, (iv) natural calamity, or (v) for any other connected reason. Financial stringency cannot constitute a ground for lay-off (*Hope Textiles Ltd*. v. *State of MP,* 1993 I LLJ 603).

Lastly, the right to lay-off cannot be claimed as an inherent right of the employer. This right must be specifically provided for either by the contract of employment or by the statute (*Workmen of Dewan Tea Estate* v. *Their Management*). In fact 'lay-off' is an obligation on the part of the employer, i.e., in case of temporary stoppage of work, not to discharge the workmen but to lay-off the workmen till the situation improves. Power to lay-off must be found out from the terms of contract of service or the standing orders governing the establishment (*Workmen* v. *Firestone Tyre and Rubber Co.,* 1976 3 SCC 819).

There cannot be lay-off in an industrial undertaking which has been closed down. Lay-off and closure cannot stand together.

Test your knowledge

Which of the following are valid reasons for an employer declaring 'Lay-off'?

(a) Shortage of coal, power or raw materials

(b) Accumulation of stocks

(c) Break-down of machinery

(d) Financial stringency

Correct answer: (a), (b) and (c)

Difference between lay-off and lock-out

(1) In lay-off, the employer refuses to give employment due to certain specified reasons, but in lock-out, there is deliberate closure of the business and employer locks out the workers not due to any such reasons.

(2) In lay-off, the business continues, but in lock-out, the place of business is closed down for the time being.

(3) In a lock-out, there is no question of any wages or compensation being paid unless the lock-out is held to be unjustified.

(4) Lay-off is the result of trade reasons but lock-out is a weapon of collective bargaining.

(5) Lock-out is subject to certain restrictions and penalties but it is not so in case of lay-off.

However, both are of temporary nature and in both cases the contract of employment is not terminated but remains in suspended animation.

(vii) Retrenchment

"Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include:

(a) voluntary retirement of the workman; or

(b) retirement of the workman or reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

(c) termination of the service of workman on the ground of continued ill-health.

Thus, the definition contemplates following requirements for retrenchment:

(i) There should be termination of the service of the workman.

(ii) The termination should be by the employer.

(iii) The termination is not the result of punishment inflicted by way of disciplinary action.

(iv) The definition excludes termination of service on the specified grounds or instances mentioned in it. [Section 2(oo)]

The scope and ambit of Section 2(oo) is explained in the case of *Santosh Gupta* v. *State Bank of Patiala,* (1980) Lab.I.C.687 SC), wherein it was held that if the definition of retrenchment is looked at unaided and unhampered by precedent, one is at once struck by the remarkably wide language employed and particularly the use of the word 'termination for any reason whatsoever'. If due weight is given to these words, i.e. they are to be understood as to mean what they plainly say, it is difficult to escape the conclusion that retrenchment must include every termination of service of a workman by an act of the employer. In the case of *Punjab Land Development Corporation Ltd.* v. *Labour Court, Chandigarh,* (1990) II LLJ 70 SC, the Supreme Court held that expression "retrenchment" means termination by employer of services of workman for any reason whatsoever except those expressly excluded in the Section itself.

The expression "for any reason whatsoever" in Section 2(oo) could not be safely interpretted to include the case of discharge of all workmen on account of *bona fide* closure of business, because for the application of definition, industry should be a working or a continuing or an existing industry, not one which is altogether a closed one. So the underlying assumption would be of course, that the undertaking is running as an undertaking and the employer continues to be an employer (*Hariprasad Shivshankar Shukla* v. *A.D.Divakar,* (1957) SCR 121), hereinafter referred to as *Hariprasad case.*

The *Hariprasad case* and some other decisions, lead to the unintended meaning of the term "retrenchment" that it operates only when there is surplus of workman in the industry which should be an existing one. Thus, in effect either on account of transfer of undertaking or an account of the closure of the undertaking, there can be no

question of retrenchment within the meaning of the definition contained in Section 2(oo). To overcome this view, the Government introduced new Sections 25FF and 25FFF, providing that compensation shall be payable to workmen in case of transfer of an undertaking or closure of an undertaking to protect the interests of the workmen. Thus, the termination of service of a workman on transfer or closure of an undertaking was treated as 'deemed retrenchment', in result enlarging the general scope and ambit of the expression (retrenchment) under the Act.

The Supreme Court, clearing the misunderstanding created by earlier decisions stated in *Punjab Land Development Corporation Ltd*. case (1990 II LLJ SC 70), that the sole reason for the decision of the Constitution Bench in Hariprasad case was that the Act postulated the existence and continuance of an Industry and wherein the industry, the undertaking itself was closed down or transferred, the very substratum disappeared and the Act could not regulate industrial employment in the absence of an industry. The true position in that case was that Section 2(oo) and Section 25F could not be invoked since the undertaking itself ceased to exist. In fact, the Constitution Bench in that case was neither called upon to decide, nor did it decide, whether in a continuing business, retrenchment was confined only to discharge of surplus staff and the reference to discharge the surplusage was for the purpose of contrasting the situation in that case (i.e.) workmen were being retrenched because of cessation of business and those observations did not constitute reasons for the decision. What was decided was that if there was no continuing industry, the provision could not apply. In fact, the question whether retrenchment did or did not include other terminations was never required to be decided in Hariprasad case and could not therefore have been or be taken to have been decided in that case.

The Supreme Court in the *Punjab Land Development Corporation Ltd.* case clarified that the expression "retrenchment" does not mean only termination by the employer of service of surplus labour for any reason whatsoever. The expression "retrenchment" is not to be understood in the narrow, natural and contextual meaning but is to be understood in its wider literal meaning to mean termination of service of workman for any reason whatsoever.

The expression "for any reason whatsoever" in Section 2(oo), must necessarily draw within its ambit, the termination of the workers services due to reasons such as economy, rationalisation in industry, installation or improvement of plant or technique and the like. It is in conjunction with such reasons that the words "any reason whatsoever" must be read and construed (*Kamleshkumari Rajanikant Mehta* v. *Presiding Officer, Central Government, Industrial Tribunal No.1,* (1980) Lab I.C.1116).

A casual labourer is a workman and as such his termination would amount to retrenchment within Section 2(oo); 1981-II Labour Law Journal 82 (DB) (Cal.). Where persons are employed for working on daily wages their disengagement from service or refusal to employ for a particular work cannot be construed to be a retrenchment and that concept of retrenchment cannot be stretched to such an extent as to cover such employees *(U.P.* v. *Labour Court, Haldwani,* 1999 (81) FLR 319 All.).The Supreme Court observed that if the termination of an employee's services is a punishment inflicted by way of disciplinary action, such termination would amount to retrenchment (*SBI* v. *Employees of SBI,* AIR 1990 SC 2034). But where the workmen were engaged on casual basis for doing only a particular urgent work, the termination of their service after the particular work is over, is not a retrenchment (*Tapan Kumar Jana* v. *The General Manager, Calcutta Telephones*, (1980) Lab.I.C.508).

In *Parry & Co. Ltd.* v. *P.C. Pal*, (1970) II L.L.J. 429, the Supreme Court observed that the management has a right to determine the volume of its labour force consistent with its business or anticipated business and its organisation. If for instance a scheme of reorganisation of the business of the employer results in surplusage of employees, no employer is expected to carry the burden of such economic dead weight and retrenchment has to be accepted as inevitable, however, unfortunate it be.

The fact that the implementation of a reorganisation scheme adopted by an employer for reasons of economy and convenience would lead to the discharge of some of the employees, will have no material bearing on the question as to whether the reorganisation has been adopted by the employer *bona fide* or not. The retrenchment should be *bona fide* and there should be no victimisation or unfair labour practice on the part of the employer. The Supreme Court in the case of *Workmen of Subong Tea Estate* v. *Subong Tea Estate,* (1964) 1 L.L.J. 333, laid down following principles with regard to retrenchment:

1. The management can retrench its employees only for proper reasons, which means that it must not be actuated by any motive of victimisation or any unfair labour practice.
2. It is for the management to decide the strength of its labour force, and the number of workmen required to carry out efficiently the work in his industrial undertaking must always be left to be determined by the management in its discretion.
3. If the number of employees exceeds the reasonable and legitimate needs of the undertaking, it is open to the management to retrench them.
4. Workmen may become surplus on the ground of rationalisation or on the group of economy reasonably and bona fide adopted by the management or of other industrial or trade reasons.
5. The right of the employer to effect retrenchment cannot normally be challenged but when there is a dispute in regard to the validity of the retrenchment, it would be necessary for the tribunal to consider whether the impugned retrenchment was justified for proper reasons and it would not be open to the employer either capriciously or without any reason at all to say that it proposes to reduce its labour for no rhyme or reason.

The Section does not make any difference between regular and temporary appointment or an appointment on daily wage basis or appointment of a person not possessing requisite qualification (L.L.J.-II-1996 Mad. 216) or whether the appointment was held to be in accordance with law or not. In *Prabhudayal Jat* v. *Alwar Sehkari Bhumi Vikas Bank Ltd.,* (1997) Lab IC Raj. 944, where the services of an employee irregularly appointed was terminated, the Court held, it was a fit case of retrenchment.

In *Anand Behari* v. *RSRTC,* AIR 1991 SC 1003, the services of bus conductors, were terminated on the ground of weak eye sight which was below the standard requirement. Supreme Court held that the termination is due to continued ill- health which has to be construed relatively in its context, and that must have a bearing on the normal discharge of their duties. Ill-health means disease, physical defect, infirmity or unsoundness of mind. Termination on account of lack of confidence is stigmatic and does not amount to retrenchment (*Chandulal* v. *Pan American Airways,* (1985) 2 SCC 727). Striking of the name of a worker from the rolls on the ground of absence for a specific period, provided under Standing Orders amounts to retrenchment (1993 II LLJ 696). Disengagement of workers of seasonal factories after season is not a retrenchment (LLJ I 98 SC 343).

(viii) Award

"Award" means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under Section 10-A. [Section 2(b)]

This definition was analysed in the case of *Cox & Kings (Agents) Ltd.* v. *Their Workmen,* AIR 1977 S.C. 1666 as follows: The definition of "award" is in two parts. The first part covers a determination, final or interim, of any industrial dispute. The second part takes in a determination of any question relating to an industrial dispute. However, basic thing to both the parts is the existence of an industrial dispute, actual or apprehended. The 'determination contemplated is of the industrial dispute or a question relating thereto on merits.

The word 'determination' implies that the Labour Court or the Tribunal should adjudicate the dispute upon relevant materials and exercise its own judgement. The definition of 'award' also includes the 'interim award',

but it should be distinguished from 'interim relief' granted by Tribunal under Section 10(4). (*Hotel Imperial* v. *Hotel Workers Union*). However, in *Management of Bihar State Electricity Board* v. *Their Workmen,* it was held that since there is no provision for interim relief in the Act, it will take the form of interim award. It may be noted that if the 'interim relief' does not take the form of 'interim award', the violation of it, will not attract any penalty under the Act.

Further, if an industrial dispute has been permitted to be withdrawn by an order of the adjudication authority, it will not amount to an award because there is no determination of the dispute on merit. However, position would be different if the dispute has been settled by a private agreement and the Tribunal has been asked to make award in terms of the agreement. The Delhi High Court in *Hindustan Housing Factory Employees Union* v. *Hindustan Housing Factory,* has held that such an award is binding on the parties provided it is not tainted with fraud, coercion, etc. However, it is necessary that the Tribunal brings its own judicial mind with regard to such a compromise so that there is determination of the dispute.

Lastly, if any party to the dispute does not appear before the adjudication authority, the Tribunal can proceed ex-parte but cannot make award unless it has exercised its mind. Thus, the order of dismissal of the reference, for default, does not amount to award.

(ix) Appropriate Government

"Appropriate Government" means:

(i) in relation to any industrial disputes concerning any industry carried on by or under the authority of the Central Government or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government or in relation to an industrial dispute concerning a Dock Labour Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 or the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, or the Employees' State Insurance Corporation established under Section 3 of the Employees' State Insurance Act, 1948 or the Board of Trustees constituted under Section 3-A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 or the Central Board of Trustees and the State Boards of Trustees constituted under Section 5-A and Section 5-B, respectively, of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956 or the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956, or the Deposit Insurance and Credit Guarantee Corporation established under Section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961, or the Central Warehousing Corporation established under Section 3 of the Warehousing Corporation Act, 1962, or the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963, or the Food Corporation of India established under Section 3, or a Board of Management established for two or more contiguous States under Section 16 of the Food Corporations Act, 1964, or the Airports Authority of India constituted under Section 3 of the Airports Authority of India Act, 1994, or a Regional Rural Bank established under Section 3 of the Regional Rural Banks Act, 1976 or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Corporation of India Limited, the National Housing Bank establishment under Section 3 of the National Housing Bank Act, 1987 or the Banking Service Commission established under Section 3 of the Banking Service Commission Act, 1975, or an air transport service, or a banking or an insurance company, a mine, an oil-field, a Cantonment Board or a major port, the Central Government, and

(ii) in relation to any other Industrial Dispute, the State Government. [Section 2(a)]

(x) Arbitrator

An "Arbitrator" includes an umpire. [Section 2(aa)]

(xi) Average Pay

"Average pay" means the average of the wages payable to a workman:

(i) in the case of monthly paid workman, in the three complete calendar months;

(ii) in the case of weekly paid workman, in the four complete weeks;

(iii) in the case of daily paid workman, in the twelve full working days preceding the date on which the average pay becomes payable if the workman had worked for three complete calendar months or four complete weeks or twelve full working days as the case may be, and where such calculation cannot be made, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked. [Section 2(aaa)]

(xii) Closure

"Closure" means the permanent closing down of a place of employment or a part thereof. [Section 2(cc)]

(xiii) Controlled Industry

"Controlled Industry" means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest. [Section 2(ee)]

(xiv) Employer

"Employer" means:

(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority. [Section 2(g)]

"Employer includes among others an agent of an employer, general manager, director, occupier of factory etc.

(xv) Executive

"Executive" in relation to a Trade Union, means the body, by whatever name called, to which the management of the affairs of the trade union is entrusted. [Section 2(gg)]

(xvi) Independent

A person shall be deemed to be "independent" for the purpose of his appointment as the chairman or other member of a Board, Court or Tribunal if he is unconnected with the industrial dispute referred to such Board, Court or Tribunal, or with any industry directly affected by such dispute.

Provided that no person shall cease to be independent by reason only of the fact that he is a shareholder of an incorporated company which is connected with, or likely to be affected by, such industrial dispute; but in such a case, he shall disclose to the appropriate Government, the nature and extent of the shares held by him in such company. [Section 2(i)]

(xvii) Office Bearer

"Office Bearer", in relation to a trade union, includes any member of the executive thereof, but does not include an auditor. [Section 2(III)]

(xviii) Public Utility Service

"Public Utility Service" means:

(i) any railway service or any transport service for the carriage of passengers or goods by air;

(ia) any service in, or in connection with the working of, any major port or dock;

(ii) any section of an industrial establishment, on the working of which the safety of the establishment or the workman employed therein depends;

(iii) any postal, telegraph or telephone service;

(iv) any industry which supplies power, light or water to the public;

(v) any system of public conservancy or sanitation;

(vi) any industry specified in the First Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification:

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months at any one time, if in the opinion of the appropriate Government public emergency or public interest requires such extension. [Section 2(n)]

Public utility services may be carried out by private companies or business corporations (*D.N. Banerji* v. *P.R. Mukharjee (Budge Budge Municipality),* AIR 1953 SC 58).

(xix) Settlement

"Settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer. [Section 2(p)]

An analysis of Section 2(p) would show that it envisages two categories of settlements (i) a settlement arrived at in the course of conciliation proceedings, and (ii) a written agreement between employer arrived at otherwise in the course of conciliation proceedings. For the validity of the second category of settlement, it is essential that parties thereto should have subscribed to it in the prescribed manner and a copy thereof sent to authorised officer and the conciliation officer (*Tata Chemicals Ltd.* v. *Workmen,* 1978 Lab. I.C. 637). Moreover, settlement contemplates only written settlement, and no oral agreement can be pleaded to vary or modify or supercede a written settlement (AIR 1997 SC 954).

A settlement cannot be weighed in any golden scale and the question whether it is just and fair has to be answered on the basis of principles different from those which came into play where an industrial dispute is under adjudication. If the settlement has been arrived at by a vast majority of workmen with their eyes open and was also accepted by them in its totality, it must be presumed to be fair and just and not liable to be ignored merely because a small number of workers were not parties to it or refused to accept it (*Tata Engineering and Locomotive Co. Ltd.* v. *Workmen,* 1981-II Labour Law Journal 429 SC). **A memorandum of settlement signed by office bearers of union without being authorised either by constitution of union or by executive committee of the union or by the workmen to enter into agreement with the management does not amount to settlement (*Brooke Bond India Pvt. Ltd.* v. *Workman,* (1981) 3 SCC 493).**

(xx) Trade Union

"Trade Union" means a trade union registered under the Trade Unions Act, 1926. [Section 2(qq)]

(xxi) Unfair Labour Practice

It means any of the practices specified in the Fifth Schedule. [Section 2(ra)]

(xxi) Wages

"Wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to workman in respect of his employment or of work done in such employment, and includes:

(i) such allowance (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession,

but does not include:

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service.

(d) any commission payable on the promotion of sales or business or both. [Section 2(rr)]

DISMISSAL ETC. OF AN INDIVIDUAL WORKMAN TO BE DEEMED TO BE AN INDUSTRIAL DISPUTE

According to Section 2A, where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between the workman and his employer connected with or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

The ambit of Section 2A is not limited to bare discharge, dismissal, retrenchment or termination of service of an individual workman, but any dispute or difference between the workman and the employer connected with or arising out of discharge, dismissal, retrenchment or termination is to be deemed industrial dispute. It has to be considered whether the claim for gratuity is connected with or arises out of discharge, dismissal, retrenchment or termination of service. The meaning of the phrase "arising out" of is explained in *Mackinnon Mackenzie & Co. Ltd.* v. *I.M. Isaak,* (1970) I LLJ 16. A thing is said to arise out of another when there is a close nexus between the two and one thing flows out of another as a consequence. The workman had claimed gratuity and that right flowed out of the termination of the services. Whether he is entitled to gratuity is a matter for the Tribunal to decide. It cannot be accepted that the claim of gratuity does not arise out of termination (*Joseph Niranjan Kumar Pradhan* v. *Presiding Officer, Industrial Tribunal, Orissa,* 1976 Lab. I.C. 1396).

AUTHORITIES UNDER THE ACT AND THEIR DUTIES

The Act provides for following Authorities for Investigation and settlement of industrial disputes:

(i) Works Committee.

(ii) Conciliation Officers.

(iii) Boards of Conciliation.

(iv) Court of Inquiry.

(v) Labour Tribunals.

(vi) Industrial Tribunals.

(vii) National Tribunal.

(i) Works Committee

Section 3 of the Act provides that the appropriate Government may by general or special order require the employer to constitute in the prescribed manner a Works Committee in industrial establishments, where 100 or

more workmen are employed or have been employed on any working day in the preceding 12 months. The Works Committee will be comprised of the representatives of employers and workmen engaged in the establishment.

It shall be the duty of the Works Committee to promote measures for securing and preserving amity and good relations between the employer and workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters [Section 3(2)].

(ii) Conciliation Officers

With the duty of mediating in and promoting the settlement of industrial disputes, the appropriate Government may, by notification in the Official Gazette, appoint such number of Conciliation Officers as it thinks fit. The Conciliation Officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period. The main objective of appointing the Conciliation Officers, by the appropriate Government, is to create congenial atmosphere within the establishment where workers and employers can reconcile on their disputes through the mediation of the Conciliation Officers. Thus, they help in promoting the settlement of the disputes. (Section 4)

(iii) Boards of Conciliation

For promoting the settlement of an industrial dispute, the appropriate Government may, as occasion arises, constitute by a notification in the Official Gazette, a Board of Conciliation. A Board shall consist of a Chairman and two or four other members as the appropriate Government thinks fit.

It shall be the duty of Board to endeavour to bring about a settlement of the dispute and for such purpose it shall, without delay, investigate into the dispute and all matters affecting the merits and the right settlement. The Board may also do all such things which may be considered fit by it, for including the parties to come for a fair and amicable settlement of the dispute. In case of settlement of the dispute, the Board shall send a report thereof to the appropriate Government together with a memorandum of settlement signed by all the parties to the dispute. In case no settlement is arrived at, the Board shall forward a report to appropriate Government enlisting therein the steps taken by the Board for ascertaining the facts and circumstances related to the dispute and for bringing about a settlement thereof. The Board will also enlist the reasons on account of which in its opinion a settlement could not be arrived at and its recommendations for determining the disputes. (Section 5)

(iv) Courts of Inquiry

According to Section 6 of the Act, the appropriate Government may as occasion arises, by notification in the Official Gazette constitute a Court of Inquiry into any matter appearing to be connected with or relevant to an industrial dispute. A Court may consist of one independent person or of such number of independent persons as the appropriate Goverment may think fit and where a Court consists of two or more members, one of them shall be appointed as the Chairman. It is the duty of such a Court to inquire into matters referred to it and submit its report to the appropriate Government ordinarily within a period of six months from the commencement of the inquiry. The period within which the report is to be submitted is not mandatory and the report may be submitted even beyond the period of six months without affecting the legality of the inquiry.

Test your knowledge

Choose the correct answer

Which of the following is not a designated authority for investigation and settlement of industrial disputes?

(a) Works Committee

(b) Conciliation Officers

(c) Labour Courts

(d) Dispute Tribunal

Correct answer: (d)

(v) Labour Courts

Under Section 7, the appropriate Goverment is empowered to constitute one or more Labour Courts for adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under the Act.

A Labour Court shall consist of one person only to be appointed by the appropriate Government.

A person shall not be qualified for appointment as the presiding officer of a Labour Court unless –

(a) he is, or has been, a judge of a High Court: or

(b) he has, for a period not less than three years, been a district Judge or an Additional District Judge; or

(c) he has held any judicial office in India for not less than seven years; or

(d) he has been the presiding officer of a Labour Court constituted under any provincial Act or State Act for not less than five years.

When an industrial dispute has been referred to a Labour Court for adjudication, it is the duty of the Labour Court to (i) hold its proceedings expeditiously, and (ii) submit its award to the appropriate Government soon after the conclusion of the proceedings. No time period has been laid down for the completion of proceedings but it is expected that such Courts will hold their proceedings without going into the technicalities of a Civil Court. Labour Court has no power to permit *suo motu* the management to avail the opportunity of adducing fresh evidence in support of charges (1998 Lab 1C 540 AP).

Provisions of Article 137 of the Limitation Act do not apply to reference of dispute to the Labour Court. In case of delays, Court can mould relief by refusing back wages or directing payment of past wages (1999 LAB 1C SC 1435).

(vi) Tribunals

(1) The appropriate Goverment may by notification in the Official Gazette, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter whether specified in the Second Schedule or the Third Schedule and for performing such other functions as may be assigned to them under this Act.

(2) A Tribunal shall consist of one person only to be appointed by the appropriate Government.

(3) A person shall not be qualified for appointment as the presiding officer of a Tribunal unless:

(a) he is, or has been, a Judge of High Court; or

(b) he has, for a period of not less than three years, been a District Judges or an Additional District Judge.

(4) The appropriate Government may, if it so thinks fit, appoint two persons as assessors to advise the Tribunal in the proceedings before it.

Further, the person appointed as a Presiding Officer should be an independent person and must not have attained the age of 65 years. (Section 7-A)

The Industrial Tribunal gets its jurisdiction on a reference by the appropriate Government under Section 10. The Government can nominate a person to constitute a Tribunal for adjudication of industrial disputes as and when they arise and refer them to it. The Tribunal may be constituted for any limited or for a particular case or area. If appointed for a limited period, it ceases to function after the expiry of the term even when some matters are still pending (*J.B. Mangharam & Co.* v. *Kher,* A.I.R. 1956 M.B.113).

Further, when a Tribunal concludes its work and submits its award to the appropriate Government, it does not extinguish the authority of the Tribunal nor does it render the Tribunal *functus officio*. The Government can refer to it for clarification on any matter related to a prior award (*G. Claridge & Co. Ltd*. v. *Industrial Tribunal,* A.I.R. 1950 Bom.100).

The duties of Industrial Tribunal are identical with the duties of Labour Court, i.e., on a reference of any industrial dispute, the Tribunal shall hold its proceedings expeditiously and submit its award to the appropriate Government.

(vii) National Tribunals

(1) Under Section 7-B, the Central Government alone has been empowered to constitute one or more National Tribunals for the adjudication of industrial disputes which (a) involve questions of national importance or (b) are of such a nature that industrial establishments situated in more than one State are likely to be interested in or affected by such disputes.

(2) A National Tribunal shall consist of one person only to be appointed by the Central Government.

(3) A person shall not be qualified for appointment as the Presiding Officer of a National Tribunal unless: he is, or has been, a Judge of a High Court; or

(4) The Central Government may, if it so thinks fit, appoint two persons as assessors to advise the National Tribunal in the proceeding before it.

Section 7-C further provides that such a presiding officer should be an independent person and must not have attained the age of 65 years.

Duties

When a matter has been referred to a National Tribunal, it must adjudicate the dispute expeditiously and submit its award to the Central Government. (Section 15)

REFERENCE OF DISPUTES

The adjudication of industrial disputes by Conciliation Board, Labour Court, Court of Inquiry, Industrial Tribunal or National Tribunal can take place when a reference to this effect has been made by the appropriate Government under Section 10. The various provisions contained in this lengthy Section are summed up below:

(A) Reference of disputes to various Authorities

Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing make a reference to various authorities in the following ways:

(a) It may refer the dispute to a Conciliation Board for promoting the settlement of the dispute. As noted earlier, duty of the Board is to promote settlement and not to adjudicate the dispute. A failure report of the Board will help the Government to make up its mind as to whether the dispute can be referred for compulsory adjudication. Further, any matter appearing to be connected with or relevant to the dispute

cannot be referred to a Conciliation Board (*Nirma Textile Finishing Mills Ltd.* v. *Second Tribunal,* Punjab 1957 I L.L.J. 460 S.C.).

(b) It may refer any matter appearing to be connected with or relevant to the dispute to a Court of Inquiry. The purpose of making such a reference is not conciliatory or adjudicatory but only investigatory.

(c) It may refer the dispute, or any matter appearing to be connected with, or relevant to, the dispute if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication. However, disputes relating to any matter falling in the Third Schedule can also be referred to a Labour Court, if the appropriate Government so thinks fit provided the dispute is not likely to affect more than 100 workmen.

(d) It may refer the dispute or any matter appearing to be connected with, or relevant to the dispute specified in the Second or Third Schedule, to an Industrial Tribunal for adjudication. [Section 10(1)]

Under the second proviso to Section 10(1), where the dispute relates to a public utility service and a notice of strike or lock-out under Section 22 has been given, it is mandatory for the appropriate Government or the Central Government as the case may be, to make a reference even when some proceedings under the Act are pending in respect of the dispute. But the Government may refuse to make the reference if it considers that (i) notice of strike/lock-out has been frivolously or vexatiously given, or (ii) it would be inexpedient to make the reference. If the Government comes to a conclusion and forms an opinion which is vitiated by *mala fide* or biased or irrelevant or extraneous considerations, then the decision of the Government will be open to judicial review.

Where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court (Labour Court, Tribunal or National Tribunal), the appropriate Government, if satisfied that the person applying represent the majority of each party, shall make the reference accordingly.

The Industrial Disputes Act provides for no appeal or revision as against the awards so made nor any such remedy is specifically provided for by any other statute or statutory provision though no doubt the Supreme Court in its discretion may under Article 136 of the Constitution of India, grant special leave to a party aggrieved by such an award to appeal to the Supreme Court against an award so made (1978-II Labour Law Journal, Cal.).

Section 10(1) providing for the powers of appropriate Government to make a reference, has been the favoured subject of judicial interpretation. The various observations made in the course of judicial interpretation of Section 10(1) are summarised below:

(i) The order making a reference is an administrative act and it is not a judicial or quasi-judicial act (*State of Madras* v. *C.P. Sarathy,* (1953) I L.L.J. 174 SC). It is because the Government cannot go into the merits of the dispute. Its duty is only to refer the dispute for the adjudication of the authority so that the dispute is settled at an early date.

(ii) The powers of the appropriate Government to make a reference is discretionary but within narrow limits it is open to judicial review.

(iii) Ordinarily the Government cannot be compelled to make a reference. But in such a situation the Government must give reasons under Section 12(5) of the Act. If the Court is satisfied that the reasons given by the Government for refusing to the issue, the Government can be compelled to reconsider its decision by a writ of Mandamus (*State of Bombay* v. *K.P. Krishnan,* A.I.R. 1960 S.C. 1223). The appropriate government is not bound to refer belated claims (1994 I LLN 538 P&H DB).

(iv) In the case of *Western India Match Co. Ltd.* v. *Workmen,* it was held that it is not mandatory for the appropriate Government to wait for the outcome of the conciliation proceedings before making an order of reference. The expression “the appropriate Government at any time may refer” takes effect in such

cases where the Government decides to make a reference without waiting for concilliation proceedings to begin or to be completed.

(v) Refusal of the Government to refer the dispute for adjudication does not debar it from making subsequent reference. It at one stage the appropriate Government had come to the conclusion that no reference was called for in the interest of industrial peace, there is nothing in the Act, which bars it from re-examining the matter, whether in the light of fresh material or otherwise, and from making a reference if it comes to the conclusion that a reference is justified and it is expedient in the interest of industrial peace to make such reference (*Western India Match Co. Ltd*. v. *Workers Union*).

(vi) The appropriate Government has no power either expressly or impliedly to cancel, withdraw or supersede any matter referred for adjudication. However, it is empowered to add to or amplify a matter already referred for adjudication (*State of Bihar* v. *D.N. Ganguli,* 1958-II L.L.J. 634 S.C.). The Government is competent to correct clerical error (*Dabur Ltd.* v. *Workmen,* A.I.R. 1968 S.C. 17). Even the Government can refer a dispute already pending before a Tribunal, afresh to another Tribunal, if the former Tribunal has ceased to exist. Now under Section 33-B the Government is empowered to transfer any dispute from one Tribunal to another Tribunal.

(vii) If reference to dispute is made in general terms and disputes are not particularised, the reference will not become bad provided the dispute in question can be gathered by Tribunal from reference and surrounding facts (*State of Madras* v. *C.P. Sarthy*. Also see *Hotel Imperial, New Delhi.* v. *The Chief Commissioner, Delhi*).

(viii) The appropriate Government can decide, before making a reference, the *prima facie* case, but it cannot decide the issue on merits (*Bombay Union of Journalists* v. *State of Bombay,* (1964) 1 L.L.J., 351 SC).

(B) Reference of dispute to National Tribunal involving question of importance, etc.

According to Section 10(1-A), where the Central Government is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by such dispute and that the dispute should be adjudicated by a National Tribunal, then, the Central Government may, whether or not it is the appropriate Government in relation to that dispute, at any time, by order in writing, refer the dispute or any matter appearing to be connected with, or relevant to the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a National Tribunal, and accordingly.

(a) If the matter under adjudication before the National Tribunal is pending in a proceeding before a Labour Court or Tribunal, the proceeding before the Labour Court or the Tribunal, as the case may be in so far as it relates to such matter, shall be deemed to have been quashed on such reference to the National Tribunal; and

(b) It shall not be lawful for the appropriate Government to refer the matter under adjudication before the National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of the proceeding in relation to such matter before the National Tribunal. [Section 10(1-A) and 10(5)]

In this sub-section, “Labour Court” or “Tribunal” includes any Court or other authority constituted under any law relating to investigation and settlement of industrial disputes in force in any State.

(C) Reference on application of parties

According to Section 10(2), where the parties to an industrial disputes apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court, Labour Court, Tribunal or National Tribunal, the appropriate Government, if satisfied that the persons applying represent the majority of each party, shall make the reference accordingly and shall specify the time limit (not exceeding three months) to submit the award, such time limit may be extended if required.

Thus, it is mandatory for the Government to make a reference if (i) application to this effect has been made by the parties to the dispute, and (ii) the applicants represent the majority of each party to the satisfaction of the appropriate Government. (*Poona Labour Union* v. *State of Maharashtra,* (1969) II L.L.J.291 Bombay). The Government cannot, before making reference, go into the question of whether any industrial dispute exists or is apprehended.

(D) Time limit for submission of awards

According to Section 10(2A) an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal shall specify the period within which its award shall be submitted to the appropriate Government. The idea is to expedite the proceedings. Sub-section (2A) reads as follows:

"An order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this Section shall specify the period within which such Labour Court, Tribunal or National Tribunal shall submit its award on such dispute to the appropriate Government.

Provided that where such dispute is connected with an individual workman, no such period shall exceed three months:

Provided further that where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, to the Labour Court, Tribunal or National Tribunal for extension of such period or for any other reason, and the presiding officer of such Labour Court, Tribunal or National Tribunal considers it necessary or expedient to extend such period, he may for reasons to be recorded in writing, extend such period by such further period as he may think fit:

Provided also that in computing any period specified in this sub-section, the period, if any, for which the proceedings before the Labour Court, Tribunal or National Tribunal had been stayed by any injunction or order of a Civil Court shall be excluded:

Provided also that no proceedings before a Labour Court, Tribunal or National Tribunal shall lapse merely on the ground that any period specified under this sub-section had expired without such proceedings being completed".

(E) Prohibition of strike or lock-out

Where an industrial dispute has been referred to a Board, Labour Court, Tribunal or National Tribunal under this Section, the appropriate Government may by order prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference. [Section 10(3)]

It is necessary that the Government makes an order prohibiting strike or lock out. If no order is made, continuance of strike or lock-out is not illegal. Further, once the order prohibiting strike or lock-out is made, the mere fact that strike was on a matter not covered by the reference, is immaterial (*Keventers Karamchari Sangh* v. *Lt. Governor, Delhi,* (1971) II L.L.J. 525 Delhi).

The only requirement for taking action under Section 10(1) is that there must be some material before the Government which will enable the appropriate Government to form an opinion that an industrial dispute exists or is apprehended. This is an administrative function of the Government as the expression is understood in contradiction to judicial or quasi-judicial function. Merely because the Government rejects a request for a reference or declines to make a reference, it cannot be said that the industrial dispute has ceased to exist, nor could it be said to be a review of any judicial or quasi-judicial order or determination. The industrial dispute may nevertheless continue to remain in existence and if at a subsequent stage the appropriate Government is satisfied that in the interest of industrial peace and for promoting industrial harmony it is desirable to make a reference, the appropriate Government does not lack power to do so under Section 10(1) nor is it precluded from making a reference on the only ground that on an earlier occasion, it had declined to make the reference.

(F) Subject-matter of adjudication

Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this

Section or in a subsequent order, the appropriate Goverment has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto. [Section 10(4)]

(G) Powers of the Government to add parties

Where a dispute concerning any establishment of establishments has been, or is to be, referred to a Labour Court, Tribunal or National Tribunal under this Section and the appropriate Government is of opinion, whether on an application made to it in this behalf or otherwise, that the dispute is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in, or affected by, such dispute, the appropriate Government may, at the time of making the reference or at any time thereafter but before the submission of the award, include in that reference such establishment, group or class of establishments, whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments. [Section 10(5)]

VOLUNTARY REFERENCE OF DISPUTES TO ARBITRATION

Section 10-A provides for the settlement of industrial disputes by voluntary reference of such dispute to arbitrators. To achieve this purpose, Section 10-A makes the following provisions:

(i) Where any industrial dispute exists or is apprehended and the same has not yet been referred for adjudication to a Labour Court, Tribunal or National Tribunal, the employer and the workmen may refer the dispute, by a written agreement, to arbitration specifying the arbitrator or arbitrators. The presiding officer of a Labour Court or Tribunal or National Tribunal can also be named by the parties as arbitrator.

Where an arbitration agreement provides for a reference of the dispute to an even number of arbitrators, the agreement shall provide for the appointment of another person as umpire who shall enter upon the reference, if the arbitrators are equally divided in their opinion, and the award of the umpire shall prevail and shall be deemed to be the arbitration award for the purposes of this Act.

(ii) An arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

(iii) A copy of the arbitration agreement shall be forwarded to appropriate Government and the Conciliation Officer and the appropriate Government shall within one month from the date of the receipt of such copy, publish the same in the Official Gazette.

According to Section 10-A(3A), where an industrial dispute has been referred to arbitration and the appropriate Government is satisfied that the persons making the reference represent the majority of each party, the appropriate Government may, within the time referred above, issue a notification in such manner as may be prescribed; and when any such notification is issued, the employer and workmen who are not parties to the arbitration agreement but are concerned in the dispute, shall be given an opportunity of presenting their case before the arbitrator or arbitrators.

(iv) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all arbitrators, as the case may be.

(v) Where an industrial dispute has been referred to arbitration and a notification has been issued, the appropriate Government may, by order, prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference.

(vi) Nothing in the Arbitration Act, 1940 shall apply to arbitrations under this Section.

PROCEDURE AND POWERS OF AUTHORITIES

Section 11 provides that

(1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.

(2) A Conciliation Officer or a member of a Board or Court or the Presiding Officer of a Labour Court, Tribunal or National Tribunal may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.

(3) Every Board, Court, Labour Court, Tribunal and National Tribunal shall have the same powers as are vested in Civil Court under the Code of Civil Procedure, 1908 when trying a suit, in respect of the following maters, namely:

(a) enforcing the attendance of any person and examining him on oath;

(b) compelling the production of documents and material objects;

(c) issuing commissions for the examination of witnesses;

(d) in respect of such other matters as may be prescribed.

Further, every inquiry or investigation by such an authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code.

(4) A Conciliation Officer may enforce the attendance of any person for the purpose of examination of such person or call for and inspect any document which he has ground for considering to be relevant to the industrial dispute or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under this Act, and for the aforesaid purposes, the Conciliation Officer shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect of enforcing the attendance or compelling the production of documents.

(5) A Court, Labour Court, Tribunal or National Tribunal may, if it so thinks fit, appoint one or more persons having special knowledge of the matter under consideration, as assessor or assessors to advise it in the proceeding before it.

(6) All Conciliation Officers, members of a Board or Court and the Presiding Officers of a Labour Court, Tribunal or National Tribunal shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

(7) Subject to any rules made under this Act, the costs of, and incidental to, any proceeding before a Labour Court, Tribunal or National Tribunal shall be in the discretion of that Labour Court, Tribunal or National Tribunal and the Labour Court Tribunal or National Tribunal, as the case may be, shall have full power to determine by and to whom and to what extent and subject to what conditions, if any, such costs are to be paid, and to give all necessary directions for the purposes aforesaid and such costs may, on application made to the appropriate Government by the person entitled, be recovered by that Government in the same manner as an arrear of land revenue.

(8) Every Labour Court, Tribunal or National Tribunal shall be deemed to be Civil Court for the purposes of Section 345, 316 and 348 of the Code of Criminal Procedure, 1973.

Thus, we see that Section 11(1) gives wide powers to various authorities. However, power to lay-down its own procedure is subject to rules made by the appropriate Government. The Industrial Disputes (Central) Rules, 1957 has prescribed a detailed procedure which these authorities are required to follow. (See Rules 9 to 30). The authorities are not bound to follow the rules laid down in Civil Procedure Code, 1908 or the Indian Evidence Act. However, being quasi-judicial bodies, they should use their discretion in a judicial manner without caprice and act according to the general principles of law and rules of natural justice.

Powers to give appropriate relief in case of discharge or dismissal

According to Section 11-A, where an industrial dispute relating to the discharge or dismissal of a workman has

been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

According to the proviso to Section 11-A, in any proceeding under this Section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take fresh evidence in relation to the matter.

Before the enactment of Section 11-A, there was no provision circumscribing the perimeter of the jurisdiction of the Tribunal to interfere with the disciplinary action of discharge or dismissal for misconduct taken by an employer against an industrial workman.

In *Indian Iron and Steel Co. Ltd.* v. *Their Workmen*, (1958) I LLJ. 260, the Supreme Court, while considering the Tribunal's power to interfere with the managements decision to dismiss, discharge or terminate the service of a workman, has observed that in cases of dismissal for misconduct the Tribunal does not act as a Court of appeal and substitute its own judgement for that of the management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc., on the part of the management.

The above Section has no relevance to punishments other than dismissal or discharge (*Rajasthan SRTC* v. *Labour Court,* (1994)1LLJ 542).

STRIKES AND LOCK-OUTS

Strikes and lock-outs are the two weapons in the hands of workers and employers respectively, which they can use to press their viewpoints in the process of collective bargaining. The Industrial Disputes Act, 1947 does not grant an unrestricted right of strike or lock-out. Under Section 10(3) and Section 10A(4A), the Government is empowered to issue order for prohibiting continuance of strike or lock-out. Sections 22 and 23 make further provisions restricting the commencement of strikes and lock-outs.

(i) General prohibition of strikes and lock-outs

No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out:

(a) during the pendency of conciliation proceedings before a Board and seven days the conclusion of such proceedings;

(b) during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal and two months after the conclusion of such proceedings;

(bb) during the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a notification has been issued under sub-section (3A) of Section 10A; or

(c) during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award. (Section 23)

The purpose of above provisions is to ensure peaceful atmosphere during the pendency of any proceeding before a Conciliation Officer, Labour Court, Tribunal or National Tribunal or Arbitrator under Section 10A.

(ii) Prohibition of strikes and lock-outs in public utility service

The abovementioned restrictions on strikes and lock-outs are applicable to both utility services and non-utility

services. Section 22 provides for following additional safeguards for the smooth and uninterrupted running of public utility services and to obviate the possibility of inconvenience to the general public and society (*State of Bihar* v. *Deodar Jha,* AIR 1958 Pat. 51).

(1) No person employed in a public utility service shall go on strike in breach of contract.

(a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking, i.e., from the date of the notice to the date of strike a period of six weeks should not have elapsed; or

(b) within 14 days of giving of such notice, i.e., a period of 14 days must have elapsed from the date of notice to the date of strike; or

(c) before the expiry of the date of strike specified in any such notice as aforesaid, i.e., the date specified in the notice must have expired on the day of striking; or

(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conciliation of such proceedings.

(2) No employer carrying on any public utility service shall lock-out any of his workmen:

(a) without giving them notice of lock-out as hereinafter provided within six weeks before locking-out; or

(b) within 14 days of giving such notice; or

(c) before the expiry of the date of lock-out specified in any such notice as aforesaid; or

(d) during the pendency of any conciliation proceedings before a Conciliation Officer and 7 days after the conciliation of such proceedings.

Right to Strike is to be exercised after complying with certain conditions regarding service of notice and also after exhausting intermediate and salutary remedy of conciliation proceedings (*Dharam Singh Rajput* v. *Bank of India, Bombay,* 1979 Lab. I.C. 1079).

The Act nowhere contemplates that a dispute would come into existence in any particular or specified manner. For coming into existence of an industrial dispute, a written demand is not a *sine qua non* unless of course in the case of public utility service because Section 22 forbids going on strike without giving a strike notice (1978-I Labour Law Journal 484 SC).

(3) The notice of lock-out or strike under this Section shall not be necessary where there is already in existence a strike or, as the case may be, lock-out in the public utility service, but the employer shall send intimation of such lock-out or strike on the day on which it is declared, to such authority as may be specified by the appropriate Government either generally or for a particular area or for a particular class of public utility services.

(4) The notice of strike referred to in Section 22(1) shall be given by such number of persons to such person or persons and in such manner as may be prescribed.

(5) The notice of lock-out referred to in Section 22(2) shall be given in such manner as may be prescribed.

(6) If on any day an employer receives from any persons employed by him any such notices as are referred to in sub-section (1) or gives to any persons employed by him any such notices as are referred to in sub-section (2), he shall within five days thereof report to the appropriate Government or to such authority as that Government may prescribe the number of such notices received or given on that day. (Section 22)

Test your knowledge

State whether the following statement is "True" or "False"

No person employed in a public utility service shall go on strike without giving to the employer a notice of strike, within five weeks before striking.

- True
- False

Correct Answer: False

(iii) Illegal strikes and lock-outs

(1) A strike or lock-out shall be illegal if:

(i) it is commenced or declared in contravention of Section 22 or Section 23; or

(ii) It is continued in contravention of an order made under Section 10(3) or Section 10A(4A).

(2) Where a strike or lock-out in pursuance of an industrial dispute has already commenced and is in existence at the time of reference of the dispute to a Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, the continuance of such strike or lock-out shall not be deemed to be illegal, provided that such strike or lock-out was not at its commencement in contravention of the provisions of this Act or the continuance thereof was not prohibited under Section 10(3) or Section 10A(4A).

(3) A lock-out declared in consequence of an illegal strike or strike declared in consequence of an illegal lock-out shall not be deemed to be illegal. (Section 24)

No person shall knowingly expend or apply any money in direct furtherance or support of any illegal strike or lock-out (Section 25).

JUSTIFIED AND UNJUSTIFIED STRIKES

If a strike is in contravention of the above provisions, it is an illegal strike. Since strike is the essence of collective bargaining, if workers resort to strike to press for their legitimate rights, then it is justified. Whether strike is justified or unjustified will depend upon the fairness and reasonableness of the demands of workers**.**

In the case of *Chandramalai Estate* v. *Its Workmen*, (1960) II L.L.J. 243 (S.C.), the Supreme Court observed: "While on the one hand it be remembered that strike is a legitimate and sometimes unavoidable weapon in the hands of labour, it is equally important to remember that indiscriminate and hasty use of this weapon should not be encouraged. It will not be right for labour to think that for any kind of demand a strike can be commenced with impunity without exhausting reasonable avenues for peaceful achievement of their objects. There may be cases where the demand is of such an urgent and serious nature that it would not be reasonable to expect labour to wait till after asking the Government to make a reference. In such cases, strike even before such a request has been made, will be justified".

Thus, if workmen go on strike without contravening statutory requirements, in support of their demands, the strike will be justified. In the beginning strike was justified but later on workmen indulged in violence, it will become unjustified.

In the case of *Indian General Navigation and Rly. Co. Ltd.* v. *Their Workmen,* (1960) I L.L.J. 13, the Supreme Court held that the law has made a distinction between a strike which is illegal and one which is not, but it has not made distinction between an illegal strike which may be said to be justifiable and one which is not justifiable.

This distinction is not warranted by the Act and is wholly misconceived, specially in the case of employees in a public utility service. Therefore, an illegal strike is always unjustified.

It is well settled that in order to entitle the workmen to wages for the period of strike, strike should be legal as well as justified. A strike is legal if it does not violate any provision of the statute. Again a strike cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. Whether a particular strike is justified or not is a question of fact which has to be judged in the light of the facts and circumstances of each case, it is also well settled that the use of force or violence or acts of sabotage resorted to by the workmen during a strike disentitled them to wages for the strike period (*Crompton Greaves Limited* v. *Workmen,* 1978 Lab. I.C. 1379).

Where pending an industrial dispute the workers went on strike the strike thus being illegal, the lock-out that followed becomes legal, a defensive measure (1976-I Labour Law Journal, 484 SC).

Test your knowledge

State whether the following statement is "True" or "False"

A lock-out declared in consequence of an illegal strike or strike declared in consequence of an illegal lock-out shall not be deemed to be illegal.

- True
- False

Correct answer: True

WAGES FOR STRIKE PERIOD

The payment of wages for the strike period will depend upon whether the strike is justified or unjustified. This also depends upon several factors such as service conditions of workman, the cause which led to strike, the urgency of cause or demand of workman, the reason for not resorting to dispute settlement machinery under the Act or service rules/regulations etc. (1994-SCC-1197). No wages are payable if the strike is illegal or it is unjustified. Further, if the workers indulge in violence, no wages will be paid even when their strike was legal and justified (*Dum Dum Aluminium Workers Union* v. *Aluminium Mfg. Co.).* The workmen must not take any hasty steps in resorting to strike. They must, first take steps to settle the dispute through conciliation or adjudication except when the matter is urgent and of serious nature. Thus, in *Chandramalai Estate* v. *Workmen,* it was observed that when workmen might well have waited for some time, after conciliation efforts had failed, before starting a strike, and in the mean time could have asked the Government to make a reference, the strike would be unjustified and the workmen would not be entitled to wages for the strike period.

In the case of *Crompton Greaves Ltd.* v. *The Workmen,* AIR 1978 S.C. 1489, it was observed that for entitlement of wages for the strike period, the strike should be legal and justified. Reiterating this position, the Court held in Syndicate Bank v. Umesh Nayak (1994 SCC 1197) that where the strike is legal but at the same time unjustified, the workers are not entitled for wages for the strike period. It cannot be unjustified unless reasons for it are entirely preverse or unreasonable. The use of force, violence or acts of sabotage by workmen during the strike period will not entitle them for wages for the strike period.

Supreme Court in *Bank of India* v. *T.S. Kelawala* (1990 II LLJ S.C. 39) decided, that where employees are going on a strike for a portion of the day or for whole day and there was no provision in the contract of employment or service rules or regulations for deducting wages for the period for which the employees refused to work although work was offered to them, and such deduction is not covered by any other provision, employer is entitled to deduct wages proportionately for the period of absence or for the whole day depending upon the circumstances.

DISMISSAL OF WORKMEN AND ILLEGAL STRIKE

If workers participate in an illegal strike, the employer is within his right to dismiss the striking workmen on ground of misconduct. For this it is necessary that a proper and regular domestic enquiry is held. In the case of *Indian General Navigation and Rly. Co*. v. *Their Workmen*, the Supreme Court laid down the general rule that mere taking part in an illegal strike without anything further would not necessarily justify the dismissal of all workmen taking part in the strike and that it was necessary to hold a regular inquiry after furnishing charge-sheet to each of the workman sought to be dealt with for his participation in the strike. It was further observed, that because workmen go on strike, it does not justify the management in terminating their services. In any case if allegations of misconduct have been made against them, those allegations have to be enquired into by charging them with specific acts of misconduct and giving them an opportunity to defend themselves at the enquiry. In the case of *Express Newspaper (P) Ltd.* v. *Michael Mark,* (1962) II L.L.J. 220 (S.C.), the Supreme Court held that where the workmen who had participated in an illegal strike, did not join their duties which resulted in their dismissal under the Standing Orders, participation in strike means that they have abandoned their employment. However, the employer can take disciplinary action against the employees under the Standing Orders and dismiss them.

Further, the quantum of punishment should depend upon the extent of involvement in the strike. Those who are guilty of violence, encourage other workers to join an illegal strike and physically obstruct the loyal workers from joining their duties, they can be dismissed from their service. But dismissal of peaceful strikers who merely acted as dumb-driven cattle cannot be justified. The question of punishment has to be considered by the industrial adjudication keeping in view the overriding consideration of the full and efficient working of the industry as a whole.

However, the Supreme Court in an unprecedented judgement in *T.K. Rangarajan* v. *Government of Tamil Nadu and Others*, (2003) 6 SCC 581: 2003-III-LLJ-275 held that the government employees have no fundamental right, statutory or equitable or moral to resort to strike and they can not take the society at ransom by going on strike, even if there is injustice to some extent.

The Apex Court went to observe that strike as a weapon is mostly used which results in chaos and total mal administration. The judgement has evoked a lively debate for and against the proposition.

The Supreme Court has agreed to hear a petition seeking review of its judgement banning strike by all government employees and it is expected that the inconsistencies in the judgement are likely to be resolved.

Test your knowledge

State whether the following statement is "True" or "False"

The payment of wages for the strike period will not depend upon whether the strike is justified or unjustified

- True
- False

Correct answer: False

JUSTIFICATION OF LOCK-OUT AND WAGES FOR LOCK-OUT PERIOD

A lock-out in violation of the statutory requirements is illegal and unjustified and workers are entitled to wages for

the lock- out period. For legal lock-out, no wages are payable to workmen. But where the lock-out, though legal is declared with the ulterior motive of victimisation of workmen or has been continued for unreasonable period of time, it is unjustified and the workmen are entitled to wages. In *Lord Krishna Sugar Mills Ltd.* v. *State of U.P.* (1964) II L.L.J. 76 (All), it was observed that locking-out the workmen without any prior notice to them and as a retaliatory measure to terrorise them, is illegal or unjustified. Where illegal or unjustified strike is followed by an unjustified lock out, the wages for lock-out period will depend upon the extent of blame for each others act (*India Marine Services (P) Ltd.* v. *Their Workmen*, (1963) I L.L.J. 122 S.C.).

CHANGE IN CONDITIONS OF SERVICE

(1) Change in service conditions when no proceedings are pending before Labour Court/Tribunal etc.

Notice of change: Section 9A of the Industrial Disputes Act, 1947 lays down that any employer who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in Schedule IV (given in the end of this study) is required to follow the procedure laid down in Section 9A of the Act.

According to Section 9A, the workmen likely to be affected by the proposed changes are to be given a notice in the prescribed manner. No change can be made within 21 days of giving such notice. However, no notice is required for effecting any such change when it is in pursuance of any settlement or award. These provisions are wholly inapplicable to any alleged right to work relief for office bearers of trade unions. No such right is recognised under provisions of the Act (LLJ II 1998 Mad. 26).

According to Section 9B, where the appropriate Government is of opinion that the application of the provisions of Section 9A to any class of industrial establishments or to any class of workmen employed in any industrial establishment affect the employers in relation thereto so prejudicially that such application may cause serious repercussion on the industry concerned and that public interest so requires, the appropriate Government may, by notification in the Official Gazette, direct that the provisions of the said Section shall not apply or shall apply, subject to such conditions as may be specified in the notification, to that class of industrial establishments or to that class of the workmen employed in any industrial establishment.

(2) Change in conditions of service during pendency of proceedings

Section 33 prohibits the employer from bringing any change, to the prejudice of any workman, in the conditions of service in respect of any matter connected with the dispute which is pending before a Conciliation Officer, or Conciliation Board or an Arbitrator or Labour Court or Tribunal or National Tribunal. The purpose of such a prohibition is to protect the workmen concerned, during the pendency of proceedings against employers harassment and victimisation on account of their having raised the industrial dispute of their continuing the pending proceedings. This Section also seeks to maintain status quo by prescribing management conduct which may give rise to fresh dispute which further exacerbate the already strained relations between the employer and the workmen (*Automobile Products of India Ltd*. v. *Rukmaji Bala* AIR 1955 SC 258). Thus ordinary right of the employer to alter the terms of his employees service to their prejudice or to terminate their services under the general law governing the contract of employment, has been banned subject to certain conditions. However, under Section 3, employer is free of deal with employees when the action against the concerned workman is not punitive or *mala fide* or does not amount to victimisation or unfair labour practice (*Air India Corporation* v. *A. Rebello,* 1972-I L.L.J. 501 S.C.). A detailed study of Section 33 will further clarify that aspect.

According to Section 33(1), during the pendency of any proceedings before Conciliation Officer or a Board, or an Arbitrator, or a Labour Court or Tribunal or National Tribunal, in respect of an industrial dispute, the employer is prohibited from taking following actions against the workmen, except with the express permission in writing of the authority before which the proceedings are pending.

(a) to alter in regard to any matter connected with the dispute to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings.

(b) to discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute for any misconduct connected with the dispute".

From the above provisions, it is clear that prohibition on the employer is not absolute. He can make changes in the conditions of service provided he has obtained, before effecting any change, permission in writing of the authority before which the proceedings are pending. Further, alterations in the conditions of services should be to the prejudice of a workman. Transfer of a workman from one department is an ordinary incidence of service and therefore, does not amount to alteration or the prejudice of a workman, even when transfer amounts to reduction in earning due to reduced over-time wages.

In the case of *Bhavanagar Municipality* v. *Alibhai Karimbhai*, AIR 1977 S.C. 1229, the Supreme Court laid down the following essential features of Section 33(1)(a):

(i) the proceedings in respect of industrial dispute should be pending before the Tribunal;

(ii) conditions of service immediately before the commencement of Tribunal proceedings should have been altered;

(iii) alteration is in regard to a matter connected with the pending industrial dispute;

(iv) workmen whose conditions of service have been altered are concerned in the industrial dispute;

(v) alteration is to the prejudice of the workmen.

Change in condition of service – When permissible

Section 33(1) prohibits the employer from changing, during the pendency of proceedings, the conditions of service relating to matter connected with the dispute. Employers were prevented from taking action even in obvious cases of misconduct and indiscipline unconnected with the dispute. To overcome this difficulty, Section 33(2) makes the following provisions:

(i) During the pendency of any such proceedings in respect of an industrial dispute, the employer is permitted to take following actions, in accordance with the standing orders applicable to workmen concerned in such disputes or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman:

  (a) to alter, in regard to 'any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceedings.

  (b) to discharge or punish, whether by dismissal or otherwise, that workman for any misconduct not connected with the dispute.

(ii) According to proviso to Section 33(2), no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceedings are pending for approval of the action taken by the employer.

According to Section 33(5), where an employer makes an application to a Conciliation Officer, Board, an Arbitrator, a Labour Court, Tribunal or National Tribunal under the above proviso for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass within a period of three months from the date of receipt of such application, such order in relation thereto as it deems fit (unless extended on reasonable grounds).

Thus, the stringency of the previous provision is ought to be softened by permitting the employer to take action against the workmen in accordance with the standing orders applicable to them during the pendency of proceedings in regard to any matter unconnected with the dispute by the present Section 33(2).

In cases falling under sub-section (2), the employer is required to satisfy the specified conditions, but he need not necessarily obtain the previous consent in writing before he takes any action. The ban imposed by Section

33(2) is not as rigid or rigorous as that imposed by Section 3(1). The jurisdiction to give or withhold permission is *prima facie* wider than the jurisdiction to give or withhold approval. In dealing with cases falling under Section 32(2) the industrial authority will be entitled to enquire whether the proposed action is in accordance with the standing orders, whether the employer concerned has been paid wages for one month, and whether an application has been made for approval as prescribed by the said sub-section. It is obvious that in case of alteration of conditions of service falling under Section 33(2)(b), no such approval is required and the right of the employer remains unaffected by any ban. Therefore, putting in negatively, the jurisdiction of the appropriate industrial authority in holding enquiry under Section 33(2)(b) cannot be wider and is, if at all, more limited, than that permitted under Section 33(1), and in exercising its powers under Section 33(2) the appropriate authority must bear in mind the departure deliberately made by the legislature in separating the two classes falling under the two sub-sections, and in providing for express permission in one case and only approval in the other". The crucial date for seeking permission of authorities to dismiss an employee is the date of dismissal and not the date of initial action (LAB IC 1998 Mad. 3422).

(3) Protected workmen and change in conditions of service, etc.

A protected workman in relation to an establishment, means a workman who, being a member of the executive or other officer bearer of a registered Trade Union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

According to Section 33(3), notwithstanding anything contained in Section 33(2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute:

(a) by altering, to the prejudice of such protected workman, the condition of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

In every establishment the number of workmen to be recognised as protected workmen for the purposes of above-stated provisions, shall be one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various Trade Unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen [Section 33(4)]. Bombay High Court in *Blue Star Ltd.* v. *Workmen,* held that a Trade Union-worker cannot enjoy the luxury of getting salary, for not doing the assigned task in the company and spending away his time in Trade Union activities exclusively. The Trade Union office bearers cannot claim any special privilege over and above ordinary workers. [Section 33(3) and (4)]

Principles governing domestic enquiry

Some important principles governing a domestic enquiry are summarised below:

(1) The enquiry should be conducted by an unbiased person, i.e., who is neither against nor in favour of a particular party. The person should not be an interested party. He should not import his own knowledge (*Associated Cement Co. Ltd.* v. *Their Workmen*). If he has himself witnessed anything, the enquiry should be held by somebody else. Thus, it should be ensured that justice is not only rendered but appear to be rendered. However, a person holding enquiry will not be held as baised merely on the ground that he receives remuneration from the employer.

(2) The enquiry officer should conduct the enquiry honestly. It should be seen that enquiry is not mere empty formalities (*Kharah & Co.* v. *Its Workmen,* AIR 1964 SC 719).

(3) The employee should be given a fair opportunity to defend himself. He should be clearly informed of the charges levelled against him. Evidence must be examined in the presence of the workman, and he should be given opportunity to cross-examine the witnesses (*Meenaglass Tea Estate* v. *Its Workmen,* AIR 1963 SC 1719). However, the enquiry officer can proceed with the enquiry if the worker refuses to participate without reasons.

(4) If any criminal proceedings, e.g., the theft, etc., are pending against any workman, the enquiry officer need not wait for the completion of those proceedings. However, he may wait for the out-come of such proceedings if the case is of grave or serious nature (*D.C.M.* v. *Kushal Bhum,* AIR 1960 SC 806).

(5) Holding out of preliminary enquiry is not mandatory or necessary. But it is desirable to find out *prima facie* reasons for the domestic enquiry.

(6) A proper procedure should be followed in conducting enquiry. If procedure is prescribed by Standing Orders, it must be followed. Normally, a worker should be informed by a notice so that he can prepare his defence. The proceedings may be adjourned at the discretion of the enquiry officer. The pleadings and other rules should not be rigid and technical. Strict rules of the Evidence Act need not be followed.

(7) The enquiry officer should clearly and precisely record his conclusions giving briefly reasons for reaching the said conclusion.

(4) Recovery of money due from an employer

Following provisions have been made in this respect:

(1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or Chapter V-B, the workman himself or any other person authorised by him in writing in this behalf, or, in the case of death of the workman his assignee or heirs may, without prejudice to any other mode of recovery make an application to the appropriate Government for the recovery of money due to him and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue.

(2) Every such application shall be made within one year from the date on which the money become due to the workman from the employer. However, any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period. However stale claim cannot be entertained unless delay is satisfactorily explained.

(3) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within three months unless extended by the Presiding Officer of a Labour Court.

(4) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case.

(5) The decision of the Labour Court shall be forwarded by it to the appropriate Government and any amount found due by the Labour Court may be recovered in the manner provided for in point (1) above.

(6) Where workmen employed under the same employer are entitled to receive from him any money or any

benefit capable of being computed in terms of money then, subject to such rules as may be made in this behalf, a single application for the recovery of the amount due may be made on behalf of or in respect of any number of such workmen. (Section 33-C)

UNFAIR LABOUR PRACTICES

A new Chapter VC relating to unfair labour practices has been inserted. Section 25T under this Chapter lays down that no employer or workman or a Trade Union, whether registered under the Trade Unions Act, 1926 or not, shall commit any unfair labour practice. Section 25U provides that any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

The unfair labour practices have been listed in Schedule V which is reproduced at the end of the topic of this study lesson.

PENALTIES

1. Penalty for illegal strikes

Any workman who commences, continues or otherwise acts in furtherance of a strike which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees or with both. [Section 26(1)]

In the case of *Vijay Kumar Oil Mills* v. *Their Workmen,* it was held that the act of a workman to participate in an illegal strike gives the employer certain rights against the workman, which are not the creation of the Statute but are based on policy, and the employer has every right to waive such rights. In a dispute before the Tribunal, waiver can be a valid defence by the workman. However, waiver by the employer cannot be a defence against prosecution under Section 26 and something which is illegal by Statute cannot be made legal by waiver (*Punjab National Bank* v. *Their Workmen).*

2. Penalty for illegal lock-outs

Any employer who commences, continues, or otherwise, acts in furtherance of a lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both. [Section 26(2)]

3. Penalty for instigation etc.

Any person who instigates or incites others to take part in, or otherwise acts in furtherance of, a strike or lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (Section 27)

4. Penalty for giving financial aid to illegal strikes and lock-outs

Any person who knowingly expends or applies any money in direct furtherance or support of any illegal strike or lock-out shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (Section 28)

5. Penalty for breach of settlement or award

Any person who commits a breach of any term of any settlement or award which is binding on him under this Act, should be punishable with imprisonment for a term which may extend to six months, or with fine or with both, and where the breach is a continuing one with a further fine which may extend to two hundred rupees for everyday during which the breach continues after the conviction for the first, and the Court trying the offence, if it fines the offender, may direct that the whole or any part of the fine realised from him shall be paid, by way of compensation to any person who, in its opinion has been injured by such breach. (Section 29)

6. Penalty for disclosing confidential information

Any person who wilfully discloses any such information as is referred to in Section 21 in contravention of the provisions of that section shall, on complaints made by or on behalf of the trade union or individual business affected, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both. (Section 30)

7. Penalty for closure without notice

Any employer who closes down any undertaking without complying with the provisions of Section 25-FFA shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five thousand rupees, or with both. (Section 30-A)

8. Penalty for other offences

Any employer who contravenes the provisions of Section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Further, whoever contravenes any of the provisions of this Act or any rules made thereunder shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with fine which may extend to one hundred rupees. (Section 31)

9. Offence by companies, etc.

Where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not) every director, manager, secretary, agent or other officer or person concerned with management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. (Section 32)

Test your knowledge

What is the penalty on any employer who continues a lock-out even if it is illegal?

(a) Imprisonment for a term which may extend to one month, or

(b) A fine of Rs. 1,000, or

(c) Both (a & b)

(d) No penalty

Correct answer: (a), (b) and (c)

SCHEDULES

THE FIRST SCHEDULE

[*See* Section 2(n)(vi)]

Industries which may be Declared to be Public Utility Services under sub-clause (vi) of Clause (n) of Section 2

1. Transport (other than railways) for the carriage of passengers of goods [by land or water];
2. Banking;
3. Cement;
4. Coal;

5. Cotton textiles;
6. Foodstuffs;
7. Iron and steel;
8. Defence establishments;
9. Service in hospitals and dispensaries;
10. Fire brigade service;
11. India Government Mints;
12. India Security Press;
13. Copper Mining;
14. Lead Mining;
15. Zinc Mining;
16. Iron Ore Mining;
17. Service in any oil field;
18. *(deleted)*
19. Service in uranium industry;
20. Pyrites mining industry;
21. Security Paper Mill, Hoshangabad;
22. Services in Bank Note Press, Dewas;
23. Phosphorite Mining;
24. Magnesite Mining;
25. Currency Note Press;
26. Manufacture or production of mineral (crude oil), motor and aviation spirit, diesel oil, kerosine oil, fuel oil, hydrocarbon oils and their blend-including synthetic fuels, lubricating oils and the like.
27. Service in the International Airports Authority of India.
28. Industrial establishments manufacturing or producing nuclear fuel and components, heavy water and allied chemicals and atomic energy.

