

CHAPTER – IV

ANALYSIS OF WORKMAN'S COMPENSATION ACT, 1923

The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves, rendered it advisable that they should be protected, as far as possible from hardship arising from accidents. After a detailed examination of the question by the Government of India, Local Governments were addressed in July 1921, and provisional views of the Government of India were published for general information. The advisability of legislation had been accepted by the great majority of Local Governments and of employers' and workers' associations and the Government of India believed that public opinion generally is in favour of legislation. In June, 1922 a committee was convened to consider the question. After considering the numerous replies and opinions received by the Government of India, the committee was unanimously in favour of legislation, and drew up detailed recommendations. On the recommendations of the committee the Workmen's Compensation Bill was introduced in the Legislature. The Workmen's Compensation Bill having been passed by the Legislature received its assent on the 5th March, 1923. It came into force on 1st day of July, 1924.¹

The Workmen's Compensation Act, 1923 is one of the earliest labour welfare and social security legislation enacted in India. It recognizes the fact that if a workman is a victim of accident or an occupational disease in course of his employment, he needs to be compensated. The Act does not apply to those workers who are insured under the Employees' State Insurance Act, 1948. Section 53 of the Employees' State Insurance Act provides that an insured person or his dependents shall not be entitled to receive or recover whether from the employer of the insured person or from any other person any compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise in respect of an employment injury sustained by the insured person as an employee under this Act.

Workers compensation in India may seem to be a headache for all types business in India, but it is a boon for both employees and employers. It gives

¹ The Workmen's Compensation Act, 1923 (8 of 1923), as amended by Act No. 22 of 1984.

employees several benefits, which helps in keeping up motivation and loyalty towards the company. This, in turn, leads to better performance as well as reduced employee attrition rates.

4.1 STATEMENT OF OBJECTS AND REASONS

The general principles of workmen's compensation command almost universal acceptance and India is now nearly alone among civilized countries in being without legislation embodying those principles. For a number of years the more generous employers have been in the habit of giving compensation voluntarily, but this practice is by no means general. The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible from hardship arising from accidents.

An additional advantage of legislation of this type is that by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects of such accidents as do occur. The benefits so conferred on the workman added to the increased sense² of security which he will enjoy, should render industrial life more attractive and thus increase the available supply of labour. At the same time, a corresponding increase in the efficiency of the average workman may be expected. A system of insurance would prevent time burden from pressing too heavily on any particular employer. An Act is to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident, whereas it is expedient to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident.

It is well-settled that the Act is a piece of social security and welfare legislation. Its dominant purpose is to protect the workman and, therefore, the provisions of the Act should not be interpreted too narrowly so as to debar the workman from compensation which the Parliament thought they ought to have. The

² Section 16(3), The Workmen's Compensation Occupational Diseases (Punjab) Rules, 1964.

intention of the Legislature was to make the employer an insurer of the workman responsible against the loss caused by the injuries or death, which ought to have happened, while the workman was engaged in his work³.

Workers compensation is the insurance coverage given by an employer to its employees. The benefits offered by a workers protection policy would depend on the type of policy chosen by the employer. The most common kind of benefit offered by workers compensation in India is medical benefits. Medical benefits are given for treating any medical problems that are associated with the job. These benefits extend for treating work-related accidents and illnesses, and insurance may be given by either the insurance company or the employer itself. Medical costs covered would include physical reinstatement, hospitalization, oral care, lab services, etc. Other benefits that may be added include temporary and permanent disability benefits and death benefits. A proper workers compensation policy is a huge benefit, even if you have only a small business. If you would like to find out more about small business workers compensation India and the laws that govern it, then read on.

4.2 DEFINITION AND DESCRIPTION OF LAWS THAT GOVERN WORKERS COMPENSATION IN INDIA

Workers compensation is defined as the amount payable by an employer towards employees for any injuries sustained during the course of their employment. It would cover medical or other expenses incurred by the employees of a company during the course of performing work-related activities. Workers protection is usually paid as a variable or base pay. If an employer chooses the base pay option, then employees would be compensated according to his or her role in the organization. Retirement benefits such as provident fund, superannuation, house rent allowances and provident funds would be proportional to the basic salary. If an employer chooses the variable pay option, then the workers compensation amount would be based according to the individual performance of that employee and how much they contribute to the company goals.

The laws for workers compensation in India are covered by the Workmen's Compensation Act, 1923.⁴ The Workmen's Compensation Act is administered on a

³ *Sunita Devi v. Autar Singh*, (2004) 104 FJK 1007 (Jhar).

state level by the Commissioners for Workmen's Compensation. This Act sets guidelines for employers to provide compensation for workers and their families in cases of employment-related injuries that result in death or disability. Workers who are covered under this act include those employed in plantations, mines and mechanically drive vehicles, construction works, factories and other areas where workers are in considerable physical danger. According to this act, the amount that is payable to the workers depends on certain factors like the nature of injury, age of the injured worker and his or her average monthly wage. The Workmen's Compensation Act also sets form minimum and maximum rates for workers compensation payable for death and disability. These minimum rates have been fixed over time with various amendments over the years. The most significant amendment, however, was the Workmen's Compensation (Amendment) Act, 2000. According to this amendment, workers or family members would receive compensation amounts at a greater rate if they died or were disable in the line of job. You can find several insurance companies in India that offer policies for big and small business workers compensation India. For example, United India Insurance Company offers Workmen's compensation insurance. As an employer, you can also get an insurance policy to cover your liabilities towards workers compensation in India. The premium payable would be based according to employee wages, and such policies are commonly known as employer's liability insurance policies. They indemnify the insured employer against liabilities towards workers compensation in India.

4.3 WORKMEN'S COMPENSATION ACT, 1923

This is a very old enactment for providing social security to workmen. Under this Act, a workman who dies or suffers disablement (partial or total) due to accident is entitled to get compensation from employer. Act does not apply where workman covered under Employees State Insurance Act⁵, since a workman is entitled to get compensation from ESIC, a workman covered under Employees State Insurance Act is not entitled to get compensation under Workmen's Compensation Act, as per section 53 of ESIC. However, Act is applicable to factories, mines, plantations,

⁴ For Statement of Objects and Reasons, see Gazette of India, 1922, p. 313, and for Report of Joint Committee, see Gazette of India, 1923, p. 37.

⁵ The Employees State Insurance Act, 1948.

transport establishments, construction work etc. who are not covered under Employees State Insurance Act.

4.4 OBJECTIVES

The Workmen's Compensation Act, 1923, aims to provide workmen and their dependents some relief in case of accidents, arising out of and in the course of employment and causing either death or disablement of workmen as a measure of relief and social security. It also provides payment by certain classes of employers to their workmen, compensation for injury by accident. Enables a workman to get compensation irrespective of his negligence. It lays down the various amounts payable in case of an accident, depending upon the type and extent of injury. The employer now knows the amount of compensation he has to pay and is saved of many uncertainties to which he was subject before the Act came into force. The legislation has given security to the worker and this has increased the