THE SECOND SCHEDULE

(*See* Section 7)

Matters within the Jurisdiction of Labour Court

1. The propriety or legality of an order passed by an employer under standing orders;
2. The application and interpretation of standing orders;
3. Discharge of dismissal of workmen including reinstatement of or grant of relief to, workmen wrongfully dismissed;
4. Withdrawal of any customary concession or privilege;
5. Illegality or otherwise of a strike or lock-out; and
6. All matters other than those specified in the Third Schedule.

THE THIRD SCHEDULE

[*See* Section 7-A)

Matters within the Jurisdiction of Industrial Tribunals

1. Wages, including the period and mode of payment;
2. Compensatory and other allowances;
3. Hours of work and rest intervals;
4. Leave with wages and holidays;
5. Bonus, profit sharing, provident fund and gratuity;
6. Shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Rules of discipline;
9. Rationalisation;
10. Retrenchment of workmen and closure of establishment; and
11. Any other matter that may be prescribed.

THE FOURTH SCHEDULE

[*See* Section 9-A]

Conditions of Service for Change of which Notice is to be Given

1. Wages, including the period and mode of payment.
2. Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force.
3. Compensatory and other allowances;
4. Hours of work and rest intervals;
5. Leave with wages and holidays;
6. Starting, alternating or discontinuance of shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Withdrawal of any customary concession or privilege or change in usage;
9. Introduction of new rules of discipline, or alteration of existing rules except insofar as they are provided in standing orders;
10. Rationalisation, standardisation or improvement of plant or technique which is likely to lead to retrenchment of workmen;
11. Any increase or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department of shift (not occasioned by circumstances over which the employer has no control).

THE FIFTH SCHEDULE

[*See* Section 2(ra)]

Unfair Labour Practices

I. On the part of employers and trade unions of employers

1. To interfere with, restrain from, or coerce, workmen in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection that is to say:
   (a) threatening workmen with discharge or dismissal, if they join a trade union.
   (b) threatening a lock-out or closure, if a trade union is organised;
   (c) granting wage increase to workmen at crucial periods of trade union organisation, with a view to undermining the efforts of the trade union at organisation.
2. To dominate, interfere with or contribute support, financial or otherwise to any trade union, that is to say:
   (a) an employer taking an active interest in organising a trade union of workmen; and
   (b) an employer showing partiality or granting favour to one of several trade unions attempting to organise his workmen or to its members, where such a trade union is not a recognised trade union.
3. To establish employer sponsored trade unions of workmen.
4. To encourage or discourage membership in any trade union by discriminating against any workmen, that is to say:
   (a) discharging or punishing a workman, because he urged other workmen to join or organise a trade union;
   (b) discharging or dismissing a workman for taking part in any strike (not being a strike which is deemed to be an illegal strike under this Act);
   (c) changing seniority rating of workmen because of trade union activities;
   (d) refusing to promote workmen to higher posts on account of their trade union activities;
   (e) giving unmerited promotions to certain workmen with a view to creating discord amongst other workmen, or to undermine the strength of their trade union;
   (f) discharging office-bearers or active members of the trade union on account of their trade union activities.
5. To discharge or dismiss workmen:
   (a) by way of victimisation;
   (b) not in good faith, but in the colourable exercise of the employers rights;
   (c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
   (d) for patently false reasons;
   (e) on untrue or trumped up allegations of absence without leave;
   (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
   (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the workman, thereby leading to a disproportionate punishment.

6. To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike.
7. To transfer a workman *mala fide* from one place to another under the guise of following management policy.
8. To insist upon individual workmen, who are on a legal strike to sign a good conduct bond, as a pre-condition to allowing them to resume work.
9. To show favouritism or partiality to one set of workers regardless of merit.
10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them to the status and privileges of permanent workmen.
11. To discharge or discriminate against any workman for filling charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.
12. To recruit workmen during a strike which is not an illegal strike.
13. Failure to implement award, settlement or agreement.
14. To indulge in acts of force or violence.
15. To refuse to bargain collectively, in good faith with the recognised trade unions.
16. Proposing or continuing a lock-out deemed to be illegal under this Act.

II. On the part of workmen and trade unions of workmen

1. To advise or actively support or instigate any strike deemed to be illegal under this Act.
2. To coerce workmen in the exercise of their right to self-organisation or to join a trade union or refrain from joining any trade union, that is to say:
   (a) for a trade union or its members to picketing in such a manner that non-striking workmen are physically debarred from entering the work places;
   (b) to indulge in acts of force or violence or to hold out threats of intimidation in connection with a strike against non-striking workmen or against managerial staff.
3. For a recognised union to refuse to bargain collectively in good faith with the employer.
4. To indulge in coercive activities against certification of bargaining representative.
5. To stage, encourage or instigate such forms of coercive actions as wilful go slow, squatting on the work premises after working hours or gherao of any of the members of the managerial or other staff.
6. To stage demonstrations at the residences of the employers or the managerial staff members.
7. To incite or indulge in wilful damage to employers property connected with the industry.
8. To indulge in acts of force of violence to hold out threats of intimidation against any workman with a view to prevent him from attending work.

LESSON ROUND UP

- The Industrial Disputes Act, 1947 is an Act to make provision for the investigation and settlement of industrial disputes and for certain other purposes.
- The Industrial Disputes Act applies to all industries. "Industry" for the purpose of Industrial Disputes Act is defined under the Act.

- The industrial dispute connotes a real and substantial difference between employers and employers or between employers and workmen or between workmen and workmen, having some elements of persistency and continuity till resolved and likely to endanger industrial peace of the undertaking or the community.
- An individual dispute espoused by the union becomes an industrial dispute. The disputes regarding modification of standing orders, contract labour, lock out in disguise of closure have been held to be industrial disputes.
- The Act provides for a special machinery of Conciliation Officers, Work Committees, Courts of Inquiry, Labour Courts, Industrial Tribunals and National Tribunals, defining their powers, functions and duties and also the procedure to be followed by them.
- It also enumerates the contingencies when a strike or lock-out can be lawfully resorted to, when they can be declared illegal or unlawful, conditions for laying off, retrenching, discharging or dismissing a workman, circumstances under which an industrial establishment can be closed down and several other matters related to industrial employees and employers.

SELF TEST QUESTIONS

1. What is the object and scope of the Industrial Disputes Act, 1947?
2. Define: (a) Industrial Dispute; (b) Workman; (c) Lay off; (d) Retrenchment; (e) Strike; (f) Lock-out;
3. Describe the various steps in settlement of an industrial dispute. Is it incumbent on the appropriate Government to refer every industrial dispute to adjudication?
4. Describe briefly the authorities provided in the Act for adjudication of industrial disputes.
5. Briefly discuss the provisions relating to illegal strikes and lock-outs.

Lesson 15
The Trade Union Act, 1926

LESSON OUTLINE

- Learning Objectives
- Introduction
- Trade Union
- Executive
- Office bearer
- Registered Office of Trade Union
- Trade Dispute
- Registration of Trade Union
- Mode of Registration
- Rules of Trade Union
- Certificate of Registration
- Cancellation of Registration
- Return of Trade Union

LEARNING OBJECTIVES

Trade Union means "any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions".

Trade union is a voluntary organization of workers pertaining to a particular trade, industry or a company and formed to promote and protect their interests and welfare by collective action. They are the most suitable organisations for balancing and improving the relations between the employer and the employees. They are formed not only to cater to the workers' demand, but also for inculcating in them the sense of discipline and responsibility.

Every registered Trade Union shall be a body corporate by the name under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to contract, and shall by the said name sue and be sued.

In this lesson, students will be acclimatized with the legal frame work stipulated under the Trade Unions Act, 1926.

The legislation regulating the trade unions is the Trade Unions Act, 1926.

Introduction

Trade Unions Act, 1926 deals with the registration of trade unions, their rights, their liabilities and responsibilities as well as ensures that their funds are utilised properly. It gives legal and corporate status to the registered trade unions. It also seeks to protect them from civil or criminal prosecution so that they could carry on their legitimate activities for the benefit of the working class. The Act is applicable not only to the union of workers but also to the association of employers. It extends to whole of India.

Definition

Section 2 of the Act defines various terms used in the Act, some of the definitions are given here under:

Executive means the body, by whatever name called, to which the management of the affairs of a trade union is entrusted.[Section 2 (a)]

Office-bearer in the case of a trade union, includes any member of the executive thereof, but does not include an auditor.[Section 2 (b)]

Registered office means that office of a trade union which is registered under this Act as the head office thereof. [Section 2 (d)]

Registered trade union means a trade union registered under this Act.[Section 2 (e)]

Trade dispute means any dispute between employers and workmen, or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labor, of any person, and “workmen” means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.[Section 2 (g)]

Trade union means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions. [Section 2 (h)]

Mode of registration

Section 4 provides that any seven or more members of a Trade Union may by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union .

However, no Trade Union of workmen shall be registered unless at least ten per cent. or one hundred of the workmen, whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration.

Application for registration

Section 5 stipulates that every application for registration of a Trade Union shall be made to the Registrar and shall be accompanied by a copy of the rules of the Trade Union and a statement of the following particulars, namely:

- the names, occupations and address of the members making application;
- in the case of a Trade Union of workmen, the names, occupations and addresses of the place of work of the members of the Trade Union making the application;
- the name of the Trade Union and the address of its head office; and
- the titles, names, ages, addresses and occupations of the office-bearers of the Trade Union.

Where a Trade Union has been in existence for more than one year before the making of an application for its registration, there shall be delivered to the Registrar, together with the application, a general statement of the assets and liabilities of the Trade Union prepared in such form and containing such particulars as may be prescribed

Provisions contained in the rules of a Trade Union

A Trade Union shall not be entitled to registration under the Act, unless the executive thereof is constituted in accordance with the provisions of the Act, and the rules thereof provide for the following matters, namely:—

- the name of the Trade Union;
- the whole of the objects for which the Trade Union has been established;
- the whole of the purposes for which the general funds of the Trade Union shall be applicable, all of which purposes shall be purposes to which such funds are lawfully applicable under this Act;
- the maintenance of a list of the members of the Trade Union and adequate facilities for the inspection thereof by the office-bearers and members of Trade Union;
- the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the Trade Union is connected, and also the admission of the number of honorary or temporary members as office-bearers required under section 22 to form the executive of the Trade Union;
- the payment of a minimum subscription by members of the Trade Union
- the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members;
- the manner in which the rules shall be amended, varied or rescinded;
- the manner in which the members of the executive and the other office-bearers of the Trade Union shall be elected and removed;
- the duration of period being not more than three years, for which the members of the executive and other office-bearers of the Trade Union shall be elected;
- the safe custody of the funds of the Trade Union, an annual audit, in such manner as may be prescribed, of the accounts thereof, and adequate facilities for the inspection of the account books by the office-bearers and members of the Trade Union; and
- the manner in which the Trade Union may be dissolved

Certificate of Registration

The Registrar, on being satisfied that the Trade Union has complied with all the requirements of the Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration. The Registrar, on registering a Trade Union under section 8, shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under the Act.

Incorporation of registered Trade Union

Every registered Trade Union shall be a body corporate by the name under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to contract, and shall by the said name sue and be sued.

Cancellation of registration

A certificate of registration of a Trade Union may be withdrawn or cancelled by the Registrar on the following grounds –

- on the application of the Trade Union to be verified in such manner as may be prescribed;
- if the Registrar is satisfied that the certificate has been obtained by fraud or mistake or that the Trade Union has ceased to exist or has wilfully and after notice from the Registrar contravened any provision of this Act or allowed any rule to continue in force which is inconsistent with any such provision or has rescinded any rule providing for any matter provision for which is required by section 6;
- if the Registrar is satisfied that a registered Trade Union of workmen ceases to have the requisite number of members:

Returns

Section 28 of the Act provides that there shall be sent annually to the Registrar, on or before such date as may be prescribed, **a general statement**, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st day of December next preceding such prescribed date, and of the assets and liabilities of the Trade Union existing on such 31st day of December. The statement shall be prepared in such form and shall comprise such particulars as may be prescribed.

Together with the general statement there shall be sent to the Registrar a statement showing changes of office-bearers made by the Trade Union during the year to which the general statement refers together also with a copy of the rules of the Trade Union corrected upto the date of the despatch thereof to the Registrar. **A copy of every alteration** made in the rules of a registered Trade Union shall be sent to the Registrar within fifteen days of the making of the alteration.

For the purpose of examining the abovementioned documents the Registrar, or any officer authorised by him by general or special order, may at all reasonable times inspect the certificate of registration, account books, registers, and other documents, relating to a Trade Union, at its registered office or may require their production at such place as he may specify in this behalf, but no such place shall be at a distance of more than ten miles from the registered office of a Trade Union.

LESSON ROUND UP

- Trade union means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions.
- Any seven or more members of a Trade Union may by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of the Act with respect to registration, apply for registration of the Trade Union .
- Every application for registration of a Trade Union shall be made to the Registrar and shall be accompanied by a copy of the rules of the Trade Union and a statement of the specified particulars.
- The Registrar, on being satisfied that the Trade Union has complied with all the requirements of the Act in regard to registration, shall register the Trade Union and issue a certificate of registration .
- Every registered Trade Union shall be a body corporate by the name under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to contract, and shall by the said name sue and be sued.
- Trade Union Act provides that there shall be sent annually to the Registrar, on or before such date as

may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st day of December next preceding such prescribed date, and of the assets and liabilities of the Trade Union existing on such 31st day of December.

SELF TEST QUESTIONS

1. Write short notes on Trade Dispute and Trade Union.
2. Briefly explain the scope and object of Trade Union Act, 1926.
3. State the procedure of registration of Trade Union
4. What are the advantages of a registered Trade Union?
5. State the provisions regarding filing of Return by Trade Union under Trade Union Act, 1926.

Lesson 16
The Labour Laws (Exemption from Furnishing Returns and Maintaining Register by Certain Establishments) Act, 1988

LESSON OUTLINE

- Object, scope of the Act
- Schedule act
- Small Establishment
- Very Small Establishment
- Exemption from maintenance of Registers and Returns
- Penalty

LEARNING OBJECTIVES

Parliament enacted from time to time a number of labour laws for regulating employment and conditions of service of workers. Whenever a new law was enacted, it prescribed certain registers to be maintained by the employers. Simultaneously, the laws also prescribed for furnishing of returns of various details by the employers to the concerned enforcing authorities.

The (Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988 was enacted to provide for the exemption of employers in relation to establishments employing a small number of persons from furnishing returns and maintaining registers under certain labour laws. Small establishments were exempted from furnishing returns and maintaining registers under certain enactments mentioned in the first Schedule to the Act and instead they were required to furnish returns and maintain registers in the forms set out in the Second Schedule to the Act.

Therefore, it is essential for the students to be familiar with the general Principles of the Labour Laws (Exemption from Furnishing Returns & Maintaining Registers by certain Establishments) Act, 1988.

The Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988 provides for the exemption of employers in relation to establishments employing a small number of persons from furnishing returns and maintaining registers under certain labour laws. It extends to the whole of India

DEFINITIONS

Section 2 of the Act defines various terms used in the Act, some of the definitions are given here under:

Scheduled Act means an Act specified in the first Schedule and is in force on commencement of this Act in the territories to which such Act extends generally, and includes the rules made thereunder. {Section 2(d)}

Small establishment means an establishment in which not less than ten and not more nineteen persons are employed or were employed on any day of the preceding twelve months. {Section 2(e)}

Very small establishment means an establishment in which not more than nine persons are employed or were employed on any day of the preceding twelve months. {Section 2(f)}

Exemption from returns and registers required under certain labour laws

It shall not be necessary for an employer in relation to any small establishment or very small establishment to which a Scheduled Act applies to furnish the returns or to maintain the registers required to be furnished or maintained under that Scheduled Act. However, such employer required to –

(a) furnishes a Core Return in Form A;

(b) maintains registers in Form B, Form C, and Form D, in the case of small establishments; and registers in Form D and Form E, in the case of very small establishments.

It may be noted that as per section 2(d) "Scheduled Act" means an Act specified in the first Schedule and includes the rules made there under. Act specified in the first Schedule are as follows:

1. The Payment of Wages Act, 1936
2. The Weekly Holidays, Act, 1942
3. The Minimum Wages Act, 1948
4. The Factories Act, 1948
5. The Plantation Labour Act, 1951
6. The Working Journalist and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955
7. The Contract Labour (Regulation and Abolition) Act, 1970
8. The Sales Promotion Employees (Conditions of Service) Act, 1976
9. The Equal Remuneration Act, 1976

Penalty

Any employer who fails to comply with the provisions of this Act, shall, on conviction, be punishable in the case of the first conviction, with fine which may extend to rupees five thousand; and in the case of any second or subsequent conviction, with imprisonment for a period which shall not be less than one month but which may extend to six months or with fine which shall not be less than rupees ten thousand but may extend to rupees twenty- five thousand, or with both.

LESSON ROUND UP

– The Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988 provide for the exemption of employers in relation to establishments

employing a small number of persons from furnishing returns and maintaining registers under certain labour laws. It extends to the whole of India.

- Small establishment means an establishment in which not less than ten and not more nineteen persons are employed or were employed on any day of the preceding twelve months.
- Very small establishment means an establishment in which not more than nine persons are employed or were employed on any day of the preceding twelve months.
- It shall not be necessary for an employer in relation to any small establishment or very small establishment to which a Scheduled Act applies to furnish the returns or to maintain the registers required to be furnished or maintained under that Scheduled Act. However, such employer required to –(a) furnishes a Core Return in Form A; (b) maintains registers in Form B, Form C, and Form D, in the case of small establishments; and registers in Form D and Form E, in the case of very small establishments.
- Any employer who fails to comply with the provisions of the Act, shall, on conviction, be punishable in the case of the first conviction, with fine which may extend to rupees five thousand; and in the case of any second or subsequent conviction, with imprisonment for a period which shall not be less than one month but which may extend to six months or with fine which shall not be less than rupees ten thousand but may extend to rupees twenty- five thousand, or with both.

SELF TEST QUESTIONS

1. Define the scope and object of the Act.
2. Distinguish between Small Establishment and Very Small Establishment
3. What do you mean by Schedule Act and list out the Act Specified under Schedule Act?
4. List out the Return and Register Specified under Second Schedule to the Act.
5. State the provision under the Act regarding exemption from maintenance of Register and Return by small and very small establishment.

Lesson 17

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959

LESSON OUTLINE

- Learning Objective
- Object and scope of the Act
- Employee
- Employer
- Establishment
- Establishment in Public Sectors
- Establishment in Private Sector
- Employment Exchange
- Notification of vacancies to employment exchanges
- Employers to furnish information and returns in prescribed form
- Right of access to records or documents
- Penalties

LEARNING OBJECTIVES

The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 provides for compulsory notification of vacancies and submission of employment returns by the employers to the employment exchanges. Thus, the main activities of the employment exchanges are registration, placement of job seekers, career counseling, and vocational guidance and collection of employment market information.

The Act applies to all establishments in the public sector and such establishments in the private sector as are engaged in non-agricultural activities and employing 25 or more workers. The employer in every establishment in public sector in any State or area shall furnish such prescribed information or return in relation to vacancies that have occurred or are about to occur in that establishment, to such prescribed employment exchanges.

In this lesson, students will explore the implementation of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959.

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 provides for the compulsory notification of vacancies to employment exchanges. It extends to the whole of India.

DEFINITION

Employee means any person who is employed in an establishment to do any work for remuneration.{ Section 2(b)}

Employer means any person who employs one or more other person to do any work in an establishment for remuneration and includes any person entrusted with the supervision and control of employees in such establishment.{ Section 2(c)}

Employment Exchange means any office or place established and maintained by the Government for the collection and furnishing of information, either by the keeping of registers or otherwise, respecting— (i) persons who seek to engage employees. (ii) persons who seek employment, and (iii) vacancies to which persons seeking employment, may be appointed .{ Section 2(d)}

Establishment means— (a) any office, or (b) any place where any industry, trade, business or occupation is carried on.{ Section 2(e)}

Establishment in Public Sector means an establishment owned, controlled or managed by — (1) the Government or a department of the Government (2) a Government company as defined in Section 617 of the Companies Act,1956 (1 of 1956) ; (3) a corporation (including a co-operative society) established by or under a Central, Provincial or State Act, which is owned, controlled or managed by the Government; (4) a local authority.{ Section 2(f)}

Establishment in Private Sector means an establishment which is not an establishment in public sector and where ordinarily twenty-five or more persons are employed to work for remuneration.{ Section 2(g)}

Act not to apply in relation to certain vacancies

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 does not apply in relation to vacancies in any employment –

(i) in agriculture and horticulture in any establishment in private sector;

(ii) in domestic service;

(iii) where the period of employment is less than three months;

(iv) to do unskilled office work;

(v) connected with the staff of Parliament;

(vi) proposed to fill through promotion or by absorption of surplus staff;

(vii) which carries a remuneration of less than sixty rupees a month.

Notification of vacancies to employment exchanges

Section 4 of the Act provides that the employer in every establishment in public sector in that State and the employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall notify the vacancy to such employment exchanges as may be prescribed. However, there is no obligation upon any employer to recruit any person through the employment exchange to fill any vacancy.

Employers to furnish information and returns in prescribed form

Section 5 stipulates that the employer in every establishment in public sector in that State or area shall furnish such information or return as may be prescribed in relation to vacancies that have occurred or are about to occur in that establishment, to such employment exchanges as may be prescribed.

The appropriate Government may, by notification in the Official Gazette, require that from such date, the employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall furnish such information or return as may be prescribed in relation to vacancies that have occurred or are about to occur in that establishment to such employment exchanges as may be prescribed.

Right of access to records or documents

Section 6 empowers such officer of Government as may be prescribed in this behalf, or any person authorised by him in writing, shall have access to any relevant record or document in the possession of any employer required to furnish any information or returns under section 5 and may enter at any reasonable time any premises where he believes such record or document to be and inspect or take copies of relevant records or documents or ask any question necessary for obtaining any required information.

Penalties

If any employer fails to notify to the employment exchanges prescribed for the purpose any vacancy, he shall be punishable for the first offence with fine which may extend to five hundred rupees and for every subsequent offence with fine which may extend to one thousand rupees.

If any refuses or neglects to furnish such information or return, or furnishes or causes to be furnished any information or return which he knows to be false, or refuses to answer, or gives a false answer to, any question necessary for obtaining any information required to be furnished or impedes the right of access to relevant records or documents or the right of entry, he shall be punishable for the first offence with fine which may extend to two hundred and fifty rupees and for every subsequent offence with fine which may extend to five hundred rupees.

LESSON ROUND UP

- The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 provides for compulsory notification of vacancies and submission of employment returns by the employers to the employment exchanges.
- According to the Act, the term employment exchange means any office or place established and maintained by the Government for the collection and furnishing of information, either by keeping of registers or otherwise, respecting:- (i) persons who seek to engage employees; (ii) persons who seek employment;and (iii) vacancies to which persons seeking employment may be appointed".
- The main activities of the employment exchanges are registration, placement of job seekers, career counselling, and vocational guidance and collection of employment market information.
- The Act empowers such officer of Government as may be prescribed in this behalf, or any person authorised by him in writing, shall have access to any relevant record or document in the possession of any employer required to furnish any information or returns and may enter at any reasonable time any premises where he believes such record or document to be and inspect or take copies of relevant records or documents or ask any question necessary for obtaining any required information.
- If any employer fails to notify to the employment exchanges prescribed for the purpose any vacancy, he shall be punishable for the first offence with fine which may extend to five hundred rupees and for every subsequent offence with fine which may extend to one thousand rupees.

SELF TEST QUESTIONS

1. What is the object of Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959
2. Write short notes on Employer and Employment Exchange.

3. Enumerate the provision regarding notification of vacancies under of Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959
4. What are the penal provisions if any employer fails to notify to the employment exchanges any vacancies?
5. Is it mandatory for employer in every establishment in public sector in that to furnish information or return in relation to vacancies to Employment Exchange?

Lesson 18
Apprentices Act, 1961

LESSON OUTLINE

- Learning objectives
- Object and scope of the Act
- Apprentice
- Apprentice Training
- Qualification for being engaged as an Apprentice
- Contract of Apprenticeship
- Obligations of Employers
- Obligations of Apprentices
- Apprentice are Trainees and not Workers
- Payment to Apprentices
- Hours of work, overtime, leave and holidays
- Conduct and Discipline
- Records and Returns
- Authorities under the Act
- Offences and Penalties
- Offences by Companies

LEARNING OBJECTIVES

Industrial development of any nation depends on development of its human resource. Enhancement of skills is an important component of Human Resource Development. Training of apprentices in the actual workplace is necessary for the up gradation and acquisition of skills. The Apprentices Act, 1961 was enacted to regulate and control the programme of training of apprentices. The term apprentice means a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship. While, apprenticeship training means a course of training in any industry or establishment undergone in pursuance of a contract of apprenticeship and under prescribed terms and conditions which may be different for different categories of apprentices.

The Act makes it obligatory on part of the employers both in public and private sector establishments having requisite training infrastructure as laid down in the Act. Every employer shall have the obligations in relation to an apprentice to provide the apprentice with training in his/ her trade in accordance with the provisions of the Act, and the rules made there under.

In this lesson, students will be acclimatized with the legal frame work stipulated under the Apprentices Act, 1961.

The Apprentices Act, 1961 enacted to regulate and control the programme of training of apprentices and for matters connected therewith.

OBJECT AND SCOPE OF THE ACT

The Apprentices Act, 1961 was enacted with the objectives to regulate the programme of training of apprentices in the industry so as to conform to the prescribed training standards as laid down by the Central Apprenticeship Council; and to utilize fully the facilities available in industry for imparting practical training with a view to meeting the requirements of skilled manpower for industry. It extends to whole of India

DEFINITIONS

Section 2 of the Act defines various terms used in the Act; Some of the definitions are given here under:

Apprentice means a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship.{ Section 2(aa)}

Apprenticeship training means a course of training in any industry or establishment undergone in pursuance of a contract of apprenticeship and under prescribed terms and conditions which may be different for different categories of apprentices.{ Section 2 (aaa)}

Designated trade means any trade or occupation or any subject field in engineering or technology or any vocational course which the Central Government, after consultation with the Central Apprenticeship Council, may, by notification in the Official Gazette, specify as a designated trade for the purposes of this Act.{ Section 2 (e)}

Employer means any person who employs one or more other persons to do any work in an establishment for remuneration and includes any person entrusted with the supervision and control of employees in such establishment.{Section 2 (f)}

Establishment includes any place where any industry is carried on and where an establishment consists of different departments or have branches, whether situated in the same place or at different places, all such departments or branches shall be treated as part of that establishment.{ Section 2 (g)}

Graduate or technician apprentice means an apprentice who holds, or is undergoing training in order that he may hold a degree or diploma in engineering or technology or equivalent qualification granted by any institution recognised by the Government and undergoes apprenticeship training in any such subject field in engineering or technology as may be prescribed.{ Section 2 (j)}

Industry means any industry or business in which any trade, occupation or subject field in engineering or technology or any vocational course may be specified as a designated trade. {Section 2 (k)}

Technician (vocational) apprentice means an apprentice who holds or is undergoing training in order that he may hold a certificate in vocational course involving two years of study after the completion of the secondary stage of school education recognised by the All-India Council and undergoes apprenticeship training in any such subject field in any vocational course as may be prescribed.{ Section 2 (pp)}

Trade apprentice means an apprentice who undergoes apprenticeship training in any such trade or occupation as may be prescribed. {Section 2 (q)}

Worker means any person who is employed for wages in any kind of work and who gets his wages directly from the employer but shall not include an apprentice .{ Section 2 (r)}

Qualification for being engaged as an apprentice

A person shall be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade, if such person –

(a) is not less than fourteen years of age; and

(b) satisfies such standards or education and prescribed physical fitness .

Contract of apprenticeship

No person shall be engaged as an apprentice to undergo apprenticeship training in a designated trade unless such person or, if he is a minor, his guardian has entered into a contract of apprenticeship with the employer. The apprenticeship training shall be deemed to have commenced on the date on which the contract of apprenticeship has been entered into and every contract of apprenticeship may contain such terms and conditions as may be agreed to by the parties to the contract.

Obligations of employers

Every employer shall have the following obligations in relation to an apprentice, namely:–

- to provide the apprentice with the training in his trade in accordance with the provisions of the Act and the rules made thereunder;
- if the employer is not himself qualified in the trade, to ensure that a person who possesses the prescribed qualifications is placed in charge of the training of the apprentice;
- to provide adequate instructional staff, possessing such qualifications as may be prescribed for imparting practical and theoretical training and facilities for trade test of apprentices;
- to carry out his obligations under the contract of apprenticeship.

Obligations of apprentices

Every trade apprentice undergoing apprenticeship training shall have the following obligations, namely :-

- to learn his trade conscientiously and diligently and endeavor to qualify himself as a skilled craftsman before the expiry of the period of training;
- to attend practical and instructional classes regularly;
- to carry out all lawful orders of his employer and superiors in the establishment; and
- to carry out his obligations under the contract of apprenticeship.
- Every graduate or technician apprentice, technician (vocational) apprentice undergoing apprenticeship training shall have the obligations to learn his subject field in engineering or technology or vocational course conscientiously and diligently at his place of training; to attend the practical and instructional classes regularly; to carry out all lawful orders of his employer and superiors in the establishment; to carry out his obligations under the contract of apprenticeship.

Apprentices are trainees and not workers

Every apprentice undergoing apprenticeship training in a designated trade in an establishment shall be a trainee and not a worker and the provisions of any law with respect to labour shall not apply to or in relation to such apprentice.

Records and Returns

Every employer required to maintained records of the progress of training of each apprentice undergoing apprenticeship training in his establishment in such form as may be prescribed and also furnish such information and returns in such prescribed form to such authorities and at such intervals.

Payment to apprentices

Section 13 provides that the employer shall pay to every apprentice during the period of apprenticeship training such stipend at a rate specified in the contract of apprenticeship and the stipend so specified shall be paid at such intervals and subject to such conditions as may be prescribed. An apprentice shall not be paid by his employer on the basis of piece work nor shall he be required to take part in any output bonus or other incentive scheme.

Hours of work, overtime, leave and holidays

As per section 15 the weekly and daily hours of work of an apprentice while undergoing practical training in a workshop shall be such as may be prescribed and no apprentice shall be required or allowed to work overtime except with the approval of the Apprenticeship Adviser who shall not grant such approval unless he is satisfied that such overtime is in the interest of the training of the apprentice or in the public interest. An apprentice shall be entitled to such leave as may be prescribed and to such holidays as are observed in the establishment in which he is undergoing training.

Conduct and discipline

Section 17 of the Act provides that in all matters of conduct and discipline, the apprentice shall be governed by the rules and regulations applicable to employees of the corresponding category in the establishment in which the apprentice is undergoing training.

Settlement of disputes

As per section 20 any disagreement or dispute between an employer and an apprentice arising out of the contract of apprenticeship shall be referred to the Apprenticeship Adviser for decision.

Any person aggrieved by the decision of the Apprenticeship Adviser may, within thirty days from the date of communication to him of such decision, prefer an appeal against the decision to the Apprenticeship Council and such appeal shall be heard and determined by a Committee of that Council appointed for the purpose. The decision of the Committee and subject only to such decision, the decision of the Apprenticeship Adviser shall be final.

Authorities under the Act

In addition to the Government, there are the following authorities under the Act, namely : –

(a) The National Council,

(b) The Central Apprenticeship Council,

(c) The State Council,

(d) The State Apprenticeship Council,

(e) The All India Council,

(f) The Regional Boards,

(g) The Boards or State Councils of Technical Education

(h) The Central Apprenticeship Adviser,

(i) The State Apprenticeship Adviser.

Every State Council shall be affiliated to the National Council and every State Apprenticeship Council shall be affiliated to the Central Apprenticeship Council. Every Board or State Council of Technical Education and every Regional Board shall be affiliated to the Central Apprenticeship Council.

Each of the authorities specifies above shall, in relation to apprenticeship training under the Act, perform such functions as are assigned to it by or under the Act or by the Government. However, a State Council shall also perform such functions as are assigned to it by the National Council and the State Apprenticeship Council and the Board or State Council of Technical Education shall also perform such functions as are assigned to it by the Central Apprenticeship Council.

Offences and penalties

Section 30 provides that if any employer engages as an apprentice a person who is not qualified for being so engaged, or fails to carry out the terms and conditions of a contract of apprenticeship, or contravenes the provisions of the Act relating to the number of apprentices which he is required to engage under those provisions, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

If any employer or any other person required to furnish any information or return, refuses or neglects to furnish such information or return, or furnishes or causes to be furnished any information or return which is false and which he either knows or believes to be false or does not believe to be true, or refuses to answer, or gives a false answer to any question necessary for obtaining any information required to be furnished by him, or refuses or wilfully neglects to afford the Central or the State Apprenticeship Adviser or such other person, not below the rank of an Assistant Apprenticeship Adviser, as may be authorised by the Central or the State Apprenticeship Adviser in writing in this behalf any reasonable facility for making any entry, inspection, examination or inquiry authorised by or under this Act, or requires an apprentice to work overtime without the approval of the Apprenticeship Adviser, or employs an apprentice on any work which is not connected with his training, or makes payment to an apprentice on the basis of piecework, or requires an apprentice to take part in any output bonus or incentive scheme, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

Offences by companies

If the person committing an offence under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Any person mentioned above shall not liable to such punishment provided in the Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

LESSON ROUND UP

- The Apprentices Act, 1961 was enacted to regulate and control the programme of training of apprentices and for matters connected therewith.
- The term apprentice means a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship.
- Apprenticeship training means a course of training in any industry or establishment undergone in pursuance of a contract of apprenticeship and under prescribed terms and conditions which may be different for different categories of apprentices.
- The Act makes it obligatory on part of the employers both in public and private sector establishments

having requisite training infrastructure as laid down in the Act, to engage apprenticeship training.

– No person shall be engaged as an apprentice to undergo apprenticeship training in a designated trade unless such a person or, if he/ she is a minor, his/ her guardian has entered into a contract of apprenticeship with the employer.

– Every employer shall have the obligations in relation to an apprentice to provide the apprentice with training in his/ her trade in accordance with the provisions of this Act, and the rules made there under.

– Every trade apprentice undergoing apprenticeship training shall have the obligations, to learn his/ her trade conscientiously and diligently and endeavour to qualify himself/ herself as a skilled craftsman before the expiry of the period of training.

SELF TEST QUESTIONS

1. What is the object and scope of the Apprentices Act, 1961?
2. Write short notes on Apprentice and Apprenticeship training.
3. What are the obligations of Employer under a contract of apprenticeship?
4. What are the obligations of Apprentice under a contract of apprenticeship?
5. State the penal provision under of the Apprentices Act, 1961?

Lesson 19
Audit under Labour Legislations

LESSON OUTLINE

- Learning objectives
- Introduction
- Scope of labour audit
- Methodology of conduct of labour audit
- Benefits of labour audit
- Benefits to Employer
- Benefits to Labour

LEARNING OBJECTIVES

Audit under Labour Legislations is an effective tool for compliance management of labour legislations. It helps to detect non-compliance of various labour laws applicable to an organization and to take corrective measures. Objectives of labour audit is to protect the interests of all the stakeholders. This leads to better Governance and value creation for the organisation and to avoid any unwarranted legal actions against the organization and its management.

Labour Audit is a process of fact finding. It is a continuous process. The Labour Audit will ensure a win-win situation for all interested persons. Initially, the Employers may frown at the idea of such Audits, but with passage of time, the compulsion of labour audit will infuse self-regulation amongst certain employers.

The basic objective of this lesson is to make the students understand the basic framework of audit under labour legislations.

Under the Constitution of India, Labour is a subject in the Concurrent List where both the Central and State Governments are competent to enact legislation.

INTRODUCTION

Audit under labour laws is a new concept, which is necessitated, in direct consequence of its non-compliance in large scale. Even after over six decades of attainining independence, India is still plagued with victimisation, non compliance of labour legislations is still at large. An analysis of these practices reveals that many employers resort to short cut methods to avoid the compliance of labour legislations. There is no system in place for reporting noncompliance of labour legislations by an independent professional like Company Secretary. Workers in India report many cases relating to non-compliance of labour legislation by employers.

Social Justice is guaranteed by the Preamble of our Constitution. The Directive Principles of State Policy also provides that it shall be endeavour of the State to promote the welfare of the people by effectively securing and protecting a social order in which social, economic and political justice shall inform all the institutions of national life.

Directive Principles provide –

- that the State should direct its policies towards securing the right of citizens, men and women, to an adequate means of livelihood ;
- that the ownership and control of material resources of the community be so distributed as best to subserve the common good ;
- that the economic system should not result in the concentration of wealth and the means of production to the common detriment ;
- that there should be equal pay for equal work for both men and women ;
- that the State should endeavour to secure the health and strength of workers ;
- that State should ensure that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocations unsuited to their age and strength ;
- that childhood and youth are protected from exploitation and from moral and material abandonment ;
- that State shall secure to all workers living wage, decent standard of living and free enjoyment of leisure.

Labour Audit envisages a systematic scrutiny of records prescribed under labour legislations by an independent professional like Company Secretary in Whole Time Practice (hereinafter referred to as PCS), who shall report the compliance and non-compliance/extent of compliance and conditions of labour in the Indian industry/ Factory/ Other Commercial Establishments. The Report should ideally, be addressed to the appropriate government. The appropriate government may provide for filing fees for such report on the lines of filing fees charged by Registrar of Companies for the documents filed with them.

SCOPE OF LABOUR AUDIT

The audit should cover all labour legislations applicable to an Industry/factory or other commercial establishments. If a particular piece of labour legislation is not applicable to a specific employer, the same should distinctly be disclosed in the report of an Independent Professional like Company Secretary in Whole Time Practice. The mode of disclosure has to be decided in consultation with the Ministry of Labour. An illustrative list of legislations, which may be covered under Labour Audit, is given in this lesson.

METHODOLOGY OF CONDUCT OF LABOUR AUDIT

At the commencement of audit, the Independent Professional like Company Secretary in Whole Time Practice should define the scope of his audit. The scope will certainly differ from employer to employer. Accordingly, if the

employer does not own a factory, the provisions of the Factories Act, 1948 will not be applicable. Similarly, certain factories in remote areas may not have the facilities of Employees State Insurance Corporation. In such cases, there is no need to ensure compliance of ESI Act.

As stated Independent Professional like Company Secretary in Whole Time Practice should identify various Central and State Acts and Rules that are applicable to an employer. Based on such identification, he should commence scrutinising the compliance of provisions of various Acts/Rules. It will be in the fitness of things that the Report is drafted in the same manner as PCS do for Compliance Certificate under the proviso to Section 383A(1) of the Companies Act, 1956. Checklist for compliance of each legislation has to be formulated before commencement of his audit.

BENEFITS OF LABOUR AUDIT

Benefits to the Labour

(a) Introduction of Labour Audit will boost the morale of the workers to a large extent.

(b) It will increase their Social Security.

(c) It will inculcate on workers a sense of belongingness towards their employer.

(d) It will secure timely payment of wages, gratuity, bonus, overtime, compensation etc. of the workers.

(e) Timely payment of entitlements will reduce absenteeism in the organisation.

Benefits to Employer

(a) Increased productivity in view of lower absenteeism in the enterprise. Higher the productivity, higher will be the profit.

(b) Status in the Society for the employer will increase, in view of the recognition that may be bestowed on them by the Government.

(c) Strict compliance of all labour legislation will be ensured by each of the employers, which, in turn, will reduce or even eliminate penalties / damages / fines that may be imposed by the Government.

(d) Co-operation of and understanding with the workers will improve labour relations. The congenial atmosphere is indispensable for good corporate governance.

Benefits to the Government

(a) Reduction in the number of field staff for inspection of Industries/Factories/ Commercial Establishments as most of their work will be done by an Independent Professional like Company Secretary in Whole Time Practice.

(b) Compulsory Labour Audit will ensure compliance of past defaults.

(c) In case the Government seeks to introduce filing fees for Compliance Report under Labour Legislation, the revenue of the Appropriate Government will rise phenomenally.

(d) India's image before the International Labour Organisation will improve as a country with negligible non-compliance of labour legislation.

Illustrative List of Legislations that may be brought under the ambit of Labour Audit

S.No.	Name of the Legislation	Certificates to Cover
1	Payment of Wages Act, 1936	• Annual Certificate that the wages were paid in accordance with the Act. • Number of employees in the establishment who are governed by the Act. • No deduction from wages has been made other than those authorised under the Act. • Wage Period.
2	Payment of Bonus Act, 1965	• Determination of Available and Allocable Surplus and correctness of Computation. • Timely payment of bonus. • Eligible persons are paid bonus • Whether the company paid minimum or maximum bonus.
3	Provident Funds and Miscellaneous Provisions Act, 1952	• Timely deposit of Employer and Employee's dues with Provident Fund Provisions Act, 1952 Commissioner/Trust. • Reporting of cases where proceedings under the Act have been initiated against the Directors for recovery of dues. • If the Employer has created its own trust, whether the terms of trust are more beneficial than those provided under the trust? Whether conditions imposed by PF Commissioner for the creation of Trust is satisfied?
4	Payment of Gratuity Act, 1972	• Whether liability for gratuity has been provided for in the Accounts or not? • Whether the company has formed any trust that would take care of the liability arising out of gratuity. • Number of claims during the year for the payment of gratuity and time taken for settlement. • Whether the Gratuity has been paid in accordance with the provisions of the Act? • Whether any dispute exists against the company against the payment of gratuity ? If so, details thereof.
5	Industrial Disputes Act, 1947	• Certification that any industrial dispute arose during the year or not and manner of settlement of the same. Whether the dispute resulted in any closure of factory/strike/lockout and if so the period therefor. • Was there any reference of dispute to Arbitration under section 10-A of the Act and results of such reference? • Whether the industry has adopted any unfair labour practice.

		• Name of the Protected workmen. Whether or not the industry is declared as Public Utility Services.
6	Trade Unions Act, 1926	• Number of Registered Trade unions in operation in the factory and its affiliations to any All India Organisations of Trade Unions.
7	Minimum Wages Act,1948	Whether the company is paying the wages in accordance with the provisions of the Act.
8	Employees' Compensation Act, 1923	• Fatal Accidents to be reported. • Time taken for payment for compensation. Disputes on settlement of compensation to be reported. • Any case of Occupational Disease reported in the factory or establishment. • Insurance Cover for meeting the liability. • Pending Disputes under the Act and its nature along with a note on liability accepted by the Employer.
9	Factories Act 1948	• Whether the factory is registered or not? If so, registration number of the factory be given. • Item of manufacture. • Whether hazardous industry or not if so steps suggested by appropriate government for safety has been complied with in toto. • Whether Chapter IV on Safety has been complied with or not. • Whether Chapter V on Welfare has been taken care of. • Whether working hours are in accordance with the provisions of the Act. • Maintenance of proper records of Attendance and Leaves. • Provisions relating to employment of women, young persons etc. are duly complied with.
10	Contract Labour (Regulation and Abolition) Act, 1970	• Whether the factory/establishment is covered by the provisions Contract Labour (Regulation and Abolition) Act, 1970 • Whether the factory/establishment has duly submitted all returns to the Commissioner/Regional Commissioner as per the provisions of the Act, Rules and Regulations made in this behalf. • Whether the establishment has duly applied for and obtained the certificate of registration before the employment of any contract labour. • Whether all the contractors engaged by the establishment to supply workmen do posses valid licence.

LESSON ROUND UP

- Labour Audit is a process of fact finding. It is a continuous process. The Labour Audit will ensure a win-win situation for all interested persons. Initially, the Employers may frown at the idea of such Audits, but with passage of time, the compulsion of labour audit will infuse self-regulation amongst certain employers.
- Social Justice is guaranteed by the Preamble of our Constitution. The Directive Principles of State Policy also provides that it shall be endeavour of the State to promote the welfare of the people by effectively securing and protecting a social order in which social, economic and political justice shall inform all the institutions of national life.
- The audit should cover all labour legislations applicable to an Industry/factory or other commercial establishments. If a particular piece of labour legislation is not applicable to a specific employer, the same should distinctly be disclosed in the report of an Independent Professional. The mode of disclosure has to be decided in consultation with the Ministry of Labour. An illustrative list of legislations, which may be covered under Labour Audit, is given in this lesson.
- Labour Audit will boost the morale of the workers to a large extent and it will increase their Social Security.
- Labour Audit will increased productivity in view of lower absenteeism in the enterprise. Higher the productivity, higher will be the profit.
- Compulsory Labour Audit will ensure compliance of past defaults.

SELF TEST QUESTIONS

1. Briefly explain the scope of labour audit.
2. Briefly explain the benefits of Labour audit.
3. Discuss the certificates covered under the Contract Labour (Regulation and Abolition) Act, 1970 to be verified for labour audit .
4. Discuss the certificates covered under the Factories Act 1948 to be verified for labour audit.
5. Discuss the certificates covered under the Industrial Disputes Act, 1947 to be verified for labour audit.

Lesson 20
Constitution of India

LESSON OUTLINE

- Learning Objectives
- Broad Framework of the Constitution
- Preamble
- Structure
- Fundamental Rights
- Definition of State
- Justifiability of Fundamental Rights
- Right to Constitutional Remedies
- Directive Principles of State Policy
- Fundamental Duties
- Ordinance Making Powers
- Legislative Powers of the Union and the States
- Power of Parliament to make Laws on State Lists
- Freedom of Trade, Commerce and Intercourse
- Constitutional Provisions relating to State Monopoly
- The Judiciary
- Writ Jurisdiction of High Courts and Supreme Court
- Types of Writs
- Delegated Legislation

LEARNING OBJECTIVES

India is a Sovereign Socialist Secular Democratic Republic with a Parliamentary system of Government. The Republic is governed in terms of the Constitution. All our laws derive their authority and force from the Constitution and the Constitution derives its authority from the people. The preamble to the Constitution sets out the aims and aspirations of the people of India.

The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules.

Fundamental rights are envisaged in Part III of the Constitution. Directive Principles of State Policy contains certain Directives which are the guidelines for the future Government to lead the Country. Constitution lays down that the executive power of the Union shall be vested in the President and the executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. The Supreme Court, which is the highest Court in the Country is an institution created by the Constitution.

The subject of Constitutional law is of abiding interest and is constantly in the process of development. The basic objective of this lesson is to make the students understand the basic frame work of the Constitution and important provisions stipulated therein.

The preamble to the Constitution states: WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

BROAD FRAMEWORK OF THE CONSTITUTION

The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules. Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens and other persons in a number of entrenched provisions and for the principles to be followed by the State in the governance of the country, labelled as "Directive Principles of State Policy". All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people.

Preamble

The preamble to the Constitution sets out the aims and aspirations of the people of India. It is a part of the Constitution (AIR 1973 SC 1961). The preamble declares India to be a Sovereign, Socialist, Secular, Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

The polity assured to the people of India by the Constitution is described in the preamble as a Sovereign, Socialist, Secular, and Democratic Republic. The expression "Sovereign" signifies that the Republic is externally and internally sovereign. Sovereignty in the strict and narrowest sense of the term implies independence all round, within and without the borders of the country. As discussed above, legal sovereignty is vested in the people of India and political sovereignty is distributed between the Union and the States.

The democratic character of the Indian polity is illustrated by the provisions conferring on the adult citizens the right to vote and by the provisions for elected representatives and responsibility of the executive to the legislature.

The word "Socialist", added by the 42nd Amendment, aims to secure to its people "justice—social, economic and political". The Directive Principles of State Policy, contained in Part IV of the Constitution are designed for the achievement of the socialistic goal envisaged in the preamble. The expression "Democratic Republic" signifies that our government is of the people, by the people and for the people.

Structure

Constitution of India is basically federal but with certain unitary features.

The majority of the Supreme Court judges in *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461, were of the view that the *federal features* form the basic structure of the Indian Constitution. However, there is some controversy as to whether the Indian Constitution establishes a federal system or it stipulates a unitary form of Government with some basic federal features. Thus, to decide whether our Constitution is federal, unitary or quasi federal, it would be better to have a look at the contents of the Constitution.

The essential features of a Federal Polity or System are—dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution. The political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity as follows:

(a) In India, there are Governments at different levels, like Union and States.

(b) Powers to make laws have been suitably distributed among them by way of various lists as per the Seventh Schedule.

(c) Both Union and States have to follow the Constitutional provisions when they make laws.

(d) The Judiciary is independent with regard to judicial matters and judiciary can test the validity of law

independently. The Supreme Court decides the disputes between the Union and the States, or the States *inter se.*

(e) The Constitution is supreme and if it is to be amended, it is possible only by following the procedure explained in Article 368 of the Constitution itself.

From the above, it is clear that the Indian Constitution basically has federal features. But the Indian Constitution does not establish two co-ordinate independent Governments. Both the Governments co-ordinate, co-operate and collaborate in each other's efforts to achieve the ideals laid down in the preamble.

Judicial View

The question as to whether the Indian Constitution has a federal form of Government or a unitary constitution with some federal features came up in various cases before the Supreme Court and the High Courts. But in most cases, the observations have been made in a particular context and have to be understood accordingly. The question rests mostly on value judgement i.e. on one's own philosophy.

Peculiar Features of Indian Federalism

Indian Constitution differs from the federal systems of the world in certain fundamental aspects, which are as follows:

(1) *The Mode of Formation:* A federal Union, as in the American system, is formed by an agreement between a number of sovereign and independent States, surrendering a defined part of their sovereignty or autonomy to a new central organisation. But there is an alternative mode of federation, as in the Canadian system where the provinces of a Unitary State may be transformed into a federal union to make themselves autonomous.

India had a thoroughly Centralised Unitary Constitution until the Government of India Act, 1935 which for the first time set up a federal system in the manner as in Canada viz., by creation of autonomous units and combining them into a federation by one and the same Act.

(2) *Position of the States in the Federation:* In a federal system, a number of safeguards are provided for the protection of State's rights as they are independent before the formation of federation. In India, as the States were not previously sovereign entities, the rights were exercised mainly by Union, e.g., residuary powers.

(3) *Citizenship etc:* The framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity with dual citizenship, a double set of officials and a double system of the courts. There is, however, single citizenship in India, with no division of public services or of the judiciary.

(4) Residuary Power: Residuary power is vested in the Union. In other words, the Constitution of India is neither purely federal nor purely unitary. It is a combination of both and is based upon the principle that "In spite of federalism the national interest ought to be paramount as against autocracy stepped with the establishment of supremacy of law".

Test your knowledge

When did the constitution of India come into force?

(a) January 26, 1947

(b) January 26, 1948

(c) January 26, 1949

(d) January 26, 1950

Correct answer : d

FUNDAMENTAL RIGHTS

The Constitution seeks to secure to the people "liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and fraternity assuring the dignity of the individual". With this object, the fundamental rights are envisaged in Part III of the Constitution.

The Concept of Fundamental Rights

Political philosophers in the 17th Century began to think that the man by birth had certain rights which were universal and inalienable, and he could not be deprived of them. The names of Rousseau, Locke, Montaesgue and Blackstone may be noted in this context. The Declaration of American Independence 1776, stated that all men are created equal, that they are endowed by their creator with certain inalienable rights: that among these, are life, liberty and the pursuit of happiness. Since the 17th century, it had been considered that man has certain essential, basic, natural and inalienable rights and it is the function of the State to recognise these rights and allow them a free play so that human liberty may be preserved, human personality developed and an effective cultural, social and democratic life promoted. It was thought that these rights should be entrenched in such a way that they may not be interfered with, by an oppressive or transient majority in the Legislature. With this in view, some written Constitutions (especially after the First World War) guarantee rights of the people and forbid every organ of the Government from interfering with the same.

***The position in England**:* The Constitution of England is unwritten. No Code of Fundamental Rights exists unlike in the Constitution of the United States or India. In the doctrine of the sovereignty of Parliament as prevailing in England it does not envisage a legal check on the power of the Parliament which is, as a matter of legal theory, free to make any law. This does not mean, however, that in England there is no recognition of these basic rights of the individual. The object in fact is secured here in a different way. The protection of individual freedom in England rests not on constitutional guarantees but on public opinion, good sense of the people, strong common law, traditions favouring individual liberty, and the parliamentary form of Government. Moreover, the participation of U.K. in the European Union has made a difference. (See also the Human Rights Act, 1998).

***The position in America**:* The nature of the Fundamental Rights in the U.S.A. has been described thus: The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the Courts.

The fundamental difference in approach to the question of individual rights between England and the United States is that while the English were anxious to protect individual rights from the abuses of executive power, the framers of the American Constitution were apprehensive of tyranny, not only from the executive but also from the legislature. While the English people, in their fight for freedom against autocracy stopped with the establishment of Parliamentary supremacy, the Americans went further to assert that there had to be a law superior to the legislature itself and that the restraint of such paramount written law could only save them from the fears of absolution and autocracy which are ingrained in the human nature.

So, the American Bill of Rights (contained in first ten Amendments of the Constitution of the U.S.A.) is equally binding upon the legislature, as upon the executive. The result has been the establishment in the United States of a 'Judicial Supremacy', as opposed to the 'Parliamentary Supremacy' in England. The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights.

***The position in India**:* As regards India, the Simon Commission and the Joint Parliamentary Committee had rejected the idea of enacting declaration of Fundamental Rights on the ground that abstract declarations are useless, unless there exists the will and the means to make them effective. The Nehru Committee recommended the inclusion of Fundamental Rights in the Constitution for the country. Although that demand of the people was not met by the British Parliament under the Government of India Act, 1935, yet the enthusiasm of the people to

have such rights in the Constitution was not impaired. As a result of that enthusiasm they were successful in getting a recommendation being included in the Statement of May 16, 1946 made by the Cabinet Mission-(which became the basis of the present Constitution) to the effect that the Constitution-making body may adopt the rights in the Constitution. Therefore, as soon as Constituent Assembly began to work in December, 1947, in its objectives resolution Pt. Jawahar Lal Nehru moved for the protection of certain rights to be provided in the Constitution. The rights as they emerged are contained in Part III of the Constitution the title of which is "Fundamental Rights". The Supreme Court in *Pratap Singh* v. *State of Jharkhand*, (2005) 3 SCC 551 held that Part III of the Constitution protects substantive as well as procedural rights and hence implications which arise there from must efficiently be protected by the Judiciary.

Inclusion of Fundamental Rights in Part III of the Constitution

Part III of the Indian Constitution guarantees six categories of fundamental rights. These are:

(i) Right to Equality – Articles 14 to 18;

(ii) Right to Freedom – Articles 19 to 22;

(iii) Right against Exploitation – Articles 23 and 24;

(iv) Right to Freedom of Religion – Articles 25 to 28;

(v) Cultural and Educational Rights – Articles 29 and 30;

(vi) Right to Constitutional Remedies – Articles 32.

[Earlier the right to property under Article 31 was also guaranteed as a Fundamental Right which has been removed by the 44th Constitutional Amendment Act, 1978. Now right to property is not a *fundamental right*, it is now only a legal right.

Apart from this, Articles 12 and 13 deal with definition of 'State' and 'Law' respectively. Articles 33 to 35 deal with the general provisions relating to Fundamental Rights. No fundamental right in India is absolute and reasonable restrictions can be imposed in the interest of the state by valid legislation and in such case the Court normally would respect the legislative policy behind the same. *People's Union for Civil Liberties* v. *Union of India,* (2004) 2 SCC 476.

From the point of view of persons to whom the rights are available, the fundamental rights may be classified as follows:

(a) Articles 15, 16, 19 and 30 are guaranteed only to *citizens*.

(b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to any person on the soil of India—citizen or foreigner.

(c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are absolute limitations upon the legislative power.

For convenience as well as for their better understanding it is proper to take each of these separately. But some related terms are necessary to be understood first.

Definition of State

With a few exceptions, all the fundamental rights are available against the State. Under Article 12, unless the context otherwise requires, "the State" includes –

(a) the Government and Parliament of India;

(b) the Government and the Legislature of each of the States; and

(c) all local or other authorities:

(i) within the territory of India; or

(ii) under the control of the Government of India.

The expression 'local authorities' refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards. The Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the authority should engage in performing government functions (*Electricity Board, Rajasthan* v. *Mohanlal*, AIR 1967 SC 1957). The Calcutta High Court has held that the electricity authorities being State within the meaning of Article 12, their action can be judicially reviewed by this Court under Article 226 of the Constitution of India. (*In re: Angur Bala Parui,* AIR 1999 Cal. 102). It has also been held that a university is an authority (*University of Madras* v. *Shanta Bai,* AIR 1954 Mad. 67). The Gujarat High Court has held that the President is "State" when making an order under Article 359 of the Constitution (*Haroobhai* v. *State of Gujarat*, AIR 1967, Guj. 229). The words "under the control of the Government of India" bring, into the definition of State, not only every authority within the territory of India, but also those functioning outside, provided such authorities are under the control of the Government of India. In *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479, State was interpreted to include its Income-tax department.

The Supreme Court in *Sukhdev Singh* v. *Bhagatram,* AIR 1975 SC 1331 and in *R.D. Shetty* v. *International Airports Authority,* AIR 1979 SC 1628, has pointed out that corporations acting as instrumentality or agency of government would become 'State' because obviously they are subjected to the same limitations in the field of constitutional or administrative law as the government itself, though in the eye of law they would be distinct and independent legal entities. In *Satish Nayak* v. *Cochin Stock Exchange Ltd.* (1995 Comp LJ 35), the Kerala High Court held that since a Stock Exchange was independent of Government control and was not discharging any public duty, it cannot be treated as 'other authority' under Article 12.

Test for instrumentality or agency of the State

In *Ajay Hasia* v. *Khalid Mujib,* AIR 1981 SC 481, the Supreme Court has enunciated the following test for determining whether an entity is an instrumentality or agency of the State:

(1) If the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.

(2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.

(3) Whether the corporation enjoys a monopoly status which is conferred or protected by the State.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or an instrumentality.

(5) If the functions of the corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of government.

(6) If a department of government is transferred to a corporation, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government.

An important decision on the definition of State in Article 12 is *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111. A seven Judge Bench of the Supreme Court by a majority of 5:2 held that CSIR is an instrumentality of "the State" falling within the scope of Article 12. The multiple test which is to be applied to ascertain the character of a body as falling within Article 12 or outside is to ascertain the nature of

financial, functional and administrative control of the State over it and whether it is dominated by the State Government and the control can be said to be so deep and pervasive so as to satisfy the court "of brooding presence of the Government" on the activities of the body concerned.

In *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 SCC 649, the Supreme Court applying the tests laid down in *Pardeep Kumar Biswas* case held that the Board of Control for cricket in India (BCCI) was not State for purposes of Article 12 because it was not shown to be financially, functionally or administratively dominated by or under the control of the Government and control exercised by the Government was not pervasive but merely regulatory in nature.

Judiciary although an organ of State like the executive and the legislature, is not specifically mentioned in Article 12. However, the position is that where the Court performs judicial functions, e.g. determination of scope of fundamental rights vis-a-vis legislature or executive action, it will not occasion the infringement of fundamental rights and therefore it will not come under 'State' in such situation (*A.R. Antualay* v. *R.S. Nayak*, (1988) 2 SCC 602). While in exercise of non-judicial functions e.g. in exercise of rule-making powers, where a Court makes rules which contravene the fundamental rights of citizens, the same could be challenged treating the Court as 'State'.

Justifiability of Fundamental Rights

Article 13 gives teeth to the fundamental rights. It lays down the rules of interpretation in regard to laws inconsistent with or in derogation of the Fundamental Rights.

Exsiting Laws: Article 13(1) relates to the laws already existing in force, i.e. laws which were in force before the commencement of the Constitution (pre constitutional laws). A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Future Laws: Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution (post constitutional laws). After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right.

The word 'law' according to the definition given in Article 13 itself includes –

> "... any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

It is clear that like definition of State in Article 12, the definition of 'law' in Article 13 is not exhaustive, e.g. it does not speak of even laws made by Parliament or State Legislatures which form the largest part of the body of laws. Because of this nature of the definition, the issue came up before the Supreme Court as to whether a Constitutional Amendment by which a fundamental right included in Part III is taken away or abridged is also a law within the meaning of Article 13. The Court twice rejected the view that it includes a Constitutional Amendment, but third time in the famous *Golaknath case* (A.I.R. 1967 S.C. 1643) by a majority of 6 to 5, the Court took the view that it includes such an amendment and, therefore, even a Constitutional amendment would be void to the extent it takes away or abridges any of the fundamental rights. By the Constitution (Twenty-Fourth Amendment) Act, 1971 a new clause has been added to Article 13 which provides that—

> "Nothing in this Article shall apply to any amendment of this Constitution made under Article 368"

Article 13 came up for judicial review in a number of cases and the Courts have evolved doctrines like doctrine of *eclipse, severability, prospective overruling, acquiescence* etc. for interpreting the provisions of Article 13.

Doctrine of Severability

One thing to be noted in Article 13 is that, it is not the entire law which is affected by the provisions in Part III, but on the other hand, the law becomes invalid only to the extent to which it is inconsistent with the Fundamental

Rights. So only that part of the law will be declared invalid which is inconsistent, and the rest of the law will stand. However, on this point a clarification has been made by the Courts that invalid part of the law shall be severed and declared invalid if really it is severable, i.e., if after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid. This is known as the rule of severability.

The doctrine has been applied invariably to cases where it has been found possible to separate the invalid part from the valid part of an Act. Article 13 only says that any law which is inconsistent with the fundamental rights is void "to the extent of inconsistency" and this has been interpreted to imply that it is not necessary to strike down the whole Act as invalid, if only a part is invalid and that part can survive independently. In *A.K. Gopalan* v. *State of Madras*, A.I.R.1950 S.C. 27, the Supreme Court ruled that where an Act was partly invalid, if the valid portion was severable from the rest, the valid portion would be maintained, provided that it was sufficient to carry out the purpose of the Act.

From above, it is clear that this doctrine applies only to pre constitutional laws as according to Article 13(2), State cannot even make any law which is contrary to the provisions of this Part.

Doctrine of Eclipse

The another noteworthy thing in Article 13 is that, though an existing law inconsistent with a fundamental right becomes in-operative from the date of the commencement of the Constitution, yet it is not dead altogether. A law made before the commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights, i.e. is inconsistent with it, but the eclipsed or dormant parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution. This is known as the *doctrine of eclipse*.

The doctrine was first evolved in *Bhikaji Narain Dhakras* v. *State of M.P.,* A.I.R. 1955 S.C. 781. In this case, the validity of C.P. and Berar Motor Vehicles Amendment Act, 1947, empowering the Government to regulate, control and to take up the entire motor transport business, was challenged. The Act was perfectly a valid piece of legislation at the time of its enactment. But on the commencement of the Constitution, the existing law became inconsistent under Article 13(1), as it contravened the freedom to carry on trade and business under Article 19(1)(g). To remove the infirmity the Constitution (First Amendment) Act, 1951 was passed which permitted creation by law of State monopoly in respect of motor transport business. The Court held that the Article by reason of its language could not be read as having obliterated the entire operation of the inconsistent law or having wiped it altogether from the statute book. In case of a pre-Constitution law or statute, it was held, that the *doctrine of eclipse* would apply. The relevant part of the judgement is:

> "The true position is that the impugned law became as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity."

However, there was a dispute regarding the applicability of the doctrine of eclipse, whether it should be applicable to both pre-Constitution and post-Constitution laws or only to pre-constitution laws. Some decisions were in favour of both laws and some were in favour of pre-constitution laws only. There is no unambiguous judicial pronouncement to that effect.

Waiver

The doctrine of waiver of rights is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the State. However, the person must have the knowledge of his rights and that the waiver should be voluntary. The doctine was discussed in *Basheshar Nath* v. *C.I.T.*, AIR 1959 SC 149, where the majority expressed its view against the waiver of fundamental rights. It was held that it was not open to citizens to waive any of the fundamental rights. Any person aggrieved by the consequence of the exercise of any discriminatory power, could be heard to complain against it.

The Article has been invoked in many cases. Some of the important cases and observations are as under:

Single Person Law

A law may be constitutional, even though it relates to a single individual, if that single individual is treated as a class by himself on some peculiar circumstances. The case is *Charanjit Lal Chowdhary* v. *Union of India*, AIR 1951 SC 41, in this case, the petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The company through its directors had been managing and running a textile mill of the same name. Later, on account of mis-management, a situation had arisen that brought about the closing down of the mill, thus affecting the production of an essential commodity, apart from causing serious unemployment amongst certain section of the community. The Central Government issued an Ordinance which was later replaced by an Act, known as Sholapur Spinning & Weaving Co. (Emergency Provisions) Act, 1950. With the passing of this Act, the management and the administration of the assets of the company were placed under the control of the directors appointed by the Government. As regards the shareholders, the Act declared that they could neither appoint a new director nor could take proceedings against the company for winding up. The petitioner filed a writ petition on the ground that the said Act infringed the rule of equal protection of laws as embodied in Article 14, because a single company and its shareholders were subjected to disability as compared with other companies and their shareholders. The Supreme Court dismissed the petition and held the legislation as valid. It laid down that the law may be constitutional even though it applies to a single individual if on account of some special circumstances or reasons applicable to him only, that single individual may be treated as a class by himself. However, in subsequent cases the Court explained that the rule of presumption laid down in *Charanjit Lal's* case is not absolute, but would depend on facts of each case.

For a valid classification there has to be a rational nexus between the classification made by the law and the object sought to be achieved. For example a provision for district-wise distribution of seats in State Medical colleges on the basis of population of a district to the population of the State was held to be void (*P. Rajandran* v. *State of Mysore,* AIR 1968 SC 1012).

Right of equality

Articles 14 to 18 of the Constitution deal with equality and its various facets. The general principle finds expression in Article 14. Particular applications of this right are dealt with in Articles 15 and 16. Still more specialised applications of equality are found in Articles 17 and 18.

Article 14: Equality before the law and equal protection of the laws

Article 14 of the Constitution says that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

As is evident, Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The expression 'equality before the law' which is barrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts. The second expression "the equal protection of the laws" which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhurary* v. *Union of India,* AIR 1951 SC 41). The right to equality is also recognised as one of the basic features of the Constitution (*Indra Sawhney* v. *Union of India,* AIR 2000 SC 498).

As a matter of fact all persons are not alike or equal in all respects. Application of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality. Of course, mathematical equality is not intended. Equals are to be governed by the same laws. But as regards unequals, the same laws are not complemented. In fact, that would itself lead to inequality.

Equality is a comparative concept. A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are 'similarly situated' to the complainant. (*Glanrock Estate (P) Ltd.* v. *State of T N* (2010) 10 SCC 96)

Legislative classification

A right conferred on persons that they shall not be denied equal protection of the laws does not mean the protection of the same laws for all. It is here that the doctrine of classification steps in and gives content and significance to the guarantee of the equal protection of the laws. To separate persons similarly situated from those who are not, legislative classification or distinction is made carefully between persons who are and who are not similarly situated. The Supreme Court in a number of cases has upheld the view that Article 14 does not rule out classification for purposes of legislation. Article 14 does not forbid classification or differentiation which rests upon reasonable grounds of distinction.

The Supreme Court in *State of Bihar* v. *Bihar State 'Plus-2' lectures Associations,* (2008) 7 SCC 231 held that now it is well settled and cannot be disputed that Article 14 of the Constitution guarantees equality before the law and confers equal protection of laws. It prohibits the state from denying persons or class of persons equal treatment; provided they are equals and are similarly situated. It however, does not forbid classification. In other words, what Article 14 prohibits is discrimination and not classification if otherwise such classification is legal, valid and reasonable.

Test of valid classification

Since a distinction is to be made for the purpose of enacting a legislation, it must pass the classical test enunciated by the Supreme Court in *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75. Permissible classification must satisfy two conditions, namely; (i) it must be founded on an *intelligible differentia* which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational nexus with the object sought to be achieved by the statute in question.

After considering leading cases on equal protection clause enshrined in Article 14 of the constitution, the five-Judge Bench of the Supreme Court in *Confederation of Ex-Servicemen Assns.* v. *Union of India,* (2006) 8 SCC 399 stated: "In our judgement, therefore, it is clear that every classification to be legal, valid and permissible, must fulfill the twin test; namely :

(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and

(ii) Such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question".

The classification may be founded on different basis, such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. A legal and valid classification may be based on educational qualifications (*State of Bihar* v. *Bihar State 'Plus-2' lecturers Associations and Others,* (2008) 7 SCC 238)

A law based on a permissible classification fulfills the guarantee of the equal protection of the laws and is valid. On the other hand if it is based on an impermissible classification it violates that guarantee and is void. Reiterating the test of reasonable classification, the Supreme Court in *Dharam Dutt* v. *Union of India,* (2004) 1 SCC 712 held that laying down of intelligible differentia does not, however mean that the legislative classification should be scientifically perfect or logically complete.

Scope of Article 14

The true meaning and scope of Article 14 has been explained in several decisions of the Supreme Court. **The rules with respect to permissible classification as evolved in the various decisions have been summarised by the Supreme Court in *Ram Kishan Dalmiya* v. *Justice Tendulkar,* AIR 1958 SC, 538 as follows:**

(i) Article 14 forbids class legislation, but does not forbid classification.

(ii) Permissible classification must satisfy two conditions, namely, (a) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (b) the differentia must have a relation to the object sought to be achieved by the statute in question.

(iii) The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.

(iv) In permissible classification, mathematical nicety and perfect equality are not required. Similarly, non identity of treatment is enough.

(v) Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.

(vi) Article 14 condemns discrimination not only by substantive law but by a law of procedure.

(vii) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

A remarkable example of the application of the principle of equality under the Constitution is the decision of the Constitution Bench of the Supreme Court in *R.K. Garg* v. *Union of India*, AIR 1976 SC 1559. The legislation under attack was the Special Bearer Bonds (Immunities and Exemptions) Act, 1981. It permitted investment of black money in the purchase of these Bonds without any questions being asked as to how this money came into the possession.

In a public interest litigation it was contended that Article 14 had been violated, because honest tax payers were adversely discriminated against by the Act, which legalized evasion. But the Supreme Court rejected the challenge, taking note of the magnitude of the problem of black money which had brought into being a parallel economy.

Finally it should be mentioned that Article 14 invalidates discrimination not only in substantive law but also in procedure. Further, it applies to executive acts also.

In the recent past, Article 14 has acquired new dimensions. In *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597*,* the Supreme Court held that Article 14 strikes at arbitrariness in State action and ensures a fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence (See also *Ramana Dayaram Shetty* v. *International Airport Authority,* AIR 1979 SC 1628; *Kasturi Lal* v. *State of J&K, AIR 1980 SC 1992)*. In *Ajay Hasia* v. *Khalid Mujib,* AIR 1981SC 487*,* the Supreme Court held " …. what Article 14 strikes at is arbitrariness because an action that is arbitrary must necessarily involve negation of equality….. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such action." In this case the system of selection by oral interview, in addition to written test was upheld as valid, but allocation of above 15 per cent of the total marks for interview was regarded as arbitrary and unreasonable and liable to be struck down as constitutionally invalid.

Possession of higher qualification can be treated as a valid base or classification of two categories of employees, even if no such requirement is prescribed at the time of recruitment. If such a distinction is drawn no complaint can be made that it would violate Article 14 of the Constitution (*U.P. State Sugar Corpn. Ltd.* v. *Sant Raj Singh,* (2006) 9 SCC 82.

In *Secy., State of Karnataka* v. *Umadevi,* (2006) 4 SCC *1,* the Supreme Court has held that adherence to the rule

of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding the violation of Article 14.

Article 15: Prohibition of discrimination on grounds of religion etc.

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of:

(a) religion

(b) race

(c) caste

(d) sex

(e) place of birth or

(f) any of them

Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to –

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and 15(4) create certain exceptions to the right guaranteed by Article 15(1) and 15(2). Under Article 15(3) the State can make special provision for women and children. It is under this provision that courts have upheld the validity of legislation or executive orders discriminating in favour of women (*Union of India* v. *Prabhakaran,* (1997) 2 SCC 633).

Article 15(4) permits the State to make special provision for the advancement of –

(a) Socially and educationally backward classes of citizens;

(b) Scheduled casts; and

(c) Scheduled tribes.

Article 16: Equality of opportunity in matters of public employment.

Article 16(1) guarantees to all citizens equality of opportunity in matters relating to employment or appointment of office under the State.

Article 16(2) prohibits discrimination against a citizen on the grounds of religion, race, caste, sex, descent, place of birth or residence.

However, there are certain exceptions provided in Article 16(3), 16(4) and 16(5). These are as under:

(1) Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State on a Union Territory, under any local or other authority within the State or Union Territory, residence within that State or Union Territory prior to such employment or appointment shall be an essential qualification. [Article 16(3)]

(2) A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. [Article 16(4)]

(3) A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. [Article 16(5)]

The Supreme Court in *Secy. of State of Karnataka* v. *Umadevi (3)* (2006) 4 SCC 1 held that adherence to the rule of equality in public employment is a basic feature of the Constitution and since the rule of law is the core of the Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14. Equality of opportunity is the hallmark and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. Thus any public employment has to be in terms of the Constitutional Scheme.

Test your knowledge

As per The Declaration of American Independence 1776, which of the following rights are endowed by the creator on all men?

(a) Life

(b) Liberty

(c) Virtue

(d) Pursuit of happiness

Correct answer: a, b, and d

Article 17: Abolition of untouchability

Article 17 says that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Untouchability does not include an instigation to social boycott (*Davarajiah* v. *Padamanna,* AIR 1961 Mad. 35, 39). Punishment for violation of Article 17 is to be provided by Parliament under Article 35(a)(ii).

In 1955 Parliament enacted the Untouchability (Offences) Act 1955. In 1976, the Act was amended and renamed as the "Protection of Civil Rights Act, 1955" making changes in the existing law namely, all offences to be treated as non-compoundable and offences punishable upto three months to be tried summarily; punishment of offences enhanced; preaching of untouchability or its justification made an offence; a machinery envisaged for better administration and enforcement of its provisions.

Article 18: Abolition of titles

Article 18 is more a prohibition rather than a fundamental right. British Government used to confer titles upon persons who showed special allegiance to them. Many persons were made Sir, Raj Bahadur, Rai Saheb, Knight, etc. These titles had the effect of creating a class of certain persons which was regarded superior to others and thus had the effect of perpetuating inequality. To do away with that practice, now Article 18 provides as under:

(i) No title, not being a military or academic distinction, shall be conferred by the State.

(ii) No citizen of India shall accept any title from any foreign State.

(iii) No person, who is not a citizen of India shall, while he holds any office or trust under the State, accept without the consent of the President, any title from any foreign State.

(iv) No person, holding any office of profit or trust under State shall without the consent of the President, accept any present, emolument or office of any kind from or under a foreign State.

It has been pointed out by the Supreme Court that the framers of the Constitution prohibited titles of nobility and all other titles that carry suffixes or prefixes, as they result in the distinct class of citizens. However, framers of the Constitution did not intend that the State should not officially recognise merit or work of an extra ordinary nature. The National awards are not violative of the principles of equality as guaranteed by the provisions of the Constitution. The theory of equality does not mandate that merit should not be recognised. The Court has held

that the National awards do not amount to "titles" within the meaning of Article 18(1) and they should not be used as suffixes or prefixes. If this is done, the defaulter should forfeit the National award conferred on him/her, following the procedure laid down in regulation 10 of each of the four notifications creating these National awards.

Rights Relating to Freedom

Articles 19-22 guarantee certain fundamental freedoms.

The six freedoms of citizens

Article 19(1), of the Constitution, guarantees to the citizens of India six freedoms, namely:

(a) freedom of speech and expression;

(b) assemble peaceably and without arms;

(c) form associations or unions

(d) move freely, throughout the territory of India;

(e) reside and settle in any part of the territory of India;

(f) practise any profession, or to carry on any occupation, trade or business.

These freedoms are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen. At the same time, none of these freedoms is absolute but subject to reasonable restrictions specified under clauses (2) to (6) of the Article 19. The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:

(a) The restriction can be imposed by law and not by a purely executive order issued under a statute;

(b) The restriction must be reasonable;

(c) The restriction must be imposed for achieving one or more of the objects specified in the respective clauses of Article 19.

Reasonableness

It is very important to note that the restrictions should be reasonable. If this word 'reasonable' is not there, the Government can impose any restrictions and they cannot be challenged. This word alone gives the right to an aggrieved person to challenge any restriction of the freedoms granted under this Article.

Reasonableness of the restriction is an ingredient common to all the clauses of Article 19. Reasonableness is an objective test to be applied by the judiciary. Legislative judgment may be taken into account by the Court, but it is not conclusive. It is subject to the supervision of Courts. The following factors are usually considered to assess the reasonableness of a law:

(i) The objective of the restriction;

(ii) The nature, extent and urgency of the evil sought to be dealt with by the law in question;

(iii) How far the restriction is proportion to the evil in question

(iv) Duration of the restriction

(v) The conditions prevailing at the time when the law was framed.

The onus of proving to the satisfaction of the Court that the restriction is reasonable is upon the State.

Procedural and Substantiveness

In determining the reasonableness of a law, the Court will not only see the surrounding circumstances, but all

contemporaneous legislation passed as part of a single scheme. It is the reasonableness of the restriction and not of the law that has to be found out, and if the legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the court can take judicial notice of such Acts forming part of the same legislative plan (*Krishna Sagar Mills* v. *Union of India,* AIR 1959 SC 316).

The phrase 'reasonable restrictions' connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. In determining the reasonableness of a statute, the Court would see both the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. The reasonableness of a restriction has to be determined in an objective manner and from the point of view of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations. The Court is called upon to ascertain the reasonableness of the restrictions and not of the law which permits the restriction. The word 'restriction' also includes cases of prohibition and the State can establish that a law, though purporting to deprive a person of his fundamental right, under certain circumstances amounts to a reasonable restriction only. Though the test of reasonableness laid down in clauses (2) to (6) of Article 19 might in great part coincide with that for judging 'due process' under the American Constitution, it must not be assumed that these are identical. It has been held that the restrictions are imposed in carrying out the Directive Principles of State Policy is a point in favour of the reasonableness of the restrictions.

Scope and Limitations on the Freedoms

(a) Right to freedom of speech and expression

It need not to be mentioned as to how important the freedom of speech and expression in a democracy is. A democratic Government attaches a great importance to this freedom because without freedom of speech and expression the appeal to reason which is the basis of democracy cannot be made. The right to speech and expression includes right to make a good or bad speech and even the right of not to speak. One may express oneself even by signs. The Courts have held that this right includes the freedom of press and right to publish one's opinion, right to circulation and propagation of one's ideas, freedom of peaceful demonstration, dramatic performance and cinematography. It may also include any other mode of expression of one's ideas. The Supreme Court in *Cricket Association of Bengal* v. *Ministry of Information & Broadcasting* (*Govt. of India*), AIR 1995 SC 1236, has held that this freedom includes the right to communicate through any media - print, electronic and audio visual.

The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. This freedom includes the freedom of press as it partakes of the same basic nature and characteristic (*Maneka Gandhi* v. *Union of India,* AIR 1978 S.C. 597). However no special privilege is attached to the press as such, distinct from ordinary citizens. In *Romesh Thapar* v. *State of Punjab,* AIR 1950 S.C. 124, it was observed that "freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government is possible". Imposition of pre-censorship on publication under clause (2), is violative of freedom of speech and expression.

The right to freedom of speech is infringed not only by a direct ban on the circulation of a publication but also by an action of the Government which would adversely affect the circulation of the paper. The only restrictions which may be imposed on the press are those which clause (2) of Article 19 permits and no other (*Sakal Papers (P) Ltd.* v. *Union of India,* AIR 1962 SC 305).

Regarding Commercial advertisements it was held in *Hamdard Dawakhana* v. *Union of India,* AIR 1960 SC 554 that they do not fall within the protection of freedom of speech and expression because such advertisements have an element of trade and commerce. A commercial advertisement does not aim at the furtherance of the freedom of speech. Later the perception about advertisement changed and it has been held that commercial

speech is a part of freedom of speech and expression guaranteed under Article 19(1)(a) and such speech can also be subjected to reasonable restrictions only under Article 19(2) and not otherwise (*Tata Press Ltd*. v. *MTNL,* AIR 1995 SC 2438).

The right to know, 'receive and impart information' has been recognized within the right to freedom of speech and expression (*S.P. Gupta* v. *President of India,* AIR 1982 SC 149. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. *(Secretary, Ministry of I&B, Govt. of India* v. *Cricket Association of Bengal,* (1995) 2 SCC 161)

The right to reply, i.e. the right to get published one's reply in the same news media in which something is published against or in relation to a person has also been recognised under Article 19(1)(a), particularly when the news media is owned by the State within the meaning of Article 12. It has also been held that a Government circular having no legal sanction violates Article 19(1)(a), if it compels each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection (*Bijoe Emmanuel* v. *State of Kerala,* (1986) 3 SCC 615). Impliedly the Court has recognised in Article 19(1)(a) the right to remain silent.

The Supreme Court in *Union of India* v. *Naveen Jindal,* (2004) 2 SCC 476, has held that right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1)(a) of the Constitution being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation.

Dramatic performance is also a form of speech and expression. In *K.A. Abbas* v. *Union of India,* AIR 1971 S.C. 481, the Court held that censorship of films including (pre-censorship) is justified under Article 19(1)(a) and (2) of the Constitution but the restrictions must be reasonable. The right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the latter has also been recognized. *(Odyssey Communications (P) Ltd.* v. *Lokvidayan Sangathan,* AIR 1988 SC 1642.

Clause (2) of Article 19 specifies the limits upto which the freedom of speech and expression may be restricted. It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression under the following heads:

Permissible Restrictions

(1) Sovereignty and integrity of India.

(2) Security of the State.

(3) Friendly relations with foreign States.

(4) Public Order.

(5) Decency or morality or

(6) Contempt of court.

(7) Defamation or

(8) Incitement to an offence.

Reasonable restrictions under these heads can be imposed only by a duly enacted law and not by the executive action (*Express News Papers Pvt. Ltd.* v. *Union of India,* (1986) 1 SCC 133).

Corporations

The Supreme Court, initially expressed the view that a Corporation is not a citizen within the meaning of Article 19 and, therefore, cannot invoke this Article. Subsequently the Supreme Court held that a company is a distinct

and separate entity from its shareholders and refused to tear the corporate veil for determing the constitutionality of the legislation by judging its impact on the fundamental rights of the shareholders of the company (*TELCO* v. *State of Bihar,* AIR 1965 S.C. 40). But a significant modification is made by the Supreme Court in *R.C. Cooper* v. *Union of India,* AIR 1970 S.C. 564 (also called the *Bank Nationalisation* case). The Supreme Court ruled that the test in determining whether the shareholder's right is impaired is not formal but is essentially qualitative. If the State action impaired the rights of the shareholders as well as of the company, the Court will not deny itself jurisdiction to grant relief. The shareholders' rights are equally affected, if the rights of the company are affected (*Bennett Coleman & Co.,* AIR (1973) S.C. 106).

(b) Freedom of assembly

The next right is the right of citizens to assemble peacefully and without arms [Art. 19(1)(b)]. Calling an assembly and putting one's views before it is also intermixed with the right to speech and expression discussed above, and in a democracy it is of no less importance than speech. However, apart from the fact that the assembly *must be peaceful* and *without arms*, the State is also authorised to impose reasonable restrictions on this right in the interests of:

(i) the sovereignty and integrity of India, or

(ii) public order.

Freedom of assembly is an essential element in a democratic Government. In the words of Chief Justice *Waite* of the Supreme Court of America, "the very idea of Government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect of public affairs". The purpose of public meetings being the education of the public and the formation of opinion on religious, social, economic and political matters, the right of assembly has a close affinity to that of free speech under Article 19(1)(a).

(c) Freedom of association

The freedom of association includes freedom to hold meeting and to takeout processions without arms. Right to form associations for unions is also guaranteed so that people are free to have the members entertaining similar views [Art. 19(1)(c)]. This right is also, however, subject to reasonable restrictions which the State may impose in the interests of:

(i) the sovereignty and integrity of India, or

(ii) public order, or

(iii) morality.

A question not yet free from doubt is whether the fundamental right to form association also conveys the freedom to deny to form an association. In *Tikaramji* v. *Uttar Pradesh,* AIR 1956 SC 676, the Supreme Court observed that assuming the right to form an association "implies a right not to form an association, it does not follow that the negative right must also be regarded as a fundamental right". However, the High Court of Andhra Pradesh has held, that this right necessarily implies a right not to be a member of an association. Hence, the rules which made it compulsory for all teachers of elementary schools to become members of an association were held to be void as being violative of Article 19(1)(c) *(Sitharamachary* v. *Sr. Dy. Inspector of Schools,* AIR 1958 A.P. 78). This view gets support from O*.K. Ghosh* v. *Joseph,* AIR 1963 SC 812. It has been held that a right to form associations or unions does not include within its ken as a fundamental right a right to form associations or unions for achieving a particular object or running a particular institution (2004) 1 SCC 712.

(d) Freedom of movement

Right to move freely throughout the territory of India is another right guaranteed under Article 19(1)(d). This right, however, does not extend to travel abroad, and like other rights stated above, it is also subject to the reasonable restrictions which the State may impose:

(i) in the interests of the general public, or

(ii) for the protection of the interests of any scheduled tribe.

A law authorising externment or interment to be valid must fall within the limits of permissible legislation in clause (5), namely restrictions must be reasonable and in the interests of the general public or for the protection of the interests of the Scheduled Tribes.

(e) Freedom of residence

Article 19(1)(e) guarantees to a citizen the right to reside and settle in any part of the territory of India. This right overlaps the right guaranteed by clause (d). This freedom is said to be intended to remove internal barriers within the territory of India to enable every citizen to travel freely and settle down in any part of a State or Union territory. This freedom is also subject to reasonable restrictions in the interests of general public or for the protection of the interests of any Scheduled Tribe under Article 19(5). That apart, citizens can be subjected to reasonable restrictions (*Ebrahim* v. *State of Bom.,* (1954) SCR 923, 950). Besides this, certain areas may be banned for certain kinds of persons such as prostitutes (*State of U.P.* v. *Kaushaliya*, AIR 1964 SC 416, 423).

[(f) Right to acquire, hold and dispose of property – deleted by 44th Amendment in 1978.]

(g) Freedom to trade and occupations

Article 19(1)(g) provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

An analysis of the case law reveals that the emphasis of the Courts has been on social control and social policy. However, no hard and fast rules have been laid down by the Court for interpreting this Article. The words *'trade', 'business', 'profession'* used in this Article have received a variety of interpretations. The word 'trade' has been held to include the occupation of men in buying and selling, barter or commerce, work, especially skilled, thus of the widest scope *(Safdarjung Hospital* v. *K.S. Sethi,* AIR 1970 S.C. 1407).

The word 'business' is more comprehensive than the word 'trade'. Each case must be decided according to its own circumstances, applying the common sense principle as to what business is. A *profession* on the other hand, has been held ordinarily as an occupation requiring intellectual skill, often coupled with manual skill. Like other freedoms discussed above, this freedom is also subject to reasonable restrictions. Article 19(6) provides as under :

Nothing in sub-clause (g) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions in the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The freedom is not uncontrolled, for, clause (6) of the Article authorises legislation which (i) imposes reasonable restrctions on this freedom in the interests of the general public; (ii) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and (iii) enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

In order to determine the reasonableness of the restriction, regard must be had to the nature of the business and conditions prevailing in that trade. It is obvious that these factors differ from trade to trade, and no hard and fast

rules concerning all trades can be laid down. The word 'restriction' used in clause (6) is wide enough to include cases of total prohibition also. Accordingly, even if the effect of a law is the elimination of the dealers from the trade, the law may be valid, provided it satisfies the test of reasonableness or otherwise.

The vital principle which has to kept in mind is that the restrictive law should strike a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19. The restriction must not be of an exessive nature beyond what is required in the interests of the public.

MONOPOLY

The Supreme Court's decision in *Chintamana Rao* v. *State of M.P.,* AIR 1951 S.C. 118 is a leading case on the point where the constitutionality of Madhya Pradesh Act was challenged. The State law prohibited the manufacture of bidis in the villages during the agricultural season. No person residing in the village could employ any other person nor engage himself, in the manufacture of bidis during the agricultural season. The object of the provision was to ensure adequate supply of labour for agricultural purposes. The bidi manufacturer could not even import labour from outside, and so, had to suspend manufacture of bidis during the agricultural season. Even villagers incapable of engaging in agriculture, like old people, women and children, etc., who supplemented their income by engaging themselves manufacturing bidis were prohibited without any reason. The prohibition was held to be unreasonable.

However, after the Constitutional (Amendment) Act, 1951, the State can create a monopoly in favour of itself and can compete with private traders. It has been held in *Assn. of Registration Plates* v. *Union of India,* (2004) SCC 476 that the State is free to create monopoly in favour of itself. However the entire benefit arising therefrom must ensure to the benefit of the State and should not be used as a clock for conferring private benefit upon a limited class of persons.

(a) Protection in respect of conviction for offences

Articles 20, 21 and 22 provide a system of protection, relevant to the criminal law. Article 20 guarantees to all persons — whether *citizens* or *non-citizens-three* rights namely : –

(i) Protection against ex-post facto laws

According to Article 20(1), no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Ex-post facto laws are laws which punished what had been lawful when done. If a particular act was not an offence according to the law of the land at the time when the person did that act, then he cannot be convicted under a law which with retrospective declares that act as an offence. For example, what was not an offence in 1972 cannot be declared as an offence under a law made in 1974 giving operation to such law from a back date, say from 1972.

Even the penalty for the commission of an offence cannot be increased with retrospective effect. For example, suppose for committing dacoity the penalty in 1970 was 10 years imprisonment and a person commits dacoity in that year. By a law passed after his committing the dacoity the penalty, for his act cannot be increased from 10 to 11 years or to life imprisonment.

In *Shiv Bahadur Singh* v. *State of Vindhya Pradesh,* AIR 1953 S.C. 394, it was clarified that Article 20(1) prohibited the conviction under an *ex post facto law*, and that too the substantive law. This protection is not available with respect to procedural law. Thus, no one has a vested right in procedure. A law which nullifies the rigour of criminal law is not affected by the rule against *ex post facto law* (*Rattan Lal* v. *State of Punjab,* (1964) 7 S.C.R. 676).

(ii) Protection against double jeopardy

According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. It is, however, to be noted that the conjunction "and" is used between the words prosecuted and punished, and therefore, if a person has been let off after prosecution without being punished, he can be prosecuted again.

(iii) Protection against self-incrimination

According to Article 20(3), no person accused of any offence shall be compelled to be a witness against himself. In other words, an accused cannot be compelled to state anything which goes against him. But it is to be noted that a person is entitled to this protection, only when all the three conditions are fulfilled:

1. that he must be accused of an offence;
2. that there must be a compulsion to be a witness; and
3. such compulsion should result in his giving evidence against himself.

So, if the person was not an accused when he made a statement or the statement was not made as a witness or it was made by him without compulsion and does not result as a statement against himself, then the protection available under this provision does not extend to such person or to such statement.

The 'right against self-incrimination' protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. [*Selvi* v. *State of Karnataka*, AIR 2010 SC 1974].

(b) Protection of life and personal liberty

Article 21 confers on every person the fundamental right to life and personal liberty. It says that,

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

The right to life includes those things which make life meaningful. For example, the right of a couple to adopt a son is a constitutional right guaranteed under Article 21 of the Constitution (see, *Philips Alfred Malvin* v. *Y.J. Gonsalvis and others,* AIR 1999 Ker. 187). The right to life enshrined in Article 21 guarantees right to live with human dignity. Right to live in freedom from noise pollution is a fundamental right protected by Article 21 and noise pollution beyond permissible limits is an inroad into that right. (*Noise Pollution* (v), *in re,* (2005) 5 SCC 733.

The majority in the case of *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27, gave a narrow meaning to the expression 'personal liberty' within the subject matter of Articles 20 to 22 by confining it to the liberty of the person (that is, of the body of a person). The majority of the judges also took a narrow view of the expression *'procedure established by law'* in this case. In the *State of Maharashtra* v. *Prabhakar Pandurang Sanzigri,* AIR 1966, SC 424, Subba Rao J. considered the inter-relation between Articles 19 and 21 as was discussed by the majority Judges in the *A.K. Gopalan's case* and came to the conclusion that "that view was not the last word on the subject".

The expression 'liberty' in the 5th and 14th Amendments of the U.S. Constitution has been given a very wide meaning. The restricted interpretation of the expression 'personal liberty' preferred by the majority judgement in *A.K. Gopalan's case* namely, that the expression 'personal liberty' means only liberty relating to or concerning the person or body of the individual, has not been accepted by the Supreme Court in subsequent cases.

That the expression 'personal liberty' is not limited to bodily restraint or to confinement to prison, only is well illustrated in *Kharak Singh* v. *State of U.P,* AIR 1963 SC 1295. In that case the question raised was of the validity of the police regulations authorising the police to conduct what are called as domiciliary visits against bad characters and to have surveillance over them. The court held that such visits were an invasion, on the

part of the police, of the sanctity of a man's home and an intrusion into his personal security and his right to sleep, and therefore violative of the personal liberty of the individual, unless authorised by a valid law. As regards the regulations authorising surveillance over the movements of an individual the court was of the view that they were not bad, as no right to privacy has been guaranteed in the Constitution.

However, in *Gobind* v. *State of M.P.,* AIR 1975 S.C. 1378, Mathew, J. asserted that the right to privacy deserves to be examined with care and to be denied only when an important countervailing interest is shown to be superior, and observed that this right will have to go through a process of case-by-case development. Mathew, J. explained that even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as emanating from them, the right is not absolute and it must be read subject to restrictions on the basis of compelling public interest.

Refusal of an application to enter a medical college cannot be said to affect person's personal liberty under Article 21 (*State of A.P.* v. *L. Narendranathan,* (1971) 1 S.C.C. 607).

In *Satwant Singh Sawhney* v. *A.P.O., New Delhi*, AIR 1967 S.C. 1836, it was held that right to travel is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel, except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, the denial of a passport amounts to deprivation of personal liberty. In the absence of any procedure pescribed by the law of land sustaining the refusal of a passport to a person, it's refusal amounts to an unauthorised deprivation of personal liberty guaranteed by Article 21. This decision was accepted by the Parliament and the infirmity was set right by the enactment of the Passports Act, 1967.

It was stated in *Maneka Gandhi* v. *Union of India,* AIR 1978 S.C. 597, that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad, and no person can be deprived of this right except according to procedure prescribed by law. In this case, it was clearly laid down that the fundamental rights conferred by Part III of the Constitution are not distinct and mutually exclusive. Thus, a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has still to stand the test of one or more of fundamental rights conferred by Article 19 which may be applicable to a given situation.

Procedure established by law: The expression 'procedure established by law' means procedure laid down by statute or procedure prescribed by the law of the State. Accordingly, first, there must be a law justifying interference with the person's life or personal liberty, and secondly, the law should be a valid law, and thirdly, the procedure laid down by the law should have been strictly followed.

The law laid down in *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27, that the expression 'procedure established by law' means only the procedure enacted by a law made by the State was held to be incorrect in the *Bank Nationalisation Case* (1970) 1 S.C.C. 248. Subsequently, in *Maneka Gandhi's* case (AIR 1978 SC 49), it was laid down, that the law must now be taken to be well settled that Article 21 does not exclude Article 19 and a law prescribing a procedure for depriving a person of 'personal liberty' will have to meet the requirements of Article 21 and also of Article 19, as well as of Article 14.

The procedure must be fair, just and reasonable. It must not be arbitrary fanciful or oppressive. An interesting, follow-up of the *Maneka Gandhi's* case came in a series of cases.

In *Bachan Singh* v. *State of Punjab,* AIR 1980 S.C. 898, it was reiterated that in Article 21 the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.

Presently, this term personal liberty extends to variety of matters like right to bail, right not to be handcuffed except under very few cases, right to speedy trial, right to free legal aid etc.

Article 21A: Right to Education

This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Protection against arrest and detention

Although Article 21 does not impose a limitation on the legislature in so far as the deprivation of life or personaly liberty is concerned, yet a legislative Act providing for such deprivation is subject to the procedureal safeguards provided in Article 22 and if it does not provide for any of these safeguards it shall be declared unconstitutional. However, Article 22 does not apply uniformly to all persons and makes a distinction between:

(a) alien enemies,

(b) person arrested or detained under preventive detention law, and

(c) other persons.

So far as alien enemies are concerned the article provides no protection to them. So far as persons in category (c) are concerned, it provides the following rights (These rights are not given to persons detained under preventive detention law).

(i) A person who is arrested cannot be detained in custody unless he has been informed, as soon as he may be, of the grounds for such arrest.

(ii) Such person shall have the right to consult and to be defended by a legal practitioner of his choice.

(iii) A person who is arrested and detained must be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond twenty-four hours without the authority of magistrate.

Preventive Detention

Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it. No offence is proved nor any charge formulated and yet a person is detained because he is likely to commit an act prohibited by law. Parliament has the power to make a law for preventive detention for reasons connected with defence, foreign affairs or the security of India. Parliament and State Legislatures are both entitled to pass a law of preventive detention for reasons connected with the security of State, the maintenance of public order, or the maintenance of supplies and services essential to the community.

Safeguards against Preventive Detention

Article 22 (amended by the 44th Constitution Amendment Act, 1978)[1] contains following safeguards against preventive detention:

(a) such a person cannot be detained for a longer period than three months unless:

  (i) An Advisory Board constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention.

  (ii) Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board.

(b) The authority ordering the detention of a person under the preventive detention law shall:

1. The Change proposed by the Constitution (Forty-fourth Amendment) Act, 1978 have not been notified as yet.

(i) communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and

(ii) afford him the earliest opportunity of making the representation against the order.

It may, however, be noted that while the grounds for making the order are to be supplied, the authority making such order is not bound to disclose those facts which it considers to be against the public interest.

Test your knowledge

Choose the correct answer

Which of the following articles prohibit the State from discriminating against any citizen on grounds of religion, race, caste, sex, or place of birth?

(a) Article 15(1)

(b) Article 15(2)

(c) Article 15(3)

(d) Article 15(4)

Correct answer: (a)

Right against Exploitation

This group of fundamental rights consists of Articles 23 and 24. They provide for rights against exploitation of all citizens and non-citizens. Taking them one by one they guarantee certain rights by imposing certain prohibitions not only against the State but also against private persons.

(a) Prohibition of traffic in human beings and forced labour

Article 23 imposes a complete ban on traffic in human beings, federal and other similar forms of forced labour. The contravention of these provisions is declared punishable by law. Thus the traditional system of beggary particularly in villages, becomes unconstitutional and a person who is asked to do any labour without payment or even a labourer with payment against his desire can complain against the violation of his fundamental right under Article 23.

'Traffic' in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. 'Begar' means involuntary work without payment.

The State can impose compulsory service for public purposes such as conscription for defence for social service etc. While imposing such compulsory service the State cannot make any discrimination on grounds only of religion, race, caste or class or any of them. (Clause 2 of Article 23).

(b) Prohibition of employment of children

Article 24 prohibits the employment of children below the age of fourteen in any factory or mine. The Employment of Children Act, 1938; The Factories Act, 1948; The Mines Act, 1952; The Apprentices' Act, 1961; and the Child Labour (Prohibition and Regulation) Act, 1986 are some of the important enactments in the statute book to protect the children from exploitation by unscrupulous employers.

The Supreme Court has issued detailed guidelines as to child labour in *M.C. Mehta* v. *State of T.N.,* AIR 1993 S.C. 699.

Right to Freedom of Religion

With Article 25 begins a group of provisions ensuring equality of all religions thereby promoting secularism.

Freedom of conscience and free profession, practice and propagation of religion.

Article 25 gives to every person the:

(i) freedom of conscience, and

(ii) the right freely to profess, practice and propagate religion.

But this freedom is subject to restrictions imposed by the State on the following grounds:

(i) public order, morality and health,

(ii) other provisions in Part III of the Constitution,

(iii) any law regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice, and

(iv) any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The Supreme Court in *State of Karnataka* v. *Dr. Praveen Bhai Thogadia*, (2004) 9 SCC 684, held that secularism means that State should have no religion of its own and each person, whatever his religion, must get an assurance from the State that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience.

The freedom of religion conferred by the present Article is not confined to the citizens of India but extends to all persons including aliens and individuals exercising their rights individually or through institutions (*Ratilal* v. *State of Bombay,* (1954) SCR 105, *Stanslaus* v. *State,* AIR 1975 M. 163).

The term 'Hindu' here includes person professing the Sikh, Jain, or Buddhist religion also and accordingly the term 'Hindu religious institutions' also includes the institutions belonging to these religions. Special right has been accorded to the Sikhs to wear *kirpan* as part of professing their religion.

(a) The Concept of Religion

Our Constitution does not define the word religion. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic — There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in any system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its follower to accept, it might prescribe rituals and observances, ceremonies and modes or worship which are regarded as integral parts of religion and those forms and observances might extend even to matters of food and dress (*Justice Mukherjee in Commr. of H.R.E., Madras* v. *Sirur Mutt,* A.I.R. 1954 S.C. 282).

(b) Freedom to manage religious affairs

Although no clear cut distinction is possible, yet it may be said that while Article 25 discussed above protects the religious freedom of individuals. Article 26, deals with the collective rights of religious denominations. Here the question may be raised as to what is a religious denomination? In the words of our Supreme Court:

"The word *'denomination'* has been defined in the Oxford Dictionary to mean a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name. It is well known that the practice of setting up *Maths* as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankaracharya, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in

India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, in many cases it is the name of the founder and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnavas, undoubtedly constitute a religious denomination, and so do the followers of Madhavacharya and other religious teachers" (*Mukherjee J. in Commr. of H.R.E., Madras* v. *Sirur Mutt.,* A.I.R. 1954 S.C. 282).

However, a religious denomination is not a 'citizen'. Now coming to the provisions of Article 26, it grants to every religious denomination or any sect thereof the right—

(i) to establish and maintain institutions of religious and charitable purposes;

(ii) to manage its own affairs in matters of religion;

(iii) to own and acquire movable and immovable property; and

(iv) to administer such property in accordance with law.

All these rights are subject to public order, morality and health, and, therefore, if they conflict then the right will give way to these exceptions. One more exception may be noted. A denomination's right to manage its own affairs in matters of religion is subject to the State's power to throw open Hindu religious institutions of a public nature to all classes or sections of Hindus covered in Article 25.

(c) Freedom as to payment of tax for the promotion of any particular religion

According to Article 27, no person can be compelled to pay any taxes, the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. It is notable that freedom not to pay taxes is only with respect to those taxes the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or denomination.

(d) Freedom as to attendance at religious instruction or religious worship in educational institutions

Article 28 prohibits religious instruction in certain educational institutions and gives freedom to a person to participate in such religious instructions. The Article states that—

(i) No religious instruction can be provided in any educational instituion wholly maintained out of State funds. However, this prohibiton does not extend to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(ii) No person attending an educational institution recognised by the State or receiving aid out of State funds cannot be required:

(a) to take part in any religious instruction that may be imparted in such institution; or

(b) to attend any religious worship that may be conducted in such institution or any premises attached thereto,

unless such person or if such person is a minor, his guardian has given his consent thereto. It may, however, be noted that although person can be compelled to take religious instructions or attend worship, without his consent, yet at the same time such person is not entitled to perform any religious ceremony or worship which is contrary to the tenets of that educational institution (*Sanjib* v. *St. Paul's College*, 61 C.W.N. 71).

Test your knowledge

State whether the following statement is "True" or "False"

The right to speech and expression includes right to make a good or bad speech.

- True
- False

Correct answer: True

Cultural and Educational Rights [Rights of Minorities]

Minority

The word 'minority' has not been defined in the Constitution. The Supreme Court in *D.A.V. College, Jullundur* v. *State of Punjab,* A.I.R. 1971, S.C. 1737, seems to have stated the law on the point. It said that minority should be determined in relation to a particular impugned legislation. The determination of minority should be based on the area of operation of a particular piece of legislation. If it is a State law, the population of the State should be kept in mind and if it is a Central Law the population of the whole of India should be taken into account.

The two Articles guarantee the following rights:

(a) Protection of interests of Minorities

Article 29 guarantees two rights:

(i) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. Thus, citizens from Tamil Nadu or Bengal has the right to conserve their language or culture if they are living in Delhi, a Hindi speaking area and *vice versa*.

(ii) No citizen can be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. This provision is general and applies to each citizen individually and is not confined to a group of citizens. An exception is made to this right to the effect that if a special provision is made for the admission of persons belonging to educationally or/and socially backward classes or scheduled castes or scheduled tribes it shall be valid.

(b) Right of Minorities to establish and administer educational institutions

The rights guaranteed to the minorities in Article 30 are even more important than those covered by Article 29. Following rights are declared in Article 30 :

(i) All minorities, whether based on religion or on language, shall have the right to establish and administer educational institutions of their choice. It may be noted here that this right is not limited only to linguistic minorities but it extends to religious minorities also. Both of them have been given the freedom to establish and administer educational institutions of their own choice. So they can establish educational institution of any type and cannot be restrained from its administration. The maladministration may be checked by the State but administration cannot be entrusted to outside hands. Mal-administration defeats the very object of Article 30, which is to promote excellence of minority institutions in the field of education (*All Saints High School* v. *Government of A.P.*, AIR 1980 SC 1042). And in that educational institution they may teach religion, or may give secular education, but no bar can be imposed on their choice. In the matter of medium of instruction also, the minorities are completely free to adopt any medium of their choice.

(ii) The State cannot, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. It has been held that the State cannot impose conditions in granting aid to such institutions. Further, the minority institutions are also entitled to recognition and the State cannot deny them that right, merely because they do not follow the directions of the State which impair rights under Article 30 (In *re. Kerala Education Bill* 1957, A.I.R. 1958 S.C. 956; *Sidhrajbhai* v. *State of Gujarat,* A.I.R. 1963 S.C. 540).

In *DAV College* v. *State of Punjab,* AIR 1971 SC 1737, it was held that any community—religious or linguistic, which is numerically less than 50 percent of the population of that State, is a minority within the meaning of Article 30. The expression minority in Article 30(1) is used as distinct from 'Any sections of citizens' in Article 29(1) which lends support to the view that Article 30(1) deals with national minorities or minorities recognised in the context of the entire nation (*St. Xaviers College* v. *State of Gujarat,* AIR 1974 SC 1389).

The right conferred on religious and linguistic minorities to adminster educational institutions of their choice, though couched in absolute terms, is not free from regulation. Delhi High Court in *Delhi Abibhavak Mahasangh* v. *U.O.I.* and others AIR 1999 Delhi 124 held that Article 30(1) of the Constitution does not permit, minorities to indulge in commercialisation of education in the garb of constitutional protection. For the application of this right minority institutions are divided into three classes: (i) institution which neither seek aid nor recognition from the State; (ii) institution that seek aid from the State; and (iii) institutions which seek recognition but not aid. While the institutions of class (i) cannot be subjected to any regulations except those emanating from the general law of the land such as labour, contract or tax laws, the institutions in classes (ii) and (iii) can be subjected to regulations pertaining to the academic standards and to the better administration of the institution, in the interest of that institution itself.

In *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481, is an eleven Bench decision dealing with right of minorities to establish and administer educational institutions and correctness of the decision in *St. Stephen's College* case. While interpreting Article 30, the Supreme Court held that minority includes both linguistic and religious minorities and for determination of minority status, the unit would be the State and not whole of India. Further, the right of minorities to establish and administer educational institutions (including professional education) was not absolute and regulatory measures could be imposed for ensuring educational standards and maintaining excellence thereof. Right of minorities included right to determine the procedure and method of admission and selection of students, which should be fair and transparent and based on merit.

The Constitution (44th Amendment Act) has introduced new sub-clause (1A) which provides that wherever compulsory acquisition of any property of an educational institution established and administered by a minority is provided under any law, the State shall ensure that the amout fixed by or determined under any such law is such as would not restrict or abrogate the right guaranteed under this Article.

Articles 31A, 31B and 31C relating to Property

Right to property is no more a fundamental right which was previously guaranteed under Part III of the Constitution by Article 31.

But the right to property has been inserted by Article 300A under Part XII of the Constitution. Article 300A reads – "No person shall be deprived of his property save by authority of law".

Saving of Laws Providing for Acquisition of Estates etc.

Then follows Article 31A which is an exception to the right of equality as guaranteed in Article 14 and to the six freedoms as guaranteed in Article 19, if they come into conflict with any law mentioned in Article 31A.

Such laws are those which provide for—

(i) the acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights. 'Estate' here means the property included within that expression according to the land tenurers applicable in the area where it is situated. And 'rights' in relation to an estate means proprietory and other intermediary rights. In short, such laws are those which related to agrarian reforms, or

(ii) the taking over of the management of any property by the State for a limited period in the public interest or in order to secure the proper management of the property, or

(iii) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(iv) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or

(v) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence.

However, limitations, have been imposed with respect to the laws relating to the acquisition of the estates. They are:

(a) If such a law is made by a State Legislature then it cannot be protected by the provisions of Article 31A unless such law having been reserved for the consideration of the President has received his assent, and

(b) If the law provides for the acquisition of (i) any land within the ceiling limit applicable in that area, (ii) any building or structure standing thereon or apartment thereto, it (law) shall not be valid unless it provides for payment of compensation at a rate which shall not be less than the market value thereof. This provision, however, has been amended by the Constitution (29th Amendment) Act.

Validation of certain Acts and Regulations

Article 31B certain laws against attack on the ground of violation of any fundamental rights. The laws so protected are specified in the Nineth Schedule to the Constitution. These laws also relate mainly to land reforms.

Saving of Laws giving effect to certain Directive Principles

Article 31C added by 25th Amendment of the Constitution lifted to the constitutional limitations on the powers of State, imposed by Article 14 (equality before law) and Article 19 (freedoms) as regards law giving effect to the policy of the State towards securing the principles — specified in clause (b) or clause (c) of Article 39. These principles are –

(i) that the ownership and control of the matenal resources of the community are so distributed as best to subserve the common good, and

(ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The issue whether the 24th, 25th and 29th Amendments made by Parliament were valid or not was raised in the Supreme Court. In [*Kesavananda Bharti* v. *State of Kerala*, (1973) S.C.C. 225], the majority judgement (of a full bench of 13 judges) upheld the power of Parliament to amend the Constitution provided it did not alter its basic framework.

By the 42nd Amendment in Article 31-C for the words the principles specified in clause (a) or clause (c) of Article 34 the words in all or any of the principles laid down in Part IV were substituted. But this substitution was held to be void by the Supreme Court in *Minerva Mills* v. *Union of India,* (1980) 2 SCC 591.

Right to Constitutional Remedies

Article 32 guarantees the enforcement of Fundamental Rights. It is remedial and not substantive in nature. The rest of the Articles 33 to 35 relate to supplementary matters and do not create or guarantee any right. Therefore, we shall discuss Art. 32 first and then rest of the Articles i.e. 33-35 briefly.

Remedies for enforcement of Fundamental Rights

It is a cardinal principle of jurisprudence that where there is a right there is a remedy (*ubi jus ibi remedium*) and if rights are given without there being a remedy for their enforcement, they are of no use. While remedies are available in the Constitution and under the ordinary laws, Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right. It is really a far reaching provision in the sense that a person need not first exhaust the other remedies and then go to the Supreme Court. On the other hand, he can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*, whichever may be appropriate for the enforcement of the right, the violation of which has been alleged. This power of the Supreme Court to issue directions, etc., may also be assigned to other Courts by Parliament without affecting the powers of the Supreme Court.

The right to move the Supreme Court is itself a guarantee right and the significance of this has been assessed by Gajendragadkar, J. in the following words:

> The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of Patanjali Sastri, J., regard itself 'as the protector and guarantor of fundamental rights', and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights. In discharging the duties assigned to it, this Court has to play the role of 'sentinel on the *qui vive'* (*State of Madras* v. *V.G. Row,* AIR 1952 SC 196) and it must always regard it as its solemn duty to protect the said fundamental rights 'zealously and vigilantly' *Daryao* v. *State of U.P.,* AIR 1961 SC 1457).

Where a fundamental right is also available against the private persons such as the right under Articles 17, 23 and 24, the Supreme Court can always be approached for appropriate remedy against the violation of such rights by private individuals. *(Peoples' Union for Democratic Rights* v. *Union of India,* AIR 1982 SC 1473). A petitioners challenge under Article 32 extends not only to the validity of a law but also to an executive order issued under the authority of the law.

The right guaranteed by Article 32 shall not be suspended except as provided in the Constitution. Constitution does not contemplate such suspension except by way of President's order under Article 359 when a proclamation of Emergency is in force.

Again in Article 31C the words appearing at the end of the main paragraph, namely and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy were declared to be void in *Kesavananda's* case.

Supplementary provisions

Articles 33-35 – contain certain supplementary provisions.

Article 33 authorises Parliament to restrict or abrogate the application of fundamental rights in relation to members of armed forces, para-military forces, police forces and analogous forces.

Article 34 is primarily concerned with granting indemnity by law in respect of acts done during operation of martial law. The Constitution does not have a provision authorizing proclamation of martial law. Article 34 says that Parliament may by law indemnify any person in the service of the Union or of State or any other person, for an act done during martial law.

Article 35 provide that wherever parliament has by an express provision been empowered to make a law restricting a fundamental right Parliament alone can do so, (and not the state legislature).

Amendability of the Fundamental Rights

(A) Since 1951, questions have been raised about the scope of amending process contained in Article 368 of the Constitution. The basic question raised was whether the Fundamental Rights are amendable. The question whether the word 'Law' in Clause (2) of Article 13 includes amendments or not or whether amendment in Fundamental Rights guaranteed by Part III of the Constitution is permissible under the procedure laid down in Article 368 had come before the Supreme Court in *Shankari Prasad* v. *Union of India,* A.I.R. 1951 S.C. 458, in 1951 where the First Amendment was challenged. The Court held that the power to amend the Constitution including the Fundamental Rights, was contained in Article 368 and that the word 'Law' in Article 13(2) did not include an amendment to the Constitution which was made in exercise of constituent and not legislative power. This decision was approved by the majority judgement in *Sajjan Singh* v. *State of Rajasthan,* A.I.R. 1965 S.C. 845.

Thus, until the case of I.C. *Golak Nath* v. *State of Punjab*, A.I.R. 1967, S.C. 1643, the Supreme Court had been holding that no part of our Constitution was unamenable and that parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368 itself.

(B) But, in *Golak Nath's* case, a majority overruled the previous decisions and held that the Fundamental Rights are outside the amendatory process if the amendment takes away or abridges any of the rights. The majority, in *Golak Nath's* case, rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Article 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Article 13(2).

(C) To nullify the effect of *Golak Nath's* case, Parliament passed the Constitution (Twenty-Fourth Amendment) Act in 1971 introducing certain changes in Article 13 and Article 368, so as to assert the power of Parliament (denied to it in *Golak Nath's* case) to amend the Fundamental Rights. The Constitutional validity of the 24th Amendment was challenged in the case of *Kesavanand Bharti* v. *State of Kerala,* A.I.R. 1973 S.C. 1461. The Supreme Court upheld the validity of 24th Constitutional Amendment holding that Parliament can amend any Part of the Constitution including the Fundamental Rights. But the Court made it clear that Parliament cannot alter the basic structure or framework of the Constitution. In *Indira Gandhi* v. *Raj Narain,* AIR 1975 S.C. 2299, the appellant challenged the decision of the Allahabad High Court who declared her election as invalid on ground of corrupt practices. In the mean time Parliament enacted the 39th Amendment withdrawing the control of the S.C. over election disputes involving among others, the Prime Minister. The S.C. upheld the challenge of 39th amendment and held that democracy was an essential feature forming part of the basic structure of the Constitution. The exclusion of Judicial review in Election disputes in this manner damaged the basic structure. The *doctrine of 'basic structure'* placed *a limitation on the powers of the Parliament to introduce* substantial alterations or to make a new Constitution.

To neutralise the effect of this limitation, the Constitution (Forty-Second Amendment) Act, 1976 added to Article 368 two new clauses. By new clause (4), it has been provided that no amendment of the Constitution made before or after the Forty-Second Amendment Act shall be questioned in any Court on any ground. New clause (5) declares that there shall be no limitation whatever on the Constitutional power of parliament to amend by way of addition, variation or repeal the provisions of this Constitution made under Article 368.

The scope and extent of the application of the doctrine of basic structure again came up for discussion before the S.C. in *Minerva Mill Ltd.* v. *Union of India,* (1980) 3 SCC, 625. The Supreme Court unanimously held clauses

(4) and (5) of Article 368 and Section 55 of the 42nd Amendment Act as unconstitutional transgressing the limits of the amending power and damaging or destroying the basic structure of the Constitution.

In *Woman Rao* v. *Union of India,* (1981) 2 SCC 362 the Supreme Court held that the amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they , or any one or more of them are beyond the constitutional power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. [See also *Bhim Singh Ji* v. *Union of India* (1981)1 SCC 166.]

In *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261 the Supreme Court held that power of judicial review is an integral and essential feature of the Constitution constituting the basic part , the jurisdiction so conferred on the High Courts and the Supreme Court is a part of in- violable basic structure of the Constitution.

In *I.R. Coelho* v. *State of T.N.,* (2007) 2 SCC 1, Article 31-B as introduced by the Constitution (First amendment) Act 1951 was held to be valid by the Supreme Court. The fundamental question before the nine Judge Constitution Bench was whether on or after 24.4.1973 (i.e. when the basic structure of the Constitution was propounded) it is permissible for the Parliament under Article 31-B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so what is the effect on the power of judicial review of the court. The challenge was made to the validity of the urban land (Ceiling and Regulation) Act, 1976 which was inserted in the Ninth Schedule.

The Supreme Court held that all amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touch stone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles under lying them. So also any law included in Schedule IX do not become part of the Constitution. They derive their validity on account of being included in Schedule IX and this exercise is to be tested every time it is undertaken. If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law on the principles declared in this judgement. However, if a law held to be violative of any rights of Part III is subsequently incorporated in the Ninth Schedule after 24.4.1973 such a violation shall be open to challenge on the ground that it destroys or damages the basic structure doctrine.

In *Glanrock Estate (P) Ltd.* v. *State of Tamil Nadu* (2010) 10 SCC 96, the Supreme Court upheld constitutional validity of Constitution (Thirty-fourth) Amendment Act, 1974. By Constitution (Thirty-fourth) Amendment Act, 1974 Gudalur Janman Estates (Abolition & Conversion into Ryotwari) Act, 1969 was inserted in the Ninth Schedule as item 80.

It was alleged that the 1969 Act violated the principle of equality because by the T N Land Reforms (Fixation of Ceiling on Land) Act, 1961 only ceiling surplus forest lands vested in the State but by the 1969 Act all forests vested in the State. The constitutional amendment was further challenged on the ground that it validated the 1969 Act by inserting it in the Ninth Schedule in spite of Section 3 of the 1969 Act having been declared as unconstitutional in Balmadies case, (1972) 2 SCC 133, thereby violating the principles of judicial review, rule of law and separation of powers. (Section 3 had been declared unconstitutional in Balmadies case because it could not be shown how vesting of forest lands was an agrarian reform.)

Upholding the constitutional validity of the amendment, the Supreme Court held:

None of the facets of Article 14 have been abrogated by the Constitution (Thirty-fourth Amendment) Act, 1974, which included the 1969 Act in the Ninth Schedule. When the 1969 Act was put in the Ninth Schedule in1 974, the Act received immunity from Article 31(2) with retrospective effect.

It is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31-B. If every breach of Articl3 14, however egregious, is held to be unprotected by Article 31-B, there would be no purpose in protection by Article 31-B.

In the present case, not even an ordinary principle of equality under Article 14, leave aside the egalitarian equality as an overarching principle, is violated. Even assuming for the same of argument that Article 14 stood violated, even then the 1969 Act in any event stood validated by its insertion in the Ninth Schedule vide the Constitution (Thirty-fourth Amendment) Act, 1974.There is no merit in the submission that the Constitution (Thirty-fourth Amendment) Act, 1974 by which the 1969 Act was inserted in the Ninth Schedule as item 80 seeks to confer naked power on Parliament and destroys basic features of the Constitution, namely, judicial review and separation of powers as well as rule of law.

The doctrine of basic structure provides a touchstone on which validity of the constitutional amendment Act could be judged. Core constitutional values/ overarching principles like secularism; egalitarian equality etc. fall out side the amendatory power under Article 368 of the Constitution and Parliament cannot amend the constitution to abrogate these principles so as to rewrite the constitution. [In *Glanrock Estate (P) Ltd.* v. *State of T N* (2010) 10 SCC 96.]

DIRECTIVE PRINCIPLES OF STATE POLICY

The Sub-committee on Fundamental Rights constituted *by the Constituent Assembly* has suggested two types of Fundamental Rights — one which can be enforced in the Courts of law and the other which because of their different nature cannot be enforced in the law Courts. Later on however, the former were put under the head 'Fundamental Rights' as Part III which we have already discussed and the latter were put separately in Part IV of the Constitution under the heading 'Directive Principles of State Policy' which are discussed in the following pages.

The Articles included in Part IV of the Constitution (Articles 36 to 51) contain certain Directives which are the guidelines for the future Government to lead the country. Article 37 provides that the 'provisions contained in this part (i) *shall not be enforceable by any Court*, but the principles therein laid down are neverthless (ii) *fundamental in the governance of the country* and it shall be the duty of the state to apply these principles in making laws. The Directives, however, differ from the fundamental rights contained in Part-III of the Constitution or the ordinary laws of the land in the following respects :

(i) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.

(ii) The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive neither the state nor an individual can violate any existing law.

(iii) The Directives per-se do not confer upon or take away any legislative power from the appropriate legislature.

(iv) The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.

(v) The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.

(vi) Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the state.

Conflict between a Fundamental Right and a Directive Principle

The declarations made in Part IV of the Constitution under the head 'Directive Principles of State Policy' are in many cases of a wider import than the declarations made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two classes of the provisions may easily arise. What will be the legal position if a law enacted to enforce a Directive Principle violates a Fundamental Right? Initialy, the Courts, adopted a strict view in this respect and ruled that a Directive Principle could not override a Fundamental

Right, and in case of conflict between the two, a Fundamental Right would prevail over the Directive Principle. When the matter came before the Supreme Court in *State of Madras* v. *Champakram Dorairajan*, *AIR 1951 S.C. 226*, where the validity of a Government order alleged to be made to give effect to a Directive Principle was challenged as being violative of a Fundamental Right, the Supreme Court made the observation that :

> "The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights."

The Court ruled that while the Fundamental Rights were enforceable, the Directive Principles were not, and so the laws made to implement Directive Principles could not take away Fundamental Rights.

The Supreme Court also pointed out that looking at Directive Principles, we find as was envisaged by the Constitution makers, that they lay down the ideals to be observed by every Government to bring about an economic democracy in this country. Such a democracy actually is our need and unless we achieve it as soon as possible, there is a danger to our political and constitutional democracy of being overthrown by undemocratic and unconstitutional means.

Important Directive Principles

To be specific, the important Directive Principles are enumerated below:

(a) State to secure a social order for the promotion of welfare of the people:

(1) The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political should inform all the institutions of the national life (Article 38).

(2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations. (introduced by Constitution 44th Amendment Act).

(b) *Certain principles of policy to be followed by the State*. The State, particularly, must direct its policy towards securing:

(i) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(ii) that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods;

(iii) that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;

(iv) equal pay for equal work for both men and women;

(v) that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter avocation unsuited to their age or strength;

(vi) that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

(bb) The State shall secure that the operation of legal system promotes justice on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39A).

(c) The State must take steps to organise the Village Panchayats and enable them to function as units of self-government (Article 40).

(d) Within the limits of economic capacity and development the State must make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, etc. (Article 41).

(e) Provision must be made for just and humane conditions of work and for maternity relief (Article 42).

(f) The State must endeavour to secure living wage and good standard of life to all types of workers and must endeavour to promote cottage industries on an individual of co-operative basis in rural areas (Article 43).

(ff) The State take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry (Article 43A).

(g) The State must endeavour to provide a uniform civil code for all Indian citizens (Article 44).

(h) Provision for free and compulsory education for all children upto the age of fourteen years (Article 45).

(i) The State must promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46).

(j) The State must regard it one of its primary duties to raise the level of nutritional and the standard of living and to improve public health and in particular it must endeavour to bring about prohibition of the consumption, except for medicinal purposes, in intoxicating drinks and of drugs which are injurious to health (Article 47).

(k) The State must organise agriculture and animal husbandry on modern and scientific lines and improve the breeds and prohibit the slaughter of cows and calves and other milch and draught cattle (Article 48).

(kk) The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country (Article 48A).

(l) Protection of monuments and places and objects of national importance is obligatory upon the State (Article 49).

(m) The State must separate executive from judiciary in the public services of the State (Article 50).

(n) In international matters the State must endeavour to promote peace and security, maintain just and honourable relations in respect of international law between nations, treaty obligations and encourage settlement of international disputes by arbitration (Article 51).

FUNDAMENTAL DUTIES

Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution Forty-second Amendment) Act, 1976.

The objective in introducing these duties is not laid down in the Bill except that since the duties of the citizens are not specified in the Constitution, so it was thought necessary to introduce them.

These Fundamental Duties are:

(a) to abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) To cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

(k) To provide opportunities for education to one's child or, as the case may be, ward between the age of six and fourteen years.

Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their implementation. Fundamental duties can't be enforced by writs (*Surya Narain* v. *Union of India,* AIR 1982 Raj 1). The Supreme Court in *AIIMS Students' Union v. AIIMS* (2002) SCC 428 has reiterated that though the fundamental duties are not enforceable by the courts, they provide a valuable guide and aid to the interpretation of Constitutional and legal issues.

Further, in *Om Prakash* v. *State of U.P.* (2004) 3 SCC 402, the Supreme Court held that fundamental duties enjoined on citizens under Article 51-A should also guide the legislative and executive actions of elected or non-elected institutions and organizations of citizens including municipal bodies.

Test your knowledge

State whether the following statement is "True" or "False"

The fundamental duties are imposed upon the States and not upon the citizens.

- True
- False

Correct answer: False

ORDINANCE MAKING POWERS

1. Of the President

In its Article 53 the Constitution lays down that the "executive power of the union shall be vested in the president". The President of India shall, thus, be the head of the 'executive power' of the union. The executive power may be defined as the power of "carrying on the business of Government" or "the administration of the affairs of the state" excepting functions which are vested in any other authority by the Constitution. The various powers that are included within the comprehensive expression 'executive power' in a modern state have been classified under various heads as follows:

(i) Administrative power, i.e., the execution of the laws and the administration of the departments of Government.

(ii) Military power, i.e., the command of the armed forces and the conduct of war.

(iii) Legislative power, i.e., the summoning prorogation, etc. of the legislature.

(iv) Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

These powers vest in the President under each of these heads, subject to the limitations made under the Constitution.

Ordinance-making power

The most important legislative power conferred on the President is to promulgate Ordinances. Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say it may relate to any subject in respect of which parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.

On the other hand, according to Article 13(3)(a) "Law" includes an "Ordinance". But an Ordinance shall be of temporary duration. It may be of any nature, i.e., it may be retrospective or may amend or repeal any law or Act of Parliament itself.

This independent power of the executive to legislate by Ordinance has the following peculiarities:

(i) the Ordinance-making power will be available to the President only when both the Houses of Parliament have been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. However, Ordinance can be made even if only one House is in Session because law cannot be made by that House in session alone. Both the Houses must be in session when Parliament makes the law. The President's Ordinance making power under the Constitution is not a co-ordinate or parallel power of legislation along with Legislature.

(ii) this power is to be exercised by the President on the advice of his Council of Ministers.

(iii) the President must be satisfied about the need for the Ordinance and he cannot be compelled

(iv) the Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.

(v) the period of six weeks will be counted from the latter date if the Houses reassemble on different dates.

2. Of the Governor

The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally there shall be a Governor for each State but the same person can be appointed as Governor for two or more states. The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. The head of the executive power to a State is the Governor just as the President for the Union.

Powers: The Governor possesses executive, legislation and judicial powers as the Presidents except that he has no diplomate or military powers like the President.

Ordinance making power

This power is exercised under the head of 'legislative powers'. The Governor's power to make Ordinances as given under Article 213 is similar to the Ordinance making power of the President and have the force of an Act of the State Legislature. He can make Ordinance only when the state Legislature or either of the two Houses

(where it is bicameral) is not in session. He must be satisfied that circumstances exist which render it necessary to take immediate action. While exercising this power Governor must act with the aid and advise of the Council of Ministers. But in following cases the Governor cannot promulgate any Ordinance without instructions from the President:

(a) if a Bill containing the same provisions would under this constitution have required the previous section of the President.

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President.

(c) an Act of the state legislature containing the same provisions would under this constitution have been invalid under having been reserved for the consideration of the President, it had received the assent of the President.

The Ordinance must be laid before the state legislature (when it re-assembles) and shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

Test your knowledge

Which of the following powers are held by the Governor?

– Executive power

– Military power

– Legislative power

– Judicial power

Correct answer: a, c, and d

LEGISLATIVE POWERS OF THE UNION AND THE STATES

1. Two Sets of Government

The Indian Constitution is essentially federal.

Dicey, in the "Law of Constitution' has said "Federation means the distribution of the force of the state among a number of co-ordinate bodies, each originating in and controlled by the Constitution". The field of Government is divided between the Federal and State Governments which are not subordinate to one another but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle.

A federal constitution establishes a dual polity as it comprises two levels of Government. At one level, there exists a Central Government having jurisdiction over the whole country and reaching down to the person and property of every individual therein. At the other level, there exists the State Government each of which exercises jurisdiction in one of the States into which the country is divided under the Constitution. A citizen of the federal country thus becomes subject to the decrees of two Government — the central and the regional.

The Union of India is now composed of 28 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. The result is that the States are not delegates of the Union and though there are agencies and devices for Union control over

the States in many matters, the States are autonomous within their own spheres as allotted to them by the Constitution. Both the Union and States are equally subject to the limitations imposed by the Constitution, say, for example, the exercise of legislative powers being limited by Fundamental Rights. However, there are some parts of Indian territory which are not covered by these States and such territories are called Union Territories.

The two levels of Government divide and share the totality of governmental functions and powers between themselves. A federal constitution thus envisages a division of governmental functions and powers between the centre and the regions by the sanction of the Constitution.

Chapter I of Part XI (Articles 245 to 255) of the Indian Constitution read with Seventh Schedule thereto covers the legislative relationship between the Union and the States. In analysis of these provisions reveals that the entire legislative sphere has been divided on the basis of:

(a) territory with respect to which the laws are to be made, and

(b) subject matter on which laws are to be made.

2. Territorial Distribution

The Union Legislature, i.e., Parliament has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the territory of the respective States. Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot be operative beyond the territorial limits of that States. For example, a law passed by the legislature of the Punjab State cannot be made applicable to the State of Uttar Pradesh or any other state. However, this simple generalisation of territorial division of legislative jurisdiction is subject to the following clarification.

(A) Parliament

From the territorial point of view, Parliament, being supreme legislative body, may make laws for the whole of India; or any part thereof; and it can also make laws which may have their application even beyond the territory of India. A law made by Parliament is not invalid merely because it has an extra-territorial operation. As explained by Kania C.J. in *A.H. Wadia* v. *Income-tax Commissioner,* A.I.R. 1949 F.C. 18, 25 “In the case of sovereign Legislature, questions of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity. The legislation may offend the rules of International law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned”.

A Union Territory is administered directly by the Central Executive. Article 239(1) provides save as otherwise provided, by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. Article 239A empowers Parliament to create local Legislatures or Council of Ministers or both for certain Union Territories with such constitutional powers and functions, in each case, as may be specified in the law. Article 246(4) provides that Parliament can make a law for a Union Territory with respect to any matter, even if it is one which is enumerated in the State List. With regard to Union Territories, there is no distribution of legislative powers. Parliament has thus plenary powers to legislate for the Union Territories with regard to any subject. These powers are, however, subject to some special provisions of the Constitution.

(B) State Legislature

A State Legislature may make laws only for the state concerned. It can also make laws which may extend beyond the territory of that State. But such law can be valid only on the basis of “territorial nexus”. That is, if there is sufficient nexus or connection between the State and the subject matter of the law which falls beyond the territory of the State, the law will be valid. The sufficiency of the nexus is to be seen on the basis of the test laid

down by our Supreme Court in *State of Bombay* v. *R.M.D.C.,* A.I.R. 1957 S.C. 699, according to which two conditions, must be fulfilled:

(i) the connection must be real and not illusory; and

(ii) the liability sought to be imposed by that law must be pertinent to that connection.

If both the conditions are fulfilled by a law simultaneously then only it is valid otherwise not. To illustrate, in the case cited above a newspaper in the name of "Sporting Star" was published and printed at Bangalore in Mysore (now Karnataka) State. It contained crossword puzzles and engaged in prize competitions. It had wide circulation in the State of Bombay (now Maharashtra) and most of its activities such as the standing invitations, the filling up of the forms and the payment of money took place within that State. The State of Bombay imposed a tax on the newspaper. The publishers challenged the validity of the law on the ground that it was invalid in so far it covered a subject matter falling beyond the territory of that State because the paper was published in another State. The Supreme Court, applying the doctrine of territorial nexus, held that the nexus was sufficient between the law and its subject-matter to justify the imposition of the tax. So in this way, the state laws may also have a limited extra-territorial operation and it is not necessary that such law should be only one relating to tax-matters.

3. Distribution of Subject Matter of Legislation

In distributing the subjects on which legislation can be made, different constitutions have adopted different pattern. For example, in the U.S.A. there is only one short list on the subject. Either by their express terms or by necessary implication some of them are exclusively assigned to the Central Government and the others concurrent on which Centre and the States both can make laws. The subjects not enumerated in this list, i.e., residuary subjects, have been left for the States. Similar pattern has been followed in Australia but there is one short list in which a few subjects have been exclusively assigned to the Centre and there is a a longer list in which those subjects are enumerated on which Centre and States both can make laws. By necessary implication a few of these concurrent subject have also become exclusively Central subjects. The unenumerated subjects fall exclusively within the State jurisdiction. A different pattern has been adopted in Canada where there are three lists of subjects, one consists of subjects exclusively belonging to the Centre, the other consists of those exclusively belonging to the States and the third where both can make law. Thus residuary subjects fall within the central jurisdiction. The Government of India Act, 1935 followed the Canadian pattern subject to the modification that here the lists of subjects were much more detailed as compared to those in the Canadian Constitution and secondly, the residuary subjects had been left to the discretion of the Governor-General which he could assign either to Centre or to the States.

The Constitution of India, substantially follows the pattern of the Government of India Act, 1935 subject to the modification that the residuary subjects have been left for the Union as in Canada. To understand the whole scheme, the Constitution draws three long lists of all the conceivable legislative subjects. These lists are contained in the VIIth Schedule to the Constitution. List I is named as the Union List. List II as the State List and III as the Concurrent List. Each list contains a number of entries in which the subjects of legislation have been separately and distinctly mentioned. The number of entries in the respective lists is 97, 66 and 47. The subjects included in each of the lists have been drawn on certain basic considerations and not arbitrarily or in any haphazard manner.

Thus, those subjects which are of national interest or importance, or which need national control and uniformity of policy throughout the country have been included in the Union List; the subjects which are of local or regional interest and on which local control is more expedient, have been assigned to the State List and those subjects which ordinarily are of local interest yet need uniformity on national level or at least with respect to some parts of the country, i.e., with respect, to more than one State have been allotted to the Concurrent List. To illustrate, defence of India, naval, military and air forces; atomic energy, foreign affairs, war and peace, railways, posts and telegraphs, currency, coinage and legal tender; foreign loans; Reserve Bank of India; trade and commerce with

foreign countries; import and export across customs frontiers; inter-State trade and commerce, banking; industrial disputes concerning Union employees; coordination and determination of Standards in institutions for higher education are some of the subjects in the Union List. Public Order; police; prisons; local Government; public health and sanitation; trade and commerce within the State; markets and fairs; betting and gambling etc., are some of the subjects included in the State List. And coming to the Concurrent List, Criminal law; marriage and divorce; transfer of property; contracts; economic and social planning; commercial and industrial insurance; monopolies; social security and social insurance; legal, medical and other professions; price control, electricity; acquisition and requisition of property are some of the illustrative matters included in the Concurrent List.

Apart from this enumeration of subjects, there are a few notable points with respect to these lists, e.g.:

(i) The entries relating to tax have been separated from other subjects and thus if a subject is included in any particular List it does not mean the power to impose tax with respect to that also follows. Apart from that, while other subjects are in the first part of the List in one group, the subjects relating to tax are given towards the end of the List.

(ii) Subject-matter of tax is enumerated only in the Union List and the State List. There is no tax subject included in the Concurrent List.

(iii) In each List there is an entry of "fees" with respect to any matter included in that List excluding court fee. This entry is the last in all the Lists except List I where it is last but one.

(iv) There is an entry each in Lists I and II relating to "offences against laws with respect to any of the matters" included in the respective List while criminal law is a general subject in the Concurrent List.

So far we have discussed the general aspect of the subject matters of legislation or of the items on which Legislation could be passed. The next question that arises is, who will legislate on which subject? Whether, it is both Centre and the States that can make laws on all subjects included in the three Lists or there is some division of power between the two to make laws on these subjects? The answer is that the Constitution makes clear arrangements as to how the powers shall be exercised by the Parliament or the State Legislatures on these subjects. That arrangement is mainly contained in Article 246, but in addition to that, provisions have also been made in Articles 247 to 254 of the Constitution. A wholesome picture of this arrangement is briefly given below.

Test your knowledge

Choose the correct answer

Which pattern was followed by The Government of India Act, 1935?

– Australian

– Canadian

– British

– African

Correct answer: b

4. Legislative Powers of the Union and the States with respect to Legislative Subjects

The arrangement for the operation of legislative powers of the Centre and the States with respect to different subjects of legislation is as follows:

(a) With respect to the subject enumerated in the Union i.e., List I, the Union Parliament has the *exclusive* power to make laws. The State Legislature has no power to make laws on any of these subjects and it

is immaterial whether Parliament has exercised its power by making a law or not. Moreover, this power of parliament to make laws on subjects included in the Union List is notwithstanding the power of the States to make laws either on the subjects included in the State List or the Concurrent List. If by any stretch of imagination or because of some mistake — which is not expected — the same subject which is included in the Union List is also covered in the State List, in such a situation that subject shall be read only in List I and not in List II or List III. By this principle the superiority of the Union List over the other two has been recognised.

(b) With respect to the subjects enumerated in the State List, i.e., List II, the legislature of a State has *exclusive* power to make laws. Therefore Parliament cannot make any law on any of these subjects, whether the State makes or does not make any law.

(c) With respect to the subjects enumerated in the Concurrent List, i.e., List III, Parliament and the State Legislatures both have powers to make laws. Thus, both of them can make a law even with respect to the same subject and both the laws shall be valid in so far as they are not repugnant to each other. However, in case of repugnancy, i.e., when there is a conflict between such laws then the law made by Parliament shall prevail over the law made by the State Legislature and the latter will be valid only to the extent to which it is not repugnant to the former. It is almost a universal rule in all the Constitutions where distribution of legislative powers is provided that in the concurrent field the Central law prevails if it conflicts with a State law. However, our Constitution recognises an exception to this general or universal rule. The exception is that if there is already a law of Parliament on any subject enumerated in the Concurrent List and a state also wants to make a law on the same subject then a State can do so provided that law has been reserved for the consideration of the President of India and has received his assent. Such law shall prevail in that State over the law of Parliament if there is any conflict between the two. However, Parliament can get rid of such law at any time by passing a new law and can modify by amending or repealing the law of the State.

(d) With respect to all those matters which are not included in any of the three lists, Parliament has the exclusive power to make laws. It is called the residuary legislative power of Parliament. The Supreme Court has held that the power to impose wealth-tax on the total wealth of a person including his agricultural land belongs to Parliament in its residuary jurisdiction *(Union of India* v. *H.S. Dhillon,* A.I.R. 1972 S.C. 1061).

Test your knowledge

State whether the following statement is "True" or "False"

With respect to the subjects enumerated in the Concurrent List, only the Parliament and not the State Legislature has powers to make laws.

- True
- False

Correct answer: False

5. Power of Parliament to make Laws on State List

We have just discussed that the State legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach upon them. However, our Constitution makes a few exceptions to this general rule by authorising Parliament to make law even on the subjects enumerated in the State List. Following are the exceptions which the Constitution so recognises:

(a) In the National Interest (Article 249)

Parliament can make a law with respect to a matter enumerated in the State List if the Council of States declares by a resolution supporetd by two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make a law on that matter. By such declaration Parliament gets the authority to legislate on that matter for the whole or part of the country so long as the resolution of the Council of States remains in force. But such resolution shall remain in force for a period not exceeding one year. However, a fresh resolution can be passed a the end of one year to give extended lease to the law of Parliament and that way the law of Parliament can be continued to remain in force for any number of years.

The laws passed by Parliament under the provision cease to have effect automatically after six months of the expiry of the resolution period. Beyond that date, such Parliamentary law becomes inoperative except as regards the thing done or omitted to be done before the expiry of that law.

(b) During a proclamation of emergency (Article 250)

While a Proclamation of Emergency is in operation, Article 250 of the Constitution of India removes restrictions on the legislative authority of the Union Legislature in relation to the subjects enumerated in the State List. Thus, during emergency, Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List. These laws will cease to have effect on the expiration of six months after the proclamation ceases to operate. After that date, such union laws shall become inoperative, except in respect of things done or omitted to be done before the expiry of the said period. Under Article 352, if the President is satisfied that a grave emergency exists where-by the security of India or any part of the territory thereof is threatened whether by war, or external aggression or armed rebellion, he may by proclamation make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation. It is not necessary that there is an actual war or armed rebellion. It is enough that the President is satisfied that there is an imminent danger of such war or armed rebellion as the case may be. The proclamation of emergency shall not be issued except when the decision of the union cabinet that such proclamation may be issued, has been communicated to the President in writing. Every such proclamation shall be laid before each House of Parliament and unless it is approved by both the Houses by a majority of not less than two-thirds of the members present and voting within a period of 30 days thereof, such proclamation shall cease to operate. If any such proclamatioin is issued at a time when the House of People (Lok Sabha) has been dissolved, or the dissolution of the House of People takes place during the period of one month referred to above but before passing the resolution, and if a resolution approving the proclamation has been passed by the Council of State (Rajya Sabha), the proclamation shall cease to operate at the expiry of thirty days from the date on which the House of the People (Lok Sabha) first sits after it's reconstitution, unless before the expiration of the said period of thirty days a resolution approving the proclamation has also passed by the House of the People.

A proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of passing of the second resolution approving the proclamation. But this period of six months may be extended by a further period of six months, if, within the first six months, both the Houses of Parliament pass a resolution approving the continuance in force of such proclamation. *Prior to the Constitution 44th Amendment Act, the position was that the proclamation when approved by both the Houses of Parliament would remain in the force for an indefinite period unless and until the President chose to revoke the proclamation in exercise of the power conferred by the then Article 352(2)(a).*

Article 353 provides that while a proclamation of emergency is in operation, the Parliament shall have the power to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding, that it is one which is not enumerated in the Union List.

(c) Breakdown of Constitutional Machinery in a State (Article 356 and 357)

In case the Governor of a State reports to the President, or he is otherwise satisfied that the Government of a State cannot be carried on according to the provisions of the Constitution, then he (President) can make a proclamation to that effect. By that proclamation, he can assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State, and declare that the powers of Legislature of that State shall vest in Parliament. Parliament can make laws with respect to all state matters as regards the particular state in which there is a breakdown of constitutional machinery and is under the President's rule. Further it is not necessary that the legislature of the concerned state should be suspended or dissolved before it is brought under the President's rule, but practically it so happens. It is important to note that the President cannot, however, assume to himself any of the powers vested in or exercisable by a High Court or to suspend, either in whole or in part, the operation of any provision of the Constitution relating to the High Courts.

Under the Constitution of India, the power is really that of the Union Council of Ministers with the Prime Minister as its head. The satisfaction of the President contemplated by this Article is subjective in nature. The power conferred by Article 356 upon the President is a conditional power. It is not an absolute power. The existence of material-which may comprise of, or include, the report(s) of the Governor — is a pre-condition. The satisfaction must be formed on relevant materials. Though the power of dissolving the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall Constitutional scheme that the President shall exercise it only after the proclamation is approved by both the Houses of Parliament under Clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly under Sub-clause (c) of Clause (1). The proclamation under Clause (1) can be issued only where the situation contemplated by the clause arises. Clause (3) of Article 356, is conceived as a control on the power of the President and also as a safeguard against its abuse (*S.R. Bommai* v. *Union of India,* AIR 1994 SC 1918).

Clause 2 of Article 356 provides that any such proclamation may be revoked or varied by a subsequent proclamation. It may, however, be noted that the presidential proclamation is valid only for six months at a time and that also if approved by both the Houses of Parliament within a period of two months from the date of proclamation. A fresh proclamation can be issued to extend the life of the existing one for a further period of six months but in no case such proclamation can remain in force beyond a consecutive period of three years. The Constitution (Fourty-Second) Amendment Act, 1976 inserted a new clause (2) in Article 357. It provides that any law made in exercise of the Power of the Legislature of the State by Parliament or the President or other Authority referred to in Sub-clause (a) of Clause (1) which Parliament or the President or such other Authority would not, but for the issue of a proclamation under Article 356 have been competent to make shall, after the proclamation has ceased to operate, continue in force until altered, or repealed or amended by a competent Legislature or other authority. This means that the laws made during the subsistence of the proclamation shall continue to be in force unless and until they are altered or repealed by the State Legislature. So an express negative act is required in order to put an end to the operation of the laws made in respect of that State by the Union.

The action of the President under Article 356 is a constitutional function and the same is subject to judicial review. The Supreme Court or High Court can strike down the proclamation if it is found to be *mala fide* or based on wholly irrelevant or extraneous grounds. If the Court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. (see *S.R. Bommai's case*).

(d) On the request of two or more States (Article 252)

Article 252 of the Constitution enumerates the power of Parliament to legislate for state. The exercise of such power is conditional upon an agreement between two or more States requesting Parliament to legislate for them

on a specified subject. This article provides that, if two or more States are desirous that on any particular item included in the State List there should be a common legislation applicable to all such States then they can make a request to Parliament to make such law on that particular subject. Such request shall be made by passing a resolution in the legislatures of the State concerned. If request is made in that form then parliament can make law on that subject as regards those States. The law so made may be adopted by other States also, by passing resolutions in their legislatures. Once, however, such law has been made, the power of those State legislatures which originally requested or which later on adopted such law is curtailed as regards that matter; and only Parliament can amend, modify or repeal such a law on similar request being made by any State or States. If any of the consenting States makes a law on that subject then its law will be invalid to the extent to which it is inconsistent with a law of Parliament.

To take an example, Parliament passed the Prize Competitions Act, 1955 under the provisions of the Constitution.

(e) Legislation for enforcing international agreements (Article 253)

Parliament has exclusive power with respect to foreign affairs and entering into treaties and agreements with foreign countries and implementing of treaties and agreements and conventions with foreign countries. But a treaty or agreement concluded with another country may require national implementation and for that purpose a law may be needed. To meet such difficulties, the Constitution authorises Parliament to make law on any subject included in any list to implement:

(i) any treaty, agreement or convention with any other country or countries, or

(ii) any decision made at any international conference, association or other body.

These five exceptions to the general scheme of distribution of legislative powers on the basis of exclusive Union and State Lists go to show that in our Constitution there is nothing which makes the States totally immune from legislative interference by the Centre in any matter. There remains no subject in the exclusive State jurisdiction which cannot be approached by the Centre in certain situations. But by this, one must not conclude that the distribution of legislative power in our Constitution is just illusory and all the powers vest in the Centre. On the other hand, the distribution of legislative powers is real and that is the general rule but to face the practical difficulties the Constitution had made a few exceptions which are to operate within the circumscribed sphere and conditions.

6. Interpretation of the Legislative Lists

For giving effect to the various items in the different lists the Courts have applied mainly the following principles :

(a) ***Plenary Powers:*** The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on the power, then it is to be given the widest scope that its words are capable of, without, rendering another item nugatory. In the words of Gajenderagadkar, C.J.

"It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. A general word used in an entry ... must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it (*Jagannath Baksh Singh* v. *State of U.P.,* AIR 1962 SC 1563).

Thus, a legislature to which a power is granted over a particular subject may make law on any aspect or on all aspects of it; it can make a retrospective law or a prospective law and it can also make law on all matters ancillary to that matter. For example, if power to collect taxes is granted to a legislature, the power not to collect taxes or the power to remit taxes shall be presumed to be included within the power to collect taxes.

(b) ***Harmonious Construction:*** Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory. Therefore, when there appears a conflict between two entries in the two different lists the two entries should be so interpreted, that each of them is given effect and, for that purpose the scope and meaning of one may be restricted so as to give meaning to the other also.

(c) ***Pith and Substance Rule:*** The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. In a federal Constitution, as was observed by Gwyer C.J. "it must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere" (*Prafulla Kumar* v. *Bank of Khulna,* AIR 1947 PC 60). Therefore, where such overlapping occurs, the question must be asked, what is, "pith and substance" of the enactment in question and in which list its true nature and character is to be found. For this purpose the enactment as a whole with its object and effect must be considered. By way of illustration, acting on entry 6 of List II which reads "Public Health and Sanitation". Rajasthan Legislature passed a law restricting the use of sound amplifiers. The law was challenged on the ground that it dealt with a matter which fell in entry 81 of List I which reads: "Post and telegraphs, telephones, wireless broadcasting and other like forms of communication", and, therefore, the State Legislature was not competent to pass it. The Supreme Court rejected this argument on the ground that the object of the law was to prohibit unnecessary noise affecting the health of public and not to make a law on broadcasting, etc. Therefore, the pith and substance of the law was "public health" and not "broadcasting" (*G. Chawla* v. *State of Rajasthan,* AIR 1959 SC 544).

(d) ***Colourable Legislation:*** It is, in a way, a rule of interpretation almost opposite to the one discussed above. The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a colour of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such legislation is called colourable piece of legislation and is invalid. To take an example in *Kameshwar Singh* v. *State of Bihar,* A.I.R. 1952 S.C. 252, the Bihar Land Reforms Act, 1950 provided that the unpaid rents by the tenants shall vest in the state and one half of them shall be paid back by the State to the landlord or zamindar as compensation for acquisition of unpaid rents. According to the provision in the State List under which the above law was passed, no property should be acquired without payment of compensation. The question was whether the taking of the whole unpaid rents and then returning half of them back to them who were entitled to claim, (i.e., the landlords) is a law which provides for compensatioin. The Supreme Court found that this was a colourable exercise of power of acquisition by the State legislature, because "the taking of the whole and returning a half means nothing more or less than taking of without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised".

The motive of the legislature is, however, irrelevant for the application of this doctrine. Therefore, if a legislature is authorised to do a particular thing directly or indirectly, then it is totally irrelevant as to with what motives – good or bad – it did that.

These are just few guiding principles which the Courts have evolved, to resolve the disputes which may arise about the competence of law passed by Parliament or by any State Legislature.

Test your knowledge

State whether the following statement is "True" or "False"

During emergency, the Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List.

- True
- False

Correct answer: True

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

This heading has been given to Part XIII of the Constitution. This part originally consisted of seven articles – Articles 301 to 307 – of which one (Art. 306) has been repealed. Out of these articles it is the first, i.e., 301 which, in real sense, creates an overall comprehensive limitation on all legislative powers of the Union and the State which affect the matters covered by that Article. This Article guarantees the freedom of trade, commerce and intercourse and runs in the following words:

> "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

The opening words of this Article clearly show, and it has been so held by the Supreme Court, that except the provisions contained under this Part, i.e., Articles 302 to 307 under no other provision of the Constitution the free flow of trade and commerce can be interfered with. The object of the freedom declared by this Article is to ensure that the economic unity of India may not be broken by internal barriers.

The concept *of trade, commerce and intercourse* today is so wide that from ordinary sale and purchase it includes broadcasting on radios, communication on telephone and even to non-commercial movement from one place to another place. If such is the scope of trade and commerce then any law relating to any matter may affect the freedom of trade, commerce and intercourse, e.g., it may be said that the law which imposes the condition of licence for having a radio violates the freedom of trade and commerce, or a law which regulates the hours during which the electricity in a particular locality shall be available may be called as affecting the freedom of trade and commerce because during those hours one cannot use the radio or television or one cannot run this factory. If that view is taken then every law shall become contrary to Articles 301 and unless saved by Articles 302 to 307 shall be unconstitutional. To avoid such situations the Supreme Court in the very first case on the matter (*Atiabari Tea Co.* v. *State of Assam,* A.I.R. 1951 S.C. 232) declared that only those laws which "directly and immediately" restrict or impede the freedom of trade and commerce are covered by Article 301 and such laws which directly and incidentally affect the freedom guaranteed in that article are not within the reach of Article 301. The word 'intercourse' in this article is of wide import. It will cover all such intercourse as might not be included in the words 'trade and commerce'. Thus, it would cover movement and dealings even of a non-commercial nature (*Chobe* v. *Palnitkar,* A.I.R. 1954 Hyd. 207). The word, free in Article 301 cannot mean an absolute freedom. Such measures as traffic regulations licensing of vehicles etc. are not open to challenge.

It was further held in the next case (*Automobile Transport Ltd.* v. *State of Raj.,* A.I.R. 1962 S.C. 1906) that regulations that facilitate the freedom of trade and commerce and compensatory taxes are also saved from the reach of Article 301. About compensatory taxes the Supreme Court has doubted the correctness of its own views in a later case *Khyerbari Tea Co.* v. *State of Assam,* A.I.R. 1964 S.C. 925.

With respect to regulatory laws also, we may say that if they are the laws which facilitate the freedom of trade and commerce then they are not at all laws which impede the free flow of trade and commerce directly or indirectly. The freedom of trade and commerce guaranteed under Article 301 applies throughout the territory of India; it is not only to inter-state but also to intra-state trade commerce and intercourse. But in no way it covers the foreign trade or the trade beyond the territory of India. Therefore, the foreign trade is free from the restriction of Article 301.

Trade and commerce which are protected by Article 301 are only those activities which are regarded as lawful trading activities and are not against policy. The Supreme Court held that gambling is not "trade". Similarly, prize competitions being of gambling in nature, cannot be regarded as trade or commerce and as such are not protected under Article 301 (*State of Bombay* v. *RMDC,* AIR 1957 SC 699).

The freedom guaranteed by Article 301 is not made absolute and is to be read subject to the following exceptions as provided in Articles 302-305.

(a) Parliament to Impose Restriction in the Public Interest

According to Article 302 Parliament may, by law, impose such restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest.

(b) Parliament to make Preference or Discrimination

Parliament cannot by making any law give preference to one State over the other or make discrimination between the States except when it is declared by that law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India [Article 303 (1) and (2)].

(c) Power of the State Legislature

The Legislature of a State may by law:

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse within the State as may be required in the public interest.

However, no bill or amendment for making a law falling in this provision can be introduced or moved in the Legislature of a State without the previous sanction of the President. [Article 304]

In *Kalyani Stores* v. *State of Orissa,* Supreme Court held that Article 304 enables State legislature to impose taxes on goods from other States, if goods produced within the state are subjected to such taxes. A subsequent assent of President is also sufficient, as held in *Karnataka* v. *Hansa Corpn.,* (1981) SC 463.

(d) Saving of Existing Laws

The law which was already in force at the commencement of the Constitution shall not be affected by the provisions of Article 301 except in so far as the President may, by order, otherwise direct (Art 305).

(e) Saving of Laws providing for State Monopoly

The laws which create State monopoly in any trade, etc. are saved from attack under Article 301, i.e., they are valid irrespective of the fact that they directly impede or restrict the freedom of trade and commerce. So, if the State creates a monopoly in road, transporters cannot complain that their freedom of trade and commerce has been affected or if the State created monopoly in banking then other bankers cannot complain that their freedom of trade and commerce has been restricted.

The last provision (Article 307) in Part XIII which need not even be mentioned except by way of information

authorises Parliament to appoint by law such authority as it considers appropriate for carrying out purposes of Articles 301 to 304 and to confer on the authority so appointed such powers and duties as it thinks necessary.

CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

Creation of monopoly rights in favour of a person or body of persons to carry on any business *prima facie* affects the freedom of trade. But in certain circumstances it can be justified.

After the Constitution (Amendment) Act, 1951, the States create a monopoly in favour of itself, without being called upon to justify its action in the Court as being reasonable.

Sub-clause (ii) of clause (6) of Article 19 makes it clear that the freedom of profession, trade or business will not be understood to mean to prevent the state from undertaking either directly or through a corporation owned or controlled by it, any trade, business, industry or service, whether to the exclusion, complete or partial, citizens or otherwise.

If a law is passed creating a State monopoly the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the state monopoly. Sub-clause (ii) of clause (6) protects only the essential and basic provisions. If there are other provisions which are subsidiary or incidental to the operation of the monopoly they do not fall under Article 19(6)(ii). It was held by Shah, J. in *R.C. Cooper* v. *Union of India,* (1970) 1 SCC 248 (known as *Bank Nationalisation case)*, that the impugned law which prohibited the named banks from carrying the banking business was a necessary incident of the business assumed by the Union and hence was not liable to be challenged under Article 19(6)(ii) in so far as it affected the right of a citizen to carry on business.

THE JUDICIARY

The Supreme Court

The Courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country (both for matters of ordinary law and for interpreting the Constitution) is an institution created by the Constitution. Immediately before independence, the Privy Council was the highest appellate authority for British India, for matters arising under ordinary law. But appeals from High Courts in constitutional matters lay to the Federal Court (created under the Government of India Act, 1935) and then to the Privy Council. The Supreme Court of India, in this sense, has inherited the jurisdiction of both the Privy Council and the Federal Court. However, the jurisdiction of the Supreme Court under the present Constitution is much more extensive than that of its two predecessors mentioned above.

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

High Courts

The High Courts that function under the Constitution were not created for the first time by the Constitution. Some High Courts existed before the Constitution, although some new High Courts have been created after 1950. The High Courts in (British) India were established first under the Indian High Courts Act, 1861 (an Act of the U.K. Parliament). The remaining High Courts were established or continued under the Constitution or under special Acts. High Courts for each State (or Group of States) have appellate, civil and criminal jurisdiction over lower Courts. High Courts have writ jurisdiction to enforce fundamental rights and for certain other purposes.

Some High Courts (notably) Bombay, Calcutta and Delhi, have ordinary original civil jurisdiction (i.e. jurisdiction to try regular civil suits) for their respective cities. High Courts can also hear references made by the Income Tax Appellate Tribunal under the Income Tax Act and other tribunals.

It should be added, that the “writ” jurisdiction vested at present in all High Courts by the Constitution was (before the Constitution came into force) vested only in the High Courts of Bombay, Calcutta and Madras (i.e. the three Presidency towns).

Subordinate Courts

Finally, there are various subordinate civil and criminal courts (original and appellate), functioning under ordinary law. Although their nomenclature and powers have undergone change from time to time, the basic pattern remains the same. These have been created, not under the Constitution, but under laws of the competent legislature. Civil Courts are created mostly under the Civil Courts Act of each State. Criminal courts are created mainly under the Code of Criminal Procedure.

Civil Courts

In each district, there is a District Court presided over by the District Judge, with a number of Additional District Judges attached to the court. Below that Court are Courts of Judges (sometimes called subordinate Judges) and in, some States, Munsiffs. These Courts are created under State Laws.

Criminal Courts

Criminal courts in India primarily consist of the Magistrate and the Courts of Session. Magistrates themselves have been divided by the Code of Criminal Procedure into 'Judicial' and 'Executive' Magistrates. The latter do not try criminal prosecutions, and their jurisdiction is confined to certain miscellaneous cases, which are of importance for public tranquillity and the like. Their proceedings do not end in conviction or acquittal, but in certain other types of restrictive orders. In some States, by local amendments, Executive Magistrates have been vested with powers to try certain offences.

As regards Judicial Magistrates, they are of two classes : Second Class and First Class. Judicial Magistrates are subject to the control of the Court of Session, which also is itself a Court of original jurisdiction. The powers of Magistrates of the two classes vary, according to their grade. The Court of Session can try all offences, and has power to award any sentence, prescribed by law for the offence, but a sentence of death requires confirmation by the High Court.

In some big cities (including the three Presidency towns and Ahmedabad and Delhi), the Magistrates are called Metropolitan Magistrates. There is no gradation *inter se*. Further, in some big cities (including the three Presidency towns and Ahmedabad and Hyderabad), the Sessions Court is called the "City Sessions Court", its powers being the same as those of the Courts of Session in the districts.

Special Tribunals

Besides these Courts, which form part of the general judicial set up, there are hosts of specialised tribunals dealing with direct taxes, labour, excise and customs, claims for accidents caused by motor vehicles, copyright and monopolies and restrictive trade practices.

For the trial of cases of corruption, there are Special Judges, appointed under the Criminal Law Amendment Act, 1952.

Test your knowledge

Choose the correct answer

Which of the following courts can advise the President on a reference made by the President on questions of fact and law?

(a) Supreme court

(b) High court

(c) Criminal court

(d) Civil court

Correct answer: (a)

WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

In the words of Dicey, prerogative writs are *'the bulwark of English Liberty'.* The expression 'prerogative writ' is one of Engish common law which refers to the extraordinary writs granted by the sovereign, as fountain of justice on the ground of inadequacy of ordinary legal remedies. In course of time these writs were issued by the High Court as extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. Under the Constitution by virtue of Article 226, every High Court has the power to issue directions or orders or writs including writs in the nature of *Habeas corpus, Mandamus, Prohibition, Quo warranto* and *Certiorari* or any of them for the enforcement of fundamental rights stipulated in Part III of the Constitution or for any other purpose.This power is exercisable by each High Court throughout the territory in relation to which it exercises jurisdiction. Where an effective remedy is available, the High Court should not readily entertain a petition under Article 226 of the constitution of India e.g. under the Companies Act, a share holder has very effective remedies for prevention of oppression and mismanagement. Consequently High Court should not entertain a petition under the said Article (*Ramdas Motors Transport Company Limited* v. *T.A. Reddy,* AIR 1997 SC 2189).

The Supreme Court could be moved by appropriate proceedings for the issue of directions or orders or writs, as referred to under Article 226 for the enforcement of the rights guaranteed by Part III of the Constitution. Article 32 itself being a fundamental right, the Constitutional remedy of writ is available to anyone whose fundamental rights are infringed by state action. Thus we see the power of the High Courts to issue these writs is wider than that of the Supreme Court, Whereas:

(a) an application to a High Court under Article 226 will lie not only where some other limitation imposed by the Constitution, outside Part III, has been violated, but, an application under Article 32 shall not lie in any case unless the right infringed is 'Fundamental Right' enumerated in Part III of the Constitution;

(b) while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Article 226, issue a writ against any person, Government or other authority only if such person or authority is physically resident or located within the territorial jurisdiction of the particular High Court or if the cause of action arises within such jurisdiction.

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as "the protector and guarantor of fundamental rights" by Article 32 (1). Although the Constitution has provided for concurrent writ jurisdiction of the High Courts it is not necessary, that an aggrieved petitioner should first apply to the High Court and then to the Supreme Court (*Romesh Thappar* v*. Madras*).

The jurisdiction of the High Court also extends to the enforcement of rights other than fundamental rights provided there is a *public duty*. The Supreme Courts jurisdiction to issue writs extends to all fundamental rights (*Common Cause* v *Union of India,* A.I.R. 1999 SC 2979).

Types of Writs

A brief discription of the various types of writs is given below:

1. Habeas Corpus

The writ of *Habeas corpus* - an effective bulwark of personal liberty – is a remedy available to a person who is confined without legal justification. The words '*Habeas Corpus*' literally mean "to have the body". When a *prima facie* case for the issue of writ has been made then the Court issues a *rule nisi* upon the relevant authority to show cause why the writ should not be issued. This is in national order to let the Court know on what grounds he has been confined and to set him free if there is no justification for his detention. This writ has to be obeyed by the detaining authority by producing the person before the Court. Under Articles 32 and 226 any person can move for this writ to the Supreme Court and High Court respectively. The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty for the issuance of the writ of *Habeas Corpus* as no man can

be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner. An appeal to the Supreme Court of India may lie against an order granting or rejecting the application (Articles 132, 134 or 136). The disobedience to this writ is met with by punishment for contempt of Court under the Contempt of Courts Act.

2. Mandamus

The word '*Mandamus'* literally means we command. The writ of *mandamus* is, a command issued to direct any person, corporation, inferior court, or Government requiring him or it do a particular thing specified therein which pertains to his or its office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction while resort to certiorari and prohibition arises when the tribunal has wrongly exercised jurisdiction or exceeded its jurisdiction and are available only against judicial and quasi-judicial bodies. *Mandamus* can be issued against any public authority. It commands activity. The writ is used for securing judicial enforcement of public duties. In a fit case, Court can direct executives to carry out Directive Principles of the Constitution through this writ (*State of Maharashtra* v. *MP Vashi,* 1995 (4) SCALE). The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed for. It is not issued if the authority has a discretion.

The Constitution of India by Articles 226 and 32 enables *mandamus* to be issued by the High Courts and the Supreme Court to all authorities.

Mandamus does not lie against the President or the Governor of a State for the exercise of their duties and power (Article 361). It does not lie also against a private individual or body except where the state is in collusion with such private party in the matter of contravention of any provision of the Constitution of a statute. It is a discretionary remedy and the High Court may refuse if alternative remedy exists except in case of infringement of fundamental rights.

3. Prohibition

A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

While *mandamus* commands activity, prohibition commands inactivity, it is available only against judicial or quasi judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent this writ may be of right and not a matter of discretion.

4. Certiorari

It is available to any person, wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially in excess of their legal authority" (See *The King* v. *Electricity Commissioners,* (1924) I.K.B. 171, P. 204-5).

The writ removes the proceedings from such body to the High Court, to quash a decision that goes beyond its jurisdiction. Under the Constitution of India, all High Courts can issue the writ of *certiorari* throughout their territorial jurisdiction when the subordinate judicial authority acts (i) without or in excess of jurisdiction or in (ii) contravention of the rules of natural justice or (iii) commits an error apparent on the face of the record. The jurisdiction of the Supreme Court to issue such writs arises under Article 32. Although the object of both the writs of *prohibition* and of *certiorari* is the same, prohibition is available at an earlier stage whereas *certiorari* is available at a later stage but in similar grounds i.e. *Certiorari* is issued after authority has exercised its powers.

5. Quo Warranto

The writ of *quo warranto* enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is an usurper. The holder of the office has to show to the court under what authority he holds the office. It is issued when:

(i) the office is of public and of a substantive nature,

(ii) created by statute or by the Constitution itself, and

(iii) the respondent has asserted his claim to the office. It can be issued even though he has not assumed the charge of the office.

The fundamental basis of the proceeding of *Quo warranto* is that the public has an interest to see that a lawful claimant does not usurp a public office. It is a discretionary remedy which the court may grant or refuse.

Test your knowledge

Choose the correct answer

Which of the following writs enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is a usurper?

(a) Habeas Corpus

(b) Mandamus

(c) Certiorari

(d) Quo Warranto

Correct answer: d

DELEGATED LEGISLATION

The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances which cannot always be foreseen, in implementing our socio-economic policies pursuant to the establishment of a welfare state as contemplated by our Constitution, have made it necessary for the legislatures to delegate its powers. Further, the Parliamentary procedure and discussions in getting through a legislative measure in the Legislatures is usually time consuming.

The three relevant justifications for delegated legislation are:

(i) the limits of the time of the legislature;

(ii) the limits of the amplitude of the legislature, not merely its lack of competence but also its sheer inability to act in many situations, where direction is wanted; and

(iii) the need of some weapon for coping with situations created by emergency.

The delegation of the legislative power is what Hughus, Chief Justice called, flexibility and practicability *(Currin* v. *Wallace* 83 L. ed. 441).

Classification of delegated legislation

The American writers classify delegated legislation as contingent and subordinate. Further, legislation is either supreme or subordinate. The Supreme Law or Legislation is that which proceeds from supreme or sovereign power in the state and is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some sovereign or supreme authority.

Classification of Subordinate Legislation

1. Executive Legislation

The tendency of modern legislation has been in the direction of placing in the body of an Act only few general rules or statements and relegating details to statutory rules. This system empowers the executive to make rules and orders which do not require express confirmation by the legislature. Thus, the rules framed by the Government under the various Municipal Acts fall under the category.

2. Judicial Legislation

Under various statues, the High Courts are authorised to frame rules for regulating the procedure to be followed in courts. Such rules have been framed by the High Courts under the Guardians of Wards Act, Insolvency Act, Succession Act and Companies Act, etc.

3. Municipal Legislation

Municipal authorities are entrusted with limited and sub-ordinate powers of establishing special laws applicable to the whole or any part of the area under their administration known as bye-laws.

4. Autonomous Legislation

Under this head fall the regulations which autonomus bodies such as Universities make in respect of matters which concern themselves.

5. Colonial Legislation

The laws made by colonies under the control of some other nation, which are subject to supreme legislation of the country under whose control they are.

Principles applicable

A body, to which powers of subordinate legislation are delegated, must directly act within the powers which are conferred on it and it cannot act beyond its powers except to the extent justified by the doctrine of implied powers. The doctrine of implied powers means where the legislature has conferred any power, it must be deemed to have also granted any other power without which that power cannot be effectively exercised.

Subordinate legislation can not take effect unless published. Therefore, there must be promulgation and publication in such cases. Although there is no rule as to any particular kind of publication.

Conditional legislation is defined as a statute that provides controls but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statue. In other words in sub-ordinate legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation, the power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority, the time and manner of carrying its legislation into effect (*Hamdard Dawa Khana* v. *Union of India,* AIR, 1960 SC 554).

While delegating the powers to an outside authority the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby. If an Act is contrary to the provisions of the Constitution, it is void. Our Constitution embodies a doctrine of judicial review of legislation as to its conformity with the Constitution.

In England, however, the position is different. Parliament in England may delegate to any extent and even all its power of law-making to an outside authority. In U.S.A., the Constitution embodies the doctrine of separation of powers, which prohibits the executive being given law making powers. On the question whether there is any limit beyond which delegation may not go in India, it was held in *In re-Delhi Laws* Act, 1912 AIR 1951 SC 332, that there is a limit that essential powers of legislation or essential legislative functions cannot be delegated. However, there is no specific provision in the Constitution prohibiting the delegation. On the question whether such doctrine is recognised in our Constitution, a number of principles in various judicial decisions have been laid down which are as follows:

(a) The primary duty of law-making has to be discharged by the Legislature itself. The Legislature cannot delegate its primary or essential legislative function to an outside authority in any case.

(b) The essential legislative function consists in laying down the 'the policy of the law' and 'making it a binding rule of conduct'. The legislature, in other words must itself lay down the legislative policy and principles and must afford sufficient guidance to the rule-making authority for carrying out the declared policy.

(c) If the legislature has performed its essential function of laying down the policy of the law and providing guidance for carrying out the policy, there is no constitutional bar against delegation of subsidiary or ancillary powers in that behalf to an outside authority.

(d) It follows from the above that an Act delegating law-making powers to a person or body shall be invalid, if it lays down no principles and provides no standard for the guidance of the rule-making body.

(e) In applying this test the court could take into account the statement in the preamble to the act and if said statements afford a satisfactory basis for holding that the legislative policy or principle has been enunciated with sufficient accuracy and clarity, the preamble itself would satisfy the requirements of the relevant tests.

(f) In every case, it would be necessary to consider the relevant provisions of the Act in relation to the delegation made and the question as to whether the delegation made is *intra vires* or not will have to be decided by the application of the relevant tests.

(g) Delegated legislation may take different forms, viz. conditional legislation, supplementary legislation subordinate legislation etc., but each form is subject to the one and same rule that delegation made without indicating intelligible limits of authority is constitutionally incompetent.

LESSON ROUND UP

– The Constitution of India came into force on January 26, 1950. The preamble to the Constitution sets out the aims and aspirations of the people of India. Constitution of India is basically federal but with certain unitary features. The essential features of a Federal Polity or System are – dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution.

– The fundamental rights are envisaged in Part III of the Constitution. These are:

(i) Right to Equality; (ii) Right to Freedom; (iii) Right against Exploitation;

(iv) Right to Freedom of Religion; (v) Cultural and Educational Rights; (vi) Right to Constitutional Remedies.

– The Directive Principles as envisaged by the Constitution makers lay down the ideals to be observed by every Government to bring about an economic democracy in this country.

– Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution (Forty-second Amendment) Act, 1976.

– The most important legislative power conferred on the President is to promulgate Ordinances. The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of the Parliament. The Governor's power to make Ordinances is similar to the Ordinance making power of the President and has the force of an Act of the State Legislature.

– The Union of India is composed of 28 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. Both the Union and States are equally subject to the limitations imposed by the Constitution. However, there are some parts of Indian territory which are not covered by these States and such territories are called Union Territories.

– The courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country is an institution created by the Constitution. The jurisdiction of the Supreme Court is vast including the writ jurisdiction for enforcing Fundamental Rights.

– The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances, have made it necessary for the legislatures to delegate its powers.

– While delegating the powers to an outside authority, the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby.

SELF TEST QUESTIONS

1. The Constitution of India is "federal in character but with unitary features". Comment.
2. Discuss the Ordinance making powers of the President and of the Governor.
3. Does a law made by a State to create monopoly rights in favour of a person to carry on any business affect the freedom of trade?
4. Write short notes on:
   (i) Delegated Legislation.
   (ii) *Writ of Habeas Corpus.*
   (iii) *Writ of Mandamus.*
   (iv) *Writ of Certiorari.*
   (v) Right to Constitutional Remedies.
5. Discuss the relationship between Fundamental Rights and Directive Principles of State Policy.

Lesson 21
Interpretation of Statutes

LESSON OUTLINE

- Learning Objectives
- Introduction
- Need for and Object of Interpretation
- General Principles of Interpretation
- Primary Rules
- Mischief Rules
- Rule of Reasonable Construction
- Rule of Harmonious Construction
- Rule of Ejusdem Generis
- Noscitur a Sociis
- Strict and Liberal Construction
- Other Rules
- Internal Aids in Interpretation
- Preamble heading and Title of a Chapter
- Marginal notes
- Interpretation clause
- External Aids in Interpretation

LEARNING OBJECTIVES

A statute is a will of legislature conveyed in the form of text. Interpretation or construction of a statute is an age-old process and as old as language. It is well settled principle of law that as the statute is an edict of the Legislature, the conventional way of interpreting or construing a statute is to seek the intention of legislature. The intention of legislature assimilates two aspects; one aspect carries the concept of 'meaning', and another aspect conveys the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute. The process of construction, therefore, combines both the literal and purposive approaches.

Necessity of interpretation would arise only where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. If the language is clear and unambiguous, no need of interpretation would arise. For the purpose of construction or interpretation, the Court obviously has to take recourse to various internal and external aids. These internal aids include, long title, preamble, headings, marginal notes, illustrations, punctuation, proviso, schedule, transitory provisions, etc. When internal aids are not adequate, Court has to take recourse to external aids. It may be parliamentary material, historical background, reports of a committee or a commission, official statement, dictionary meanings, foreign decisions, etc.

The complexity of modern legislation demands a clear understanding of the principles of construction applicable to it. The students will understand the general principles of interpretation as well as internal and external aids in interpretation of the statutes.

"Interpretation or construction is the process by which the Courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed."

– Salmond

INTRODUCTION

A statute has been defined as "the will of the legislature" (*Maxwell, Interpretation of Statutes*, 11th ed. p. 1). Normally, it denotes the Act enacted by the legislature.

A statute is thus a written "will" of the legislature expressed according to the form necessary to constitute it as a law of the state, and rendered authentic by certain prescribed forms and solemnities. (*Crawford,* p. 1)

According to *Bouvier's Law Dictionary*, a statute is "a law established by the act of the legislative power i.e. an Act of the legislature. The written will of the legislature. Among the civilians, the term 'statute' is generally applied to laws and regulations of every sort law which ordains, permits or prohibits anything which is designated as a statute, without considering from what source it arises".

The Constitution of India does not use the term 'statute' but it employs the term "law" to describe an exercise of legislative power.

Statutes are commonly divided into following classes: (1) *codifying,* when they codify the unwritten law on a subject; (2) *declaratory,* when they do not profess to make any alteration in the existing law, but merely declare or explain what it is; (3) *remedial,* when they alter the common law, or the judge made (non-statutory) law; (4) *amending*, when they alter the statute law; (5) *consolidating*, when they consolidate several previous statutes relating to the same subject matter, with or without alternations of substance; (6) *enabling*, when they remove a restriction or disability; (7) *disabling or restraining*, when they restrain the alienation of property; (8) *penal*, when they impose a penalty or forfeiture.

NEED FOR AND OBJECT OF INTERPRETATION

The following observation of Denning L.J. in *Seaford Court Estates Ltd.* v. *Asher,* (1949) 2 K.B. 481 (498), on the need for statutory interpretation is instructive: "It is not within human powers to forsee the manifold sets of facts which may arise; and that; even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judge's trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. To put into other words : A judge should ask himself the question : If the makers of the Act had themselves come across this luck in the texture of it, how would they have straight ended it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

The object of interpretation has been explained in *Halsbury's Laws of England* 3rd Ed., vol. 2, p. 381 in the following words : "The object of all interpretation of a 'Written Document' is to discover the intention of the author, the written declaration of whose mind the document is always considered to be. Consequently, the construction must be as clear to the minds and apparent intention of the parties as possible, and as the law will permit. The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, and not of what was intended to have been written; to give effect to

the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent of the intention. It is not possible to guess at the intention of the parties and substitute the presumed for the expressed intention. The ordinary rules of construction must be applied, although by doing so the real intention of the parties may, in some instances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law". The object of interpretation, thus, in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.

According to *Salmond*, interpretation or construction is the process by which the Courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

Test your knowledge

Choose the correct answer

The purpose of the interpretation is:

(a) To understand the statute according to one's own comprehension

(b) To make a guess of what is written

(c) To see what is the intention expressed by the words used

(d) To be able to change the meaning according to the situation

Correct answer: c

GENERAL PRINCIPLES OF INTERPRETATION

At the outset, it must be clarified that, it is only when the intention of the legislature as expressed in the statute is not clear, that the Court in interpreting it will have any need for the rules of interpretation of statutes. It may also be pointed out here that since our legal system is, by and large, modelled on Common Law system, our rules of interpretation are also same as that of the system. It is further to be noted, that the so called rules of interpretation are really guidelines.

(i) Primary Rules

(a) The Primary Rule : Literal Construction

According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning. The objectives 'natural', 'ordinary' and 'popular' are used interchangeably.

Interpretation should not be given which would make other provisions redundant (*Nand Prakash Vohra* v. *State of H.P.*, AIR 2000 HP 65).

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed according to the ordinary and natural meaning of the words. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases."

> "Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used". (Brett M.R.)

It is trite that construction of a statute should be done in a manner which would give effect to all its provisions [*Sarbajit Rick Singh* v. *Union of India,* (2008) 2 SCC 417].

It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions of another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated.

Similarly, the main part of the section must not be construed in such a way as to render a proviso to the section redundant.

Some of the other basic principles of literal construction are:

(i) Every word in the law should be given meaning as no word is unnecessarily used.

(ii) One should not presume any omissions and if a word is not there in the Statute, it shall not be given any meaning.

While discussing rules of literal construction the Supreme Court in *State of H.P* v. *Pawan Kumar* (2005) 4 SCALE, P.1, held:

– One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words.

– If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended, abridged, so far as to avoid such an inconvenience, but no further.

— The onus of showing that the words do not mean what they say lies heavily on the party who alleges it.

— He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.

(b) The Mischief Rule or Heydon's Rule

In *Heydon's Case*, in 1584, it was resolved by the Barons of the Exchequer "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered: (1) What was the Common Law before the making of the Act; (2) What was the mischief and defect for which the Common Law did not provide; (3) What remedy the parliament had resolved and appointed to cure the disease of the Commonwealth; and (4) The true reason of the remedy.

Although judges are unlikely to propound formally in their judgements the four questions in Heydon's Case, consideration of the "mischief" or "object" of the enactment is common and will often provide the solution to a problem of interpretation. Therefore, when the material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words is the rule laid down in Heydon's case which has "now attained the status of a classic". The rule directs that the Courts must adopt that construction which "shall suppress the mischief and advance the remedy". But this does not mean that a construction should be adopted which ignores the plain natural meaning of the words or disregard the context and the collection in which they occur. (See *Umed Singh* v. *Raj Singh,* A.I.R. 1975 S.C. 43)

The Supreme Court in *Sodra Devi's* case, AIR 1957 S.C. 832 has expressed the view that the rule in Heydon's case is applicable only when the words in question are ambiguous and are reasonably capable of more than one meaning.

The correct principle is that after the words have been construed in their context and it is found that the language is capable of bearing only one construction, the rule in Heydon's case ceases to be controlling and gives way to the plain meaning rule.

(c) Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat

Normally, the words used in a statute have to be construed in their ordinary meaning, but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words, does not meet the ends as a fair and a reasonable construction. Exclusive reliance on the bare dictionary meaning of words' may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough interpreting the provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve.

According to this rule, the words of a statute must be construed *ut res magis* valeat quam pareat, so as to give a sensible meaning to them. A provision of law cannot be so interpreted as to divorce it entirely from common sense; every word or expression used in an Act should receive a natural and fair meaning.

It is the duty of a Court in constructing a statute to give effect to the intention of the legislature. If, therefore, giving of literal meaning to a word used by the draftsman particularly in penal statute would defeat the object of the legislature, which is to suppress a mischief, the Court can depart from the dictionary meaning which will advance the remedy and suppress the mischief.

It is only when the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship of injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence (*Tirath Singh* v. *Bachittar Singh*, A.I.R. 1955 S.C. 830).

Courts can depart from dictionary meaning of a word and give it a meaning which will advance the remedy and suppress the mischief provided the Court does not have to conjecture or surmise. A construction will be adopted in accordance with the policy and object of the statute (*Kanwar Singh* v. *Delhi Administration*, AIR 1965 S.C. 871). To make the discovered intention fit the words used in the statute, actual expression used in it may be modified (*Newman Manufacturing Co. Ltd*. v. *Marrables*, (1931) 2 KB 297, *Williams* v. *Ellis*, 1880 49 L.J.M.C.). If the Court considers that the litera legis is not clear, it, must interpret according to the purpose, policy or spirit of the statute (ratio-legis). It is, thus, evident that no invariable rule can be established for literal interpretation.

In *RBI* v. *Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424. the Supreme Court stated. If a statute is looked at in the context of its enactment, with the glasses of the statute makers provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clauses each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.(See also *Chairman Indira Vikas Pradhikaran* v. *Pure Industrial Coke and Chemicals Ltd.,* AIR 2007 SC 2458).

(d) Rule of Harmonious Construction

A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the Courts to avoid "a head on clash" between two sections of the same Act and, "whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise" (*Raj Krishna* v. *Pinod Kanungo*, A.I.R. 1954 S.C. 202 at 203).

Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both. This is what is known as the "rule of harmonius construction".

The Supreme Court applied this rule in resolving a conflict between Articles 25(2)(b) and 26(b) of the Constitution and it was held that the right of every religious denomination or any section thereof to manage its own affairs in matters of religion [Article 26(b)] is subject to a law made by a State providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)(b)]. See *Venkataramana Devaru* v. *State of Mysore*, A.I.R. 1958 S.C. 255.

Test your knowledge

State whether the following statement is "True" or "False"

According to the Rule of Literal Construction, a statute is interpreted according to the general meaning of the words even if it leads to absurdity.

Correct answer: False

(e) Rule of Ejusdem Generis

Ejusdem Generis, literally means "of the same kind or species". The rule can be stated thus:

(a) In an enumeration of different subjects in an Act, general words following specific words may be construed with reference to the antecedent matters, and the construction may be narrowed down by treating them as applying to things of the same kind as those previously mentioned, unless of course, there is something to show that a wide sense was intended; (b) If the particular words exhaust the whole genus, then the general words are construed as embracing a larger genus.

In other words, the *ejusdem generis* rule is that, where there are general words following particular and specific words, the general words following particular and specific words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose. It is merely a rule of construction to aid the Courts to find out the true intention of the Legislature (*Jage Ram* v. *State of Haryana,* A.I.R. 1971 S.C. 1033). To apply the rule the following conditions must exist:

(1) The statute contains an enumeration by specific words,

(2) The members of the enumeration constitute a class,

(3) The class is not exhausted by the enumeration,

(4) A general term follows the enumeration,

(5) There is a distinct genus which comprises more than one species, and

(6) There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires. (See *Thakura Singh* v. *Revenue Minister,* AIR 1965 J & K 102)

The rule of *ejusdem generis* must be applied with great caution because, it implies a departure from the natural meaning of words, in order to give them a meaning or supposed intention of the legislature. The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished. The rule requires that specific words are all of one genus, in which case, the general words may be presumed to be restricted to that genus.

Whether the rule of *ejusdem generis* should be applied or not to a particular provision depends upon the purpose and object of the provision which is intended to be achieved.

(ii) Other Rules of Interpretation

(a) Expressio Unis Est Exclusio Alterius

The rule means that express mention of one thing implies the exclusion of another.

At the same time, general words in a statute must receive a general construction, unless there is in the statute some ground for limiting and restraining their meaning by reasonable construction; because many things are put into a statute *ex abundanti cautela,* and it is not to be assumed that anything not specifically included is for that reason alone excluded from the protection of the statute. The method of construction according to this maxim must be carefully watched. The failure to make the 'expressio' complete may arise from accident. Similarly, the 'exclusio' is often the result of inadvertence or accident because it never struck the draftsman that the thing supposed to be excluded requires specific mention. The maxim ought not to be applied when its application leads to inconsistency or injustice.

Similarly, it cannot be applied when the language of the Statute is plain with clear meaning *(Parbhani Transport Co-operative Society ltd v Regional Transport Authority, AIR 1960 SC 801)*

(b) Contemporanea Expositio Est Optima Et Fortissima in Lege

The maxim means that the best way to give the meaning to a document or proposition of a law is to read it as it would have read when it was made. Where the words used in a statute have undergone alteration in meaning in course of time, the words will be construed to bear the same *meaning as they had when the statute was passed on* the principle expressed in the maxim. In simple words, old statutes should be interpreted as they would have been at the date when they were passed and prior usage and interpretation by those who have an interest or duty in enforcing the Act, and the legal profession of the time, are presumptive evidence of their meaning when the meaning is doubtful.

But if the statute appears to be capable of only interpretation, the fact that a wrong meaning had been attached to it for many years, will be immaterial and the correct meaning will be given by the Courts except when title to property may be affected or when every day transactions have been entered into on such wrong interpretation.

(c) Noscitur a Sociis

The *'Noscitur a Sociis'* i.e. "It is known by its associates". In other words, meaning of a word should be known from its accompanying or associating words. It is not a sound principle in interpretation of statutes, to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim 'noscitur a socitis' has much relevance in understanding the import of words in a statutory provision (*K. Bhagirathi G. Shenoy* v. *K.P. Ballakuraya*, AIR 1999 SC 2143).

The rule states that where two or more words which are susceptible of analogous meaning are coupled together, they are understood in their cognate sense. It is only where the intention of the legislature in associating wider words with words of narrower significance, is doubtful that the present rule of construction can be usefully applied.

The *same words bear the same meaning in the same* statute. It is a matter of common sense that a particular word should be attributed with same meaning throughout a Statute. But this rule will not apply:

(i) when the context excluded that principle.

(ii) if sufficient reason can be assigned, it is proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act.

(iii) where it would cause injustice or absurdity.

(iv) where different circumstances are being dealt with.

(v) where the words are used in a different context. Many do not distinguish between the rule and the *ejusdem generis* doctrine. But there is a subtle distinction as pointed out in the case of *State of Bombay* v. *Hospital Mazdoor Sabha,* (1960) 2 SCR 866.

(d) Strict and Liberal Construction

In Wiberforce on Statute Law, it is said that what is meant by 'strict construction' is that "Acts, are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended", while by 'liberal construction' is meant that "everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute". Generally criminal laws are given strict interpretation and unless the accused is found guilty strictly as per the provisions of the law, he cannot be punished. For instance, when an Act provided for punishment for causing wound by cutting or stabbing and the accused caused wound by biting, it was not covered under that provision as cutting or stabbing implied using an external instrument while biting and causing wound does not involve any external instrument. Labour and welfare laws, on the other hand are given liberal interpretation as they are beneficial pieces of legislation. Beneficial construction to suppress the mischief and advance the remedy is generally preferred.

A Court invokes the rule which produces a result that satisfies its sense of justice in the case before it. "Although the literal rule is the one most frequently referred to in express terms, the Courts treat all three (viz., the literal rule, the golden rule and the mischief rule) as valid and refer to them as occasion demands, but do not assign any reasons for choosing one rather than another. Sometimes a Court discusses all the three approaches. Sometimes it expressly rejects the 'mischief rule' in favour of the 'literal rule'. Sometimes it prefers, although never expressly, the 'mischief rule' to the 'literal rule'.

Test your knowledge

State whether the following statement is "True" or "False"

The rule of *Ejusdem Generis* must be applied with great caution because it implies a departure from the natural meaning of words.

Correct answer: True

PRESUMPTIONS

Where the meaning of the statute is clear, there is no need for presumptions. But if the intention of the legislature is not clear, there are number of presumptions. These are :

(a) that the words in a statute are used precisely and not loosely.

(b) that *vested rights*, i.e., rights which a person possessed at the time the statute was passed, *are not taken away without express words, or necessary implication or without compensation.*

(c) *that "mens rea", i.e., guilty mind is required for a criminal act.* There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent.

The general rule applicable to criminal cases is *"actus non facit reum nisi mens sit rea" (The act itself does not constitute guilt unless done with a guilty intent).*

(d) that the *state is not affected* by a statute unless it is expressly mentioned as being so affected.

(e) that a statute *is not intended to be consistent with the principles of International Law.* Although the

judges cannot declare a statute void as being repugnant to International Law, yet if two possible alternatives present themselves, the judges will choose that which is not at variance with it.

(f) that the *legislature knows* the state of the law.

(g) that the *legislature does not make any alteration* in the existing law unless by express enactment.

(h) that the legislature *knows the practice of the executive and the judiciary.*

(i) *legislature confers powers necessary to carry out duties imposed by it.*

(j) that the *legislature does not make mistake.* The Court will not even alter an obvious one, unless it be to correct faulty language where the intention is clear.

(jj) *the law compels no man to do that which is futile or fruitless.*

(k) *legal fictions* may be said to be statements or suppositions which are known, to be untrue, but which are not allowed to be denied in order that some difficulty may be overcome, and substantial justice secured. It is a well settled rule of interpretation that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

(l) where powers and duties are inter-connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and *vice versa*, the *delegation of powers takes with it the duties.*

(m) *the doctrine of natural justice* is really a doctrine for the interpretation of statutes, under which the Court will presume that the legislature while granting a drastic power must intend that it should be fairly exercised.

INTERNAL AND EXTERNAL AIDS IN INTERPRETATION

In coming to a determination as to the meaning of a particular Act, it is permissible to consider two points, namely, (1) the external evidence derived from extraneous circumstances, such as, previous legislation and decided cases etc., and (2) the internal evidence derived from the Act itself.

(a) Internal Aids in Interpretation

The following may be taken into account while interpreting a statute:

Title

The long title of an Act is a part of the Act and is admissible as an aid to its construction. The long title sets out in general terms, the purpose of the Act and it often precedes the preamble. It must be distinguished from short title which implies only an abbreviation for purposes of reference, the object of which is identification and not description. To give an example, The Civil Procedure Code, 1908 is a long title and CPC 1908 is a short title. The true nature of the law is determined not by the name given to it but by its substance. However, the long title is a legitimate aid to the construction.

While dealing with the Supreme Court Advocates (Practice in High Court) Act, 1951 bearing a full title as "An Act to authorise Advocates of the Supreme Court to practice as of right in any High Court", S.R. Das, J. observed: "One cannot but be impressed at once with the wording of the full title of the Act. Although there are observations in earlier English Cases that the title is not a part of the statute and is, therefore, to be excluded from consideration in construing the statutes. It is now a settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of an enactment.

Preamble

The true place of a preamble in a statute was at one time, the subject of conflicting decisions. In *Mills* v. *Wilkins,*

(1794) 6 Mad. 62, Lord Hold said: "the preamble of a statute is not part thereof, but contains generally the motives or inducement thereof". On the other hand, it was said that "the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and the mischief it was intended to remedy". The modern rule lies between these two extremes and is that where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it, but where the enacting part is ambiguous, the preamble can be referred to explain and elucidate it (*Raj Mal* v. *Harnam Singh,* (1928) 9 Lah. 260). In *Powell* v. *Kempton Park Race Course Co.,* (1899) AC 143, 157, Lord Halsbury said: "Two propositions are quite clear — One that a preamble may afford useful light as to what a statute intends to reach and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment". This rule has been applied to Indian statutes also by the Privy Council in *Secretary of State* v. *Maharaja Bobbili,* (1920) 43 Mad. 529, and by the Courts in India in a number of cases (See for example, *Burrakur Coal Co.* v. *Union of India*, AIR 1961 SC 154. Referring to the cases in Re. *Kerala Education Bill*, AIR 1958 SC 956 and *Bishambar Singh* v. *State of Orissa*, AIR 1954 SC 139, the Allahabad High Court has held in *Kashi Prasad* v. *State,* AIR 1967 All. 173, that even though the preamble cannot be used to defeat the enacting clauses of a statute, it has been treated to be a key for the interpretation of the statute.

Supreme Court in *Kamalpura Kochunni* v. *State of Madras*, AIR 1960 SC 1080, pointed out that the preamble may be legitimately consulted in case any ambiguity arises in the construction of an Act and it may be useful to fix the meaning of words used so as to keep the effect of the statute within its real scope.

Heading and Title of a Chapter

In different parts of an Act, there is generally found a series or class of enactments applicable to some special object, and such sections are in many instances, preceded by a heading. It is now settled that the headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislature. But conflicting opinions have been expressed on the question as to what weight should be attached to the headings. A "heading", according to one view "is to be regarded as giving the key to the interpretation of clauses ranged under it, unless the wording is inconsistent with such interpretation; and so that headings, might be treated "as preambles to the provisions following them". But according to the other view, resort to the heading can only be taken when the enacting words are ambiguous. So Lord *Goddard, C.J*. expressed himself as: However, the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the sections where there cannot be any doubt as to the ordinary meaning of the words". Similarly, it was said by Patanjali Shastri, J.: "Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment". In this regard, the Madhya Pradesh High Court in *Suresh Kumar* v. *Town Improvement Trust*, AIR 1975 MP 189, has held: "Headings or titles prefixed to sections or group of sections may be referred to as to construction of doubtful expressions; but the title of a chapter cannot be used to restrict the plain terms of an enactment".

The Supreme Court observed that ..... "the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or the sub-heading may be referred to as an aid for construing the provision but even in such a case aid could not be used for cutting down the wide application of the clear words used in the provision" (*Frick India Ltd.* v. *Union of India*, AIR 1990 SC 689).

Marginal Notes

In England, the disposition of the Court is to disregard the marginal notes. In our country the Courts have

entertained different views. Although opinion is not uniform, the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section.

"There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament" (*Balraj Kumar* v. *Jagatpal Singh*, 26 All. 393). Patanjali Shastri, J., after referring to the above case with approval observed : "Marginal notes in an Indian statute, as in an Act of Parliament cannot be referred to for the purpose of construing the Statute" *(C.I.T*. v*. Anand Bhai Umar Bhai,* A.I.R. 1950 S.C. 134). At any rate, there can be no justification for restricting the section by the marginal note, and the marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear and unambiguous (*Chandraji Rao* v. *Income-tax Commissioner,* A.I.R. 1970 S.C. 158).

The Privy Council in *Balraj Kumar* v. *Jagatpal Singh*, (1904) 26 All. 393, has held that the marginal notes to the sections are not to be referred to for the purpose of construction. The Supreme Court in *Western India Theatres Ltd.* v. *Municipal Corporation of Poona,* (1959) S.C.J. 390, has also held, that a marginal note cannot be invoked for construction where the meaning is clear.

Marginal notes appended to the Articles of the Constitution have been held to constitute part of the Constitution as passed by the Constituent Assembly and therefore, they have been made use of in consulting the Articles, e.g. Article 286, as furnishing prima facie, "some clue as to the meaning and purpose of the Article".

When reference to marginal note is relevant? The Supreme Court has held that the marginal note although may not be relevant for rendition of decisions in all types of cases but where the main provision is sought to be interpreted differently, reference to marginal note would be permissible in law. [*Sarbajit Rick Singh* v. *Union of India* (2008) 2 SCC 417; See also *Dewan Singh* v. *Rajendra Prasad* (2007) 1 Scale 32].

Interpretation Clauses

It is common to find in statutes "definitions" of certain words and expressions used elsewhere in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply. A definition section may borrow definitions from an earlier Act and definitions so borrowed need not be found in the definition section but in some provisions of the earlier Act.

The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to 'mean' such and such, the definition is *prima facie* restrictive and exhaustive, whereas where the word defined is declared to 'include' such and such, the definition is *prima facie* extensive. Further, a definition may be in the form of 'means and includes', where again the definiton is exhaustive. On the other hand, if a word is defined 'to apply to and include', the definition is understood as extensive. (See *Balkrisha*n v. *M. Bhai* AIR 1999 MP 86)

A definition section may also be worded in the form 'so deemed to include' which again is an inclusive or extensive definition and such a form is used to bring in by a legal fiction something within the word defined which according to ordinary meaning is not included within it.

A definition may be both inclusive and exclusive i.e. it may include certain things and exclude others. In such a case limited exclusion of a thing may suggest that other categories of that thing which are not excluded fall within the inclusive definition.

The definition section may itself be ambiguous and may have to be interpreted in the light of the other provisions of the Act and having regard to the ordinary connotation of the word defined. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give precision and certainty to a word or a phrase which would otherwise be vague and uncertain but not to contradict or supplement it altogether.

When a word has been defined in the interpretation clause, *prima facie* that definition governs whenever that word is used in the body of the statute.

When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language, the provision and the object intended to be served thereby.

Proviso

"When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of proviso". In the words of Lord Macmillan: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to the case".

As stated by Hidayatullah, J. : "As a general rule, **a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule**".

A distinction is said to exist between the provisions worded as 'proviso', 'exception' or 'saving clause'. 'Exception' is intended to restrain the enacting clause to particular cases; 'proviso' is used to remove special cases from the general enactment and provide for them specially; and 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing.

Test your knowledge

Choose the correct answer

The purpose of interpretation clause is:

(a) To give dictionary meaning of the word or expression.

(b) To give an overview of the statute

(c) To give complete meaning of the statute

(d) To avoid the necessity of frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply

Correct answer: d

Illustrations or Explanation

"Illustrations attached to sections are part of the statute and they are useful so far as they help to furnish same indication of the presumable intention of the legislature. An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. But illustrations cannot have the effect of modifying the language of the section and they cannot either curtail or expand the ambit of the section which alone forms the enactment. The meaning to be given to an 'explanation' must depend upon its terms, and 'no theory of its purpose can be entertained unless it is to be inferred from the language used" (*Lalla Ballanmal* v. *Ahmad Shah,* 1918 P.C. 249).

An explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an explanation may have been added *ex abundanti cautela* to allay groundless apprehension.

Schedules

The schedules form a part of the statute and must be read together with it for all purposes of construction. But expression in the schedule cannot control or prevail against the express enactment (*Allen* v. *Flicker*, 1989, 10 A and F 6.40).

In *Ramchand Textile* v. *Sales Tax Officer*, A.I.R. 1961, All. 24, the Allahabad High Court has held that, if there is any appearance of inconsistency between the schedule and the enactment, the enactment shall prevail. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

There are two principles or rules of interpretation which ought to be applied to the combination of an Act and its schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then the Act and the schedule must be read as if the schedule were operating for that purpose only. If the language of a clause in the schedule can be satisfied without extending it beyond for a certain purpose, in spite of that, if the language of the schedule has in its words and terms that go clearly outside the purpose, the effect must be given by them and they must not be treated as limited by the heading of the part of the schedule or by the purpose mentioned in the Act for which the schedule is *prima facie* to be used. One cannot refuse to give effect to clear words simply because *prima facie* they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act.

Whether a particular requirement prescribed by a form is mandatory or directory may have to be decided in each case having regard to the purpose or object of the requirement and its interrelation with other enacting provisions of the statute; and it is difficult to lay down any uniform rule. Where forms prescribed under the rules become part of rules and, the Act confers an authority prescribed by rules to frame particulars of an application form, such authority may exercise the power to prescribe a particular form of application.

The statement of objects and reasons as well as the 'notes on clauses of the Bill relating to any particular legislation may be relied upon for construing any of its provisions where the clauses have been adopted by the Parliament without any change in enacting the Bill, but where there have been extensive changes during the passage of the Bill in Parliament, the objects and reasons of the changed provisions may or may not be the same as of the clauses of the original Bill and it will be unsafe to attach undue importance to the statement of objects and reasons or notes on clauses.

The Courts have only to enquire, what has the legislature thought fit to enact?

Regarding the reference to the statement of objects and reasons, it is a settled law that it can legitimately be referred to for a correct appreciation of:

(1) what was the law before the disputed Act was passed;

(2) what was the mischief or defect for which the law had not provided;

(3) what remedy the legislature has intended; and

(4) the reasons for the statute.

(b) External Aids in Interpretation

Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. Where the words of an Act are clear and unambiguous, no resource to extrinsic matter, even if it consists of the sources of the codification, is permissible. But where it is not so, the Court can consider, apart from the intrinsic aids, such as preamble and the purview of the Act, both with the prior events leading up to the introduction of the Bill, out of the which the Act has emerged, and subsequent events from the time of its introduction until its final enactment like the legislation, history of the Bill, Select Committee reports.

Parliamentary History

The Supreme Court, enunciated the rule of exclusion of Parliamentary history in the way it is enunciated by English Courts, but on many occasions, the Court used this aid in resolving questions of construction. The Court has now veered to the view that legislative history within circumspect limits may be consulted by Courts in resolving ambiguities.

It has already been noticed that the Court is entitled to take into account "such external or historical facts as may be necessary to understand the subject-matter of the statute", or to have regard to "the surrounding circumstances" which existed at the time of passing of the statute. Like any other external aid, the inferences from historical facts and surrounding circumstances must give way to the clear language employed in the enactment itself.

Reference to Reports of Committees

The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into "so as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief. So we should not be unduly influenced by the Report *(Letang* v. *Cooper* (1964) 2 All. E.R. 929; see also *Assam Railways & Trading Co. Ltd.* v. *I.R.C*. (1935) A.C. 445).

When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision (*Davis* v. *Johnson* (1978) 1 All. E.R. 1132. But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.

Present trends in the European Economic Community Countries and the European Court, however, is to interpret treaties, conventions, statutes, etc. by reference to *travaux preparatories,* that is, all preparatory records such as reports and other historical material.

Social, Political and Economic Developments and Scientific Invention

Reference to other Statutes

It has already been stated that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context, permits reference to other statutes in *pari materia, i.e*. statutes dealing with the same subject matter or forming part of the same system. *Viscount Simonds* conceived it to be a right and duty to construe every word of a statute in its context and he used the word in its widest sense including other statutes in *pari materia*.

The meaning of the phrase *'pari materia'* has been explained in an American case in the following words: "Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the words *simlis.* It is used in opposition to it intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. When the two pieces of legislation are of differing scopes, it cannot be said that they are in pari materia.

It is a well accepted legislative practice to incorporate by reference, if the legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and subjects of the Act.

Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. But the later law is entitled to weight when it comes to the problem of construction.

Generally speaking, a subsequent Act of a legislature affords no useful guide to the meaning of another Act which comes into existence before the later one was ever framed. Under special circumstances the law does, however, admit of a subsequent Act to be resorted to for this purpose but the conditions, under which the later Act may be resorted to for the interpretation of the earlier Act are strict. Both must be laws on the same subject and the part of the earlier Act which is sought to be construed must be ambiguous and capable of different meanings.

Although a repealed statute has to be considered, as if it had never existed, this does not prevent the Court from looking at the repealed Act in *pari materia* on a question of construction.

The regulations themselves cannot alter or vary the meaning of the words of a statute, but they may be looked at as being an interpretation placed by the appropriate Governent department on the words of the statute. Though the regulations cannot control construction of the Act, yet they may be looked at, to assist in the interpretation of the Act and may be referred to as working out in detail the provisions of the Act consistently with their terms.

Dictionaries

When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word, regard must always be had to the context as it is a fundamental rule that *"the meaning of words and expressions used in an Act must take their colour from the context in which they appear".* Therefore, when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers". As stated by *Krishna Aiyar, J.* "Dictionaries are not dictators of statutory construction where the benignant mood of a law, and more emphatically the definition clause furnish a different denotation". Further, words and expressions at times have a 'technical' or a 'legal meaning' and in that case, they are understood in that sense. Again, judicial decisions expounding the meaning of words in construing statutes in pari materia will have more weight than the meaning furnished by dictionaries.

Use of Foreign Decisions

Use of foreign decisions of countries following the same system of jurisprudence as ours and rendered on statutes in *pari materia* has been permitted by practice in Indian Courts. The assistance of such decisions is subject to the qualification that prime importance is always to be given to the language of the relevant Indian Statute, the circumstances and the setting in which it is enacted and the Indian conditions where it is to be applied.

LESSON ROUND UP

- A statute normally denotes the Act enacted by the legislature. The object of interpretation in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.
- The General Principles of Interpretation are Primary Rules and other Rules of Interpretation.
- **The primary rules are:**
  - *Literal Construction:* According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning.
  - *The Mischief Rule or Heydon's Rule:* The rule directs that the Courts must adopt that construction which "shall suppress the mischief and advance the remedy".
  - *Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat:* According to this rule, the words of a statute must be construed *ut res magis valeat quam pareat*, so as to give a sensible meaning to them. A provision of law cannot be so interpreted as to divorce it entirely from common sense; every word or expression used in an Act should receive a natural and fair meaning.
  - *Rule of Harmonious Construction:* Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both.

  - *Rule of Ejusdem Generis:* The *ejusdem generis* rule is that, where there are general words following particular and specific words, the general words following particular and specific words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose.

- **Other Rules of Interpretation are:**
  - *Expressio Unis Est Exclusio Alterius:* The rule means that express mention of one thing implies the exclusion of another.
  - *Contemporanea Expositio Est Optima Et Fortissima in Lege:* The maxim means that a contemporaneous exposition is the best and strongest in law.
  - *The 'Noscitur a Sociis'* i.e. "It is known by its associates". In other words, meaning of a word should be known from its accompanying or associating words.
  - *Strict and Liberal Construction:* What is meant by 'strict construction' is that "Acts, are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended", while by 'liberal construction' is meant that "everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute".
  - *Presumptions:* Where the meaning of the statute is clear, there is no need for presumptions. But if the intention of the legislature is not clear, there are number of presumptions.
- **Internal Aids in Interpretation are:**
  - Title; Preamble; Heading and Title of a Chapter; Marginal Notes; Interpretation Clauses; Proviso; Illustrations or Explanations; and Schedules.
- **External Aids in Interpretation***:* Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. There are: Parliamentary History; Reference to Reports of Committees; Reference to other Statutes; Dictionaries and Use of Foreign Decisions.

SELF TEST QUESTIONS

1. Discuss the need and object for interpretation of statutes.
2. Write notes on the following indicating their importance as an aid to interpretation of statutes:
   (i) Preamble.
   (ii) Interpretation clause.
3. What are the internal and external aids which could be taken into account while interpretation.
4. Write short notes on:
   (i) Golden rule.
   (ii) Harmonious construction.
5. Briefly discuss general principles of interpretation.

Lesson 22
An Overview of Law Relating to Specific Relief, Limitation and Evidence

LESSON OUTLINE

- Learning objectives
- Introduction
- Who may sue for Specific Performance
- Recovery of possession of Movable and Immovable Property
- Persons against whom Specific Performance Available
- Persons against whom Specific Performance cannot be Enforced
- Discretion of the Court
- Rectification of Instruments
- Rescission of Contracts
- Cancellation of Instruments
- Declaratory Decrees
- Preventive Reliefs
- General Conditions of Liability for a Tort
- Kinds of Tortious Liability
- Vicarious Liability of the State
- Torts or wrongs to personal safety and freedom
- Remedies in Torts
- Computation of the Period of Limitation
- Bar of Limitation
- Acquisition of ownership by Possession
- Limitation and writs under the Constitution
- The Schedule
- Classification of Period of Limitation
- Statements about the Facts to be Proved
- Opinion of Third Persons when Relevant
- Facts of which evidence can not be given
- Oral, Documentary and Circumstantial Evidence
- Presumptions

LEARNING OBJECTIVES

The Specific Relief Act, 1963 is an Act to define and amend the law relating to certain kinds of specific relief. Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law. "Tort" means a civil wrong which is not exclusively the breach of a contract or the breach of trust. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications. The Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by any enactment.

“Evidence” means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

The "Law of Evidence" may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as “Law of Evidence”. The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence

The object of this study lesson is to impart basic knowledge to the students regarding law relating to Specific Relief, Torts, Limitation and Evidence.

Law as “the body of principles recognised and applied by the State in the administration of justice.”

– Salmond

LAW RELATING TO SPECIFIC RELIEF

SECTION I

INTRODUCTION

The law relating to specific relief in India is provided in the Specific Relief Act of 1963. The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief.

The expression 'specific relief' means a relief in specie. It is a remedy which aims at the exact fulfillment of an obligation.

SCOPE OF THE ACT

The Specific Relief Act, 1963 is not exhaustive. It does not consolidate the whole law on the subject. As the Preamble would indicate, it is an Act "to define and amend the law relating to certain kinds of specific relief". It does not purport to lay down the law relating to specific relief in all its ramifications (AIR 1972 SC 1826)

There are other kinds of specific remedy provided for by other enactments e.g. the Transfer of Property Act deals with the specific remedies available to a mortgagor or mortgagee; the Partnership Act deals with the specific remedies like dissolution and accounts as between partners.

Under the Specific Relief Act, 1963, remedies have been divided as specific relief (Sections 5-35) and preventive relief (Sections 36-42). These are :

(i) Recovering possession of property (Sections 5-8);

(ii) Specific performance of contracts (Sections 9-25);

(iii) Rectification of Instruments (Section 26);

(iv) Rescission of contracts (Sections 27-30);

(v) Cancellation of Instruments (Section 31-33);

(vi) Declaratory decrees (Sections 34-35); and

(vii) Injunctions (Sections 36-42).

WHO MAY SUE FOR SPECIFIC PERFORMANCE

Section 15 lays down that specific performance of a contract may be obtained by (a) any party thereto; (b) the representative in interest or the principal, of any party thereto; provided that where the learning, skill, insolvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party; (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder; (d) where the contract has been entered into by tenant-for-life in due exercise of a power the remainder man; (e) a reversioner in possession, where the agreement is a convenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such convenant; (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach; (g) when a company has entered into a contract and subsequently becomes amalgamated with another company the new company which arises out of the amalgamation; (h) when the promoters of a company have, before its incorporation, entered into a contract for

the purpose of the company and such a contract is warranted by the terms of the incorporation of the company provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Generally, only a party to the contract can get its specific performance. The section gives the list of persons who can sue for specific performance of a contract. The general principle is that in a suit for specific performance of a contract, all the parties to the contract should be parties to the suit and no one else.

Test your knowledge

State whether the following statement is "True" or "False"

Generally, only a party to the contract can get its specific performance.

- True
- False

Correct answer: True

Contracts which can be specifically enforced

Section 10 provides the cases in which specific performance of contract is enforceable. It says that except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced (a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done, or (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. The explanation provides that unless and until the contrary is proved, the Court shall presume:

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and (ii) that the breach of a contract to transfer movable property can be so relieved except in the two cases: (a) where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market, and (b) where the property is held by the defendant as the agent or trustee of the plaintiff.

So, under this Section, contracts for sale of patent right, copy right, shares of a company which are not easily available, future property, chattels of special value, etc., are specifically enforceable. In an agreement for sale of agricultural land, the respondent vendor wilfully avoided the execution of sale deed after receiving full sale consideration. Rajasthan High Court held that compensation by way of damages would not be substituted to execution of sale deed. The Court directed the respondents to enforce the specific performance of the agreement (*Ram Karan and others* v. *Govind Lal and other,* AIR 1999 Raj. 167). In a suit for specific performance of contract of sale of a house, a stranger to the contract cannot seek to be impleaded. That will change the very nature of the suit.

To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract *Mankaur* v. *Hartar Singh* (2010) 10 SCC 512.

Cases in which specific performance of contracts connected with trusts enforceable

Section 11 lays down that except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly of a

trust. But if a trustee enters into a contract in excess of his powers then such a contract cannot be specifically enforced.

Illustrations

A contracts with B to paint a picture for B and B agrees to pay Rs. 1000 for the same. The picture is painted. 'B' is entitled to have it delivered to him on payment or tender of Rs. 1,000.

A is a trustee of land with power of lease it for 7 years. He enters into a contract with B to grant a lease of the land for 7 years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of company have power to sell the concern with the sanction of a general meeting of the shareholders, Directors contract to sell it without any such sanction. This contract cannot be specifically enforced.

Specific performance of part of a contract

Section 12 deals with specific performance of a part of a contract. Sub-section (1) lays down the general principle that except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract. Sub-sections (2)-(4) lay down the exceptions to this general rule as follows:

(i) Sub-section 2 says that where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of the either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

A contracts to sell B a piece of land consisting of 100 *bighas*. It turns out that 98 *bighas* of the land belongs to A and the two remaining *bighas* to a stranger, who refuses to part with them. The two bighas are not necessary for the use of enjoyment of the 98 *bighas,* nor so important for such use or enjoyment that the loss of them may not be made in goods or in money. A may be directed at the suit of B to convey to B the 98 *bighas* and to make compensation to him. For not conveying the two remaining *bighas;* B may be directed at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less the sum awarded as compensation for the deficiency.

(ii) Sub-section 3 lays down that where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either (a) forms a considerable part of the whole, though admitting of compensation in money; or (b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the party (i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement, and (ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

For example, A contracts to sell B a piece of land consisting of 100 bighas for Rs. 1,00,000. It turns out that only 50 bighas of land belong to A. 50 bighas are substantial part of the contract. A cannot demand specific performance of the contract but B can demand specific performance to get 50 bighas of land from A by paying the full consideration i.e. Rs. 1,00,000.

(iii) Sub-section 4 lays down that when a part of a contract which taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part. For the purposes of this section, a party to the contract shall be deemed to be unable to perform the whole of his part of it, if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.

Section 13 lays down the rights of a purchaser or lessee against the seller or lessor with no title or imperfect title. It lays down that where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter) has the following rights, namely: (a) if the vendor or lessor has, subsequent to the contract, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest; (b) where the concurrence of other persons is necessary for validating the title, and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence and when conveyance by other person is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance; (c) where the vendor professes to sell unencumbered property but the property is, mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee; (d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title, or imperfect title, the defendant has a right to a return of his deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject matter of the contract. Sub-section (2) of Section 13 lays down that the aforesaid provisions of the sections shall also supply, as far as may be to contracts for or hire of movable property.

Test your knowledge

As per Section 10, which of the following cases are specifically enforceable?

(a) Contracts for sale of patent right

(b) Copy right

(c) Rent laws

(d) Future property

Correct answer: (a), (b), and (d)

Contracts which cannot be specifically enforced

Section 14 lays down the contracts which cannot be specifically enforced. They are (a) A contract for the non-performance of which compensation in money is an adequate relief; (b) A contract which runs into such minute and numerous details that the Court cannot enforce specific performance of its material terms or which is dependant upon the personal qualification or volition of the parties or a contract from its nature is such that the Court cannot enforce specific performance; (c) A contract which is in its nature determinable; (d) A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise. Sub-section (2) lays down that save as provided by the Arbitration Act, 1943, no contract to refer present or future difference to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions for the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit.

Sub-section (3) lays down that notwithstanding anything contained in clause (a) or clause (c) or clause (d) of Sub-section (1), the Court may enforce specific performance in the following cases: (a) where the suit is for the enforcement of a contract—(i) to execute a mortage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once; provided that where only a part of the loan has been advanced the vendor is willing to advance the remaining part of the loan in terms of the contract; or (ii) to take up and pay for any debentures of a company; (b) where the suit is for (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business, or (ii) the purchase of a share of a partner of a firm (c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any

other work on land provided that the following conditions are fulfilled, namely, (i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work; (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the land on which the building is to be constructed or other work is to be executed.

Illustrations

A contracts to sell and B contracts to buy, one lakh of rupees in the four per cent Central Government loan; the contract may be specifically performed.

A contracts to render personal service to B or A contracts to marry B or A contracts to employ B on personal service or A, an author, contracts with B, a publisher to complete a literary work. B cannot enforce specific performance of these contracts. Not only contract of personal service, but any contract requiring personal skill, knowledge or volition of the parties, for example, to marry, to paint a picture, to complete a literary work or to sing or act at a theatre will not be specifically enforced as such contracts would require a constant and general superintendence as cannot be conveniently undertaken by a Court of Justice.

A and B contract to become partners, the contract is not specifying the duration of the proposed partnership. In such a case the contract cannot be specifically enforced since, either A and B might at once dissolve the partnership (*Scott* v. *Rayment* (1868) L.R. 7 Eq. 112).

The Court will not decree specific performance of an agreement if it be of such a nature that better justice will be done by leaving the parties to their remedy in damages (*Wilson* v. *Northampton & Banbury Junction Rly. Co.* (1874) 9 C.H. App. 279).

The very foundation of specific performance of a contract is that an award for damages does not afford the aggrieved party a complete remedy. If in the opinion of the Court damages will be an adequate remedy, specific performance of the contract cannot be decreed (*Ramji Patel* v. *Rao Kishore,* (1929) P.C. 190).

In such a case pecuniary compensation is equated with the specific performance of the contract. It can be decreed only when the remedy at law is not adequate or is defective. The court may come to the conclusion that the ends of justice will be served better by awarding the damages instead of the specific performance of the contract.

A Contract may be specifically enforced:

(a) If it is one for non-performance of which the mere payment of money would not be an adequate relief; and

(b) the contract is otherwise, proper to be specifically enforced. Section 14(1)(b) provides three reasons for refusing specific performance:

  (i) When a contract runs into minute or numerous details; or

  (ii) When a contract is dependent upon the personal qualification or volition of the parties; or

  (iii) When the contract by nature is such that the Court cannot enforce, specific performance of its material terms.

In the same way, contracts of personal service cannot be specifically enforced. These contracts are based upon the personal relations of the parties. They require mutual trust and confidence of the parties. When the contract is for personal service, it requires some skill or talent or of some intellectual pursuit, and in that case a decree for

its specific performance cannot be passed by the court, as it will never know if the decree has been truthfully and fully executed. The Court will refuse specific performance of a contract if it is of such a nature that the Court cannot enforce its specific performance.

Under Section 14(1)(c) contracts which are in their nature determinable cannot be specifically enforced.

The Court will not enforce a contract which is in its nature determinable by the defendant. Determinable contract is such a contract where one of the parties can put an end to it. So even if a decree is passed, the defendant by putting an end to the contract, will evade the decree. A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership can not be specifically performed, for if it were so performed, either A or B might at once dissolve the partnership.

RECOVERY OF POSSESSION OF MOVABLE AND IMMOVABLE PROPERTY

Sections 5 to 8 deal with recovery of possession of property. Property may either be (i) immovable, or (ii) movable. Sections 5 and 6 deal with recovery of possession of immovable property while Sections 7 and 8 deal with movable property.

Recovery of possession of specific immovable property

According to Section 5, a person, entitled to the possession of specific immovable property may recover the same in the manner provided by the Code of Civil Procedure, 1908. The word 'person' includes any company or association or body of individuals, whether incorporated or not. The action under Section 5 arises when claim is made on the basis of "title".

Recovery of possession of dispossessed immovable property

The Act provides another relief under Section 6 for the recovery of possession of immovable property where the claim is based merely on 'possession'. Section 6 provides that if any person is dispossessed without his consent, of immovable property otherwise than in due course of Law, he or any person claiming through him may by suit recover possession thereof, notwithstanding any other title that may be set up in such suit. There are two restrictions; no suit under Section 6 shall be brought (i) after the expiry of 6 months from the date of dispossession, or (ii) against the Government. Under Sub-section (3) no appeal or review is allowed of any order of decree passed under this Section. Sub-section (4) allows a person to file a suit to establish his title to such property and recover possession thereof.

The object of these provisions is to discourage people from taking the law into their own hands. The Sections provide a speedy and summary remedy through a medium of Civil Court for restoration of possession to the dispossessed. Section 5 thus provides for a suit for ejectment on the basis of title and Section 6 gives a remedy without establishing title provided the suit is brought within 6 months of the date of possession. The object of Section 6 is to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely providing previous possession and wrongful dispossession without proving title (*Lachman* v. *Shambu Narain,* ILR (1911) 33 ALL 174). A suit under Section 6 is maintainable between landlords and tenants. Heirs are also entitled to sue for recovery of possession.

Recovery of specific movable property

A person is entitled to recover the possession of specific movable property in the manner provided by the Code of Civil Procedure, 1908. (Section 7)

Explanation 1: A trustee may sue for possession of movable property of which he is a trustee. The term 'trustee' includes every person holding property in trust.

Explanation 2: A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Illustrations

(a) A bequeaths land to B for his life, with remainder to C. A dies, B enters on the land, but C, without B's consent, obtains possession of the title deeds, B may recover them from C.

(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody (See *Donald* v. *Suckling* (1866) L.R. 1 Q.B. 585).

(c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B (*Oliver* v. *Oliver* (1861) 11 C.B.N.S. 139).

(d) A deposits books and papers for safe custody with B. B losses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under Section 168 of the Indian Contract Act, 1872.

(e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

An action in detinue would lie only for some specific article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party. Section 7 lays down that a person entitled to the possession of specific movable propety may recover the same in the manner prescribed by the Civil Procedure Code. A trustee or a person having a special or a temporary right to the present possession may also file a suit under this section.

Test your knowledge

Which of the following Sections deal with the recovery of possession of movable property?

(a) Sections 1 and 2

(b) Sections 3 and 4

(c) Sections 7 and 8

(d) Sections 9 and 10

Correct answer: (c)

Liability of person in possession, not as owner to deliver to persons entitled to immediate possession

Section 8 lays down that any person having the possession or control of a particular article of movable property of which he is not the owner, may be compelled specifically, to deliver it to the person entitled to its immediate possession in any of the following four cases:

(a) When the thing claimed is held by the defendant as the agent or trustee of the plaintiff, (b) when the compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, (c) when it would be extremely difficult to ascertain the actual damage caused by its loss, (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff. Unless and until the contrary is proved, the Court shall, in respect of any article of movable property claimed under clause (b) or (c) of this section presume that (i) compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed or as the case may be, and (ii) it would be extremely difficult to ascertain the actual damage caused by its loss.

Thus under this part of the Act, if a person, who has been dispossessed, does not bring a suit under Section 6 of the Specific Relief Act within 6 months, he may still bring a suit for recovery alleging any title to the property. But in this case, the suit may be defeated by the defendant by proving a better title.

Illustrations

(a) A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B, without A's authority, pledges the furniture to C, and C knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to 'A' for he holds it as A's trustee.

(b) Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

(c) 'A' is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of special character to bear an ascertainable market value. B may be compelled to deliver them to A.

PERSONS AGAINST WHOM SPECIFIC PERFORMANCE AVAILABLE

Section 15 lays down the parties who can bring an action for specific performance.

According to Section 19, specific performance of a contract may be enforced against (a) either party thereto, (b) any person claiming under him, by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract, (c) any person claiming under a title which though prior to the contract, and known to the plaintiff, might have been displaced by the defendant, (d) when a company has entered into a contract and subsequently becomes amalgamated with another company — the new company which arises out of the amalgamation, (e) when the promoters of a company have before its incorporation entered into a contract, for the purpose of the company and such contract is warranted by the terms of the incorporation of the company; provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Clauses (a) and (b) embody the principle that Court will enforce specific performance of a contract not only against either party, thereto, but also against any person claiming under either of the parties, a title arising subsequently to the contract, except a transferee for value who has paid money in good faith and without notice of the original contract.

Examples to clause (c) are voluntary alienness, joint tenants claiming survivorship and remainder man.

PERSONS AGAINST WHOM SPECIFIC PERFORMANCE CANNOT BE ENFORCED

Under Section 16, specific performance of a contract cannot be enforced in favour of a person — (a) who would not be entitled to recover compensation for its breach, or (b) who has became incapable of performing, or violates any essential term of the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract, or (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. The obligation imposed by Section 16 of the Act is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of clause (a), (b) and (c) thereof.

Thus in a suit for specific performance the plaintiff should not only plead and prove the terms of the agreement but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract.

To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. Right from the date of the execution till the date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. *N.P. Thirgnanam* v. *Dr. R Jagan Mohan Rao*, AIR 1996 SC 116, (1995) 5 SCC 115.

The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. The circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either ever or prove the same he must fail.

A Court may not, therefore, grant to a plaintiff who has failed to to prove that he has performed or has always been ready and willing to perform his part of the agreement, the specific performance whereof he seeks (See *Ram Awadh* v. *Achhaibar Dubey*, AIR 2000 SC 860).

The explanation states that for the purpose of clause (c), (i) where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court (ii) the plaintiff must ever performance of, or readiness and willingness to perform, the contract according to its construction.

Section 17 sets out two more cases where specific performance cannot be enforced in favour of a vendor or lessor. It states that a contract to sell or let any immovable property cannot be specifically enforced in favour of vendor or lessor (a) who knowing himself not to have any title to the property, has contracted to sell or let the property; (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt Sub-section (2) lays down that the provisions of Sub-section (1) shall also apply as far as may be, to contracts for the sale or hire of movable property.

According to this Section, a contract to sell or hire property cannot be specifically enforced in favour of a seller or lessor if he had no title to the property. A person who knows that he has no title to the property but still enters into a contract with regard to that property, he cannot have the remedy of specific performance. It is the duty of the vendor to make a reasonable, clear and marketable title about which there must not be any rational doubt.

Illustration

A without C's authority contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract even though C is willing to confirm it.

Non-enforcement except with variation

According to Section 18, where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up in the following cases, namely: (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract; (b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce, (c) where the parties have subsequently to the execution of the contract, varied its terms.

Illustration

A contracts in writing to let a house to B for a certain term, at the rent of Rs. 100/- per month, putting it first into tenantable repair. The house turns out to be not worth repairing. So with B's consent, A pulls it down and erects a new house in its place. B contracting orally to pay rent at Rs. 120/- per month. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

DISCRETION OF THE COURT

Sub-section (1) of Section 20 lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary but based on sound and reasonable grounds guided by judicial principles and capable of correction by a Court of appeal. Sub-section (2) lays down that the following are cases in which the Court may properly exercise discretion not to decree specific performance – (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would involve no such hardship on the plaintiff; (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. *Explanation 1* appended to the Section states that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b) *Explanation 2* to the Section says that the question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

Sub-section (3) lays down that Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance. Sub-section (4) says that the court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. Specific performance is a discretionary remedy. The Court is not bound to decree specific performance merely because it is lawful to do so. Courts can take into consideration the conduct of the parties and the circumstances attending its execution and may exercise a discretion in granting or withholding a decree for specific performance (*Jethalal* v. *Bachu,* 47 Bom. 46). However, this discretion is not an arbitrary discretion but one governed by sound principles of equity. It has been held that the court is not bound to grant relief of specific performance even if it is lawful to do so. [*Yellapa Sastri* v. *Gunda Shankara*, AIR 2010 (NOC) 731 A.P. See also AIR 2008 SC 1786].

Illustration

In *Dennev-light* (1857) 8 D M & G 774, the Court refused specific performance against a buyer where the land contracted to be purchased was wholly surrounded by land belonging to others over which there was no right of way.

It is to be noted that the word ‘mere’ has to be given due weight. Specific performance may be refused where inadequacy of consideration is coupled with some other factor not necessarily amounting to fraud, e.g. mistake, or surprise, or unfair advantage taken by the plaintiff of his superior knowledge or bargaining position even though the circumstances do not justify rescission of the contract.

The hardship to be considered is at the time of the contract, unless the hardship has been brought on by the action of the plaintiff. Mere rise in price of the property agreed to be sold is not a ground for refusing a discretionary relief in favour of the purchaser. What has to be considered is the fairness of the contract at the time it was made and the subsequent rise in price is not a matter to be taken into consideration.

Court’s power to award damages in certain cases

Under Section 21 of the Specific Relief Act, the Court is empowered to award compensation in certain cases. Sub-section (1) states that in a suit for specific performance of a contract, the plaintiff may also claim compensation

for its breach, either in addition to, or in substitution of such performance, Sub-section (2) states that if, in any suit the Court decides that specific performance ought not to be granted but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly. Sub-section 3 lays down that if, in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. Sub-section (4) states that in determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872. Sub-section 5 lays down that no compensation shall be awarded under this Section unless the plaintiff has claimed such compensation in his plaint provided that where the plaintiff has not claimed any such compensation in the plaint, the Court shall at any stage at the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such compensation. Even if the contract has become incapable of specific performance that does not preclude the Court from exercising the jurisdiction conferred by this section.

The conditions according to which damages may be awarded by the Court in addition to specific performance are:

(i) the Court decides that specific performance ought to be granted but,

(ii) the justice of the case requires that not only specific performance but also some compensation for the breach of the contract should also be given to the plaintiff.

In a suit for specific performance, the plaintiff may ask for damages in the alternative or in addition to specific performance of the contract. The Court's power to award damages in a suit for specific performance is laid down in Section 21.

The circumstances in which a court would award damages in lieu of specific performance:

(a) Specific performance could have been granted but in the circumstances of the case the Court in its discretion considers that it would be better to award damages instead of specific performance.

(b) Though specific performance is refused, plaintiff is entitled to compensation for breach of the contract.

(c) If the circumstances are such that specific performance would not be granted; for example, where the plaintiff has disentitled himself to the specific performance, damages cannot be awarded under Section 21 in lieu of specific performance.

Section 22 gives power to the Court to grant relief for possession, partitions, refund of earnest money. Under Section 22 any person, suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case ask for (a) possession or partition and separate possession, of the property in addition to any such performance; or (b) any other relief to which he may be entitled in case his claim for specific performance is refused.

The power of the Court to grant relief under clause (b) shall be without prejudice to its power to award compensation under Section 21.

Illustrations

(a) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(b) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument dated the 1st January 1877. Soon after that day, A fraudulently grants to C a lease of part of the land, and procures the lease dated the 1st October, 1876 to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

On such cancellation, the Court may require the party to whom such relief is granted to restore as far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

In a case defendant and plaintiff were real brothers residing jointly in a house. The defendant executed agreement to sell the property of his share in favour of plaintiff. Subsequently he sold the same property to another purchaser. The subsequent purchaser had no knowledge about the earlier agreement. It was held that he is the *bona-fide* purchaser of the property. The plaintiff can recover back earnest money paid by him to defendant (*Jagtar Singh* v. *Gurmit Singh,* AIR 2006 P&H 62).

Test your knowledge

State whether the following statement is" true" or "false".

Under the Specific Relief Act, a Court can give either specific relief or compensatory relief and not both.

- True
- False

Correct Answer: True

Section 23 lays down that even if the parties have agreed for liquidated damages, in the contract itself, specific performance of that contract may be decreed by the Court in proper cases but in that case the payment of the sum named in the contract will not be decreed.

Section 24 imposes a bar on suit for compensation for breach of a contract after dismissal of the suit for specific performance.

RECTIFICATION OF INSTRUMENTS

Section 26 of the Specific Relief Act, 1963 contains the law as to rectification of instruments.

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Where a contract reduced into writing in pursuance of a previous agreement, fails to express the real intention of the parties, the court will rectify the instrument in accordance with their true intention. Here, there must be in existence as between the parties, a complete and perfectly unobjectionable contract; but the writing designed to embody it, either from fraud or mutual mistake, is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into confirmity with the true intention. In such a case, if such instrument is enforced, one party will suffer and if it is rescinded altogether both the parties will suffer but if it is rectified and enforced neither party will suffer. The principle on which the courts act in correcting instruments is that the parties are to be placed in the same position as that in which they would have stood if no error had been committed (*Sudha Singh* v. *Munshi Ram,* A.I.R. 1927 Cal. 605). There must have been a complete agreement prior to the instrument. It should be in writing and there must be clear evidence of mutual mistake or of fraud.

In order to obtain rectification the conditions mentioned in Section 26 must be present. Thus:

(i) Rectification would be granted where, though there was a consensus between the parties as to the contract through fraud of one of the parties, the instrument did not correctly express the real intention.

(ii) It will also be granted, at the instance of third party, where both the parties are equally innocent, but owing to a common mistake, the instrument does not express their intention.

(iii) Sub-section (2) makes it clear that rectification would not be allowed so as to prejudice rights acquired by third party in good faith and for value.

For example, A intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B in which through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and let the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C, but it cannot be rectified so as to affect D's lease.

(iv) The only limitation placed on the Courts discretion is that the rectification can be done without prejudice to the rights acquired by third persons in good faith and for value.

RESCISSION OF CONTRACTS

Section 27 deals with Rescission of Contracts. "Rescission" means putting an end to a contract which is still operative and making it null and void *ab initio.* It does not apply to void contracts. Section 27 states the principle upon which rescission can be ordered. A person suing for rescission cannot, in the alternative sue for specific performance but a person suing for specific performance can sue for rescission.

Sub-section (1) lays down that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely – (a) where the contract is voidable or terminable by the plaintiff; (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff. Sub-section (2) lays down that notwithstanding anything contained in Sub-section (1), the Court may refuse to rescind the contract – (a) where the plaintiff has expressly or impliedly ratified the contract; or (b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or (c) where third-parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract. The explanation provides that in this Section, "contract" in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

"This specie of specific relief is the reverse of specific performance. In one case the relief is granted by enforcing the performance of a contract which binds the parties, and the other by discharging him when it is not just to bind him" (Banerjee). So the equitable relief by way of rescission is exactly opposite of specific performance. Here, the contract is put to an end and is made null and void where by the contractual obligations also come to an end. Section 27 provides ground to the aggrieved party to rescind a contract without obtaining consent of the other party.

Under clause (a) where a contract is voidable or terminable by the plaintiff, he may rescind it. The contract may become voidable or terminable due to fraud, undue influence, misrepresentation or coercion.

Any person interested in a contract may sue to have it rescinded. Hence a suit may be brought by a third party whose interests are affected by the contract.

In case of a rescission of a contract, the Court may, in its discretion, require the party to whom such relief is granted to make any compensation to the other party. The main object of this relief is to put both the parties in their original positions. If a plaintiff fails to get specific performance of a contract in writing, he may get it rescinded and delivered up to be cancelled.

Doctrine of part performance

The doctrine of part performance has been applied in India to the contracts of transfer of immovable property

which though required to be registered have not been registered. The doctrine has been given statutory recognition in 1929 adding two new sections to Section 53A of the Transfer of Property Act and Section 27A to the Specific Relief Act, and a proviso to Section 49 of the Indian Registration Act.

Test your knowledge

Which of the following are required for rectification of instruments?

(a) Existence of a complete agreement prior to the instrument

(b) In writing form

(c) A clear evidence of mutual mistake or fraud

(d) A verbal agreement

Correct answer: (a), (b) and (c)

CANCELLATION OF INSTRUMENTS

Sub-section (1) of Section 31 provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion, so adjudge it and order it to be delivered up and cancelled. Sub-section (2) lays down that if the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

The relief of cancellation of instruments is founded upon the administration of protective justice which is technically known as "*Quia time*". It is based upon the administration of protective justice for fear that the instrument may be vexatiously, or injuriously used by the defendant against the plaintiff when the evidence to impeach it may be lost or that it may throw a cloud of suspicion over the title or interest (*Jekadula* v. *Bai Jini,* 39 B T R.,1072).

Relief of cancellation under Section 31 would be available when (i) an instrument is void or voidable against the plaintiff; (ii) where the plaintiff may apprehend serious injury if the instrument is left outstanding and (iii) where it is proper under the circumstances of the case to grant the relief.

Illustrations

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A agrees to sell and deliver a ship to B, to be paid for by B's acceptance of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills (*Anglo Danubian Co.* v. *Rogerson* (1867) L.R. 4 Eq. 3).

Section 32 lays down that where an instrument is evidence of different rights or different obligations, the Court may, in proper case, cancel it in part and allow it to stand for the residue. The Court is not bound to cancel the whole of the instrument but may, in its discretion, when necessary, cancel it in part and allow rest of it to stand.

A executes a deed of mortgage in favour of B. A gets back the deed from B by fraud and endorses on it a receipt for Rs. 1,200 purporting to be signed by B. B's signature is forged. B is entitled to have the endorsement cancelled, leaving the deed to stand in other respects (*Ram Chandar* v. *Ganga Saran,* (1917) 39 All. 103).

Section 33(1) provides that on adjudging the cancellation of an instrument, the Court may require the party to

whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require. The provisions of this Section are almost similar to the provisions of Section 30 of this Act. Under both the Sections, the plaintiff must make such compensation to the defendant as the justice may require.

DECLARATORY DECREES

A declaratory decree is a decree whereby any right as to any property or the legal character of a person is judicially ascertained.

The Supreme Court in *State of Madhya Pradesh* v. *Mangilal Sharma,* 1997 (7) SCALE 783, held that a declaratory decree merely declares the right of the decreehoder *vis-a-vis* the judgement debtor and does not in terms direct the judgement debtor to do or refrain from doing any particular act or thing. It cannot be executed as it only declares the rights of the decree-holder qua the judgement debtor and does not, in terms, direct him to do or refrain from doing any particular act or thing.

Section 34 lays down that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The explanation provides that a trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

The object of declaratory decree is to remove doubt by having legal status of any rights declared by the Court, and to perpertuate and strengthen testimony regarding title and protect it from adverse attacks. One of the objects of the legislature was to allow the right to enjoy the property rightfully belonging to the plaintiff. In case of declaratory decree, neither specific performance nor any compensation is awarded but only a declaration of the rights of the parties is made without any consequential relief being granted. The declaration does not confer any new rights upon the plaintiff but it merely declares what he had before. It only clears the mist that has gathered round the plaintiff's title or status. The Court is being asked to put an end to the dispute and uncertainty by determining the legal character in issue. By that way the property may be put to better use, enjoyment and improvement. To maintain a suit under this Section following conditions must be fulfilled:

(a) the plaintiff must be a person entitled to any legal character or to any right as to any property;

(b) the defendant must be a person denying or interested to deny the plaintiff's title to such legal character or, right;

(c) the declaration issued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property; and

(d) where the plaintiff is able to seek further relief than a mere declaration he must seek such relief.

Illustration

A is properly in possession of certain lands. The inhabitants of a neighbouring village claim a right of way across the land. A may use for a declaration that they are not entitled to the right so claimed.

The relief by way of declaration is purely discretionary. Instances of legal characters are —

(1) Divorce on the ground of impotency

(2) Legal character by marriage

(3) Legitimacy or illegitimacy

(4) Status of an adopted son

(5) Priest of temple

Effect of Declaration

Section 35 lays down that a declaration is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Such a declaration is not *judgement in rem* and as such it cannot bind strangers.

Illustration

A, a Hindu, in a suit to which B, his alleged wife is the defendant's seeks a declaration that his marriage was duly solemnised and prays for an order of restitution of conjugal rights. The Court makes the declaration and order of restitution of conjugal rights. C, a third-party claiming that B is his wife, sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

PREVENTIVE RELIEFS

Part III of the Specific Relief Act, 1963 grants specific relief called Preventive Relief i.e., preventing a party from doing that which he is under an obligation not to do. Preventive relief is granted at the discretion of the court by way of an injunction.

An injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases (when it is called a 'mandatory injunction') commanding active restitution of the former state of things.

Lord Halsbury defines injunction as "a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing".

The main difference between an injunction and specific performance is that the remedy in case of an injunction is generally directed to prevent the violation of a negative act and therefore deals not only with contracts but also with torts and many other subjects of purely equitable one, whereas specific performance is directed to compelling performance of an active duty.

It is known as a "judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another is restrained from continuing or commencing such wrongful act. Injunction is the most ordinary form of preventive relief. For the effective administration of justice, this power to prevent and to restrain is absolutely necessary.

Characteristics of an injunction

An injunction has three characteristic features;

(a) It is a judicial process.

(b) The object of this judicial process is to restrain or to prevent.

(c) The act restrained or prevented is a wrongful act. An injuction acts or operates always in *personam*.

If the wrongful act has already taken place, the injunction prevents its repetition. If it is merely threatened, the threat is prevented from being executed.

Temporary and perpetual injunctions

Section 36 states that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

The temporary injunctions are granted under Order 39 Rules 1-2 of the Civil Procedure Code while perpetual injunctions are dealt within Section 38 of the Specific Relief Act.

The temporary injunction may be dissolved at any time under Civil Procedure Code by the defendant showing specific cause to the satisfaction of the Court against the order granting the injunction, or it automatically terminate with the disposal of the suit. The general principles governing temporary and permanent injunctions are mainly the same except that a temporary injunction is granted before the plaintiff establishes his case at the trial.

Sub-section (1) of Section 37 lays down that temporary injunctions are such as are to continue until a specified time, or until the further order of the Court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

Sub-section (2) states that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the Plaintiff. It may be pointed out that:

(i) While Section 37(1) of the Act gives the meaning of a perpetual injunction, Sections 37 to 62 lay down the principles according to which the perpetual injunction would be granted.

(ii) The cases in which the perpetual injunction may be granted are of two classes. The object is to prevent the breach of an obligation existing in favour of the applicant, but such obligation may either arise out of a contract or otherwise. In case of contractual agreement principles governing specific performance will apply and in other cases, the injunction would be granted if the plaintiff can show that the defendant has a legal duty or obligation towards him and that by the non-performance of such duty the right to enjoyment of property has been materially affected. Such cases are where the defendant is trustee of the property of the plaintiff or where the injunction is necessary to prevent multiplicity of judicial proceedings, etc.

Section 38 deals with granting of perpetual injunction. Sub-section (1) states that subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour whether express or by implication.

Sub-section (2) provides that when any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II, i.e., the chapter on specific performance of contracts. Sub-section (3) lays down that when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in the following cases, namely: (a) where the defendant is a trustee of the property for the plaintiff; (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion; (c) where the invasion is such that compensation in money would not afford adequate relief; (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Test your knowledge

Which of the following are 'instances of legal character'?

(a) Divorce on the ground of impotency

(b) Legal character by marriage

(c) Status of an adopted son

(d) Status of a relative

Correct answer: (a), (b) and (c)

Difference between the remedies of specific performance and injunction

Specific performance is decreed to compel the performance of an active duty, while injunction is decreed to prevent the violation of a negative duty. Normally, the former deals with contracts, while the latter with torts and other subjects of equitable nature. If a contract is positive in its nature, it calls for the relief of specific performance, on the other hand, if it is negative in its nature, it calls for relief of injunction.

The principle governing the award of injunction as a mode of enforcement of contracts is similar to that of specific performance. This is clearly borne out by Section 38(2) of the Act. Thus, the enforcement of a contract is governed by both specific relief and injunction. "The jurisdiction of equity to grant such injunction is substantially coexistent with its jurisdiction to compel a specific performance". But still their fields of operation are separate from each other. While a promise to do is enforced by specific performance, a promise to forbear is enforced by injunction. Section 41(e) further provides that contract which will not be affirmatively enforced by a decree of specific performance, will not be negatively enforced by issuing an injunction. The only exception to this rule is found in Section 42.

Mandatory injunction

Section 39 dealing with mandatory injunctions states that when to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts. For example, A builds a house with eaves projecting over B's land, B may sue for an injunction to pull down so much of the eaves as so projecting over his land.

According to Section 40, the plaintiff in a suit for perpetual injunction under Section 38 or mandatory injunction under Section 39, may claim damages either in addition to, or in substitution for such injunction and the Court, may, if it thinks fit, award such damages.

Injunction when refused

Section 41 gives a list of cases in which a perpetual injunction cannot be granted. It says that an injunction cannot be granted — (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings; (b) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought; (c) to restrain any person from applying to any legislative body; (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter; (e) to prevent the breach of a contract the performance of which would not be specifically enforced; (f) to prevent on the ground of nuisance, an act of which it is not reasonably clear that it will be nuisance; (g) to prevent a continuing breach in which the plaintiff has acquiesced; (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust; (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court; (j) when the plaintiff has no interest in the matter.

It may be noted that this relief also is a discretionary remedy. It may be refused even if the case is not covered by Section 41.

Injunction to perform negative agreement

Section 42 provides that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

This Section is based upon an English case viz., *Lumley* v. *Wagner* (21) L.J. CH. 898. In this case Miss W, a singer agreed to sing at L's theatre for a certain period and not to sing anywhere else during that period. Afterwards, she entered into a contract to sing at another theatre and refused to perform her contract with L. The Court refused to enforce her positive agreement to sing at L's theatre (by specific performance since it is based on personal volition) but granted an injunction restraining her from singing at any other theatre thereby preventing breach of the negative part of the agreement though the positive part of it, being a contract for the personal service, could not be specifically enforced.

Conditions necessary for the applicability of this Section are:

(1) The contract should comprise of two agreements, one affirmative and another negative.

(2) Both the agreements must be divisible.

(3) The negative agreement must relate to a specific act.

(4) The Court should be unable to compel specific performace of the affirmative agreement.

(5) The plaintiff must not have failed to perform the contract, so far as it is binding upon him.

A negative stipulation may be express or implied. An express negative stipulation in one where the negative stipulation is put expressly. The Section does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is therefore a question of interpretation in each case to find whether a particular contract can be said to have a negative stipulation, express or implied, contained in it, e.g., the mere use of word "exclusively" does not imply a negative stipulation to refrain from service of other people.

The provisions of this Section are based on the equitable principle that "he who seeks equity must do equity".

The principle as laid down in Section 42 was followed in the cases of *Burn Mcdonald* (1907) 36 Cal 354; *Metropolitan Electric Supply* v. *Ginder,* (1901) 2 Ch. 799; *Subba Naidu* v. *Hari Badshah,* (13 M.L.J. 13); and *Madras Rly Co.* v. *Rust,* (1891) 14 Mad 18.

LAW RELATING TO TORTS

SECTION II

INTRODUCTION

The word 'tort' is a French equivalent of English word 'wrong'. The word tort is derived from Latin language from the word *Tortum.* Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.

Broadly speaking, public wrongs are the violations of 'public law and hence amount to be offences against the State, while private wrongs are the breaches of private law, i.e., wrongs against individuals. Public wrongs or crimes are those wrongs which are made punishable under the penal law which belong to the public law group.

Section 2(m) of the Limitation Act, 1963, states: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

Salmond defines it as "a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."

Fraser describes it as "an infringement of a right *in rem* of a private individual giving a right of compensation at the suit of the injured party."

Winfield says : "Tortious liability arises from the breach of duty, primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages".

Two important elements can be derived from all these definitions, namely: (i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and (ii) that every civil wrong is not a tort. Accordingly, it is now possible to distinguish tort from a crime and from a contract, a trust and a quasi-contract. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

GENERAL CONDITIONS OF LIABILITY FOR A TORT

As stated earlier, there is no fixed catalogue of circumstances, which along and for all time mark the limit of what are torts. Certain situations have been held to be torts and will continue to be so in the absence of statutory repeal, and others have been held not to be torts. However, certain general conditions for tortuous liability can be laid down.

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be:

(i) a wrongful act or omission of the defendant;

(ii) the wrongful act must result in causing legal damage to another; and

(iii) the wrongful act must be of such a nature as to give rise to a legal remedy.

(i) *Wrongful act:* The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. In other words, it should prejudicially affect any of the above mentioned interests, and protected by law. Thus, every person whose legal rights, e.g., right of reputation, right of bodily safety and freedom, and right to property are violated without legal excuse, has a right of action against the person who violated them, whether loss results from such violation or not.

(ii) *Legal damages:* it is not every damage that is a damage in the eye of the law. It must be a damage which the law recognizes as such. In other words, there should be legal injury or invasion of the legal right. In the absence of an infringement of a legal right, an action does not lie. Also, where there is infringement of a legal right, an action lies even though no damage may have been caused.

As was stated in *Ashby* v. *White*, (1703) 2 Ld. Raym. 938 legal damage is neither identical with actual damage nor is it necessarily pecuniary. Two maxims, namely : (i) *Damnum sine injuria*, and (ii) *injuria sine damnum*, explain this proposition.

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Common examples are, where the damage results from an act done in the exercise of legal rights. Thus, if I own a shop and you open a shop in the neighbourhood, as a result of which I lose some customers and my profits fall off, I cannot sue you for the lose in profits, because you are exercising your legal right. [*Gloucester Grammer School* case, (1410) Y.B. Hill. 11 Hen, 4, of. 47, pp. 21,36]

Injuria Sine Damno

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort.

Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus

when there is an invasion of an "absolute" private right of an individual, there is an *injuria* and the plaintiff's action will succeed even if there is no *Damnum* or damages. In simple terms, it means that if some one else's legal rights are infringed upon, it is actionable, even if no damage has resulted to the other person. The leading example is the case of *Ashby v White* referred to above where a person was wrongfully not allowed to vote and even though it has not caused him any damage, since his legal right to vote was denied, he was entitled to compensation. An absolute right is one, the violation of which is actionable *per se*, i.e., without the proof of any damage. *Injuria sine damno* covers such cases and action lies when the right is violated even though no damage has occurred. Thus the act of trespassing upon another's land is actionable even though it has not caused the plaintiff even the slightest harm.

(iii) *Legal remedy:* The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages, although some other remedies, e.g., injunction, may be obtained in addition to damages or specific restitution may be claimed in an action for the detention of a chattel. Self-help is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land. For example, if "A" finds a drunken stranger in his room who has no business to be there in it, and is thus a trespass, he (A) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

Mens Rea

How far a guilty mind of persons is required for liability for tort?

The General principle lies in the maxim "*actus non facit reum nisi mens sit rea"* i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence. For example, under criminal law, *mens rea* must be proved. However, to this principle cases of absolute or strict liability are exceptions.

Test your knowledge

State whether the following statement is "True" or "False"

The act of trespassing upon another's land is not actionable if it has not caused the plaintiff the slightest harm.

- True
- False

Correct answer: False

KINDS OF TORTIOUS LIABILITY

The following types of tortuous liability may be noted:

(A) STRICT OR ABSOLUTE LIABILITY

In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence on the defendant's part. In other words, the defendant is held liable without fault. These cases fall under the following categories:

(i) *Liability for Inevitable Accident* – Such liability arises in cases where damage is done by the escape of dangerous substances brought or kept by anyone upon his land. Such cases are where a man is made by law an insurer of other against the result of his activities.

(ii) ***Liability for Inevitable Mistake*** – Such cases are where a person interferes with the property or reputation of another.

(iii) ***Vicarious Liability for Wrongs committed by others*** – Responsibility in such cases is imputed by law on grounds of social policy or expediency. These case involve liability of master for the acts of his servant.

Rule in Rylands v. Fletcher

The rule in *Rylands* v. *Flethcer* (1868) L.R. 3 H.L. 330 is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants. It was held in that case that: "If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it does not escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage."

The facts of this case were as follows: B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursted through the shafts and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed; "We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, *prima facie* answerable for all the damage which is the natural consequence of its escape."

Later in the case of *Read* v. *Lyons* [(1946) 2 All. E.R. 471 (H.L.)], it has been explained that two conditions are necessary in order to apply the rule in *Ryland* v. *Fletcher*, these are:

(i) *Escape:* from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and

(ii) *Non-natural use of Land:* The defendant is liable if he makes a non-natural use of land.

If either of these conditions is absent, the rule of strict liability will not apply.

Exceptions to the Rule of Strict Liability

The following exceptions to the rule of strict liability have been introduced in course of time, some of them being inherent in the judgment itself in *Ryland* v. *Fletcher:*

(i) ***Damage due to Natural Use of the Land***

In *Ryland* v. *Fletcher* water collected in the reservoir in such large quantity, was held to be non-natural use of land. Keeping water for ordinary domestic purpose is 'natural use'. Things not essentially dangerous which is not unusual for a person to have on his own land, such as water pipe installations in buildings, the working of mines and minerals on land, the lighting of fire in a fire-place of a house, and necessary wiring for supplying electric light, fall under the category of "natural use" of land.

(ii) ***Consent of the plaintiff***

Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule in *Ryland* v. *Flethcher* does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

(iii) ***Act of Third Party***

If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable. Thus, in *Box* v. *Jubh* (1879) 4 Ex. D. 76, the overflow from the defendant's reservoir was caused by the blocking of a drain by stranger, the defendant was held not liable. But if the act of the stranger, is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care prevent the damage. Failure on his part to avoid such damage will make him liable.

(iv) ***Statutory Authority***

Sometimes, public bodies storing water, gas, electricity and the like are by statute, exempted from liability so long as they have taken reasonable care. This is based on the principle that they act in public interest.

Thus, in *Green* v. *Chelzea Water Works Co.* (1894) 70 L.T. 547 the defendant company had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any fault on its part as a consequence of which plaintiff's premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

(v) ***Act of God***

If an escape is caused, through natural causes and without human intervention circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, there is then said to exist the defence of Act of God.

(vi) ***Escape due to plaintiff's own Default***

Damage by escape due to the plaintiff's own default was considered to be good defence in *Rylands* v. *Fletcher* itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused.

Applicability of the rule in Rylands v. *Fletcher in cases of enterprises engaged in a hazardous or inherently dangerous industry*

The Supreme Court has discussed the applicability of the rule of *Reylands* v. *Fletcher* in the case of *M.C. Mehta* v. *Union of India and Others* (1987) 1. Comp. L.J. p. 99 S.C. while determining the principles on which the liability of an enterprise engaged in a hazardous or inherently dangerous industry depended if an accident occurred in such industry.

> "We have to evolve new principle and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that, in any other foreign country".

On the question of the nature of liability for a hazardous enterprise the court while noting that the above rule as developed in England recognizes certain limitations and responsibilities recorded it's final view as follows:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part."

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under *Rylands* v. *Fletcher*, need not be proved in India.

Test your knowledge

Which of the following are different kinds of strict or absolute liability?

(a) Liability for inevitable accident

(b) Liability for evitable accident

(c) Liability for inevitable mistake

(d) Vicarious liability for wrongs committed by others.

Correct answer: (a), (c) and (d)

(B) VICARIOUS LIABILITY

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. A master is vicariously liable for the tort of his servant, principal for the tort of his agent and partners for the tort of a partner. This is know as vicarious liability in tort. The common examples of such a liability are:

(a) Principal and Agent [Specific authority]

Qui facit per alium facit per se – he who acts through another is acting himself, so that the act of the agent is the act of the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same. In *Lloyd* v. *Grace, Smith & Co.* (1912) A.C. 716, the managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign documents transferring her property to him. He had done so without the knowledge of his principal who was liable because the fraud was committed in the course of employment.

(b) Partners

For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable therefore to the same extent as the guilty partner. The liability of the partners is joint and several. In *Hamlyn* v. *Houston & Co.* (1903) 1 K.B. 81, one of the two partners bribed the plaintiff's clerk and induced him to divulge secrets relating to his employer's business. It was held that both the partners were liable for the tort committed by only one of them.

(c) Master and Servant [Authority by relation]

A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several.

In such cases (1) liability of a person is independent of his own wrongful intention or negligence (2) liability is joint as well several (3) In case of vicarious liability the liability arises because of the relationship between the principal and the wrongdoer but in case of absolute or strict liability the liability arises out of the wrong itself.

A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim *Respondeat Superior* (Let the principal be liable) or on the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself).

The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

(d) Employer and Independent Contractor

It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors.

A servant is a person who is employed by another (the employer) to perform services in connection with the affairs of the employer, and over whom the employer has control in the performance of these services. An *independent contractor* is one who works for another but who is not controlled by that other in his conduct in the performance of that work. These definitions show that a person is a servant where the employer "retains the control of the actual performance" of the work.

(e) Where Employer is Liable for the acts of Independent Contractor

The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:

(i) When employer authorizes him to commit a tort.

(ii) In torts of strict liability

(iii) Negligence of independent contractor

(f) Where Employer is not Liable for the acts of an Independent Contractor

An employer is not liable for the tort of an independent contractor if he has taken care in the appointment of the contractor. In *Philips* v. *Britania Hygienic Laundry Co.* (1923), the owner of lorry was held not liable when a third-party's vehicle was damaged, in consequence of the negligent repair of his lorry by a garage proprietor.

Employers of independent contractors are liable for the "collateral negligence" of their contractors in the course of his employment. Where A employed B to fit casement windows into certain premises. B's servant negligently put a tool on the still of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off the still on to a passer by. The employer was held to be liable, because the harm was caused by the work on a highway and duty lies upon the employer to avoid harm.

(g) Liability for the acts of Servants

An employer is liable whenever his servant commits a tort *in the course of his employment.* An act is deemed to be done in the course of employment if it is either:

(i) a wrongful act authorized by the employer, or

(ii) a wrongful and unauthorized mode of doing some act authorized by the employer.

So for as the first alternative is concerned there is no difficulty in holding the master liable for the tort of his servant. A few examples, however, are necessary to explain the working of the rule in the second. These are as follows:

In *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board* (1942) A.C. 509, the director of a petrol lorry, while transferring petrol from the lorry to an underground tank at a garage, struck a match in order to light a cigarette and then threw it, still alight on the floor. An explosion and a fire ensued. The House of Lords held his employers liable for the damage caused, for he did the act in the course of carrying out his task of delivering petrol; it was an unauthorized way of doing what he was employed to do.

Similarly, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rly. Co.* (1873) L.R. 7 C.P. 415, erroneously thinking that the plaintiff was in the wrong train, a porter of the defendants forcibly removed him. The defendants were held liable.

(C) VICARIOUS LIABILITY OF THE STATE

(a) The Position in England

At Common Law the Crown could not be sued in tort, either for wrongs actually authorized by it or committed by its servants, in the course of their employment. With the passing of the Crown Proceeding Act, 1947, the Crown is liable for the torts committed by its servants just like a private individual. Thus, in England, the Crown is now vicariously liable for the torts of its servants.

(b) The Position in India

Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India.

When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. If it is a sovereign function, it could claim immunity from the tortuous liability, otherwise not. A sovereign function denotes the activity of the State which can be done only by the State like defence, police, etc. The State is not liable vicariously for any breach by its employees. A non sovereign function covers generally the activities of commercial nature or those which can be carried out by a private individual like transport, hospitals etc. in which the State is equally liable similar to a private person.

Test your knowledge

Which of the following are common examples of vicarious liability?

(a) Principal and agent

(b) Partners

(c) Master and servant

(d) Employer and employed contractor

Correct answer: (a), (b) and (c)

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:

(a) Battery

Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery. To constitute a tort of battery, therefore, two things are necessary: (i) use of force, however, trivial it may be without the plaintiff's consent, and (ii) without any lawful justification.

Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without any lawful justification is battery.

(b) Assault

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed. The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established. Usually when there is a battery, there will also be assault, but not for instance, when a person is hit from behind. To point a

loaded gun at the plaintiff, or to shake fist under his nose, or to curse him in a threatening manner, or to aim a blow at him which is intercepted, or to surround him with a display of force is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it, is an assault.

(c) Bodily Harm

A willful act (or statement) of defendant, calculated to cause physical harm to the plaintiff and in fact causing physical harm to him, is a tort.

(d) False Imprisonment

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body. What happens in false imprisonment is that a person is confined within certain limits so that he cannot move about and so his personal liberty is infringed. It is a serious violation of a person's right and liberty whether being confined within the four walls or by being prevented from leaving place where he is. If a man is restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

(e) Malicious Prosecution

Malicious prosecution consists in instigating judicial proceedings (usually criminal) against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property.

The following are the essential elements of this tort:

(i) There must have been a *prosecution* of the plaintiff by the defendant.

(ii) There must have been *want of reasonable and probable cause* for that prosecution.

(iii) The defendant must have *acted maliciously* (i.e. with an improper motive and not to further the end of justice).

(iv) The plaintiff must have suffered *damages* as a result of the prosecution.

(v) The prosecution must have terminated *in favour of the plaintiff.*

To be actionable, the proceedings must have been instigated actually by the defendant. If he merely states the fact as he believes them to a policeman or a magistrate he is not responsible for any proceedings which might ensue as a result of action by such policeman or magistrate on his/her own initiative.

This is because there is no malice involved in it. Malicious prosecution thus actually refers to the case of initial prosecution with malice and as a remedy for it, the other party who had won the case, may institute, under the law of torts, a suit for malicious prosecution.

(f) Nervous Shock

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard. Causing of nervous shock itself is not enough to make it an actionable tort, some injury or illness must take place as a result of the emotional disturbance, fear or sorrow.

(g) Defamation

Defamation is an attack on the reputation of a person. It means that something is said or done by a person which affects the reputation of another. It is defined as follows:

> "Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person."

Defamation may be classified into two heads: Libel and Slander. *Libel* is a representation made in some permanent form, e.g. written words, pictures, caricatures, cinema films, effigy, statue and recorded words. In a cinema films both the photographic part of it and the speech which is synchronized with it amount to tort.

Slander is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures.

Generally, the punishment for libel is more severe than for slander.

Defamation is tort as well as a crime in India.

In India both libel and slander are treated as a crime. Section 499 of the Indian Penal Code recognizes both libel and slander as an offence. However, torts in criminal law are stricter than in law of tort.

REMEDIES IN TORTS

Judicial Remedies

Three types of judicial remedies are available to the plaintiff in an action for tort namely: (i) Damages or Compensation, (ii) Injunction, and (iii) Specific Restitution of Property.

Extra Judicial Remedies

In certain cases it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:

(a) Self Defence

It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

(b) Prevention of Trespass

An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them but the force should be reasonable for the purpose.

(c) Re-entry on Land

A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

(d) Re-caption of Goods

It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by the use of a reasonable force from one who has wrongly taken it or wrongfully detained it.

(e) Abatement of Nuisance

The occupier of land may lawfully abate (i.e. terminate by his own act), any nuisance injuriously affecting it. Thus, he may cut overhanging branches as spreading roots from his neighbour's trees, but (i) upon giving notice; (ii) by choosing the least mischievous method; (iii) avoiding unnecessary damage.

(f) Distress Damage Feasant

An occupier may lawfully seize any cattle or any chattel which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage. The right is known as that of distress damage feasant-to distrain things which are doing damage. It is a legal seizure and detention of cattle or chattel till compensation is paid for the damage.

Test your knowledge

Which of the following situations are considered as assault?

(a) Point a loaded gun at the plaintiff

(b) Curse him in a threatening manner

(c) Use force

(d) Aim a blow at him which is intercepted

Correct answer: (a), (b) and (d)

LAW RELATING TO LIMITATION

SECTION III

INTRODUCTION

The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications.

The Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by any enactment. The Act extends to whole of India except the State of Jammu and Kashmir.

Limitation Bars Remedy, But Does Not Extinguish Rights

The Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process (*Bombay Dying & Mfg. Co. Ltd.* v. *State of Bombay*, AIR 1958 SC 328). Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal as the right to cause of action always remains. Similarly, even if the defence of limitation is not set by the other party, the Court cannot accept any suit, appeal or application beyond the period of limitation.

COMPUTATION OF THE PERIOD OF LIMITATION FOR DIFFERENT TYPES OF SUITS

The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions. The Act prescribes the period of limitation in Articles in Schedule to the Act. In the Articles of the Schedule to the Limitation Act, Columns 1, 2, and 3 must be read together to give harmonious meaning and construction.

The Schedule containing the table showing the relevant Articles prescribing limitation period for a specified suit and also time from which such period commences is given at the end of this Lesson.

BAR OF LIMITATION

Section 3 of the Act provides that any suit, appeal or application if made beyond the prescribed period of limitation, it is the duty of the Court not to proceed with such suits irrespective of the fact whether the plea of limitation has been set up in defence or not. The provisions of Section 3 are mandatory. The Court can suo motu take note of question of limitation. The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of presentation of the plaint. It is a vital section upon which the whole limitation Act depends for its efficacy.

The effect of Section 3 is not to deprive the Court of its jurisdiction. Therefore, decision of a Court allowing a suit which had been instituted after the period prescribed is not vitiated for want of jurisdiction. A decree passed in a time barred suit is not a nullity.

Test your knowledge

Choose the correct answer

Which of the following States does not come under the purview of the Act of Limitation?

(a) Punjab

(b) Jammu & Kashmir

(c) Uttar Pradesh

(d) Bihar

Correct answer: (b)

EXTENSION OF TIME IN CERTAIN CASES

Doctrine of sufficient cause

Section 5 allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay. This is known as doctrine of "sufficient cause" for condonation of delay which is embodied in Section 5 of the Limitation Act, 1963. Section 5 provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

It is clarified by the explanation appended to the Section 5 that the fact that the appellant or applicant was misled by any order, practice or judgement of the High Court in ascertaining or computing the prescribed period may be a sufficient cause within the meaning of this section.

Thus, the Court may admit an application or appeal even after the expiry of the specified period of limitation if it is satisfied with the applicant or the appellant, as the case may be as to sufficient cause for not making it within time.

The Section is not applicable to applications made under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 and also to suits. The Court has no power to admit a time barred suit even if there is a sufficient cause for the delay. It applies only to appeals or applications as specified therein. The reason for non-applicability of the Section to suits is that, the period of limitation allowed in most of the suits extends from 3 to 12 years whereas in appeals and application it does not exceed 6 months. For the applicability of Section 5, the "prescribed period" should be over. The prescribed period means any period prescribed by any law for the time being in force.

The party applying for condonation of delay should satisfy the Court for not making an appeal or application within the prescribed period for sufficient cause. The term sufficient cause has not been defined in the Limitation Act. It depends on the circumstances of each case.

However, it must be a cause which is beyond the control of the party. In *Ramlal* v. *Rewa Coal Fields Ltd.,* AIR 1962 SC 361, the Supreme Court held that once the period of limitation expires then the appellant has to explain the delay made thereafter for day by day and if he is unable to explain the delay even for a single day, it would be deemed that the party did not have sufficient cause for delay.

It is the Court's discretion to extend or not to extend the period of limitation even after the sufficient cause has been shown and other conditions are also specified. However, the Court should exercise its discretion judicially and not arbitrarily.

***What is sufficient* cause and what is not may be explained by the following Judicial observations:**

1. Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal should be regarded as sufficient cause under Section 5;
2. In certain cases, mistake of counsel may be taken into consideration in condonation of delay. But such mistake must be *bona fide;*
3. Wrong advice given by advocate can give rise to sufficient cause in certain cases;
4. Mistake of law in establishing or exercising the right given by law may be considered as sufficient cause. However, ignorance of law is not excuse, nor the negligence of the party or the legal adviser constitutes a sufficient cause;
5. Imprisonment of the party or serious illness of the party may be considered for condonation of delay;
6. Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application was considered for condoning the delay.

7. Non-availability of the file of the case to the State counsel or Panel lawyer is no ground for condonation of inordinate delay (*Collector and Authorised Chief Settlement Commissioner* v. *Darshan Singh and others,* AIR 1999 Raj. 84).

8. Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause (*Mahendra Yadav* v. *Ratna Devi & others,* AIR 2006 (NOC) 339 Pat.

The test of "sufficient course" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of sufficient cause' delightfully undefined thereby leaving to the court a well-intended discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such. [*R B Ramlingam* v. *R B Bhvansewari* (2009) 2 SCC 689.]

The quasi-judicial tribunals, labour courts or executive authorities have no power to extend the period under this Section.

There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the court as such.

Persons under legal disability

Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. Section 7 supplements Section 6, Section 8 controls these sections, which serves as an exception to Sections 6 and 7. The combined effect of Sections 6 and 8 is that where the prescribed period of limitation expires before the cessation of disability, for instance, before the attainment of majority, the minor will no doubt be entitled to a fresh period of limitation from the attainment of his majority subject to the condition that in no case the period extended by Section 6 shall by virtue of Section 8 exceeds three years from cessation of disability, i.e. attainment of majority.

Sections 6, 7 and 8 must be read together. Section 8 imposes a limitation on concession provided under Sections 6 and 7 to a person under disability up to a maximum of three years after the cessation of disability. The Section applies to all suits except suits to enforce rights of pre-emption.

The period of three years under Section 6 of this Act has to be counted, not from the date of attainment of majority by the person under disability, but from the date of cessation of minority or disability.

Both Sections 6 and 7 go together. Section 7 is an extension of Section 6, where the point of time at which the existence of disability is to be recognized i.e. *"the time from which the period of limitation is to be reckoned".*

Section 7 is only an application of the principle in Section 6 to a joint-right inherited by a group of persons wherein some or all of whom are under the disability. The disability of all except one does not prevent the running of time, if the discharge can be given without the concurrence of the other. Otherwise the time will run only when the disability is removed.

To apply Section 7, disability must exist when the right to apply accrued, i.e., at the time from which period of limitation is to be reckoned.

In other words, Section 8 provides that in those cases where the application of Section 6 or 7 of the Act results in an extension of the period prescribed by Schedule, that extension is not to be more than three years after the cessation of the disability.

Test your knowledge

Which of the following authorities do not have the power to extend the period as per Section 5?

(a) Labour courts

(b) Quasi-judicial tribunals

(c) High Court

(d) Executive authorities

Correct answer: a, b and d

CONTINUOUS RUNNING OF TIME

According to Section 9 of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.

The rule of this Section is based on the English dictum. "Time when once it has commenced to run in any case will not cease to be so by reason of any subsequent event". Thus, when any of the statutes of limitation is begun to run, no subsequent disability or inability will stop this running.

The applicability of this Section is limited to suits and applications only and does not apply to appeals unless the case fell within any of the exceptions provided in the Act itself.

For the applicability of Section 9 it is essential that the cause of action or the right to move the application must continue to exist and subsisting on the date on which a particular application is made. If a right itself had been taken away by some subsequent event, no question of bar of limitation will arise as the starting point of limitation for that particular application will be deemed not to have been commenced.

Thus, time runs when the cause of action accrues. True test to determine when a cause of action has accrued is to ascertain the time, when plaintiff could have maintained his action to a successful result first if there is an infringement of a right at a particular time, the whole cause of action will be said to have arisen then and there.

Section 9 contemplates only cases where the cause of action continues to exist. Section 10 excludes suits against trustees and their representatives from the purview of the Act. In order to invoke the application of Section 10 the property must be vested in a trustee or trustees for a specific-purpose.

COMPUTATION OF PERIOD OF LIMITATION

(i) Exclusion of certain days or exclusion of time in legal proceedings

While computing Period of Limitation certain day/days are to be excluded.

Part III of the Act containing Sections 12 to 24 deals with computation of period of limitation and Section 12 prescribes the time which shall be excluded in computing the time of limitation in legal proceedings.

Computation of period of limitation for a suit, appeal or application: According to Section 12(1), the day which is to be excluded in computing period of limitation is the day from which the period of limitation is to be reckoned. In case of any suit, appeal or application, the period of limitation is to be computed exclusive of the day on which the time begins to run.

Computation of period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgement. The day on which the judgement complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded [Section 12(2)].

Computation of period for an application made for leave to appeal from a decree or order. The time requisite for obtaining a copy of the judgement shall also be excluded [Section 12(3)].

Computation of Limitation period for an application to set aside an award: The time required for obtaining a copy of the award shall be excluded [Section 12(4)].

Thus, the time required for getting copies of certain decisions, mentioned under Section 12 is also to be excluded in computing the period of limitation as per Sub-sections (2), (3) and (4).

The term "time requisite for obtaining a copy" means the time which is reasonably required for obtaining such a copy, On the explanation to Section 12, the Supreme Court in the case of *Udayan China Bhai* v. *R.C. Bali,* AIR 1977 SC 2319, held that by reading Section 12(2) with explanation it is not possible to accept the submission that in computing the time requisite for obtaining copy of a decree by an application made after preparation of the decree, the time that elapsed between the pronouncement of the judgement and the signing of the decree should be excluded.

However, the time taken by the Court to prepare the decree or order before an application for a copy is made shall not be excluded in computing the time for obtaining a copy of a decree or an order. (Explanation to Section 12)

(ii) Exclusion of time during which leave to sue or appeal as a pauper is applied for (Section 13).

(iii) Exclusion of time bona fide taken in a court without jurisdiction. (Section 14)

The relief to a person is given by Section 14 of the Act when the period of limitation is over, because another civil proceedings relating to the matter in issue had been initiated in a court which is unable to entertain it, by lack of jurisdiction or by any other like cause. The following conditions must co-exist for the applicability of this Section:

(a) that the plaintiff or the applicant was prosecuting another civil proceedings against the defendant with due diligence;

(b) that the previous suit or application related to the same matter in issue;

(c) that the plaintiff or the applicant prosecuted in good-faith in that court; and

(d) that the court was unable to entertain a suit or application on account of defect of jurisdiction or other like cause.

(iv) Exclusion of time in certain other cases

(a) When a suit or application for the execution of a decree has been stayed by an injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded. [Section 15(1)]

(b) The time required to obtain the sanction or consent of the Govt. required, or a notice period shall also be excluded in case of suits. [Section 15(2)]

(c) In a suit or an application for execution of a decree by any receiver or interim receiver or any liquidator, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of their appointment shall be excluded. [Section 15(3)]

(d) The time during which a proceeding to set aside the sale has been prosecuted shall be excluded in case of a suit for possession by a purchaser at a sale in execution of a decree. [Section 15(4)]

(e) The time during which the defendant has been absent from India and from the territories outside India administered by the Central Government, shall also be excluded. [Section 15(5)]

(f) In case of death of a person before the right to institute a suit accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application. The same rule applies in case if defendant dies. [Sections 16(1) and (2)]

However, the above rule does not apply to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office. [Section 16(3)]

(g) Where the suit or application is based upon the fraud or mistake of the defendant or respondent or his agent or in other cases as mentioned in Section 17, the period of limitation shall not begin to run until the plaintiff or applicant has discovered fraud or mistake subject to certain exceptions. (Section 17)

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION

Section 18 of the Act deals with the effect of acknowledgement of liability in respect of property or right on the period of limitation. The following requirements should be present for a valid acknowledgement as per Section 18:

1. There must be an admission or acknowledgement;
2. Such acknowledgement must be in respect of any property or right;
3. It must be made before the expiry of period of limitation; and
4. It must be in writing and signed by the party against whom such property or right is claimed.

If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST ON LEGACY

As per Section 19 of the Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. The proviso says that, save in the case of payment of interest made before the 1st day of January, 1928 an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment.

According to the explanation appended to this Section:

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) 'debt' does not include money payable under a decree or order of a court for the purpose of this Section.

Thus, according to this section a fresh period of limitation becomes available to the creditor from the date of part payment when part-payment of debt is made by the debtor before the expiration of the period of limitation.

COMPUTATION OF TIME MENTIONED IN INSTRUMENTS

All instruments shall for the purposes of this Act be deemed to be made with reference to the Gregorian Calendar. (Section 24)

Test your knowledge

Choose the correct answer

Which of the following Sections states the time which shall be excluded in computing the time of limitation in legal proceedings?

(a) Section 10

(b) Section 11

(c) Section 12

(d) Section 13

Correct answer: (c)

ACQUISITION OF OWNERSHIP BY POSSESSION

Section 25 applies to acquisition of easements. It provides that the right to access and use of light or air, way, watercourse, use of water, or any other easement which have been peaceably enjoyed without interruption and for twenty years (thirty years if property belongs to Government) shall be absolute and indefeasible. Such period of twenty years shall be a period ending within two years next before the institution of the suit.

LIMITATION AND WRITS UNDER THE CONSTITUTION

The subject of limitation is dealt with in entry 13, List III of the Constitution of India. The Legislature may, without violating the fundamental rights, enact statutes prescribing limitation within which actions may be brought or varying or changing the existing rules of limitation either by shortening or extending time provided a reasonable time is allowed for enforcement of the existing right of action which would become barred under the amended Statute.

The Statute of Limitation is not unconstitutional since it applies to right of action in future. It is a shield and not a weapon of offence (34 American Jurisprudence, P. 16).

The State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India under Article 32 of the Constitution. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13(2) of the Constitution. It is against the State action that Fundamental Rights are claimed (*Tilokchand Motichand* v. *H.P. Munshi,* AIR 1970 SC 898).

The Limitation Act does not in terms apply to a proceeding under Article 32 or Article 226 of the Constitution. But the Courts act on the analogy of the statute of limitation and refuse relief if the delay is more than the statutory period of limitation (*State of M.P.* v. *Bhai Lal Bhai*, AIR 1964 SC 1006). Where the remedy in a writ petition corresponds to a remedy in an ordinary suit and latter remedy is subject to bar of a statute of limitation, the Court in its writ jurisdiction adopts in the statute its own rule of procedure and in absence of special circumstances imposes the same limitation in the writ jurisdiction.

If the right to property is extinguished by prescription under Section 27 of the Limitation Act, 1963, there is no subsisting right to be enforced under Article 32 of the Constitution. In other case where the remedy only, not the right, is extinguished by limitation the Court will refuse to entertain stale claims on the ground of public policy (*Tilokchand Motichand* v. *H.P. Munshi,* AIR 1970 SC 898).

ANNEXURE

THE SCHEDULE

(Periods of Limitation)

[Sections 2(j) and 3]

Description of suit	*Period of limitation*	*Time from which period begins to run*
(1)	*(2)*	*(3)*
First Division — SUITS		
PART I — SUITS RELATING TO ACCOUNTS		
1. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last time admitted or proved is entered in the account, such year to be computed as in the account.
2. Against a factor for an account.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
3. By a principal against his agent for movable property received by the latter and not accounted for.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
4. Other suits by principals against agents for neglect or misconduct.	Three years	When the neglect or misconduct becomes known to the plaintiff.
5. For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution.
PART II — SUITS RELATING TO CONTRACTS		
6. For a seaman's wages.	Three years	The end of the voyage during which the wages are earned.
7. For wages in the case of any other person.	Three years	When the wages accrue due.
8. For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	Three years	When the food or drink is delivered.
9. For the price of lodging.	Three years	When the price becomes payable.
10. Against a carrier for compensation for losing or injuring goods.	Three years	When the loss of injury occurs.
11. Against a carrier for compensation for non-delivery of, or delay in delivering goods.	Three years	When the goods sought to be delivered.

12. For the hire of animals, vehicles, boats or household furniture.	Three years	When the hire becomes payable.
13. For the balance of money advanced in payment of goods to be delivered.	Three years	When the goods ought to be delivered.
14. For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years	The date of delivery of the goods.
15. For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years	When the period of credit expires.
16. For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years	When the period of the proposed bill elapses.
17. For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years	The date of the sale.
18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
19. For money payable for money lent.	Three years	When the loan is made.
20. Like suit when the lender has given a cheque for the money.	Three years	When the cheque is paid.
21. For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
22. For money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable.	Three years	When the demand is made.
23. For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.
24. For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use.	Three years	When the money is received.
25. For money payable for interest upon money due form the defendant to the plaintiff.	Three years	When the interest becomes due.
26. For money payable to the plaintiff for money found to be due from the	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised

	defendant to the plaintiff on accounts stated between them.		in this behalf unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
27.	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
28.	On a single bond, where a day is specified for payment.	Three years	The day so specified.
29.	On a single bond, where no such day is specified.	Three years	The date of executing the bond.
30.	On a bond subject to a condition.	Three years	When the condition is broken.
31.	On a bill of exchange or promissory note payable at a fixed time after date.	Three years	When the bill or note falls due.
32.	On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years	When the bill is presented.
33.	On a bill of exchange accepted payable at a particular place.	Three years	When the bill is presented at that place.
34.	On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years	When the fixed time expires.
35.	On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years	The date of the bill or note.
36.	On a promissory note or bond payable by instalments.	Three years	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
37.	On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made unless where the payee or obligee waives the benefit of the provision and than when fresh default is made in respect of which there is no such waiver.
38.	On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years	The date of the delivery to the payee.

39. On a dishonoured foreign bill where protest has been made and notice given.	Three years	When the notice is given.
40. By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance.	Three years	The date of the refusal to accept.
41. By the acceptor of an accommodation – bill against the drawer.	Three years	When the acceptor pays the amount of the bill.
42. By a surety against the principal debtor.	Three years	When the surety pays the creditor.
43. By a surely against a co-surety.	Three years	When the surety pays anything in excess of his own share.
44. (a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	The date of the death of the deceased or where the claim on the policy is denied, either partly or wholly, the date of such denial.
(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
45. By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years	When the insurers elect to avoid the policy.
46. Under the Indian Succession Act, 1925, Section 360 or Section 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years	The date of the payment or distribution.
47. For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure.
48. For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-shares.	Three years	The date of the payment in excess of the plaintiff's own share.

49. By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	When the right to contribution accrues.
50. By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years	The date of the payment.
51. For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years	When the profits are received.
52. For arrears of rent.	Three years	When the arrears become due.
53. By a vendor of immovable property for personal payment of unpaid purchase-money.	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
54. For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused.
55. For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
PART III — SUITS RELATING TO DECLARATIONS		
56. To declare the forgery of an instrument issued or registered.	Three years	When the issue or registration becomes known to the plaintiff.
57. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Three years	When the alleged adoption becomes known to the plaintiff.
58. To obtain any other declaration.	Three years	When the right to sue first accrues.
PART IV — SUITS RELATING TO DECREES AND INSTRUMENTS		
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
60. To set aside a transfer of property made by the guardian of a ward –		
(a) by the ward who has attained majority;	Three years	When the ward attains majority.
(b) by the ward's legal representative –		
(i) When the ward dies within three	Three years	When the ward attains majority.

years from the date of attaining majority;		
(ii) when the ward dies before attaining majority.	Three years	When the ward dies.
PART V — SUITS RELATING TO IMMOVABLE PROPERTY		
61. By a mortgagor –		
(a) to redeem or recover the possession of immovable property mortgaged;	Thirty years	When the right to redeem or to recover possession accrues.
(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
(c) to recover surplus collection received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.
63. By a mortgagee:		
(a) for foreclosure;	Thirty years	When the money secured by the mortgagee becomes due.
(b) for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.
65. For possession of immovable property or any interest herein based on title. *Explanation* **—** For the purposes of this article – (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, rever-sioner or	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in execution of a decree when the judgement debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgement debtor who was out of possession.		
66. For possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition.	Twelve years	When the forfeiture is incurred or the condition is broken.
67. By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.
PART VI — SUITS RELATING TO MOVABLE PROPERTY		
68. For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
69. For other specific movable property.	Three years	When the property is wrongfully taken.
70. To recover movable property deposited or pawned from a depository or pawnee.	Three years	The date of refusal after demand.
71. To recover movable property deposited or pawned, and afterwards bought from the depository or pawnee for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.
PART VII — SUITS RELATING TO TORT		
72. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year	When the act or omission takes place.

73. For compensation for false imprisonment.	One year	When the imprisonment ends.
74. For compensation for a malicious prosecution.	One year	When the plaintiff is acquitted or the prosecution is otherwise terminated.
75. For compensation for libel.	One year	When the libel is published.
76. For compensation for slander.	One year	When the words are spoken, or if the words are not actionable in themselves, when the special damage complained of results.
77. For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year	When the loss occurs.
78. For compensation for inducing a person to break a contract with the plaintiff.	One year	The date of the breach.
79. For compensation for an illegal, irregular or excessive distress.	One year	The date of the distress.
80. For compensation for wrongful seizure of movable property under legal process.	One year	The date of the seizure.
81. By executors, adminis-trators or representatives' under the Legal Representatives' Suits Act, 1855.	One year	The date of the death of the person wronged.
82. By executors' administrators or representatives under the Indian Fatal Accidents Act, 1855.	Two years	The date of the death of the person killed.
83. Under the Legal Representatives' Suits Act, 1855, against an executor, an administrator or any other representative.	Two years	When the wrong complained of is done.
84. Against one who having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the perversion first becomes known to the person injured thereby.
85. For compensation for obstructing a way or a water-course.	Three years	The date of the obstruction.
86. For compensation for diverting a water-course.	Three years	The date of the diversion.
87. For compensation for trespass upon immovable property.	Three years	The date of the trespass.
88. For compensation for infringing copyright or any other exclusive privilege.	Three years	The date of the infringement.
89. To restrain waste.	Three years	When the waste begins.

90. For compensation for injury caused by an injunction wrongfully obtained.	Three years	When the injunction ceases.
91. For compensation —		
(a) for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion;	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
(b) for wrongfully taking or injuring or wrongfully detaining any other specific movable property.	Three years	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
PART VIII — SUITS RELATING TO TRUSTS AND TRUST PROPERTY		
92. To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
93. To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
94. To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
95. A set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
96. By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later.

PART IX — SUITS RELATING TO MISCELLANEOUS MATTERS		
97. To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property when the instrument of sale is registered.
98. By a person against whom (an order referred to in Rule 63 or Rule 103) of Order XXI of the Code of Civil Procedure, 1908 or an order under Section 28 of the Presidency Small Cause Courts Act, 1882, has been made, to establish the right which he claims to the property comprised in the order.	One year	The date of the final order.
99. To set aside a sale by a Civil or Revenue Court or a sale for arrears of Government revenue or for any demand recoverable as such arrears.	One year	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.
100. To alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order or an officer of Government in his official capacity.	One year	The date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be.
101. Upon a judgement including a foreign judgement, or a recognisance.	Three years	The date of the judgement or recognisance.
102. For property which the plaintiff has conveyed while insane.	Three years	When the plaintiff is restored to sanity and has knowledge of the conveyance.
103. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	The date of the trustee's death or if the loss has not then resulted, the date of the loss.
104. To establish a periodically recurring right.	Three years	When the plaintiff is first refused the enjoyment of the right.
105. By a Hindu for arrears of maintenance.	Three years	When the arrears are payable.
106. For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the	Twelve years	When the legacy or share becomes payable or deliverable.

property of an interstate against an executor or an administrator or some other person legally charged with the duty of distributing the estate.		
107. For possession of a hereditary office. Explanation — A hereditary office is possessed when the properties thereof are usually received or if there are no properties when the duties thereof are usually performed.	Twelve years	When the defendant takes possession of the office adversely to the plaintiff.
108. Suit during the life of a Hindu or Muslim female by a Hindu or Muslim who if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years	The date of the alienation.
109. By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.
110. By a person excluded from a joint family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.
111. By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.
112. Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu & Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.
PART X — SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD		
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

Second Division — Appeals		
114. Appeal from an order of Acquittal –		
(a) under Sub-section (1) or Sub-section (2) of Section 417 of the Code of Criminal Procedure, 1898;	Ninety days	The date of the order appealed from.
(b) under Sub-section (3) of Section 417 of that Code.	Thirty days	The date of the grant of special leave.
115. Under the Code of Criminal Procedure, 1898.		
(a) from a sentence of death passed by a Court of Session or by a High Court in exercise of its Original Criminal Jurisdiction;	Thirty days	The date of the sentence.
(b) from any other sentence or any order not being an order of acquittal –		
(i) to the High Court;	Sixty days	The date of the sentence or order.
(ii) to any other Court.	Thirty days	The date of the sentence or order.
116. Under the Code of Civil Procedure, 1908 –		
(a) to a High Court from any decree or order;	Ninety days	The date of the decree or order.
(b) to any other Court from any decree or order.	Thirty days	The date of the decree or order.
117. From a decree or order of any High Court to the same Court.	Thirty days	The date of the decree or order.
Third Division — Applications		
118. For leave to appear and defend a suit under summary procedure.	Ten days	When the summons is served.
119. Under the Arbitration Act, 1940.		
(a) for the filing in Court of an award.	Thirty days	The date of service of the notice of the making of the award.
(b) for setting aside an award or getting an award remitted for reconsideration.	Thirty days	The date of service of the notice of the filing of the award.
120. Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days	The date of death of the plaintiff, appellant, defendant or respondent as the case may be.

121. Under the same Code for an order to set aside an abatement.	Sixty days	The date of abatement.
122. To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs.	Thirty days	The date of dismissal.
123. To set aside a decree passed *ex parte* or to re-hear an appeal decreed or heard *ex parte.* *Explanation:* For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908, shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.
124. For a review of judgement by a Court other than the Supreme Court.	Thirty days	The date of the decree or order.
125. To record an adjustment or satisfaction of a decree.	Thirty days	When the payment or adjustment is made.
126. For the payment of the amount of a decree by instalments.	Thirty days	The date of the decree.
127. To set aside a sale in execution of a decree, including any such application by a judgement-debtor.	Sixty days	The date of the sale.
128. For possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree.	Thirty days	The date of the dispossession.
129. For possession after removing resistance or obstruction to delivery of possession of immovable property decree or sold in execution of a decree.	Thirty days	The date of resistance or obstruction.
130. For leave to appeal as a Pauper —		
(a) to the High Court;	Sixty days	The date of decree appealed from.
(b) to any other Court.	Thirty days	The date of decree appealed from.
131. To any Court for the exercise of its powers of revision under the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973.	Ninety days	The date of the decree or order or sentence sought to be revised.
132. To the High Court for a certificate of fitness to appeal to the Supreme	Sixty days	The date of the decree, order or sentence.

Court under Clause (1) of Article 132, Article 133 or sub-clause (c) of clause (1) of Article 134 of the Constitution or under any other law for the time being in force.		
133. To the Supreme Court for special leave to appeal–		
(a) in a case involving death sentence;	Sixty days	The date of the judgement, final order or sentence.
(b) in a case where leave to appeal was refused by the High Court;	Sixty days	The date of the order of refusal.
(c) in any other case.	Ninety days	The date of the judgement or order.
134. For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year	When the sale becomes absolute.
135. For the enforcement of a decree granting a mandatory injunction.	Three years	The date of the decree or where a date is fixed for performance, such date.
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.

Test your knowledge

Which Article of the Indian Constitution states that the State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India?

(a) Article 30

(b) Article 32

(c) Article 34

(d) Article 36

Correct answer: (b)

CLASSIFICATION OF PERIOD OF LIMITATION

Depending upon the duration, period of limitation for different purposes may be classified as follows:

Period of 30 years: The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided only for three kinds of suits:

1. Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
2. Suits by mortgagee for foreclosure;
3. Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

Period of 12 years: A period of 12 years is prescribed as a limitation period for various kinds of suits relating to immovable property, trusts and endowments.

Period of 3 years: A period of three years has been prescribed for suits relating to accounts, contracts, declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

Period varying between 1 to 3 years: The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.

Period in days varying between 90 to 10 days: The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons. For appeals against a sentence of death passed by a court of session or a High Court in the exercise of its original jurisdiction the limitation period is 30 days. For appeal against any sentence other than a sentence of death or any other not being an order of acquittal, the period of 60 days for the appeal to High Court and 30 days for appeal to any other Court is prescribed.

For appeal against acquittal by State Government from the date of the order of acquittal is 90 to 30 days for appeals against acquittal by a complainant in a complaint case from the date of grant of special leave. Period of leave to appeal as a pauper from the date of the decree is 60 days when application for leave to appeal is made to the High Court and 30 days to any other Court.

LAW RELATING TO EVIDENCE
SECTION IV

INTRODUCTION

The "Law of Evidence" may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as "Law of Evidence".

The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence.

The Act extends to the whole of India except the State of Jammu and Kashmir and *applies to all judicial proceedings in or before any Court,* including Court-martial (other than the Court-martial convened unde the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act) but not to affidavits presented to any Court or officer, or to proceedings before an arbitrator.

Judicial Proceedings

The Act does not define the term "judicial proceedings" but it is defined under Section 2(i) of the Criminal Procedure Code as "a proceeding in the course of which evidence is or may be legally taken on oath".

However, the proceedings under the Income Tax are not "judicial proceedings" under this Act. That apart, the Act is also not applicable to the proceedings before an arbitrator.

An affidavit is a declaration sworn or affirmed before a person competent to administer an oath. Thus, an affidavit per se does not become evidence in the suits but it can become evidence only by consent of the party or if specifically authorised by any provision of the law. They can be used as evidence only under Order XIX of the Civil Procedure Code.

Evidence: The term evidence is defined under Section 3 of the Evidence Act as follows :

"Evidence" means and includes:

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents (including electronic records) produced for the inspection of the Court; such documents are called documentary evidence.

The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

Evidence under Section 3 of the Indian Evidence Act, 1872 may be either oral or personal (i.e. all statements which the Court permits or requires to be made before it by witnesses, and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue. There must be an open and visible connection between the principal fact and the evidentially facts. Facts are which form part of the same transaction, though not in issue, place or at different times and places.

In general the rules of evidence are same in civil and criminal proceedings but there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, specially when the offence charged amounts to felony or treason, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt. In other words, in civil proceedings it is sufficient if the evidence shows that in all probability the accused would have committed the wrong; but in criminal proceedings, evidences must show beyond all doubts that the accused alone would have committed the crime.

Scheme of the Act: The Act is divided into three parts:

Part I Relevancy of Facts-Chapter I containing Sections 1 to 4 deals with preliminary points and relevancy of facts is dealt with in Chapter II containing Sections 5 to 55.

Part II On proof (Chapters III to VI) containing Sections 56 to 100.

Part III Production and effect of evidence (Chapters VII to XI containing Sections 101 to 167).

Relevancy of Facts: Sections 6 to 55 of the Act deal with relevancy of facts. A fact is also known as Factum Prolans or a fact that proves. The question arises what then the term "fact" signifies?

Fact

According to Section 3, *"fact"* means and includes:

(a) anything, state of things, or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious.

Thus facts are classified into physical and psychological facts.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at the specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

Illustrations (a), (b) and (c), are the examples of physical facts whereas the illustrations (d) and (e) are the examples of psychological bids.

Evidence may be given of facts in issue and relevant facts

According to Section 5, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

The Explanation appended to Section 5, however, makes it clear that this section shall not enable any person to give evidence of a fact to which he is disentitled to prove by any provision of the law.

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:-

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

It is evident that only facts in issue and relevant facts may be given in evidence. To understand their relevancy it is necessary to know their meanings. These terms are defined in Section 3. It is explained as follows:-

Relevant Fact

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. (Section 3)

Where in a case direct evidence is not available to prove a fact in issue then it may be proved by any circumstantial evidence and in such a case every piece of circumstantial evidence would be an instance of a "relevant fact".

Logical relevancy and legal relevancy

A fact is said to be logically relevant to another when it bears such casual relation with the other as to render probably the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant. Relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant. Of course every fact legally relevant will be found to be logically relevant; but every fact logically relevant is not necessarily relevant under the Act as common sense or logical relevancy is wider than legal relevancy. A judge might in ordinary transaction, take one fact as evidence of another and act upon it himself, when in Court, he may rule that it was legally irrelevant. And he may exclude facts, although logically relevant, if they appear to him too remote to be really material to the issue.

Test your knowledge

State whether the following statement is "True" or "False"

All facts logically relevant are not, however, legally relevant.

- True
- False

Correct answer: True

Legal relevancy and admissibility

Relevancy and admissibility are not co-extensive or interchangeable terms. A fact may be legally relevant, yet its reception in evidence may be prohibited on the grounds of public policy, or on some other ground. Similarly every admissible fact is not necessarily relevant. The tenth Chapter of the Act makes a number of facts receivable in evidence, but these facts are not "relevant" under the second Chapter which alone defines relevancy.

Facts in issue

According to Section 3 the expression "facts in issue" means and includes-any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, necessarily follows.

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustration

A is accused of the murder of B.

At his trial the following facts may be in issue:

that A caused B's death;

that A intended to cause B's death;

that A had received grave and sudden provocation from B;

that A at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

A fact in issue is called as the principal fact to be proved or *factum probandum* and the relevant fact the evidentiary fact or *factum probans* from which the principal fact follows. The fact which constitute the right or liability called "fact in issue" and in a particular case the question of determining the "facts in issue" depends upon the rule of the substantive law which defines the rights and liabilities claimed.

Facts in issue and issues of fact

Under Civil Procedure Code, the Court has to frame issues on all disputed facts which are necessary in the case. These are called issues of fact but the subject matter of an issue of fact is always a fact in issue. Thus when described in the context of Civil Procedure Code, it is an 'issue of fact' and when described in the language of Evidence Act it is a 'fact in issue'. Thus as discussed above, distinction between facts in issue and relevant facts is of fundamental importance.

Classification of relevant facts

Principles of Sections relating to relevancy of facts are mere rules of logic. Relevant facts may be classified in the following form:

(a) facts connected with the facts to be proved; (Sections 6 to 16)

(b) statement about the facts to be proved e.g. admission, confession;

(Sections 17 to 31)

(c) statements by persons who cannot be called as witnesses; (Sections 32 to 33)

(d) statements made under special circumstances; (Sections 34 to 38)

(e) how much of a statement is to be proved; (Section 39)

(f) judgements of Courts of justice, when relevant; (Sections 40 to 44)

(g) opinions of third persons, when relevant; (Sections 45 to 51)

(h) character of parties in Civil cases and of the accussed in criminal cases. (Sections 52 to 55)

Two fundamental rules on which the law of evidence is based are: (a) no facts other than those having rational probative value should be admitted in evidence and, (b) all facts having rational probative value are admissible in evidence unless excluded by a positive rule of paramount importance.

The Court 'may presume' a fact as may be provided by the Act, unless and until it is disproved or may call for proof of it. The court shall presume a fact whenever it is directed by this Act, and shall regard such fact as proved unless and until it is disproved (Section 4). Presumption has been defined as an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a proces of probable reasoning from some matter of fact, either judicially noticed, admitted or established by legal evidence to the satisfaction of the tribunal. It is an inference of the existence of some fact, which is drawn, without evidence, from some other fact already proved or assumed to exist (wills). Presumption is either of a fact or law. These presumptions which are inference are always rebuttable. Presumption of law is either conclusive or rebuttable.

The Act also provides that when one fact is declared by this Act to be conclusive proof of another, the court shall on the proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.

RELEVANCY OF FACTS CONNECTED WITH THE FACT TO BE PROVED

The facts coming under this category are as follows:

(1) *Res gestae or facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction.*

Section 6 embodies the rule of admission of evidence relating to what is commonly known as res gestae. Acts or declarations accompanying the transaction or the facts in issue are treated as part of the res gestae and admitted as evidence. The obvious ground for admission of such evidence is the spontaneity and immediacy of the act or declaration in question.

Illustration

A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

The word 'by-standers' means the persons who are present at the time of the beating and not the persons who gather on the spot after the beating (46 P.L.R. 353); (1945) Lah. 146).

(b) A is accused of waging war against the 'Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, although A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Thus, the evidence about the fact which is also connected with the same transaction, cannot be said to be inadmissible.

The above section lays down the rule which in English text books is treated under the head of res gestae. It may be broadly defined as matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the same transaction.

The essence of the doctrine of res gestae is that the facts which, though not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue (AIR 1957 Cal. 709).

(2) *Facts constituting the occasion, or effect of, or opportunity or state of things for the occurrence of the fact to be proved whether it be a fact or another relevant fact.* (Section 7)

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place whether the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B known to A, which afforded an

opportunity for the administration of poison, are relevant facts.

The above transaction provides that, though they are not part of the same transaction, are relevant if they are the occasions caused or effects of facts of an issue.

(3) *Motive, preparation and previous or subsequent conduct.*

According to Section 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive means which moves a person to act in a particular way. It is different from intention. The substantive law is rarely concerned with motive, but the existence of a motive, from the point of view of evidence would be a relevant fact, in every criminal case. That is the first step in every investigation. Motive is a psychological fact and the accused's motive, will have to be proved by circumstantial evidence. When the question is as to whether a person did a particular act, the fact that he made preparations to do it, would certainly be relevant for the purpose of showing that he did it.

The Section makes the conduct of certain persons relevant. Conduct means behaviour. The conduct of the parties is relevant. The conduct to be relevant must be closely connected with the suit, proceeding, a fact in issue or a relevant fact, i.e., if the Court believes such conduct to exist, it must assist the Court in coming to a conclusion on the matter in controversy. It must influence the decision. If these conditions are satisfied it is immaterial whether the conduct was previous to or subsequent to the happening of the fact in issue.

Illustrations

(a) A is tried for the murder of B.

The fact that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence - "the police is coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not

to trust A, for he owes B 10,000 rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of properly acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint she said that she had been ravished is not relevant as conduct under this Section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

(k) the question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

What is relevant under Section 8 is the particular act upon the statement and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved.

(4) *Facts necessary to explain or introduce relevant facts.*

According to Section 9, such facts are -

(i) which are necessary to explain or introduce a fact in issue or relevant fact, or

(ii) which support or rebut an inference suggested by a fact in issue or relevant fact, or

(iii) which establish the identity of a person or thing whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or

(iv) which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts which establish the identity of an accused person are relevant under Section 9.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left house, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that the left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer". This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it - "A says you are to hide this". B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Test your knowledge

Choose the correct answer

Which of the following are facts not necessary to explain or introduce relevant facts?

(a) Facts necessary to explain or introduce a fact

(b) Facts which do not support an inference

(c) Facts which establishes the identity of a person or thing

(d) Facts which show the relation of parties by whom any such fact was transacted

Correct answer: b

STATEMENTS ABOUT THE FACTS TO BE PROVED

The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are three exceptions which are :

(i) Admissions and confessions;

(ii) Statements as to certain matters under certain circumstances by persons who are not witnesses; and

(iii) Statements made under special circumstances.

(i) Admissions and Confessions

Sections 17 to 31 lay down the first exception to the general rule known as admissions and confessions.

Admissions

An admission is defined in Section 17 as a statement, oral or documentary or *contained in electronic form* which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances mentioned under Sections 18 to 20. Thus, whether a statement amounts to an admission

or not depends upon the question whether it was made by any of the persons and in any of the circumstances described in Sections 18-20 and whether it suggests an inference as to a fact in issue or a relevant fact in the case. Thus admission may be verbal or contained in documents as maps, bills, receipts, letters, books etc.

(However, the word 'statement' has not been defined in the Act. Therefore the ordinary dictionary meaning is to be followed which is "something that is stated.")

An admission may be made by a party, by the agent or predecessor-in-interest of a party, by a person having joint propriety of pecuniary interest in the subject matter (Section 18) or by a "reference" (Section 20).

An admission is the best evidence against the party making the same unless it is untrue and made under the circumstances which does not make it binding on him.

An admission by the Government is merely relevant and non conclusive, unless the party to whom they are made has acted upon and thus altered his detriment.

An admission must be clear, precise, not vague or ambiguous. In *Basant Singh* v. *Janky Singh*, (1967) 1 SCR 1, The Supreme Court held:

> "(1) Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admission. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true.
>
> (2) All the statements made in the plaint are admissible as evidence. The Court is, however, not bound to accept all the statements as correct. The Court may accept some of the statements and reject the rest."

Admission means conceding something against the person making the admission. That is why it is stated as a general rule (the exceptions are in Section 21), that admissions must be self-harming; and because a person is unlikely to make a statement which is self-harming unless it is true evidence of such admissions as received in Court.

These Sections deal only with admissions oral and written. Admissions by conduct are not covered by these sections. The relevancy of such admissions by conduct depends upon Section 8 and its explanations.

Oral admissions as to the contents of electronic records are not relevant unless the genuineness of the record produced is in question. (Section 22A)

Confessions

Sections 24 to 30 deal with confessions. However, the Act does not define a confession but includes in it admissions of which it is a species. Thus confessions are special form of admissions. Whereas every confession must be an admission but every admission may not amount to a confession. Sections 27 to 30 deal with confessions which the Court will take into account. A confession is relevant as an admission unless it is made:

(i) to a person in authority in consequence of some inducement, threat or promise held out by him in reference to the charge against the accused;

(ii) to a Police Officer; or

(iii) to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present.

Thus, a statement made by an accused person if it is an admission, is admissible in evidence. The confession is an evidence only against its maker and against another person who is being jointly tried with him for an offence.

Section 30 is an exception to the general rule that confession is only an evidence against the confessor and not against the others.

The confession made in front of magistrate in a native state recorded is admissible against its maker is also admissible against co-accused under Section 30.

The Privy Council in *Pakala Narayanaswami* v. *Emperor,* (1929) PC 47, observed that: No statement that contains self exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. All confessions are admissions but not *vice versa.*

A confession must, either admit, in terms the offence, or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, is not of itself a confession. For example, an admission that the accused was the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession of the knife or revolver. A confession cannot be construed as meaning a statement by the accused suggesting the inference that he committed the crime.

According to Section 24, confession caused by inducement, threat or promise is irrelevant. To attract the prohibition contained in Section 24 of the Evidence Act the following six facts must be established:

(i) that the statement in question is a confession;

(ii) that such confession has been made by an accused person;

(iii) that it has been made to a person in authority;

(iv) that the confession has been obtained by reason of any inducement, threat or promise proceeded from a person in authority;

(v) such inducement, threat or promise, must have reference to the charge against the accused person;

(vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

To exclude the confession it is not always necessary to prove that it was the result of inducement, threat or promise. It is sufficient if a legitimate doubt is created in the mind of the Court or it appears to the Court that the confession was not voluntary. It is however for the accused to create this doubt and not for the prosecution to prove that it was voluntarily made. A confession if voluntary and truthfully made is an efficacious proof of guilt.

Test your knowledge

What are the main characteristics of an admission?

(a) It must be clear

(b) It must be vague

(c) It must be precise

(d) It must be ambiguous

Correct answer: (a) and (c)

Confessions vs. Admissions

A confession, however, is received in evidence for the same reason as an admission, and like an admission it must be considered as a whole. Further there can be an admission either in a civil or a criminal proceedings, whereas there can be a confession only in criminal proceedings. An admission need not be voluntary to be relevant, though it may effect its weight; but a confession to be relevant, must be voluntary. There can be relevant admission made by an agent or even a stranger, but, a confession to be relevant must be made by the

accused himself. A confession of a co-accused is not strictly relevant, though it may be taken into consideration, under Section 30 in special circumstances.

Confessions are classified as: (a) judicial, and (b) extra-judicial. Judicial confessions are those made before a Court or recorded by a Magistrate under Section 164 of the Criminal Procedure Code after following the prescribed procedure such as warning the accused that he need not to make the confession and that if he made it, it would be used against him. Extra-judicial confessions are those which are made either to the police or to any person other than Judges and Magistrates as such.

An extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence. It will have to be proved just like any other fact. The value of the evidence depends upon the truthfulness of the witness to whom it is made.

In *Ram Khilari* v. *State of Rajasthan*, AIR 1999 SC 1002, the Supreme Court held that where an extra-judicial confession was made before a witness who was a close relative of the accused and the testimony of said witness was reliable and truthful, the conviction on the basis of extra judicial confession is proper.

In another case, the Supreme Court has further held that the law does not require that the evidence of an extra-judicial confession should be corroborated in all cases. When such confession was proved by an independent witness who was a responsible officer and one who bore no animus against the accused, there is hardly any justification to disbelieve it. Also, where the Court finds that the confession made by the accused to his friend was unambiguous and unmistakably conveyed that the accused was the perpetrator of the crime and the testimony of the friend was truthful, reliable and trustworthy, a conviction based on such extra-judicial confession is proper and no corroboration is necessary. Much importance could not be given to minor discrepancies and technical errors (*Vinayak Shivajirao Pol* v. *State of Maharashtra,* 1998 (1) Scale 159).

Illustrations

1. A undertakes to collect rents from C on behalf of B. B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B. A statement by C that he owed rent to B, is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

2. The question is, whether a horse sold by A to B is sound.

A says to B–"Go and ask C, C knows all about it". C's statement is an admission.

3. The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B holds that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

4. A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because if A were dead, it would be admissible under Section 32, clause (2).

5. A and B are jointly tried for the murder of C. It is proved that A said-"B and I murdered C". The Court may consider the effect of this confession as against B.

6. A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried. (If there is joint trial Section 30 applies)

Illustrations 5 and 6 are exceptions to the general rule that a confession is only evidence against the person who makes the confession. These are based on Section 30 of the Act.

(ii) Statements by persons who cannot be called as witnesses

Certain statements made by persons who are dead, or cannot be found or produced without unreasonable delay or expense, makes the second exception to the general rule. However, the following conditions must be fulfilled for the relevancy of the statements:

(a) That the statement must relate to a fact in issue or relevant fact,

(b) That the statement must fall under any of following categories:

(i) the statement is made by a person as to the cause of this death or as to any of the circumstances resulting in his death;

(ii) statement made in the course of business;

(iii) Statement which is against the interest of the maker;

(iv) a statement giving the opinion as to the public right or custom or matters of general interest;

(v) a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject;

(vi) a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belong;

(vii) a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc.;

(viii) a statement made by a number of persons expressing their feelings or impression;

(ix) evidence given in a judicial proceeding or before a person authorised by law to take it, provided that the proceeding was between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross examine and the questions in issue were substantially the same as in the first proceeding.

Illustrations

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the course of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(d) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his own son, is a relevant fact.

(e) A sues B for libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

(iii) Statements made under special circumstances

The following statements become relevant on account of their having been made under special circumstances:

(i) Entries made in books of account, including those maintained in an electronic form regularly kept in the course of business. Such entries, though relevant, cannot, alone, be sufficient to charge a person with liability; (Section 34)

(ii) Entries made in public or official records or an *electronic record* made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by the law; (Section 35)

(iii) Statements made in published maps or charts generally offered for the public sale, or in maps or plans made under the authority of the Central Government or any State government; (Section 36)

(iv) Statement as to fact of public nature contained in certain Acts or notification; (Section 37)

(v) Statement as to any foreign law contained in books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. (Section 38)

When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, *electronic record,* book or of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. (Section 39)

Test your knowledge

Choose the correct answer

Which of the following are judicial confessions?

(a) Confessions made to the police

(b) Confessions made before a Court

(c) Confessions made to a Judge

(d) Confessions made to a Magistrate

Correct answer: (b), (c) and (d)

OPINION OF THIRD PERSONS WHEN RELEVANT

The general rule is that opinion of a witness on a question whether of fact or law, is irrelevant. However, there are some exceptions to this general rule. These are:

(i) Opinions of experts. (Section 45)

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant. Similarly the opinions of experts on typewritten documents as to whether a given document is typed on a particular typewriter is relevant.

As a general rule the opinion of a witness on a question whether of fact, or of law, is irrelevant. Witness has to state the facts which he has seen, heard or perceived, and noted the conclusion, form of observations. The functions of drawing inferences from facts is a judicial function and must be performed by the Court. However, to this general rule, there are some exceptions as indicated in Section 45. Opinions of experts are relevant upon a point of (a) foreign law (b) science (c) art (d) identity of hand writing (e) finger impression special knowledge of the subject matter of enquiry become relevant.

(ii) *Facts which support or are inconsistent with the opinions of experts are also made relevant.* (Section 46)

(iii) *Others:* In addition to the opinions of experts, opinion of any other person is also relevant in the following cases :

(a) Opinion as to the handwriting of a person if the person giving the opinion is acquainted with the handwriting of the person in question; (Section 47)

(b) Opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate; (Section 47A)

(c) Opinion as to the existence of any general right or custom if the person giving the opinion is likely to be aware of the existence of such right or custom; (Section 48)

(d) Opinion as to usages etc. words and terms used in particular districts, if the person has special means of knowledge on the subject; (Section 49)

(e) Opinion expressed by conduct as the existence of any relationship by persons having special means of knowledge on the subject. (Section 50)

FACTS OF WHICH EVIDENCE CANNOT BE GIVEN (PRIVILIGED COMMUNICATIONS)

There are some facts of which evidence cannot be given though they are relevant. Such facts are stated under Sections 122, 123, 126 and 127, where evidence is prohibited under those Sections. They are also referred to as ‘privileged communications’

A witness though compellable to give evidence is privileged in respect of particular matters within the limits of which he is not bound to answer questions while giving evidence. These are based on public policy and are as follows:

(i) Evidence of a Judge or Magistrate in regard to certain matters; (Section 121)

(ii) Communications during marriage; (Section 122)

(iii) Affairs of State; (Section 123)

(iv) Official communications; (Section 124)

(v) Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime; (Section 125)

(vi) In the case of professional communication between a client and his barrister, attorney or other professional or legal advisor (Sections 126 and 129). But this privilege is not absolute and the client is entitled to waive it.

Under Section 122 of the Act, communication between the husband and the wife during marriage is privileged and its disclosure cannot be enforced. This provision is based on the principle of domestic peace and confidence between the spouses. The Section contains two parts; the first part deals with the privilege of the witness while the second part of the Section deals with the privilege of the husband or wife of the witness.

Evidence as to affairs of State

Section 123 applies only to evidence derived from unpublished official record relating to affairs of State. According to Section 123, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Professional communications

Section 126 to 129 deal with the professional communications between a legal adviser and a client, which are protected from disclosure. A client cannot be compelled and a legal adviser cannot be allowed without the express consent of his client to disclose oral or documentary communications passing between them in professional confidence. The rule is founded on the impossibility of conducting legal business without professional assistance and securing full and unreserved communication between the two. Under Sections 126 and 127 neither a legal adviser i.e. a barrister, attorney, pleader or vakil (Section 126) nor his interpreter, clerk or servant (Section 128) can be permitted to disclose any communication made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any document with which any such person has become acquainted in the course and for the purpose of such employment.

In general it is not open to a party to test the credit or impeach the "truthfulness of a witness offered by him. But the Court can in its discretion allow a party to cross examine his witness" if the witness unexpectedly turns hostile. (Section 154)

Test your knowledge

What are the matters in respect of which a witness is not bound to answer questions while giving evidence?

(a) Evidence of an individual in regard to certain matters

(b) Communications during marriage

(c) Affairs of State

(d) Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime

Correct answer: (b), (c) and (d)

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

As discussed above, all facts (except two Sections 56 and 58) which are neither admitted nor are subject to judicial notice must be proved. The Act divides the subject of proof into two parts: (i) proof of facts other than the contents of documents; (ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or *electronic records* may be proved by oral evidence (Section

59) which must in all cases be "direct" (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes.

Thus, the two broad rules regarding oral evidence are:

(i) all facts except the contents of documents may be proved by oral evidence;

(ii) oral evidence must in all cases be "direct".

Oral evidence means statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. But, if a witness is unable to speak he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. (Section 119)

Direct evidence

In Section 60 of the Evidence Act, expression "oral evidence" has an altogether different meaning. It is used in the sense of "original evidence" as distinguished from "hearsay" evidence and it is not used in contradicition to "circumstantial" or "presumptive evidence". According to Section 60 oral evidence must in all cases whatever, be direct; that is to say:

– if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

– if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

– if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

– if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on. In defining the direct evidence in Section 60, the Act impliedly enacts what is called the rule against hearsay. Since the evidence as to a fact which could be seen, by a person who did not see it, is not direct but hearsay and so is the evidence as to a statement, by a person who did hear it.

Documentary evidence

A *"document"* means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence. Section 60 provides that the contents of a document must be proved either by primary or by secondary evidence.

Primary evidence

"*Primary evidence*" means the document itself produced for the inspection of the Court (Section 62). The rule that the best evidence must be given of which the nature of the case permits has often been regarded as expressing the great fundamental principles upon which the law of evidence depends. The general rule requiring primary evidence of producing documents is commonly said to be based on the best evidence principle and to be supported by the so called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder.

Secondary evidence

Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy. Section 63 defines the kind of secondary evidence permitted by the Act. According to Section 63, "secondary evidence" means and includes.

(1) certified copies given under the provisions hereafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

Section 65 stipulates the cases in which secondary evidence relating to documents may be given. As already stated, documents must be proved by primary evidence but in certain cases for example, where the document is lost or destroyed or the original is of such a nature as not to be easily, movable, or consists of numerous documents, or is a public document or under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence.

Special Provisions as to Evidence Relating to Electronic Record

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B.

Under Section 65B(1) any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. The conditions in respect of a computer output related above, have been stipulated under Section 65B(2) of the Evidence Act.

Circumstantial evidence

In English law the expression direct evidence is used to signify evidence relating to the 'fact in issue' (*factum probandum*) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to "relevant fact" (*facta probandum*). However, under Section 60 of the Evidence Act, the expression "direct evidence" has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is "direct" evidence under Section 60. Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

Test your knowledge

What are the two broad rules regarding oral evidence?

(a) It must be direct in all cases.

(b) All facts except the contents of documents may be proved by oral evidence.

(c) The contents of documents must be stated orally.

(d) It can be indirect.

Correct answer: (a) and (b)

PRESUMPTIONS

The Act recognises some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and untill the truth of such inference is disproved. There are three categories of presumptions:

(i) presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances.

(ii) presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.

(iii) mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms “conclusive proof”, “shall presume” and “may presume”. The term “conclusive proof” specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term “shall presume” indicates rebuttable presumptions of law; the term “may presume” indicates presumptions of fact. When we see a man knocked down by a speeding car and a few yards away, there is a car going, there is a presumption of fact that the car has knocked down the man.

ESTOPPEL

The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing (Section 115). However, there is no estoppel against the Statute. Where the Statute prescribes a particular way of doing something, it has to be done in that manner only. Other relevant Sections are Sections 116 and 117.

Principle of Estoppel

Estoppel is based on the maxim *‘allegans contratia non est audiendus’* i.e. a person alleging contrary facts should not be heard. The principles of estoppel covers one kind of facts. It says that man cannot approbate and reprobate, or that a man cannot blow hot and cold, or that a man shall not say one thing at one time and later on say a different thing.

The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it (*Sorat Chunder* v. *Gopal Chunder*).

Estoppel is a rule of evidence and does not give rise to a cause of action. Estoppel by record results from the judgement of a competent Court (Section 40, 41). It was laid down by the Privy Council in *Mohori Bibee* v. *Dharmodas Ghosh,* (1930) 30 Cal. 530 PC, that the rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it. The principle is that in such a case the conduct of the person seeking to invoke rule of estoppel is in no sense the effect of the representation made to him. The main determining element is not the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.

In *Biju Patnaik University of Tech. Orissa* v. *Sairam College*, AIR 2010 (NOC) 691 (Orissa), one private university permitted to conduct special examination of students prosecuting studies under one time approval policy. After inspection, 67 students were permitted to appear in the examination and their results declared. However, university declined to issue degree certificates to the students on the ground that they had to appear for further examination for another condensed course as per syllabus of university. It was held that once students appeared in an examination and their results declared, the university is estopped from taking decision withholding degree certificate after declaration of results.

There are different kinds of estoppel by conduct or estoppel in pais. They are: (a) estoppel by attestation (b) estoppel by contract (c) constructive estoppel (d) estoppel by election (e) equitable estoppel (f) estoppel by negligence, and (g) estoppel by silence.

Test your knowledge

State whether the following statement is "True" or "False"

A presumption is in itself evidence, but only makes a prima facie case for the party in whose favour it exists.

- True
- False

Correct answer: False

LESSON ROUND UP

- The expression 'specific relief' means a relief in specie. It is a remedy which aims at the exact fulfillment of an obligation.
- The specific Relief Act applies both to movable and immovable property. The Act applies in cases where court can order specific performance of a contract or act. As per the Act, specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a civil law.
- The essential purpose of a limitation period is to place a time limit on the period within which a party can commence legal proceedings.
- Limitation periods are imposed by statute, primarily the Limitation Act 1963. The Limitation Act provides different limitation periods for different types of suits.
- If a limitation period has expired for a particular claim, the claim will be "statute-barred". This means that it will no longer be possible for the claimant to effect recovery for that claim against the alleged wrongdoer.
- The law of Evidence may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the court, is regulated by a set of rules and principles known as law of Evidence".
- The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

- Evidence under the Act may be either oral or personal (i.e. all statements which the court permits or requires to be made before it by witnesses), and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue.
- 'Tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.
- A tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be: (i) a wrongful act or omission of the defendant; (ii) the wrongful act must result in causing legal damage to another; and (iii) the wrongful act must be of such a nature as to give rise to a legal remedy.

SELF TEST QUESTIONS

1. Explain whether specific performance of part of a contract is allowed. Is there any exception to this rule?
2. Discuss the discretion of the Court in relation to the relief of specific performance of contracts.
3. "Period of Limitation once starts cannot be stopped" Comment.
4. Does the Limitation Act apply to a proceeding under Articles 232 and 226 of the Constitution?
5. What is oral, documentary and circumstantial evidence.

Lesson 23
Code of Civil Procedure, 1908 (CPC)

LESSON OUTLINE

- Learning Objectives
- Introduction
- Aim and Scope of Civil Procedure Code, 1908
- Scheme of the Code
- Some Important Terms
- Structure of Civil Courts
- Jurisdiction of Courts and Venue of Suits
- Stay of Suit
- Place of Suing (Territorial)
- *Res* Judicata
- Set-off, Counter claim and Equitable set-off
- Temporary Injuctions and Interlocutory Orders
- Detention, Preservation, Inspection, etc. of subject-matter of Suit
- Institution of Suit
- Important stages in proceedings of a Suit
- Delivery of Summons by Court
- Appeals
- Reference, Review and Revision
- Suits by or against Corporation
- Suits by or against Minors
- Summary Procedure

LEARNING OBJECTIVES

Laws can be divided into two groups: (i) substantive law; and (ii) procedural law. Whereas substantive law determines rights and liabilities of parties and procedural or adjective law prescribes practice, procedure and machinery for the enforcement of those rights and liabilities. Procedural law is thus an adjunct or an accessory to substantive law.

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code of Civil Procedure is an adjective law it neither creates nor takes away any right. It is intended to regulate the procedure to be followed by Civil Courts. The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised.

The students need to be familiar with the essentials of the basic procedural laws of the Country. It is necessary for them to keep in view the requirement of the procedural law in handling of corporate business, even in initial stages or later, which could have legal implications at some subsequent stage.

"Civil Procedure" means, body of law concerned with the methods, procedures and practices used in civil litigation.

– Black's Law Dictionary, 6th Edn.

INTRODUCTION

The Company Secretary and the Secretarial Staff of a Company need to be familiar with the essentials of the basic procedural laws of the country. While the specific corporate, industrial, taxation, property and urban land laws have direct relevance for the efficient performance of the duties and responsibilities of the Company Secretary, the procedural law also provides the parameters for the pursuance of legal action. It is also therefore necessary to keep in view the requirement of the procedural law, or as such law is often termed "adjective law", in the handling of corporate business, even in initial stages or later, which could have legal implications at some subsequent stage. Such monitoring and guidance is required to be rendered by the Company Secretary and other Secretarial Executives to the line management for safeguarding the interests of the company. It has been endeavoured in this Chapter to summarise one of such aspects of Indian procedural laws which have to be referred to by the Company Secretaries.

AIM AND SCOPE OF CIVIL PROCEDURE CODE, 1908 [C.P.C.]

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code does not affect any special or local laws nor does it supersede any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Code is the general law so that in case of conflict between the Code and the special law the latter prevails over the former. Where the special law is silent on a particular matter the Code applies, but consistent with the special enactment.

SCHEME OF THE CODE

The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised. Thus the two parts should be read together, and in case of any conflict between the body and the rules, the former must prevail.

Test your knowledge

State whether the following statement is 'True' or 'False'

The Civil Procedure Code consolidates and amends the law relating to the procedure of the courts of civil jurisdiction.

- True
- False

Correct answer: True

SOME IMPORTANT TERMS

Cause of Action

"Cause of action" means every fact that it would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Under Order 2, Rule 2, of the Civil Procedure Code it means all the essential facts constituting the rights and its infringement. It means every fact which will be necessary for the plaintiff to prove, if traversed in order to support his right to the judgement.

Judgement, Decree and Order

"Judgement" as defined in Section 2(9) of the Civil Procedure Code means the statement given by the Judge

on the grounds of a decree or order. Thus a judgement must set out the grounds and reasons for the Judge to have arrived at the decision. In other words, a "judgement" is the decision of a Court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination (*State of Tamilnadu* v. *S. Thangaval,* AIR (1997) S.C. 2283).

"Decree" is defined in Section 2(2) of the Code as (i) the formal expression of an adjudication which, so far as regards the Court expressing it; (ii) conclusively; (iii) determines the rights of the parties; (iv) with regard to all or any of the matters in controversy; (v) in the suit and may be either preliminary (i.e. when further proceedings have to be taken before disposal of the suit) or final.

But decree does not include:

(a) any adjudication from which an appeal lies as an appeal from an Order, or

(b) any order of dismissal for default.

Essentials of a decree are:

(i) There must be a formal expression of adjudication;

(ii) There must be a conclusive determination of the rights of parties;

(iii) The determination must be with regard to or any of the matters in contravention in the suit;

(iv) The adjudication should have been given in the suit.

According to the explanation to the definition, a decree may be partly preliminary and partly final. A decree comes into existence as soon as the judgement is pronounced and not on the date when it is sealed and signed. (Order 20 Rule 7)

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. The preliminary decree is not dependent on the final. On the other hand, final decree is dependent and subordinate to the preliminary decree, and gives effect to it. The preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. If the preliminary decree is set aside the final decree is automatically superseded.

Decree-holder

"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made. [Section 2(3)] Thus, a person who is not a party to the suit but in whose favour an order capable of execution is passed is a decree-holder.

Judgement-debtor

"Judgement-debtor" means any person against whom a decree has been passed or an order capable of execution has been made. [Section 2(10)] The definition does not include legal representative of a deceased judgement-debtor.

Judgement

The *"judgement"* means a statement given by a judge on the grounds of a decree or order [Section 2(9)]. What is ordinarily called as an order is in fact a judgement. Also an order deciding a primary issue is a judgement.

Order

"*Order*" as set out in Section 2(14) of the Code means the formal expression of any decision of a Civil Court which is not a decree.

According to Section 104 of the Code, no appeal lies against orders other than what is expressly provided in the Code or any other law for the time being in force. Under the Code appealable orders are:

(i) an order under Section 35A, i.e. for compensatory costs in respect of false or vexatious claims within

pecuniary jurisdiction of the Court, but only for the limited ground that no order should have been made, or that such order should have been made for a lesser amount.

(ii) an order under Section 91 or Section 92 refusing leave to institute a suit under Section 91 (Public nuisances and other wrongful acts affecting the public) or Section 92 (alleged breach of trust created for public purposes of a charitable or religious nature).

(iii) an order under Section 95, i.e. compensation for obtaining arrest attachment or injunction on insufficient grounds.

(iv) an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.

(v) any order made under rules from which an appeal is expressly allowed by the rules.

No appeal lies from any order passed in appeal under this section.

In the case of other orders, no appeal lies except where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case which is to be set forth as a ground of objection in the memorandum of appeal.

A *decree*, shall be deemed to include the rejection of a plaint but not any adjudication from which an appeal lies or any order of dismissal for default. A preliminary decree decides the rights of parties on all or any of the matters in controversy in the suit but does not completely dispose of the suit. A preliminary decree may be appealed against and does not lose its appellate character by reason of a final decree having been passed before the appeal is presented. The Court may, on the application of any party to a suit, pass orders on different applications and any order which is not the final order in a suit is called an “interlocutory order”. An interlocutory order does not dispose of the suit but is merely a direction to procedure. It reserves some questions for further determination.

The main difference between an order and a decree is that when in an adjudication which is a decree appeal lies and second appeal also lies on the grounds mentioned in Section 100 of CPC. However, no appeal lies from an order unless it is expressly provided under Section 104 and Order 43 Rule 1. No second appeal in any case lies at all even in case of appealable orders. [Section 104(2)] A decree conclusively determines the rights and liabilities of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final but this is not the case in order.

A person in whose favour a decree has been passed not only includes a plaintiff but in cases like decree for specific performance of an agreement executable by either party, also includes a defendant.

Test your knowledge

Choose the correct answer

What are the essentials of a decree?

(a) There must be a formal expression of adjudication

(b) There must be a conclusive determination of the rights of parties

(c) The adjudication should have been given in the suit

(d) All the above

Correct answer: (d)

STRUCTURE OF CIVIL COURTS

Section 3 of the Civil Procedure Code lays down that for the purposes of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District and every Court of small causes is subordinate to the High Court and District Court.

JURISDICTION OF COURTS AND VENUE OF SUITS

Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication. The limit of this authority is imposed by charter, statute or a commission. If no such limit is imposed or defined, the jurisdiction is said to be unlimited. A limitation on jurisdiction of a Civil Court may be of four kinds. These are as follows :-

(i) jurisdiction over the subject matter

The jurisdiction to try certain matters by certain Court is limited by statute; e.g. a small cause court can try suits for money due under a promissory note or a suit for price of work done.

(ii) Place of suing or territorial jurisdiction

A territorial limit of jurisdiction for each court is fixed by the Government. Thus, it can try matters falling within the territorial limits of its jurisdiction.

(iii) Jurisdiction over persons

All persons of whatever nationality are subject to the jurisdiction of the Civil Courts of the country except a foreign State, it's Ruler or its representative except with the consent of Central Government.

(iv) Pecuniary jurisdiction depending on pecuniary value of the suit

Section 6 deal with *Pecuniary jurisdiction* and lays down that save in so far as is otherwise expressly provided Courts shall only have jurisdiction over suits the amount or value of which does not exceed the pecuniary limits of any of its ordinary jurisdiction. There is no limit on pecuniary jurisdiction of High Courts and District Courts.

Jurisdiction may be further classified into following categories depending upon their powers:

(i) *Original Jurisdiction* — A Court tries and decides suits filed before it.

(ii) *Appellate Jurisdiction* — A Court hears appeals against decisions or decrees passed by sub-ordinate Courts.

(iii) *Original and appellate Jurisdiction* — The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Courts to try all civil suits unless barred : Section 9 of Civil Procedure Code states that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The explanation appended to the Section provides that a suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision on questions as a religious rites or ceremonies.

Civil Courts have jurisdiction to entertain a suit of civil nature unless barred by law. Every person has an inherent right to bring a suit of a civil nature. Civil Court has jurisdiction to decide the question of its jurisdiction although as a result of the enquiry it may be found that it has no jurisdiction over the matter. Jurisdiction depends not on the truth or falsehood of facts, but upon their nature. Jurisdiction is determinable at the commencement not at the conclusion of the inquiry (*Rex* v. *Boltan,* (1841) 1 QB 66, 74).

A suit is expressly barred if a legislation expressly says so and it is impliedly barred if a statute creates new right or liability and prescribes a particular tribunal or forum for its assertion. When a right is created by a statute and a special tribunal or forum is provided for its assertion and enforcement, the ordinary Civil Court would have no jurisdiction to entertain such disputes.

STAY OF SUIT (DOCTRINE OF RES SUB JUDICE)

Section 10 provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court (in India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

However, the pendency of a suit in a foreign court does not preclude the Courts in India from trying a suit founded on the same cause of action.

To prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue, Section 10 is enacted. The purpose is also to avoid conflict of decision. It is really intended to give effect to the rule of *res judicata*. The institution of second suit is not barred by Section 10. It merely says that the trial cannot be proceeded with.

A suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same colour combination etc. as that of plaintiff company. A subsequent suit was instituted in different Court by the defendant company against the plaintiff company with same allegation. The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different Courts might result in conflicting decisions as issue involved in two suits was totally identical (*M/s. Wings Pharmaceuticals (P) Ltd. and another* v. *M/s. Swan Pharmaceuticals and others,* AIR 1999 Pat. 96).

Even though if a case is not governed by the provisions of the Section and matters in issue may not be identical, yet the courts have inherent powers to stay suit on principle analogous to Section 10.

Essential conditions for stay of suits are :

(i) There must be two suits instituted at different times;

(ii) The matter in issue in the later suit should be directly and substantially in issue in the earlier suit;

(iii) Such suit should be between the same parties;

(iv) Such earlier suit is still pending either in the same Court or in any other competent Court but not before a foreign Court.

If these conditions exist, the later suit should be stayed till the disposal of earlier suit, the findings of which operate as *res judicata* on the later suit.

For the applicability of Section 10, the two proceedings must be suits e.g. suit for eviction of tenant in a rent control statute cannot be sought to be stayed under Section 10 of Civil Procedure Code on the ground that tenant has earlier filed a suit for specific performance against the landlord on the basis of agreement of sale of disputed premises in favour of the tenant.

In such a case, it cannot be said that the matter in earlier suit for specific performance is directly and substantially in issue in later suit for eviction. The reason is that a suit for specific performance of contract has got nothing to do with the question regarding the relationship of landlord and tenant.

Regarding the inherent powers under Section 151, these would also not be used for staying the eviction suit as the same would frustrate the very purpose of the legislation. Therefore, invoking the powers of the Court under this Section, on the facts and circumstances of the case amounts to an abuse of the process of the Court and there can be no doubt that such a course cannot be said to subserve the ends of the justice (*N.P. Tripathi* v. *Dayamanti Devi*, AIR 1988 Pat. 123).

Test your knowledge

Choose the correct answer

Which Section is enacted to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue?

(a) Section 9

(b) Section 10

(c) Section 11

(d) Section 12

Correct answer: (b)

PLACE OF SUING (TERRITORIAL)

Section 15 lays down that every suit shall be instituted in the Court of the lowest grade to try it.

According to Section 16, subject to the pecuniary or other limitations prescribed by any law, the following suits (relating to property) shall be instituted in the Court within the local limits of whose jurisdiction the property is situated :

(a) for recovery of immovable property with or without rent or profits;

(b) for partition of immovable property;

(c) for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually distraint or attachment.

It has also been provided by a *proviso* that where relief could be obtained through personal obedience of the defendant such suit to obtain relief for compensation or respecting immovable property can be instituted either in a local Court within whose local limits of jurisdiction the property is situated or in the Court within whose local limits of jurisdiction the defendant voluntarily resides or carries on business or personally works for gain.

According to the Explanation, “property” means property situated in India.

***Where immovable property is situated within the jurisdiction of different Courts*:** Where the jurisdiction for a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the local limits of jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction the property is situated provided the value of the entire claim is cognisable by such Court. (Section 17)

***Where local limits of jurisdiction of Courts are uncertain*:** Where jurisdiction is alleged to be uncertain as being within the local limits of the jurisdiction of which of two or more Courts, any immovable property is situated, then any of the said Courts may proceed to entertain the suit after having recorded a statement to the effect that it is satisfied that there is ground for such alleged uncertainty. (Section 18)

Where wrong done to the person or to movable property **:** Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the Courts. (Section 19)

Other suits**:** Other suits to be instituted where defendants reside or cause of action arises, subject to the limitations provided by Sections 15, 16, 18 and 19, every suit shall be instituted in a Court within local limits of whose jurisdiction the defendant, or each of the defendants (where there are more than one defendant) actually and voluntarily resides or carries on business or personally works for gain or where such defendants actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the Court is obtained or the defendant(s) who do not reside or carry on business or personally work for gain at such place acquisce in such institution or, where the cause of action arises, wholly or in part. (Section 20)

In the case of a body corporate or company it shall be deemed to carry on business at its sole or principal office in India, or in case of any cause of action arising at any other place, if it has a subordinate office, at such place.

Where there might be two or more competent courts which could entertain a suit consequent upon a part of cause of action having arisen therewith if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute. Such an agreement would be valid (*Angile Insulations* v. *Davy Ashmore India Ltd.,* (1995) 3 SCALE 203).

RES JUDICATA

Section 11 of the Civil Procedure Code deals with the doctrine of *Res Judicata* that is, bar or restraint on repetition of litigation of the same issues. It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues.

The doctrine underlines the general principle that no one shall be twice vexed for the same cause (*S.B. Temple* v. *V.V.B. Charyulu,* (1971) 1 SCJ 215). The doctrine of *res judicata* prevails over the doctrine of *lis pendens* where there is a conflict between the two.

It prevents two different decrees on the same subject. Section 11 says that once a *res* is *judicata*, it shall not be adjudged again. The principle applies to suits in Section 11 of the Code; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of giving finality to litigation. For the applicability of the principle of *res judicata* embodied in Section 11, the following requirements are necessary:

(1) The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit. The expression “directly and substantially in issue” means an issue alleged by one party and denied or admitted by the another either expressly or by necessary implications (*Lonakutty* v. *Thomman*, AIR 1976 SC 1645).

In the matter of taxation for levy of Municipal taxes, there is no question of *res judicata* as each year’s assessment is final for that year and does not govern latter years (*Municipal Corporation* v. *Madan Mohan,* AIR 1976 43).

A suit for eviction on reasonable requirement was compromised and the tenant was allowed to continue as tenant for the subsequent suit for ejectment on the ground of reasonable requirement, it was found that some reasonable requirement had been present during the earlier suit. The second suit was not maintainable.

(2) The former suit has been decided–former suit means which is decided earlier.

(3) The said issue has been heard and finally decided.

The issue or the suit itself is heard and finally decided, then it operates as *res judicata* and is not the reasons leading to the decision (*Mysore State E. Board* v. *Bangalore W.C. & S. Mills,* AIR 1963 SC 1128). However, no

res judicata operates when the points could not have been raised in earlier suit. (See *Prafulla Chandra* v. *Surat Roit* AIR 1998 Ori. 41). But when a suit has been decided on merits, and the appeal is dismissed on a preliminary point, it amounts to the appeal being heard and finally decided and the decision operates as *res judicata* (*Mukunda Jana* v. *Kanta Mandal,* AIR 1979 NOC 116).

(4) Such former suit and the latter are between the same parties or litigation under the same title or persons claiming under parties above (*Isher Singh* v. *Sarwan Singh,* AIR 1965 SC 948).

In short, this principle applies where an issue which has been raised in a subsequent suit was directly and substantially in issue in a former suit between the same parties and was heard and decided finally. Findings incidentally recorded do not operate as *res judicata* (*Madhvi Amma Bhawani Amma* v. *Kunjikutty P.M. Pillai,* AIR 2000 SC 2301).

Supreme Court in *Gouri Naidu* v. *Thandrothu Bodemma and others,* AIR 1997 SC 808, held that the law is well settled that even if erroneous, an inter party judgement binds the party if the court of competent jurisdiction has decided the lis. Thus, a decision that a gift made by a coparceners is invalid under Hindu Law between coparceners, binds the parties when the same question is in issue in a subsequent suit between the same parties for partition.

A consent or compromise decree is not a decision by Court. It is an acceptance of something to which the parties had agreed. The Court does not decide anything. The compromise degree merely has the seal of the Court on the agreement of the parties. As such, the principle of *res judicata* does not generally apply to a consent or compromise decree. But when the court on the facts proved comes to a conclusion that the parties intended that the consent decree should have the effect of deciding the question finally, the principle of *res judicata* may apply to it.

The rule of *res sub judice* relates to a matter which is pending judicial enquiry while *res Judicata* relates to a matter adjudicated upon or a matter on which judgement has been pronounced. *Res sub judice* bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit, whereas rule of *res judicata* bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title. *Res Judicata* arises out of considerations of public policy viz., that there should be an end to litigation on the same matter. *Res-Judicata* presumes conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case. It is however essential that the matter directly and substantially in issue must be the same as in the former suit and not matters collaterally or incidentally in issue.

An application for amendment of a decree is not a 'suit' and may be entertained. But if such an application is heard and finally decided, then it will debar a subsequent application on general principles of law analogous to *res judicata*. However, dismissal of a suit for default, where there has been no adjudication on the merits of the application, will not operate as *res judicata*. Similarly an application for a review of judgment if refused does not bar a subsequent suit for the same relief on the same grounds. In the case of conflicting decrees, the last decree alone is the effective decree which can operate as *res judicata*.

According to this provision of the Civil Procedure Code, no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit (i.e. suit previously decided) either between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised an finally decided by such Court.

According to Explanation to the Section, the expression 'former' suit has been set out as stated above. The competence of a Court to decide an issue or suit is to be determined irrespective of any provisions as to a right of appeal from the decision of such Court. It is stated in Explanation III that the matter must have been alleged

by one party and either denied or admitted expressly or impliedly by the other. Explanation IV any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such (former) suit.

Test your knowledge

State whether the following statement is 'True' or 'False'

Res Judicata in Section 11 of the Civil Procedure Code deals with bar or restraint on repetition of litigation of the same issues.

- True
- False

Correct answer: True

Constructive *res judicata* is the doctrine which has been provided for in Explanation IV (viz. matters or issues which could have been taken as ground of defence or attack in a former suit) as earlier referred to. This doctrine is based on the following grounds of public policy:

(i) There should be an end to litigation;

(ii) The parties to a suit should not be harassed to agitate the same issues or matters already decided between them;

(iii) The time of Court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties;

(iv) It is a rule of convenience and not a rule of absolute justice.

Explanation V states that any relief claimed in the plaint but not expressly granted shall be deemed to have been refused. By Explanation VI it is provided that in the case of a representation suit or class of action all persons interested in any public or private right claimed in common for themselves and others are to be deemed to claim under the persons so litigating and *res judicata* shall apply to them.

Explanations VII and VIII have been added by the Amendment Act of 1976. Explanation VII specifically lays down that the principles of *res judicata* apply to execution proceedings. The general pinciples of *res judicata* have been recognised in Explanation VIII. It provides that the decisions of a "Court of limited jurisdiction competent to decide such issue" operates as *res judicata* in a subsequent suit though the former Court had no jurisdiction to try the subsequent suit. The general principle of *res judicata* is wider in scope than Section 11 which is applied when a case does not come within four corners of Section 11. However, when the case falls under Section 11 but the conditions are not fulfilled, the general principles of *res judicata* cannot be resorted to. The conditions may be summarised as follows :

Conditions of res judicata

1. The matter must be directly and substantially in issue in two suits;
2. The prior suit should be between the same parties or persons claiming under them;
3. The parties should have litigated under the same title;
4. The court which determined the earlier suit must be competent to try the latter suit;
5. The same question is directly and substantially in issue in the latter suit.

Bar to further suit

Section 12 puts a bar to every suit where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action. Section comes into force only when a plaintiff is precluded by rules.

Test your knowledges

State whether the following statement is 'True' or 'False'

Res-Judicata does not presume conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case.

- True
- False

Correct answer: False

SET-OFF COUNTER-CLAIM AND EQUITABLE SET-OFF

Set-off

Order 8, Rule 6 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.

Under Order VIII Rule 6 where in a suit for the recovery of money the defendant claims to *set off* against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary jurisdiction of the Court and where both parties fill the same character as in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwords unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Effect of Set-off

Under clause (2) the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgement in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filling of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order 8, Rule 6A)

Equitable set-off

Sometimes, the defendant is permitted to claim set-off in respect of an unascertained sum of money where the claim arises out of the same transaction, or transactions which can be considered as one transaction, or where there is knowledge on both sides of an existing debt due to one party and a credit by the other party found on and trusting to such debt as a means of discharging it. Generally the suits emerge from cross-demands in the same transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross-suit.

In India distinction between legal and equitable set-off is recognised. Order 8, Rule 6 contains provisions as to legal set-off. Order 8, Rule 6A recognises the counter-claim by the defendant still an equitable set-off can be claimed independently of the Code. The Common Law Courts in England do not recognise equitable claims.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

Temporary injunction

The Court may grant temporary injunction to restrain any such act (as set out below) or make such other order for the purpose of staying and preventing the wasting, damaging, alienation or sale or removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit; where it is proved by affidavit or otherwise:

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

It would be necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him if such temporary injunction (till the disposal of the suit) is not granted and that such loss or damage or harm cannot be compensated by damages. (Order XXXIX)

Interlocutory orders

Power to order interim sale

The Court may, on the application of any party to a suit order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgement in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to be sold at once. (Rule 6)

Test your knowledges

State whether the following statement is 'True' or 'False'

In order to obtain temporary injunction it is not necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him.

- True
- False

Correct answer: False

DETENTION, PRESERVATION, INSPECTION ETC. OF SUBJECT-MATTER OF SUIT

The Court may, on application of any party to a suit, and on such terms as it thinks fit:

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein;

(b) for all or any of the purposes as in (a) above, authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purpose as in (a) above authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (Rule 7)

Application for such order to be after notice –

(1) An application by the plaintiff for an order under Rule 6 or Rule 7 may be made at any time after institution of the suit.

(2) An application by the defendant for such an order may be made at any time after appearance.

(3) Before making an order under Rule 6 or Rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.

Deposit of money etc. in the Court

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security subject to further direction of the Court. Rule (10)

In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like nature arising out of the same contract or relating to the same property or right. The Court may grant an injunction on such terms including keeping of an account and furnishing security etc. as it may think fit.

The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question. In granting injunction, the Court has to see the balance of convenience and inconvenience of both sides. If the object of granting a temporary injunction is liable to be defeated by the delay, the Court while passing an order granting interim or temporary injunction, has a notice served on the defendant to show cause why the order granting the interim injunction should not be confirmed. On hearing the objection of the defendant to such injunction, the Court either confirms the interim injunction or cancels the order of injunction.

INSTITUTION OF SUIT

Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

The main essentials of the suit are –

(a) the opposing parties,

(b) the cause of action,

(c) the subject matter of the suit, and

(d) the relief(s) claimed.

The plaint consists of a heading and title, the body of plaint and the relief(s) claimed. Every suit shall be instituted in the Court of the lowest grade competent to try it, as to be determined with regard to the subject matter being either immovable or movable property or to the place of abode or of business or the defendant. A suit for a tort may be brought either where the wrong was committed or where the defendant resides or carries on business.

A suit for a breach of contract may be instituted in a Court within the local limits of whose jurisdiction the defendant or each of the defendants (where there are more than one) at the time of commencement of the suit actually or voluntarily resides or carries on business or personally works for gain, or where any of the defendants so resides or works for gain or carries on business provided the leave of the Court is given or that the other defendants acquiesce in such situation. A suit for breach of contract may also be instituted where the cause of action arises that is, where the contract was made or where the breach was committed. A suit for recovery of immovable property can be instituted in a Court within the local limits of whose jurisdiction the property or any property of it is situate. Claim for recovery of any immovable property could be for (a) *mesne* profits or arrear's of rent, (b) damages for breach of contract under which the property or any part thereof is held and (c) claims in which the relief sought is based on the same cause of action.

Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Regarding other suits, they shall be instituted in a Court within the local limits of whose jurisdiction:

(a) the defendant or each of the defendants if there are more than one at the time of the commencement of the suit actually or voluntarily resides or carries on business or personally works for gain or

(b) any of the defendants, where there are more than one at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action wholly or in part arises.

Misjoinder of Parties – Where more than one persons joined in one suit as plaintiffs or defendants in whom or against whom any right to relief does not arise or against whom separate suits are brought, no common question of law or fact would arise, it is a case of '*misjoinder of parties*'. To avoid such misjoinder, two factors are essential viz. (i) the right to relief must arise out of the same act or transaction brought by the plaintiffs or against the defendants, (ii) there is a common question of law or fact. The Code does not require that all the questions of law or of fact should be common to all the parties. It is sufficient that if there is one common question.

"*Cause of action*" means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Thus, cause of action is a bundle of essential facts which the plaintiff has to prove in order to sustain his action. The cause of action must be antecedent to the institution of the suit. It consists of two factors (a) a right, and (b) an infringement for which relief is claimed.

Every breach of contract gives rise to a cause of action and a suit may be instituted to secure the proper relief in the place –

(a) where the contract was made, or

(b) where the breach has occurred, or

(c) the place where money is payable.

The place of breach is the place where the contract had to be performed or completed.

Where the place of payment is not specified, it is to be ascertained with reference to the intention of the parties and the circumstances of each case.

Misjoinder of Causes of Action – If the plaintiffs are not jointly interested in all the causes of action there is *misjoinder of causes of action*.

All objections regarding misjoinder of parties or of cause of action should be taken at the first hearing of the suit and before the settlement of causes unless the ground for objections had subsequently arisen.

Test your knowledge

Choose the correct answer

What are the main essentials for instituting the suit?

(a) The opposing parties

(b) The cause of action

(c) The subject matter of the suit

(d) All the above

Correct answer: (d)

IMPORTANT STAGES IN PROCEEDINGS OF A SUIT

When the suit has been duly instituted, the Court issues an order (known as summons) to the defendant to appear and answer the claim and to file the written statement of his defence if any within a period of 30 days from the date of service of summons. No summons are to be issued when the defendant has appeared at the presentation of plaint and admitted the plaintiffs claim.

If the defendant fails to file the written statement within the prescribed period of 30 days, he is allowed to file the same on such other days as specified by the Court for reasons to be recorded in writing but not later than ninety days from the date of service of summons (Order 8, R1). Provision though negatively worded is procedural. It does not deal with power of court or provide consequences of non-extension of time. The provision can therefore be read as directory. (*Shaikh Salim Haji Abdul Khayumsab* v. *Kumar & Ors,* AIR 2006 SC 398.

The defendant may appear in person or by a duly instructed pleader or by a pleader accompanied by some person to be able to answer all material questions relating to the suit.

Every summons must be signed by the judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint. (Order 5)

If the requirement of personal appearance of the defendant or plaintiff is felt by the Court, then it has to make an order for such appearance. The summons must contain a direction that it is for the settlement of issues only or for the final disposal of the suit. Every summons must be accompanied by a copy of the plaint. Where no date is fixed for the appearance of the defendant, the Court has no power to dismiss the suit in default. The summons must also state that the defendant is to produce all documents in his possession or power upon which he intends to rely in support of his case.

The ordinary mode of service of summons i.e. direct service is by delivery or tendering a copy of it signed by the judge or competent officer of the Court to the person summoned either personally or to his agent or any adult male or female member of his family, against signature obtained in acknowledgement of the services.

DELIVERY OF SUMMONS BY COURT

Rule 9 substituted by the Code of Civil Procedure (Amendment) Act, 2002 provides that –

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer, who may be an officer of a Court other than that in which the suit is instituted, to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed

post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means to transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court.

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(3) Where the defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgement due), the provisions of rule 21 shall not apply.

(4) When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

Where the Court is satisfied that there is reason to believe that the person summoned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way the Court shall order the service of the summons to be served by affixing a copy thereof in some conspicuous place in the Court house and also upon some conspicuous part of the house in which the person summoned is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. (O.5, R.20, 'substituted service')

Where defendant resides in another province, a summons may be sent for service in another state to such court and in such manner as may be prescribed by rules in force in that State.

The above provisions shall apply to summons to witnesses.

In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the office in which he is employed. In the case of a suit being instituted against a corporation, the summons may be served (a) on the secretary or on any director, or other principal officer of the corporation or (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business. (O.29, R.2)

Where persons are to be sued as partners in the name of their firm, the summons shall be served either (a) upon one or more of the partners or (b) at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business. Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

Test your knowledge

State whether the following statement is 'True or 'False'

Every copy of the summons must be signed by the Judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint.

- True
- False

Correct answer: True

Defence – The defendant has to file a written statement of his defence within a period of thirty days from the date of service of summons. If he fails to file the written statement within the stipulated time period he is allowed to file the same on such other day as may be specified by the Court for reasons to be recorded in writing. The time period for filing the written statement should not exceed 90 days.

Where the defendant bases his defence upon a document or relies upon any document in his possession in support of his defence or claim for set-off or counter claim, he has to enter such document in a list and produce it in Court while presenting his written statement and deliver the document and a copy thereof to be filed within the written statement.

Any document which ought to be produced in the Court but is not so produced, such document shall not be received in evidence at the time of hearing of the suit without the leave of the Court (O.8, R.1 and 1A). However this rule does not apply to documents produced for the cross-examination of the plaintiff witnesses or handover to a witness merely to refresh his memory.

Besides, particulars of set-off must be given in the written statement. A plea of set-off is set up when the defendant pleads liability of the plaintiff to pay to him, in defence in a suit by the plaintiff for recovery of money. Any right of counter claim must be stated. In the written statement new facts must be specifically pleaded. The defendant must deal specifically with each allegation of fact of which he does not admit the truth. An evasive denial is not permissible and all allegations of facts not denied specifically or by necessary implication shall be taken to be admitted.

Appearance of parties and consequence of non-appearance – If both the parties do not appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed (O.9, R. 3 and 4). If the defendant is absent in spite of service of summons and the plaintiff appears, the Court may proceed *ex-parte*.

In case the defendant is not served with summons, the Court shall order a second summon to be issued. If the summons is served on the defendant without sufficient time to appear, the Court may postpone the hearing to a further date. If the summon was not served on the defendant in sufficient time due to the plaintiff's default, the Court shall order the plaintiff to pay costs of adjournment. Where the hearing of the suit is adjourned *ex-parte* and the defendant appears at or before such hearing and assigns a good cause for his previous non-appearance, the defendant may be heard in answer to the suit on such terms as to costs or otherwise.

The defendant is not precluded from taking part in the proceedings even though he may not be allowed to file a written statement. If the plaintiff is absent and the defendant is present at the hearing of the suit, the Court shall make an order for the dismissal of the suit, unless the defendant admits the claim of the plaintiff or a part thereof in which case the Court shall pass a decree in favour of the plaintiff in accordance with the admission of the defendant and shall dismiss the suit to the extent of the remainder (O.9, R.8).

In any case in which a decree is passed *ex-parte* against a defendant he may apply for setting aside the decree on the ground that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing and the Court shall set aside the decree on such terms as to costs payment into Court or otherwise as it deems proper and shall appoint a day for proceeding with the suit (O.9, R.13).

A defendant has four remedies available if an *ex-parte* decree is passed against him :

(i) He may file an appeal against the *ex-parte* decree under Section 96 of the C.P.C.

(ii) He may file an application for review of the judgement. (O.47, R.1)

(iii) He may apply for setting aside the *ex-parte* decree.

(iv) A suit can also be filed to set aside an *ex-parte* decree obtained by fraud but no suit shall lie for non-service of summons.

It is open to a party at the trial of a suit to use in evidence any one or more of the answers or any part of the answer of the opposite party to interrogatories without putting in the others or the whole of such answers. But the court may direct that any connected answer should also be put in.

Discovery and interrogatories and production of documents

"Discovery" means finding out material facts and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points at issue or to avoid proving admitted facts. Discovery may be of two kinds — (a) by interrogatories (b) by documents.

The objects of discovery are to:

(a) ascertain the nature of the case of the adversary or material facts for the adversary's case.

(b) obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.

(c) narrow the points at issue.

(d) avoid expense and effort in proving admitted facts.

Discovery by interrogations

Any party to a suit, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties. But interrogatories will not be allowed for the following purposes :

(i) for obtaining discovery of facts which relates exclusively to the evidence of the adversary's case or title.

(ii) to interrogate any confidential communications between the adversary and his counsel.

(iii) to obtain disclosures injurious to public interests.

(iv) interrogatories that are of a 'fishing' nature i.e. which do not relate to some definite and existing state of circumstances but are resorted to in a speculative manner to discover something which may help a party making the interrogatories.

Discovery by documents

All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents. Any party may apply to the Court for an order directing any other party to the suit to make discovery on oath the documents which are or which have been in his possession or powers relating to any matter in question. The Court may on hearing the application either refuse or adjourn it, if it is satisfied that such discovery is not necessary at all or not necessary at the stage. Or if it thinks fit in its discretion, it may make order for discovery limited to certain classes of documents.

Every party to a suit may give notice to the other party at or before the settlement of issues to produce for his inspection any document referred to in the pleadings or affidavits of the other party. If the other party refuses to comply with this order he shall not be allowed to put any such document in evidence (O.11, R.15), unless he satisfies the Court that such document relates only to his own title, he being a defendant to the suit or any other ground accepted by the Court. Documents not referred to in the pleadings or affidavits may be inspected by a party if the Court allows (O.11, R.18).

A party may refuse to produce the document for inspection on the following grounds:

(i) where it discloses a party's evidence

(ii) when it enjoys a legal professional privilege

(iii) when it is injurious to public interest

(iv) denial of possession of document.

If a party denies by an affidavit the possession of any document, the party claiming discovery cannot cross-

examine upon it, nor adduce evidence to contradict it, because in all questions of discovery the oath of the party making the discovery is conclusive (*Kedarnath* v. *Vishwanath,* (1924) 46 All. 417).

Admission by parties

"Admission" means that one party accepts the case of the other party in whole or in part to be true. Admission may be either in pleadings or by answers to interrogatories, by agreement of the parties or admission by notice.

Issues

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law.

It is incumbent on the Court at the first hearing of the suit after reading the plaint and the written statement and after ascertaining and examination of the parties if necessary regarding the material propositions of law and facts, to frame the issues thereon for decision of the case. Where the Court is of the opinion that the suit can be disposed off on issues of law only, it shall try those issues first and postpone the framing of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision of that issue.

Issues are to be framed on material proportions of fact or law which are to be gathered from the following—

(i) Allegations made in the plaint and written statement,

(ii) Allegations made by the parties or persons present on their behalf or their pleaders on oath,

(iii) Allegations in answer to interrogatories,

(iv) Contents of documents produced by the parties,

(v) Statements made by parties or their representatives when examined,

(vi) From examination of a witness or any documents ordered to be produced.

Hearing of the suit – The plaintiff has the right to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him and in such a case the defendant has a right to begin (O.18, R.1). Where there are several issues, the burden of proving some of which lies on the other party, the party beginning has an option to produce his evidence on those issues or reserve it by way of an answer to the evidence produced by the other party, and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence. Care must be taken that no part of the evidence should be produced on those issues for which the plaintiff reserves a right to produce evidence after the defence has closed his evidence, otherwise the plaintiff shall lose his right of reserving evidence (O.18, R.3).

Test your knowledge

State whether the following statement is 'True' or 'False'

All documents relating to the matters in issue in the possession or power of any adversary can not be inspected by means of discovery by documents.

- True
- False

Correct answer: False

Affidavit

An affidavit is a written statement of the deponent on oath duly affirmed before any Court or Magistrate or any Oath Commissioner appointed by the Court or before the Notary Public. An affidavit can be used in the following cases:

(i) the Court may at any time of its own motion or on application of any party order that any fact may be proved by affidavits (Section 30).

(ii) the Court may at any time order that the affidavit of any witness may be read at the hearing unless either party bona-fide desires to cross-examine him and he can be produced (O.19, R.1).

(iii) upon application by a party, evidence of a witness may be given on affidavit, but the court may at the instance of either party, order the deponent to attend the court for cross-examination unless he is exempted from personal appearance. Affidavits are confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications. (O.19, R.2&3).

Judgement

The Court after the case has been heard shall pronounce judgement in an open court either at once or on some future day as may be fixed by the court for that purpose of which due notice shall be given to the parties or their pleaders (Order XX, Rule 1). The proper object of a judgement is to support by the most cogent reasons that suggest themselves final conclusion at which the judge has conscientiously arrived.

If the judgement is not pronounced at once every endeavour shall be made by the Court to pronounce the judgement within a period of 30 days from the date on which the hearing of the case was concluded. However, if it is not practicable to do so on the ground of exceptional and extra ordinary circumstances of the case, the Court must fix a future day which should not be a day beyond sixty days for the pronouncement of the judgement giving due notice of the day so fixed to the concerned parties. In *Kanhaiyalal* v. *Anup Kumar,* AIR 2003 SC 689, where the High Court pronounced the judgment after two years and six months, the judgment was set aside by the Supreme Court observing that it would not be proper for a Court to sit tied over the matter for such a long period.

Following the decision of the Supreme Court in the above mentioned case, the Gujarat High Court in *Ramkishan Guru Mandir* v. *Ramavtar Bansraj,* AIR 2006 Guj. 34, set aside the judgment which was passed after two and a half years after conclusion of arguments holding that where a judgment was delivered after two years or more, public at large would have reasons to say bad about the Court and the judges.

The judgement must be dated and signed by the judge. Once the judgement is signed it can not afterwords be altered or added to except as provided under Section 152 or on review.

It is a substantial objection to a judgement that it does not dispose of the question as it was presented by the parties (*Reghunatha* v. *Sri Brozo Kishoro,* (1876) 3 I.A., 154).

If a judgement is unintelligible, the appellate court may set it aside and remand the case to the lower court for the recording of judgement according to law after hearing afresh the arguments of the pleaders (*Harbhagwan* v. *Ahmad,* AIR 1922 Lah. 122).

Decree

On judgement a decree follows. Every endeavour must be made to ensure that decree is drawn up expeditiously and in any case within a period of 15 days from the date on which the judgement is pronounced. It should contain the:

(i) number of the suit(s);

(ii) names and descriptions of the parties and their registered addresses;

(iii) particulars of the claim;

(iv) relief granted or other determination of the suit;

(v) amount of cost incurred and by whom is to be paid.

Execution

Execution is the enforcement of decrees or orders of the Court. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. (Section 36. For details refer Order 21)

APPEALS

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or by rules having the force of statute (*Rangoon Botatoung Company* v. *The Collector, Rangoon*, 39 I.A. 197).

There are four kinds of appeals provided under the Civil Procedure Code:

(i) Appeals from original Decrees (Sections 96-99-Order 41)

(ii) Second Appeals (Sections 100-103-Order 42)

(iii) Appeals from Orders (Sections 104-106, 0.43 r. 1-2)

(iv) Appeals to the Supreme Court (Sections 109 and 112, Order 45)

Appeals from original decrees may be preferred in the Court superior to the Court passing the decree. An appeal may lie from an original decree passed ex parte. Where the decree has been passed with the consent of parties, no appeal lies. The appeal from original decree lies on a question of law. No appeal lies in any suit of the nature cognizable by Courts of small causes when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees.

Second appeal: As per Section 100 of the Civil Procedure Code, an appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a substantial question of law. Under this Section, an appeal may lie from an appellate decree passed *ex parte*.

The memorandum of appeal must precisely state the substantial question of law involved in the appeal. If the High Court is satisfied that a substantial question of law is involved, such question shall be formulated by it and the appeal is to be heard on the question so formulated. The respondent is allowed to argue that the case does not involve such question. The High Court is empowered to hear the appeal on any other substantial question of law not formulated by it if it is satisfied that the case involves such question.

The High Court is not to vary or reverse any order or decree except the order which if made in favour of the party applying for revision would have finally disposed of the suit or proceedings or against which an appeal lies either to the High Court or any subordinate Court. A revision shall not operate as a stay suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

As a general rule the second appeal is on questions of law alone (Section 100). The Privy Council in *Durga Choudharain* v. *Jawaher Singh*, (1891) 18 Cal. 23 P.C., observed that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be... where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

Appeal from orders would lie only from the following orders on grounds of defect or irregularity in law –

(i) an order under Section 35A of the Code allowing special costs, and order under Section 91 or Section 92 refusing leave to Institute a suit of the nature referred to in Section 91 or Section 92,

(ii) an order under Section 95 for compensation for obtaining attachment or injunction on insufficient ground,

(iii) an order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree.

(iv) appealable orders as set out under Order 43, R.1.

However no appeal shall lie from following orders –

(i) any order specified in clause (a) and

(ii) from any order passed in appeal under Section 100.

Appeals to the Supreme Court would lie in the following cases:

(i) from any decree or order of Civil Court when the case is certified by the Court deciding it to be fit for appeal to the Supreme Court or when special leave is granted under Section 112 by the Supreme Court itself,

(ii) from any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,

(iii) from any judgement, decree or final orders passed by a High Court in exercise of original civil jurisdiction.

The general rule is that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary. But the appellate court has a discretion to allow additional evidence in the following circumstances:

(i) When the lower court has refused to admit evidence which ought to have been admitted.

(ii) The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.

(iii) for any other substantial cause.

but in all such cases the appellate court shall record its reasons for admission of additional evidence.

The essential factors to be stated in an appellate judgement are (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision, and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled (O.41, R.31).

The judgement shall be signed and dated by the judge or judges concurring therein.

Test your knowledge

Choose the correct answer

How many kinds of Appeals are there under the Civil Procedure Code?

(a) Two

(b) Three

(c) Four

(d) Five

Correct answer: (c)

REFERENCE, REVIEW AND REVISION

Reference to High Court

Subject to such conditions as may be prescribed, at any time before judgement a court in which a suit has been instituted may state a case and refer the same for opinion of the High Court and the High Court may make such order thereon as it thinks fit. (Section 113 Also refer to Rule 1 of Order 46).

Review

The right of *review* has been conferred by Section 114 and Order 47 Rule 1 of the Code. It provides that any person considering himself aggrieved by a decree or order may apply for a review of judgement to the

court which passed the decree or made the order on any of the grounds as mentioned in Order 47 Rule 1, namely –

(i) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

(ii) on account of some mistake or error apparent on the face of the record, or

(iii) for any other sufficient reason,

and the Court may make such order thereon as it thinks fit.

Revision

Section 115 deals with *revision*. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –

(i) to have exercised a jurisdiction not vested in it by law, or

(ii) to have failed to exercise a jurisdiction so vested, or

(iii) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order as it thinks fit.

Provided that the High Court shall not vary or reverse any order made or any order deciding an issue in the course of a suit or proceeding except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

The High Court shall not vary or reverse any decree or order against which an appeal lies either to the High Court or any Court subordinate thereto.

A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or proceeding is stayed by the High Court.

SUITS BY OR AGAINST A CORPORATION

Signature or verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. (O.29, R.1)

Service of summons

Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served:

(a) on the secretary or any director or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business. (O.29, R. 2)

Power of the Court to require personal attendance

The Court may at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. (O.29, R.3)

Test your knowledge

State whether the following statement is 'True' or 'False'

The right of review has been conferred by Section 114 and Order 47 Rule 1 of the Code.

- True
- False

Correct answer: True

SUITS BY OR AGAINST MINORS

A minor is a person (i) who has not completed the age of 18 years and (ii) for whose person or property a guardian has been appointed by a Court, for whose property is under a Court of Wards, the age of majority is completed at the age of 21 years.

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The next friend should be a person who is of sound mind and has attained majority. However, the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant for the suit. (O.32, Rules 1 and 4).

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. (O.32, R.2).

Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor [O.32, R.3(1)]. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff [O.32, R.3(2)].

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continues as such throughout all proceeding arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree. [O.32, R.3(5)]

When minor attain majority:

When the minor plaintiff attains majority he may elect to proceed with the suit or application or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next frined and for leave to proceed in his own name and the title of the suit will be corrected. If he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant apply for an order to dismiss the suit on repayment of the costs incurred by the defendant or opposite party etc. (For details see Rules 12 and 13 - Order 32)

SUMMARY PROCEDURE

A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37. Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. (Order 37)

The rules for summary procedure are applicable to the following Courts:

(1) High Courts, City Civil Courts and Small Courts;

(2) Other Courts: In such Courts the High Courts may restrict the operation of order 37 by issuing a notification in the Official Gazette.

The debt or liquidated demand in money payable by the defendant should arise on a written contract or on an enactment or on a guarantee.

Institution of summary suits

Such suit may be instituted by presenting a plaint containing the following essentials:

(1) a specific averment to the effect that the suit is filed under this order;

(2) that no relief which does not fall within the ambit of this rule has been claimed;

(3) the inscription immediately below the number of the suit in the title of the suit that the suit is being established under Order 37 of the CPC.

Leave to defend

Order 37 rule 3 prescribe the mode of service of summons etc. and leave to defend. The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such term as the Court or the Judge may think fit. However, such leave shall not be granted where:

(1) the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence or that the defences are frivolous or veracious, and

(2) the part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by him in the Court.

On the hearing of such summon for judgement, the plaintiff shall be entitled to judgement provided the defendant has not applied for leave to defend or if such application has been made and is refused or where the defendant is permitted to defend but he fails to give the required security within the prescribed time or to carry out such other precautions as may have been directed by the Court.

After decree, the Court may, under special circumstances set-aside the decree and if necessary stay or set-aside execution, and may give leave to the defendant to appear and to defend the suit. (Rule 4 order 37)

The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

Test your knowledge

Choose the correct answer

To which of the Courts are the rules for summary suit procedure applicable?

(a) High Courts

(b) City Civil Courts

(c) District Courts

(d) Small Courts

Correct answer: (a), (b) and (d)

LESSON ROUND UP

- The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised.
- The Code defines important terms that have been used thereunder and deals with different types of courts and their jurisdiction. Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication.
- Under the Code of Civil Procedure, a civil court has jurisdiction to try a suit if two conditions are fulfilled: (i) the suit must be of a civil nature; and (ii) the cognizance of such suit should not have been barred. Jurisdiction of a court may be of four kinds: jurisdiction over the subject matter; local or territorial jurisdiction; original and appellate jurisdiction; pecuniary jurisdiction depending on pecuniary value of the suit.
- Section 10 deals with stay of civil suits. The object of the rule contained in Section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel suits in respect of same matter in issue. The section intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions.
- The Code embodies the doctrine of *res judicata* that is, bar or restraint on repetition of litigation of the same issues. It enacts that since a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigaton. It is pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues. In the absence of such a rule there would be no end to litigation and the parties would be put to constant trouble, harassment and expenses.
- In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like nature arising out of the same contract or relating to the same property or right. The Court may grant an injunction on such terms including keeping of an account and furnishing security, etc. as it may think fit.
- The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question.
- The Code also provides for making certain interlocutory orders. The court has power to order sale of any moveable property which is the subject-matter of the suit or attached before judgement in such suit which is subject to speedy and natural decay or for any just and sufficient cause desirable to be sold at once.
- It can also order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein. And for that purpose it can authorise any person to enter upon or into any land or building in the possession of any other party to such suit or authorise any samples to be taken or observation to be made or experiment to be tried for the purpose of obtaining full information.
- Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

- The main essentials of the suit are: (i) the opposing parties; (ii) the cause of action; (iii) the subject matter of the suit, and (iv) the relief(s) claimed.
- Every suit shall be instituted in the Court of the lowest grade to try it. The Code specifies the categories of suits that shall be instituted in the court within the local limits of whose jurisdiction the property is situated. This is subject to the pecuniary or other limitations prescribed by any law. The various stages in proceedings of a suit have been elaborately laid down under the Code.
- It also lays down provisions relating to appeals, reference, review and revision. Any person who feels aggrieved by any decree or order passed by the court may prefer an appeal in a superior court if an appeal is provided against that decree or order or may make an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court.
- A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37. Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

SELF TEST QUESTIONS

1. Discuss Jurisdiction of Civil Courts.
2. Define following terms:
   (i) Order
   (ii) Judgement
   (iii) Decree.
3. What is *res judicata* and stay of suits.
4. Briefly discuss the provisions relating to reference, review and revision.
5. Explain in brief Summary Procedure.

Lesson 24

Criminal Procedure Code

LESSON OUTLINE

- Learning Objectives
- Introduction
- Important Definitions
- Classes of Criminal Courts
- Power of Courts
- Arrest of Persons
- Summons and Warrants
- Summons
- Warrant of Arrest
- Proclamation and Attachment
- Summons to Produce
- Search Warrant
- Security for keeping the peace and good behaviour and proceedings for maintenance of Public Order
- Preventive action of the police and their powers to Investigate
- Information to the police and their powers to Investigate
- Powers of Magistrate
- Limitation for taking cognizance of certain Offences
- Summary Trials

LEARNING OBJECTIVES

Criminal law occupies a pre-dominant place among the agencies of social control and is regarded as a formidable weapon that society has forged to protect itself against anti-social behaviour.

The law of criminal procedure is meant to be complimentary to criminal law. It is intended to provide a mechanism for the enforcement of criminal law. The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person. The Code enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass.

The law of criminal procedure is intended to provide a mechanism for the enforcement of criminal law. Without the proper procedural law the substantive criminal law which defines offences and provides punishment for them would be almost worthless.

The objective of this lesson is to impart knowledge to the students so that they develop proper perspective about the important provisions of the criminal procedure.

The Code of Criminal Procedure, 1973 is an Act to consolidate and amend the law relating to Criminal Procedure.

INTRODUCTION

The Code of Criminal Procedure, 1898 (Cr. P.C.) was repealed by the Code of 1973 enacted by Parliament on 25th January, 1974 and made effective from 1.4.1974 so as to consolidate and amend the law relating to Criminal Procedure. Company Secretaries and the secretarial profession would have relatively less to do with the Code of Criminal Procedure than with other procedural laws, except for safeguarding against incurring of liability for criminal offences by Directors, Secretary, Manager or other Principal Officer under different corporate and industrial laws. Nevertheless, it is necessary that company secretaries and other secretarial staff should be familiar with some of the relevant features of the Code. It is an Act to consolidate and amend the law relating to the procedure to be followed in apprehending the criminals, investigating the criminal cases and their trial before the Criminal Courts. It is an adjective law but also contains provisions of substantive nature (e.g. Chapters VIII, IX, X and XI). It's object is to provide a machinery for determining the guilt of and imposing punishment on offenders under the substantive criminal law, for example, the Indian Penal Code (I.P.C.). The two Codes are to be read together. The Code also provides machinery for punishment of offences under other Acts.

IMPORTANT DEFINITIONS

Offence

Section 2(n) of the Cr.P.C. defines the word "offence" to mean any act or ommission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1871. However, the term is more elaborately defined in Section 40 of the I.P.C. which states that "offence" denotes a thing made punishable by the Code. Section 39 of the Cr. P.C. imposes a duty on every person who is aware of the commission of or of intention to commit an offence, to give information of certain offences which are specified in Clause (i) to (xii) of sub-Section (1). An offence is what the legislature classes as punishable. *Mens Rea* a bad intention or guilt is an essential ingredient in every offence.

Mens rea

Mens rea means a guilty mind. The fundamental principle of penal liability is embodied in the maxim *actus non facit ream nisi mens sit rea*. The act itself does not constitute guilt unless done with a guilty intent. Thus, unless an act is done with a guilty intention, it will not be criminally punishable. The general rule to be stated is "there must be a mind at fault before there can be a crime". *Mens rea* is a subjective matter. Thus *mens rea* is an essential ingredient in every criminal offence.

The motive is not an intention. Intention involves foresight or knowledge of the probable or likely consequences of an injury. In short, *mens rea* is the state of mind which accompanies and directs the conduct resulting in the *actus reus*.

Bailable Offence and Non-bailable Offence

A "bailable offence" means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force. "Non-bailable" offence means any other offence. [Section 2(a)]

Cognizable Offence and Non-cognizable Offence

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

"Non-cognizable offence" means an offence for which, and "non-cognizable" case means a case in which, a police officer has no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer. [Section 2(c) and 2(l)]

In order to be a cognizable case under Section 2(c) of the Code, it would be enough if one or more (not ordinarily all) of the offences are cognizable.

(*Note:* It may be observed from the First Schedule that non-cognizable offences are usually bailable while cognizable offences are generally non-bailable).

Test your knowledge

Choose the correct answer

Which one of the following is the essential ingredient to try a person under criminal law?

(a) A guilty personality

(b) A guilty mind or intent

(c) An intention

(d) A motive

Correct Answer: (b)

Complaint

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include a police report. [Section 2(d)]

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

(i) an oral or a written allegation;

(ii) some person known or unknown has committed an offence;

(iii) it must be made to a magistrate; and

(iv) it must be made with the object that he should take action.

There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprit be suitably dealt with is a complaint. (*Mohd. Yousuf* v. *Afaq Jahan*, AIR 2006 SC 705).

Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173.

Test your knowledge

State whether the following statement is "True" or "False"

In a non-cognizable case, a police officer can arrest a person without a warrant.

Correct Answer: False

Bail

It means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

An *"anticipatory bail"* is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (*State of Assam* v. *R.K. Krishna Kumar* AIR 1998 SC 144).

Inquiry

It means every inquiry other than a trial, conducted under this Code by a Magistrate or Court. *[Section 2(g)].* It carries the following three features:

- the inquiry is different from a trial in criminal matters;
- inquiry is wider than trial;
- it stops when trial begins.

Investigation

It includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. [Section 2(h)]

The three terms – 'investigation', 'inquiry' and 'trial' denote three different stages of a criminal case. The first stage is reached when a police officer either on his own or under orders of a Magistrate investigates into a case (Section 202). If he finds that no offence has been committed, he submits his report to the Magistrate who drops the proceedings. But if he is of different opinion, he sends that case to a Magistrate and then begins the second stage – a trial or an inquiry. The Magistrate may deal with the case himself and either convict the accused or discharge or acquit him. In serious offences the trial is before the Session's Court, which may either discharge or convict or acquit the accused. (Chaper XVIII)

Judicial Proceeding

It includes any proceeding in the course of which evidence is or may be legally taken on oath. The term judicial proceeding includes inquiry and trial but not investigation. [Section 2(i)]

Pleader

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practise in such Court and includes any other person appointed with the premission of the Court to act in such proceeding. [Section 2(q)]

It is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

Public Prosecutor

A "public prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor. [Section 2(u)]

Public prosecutor, though an executive officer is, in a larger sense, also an officer of the Court and he is bound to assist the Court with his fair views and fair exercise of his functions.

Summons and Warrant Cases

"Summons case" means a case relating to an offence and not being a warrant case. [Section 2(w)] A "Warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. [Section 2(x)]

Those cases which are punishable with imprisonment for two years or less are summons cases, the rest are all warrant cases. Thus, the division is based on punishment which can be awarded. The procedure for the trial of summons cases is provided by Chapter XX and for warrant cases by Chapter XIX.

Test your knowledge

The three different stages of a criminal case are:

(a) Investigation

(b) Inquiry

(c) Arrest

(d) Trial

Correct Answer: (a), (b), (d)

CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:

(1) High Courts;

(2) Courts of Session;

(3) Judicial Magistrates of the first class, and, in any metropolitan area; Metropolitan Magistrates;

(4) Judicial Magistrates of the second class; and

(5) Executive Magistrates;

Besides this, the Courts may also be constituted under any other law. The Supreme Court is also vested with some criminal powers. Article 134 confers *appellate* jurisdiction on the Supreme Court in regard to criminal matters from a High Court in certain cases.

POWER OF COURTS

Chapter III of Cr.P.C. deals with power of Courts. One of such power is to try offences. Offences are divided into two categories:

(a) those under the Indian Penal Code; and

(b) those under any other law.

According to Section 26, any offence under the Indian Penal Code, 1860 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable, whereas any offence under any other law shall be tried by the Court mentioned in that law and if not mentioned, it may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable.

This Section is a general Section and is subject to the other provisions of the Code.

Power of the Court to pass sentences

(a) Sentences which High Courts and Sessions Judges may pass

According to Section 28, a High Court may pass any sentence authorised by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court.

An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

Thus, Section 26 of the Code enumerates the types of Courts in which different offences can be tried and then under Section 28, it spells out the limits of sentences which such Courts are authorised to pass.

(b) Sentences which Magistrates may pass

Section 29 lays down the quantum of sentence which different categories of Magistrates are empowered to impose. The powers of individual categories of Magistrates to pass the sentence are as under:

(i) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(ii) A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of a fine not exceeding five thousand rupees, or of both.

(iii) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.

(iv) A Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, and the powers of the Court of a Magistrate of the First class.

(c) Sentence of imprisonment in default of fine

Where a fine is imposed on an accused and it is not paid, the law provides that he can be imprisoned for a term in addition to a substantive imprisonment awarded to him, if any. Section 30 defines the limits of Magistrate's powers to award imprisonment in default of payment of fine.

It provides that the Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law provided the that the term:

(i) is not in excess of the powers of the Magistrate under Section 29; and

(ii) where imprisonment has been awarded as part of the substantive sentence, it should not exceed 1/4th of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(d) Sentences in cases of conviction of several offences at one trial

Section 31 relates to the quantum of punishment which the Court is authorised to impose where the accused is convicted of two or more offences at one trial.

Test your knowledge

An 'anticipatory bail' is granted by:

(a) The High Court

(b) The Supreme Court

(c) The Court of Session

(d) Any Magistrate

Correct Answer: (a) and (c)

ARREST OF PERSONS

Section 41 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant. These include:

(a) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasobale complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who being a released convict, commits a breach of any rule, relating to notification of residence or change of or absence from residence; or

(i) for whose arrest any requistion, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other causes for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition. (Section 41)

Arrest on refusal to give name and residence

If any person who is accused of committing a non-cognizable offence does not give his name, residence or gives a name and residence which the police officer feels to be false, he may be taken into custody. However, such person cannot be detained beyond 24 hours if his true name and address cannot be ascertained or fails to execute a bond or furnish sufficient sureties. In that event he shall be forwarded to the nearest Magistrate having jurisdiction. (Section 42)

Arrest by a private person

A private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender *(Section 43)*. This right of arrest arises under the Common Law which applies to India Ramaswamy Aiyar (1921) 44 Mad. 913.

Arrest by Magistrate

Under Section 44 clause (1), the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody. Under in clause 2, the Magistrate has power to arrest a person for which he is competent and has also been authorised to issue a warrant. However, Section 45 protects members of Armed Forces from arrest where they do something in discharge of their official duties. They could be arrested only after obtaining the consent of the Central Government.

Arrest how made

Section 46 sets out the manner in which an arrest is to be made. The Section authorises a police officer or other person making an arrest to actually touch or confine the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance. The

Section does not give a right to cause the death of a person who is not accused of an offence punishable with death sentence or life imprisonment. The word "arrest" when used in its ordinary and natural sense means the apprehension or restrain or the deprivation of one's personal liberty to go where he pleases. The word "arrest" consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.

Section 47 is an enabling provision and is to be used by the police officer with regard to exigencies of a situation. Section 48 authorises a police officer to pursue the offender in to any place in India for the purpose of effecting his arrest without warrant. Ordinarily, a police officer is not at liberty to go outside India and to arrest an offender without a warrant, but if he can arrest an offender without warrant who escapes into any place in India, he can be pursued and arrested by him without warrant. (See also Section 60)

Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay and subject to the provisions relating to bail, Article 22(2) of the Constitution of India also provides for producing the arrested person before the Magistrate within 24 hours.

When a person is arrested under a warrant, Section 76 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for a period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can under Section 167 order his detention for a term not exceeding 15 days, or he can be taken to a Magistrate, under whose jurisdiction he is to be tried, and such Magistrate can remand him to custody for a term which may exceed 15 days but not more than 60 days.

Officers in-charge of the concerned police stations shall report to the Magistrate the cases of all persons arrested without warrant, within the limits of their respective police stations whether such persons have been admitted to bail or otherwise. (Section 58)

A person arrested by a police officer shall be discharged only on his own bond or on bail or under the special order of a Magistrate, (Section 59). If a person in lawful custody escapes or is rescued, the person, from whose custody he escaped or was rescued, is empowered to pursue and arrest him in any place in India and although the person making such arrest is not acting under a warrant and is not a police officer having authority to arrest, nevertheless, the provisions of Section 47 are applicable which stipulates provisions relating to search of a place entered by the person sought to be arrested.

SUMMONS AND WARRANTS

The general processes to compel appearance are:

(1) Summons (Section 61)

(2) Warrants (Section 70)

SUMMONS

A summon is issued either for appearance or for producing a document or thing which may be issued to an accused person or witness. Every summons issued by the Court shall be in writing, in duplicate, signed by the Presiding Officer of such Court or by such officer as is authorised by the High Court and shall bear the seal of the Court (Section 61). The summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and time of the day when, the attendance of the person summoned is required.

Service of summons

The summons shall be served by a police officer or by an officer of the Court or other public servant (Section 62). In case the service cannot be effected by the exercise of due diligence, the serving officer can perform substituted service by affixing one of the duplicates of the summons to some conspicuous part of the house or homestead in which person summoned ordinarily resides, and thereupon the Court, after making such enquiries as it thinks

fit may either declare that the summons has been duly served or order fresh service, as it considers proper (Section 65).

The service of summons on corporate bodies, and societies

The service of summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the Chief Officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

The word "corporation" in this Section means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860. Thus, the societies may not be formally incorporated, yet they fall within the purview of this section. (Section 63)

When personal service of summons cannot be affected under Section 62, the extended service under Section 64 can be secured by leaving one of the duplicates with some adult male member of his family residing with him who may also be asked to sign the receipt for that. A servant is not a member of the family within the meaning of Section 64.

In the case of a Government Servant, the duplicate copy of the summons shall be sent to the head of the office by the Court and such head shall thereupon cause the summons to be served in the manner provided by Section 62 and shall return it to the Court under his signature with the endorsement required by Section 62. Such signature shall be evidence of due service. (Section 66)

Test your knowledge

Choose the correct answer

When a person is arrested without a warrant, he/she can be kept in the custody not more than:

(a) 24 hours

(b) 48 hours

(c) 72 hours

(d) 15 days

Correct Answer: (a)

WARRANT OF ARREST

Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. (Section 70) The form of warrant of arrest is Form No. 2 of the Second Schedule. The requisites of a warrant are as follows:

1. It must be in writing.
2. It must bear the name and designation of the person who is to execute it;
3. It must give full name and description of the person to be arrested;
4. It must state the offence charged;
5. It must be signed by the presiding officer; and
6. It must be sealed.

Such warrant is only for protection of a person before the concerned Court and not before the police officer.

Under Section 76 the police officer or other person executing the warrant of arrest shall (subject to the provisions of Section 71 as to security) bring the person arrested before the Court without unnecessary delay provided that such delay shall not in any case exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

PROCLAMATION AND ATTACHMENT

Where a warrant remains unexecuted, the Code provides for two remedies:

(1) issuing a proclamation (Section 82); and

(2) attachment and sale of property (Section 83).

If a Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, the Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than 30 days from the date of publishing such proclamation. (Section 82)

While issuing proclamation, the Magistrate must record to his satisfaction that the accused has absconded or is concealing himself. The object of attaching property is not to punish him but to compel his appearance.

SUMMONS TO PRODUCE

Sometimes it is necessary that a person should produce a document or other thing which may be in his possession or power for the purposes of any investigation or inquiry under this Code. This can be compelled to be produced by issuing summons (Sections 91 and 92) or a warrant (Sections 93 to 98).

SEARCH WARRANT

According to Section 93, a search warrant can be issued only in the following cases:

(1) where the Court has reason to believe that a person summoned to produce any document or other thing will not produce it;

(2) where such document or thing is not known to the Court to be in the possession of any person; or

(3) where a general inspection or search is necesary. However, a search warrant may be general or restricted in its scope as to any place or part thereof.

But such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority, by a magistrate other than a District Magistrate or Chief Judicial Magistrate, nor would such warrant be issued so as to affect Sections 123 and 124 of the Indian Evidence Act, 1872 or the Bankers' Book Evidence Act, 1891.

In terms of Section 97 any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class who has reasons to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant for the search of the person so confined. The person if found shall be immediately produced before the Magistrate for making such orders as in the circumstances of the case he thinks proper.

Test your knowledge

Choose the correct answer

A search warrant can be issued under:

(a) Section 91

(b) Section 92

(c) Sub-section (2)

(d) Section 93

Correct Answer: (d)

SECURITY FOR KEEPING THE PEACE AND GOOD BEHAVIOUR AND PROCEEDINGS FOR MAINTENANCE OF PUBLIC ORDER

(i) Security for keeping the peace and for good behaviour

The provisions of Chapter VIII are aimed at persons who are a danger to the public by reason of the commission of certain offences by them. The object of this chapter is prevention of crimes and disturbances of public tranquillity and breach of the peace.

Security for keeping the peace on conviction

When a Court of Session or Court of a Magistrate of first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

The offences specified under sub-section (2) are as follows:

(a) any offence punishable under Chapter VIII of the India Penal Code 1860.

(b) any offence which consists of or includes, assault or using criminal force or committing mischief;

(c) any offence of criminal intimidation;

(d) any other offence which caused, or was intended or known to be likely to cause a breach of the peace.

However, if the conviction is set-aside on appeal or otherwise, the bond so executed shall become void. (Section 106)

Security for keeping the peace in other cases

When an Executive Magistrate receives information that any person is likely to:

(i) commit a breach of peace; or

(ii) disturb the public tranquillity; or

(iii) do any wrongful act that may probably occasion a breach of the peace; or disturb the public tranquillity;

he may require such person to show cause why he should not be ordered to execute a bond for keeping the peace for a period not exceeding one year as the Magistrate deem fit. (Section 107)

(ii) Maintenance of public order and tranquillity

A–Unlawful assemblies

Dispersal of assembly by use of civil force

Any Executive Magistrate or office in-charge of a police station or, in the absence of such officer in-charge, any other officer not below the rank of sub-inspector may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse and it shall be thereupon the duty of the members of such assembly to disperse accordingly.

If any such assembly does not disperse or conducts itself in a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to above may proceed to disperse such assembly by force and may require the assistance of any male person not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly and if necessary arresting and confining the persons who form part of it, in order to disperse such assembly. (Section 129)

Use of armed forces to disperse assembly

If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces and to arrest and confine such persons in order to disperse the assembly or to have them punished.

Section 132 protects persons for any act purporting to be done under Sections 129 to 131. No prosecution shall be instituted against such persons in any criminal Court except with the sanction of Central Government if the person is an officer or member of the armed forces or with the sanction of State Government in any other case. *(Section 130)*

B–Public nuisances

Conditional order for removal of nuisance

Section 133 lays down the following public nuisances which can be proceeded against:

(1) the unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(2) carrying on any trade or occupation, or keeping of any goods or merchandise, injurious to the health of the community; or

(3) the construction of any building or the disposal of any substance, as is likely to cause conflagration or explosion; etc.

(4) the building, tent or structure near a public place.

(5) the dangerous animal requiring destroying, confining or disposal.

For initiating prevention under this Section the Magistrate should keep in mind that he is acting purely in the public interest. For the applicability of clause A, the public must have the right of way which is being obstructed.

Power to issue order in urgent cases of nuisance or apprehended danger

As per Section 144 of the Code where in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, in such cases the Magistrate may by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent, obstruction, annoyance of injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot, or an affray.

An order under this Section may be passed ex-parte in cases of emergency or in cases where the circumstances do not admit of the serving of notice in due time upon the person against whom the order is directed. An order

under this Section can remain in force for two months, and may be extended further for a period not exceeding six months by the State Government if it considers necessary.

PREVENTIVE ACTION OF THE POLICE AND THEIR POWERS TO INVESTIGATE

Section 149 authorises a police officer to prevent the commission of any cognizable offence. If the police officer receives the information of a design to commit such an offence, he can communicate such information to his superior police officer and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence. The police officer may arrest the person without orders from Magistrate and without a warrant if the commission of such offence cannot be otherwise prevented

The arrested person can be detained in custody only for 24 hours unless his further detention is required under any other provsions of this Code or of any other law. (Sections 150 and 151) Section 152 authorises a police officer to prevent injury to public property.

Inspection of weights and measures

Any officer incharge of the police station may without a warrant enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false, and if he finds in such place any false weights, measures or instruments he may seize the same and shall give information of such seizure to a Magistrate having jurisdiction. (Section 153)

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

Information in cognizable cases

Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant. Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. (Section 154)

The above information given to a police officer and reduced to writing is known as First Information Report (FIR). Although such words are not mentioned in the Criminal Procedure Code. The investigation of the case proceeds on this information only. Thus, the principal object of this Section is to set the criminal law in motion and to obtain information about the alleged criminal activities so as to punish the guilty.

For the purpose of enabling the police to start investigation, it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer-in-charge of the police station as indicated in Section 154 of the Code. (*Mohd. Yousuf* v. *Afaq Jahan,* AIR 2006 SC 708.)

Any person aggrieved by a refusal on the part of an officer incharge of a police station to record the information may send the substance of such information in writing and by post to the Superintendent of Police concerned who if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him.

A copy of the information as recorded under sub-section (1) shall be given to the informant free of cost.

Information as to non-cognizable cases and investigation of such cases

When information is given to an officer incharge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate. (Section 155)

The police officer is not authorised to investigate a non-cognizable case without the order of Magistrate having power to try such cases, and on receiving the order, the police officer may exercise the same powers in respect of investigation as he may exercise in a cognizable case.

Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. [Section 155(4)]

Police officer's powers to investigate cognizable case

In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorised by the Magistrate in this behalf. Any Magistrate empowered under Section 190 may order such investigation as above mentioned. Sections 160 and 161 authorise a police officer making an investigation to require the attendance of and may examine orally any person who appears to be acquainted with the facts and circumstances of the case. *(Section 156)*

Search by police officer

This Section authorises general search if the police officer has reason to believe that anything necessary for the purpose of an investigations may be found. The officer acting under this sub-section must record in writing his reasons for making of a search. But, the illegality of search will not affect the validity of the articles or in any way vitiate the recovery of the articles and the subsequent trial. (Section 165)

Whenever any person is arrested or detained in custody and it appears that the investigation cannot be completed within the period of twenty four hours as laid down in Section 57 and that there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or other competent investigation officer shall promptly transmit to the nearest judicial Magistrate a copy of the entries in the diary relating to the case, and shall forward the accused to such Magistrate at the same time (required to be mentioned day by day under Section 172). The Magistrate may then authorise the detention of the accused in custody for a term not exceeding of fifteen days. (Section 167) Every investigation must be completed without undue delay. On completion of investigation, the competent police officer under the Code shall forward a police report with the prescribed details to a Magistrate empowered to take cognizance of the offence and send along with the report all documents or relevant extracts on which the prosecution intends to rely. (Section 173)

Test your knowledge

State whether the following statement is "True" or "False"

If a case relates to two or more offences and one of the offences is a cognizable offence, the case will be treated as a non- cognizable case.

Correct Answer: False

POWERS OF MAGISTRATE

Cognizance of an offence by Magistrate

Section 190 relates to cognizance of offences by Magistrates. The Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it are fulfilled otherwise the Court does not obtain jurisdiction to try the offence (*Mohd. Safi,* AIR 1966 SC 69).

Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon:

(1) receiving a complaint of facts constituting such offence;

(2) a police report of such facts;

(3) information received from any person other than a police officer;

(4) his own knowledge that such offence has been committed.

When a Magistrate takes cognizance of an offence upon information received from any person other than a police officer or upon his own knowledge then the accused is informed that he is entitled to to have the case inquired into or tried by another Magistrate and if the accused objects to further proceedings before the Magistrate taking cognizance, the case is transferred to other Magistrate as is specified by the Chief Judicial Magistrate. (Section 191)

The Chief Judicial Magistrate may after taking cognizance of an offence transfer the case for inquiry or trial to any competent Magistrate subordinate to him. Similarly a first class Magistrate may transfer a case to such other competent Magistrate to try as the Chief Judicial Magistrate specifies. *(Section 192)*

Cognizance of an offence by Courts of Session

The Court of Session does not take cognizance of any offence, as a Court of original jurisdiction unless the case has been committed to it by a competent Magistrate. The Additional Sessions Judge and Asstt. Sessions Judge try such cases as the High Court may direct or the Sessions Judges may make over to them. (Sections 193 and 194)

Complaints to Magistrates

A Magistrate taking cognizance of an offence on complaint examines the complainant and the witnesses if any upon oath and then the substance of such examination is reduced to writing and signed by the complainant and witnesses and also by the Magistrate.

However, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses. If a public servant in the discharge of his official duties or a Court has made the complaint or if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192. Further, if the Magistrate makes over the case to another Magistrate, under Section 192 after examining the complainant and the witnesses, they need not to be re-examined by the latter Magistrate. (Section 200)

If a complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall return it for presentation to the proper Court if the complaint is in writing, and if the complaint is oral, he should direct the complainant to the proper Court. (Section 201)

The Magistrate enquiring into a case may take evidence of witnesses on oath but where the offence is triable by the Court of Session, he shall call upon the complainant to produce all his witnesses and examines them on oath. He may dismiss the complaint if after considering the statement on oath and the result of the investigation or enquiry, there is no sufficient ground for proceeding and may record his reasons for doing so. (Sections 201 to 203)

On the other hand if the Magistrate is of opinion that there is sufficient ground for taking cognizance of an offence he may either issue summons for attendance of the accused if the case appears to be a summons-case or he may in a warrant case issue a warrant or summons for the accused to be produced at a certain time before such Magistrate. It is important that no summon or warrant shall be issued against the accused unless a list of prosecution witnesses has been filed. In a proceeding instituted on the complaint in writing a copy of the complaint is to be sent with every summons or warrant. (Section 204)

Every charge under this Code shall state the offence with which the accused is charged specifying the law and the name of the offence, particulars of time and place of the alleged offence (Sections 211 and 212). For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately (Section 218). If more than one offence is committed by the same person in one series of acts so connected together as to form the same transaction, he may be charged with and tried at one trial for every such offence (Section 220). Persons accused of the same offence, committed in the course of the same transaction, or abetment of such offence may be charged jointly and tried together.

A person who has once been tried by a Court of competent jurisdiction for an offence and is convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence, nor on the same facts for any other offence A person discharged under Section 258 (i.e. a summons-case where there is judgement of acquittal by a Judicial Magistrate) shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which such Court is subordinate.

The judgement in every trial in any Criminal Court of original jurisdiction shall be pronounced by the presiding officer by delivering or reading out the whole of the judgement or the operative part of the judgement in open Court. (Section 353) Every judgement should be written in the language of the Court and should contain the point or points for determination, the decision thereon and the reasons for the decision. It should specify the offence and the Section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced (Section 354). Except as otherwise specified in the Code, no court when it has signed its judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error (Section 362). A copy of the judgement and also if so desired a certified copy are to be given to the accused free of cost. (Section 363)

Test your knowledge

State whether the following statement is "True" or "False"

Summons or warrant can not be issued against the accused unless and until the list of prosecution witnesses has been filed.

Correct Answer: True

No appeal shall lie from any judgement or order of Criminal Court except as provided for by this Code (Section 372). In the case of an acquittal, the State. Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Every appeal in the case of appealable orders shall be made in the form of a petition in writing presented by the appellant or his pleader and shall be accompanied by a copy of the judgement or order appealed against. No appeal shall be dismissed summarily unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same (Section 384). After perusing such record and hearing the parties, the apellant Court may dismiss the appeal if there are no sufficient grounds for interfering or alter the findings and acquit or discharge the accused or order re-trial by a competent court subordinate to the Appellate Court (Section 386). An Appellate Court may if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate. (Section 391)

A Court may refer a case to High Court if it is of the opinion that is involves a question as to validity of any Act, Ordinance or Regulation and the Court is of opinion that such Act, Ordinance, or Regulation is in-operative or invalid but has not been declared so by the High Court or the Supreme Court. The Court has to state setting out

its opinion and the reasons therefor, and refer the same for the decision of the High Court. The High Court passes such order as it deems fit and causes a copy of such order to be sent to the Court making the reference which shall dispose of the case conformably to the said order. The High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 in the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge. If an appeal lies, but an applications for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

Under Section 438, provisions have been made for a person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction and that Court may if it thinks fit direct that in the event of such arrest, the person shall be released on bail on such conditions which the Court may include in such directions.

Bail may be taken when any person other than a person accused of a non-bailable offence, is arrested or detained without warrant by an officer-in-charge of a police station or is brought before a Court, and is prepared at anytime while in custody or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. Such police officer or the Court if it thinks fit may instead of taking bail from such person discharge him on executing a bond without sureties for his appearance as may be required (Section 436). In case any surety becomes insolvent or dies, the Court by whose order such bond was taken, or a Magistrate (First class) may order the person from whom such security was demanded to furnish, fresh security in accordance with the directions of the original order. (Section 447)

LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

In general, there is no limitation of time in filling complaints under the Code. But delay may hurdle the investigation. Further, the Indian Limitation Act provides the period of limitation for appeal and revision applications. Therefore, chapter XXXVI has been introduced in the Code prescribing limitation period for taking cognizance of certain offences. (Sections 467 to 473)

Except as otherwise specifically provided in the Code, no Court shall take cognizance of an offence after the expiry of the period of limitation mentioned below:

(a) six months, if the offence is punishable with fine only.

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year; and

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

The period of limitation in relation to offences which may be tried together shall be determined with reference to the gravity of the offence where the punishment inflicted for such offence is more severe or the most severe.

Commencement of the period of limitation

The period in relation to an offender commences (a) on the date of the offence; (b) if the commission of the offence was not known to the person aggrieved or to the police officer, the first day on which either such offence comes to the knowledge of such person or to any police officer, whichever is earlier; (c) where the identity of the offender is not known, the first day on which such identity becomes known either to the person aggrieved or the police officer whichever is earlier. (Section 469)

The object of Section 468 is to prescribe the period of limitation and the Court is enjoined not to take cognizance of an offence specified in sub-section (2) after the expiry of such period of limitaiton. The object is to prevent the parties from filing the case after a long time so that the material evidence may not vanish. Section 469 fixes the

day from which the period of limitation should begin to run. However, Section 470 provides provisions for exclusion of time in certain cases. These are as under:

(a) the period during which another prosecution was deligently prosecuted (the prosecution should relate to the same facts and is prosecuted in good faith);

(b) the period of the continuance of the stay order or injunction (from the date of grant to the date of withdrawal) granted against the institution of prosecution;

(c) where notice of prosecution has been given, the period of notice;

(d) where previous sanction or consent for the institution of any prosecution is necessary, the period required for obtaining such consent or sanction including the date of application for obtaining the sanction and the date of the receipt of the order;

(e) the period during which the offender is absent from India or from territory outside India under Central Govt. Administration; and

(f) period when the offender is absconding or concealing himself. (Section 470)

If limitation expires on a day when the Court is closed, cognizance can be taken on the day the Court re-opens. (Section 471)

Continuing offence – In the case of a continuing offence, a fresh period of limitation begins to run at every moment during which the offence continues. (Section 472)

Extension of period of limitation – The Court may take cognizance of an offence after the expiry of the period of limitation if it is satisfied that (i) the delay is properly explained or (ii) it is necessary to do so in the interests of justice. (Section 473)

SUMMARY TRIALS

Summary trial means the "speedy disposal" of cases. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years.

Section 260(1) of the Criminal Procedure Code sets out the provisions for summary trials. It says:

(a) any Chief Judicial Magistrate;

(b) any Metropolitan Magistrate;

(c) any Magistrate of the First class who is specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences:

  (i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

  (ii) theft under Section 379, Section 380 or Section 381 of the Indian Penal Code, where the value of the property stolen does not exceed Rs. 200;

  (iii) receiving or retaining stolen property, under Section 411 of the Indian Penal Code, where the value of such property, does not exceed Rs. 200;

  (iv) assisting in the concealment or disposal of stolen property, under Section 414 of the Indian Penal Code, where the value of such property does not exceed Rs. 200;

  (v) offences under Sections 454 and 456 of the Indian Penal Code;

  (vi) insult with intent to provoke a breach of the peace, under Section 504 of the Indian Penal Code;

(vii) abetment of any of the foregoing offences;

(viii) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) any offence constituted by an act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871.

Sub-section (2) states that when in the course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided in this Code. Summary trial is a speedy trial by dispensing with formalities or delay in proceedings.

Section 262 envisages procedure for summary trials. Sub-section (1) lays down that in all summary trials the summons-case procedure should be followed irrespective of the nature of the case i.e. whether it is a summons-case or a warrant case. Sub-section (2) laying down the limit of the sentence of imprisonment states that no sentence of imprisonment for a term exceeding 3 months shall be passed in any conviction in summary trials.

Test your knowledge

State whether the following statement is "True" or "False"

Summary trial is conducted in those offences which are not punishable with imprisonment for a term exceeding two years.

Correct Answer: True

Record in summary trials

The Magistrate shall enter in the prescribed form the following particulars in every case tried summarily:

(1) the serial number of the case;

(2) the date of the commission of the offence;

(3) the date of the report or complaint;

(4) the name of the complainant (if any);

(5) the name, parentage and residence of the accused;

(6) the offence complained of and the offence proved, and the value of the property in respect of which the offence has been committed if the case comes under clause (ii) (iii) or (iv) of Section 260(1).

(7) the plea of the accused and his examination if any;

(8) the findings;

(9) the sentence or other final order;

(10) the date on which proceedings terminated.

The register containing the particulars mentioned above forms the record in a summary trial.

Judgement in summary trials

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned

Magistrate must sign such record and judgement.

The question whether a case may be tried summarily by a Magistrate as provided in this Section and if the offence is summarily triable, it is a matter of discretion of the Magistrate, which is to be judicially exercised with due care as well as considering the circumstances of the case.

Test your knowledge

Which of the following judicial authorities can conduct a summary trial?

(a) Any Judge of a High Court

(b) Any Chief Judicial Magistrate

(c) Any Metropolitan Magistrate

(d) Any first class Magistrate empowered by a High Court

Correct Answer: (b), (c) and (d)

LESSON ROUND UP

- The law of criminal procedure is meant to be complimentary to criminal law. It is intended to provide a mechanism for the enforcement of criminal law. The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person.
- For the purpose of the Code all offences have been classified into different categories. Firstly, all offences are divided into two categories – cognizable offences and non-cognizable offences; secondly, offences are classified into bailable and non-bailable offences; and thirdly, the Code classifies all criminal cases into summons cases and warrant cases.
- The Code enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass.
- The Code contemplates two types of arrests – (a) arrest with a warrant; and (b) arrest without a warrant. Where a person has been concerned in a non-cognizable offence, he cannot, except in a few cases be arrested without a warrant. Powers to arrest without a warrant are mainly conferred on the police. The Code envisages the various circumstances under which a police officer may arrest a person without a warrant.
- Further, a private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender. Furthermore, the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody.
- Whether the arrest to be made is with a warrant or without a warrant, it is necessary that in making such an arrest, the police officer or other person making such an arrest actually touches or confines the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance.
- Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay. When a person is arrested under a warrant, Section 76 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can order his detention for a term not exceeding 15 days, or he can be taken to a Magistrate, under whose

jurisdiction he is to be tried, and such Magistrate can remand him to custody for a term which may exceed 15 days but not more than 60 days.

– Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Where a warrant remains unexecuted, the Code provides for two remedies (i) issuing a proclamation; and (ii) attachment and sale of property.

– The main processes for compelling production of things and documents are (a) summons issued by a court; (b) warrant order issued by a police officer in charge of a police station; (c) search and seizure with or without a warrant. These processes may be used – (i) for the investigation, inquiry or trial in respect of an offence; or (ii) for any other proceeding generally taken as a preventive or precautionary measure.

– Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant. Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. The above information given to a police officer and reduced to writing is known as First Information Report (FIR). The investigation of the case proceeds on this information only.

– In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorized by the Magistrate in this behalf.

– Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon: (i) receiving a complaint of facts constituting such offence; (ii) a police report of such facts; (iii) information received from any person other than police officer; (iv) his own knowledge that such offence has been committed.

– The Court of Session does not take cognizance of any offence, as a Court of original jurisdiction unless the case has been committed to it by a competent Magistrate. No Court shall take cognizance of an offence after the expiry of the period of limitation. The object is to prevent the parties from filing the case after a long time so that the material evidence may not vanish.

– Summary trial means the “speedy disposal” of cases. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years. The kinds of offences that can be tried summarily have been stipulated under the Code. In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.

SELF TEST QUESTIONS

1. Is the Code of Criminal Procedure a substantive or an adjective law, or both?
2. Distinguish between:
   (a) Cognizable and Non-cognizable offences
   (b) Inquiry, Investigation and Trial
   (c) Bailable and Non-bailable offences
   (d) F.I.R. and Complaint.

3. What are the various classes of Criminal Courts? Discuss their powers.
4. How can arrest be affected by the police? When can police arrest without warrant? Can a private person cause arrest without warrant?
5. Discuss the procedure for search and seizure: (i) of persons (ii) of things.

Lesson 25
Right to Information

LESSON OUTLINE

- Learning Objectives
- Introduction
- Right to Know
- The Right to Information Act
- Salient Features of the Act
- Definitions
- Obligations of Public Authority
- Designation of Public Information Officers
- Request for obtaining information
- Duties of a PIO
- Exemption from disclosure
- Rejection of request
- Partial disclosure allowed
- Information Commissions
- Powers of Information Commissions
- Appellate Authorities
- Penalties
- Jurisdiction of Courts

LEARNING OBJECTIVES

Supreme Court of India in the case of *State of Rajasthan* v. *Raj Narain, AIR 1975 SC 865* observed that "In a Government of responsibility like ours where the agents of the public must be responsible for their conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings." Right to information is not a mere statutory right created by the Right to Information Act. It is essentially a fundamental right guaranteed by the Constitution of India.

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. In India also, the Government enacted Right to Information (RTI) Act in 2005 allowing transparency and autonomy, and access to accountability in public authorities.

It is important for the students to understand the significance of right to information in the changing scenario, and be well versed with the important provisions of this legislation as well as to know the process regarding how to apply for information, where to apply, how much fees etc. and various other related aspects.

The Right to Information Act, 2005 is an Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

INTRODUCTION

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. In India also, the Government enacted Right to Information (RTI) Act in 2005 which came into force w.e.f. October 12, 2005.

RIGHT TO KNOW

Before dwelling on the RTI Act, 2005, mention should be made that in *R.P.Limited v Indian Express Newspapers,* the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression "liberty" must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know which include a right to receive information.

It may be pointed out that the right to impart and receive information is a species of the right to freedom of speech and expression. Article 19(1) (a) of our Constitution guarantees to all citizens freedom of speech and expression. At the same time, Article 19(2) permits the State to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence.

Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a). The State is not only under an obligation to respect the Fundamental Rights of the citizens, but it is equally under an obligation to ensure conditions under which these rights can meaningfully and effectively be enjoyed by one and all.

Right to freedom of speech and expression in Art.19 (1)(a) carries with it the right to propagate and circulate one's views and opinions subject to reasonable restrictions as mentioned above. The prerequisite for enjoying this right is knowledge and information. Information adds something "new to our awareness and removes vagueness of our ideas".

Test your knowledge

Choose the correct answer

Which of the following Articles grant us right of freedom of speech and expression:

(a) Article 19

(b) Article 19(1)

(c) Article 19(1)(a)

(d) Article 21

Correct answer: (c)

THE RIGHT TO INFORMATION (RTI) ACT, 2005

The Right to Information Act, 2005 provides an effective framework for effectuating the right to information recognized under Article 19 of the Constitution. It may be pointed out that the Right to Information Bill was passed by the Lok Sabha on May 11, 2005 and by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005. The Act considered as watershed legislation, is the most significant milestone in the history of Right to Information movement in India allowing transparency and autonomy and access to accountability.

SALIENT FEATURES OF THE ACT

- The RTI Act extends to the whole of India except Jammu & Kashmir.
- It provides a very definite day for its commencement i.e. 120 days from enactment.
- It shall apply to Public Authorities.
- All citizens shall have the right to information, subject to provisions of the Act.
- The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.
- Fee will be payable by the applicant depending on the nature of information sought.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.
- Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions.

OBJECTIVE

As stated above, the RTI Act confers on all citizens a right to information. The Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority.

Test your knowledge

State whether the following statement is “True” or “False”

The RTI Act is applicable to the whole of India with all its provisions.

- True
- False

Correct answer: False

DEFINITIONS

The meaning of important terms has been incorporated under section 2 of the RTI Act. These have been discussed herein below:

Public authority

“Public authority” means any authority or body or institution of self government established or constituted –

(i) By or under the Constitution;

(ii) By any other law made by Parliament;

(iii) By and other law made by State Legislature;

(iv) By notification issued or order made by the appropriate Govt. [Section 2(h)]

Record

"Record" includes –

(a) any document, manuscript and file;

(b) any microfilm, microfiche and facsimile copy of a document;

(c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(d) any other material produced by a computer or any other device; [Section 2(I)]

Information

"Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form. [Section 2(f)]

Right to information

"Right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to –

(i) taking notes, extracts, or certified copies of documents or records;

(ii) inspection of work, documents, records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device; [Section 2(j)]

Third party

"Third party" means a person other than the citizen making a request for information and includes a public authority. [Section 2(n)]

OBLIGATIONS OF PUBLIC AUTHORITY

Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. [Section 4(1)(a)]

As per Section 4(1)(b), every public authority has to publish within one hundred and twenty days of the enactment of this Act:

(i) the particulars of its organization, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in its decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records used by its employees for discharging its functions;

(vi) a statement of the categories of the documents held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes of such meetings are accessible to the public;

(ix) a directory of its officers and employees;

(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details and beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorizations granted by it;

(xiv) details of the information available to, or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers.

(xvii) Such other information as may be prescribed; and thereafter update the publications every year.

DESIGNATION OF PUBLIC INFORMATION OFFICERS (PIO)

Every public authority has to –

(i) Designate in all administrative units or offices Central or State Public Information Officers to provide information to persons who have made a request for the information.

(ii) Designate at each sub-divisional level or sub-district level Central Assistant or State Assistant Public Information Officers to receive the applications for information or appeals for forwarding the same to the Central or State Public Information Officers.

(iii) No reason to be given by the person making request for information except those that may be necessary for contacting him. (Section 5)

REQUEST FOR OBTAINING INFORMATION

The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.

Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).

(i) Information to be provided within 30 days.

(ii) 48 hours where life or liberty is involved.

(iii) 35 days where request is given to Asst. PIO.

(iv) Time taken for calculation and intimation of fees excluded from the time frame.

(v) No action on application for 30 days is a deemed refusal.

If the interests of a third party are involved then time limit will be 40 days (maximum period + time given to the party to make representation).

No fee for delayed response. (Section 6&7)

DUTIES OF A PIO

PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing. If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.

PIO may seek the assistance of any other officer for the proper discharge of his/her duties. PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in S.8 or S.9.

Where the information requested for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request.

Where a request has been rejected, the PIO shall communicate to the requester - (i) the reasons for such rejection, (ii) the period within which an appeal against such rejection may be preferred, and (iii) the particulars of the Appellate Authority.

PIO shall provide information in the form in which it is sought unless it would disproportionately divert the resources of the Public Authority or would be detrimental to the safety or preservation of the record in question.

If allowing partial access, the PIO shall give a notice to the applicant, informing:

(i) that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;

(ii) the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;

(iii) the name and designation of the person giving the decision;

(iv) the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and

(v) his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided.

If information sought has been supplied by third party or is treated as confidential by that third party, the PIO shall give a written notice to the third party within 5 days from the receipt of the request.

Third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice. (Sections 5, 7, 10 & 11)

EXEMPTION FROM DISCLOSURE

Certain categories of information have been exempted from disclosure under the Act. These are:

(i) Where disclosure prejudicially affects the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(ii) Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court;

(iii) Where disclosure would cause a breach of privilege of Parliament or the State Legislature;

(iv) Information including commercial confidence, trade secrets or intellectual property, where disclosure would harm competitive position of a third party, or available to a person in his fiduciary relationship, unless larger public interest so warrants;

(v) Information received in confidence from a foreign government;

(vi) Information the disclosure of which endangers life or physical safety of any person or identifies confidential source of information or assistance;

(vii) Information that would impede the process of investigation or apprehension or prosecution of offenders;

(viii) Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

Personal information which would cause invasion of the privacy unless larger public interest justifies it. (Section 8)

REJECTION OF REQUEST

The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved. (Section 9)

PARTIAL DISCLOSURE ALLOWED

Under Section 10 of the RTI Act, only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.

As per Section 10 of the Act if the request for access to information is rejected on the ground that it is in relation to the information which is exempt from disclosure, in that event access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can be reasonably severed from any part that contains exempt information.

Test your knowledge

State whether the following statement is "True" or "False":

Where the information requested for concerns the life or liberty of a person, the same shall be provided within 48 hours of the receipt of the request.

Correct answer: True

WHO IS EXCLUDED?

The Act excludes Central Intelligence and Security agencies specified in the Second Schedule like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, the Crime Branch-CID-CB, Dadra and Nagar Haveli and Special Branch, Lakshadweep Police. Agencies specified by the State Governments through a Notification will also be excluded.

The exclusion, however, is not absolute and these organizations have an obligation to provide information pertaining to allegations of corruption and human rights violations. Further, information relating to allegations of

human rights violation shall be given only with the approval of the Central Information Commission within forty-five days from the date of the receipt of request. (Section 24]

INFORMATION COMMISSIONS

The Act envisages constitution of Central Information Commission and the State information Commissions.

Central Information Commission (CIC): The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of the Chief Information Commissioner and Central Information Commissioners not exceeding 10. These shall be appointed by the President of India on the recommendations of a committee consisting of PM who is the Chairman of the Committee; the leader of Opposition in the Lok Sabha; and a Union Cabinet Minister to be nominated by the Prime Minister.

The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. CIC/IC shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory. He shall not hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

The general superintendence, direction and management of the affairs of the Commission vests in the Chief Information Commissioner who shall be assisted by the Information Commissioners. Commission shall have its Headquarters in Delhi. Other offices may be established in other parts of the country with the approval of the Central Government. Commission will exercise its powers without being subjected to directions by any other authority. (Section 12)

CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment. Salary will be the same as that of the Chief Election Commissioner. This will not be varied to the disadvantage of the CIC during service. (Section 13)

State Information Commission (SIC): The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of one State Chief Information Commissioner (SCIC) and not more than 10 State Information Commissioners (SIC). These shall be appointed by the Governor on the recommendations of a committee consisting of the Chief Minister who is the Chairman of the committee. Other members include the Leader of the Opposition in the Legislative Assembly and one Cabinet Minister nominated by the Chief Minister.

The qualifications for appointment as SCIC/SIC shall be the same as that for Central Commissioners. The salary of the State Chief Information Commissioner will be the same as that of an Election Commissioner. The salary of the State Information Commissioner will be the same as that of the Chief Secretary of the State Government.

The Commission will exercise its powers without being subjected to any other authority. The headquarters of the State Information Commission shall be at such place as the State Government may specify. Other offices may be established in other parts of the State with the approval of the State Government. (Section 15 & 16)

Test your knowledge

Choose the correct answer

Which of the following acts as a chairman of the Central Information Commission:

(a) President of India

(b) Prime Minister of India

(c) The Leader of Opposition in the Parliament

(d) Any designated member of the Parliament

Correct answer: (b)

POWERS OF INFORMATION COMMISSIONS

The Central Information Commission/State Information Commission has a duty to receive complaints from any person –

(i) who has not been able to submit an information request because a PIO has not been appointed;

(ii) who has been refused information that was requested;

(iii) who has received no response to his/her information request within the specified time limits;

(iv) who thinks the fees charged are unreasonable;

(v) who thinks information given is incomplete or false or misleading; and

(vi) any other matter relating to obtaining information under this law.

If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.

The Central Information Commission or the State Information Commission during the inquiry of any complaint under this Act may examine any record which is under the control of the public authority, and no such record may be withheld from it on any grounds. (Section 18)

APPELLATE AUTHORITIES

Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.

First Appeal: First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).

Second Appeal: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority (delay may be condoned by the Commission if sufficient cause is shown).

Third Party appeal against PIO's decision must be filed within 30 days before first Appellate Authority; and, within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.

Burden of proving that denial of information was justified lies with the PIO. First Appeal shall be disposed of within 30 days from the date of its receipt or within such extended period not exceeding a total of forty-five days from the date of filing thereof, for reasons to be recorded in writing. Time period could be extended by 15 days if necessary. (Section 19)

Test your knowledge

State whether the following statement is "True" or "False"

Burden of proving that 'denial of information was justified' lies with the PIO.

Correct answer: True

PENALTIES

Section 20 of the Act imposes stringent penalty on a Public Information Officer (PIO) for failing to provide information. Every PIO will be liable for fine of Rs. 250 per day, up to a maximum of Rs. 25,000/-, for -

(i) not accepting an application;

(ii) delaying information release without reasonable cause;

(iii) malafidely denying information;

(iv) knowingly giving incomplete, incorrect, misleading information;

(v) destroying information that has been requested; and

(vi) obstructing furnishing of information in any manner.

The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty. They can also recommend disciplinary action for violation of the law against the PIO for persistently failing to provide information without any reasonable cause within the specified period.

JURISDICTION OF COURTS

As per Section 23, lower Courts are barred from entertaining suits or applications against any order made under this Act.

Test your knowledge

The Information Commission (IC) at the Centre and at the State levels has the power to impose penalty on Public Information Officer.

Correct answer: True

ROLE OF CENTRAL/STATE GOVERNMENTS

Section 26 contemplates the Role of Central/State Governments. It authorizes the Central/State Governments to:

(i) Develop and organize educational programmes for the public especially disadvantaged communities on RTI.

(ii) Encourage public authorities to participate in the development and organization of such programmes.

(iii) Promote timely and effective dissemination of accurate information by the public authorities.

(iv) Train officers and develop training materials.

(v) Compile and disseminate a User Guide for the public in the respective official language.

(vi) Publish names, designation, postal addresses and contact details of PIOs and other information such as notices regarding fees to be paid, remedies available in law if request is rejected etc.

LESSON ROUND UP

- Right to know is a necessary ingredient of participatory democracy. The Government enacted Right to Information (RTI) Act, 2005 which came into force on October 12, 2005.
- The RTI Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority. Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. Further, it is obligatory on every public authority to publish the information about various particulars prescribed under the Act within one hundred and twenty days of the enactment of this Act.
- Every public authority has to designate in all administrative units or offices Central or State Public Information Officers to provide information to persons who have made a request for the information. The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.
- The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.
- Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions.
- The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved.
- Only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.
- The Act envisages constitution of Central Information Commission and the State Information Commissions.
- The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of: (i) The Chief Information Commissioner; (ii)Central Information Commissioners not exceeding 10.
- The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.
- CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment.
- The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of: (i) One State Chief Information Commissioner (SCIC) and (ii) Not more than 10 State Information Commissioners (SIC).
- The Central /State Commission have been authorized to receive and enquire into a complaint from any person who has been denied information by the concerned authorities due to various reasons as specified under the Act. If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.

- Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.
- Stringent penalty may be imposed on a Public Information Officer for failing to provide information. The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty.
- The Act also stipulates the role of the Central/State Governments

SELF TEST QUESTIONS

1. The right to impart and receive information is a species of the right to freedom of speech and expression. Discuss
2. The RTI Act confers on all citizens a right to information. Enumerate the salient features of the Act.
3. Describe the constitution and powers of the Central Information Commission under the Act.
4. Can a person who does not receive a decision within the specified time or is aggrieved by the decision of the PIO file an appeal under the Act?
5. Specify the categories of information that have been exempted from disclosure under the Act.

GLOSSARY- LEGAL TERMS/MAXIMS

A priori	From the antecedent to the consequent.
Ab initio	From the beginning.
Absolute sententia expositore non indiget	Plain words require no explanation.
Actio mixta	Mixed action.
Actio personalis moritur cum persona	A personal right of action dies with the person.
Actionable per se	The very act is punishable and no proof of damage is required.
Actus Curiae Neminem Gravabit	Act of the Court shall prejudice no one.
Actus non facit reumnisi mens sit rea	An act does not make a man guilty unless there be guilty intention.
Actus reus	Wrongful act.
Ad hoc	For the particular end or case at hand.
Ad idem	At the same point.
Ad valorem	According to value.
Aliunde	From another source.
Amicus Curiae	A friend of court member of the bar who is appointed to assist the Court.
Animus possidendi	Intention to possess
Audi alteram partem	Hear the other side.
Benami	Nameless.
Bona fide	Good faith; genuine.
Caveat	A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator.
Caveat emptor	Let the buyer beware.
Caveat actor	Let the doer beware.

Caveat venditor	Let the seller beware.
Certiorari	A writ by which records of proceeding are removed from inferior courts to High Court and to quash decision that goes beyond its jurisdiction.
Cestui que trust	The person who has the equitable right to property in India he is known as beneficiaries.
Consensus ad idem	Common consent necessary for a binding contract.
Contemporanea expositio est optima et fortissima lege	A contemporaneous exposition or language is the best and strongest in Law.
Corpus delicti	Body/gist of the offence.
Cy pres	As nearly as may be practicable.
Damnum sine injuria	Damage without injury.
De facto	In fact.
De jure	By right (opposed to *de facto*) in Law
Dehors	Outside; foreign to (French term).
De novo	To make something new; To alter.
Dies non	Day on which work is not performed.
Deceit	Anything intended to mislead another.
Del credre agent	Is a mercantile agent who in consideration of extra remuneration called a *del credre* commission undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts.
Delegate potestas non-potest delegari	A delegated power cannot be delegated further.
Delegatus non potest delegare	A delegate cannot delegate.
Dictum	Statement of law made by judge in the course of the decision but not necessary to the decision itself.
Dispono	Convey legally.
Ejusdem generis	Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.
Estoppel	Stopped from denying.

Ex parte	Proceedings in the absence of the other party.
Expressio unius est exclusio alterius	Express mention of one thing implies the exclusion of another or which is shortly put.
Ex turpi causa non oritur actio	No action arises from an illegal or immoral cause.
Fatum	Beyond human foresight.
Fait accompli	Things done and no longer worth arguing against; an accomplished act.
Factum probandum	Fact in issue which is to be proved.
Factum probans	Relevant fact.
Ferae naturae	Dangerous by nature.
Force majeure	Circumstance beyond one's control, irresistible force or compulsion
Generalia specialibus non derogant	General things do not derogate from special.
Habeas corpus	A writ to have the body to be brought up before the judge.
Ignorantia legis neminem excusat	Ignorance of law excuses no one.
Injuria sine damno	Injury without damage.
Interest reipublicae ut sit finis litium	State or public interest requires that there should be a limit to litigation.
Ipso facto	By the very nature of the case.
In promptu	In readiness.
In posse	In a state of possibility.
In limine	Initial stage; at the outset.
In lieu of	Instead of.
Inter alia	Among other things.
Inter se	Among themselves.
In specie	In kind.
Inter vivos	Between living persons.
Intra vires	Within the powers.
In personam	A proceeding in which relief is sought against a specific person.

Indicia	A symbol; token; mark.
Innuendo	Allusive remark.
Jus in personam	Right against a person.
Jus in rem	Right against the world at large.
Jus non scriptum	Unwritten law; Customary Law.
Jus scriptum	Written Law.
Lex Marcatoria	The law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the common law, afterwards became incorporated into it.
Lex fori	The law of the forum of court.
Lis	A suit cause of action.
Lis pendens	A pending suit.
Locus standi	Right of a party to an action to appear and be heard on the question before any tribunal.
Mala fide	In bad faith.
Mandamus	A writ of command issued by a Higher Court to a Lower Court/Government/ Public Authority.
Mens rea	Guilty mind.
Manesuetae natureae	Harmless by nature.
Mesne profits	The rents and profits which a trespasser has received/made during his occupation of premises.
Misnomer	A wrong name.
Mutatis-mutandis	With necessary changes in points of detail.
Noscitur a sociis	A word is known by its associates, one is known by his companions.
Obiter dictum	An incidental opinion by a judge which is not binding.
Onus Probandi	Burden of proof.
Pari passu	On equal footing or proportionately.
Per se	By itself taken alone.
Persona non-grata	Person not wanted.

Per incuriam	Through want of care; through inadvertance.
Prima facie	At first sight; on the face of it.
Profit a prendre	A right for a man in respect of his tenement.
Pro bono publico	For the public good.
Pro forma	As a matter of form.
Pro rata	In proportion.
Posteriori	From the consequences to the antecendent.
Puisne mortgage	Second mortgage.
Pari causa	Similar circumstances, with equal right.
Pari materia	Relating to same person or thing.
Qui facit per alium facit per se	He who acts through another is acting by himself.
Quo warranto	A writ calling upon one to show under what authority he holds or claims an office.
Quia timet	Protective justice for fear. It is an action brought to prevent a wrong that is apprehended.
Quid pro quo	Something for something.
Ratio decidendi	Principle or reason underlying a decision.
Res judicata	A decision once rendered by a competent court on a matter in issue between the parties after a full enquiry should not be permitted to be agitated again.
Res ipsa loquitur	The things speak for itself.
Respondent superior	Let the principal be liable.
Res sub judice	Matter under consideration.
Res gestae	Facts relevant to a case and admissible in evidence.
Rule nisi	A rule which will become imperative and final unless cause to be shown against it.
Scire facias	Your cause to know.
Status quo	The existing state of things at any given date.
Scientiet volenti non fit injuria	Injury is not done to one who knows and wills it.

Spes successionis	Chance of a person to succeed as heir on the death of another.
Supra	Above; this word occurring by itself in a book refers the reader to a previous part of the book.
Suppressio veri	Suppression of previous knowledge.
Sui juris	Of his own right.
Simpliciter	Simply; without any addition.
Scienter	Being aware of circumstances, the knowledge of which is necessary to make one liable, as applied to the keeper of a vicious dog, means no more than reasonable cause to apprehend that he might commit the injury complained of.
Sine qua non	An indispensable condition.
Situs	Position; situation; location.
Suo motu	On its own motion.
Stare decisis	Precedent. Literally let the decision stand
Sine die	Without a day being appointed.
Travaux preparatotries	Preparatory records.
Tortum	Civil wrong actionable without contract.
Uberrimae fide	Of utmost good faith.
Ubi jus ibi remedium	Where there is a right there is remedy.
Ultra vires	Beyond the scope, power or authority.
Ut lite pendente nihil innovertur	Nothing new to be introduced during ligitation.
Usufructuary	One who has the use and reaps the profits of property, but not ownership.
Ut res magis valeat quam pereat	The words of a statue must be construed so as to give a sensible or reasonable meaning to them.
Vis major	Act of God.
Vigilantibuset, non dormientibus, jura subveniunt	The laws help those who are vigilant and not those who are slumber or lazy.
Vice versa	The order being reversed; other way round.
Volenti non fit injuria	Damage suffered by consent gives no cause of action.

EXECUTIVE PROGRAMME

INDUSTRIAL, LABOUR AND GENERAL LAWS

EP-IL&GL

TEST PAPERS

A Guide to CS Students

To enable the students in achieving their goal to become successful professionals, Institute has prepared a booklet 'A Guide to CS Students" providing the subject specific guidance on different papers and subjects contained in the ICSI curriculum. The booklet is available on ICSI website and students may down load from http://www.icsi.edu/Portals/0/AGUIDETOCSSTUDENTS.pdf

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or the Committee concerned may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity to state his case, suspend or debar the person from appearing in any one or more examinations, cancel his examination result, or studentship registration, or debar him from future registration as a student, as the case may be.

Explanation – Misconduct for the purpose of this regulation shall mean and include behaviour in a disorderly manner in relation to the Institute or in or near an Examination premises/centre, breach of any regulation, condition, guideline or direction laid down by the Institute, malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with the writing of any examination conducted by the Institute".

EXECUTIVE PROGRAMME

INDUSTRIAL, LABOUR & GENERAL LAWS

PRACTICE TEST PAPER

(*This test paper is for practice and self study only and not to be sent to the Institute)*

Time allowed: 3 hours *Maximum marks : 100*

[Attempt all questions. Each question carries 1 mark. There is no negative mark for incorrect answers.]

PART-A

1. The factors which caused variation of minimum wages in India are –

   I. Prices of essential commodities

   II. Paying capacity

   III. Productivity

   IV. Differences in exchange rates.

   Select the correct answer form the codes given bellow:

   (A) I only

   (B) IV only

   (C) I, III and IV

   (D) I, II, III and IV

2. In order to have a uniform wage structure and to reduce the disparity in minimum wages across the country, the concept of National Floor Level Minimum Wage (NFLMW) was mooted. On the basis of increase in the Consumer Price Index (Industrial Worker), the Central Government has revised the NFLMW from time to time. The present NFLMW –

   (A) Rs.80/-

   (B) Rs.100/-

   (C) Rs.115/-

   (D) Rs 225/-.

3. Which of the following area, where central government is exclusively competent to enact legislations—

   (A) Trade unions; industrial and labour disputes.

   (B) Social security and social insurance; employment and unemployment.

   (C) Welfare of labour including conditions of work, provident funds, employers' lia-bility, workmen's compensation, invalidity and old age pensions and maternity benefits.

   (D) Regulation of labour and safety in mines and oilfields

4. A premises including precincts thereof is a 'factory' within the meaning of the Factories Act, 1948 wherein a manufacturing process is being carried on without the aid of power and where the number of workers working is –

   (A) 10 or more workers

(B) 20 or more workers

(C) 15 or more workers

(D) 50 or more workers.

5. The present wage ceiling per month for the purpose of the Employees' State Insurance Act, 1948 is –

(A) Rs. 10. 000/-

(B) Rs. 15, 000/-

(C) Rs. 18, 000/-

(D) Rs. 20,000/-

6. Which Schedule of the Factories Act, 1948 specifies Beriyllium poisoning, Anthrax and Arsenic poisoning or its sequelae etc, as notifiable diseases?

(A) First Schedule

(B) Second Schedule

(C) Third Schedule

(D) Fifth Schedule

7. The present wage ceiling per month for the purpose of the Payment of Wages Act, 1936 is —

(A) Rs. 10. 000/-

(B) Rs. 15, 000/-

(C) Rs. 18, 000/-

(D) Rs. 20,000/-

8. As per Payment of Wages Act, 1936, in railway factory or industrial or other establishment upon or in which less than one thousand persons are employed, wages shall be paid before the expiry of the —

(A) Seventh day of the month.

(B) Tenth Day of the months

(C) Third Day of the months

(D) None of the above

9. The Employees' State Insurance Act, 1948 protects the interest of workers in contingencies such as —

I. Sickness

II. Maternity,

III. Temporary or permanent physical disablement,

IV. Death due to employment injury resulting in loss of wages or earning capacity.

Select the correct answer form the codes given bellow:

(A) I only

(B) II only

(C) I, III and IV

(D) I, II, III and IV

10. The verification of membership of unions operating in establishment in central sphere is conducted by Chief Labour Commissioner office under Code of Discipline for the purpose of granting recognition as and when directed by the –

    (A) Ministry of Labour and Employment.

    (B) ESI Corporation

    (C) Labour Tribunal

    (D) Office Bearer of Trade Union

11. As per the provisions contained in Chapter VB of the Industrial Dispute Act, 1947 establishment employing _____ persons or more are required to seek prior permission of Appropriate Government before effecting lay-off, retrenchment and closure.

    (A) 50

    (B) 100

    (C) 250

    (D) 500

12. _____ have been set up under the provisions of Industrial Dispute Act, 1947 for adjudication of industrial disputes in an organisation.

    (A) Lok-Adalat

    (B) Industrial Tribunal

    (C) Labour Court

    (D) All of the above

13. Payment of Bonus Act, 1965 shall apply to every factory; and every other establishment in which _____ are employed on any day during an accounting year:

    (A) 20 or more persons

    (B) 25 or more persons

    (C) 30 or more persons

    (D) 50 or more persons

14. As per Payment of Bonus Act, 1965, employees drawing salary or wages not exceeding _____ per month in any industry are eligible for bonus.

    (A) Rs. 10, 000/-

    (B) Rs. 15, 000/-

    (C) Rs. 18, 000/-

    (D) Rs. 20,000/-

15. As per the Employees Pension Scheme, 1995, members on attaining the age of fifty-eight years and having rendered minimum of _____ years of contributory service qualify for superannuation fund.

    (A) 5

    (B) 10

(C) 15

(D) 20

16. The term 'same work or work of a similar nature" mentioned in the?

(A) Equal Remuneration Act, 1976

(B) Maternity Benefit Act, 1961

(C) Industrial Employment (Standing Orders) Act, 1946

(D) The Child Labour (Prohibition and Regulation) Act, 1986

(E) None of the above

17. Which of the following enactment stipulates for nursing break to a women employee?

(A) Equal Remuneration Act, 1976

(B) Maternity Benefit Act, 1961

(C) Apprentices Act, 1961

(D) The Child Labour (Prohibition and Regulation) Act, 1986

18. Award means an interim or a final determination of any industrial dispute are determined by:

(A) Labour Court

(B) Arbitrator

(C) Both (A) & (b)

(D) None of the above

19. Which of the following statement is true about the Constitutional Validity of section 10 of the Industrial Dispute Act, 1947?

(A) It is ultra-vires the Constitution

(B) It is intra-vires the Constitution

(C) Both (A) & (b)

(D) None of the above

20. The maximum amount of gratuity payable under the Payment of Gratuity Act, 1972 is –

(A) Rs. 5,00,000

(B) Rs. 7,50,000

(C) Rs. 10,50,000

(D) Rs. 10,00,000

21. Bonus must be paid to employees within a period of …….. months from the close of the accounting year.;

(A) 8

(B) 9

(C) 12

(D) None of the above.

22. The minimum number of members required for registration of a trade union is- .

    (A) 2

    (B) 3

    (C) 7

    (D) 10

23. The employer is required to send a report to the Commissioner for workmen's compensation within …… days of the death or serious injury of the workman.

    (A) 7

    (B) 8

    (C) 9

    (D) 10

24. As per Schedule to the Child Labour Prohibition and Regulation) Act, 1986, paper making is a.

    (A) Occupation

    (B) Process

    (C) Both (A) & (b)

    (D) None of the above

25. As per the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988, an employer of any small establishment or very small establishment required to furnishes a Core Return in:

    (A) Form A

    (B) Form B

    (C) Form C

    (D) Form D.

26. Contract Labour (Regulation and Abolition) Act, 1970 applies to every establishment/ contractor in which _____ workmen are employed or were employed on any day of the preceding twelve months as contract labour.

    (A) Ten or more

    (B) Fifteen

    (C) Twenty or more

    (D) Twenty-five or more

27. The text of the Certified Standing Orders shall be prominently posted by the employer in_____ and in the language understood by the majority of his workmen.

    (A) English

    (B) Hindi

    (C) Devanagiri Script

    (D) Language specified in 8th Schedule of the Constitution

28. _____ means any trade or occupation or any subject field in engineering or technology or any vocational course which the Central Government, after consultation with the Central Apprenticeship Council, may, by notification in the Official Gazette, specify as a designated trade for the purposes of Apprentices Act, 1961.

    (A) Designated trade

    (B) Apprenticeship training

    (C) Both (A) & (B)

    (D) None of the above.

29. As per Employees' Compensation Act, 1923, in case of permanent total disablement, the minimum amount of compensation payable to an employee is _____.

    (A) Rs. 90,000/-

    (B) Rs. 1, 00,000/-

    (C) Rs. 1, 20,000/-

    (D) Rs. 1, 40,000/-

30. The Contract Labour (Regulation and Abolition) Act, 1970 shall not apply to establishments in which work is of _____

    (A) An intermittent or casual nature

    (B) Permanent work

    (C) Both (A) & (B)

    (D) None of the above.

31. Violation of the Child Labour (Prohibition & Regulation) Act, 1986 shall be punishable with imprisonment for a term not be less than _____.

    (A) one month

    (B) three months

    (C) six months

    (D) one year.

32. Under the Apprentices Act, 1961, Apprentice entitled for casual leave for the maximum period of _____ days in a year.

    (A) 12

    (B) 10

    (C) 15

    (D) 45

33. The appropriate government shall revise the minimum rates of wages under the Minimum Wages Act, 1948 at least once in every _____

    (A) 2 years

    (B) 3 years

(C) 4 years

(D) 5 years.

34. Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 does not apply in relation to vacancies in any employment –

(A) in domestic service;

(B) to do unskilled office work;

(C) connected with the staff of Parliament

(D) All of the above.

35. The rate of employers' contributions in the ESI Scheme is _____% .

(A) 4.75,

(B) 1.65

(C) 1.75

(D) 5.75

36. The first Factories Act was enacted in

(A) 1881

(B) 1895

(C) 1897

(D) 1885

37. Who is an adult as per Factories Act, 1948?

(A) Who has completed 18 years of age

(B) Who is less than 18 years

(C) Who is more than 14 years

(D) Who is more than 15 years

38. A person who has ultimate control over the affairs of the factory under Factories Act, 1948 is called as_____

(A) Occupier

(B) Manager

(C) Chairman

(D) Managing Director.

39. The space for every worker employed in the Factory after the commencement of Factories Act, 1948 should be_____ Cubic Meters.

(A) 9.9

(B) 10.2

(C) 14.2

(D) 13.2

40. The provision for cooling water during hot weather should be made by the organization if it employees_____ or more employees.

    (A) 200

    (B) 250

    (C) 300

    (D) 150

41. Who is an Adolescent as per Factories Act, 1948?

    (A) Who has completed 17 years of age?

    (B) who is less than 18 years

    (C) who has completed 15 years but less than 18 years.

    (D) None of these

42. Which one of the following is not Welfare provision under Factories Act, 1948

    (A) Canteen

    (B) Crèches

    (C) Alcoholic Beverage

    (D) Drinking Water.

43. First Aid Boxes is to be provided for _____ of persons

    (A) 125

    (B) 135

    (C) 150

    (D) 160

44. Safety Officers are to be appointed if Organization is engaging_____ or more employees.

    (A) 1000

    (B) 2000

    (C) 500

    (D) 750

45. Canteen is to be provided if engaging Employees more than_____ persons.

    (A) 250

    (B) 230

    (C) 300

    (D) 275

46. Leave with wages is allowed for employees if they work for_____ days in a month.

    (A) 15

    (B) 25

(C) 20

(D) 28

47. Welfare Officers are to be appointed if Organization is engaging_____ or more employees.

(A) 500

(B) 250

(C) 600

(D) 750

48. The Ambulance Room is to be provided If engaging employees more than_____

(A) 400

(B) 350

(C) 500

(D) 450

49. Crèche is to be provided if_____ or More lady employees are engaged.

(A) 25

(B) 32

(C) 30

(D) 40

50. The term Sabbatical is connected with

(A) Paid leave for study

(B) Paternity leave

(C) Maternity leave

(D) Quarantine leave

51. Section 2 (K) of the Factories Act 1947 Says about

(A) Manufacturing Process

(B) Factory

(C) Worker

(D) None of these

52. If the factory employs more than 1000 Workers, they should appoint qualified ———————— to carry out the prescribed duties

(A) Safety Officer

(B) Welfare officer

(C) Security officer

(D) None of these

53. For contravention of provisions of Factories Act or Rules, the occupier shall Liable for punishment up to
    (A) 2 years or fine up to Rs.1,00,000 or both
    (B) 6 months or fine unto 10, 000 or both
    (C) 3 three years or fine 10, 000 or both
    (D) None of these
54. If any employee found violating the section 20 of Factories Act 1947 shall be fine up to
    (A) Rs. 10
    (B) Rs. 5
    (C) Rs. 15
    (D) Rs.20
55. Section 41- G of the Factories Act 1948 says about
    (A) Fencing of machineries
    (B) Facing of machineries
    (C) Work on near machinery in motion
    (D) Workers participation in safety mgt.
56. Who is responsible for payment to a person employed by him in a Factory under the Payment of wages Act 1936
    (A) Accounts Manager
    (B) HR manager
    (C) Manager
    (D) Owner
57. The occupier of a Factory has to submit the document on or before——— of every year to renewal of a license for a factory.
    (A) 31st October of every year.
    (B) 30th June of every year
    (C) 31st March of every year
    (D) 31st December of every year
58. The renewal application for a license submitted by a factory after December 31st of the every year shall pay the fine amount.
    (A) 10 % of the license fee
    (B) 20% of the license fee
    (C) 30 % of the license fee
    (D) none of these.
59. Where————————or more workers are employed in a factory, then there shall be a Safety Committee in the factory.
    (A) 100 or more workers

(B) 150 or more workers

(C) 200 or more workers

(D) 250 or more workers

60. A general manager of a factory can be appointed as an Inspector of factory under the Factories Act, 1948.

(A) True

(B) False

(C) Depend on the Organizational Structure of the company

(D) None of the above

61. The Factories employing more than 1000 workers are required to submit their plan for approval to

(A) Deputy Chief Inspector of Factories

(B) Joint Chief Inspector of Factories

(C) Chief Inspector of Factories

(D) Additional Chief Inspector of Factories.

62. A weekly holiday was introduced in the Factories for the first time in the year———.

(A) 1948

(B) 1931

(C) 1926

(D) 1923

63. Under the Section 41A of the Factories Act, the Site Appraisal Committee shall be constituted once in——— year under the chairmanship of Chief Inspector of Factories.

(A) Once in 5 Year

(B) Once in 2 Year

(C) Once in 3 Year

(D) Once in a Year.

64. To close down a factory, the occupier has to give——— days notice to the authorities.

(A) 30 Days

(B) 60 Days

(C) 90 Days

(D) 14 Days

65. The annual return under the Factories Act shall be submitted to Inspector of Factories on or before .....

(A) 31st January

(B) 31st December

(C) 30th April

(D) 31st March

66. The number of elected workers in the canteen managing committee shall not be more than——— or less than————

(A) more than 5 or less than 2

(B) more than 20 or less than 10

(C) more than 15 or less than 10

(D) more than 10 or less than 5

67. Designated trade defined under

(A) Equal Remuneration Act, 1976

(B) Contract Labour (Regulation and Abolition) Act, 1970

(C) Apprentices Act, 1961

(D) Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959

68. Loss of a hand and foot of an employee due to accident Employees' Compensation Act, 1923 treated as

(A) Permanent Total Disablement

(B) Permanent Partial Disablement

(C) Neither Permanent Total Disablement nor Partial Disablement

(D) None of the above

69. The body, by whatever name called, to which the management of the affairs of a trade union is entrusted under Trade Union Act, 1926 means:

(A) Executive

(B) Office Bearer

(C) Registered Office

(D) Trade Union

70. Every woman entitled to maternity benefit under the the Maternity Benefit Act, 1961 shall also be entitled to receive from her employer

(A) Medical bonus

(B) Leave for miscarriage

(C) Leave with wages for tubectomy operation

(D) All of the above

PART-B

71. Which of the following language not included in the 8th Schedule of the Indian Constitution?

(A) English

(B) Hindi

(C) Bengali

(D) Punjabi

72. The Indian Constitution refers to minorities based on;
    (A) Religion or Language
    (B) Region or Culture
    (C) State or Region
    (D) Culture or Cast
73. Who among the following hold(s) office during pleasure of the president of India?
    1. The Governor of the State
    2. The Chief Election Commissioner
    3. The Comptroller and Auditor General of India
    4. The Attorney General of India

    Select the correct answer form the codes given bellow:
    (A) 1 only
    (B) 1 and 4
    (C) 1, 3 and 4
    (D) 1, 2, 3 and 4
74. Preamble of the Constitution of Indian is ;
    (A) Part of the Constitution
    (B) Prelogue of the Constitution
    (C) Not a part of the Constitution
    (D) None of the above
75. Summary trials will apply to such offences not punishable with imprisonment for a term exceeding :
    (i) Two years
    (ii) One year
    (iii) Two months
    (iv) Three months
76. Indian Law of Torts is based on:
    (A) USA Law of Torts
    (B) Australia Law of Torts
    (C) England Law of Torts
    (D) Latin Law of Torts
77. Which of the following conditions are required for the principle of res judicata to suits as applied by courts vide section 11 of the Code of Civil Procedure, 1908 —
    (A) The matter directly and substantially arise in former and later suits
    (B) The former suit has not been decided
    (C) The said suit has not been heard and decided
    (D) All the above are required for the application of res judicata.

78. Under law of torts, exception to the strict liability is —

    (A) Inevitable accident

    (B) Inevitable mistake

    (C) Consent of the plaintiff

    (D) All of the above.

79. Jus scriptum means:

    (A) Written Law.

    (B) Unwritten law

    (C) Customary Law

    (D) None of the above

80. What remedies are available to a defendant, if an ex-parte decree is passed against him?

    (A) He may file an appeal against the ex-parte decree under Section 96 of the C.P.C.

    (B) He may file an application for review of the judgement.

    (C) He may apply for setting aside the ex-parte decree

    (D) All of the above

81. Principle of Estoppel is based on:

    (A) the maxim 'allegans contratia non est audiendus'

    (B) Rule of evidence

    (C) Both (A) & (B)

    (D) None of the above

82. Under the Limitation Act, 1963, a suit for compensation for wrongful seizure of movable property under legal process required to be filed within _____ year from the date of the seizure.

    (A) One year

    (B) Two years

    (C) Three years

    (D) Four years

83. Essential characteristic of an injunction are:

    1. It is a judicial process
    2. It is to restrain or to prevent
    3. Wrongful act
    4. Final Order of the Court

    Select the correct answer form the codes given bellow:

    (A) 1 and 4

    (B) 1 and 2

    (C) 1, 2 and 3

    (D) 1, 3 and 4

84. "Interpretation or construction is the process by which the Courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed" was said by:

(A) Salmond

(B) Maxwell

(C) Crawford

(D) Lone Fuller

85. Where life or liberty of a person is involved, the Public Information Officer (PIO) is bound to provide information under the Right to Information Act, 2005 within_____ :

(A) 30 days

(B) 35 days

(C) 24 hours

(D) 48 hours

86. As per the Limitation Act, 1963, the period of limitation relating to suits of immovable property to redeem or recover the possession of property mortgaged is —

(A) 3 years

(B) 12 years

(C) 20 years

(D) 30 years.

87. A person against whom a decree has been passed or an order capable of execution has been made is called .....

(A) Lender

(B) Judgement debtor

(C) Legal representative of the debtor

(D) Any of the above.

88. As per the Indian Evidence Act, 1872, a witness cannot be compelled to give evidence relating to —

(A) Official communications

(B) Affairs of the State

(C) Communications during marriage

(D) All the above.

89. …… is a written statement of the deponent on oath duly affirmed before any court or any Magistrate or any Oath Commissioner appointed by the Court or before the Notary Public.

(A) An affidavit

(B) Summon

(C) Warrant

(D) None of the above

90. Under the Specific Relief Act, 1963, recovering possession of property is a –

(A) Specific relief

(B) Preventive relief

(C) Either (a) or (b)

(D) None of the above.

91. Rule of ejusdem generis shall apply when –

(A) The statute contains an enumeration by specific words

(B) The members of the enumeration constitute a class

(C) The class is not exhausted by the enumeration

(D) All the above.

92. An arbitral award –

(A) must be in writing

(B) may be an oral decision

(C) either (A) or (B) depending upon the circumstances of the case

(D) must be in writing and made on a stamp paper of prescribed value.

93. Investigation and inquiry as per the Code of Criminal Procedure, 1973 are –

(A) The same

(B) Different

(C) Depend upon the circumstances

(D) None of the above.

94. Place of arbitration is important for the determination of the rules applicable to substance of dispute, and recourse against the ……. .

(A) Award

(B) Arbitration

(C) Conciliation

(D) Mediation

95. The term 'sufficient cause' has not been defined in the Limitation Act, 1963. It depends on the …… of each case.

(A) Circumstances

(B) History

(C) Time

(D) None of the above

96. In the interpretation of statutes, an important role is played as an internal aid by :

(A) Schedules

(B) Preamble

(C) Heading

(D) All the above.

97. Under the law of limitation, suits can be filed within three years in cases relating to :

    (A) Seamen's wages

    (B) Hire of animals

    (C) Price of goods sold and delivered

    (D) All the above.

98. The right of review has been conferred by the Code of Civil Procedure, 1908. It provides that any person considering himself aggrieved by a decree or order may apply for a review of judgement to the —

    (A) Appellate Court

    (B) High Court

    (C) District Court concerned

    (D) Court which passed the decree or order.

99. The term 'cognizance' means —

    (A) A crime

    (B) Custody without warrant

    (C) Arousing judicial notice

    (D) Custody with warrant.

100. Extension of time limit under the Limitation Act, 1963 on showing sufficient cause may be granted for —

    (A) Filing a suit

    (B) Filing an application for execution of a decree

    (C) An appeal in a labour court

    (D) None of the above.

ANSWERS

PART-A

1. D
2. C
3. D
4. D
5. B
6. C
7. C
8. A
9. D
10. A
11. B
12. C
13. A
14. A
15. B
16. A
17. B
18. C
19. B
20. D
21. A
22. C
23. A
24. B
25. A
26. C
27. A
28. A
29. A
30. A
31. B
32. A
33. D
34. D
35. A
36. A
37. A
38. A
39. C
40. B
41. C
42. C
43. C
44. A
45. A
46. C
47. A
48. C
49. C
50. A
51. A
52. A
53. A
54. B
55. D
56. C
57. A
58. B
59. D
60. B
61. C
62. D
63. A
64. B
65. A
66. A
67. C
68. A
69. A
70. D

PART B

71. A
72. A
73. D
74. A
75. A
76. C
77. A
78. C
79. A
80. A
81. C
82. A
83. C
84. A
85. D
86. D
87. B
88. D
89. A
90. A
91. D
92. D
93. B
94. A
95. A
96. D
97. D
98. D
99. C
100. D

SPECIMEN OMR ANSWER SHEET

It is for practice and self use only, Not to be sent to the Institute

Examination Session : D D M M Y Y Y Y

Question Paper Booklet No.

Use Blue/Black Ball Point Pen only

How to mark answers

CORRECT METHOD Ⓐ ● Ⓒ Ⓓ

WRONG METHOD Ⓧ Ⓥ ● Ⓓ

Ⓐ Ⓥ Ⓒ Ⓓ

Ⓧ Ⓑ Ⓒ Ⓓ

Question Booklet Code

Ⓐ Ⓑ Ⓒ Ⓓ

Subject Code

Centre Code

Roll Number

Instructions for Candidate

1. There is no negative marking.
2. Use Only Blue/Black Ball Point Pen to Darken the appropriate Circle.
3. Write and darken correct Question Booklet Code Viz. A or B or C or D which will be taken as final for evaluation. In case any candidate fills in this information wrongly, Institute will not take any responsibility for rectifying the mistake.
4. Mark your answer only in the appropriate space against the number corresponding to the question.
5. Please darken the complete circle.
6. Please do NOT make any stray marks on the answer sheet.
7. Rough work must NOT be done on the answer sheet.
8. Do NOT fold or damage the edges of the sheet.
9. Use of white fluid is prohibited.

Answers

1	Ⓐ	Ⓑ	Ⓒ	Ⓓ	51	Ⓐ	Ⓑ	Ⓒ	Ⓓ
2	Ⓐ	Ⓑ	Ⓒ	Ⓓ	52	Ⓐ	Ⓑ	Ⓒ	Ⓓ
3	Ⓐ	Ⓑ	Ⓒ	Ⓓ	53	Ⓐ	Ⓑ	Ⓒ	Ⓓ
4	Ⓐ	Ⓑ	Ⓒ	Ⓓ	54	Ⓐ	Ⓑ	Ⓒ	Ⓓ
5	Ⓐ	Ⓑ	Ⓒ	Ⓓ	55	Ⓐ	Ⓑ	Ⓒ	Ⓓ
6	Ⓐ	Ⓑ	Ⓒ	Ⓓ	56	Ⓐ	Ⓑ	Ⓒ	Ⓓ
7	Ⓐ	Ⓑ	Ⓒ	Ⓓ	57	Ⓐ	Ⓑ	Ⓒ	Ⓓ
8	Ⓐ	Ⓑ	Ⓒ	Ⓓ	58	Ⓐ	Ⓑ	Ⓒ	Ⓓ
9	Ⓐ	Ⓑ	Ⓒ	Ⓓ	59	Ⓐ	Ⓑ	Ⓒ	Ⓓ
10	Ⓐ	Ⓑ	Ⓒ	Ⓓ	60	Ⓐ	Ⓑ	Ⓒ	Ⓓ
11	Ⓐ	Ⓑ	Ⓒ	Ⓓ	61	Ⓐ	Ⓑ	Ⓒ	Ⓓ
12	Ⓐ	Ⓑ	Ⓒ	Ⓓ	62	Ⓐ	Ⓑ	Ⓒ	Ⓓ
13	Ⓐ	Ⓑ	Ⓒ	Ⓓ	63	Ⓐ	Ⓑ	Ⓒ	Ⓓ
14	Ⓐ	Ⓑ	Ⓒ	Ⓓ	64	Ⓐ	Ⓑ	Ⓒ	Ⓓ
15	Ⓐ	Ⓑ	Ⓒ	Ⓓ	65	Ⓐ	Ⓑ	Ⓒ	Ⓓ
16	Ⓐ	Ⓑ	Ⓒ	Ⓓ	66	Ⓐ	Ⓑ	Ⓒ	Ⓓ
17	Ⓐ	Ⓑ	Ⓒ	Ⓓ	67	Ⓐ	Ⓑ	Ⓒ	Ⓓ
18	Ⓐ	Ⓑ	Ⓒ	Ⓓ	68	Ⓐ	Ⓑ	Ⓒ	Ⓓ
19	Ⓐ	Ⓑ	Ⓒ	Ⓓ	69	Ⓐ	Ⓑ	Ⓒ	Ⓓ
20	Ⓐ	Ⓑ	Ⓒ	Ⓓ	70	Ⓐ	Ⓑ	Ⓒ	Ⓓ
21	Ⓐ	Ⓑ	Ⓒ	Ⓓ	71	Ⓐ	Ⓑ	Ⓒ	Ⓓ
22	Ⓐ	Ⓑ	Ⓒ	Ⓓ	72	Ⓐ	Ⓑ	Ⓒ	Ⓓ
23	Ⓐ	Ⓑ	Ⓒ	Ⓓ	73	Ⓐ	Ⓑ	Ⓒ	Ⓓ
24	Ⓐ	Ⓑ	Ⓒ	Ⓓ	74	Ⓐ	Ⓑ	Ⓒ	Ⓓ
25	Ⓐ	Ⓑ	Ⓒ	Ⓓ	75	Ⓐ	Ⓑ	Ⓒ	Ⓓ
26	Ⓐ	Ⓑ	Ⓒ	Ⓓ	76	Ⓐ	Ⓑ	Ⓒ	Ⓓ
27	Ⓐ	Ⓑ	Ⓒ	Ⓓ	77	Ⓐ	Ⓑ	Ⓒ	Ⓓ
28	Ⓐ	Ⓑ	Ⓒ	Ⓓ	78	Ⓐ	Ⓑ	Ⓒ	Ⓓ
29	Ⓐ	Ⓑ	Ⓒ	Ⓓ	79	Ⓐ	Ⓑ	Ⓒ	Ⓓ
30	Ⓐ	Ⓑ	Ⓒ	Ⓓ	80	Ⓐ	Ⓑ	Ⓒ	Ⓓ
31	Ⓐ	Ⓑ	Ⓒ	Ⓓ	81	Ⓐ	Ⓑ	Ⓒ	Ⓓ
32	Ⓐ	Ⓑ	Ⓒ	Ⓓ	82	Ⓐ	Ⓑ	Ⓒ	Ⓓ
33	Ⓐ	Ⓑ	Ⓒ	Ⓓ	83	Ⓐ	Ⓑ	Ⓒ	Ⓓ
34	Ⓐ	Ⓑ	Ⓒ	Ⓓ	84	Ⓐ	Ⓑ	Ⓒ	Ⓓ
35	Ⓐ	Ⓑ	Ⓒ	Ⓓ	85	Ⓐ	Ⓑ	Ⓒ	Ⓓ
36	Ⓐ	Ⓑ	Ⓒ	Ⓓ	86	Ⓐ	Ⓑ	Ⓒ	Ⓓ
37	Ⓐ	Ⓑ	Ⓒ	Ⓓ	87	Ⓐ	Ⓑ	Ⓒ	Ⓓ
38	Ⓐ	Ⓑ	Ⓒ	Ⓓ	88	Ⓐ	Ⓑ	Ⓒ	Ⓓ
39	Ⓐ	Ⓑ	Ⓒ	Ⓓ	89	Ⓐ	Ⓑ	Ⓒ	Ⓓ
40	Ⓐ	Ⓑ	Ⓒ	Ⓓ	90	Ⓐ	Ⓑ	Ⓒ	Ⓓ
41	Ⓐ	Ⓑ	Ⓒ	Ⓓ	91	Ⓐ	Ⓑ	Ⓒ	Ⓓ
42	Ⓐ	Ⓑ	Ⓒ	Ⓓ	92	Ⓐ	Ⓑ	Ⓒ	Ⓓ
43	Ⓐ	Ⓑ	Ⓒ	Ⓓ	93	Ⓐ	Ⓑ	Ⓒ	Ⓓ
44	Ⓐ	Ⓑ	Ⓒ	Ⓓ	94	Ⓐ	Ⓑ	Ⓒ	Ⓓ
45	Ⓐ	Ⓑ	Ⓒ	Ⓓ	95	Ⓐ	Ⓑ	Ⓒ	Ⓓ
46	Ⓐ	Ⓑ	Ⓒ	Ⓓ	96	Ⓐ	Ⓑ	Ⓒ	Ⓓ
47	Ⓐ	Ⓑ	Ⓒ	Ⓓ	97	Ⓐ	Ⓑ	Ⓒ	Ⓓ
48	Ⓐ	Ⓑ	Ⓒ	Ⓓ	98	Ⓐ	Ⓑ	Ⓒ	Ⓓ
49	Ⓐ	Ⓑ	Ⓒ	Ⓓ	99	Ⓐ	Ⓑ	Ⓒ	Ⓓ
50	Ⓐ	Ⓑ	Ⓒ	Ⓓ	100	Ⓐ	Ⓑ	Ⓒ	Ⓓ

Signature of Candidate with Pen

Name (As registered with ICSI)

Signature of Invigilator with Pen

OMR Sheet in the Examination may be different from this Specimen.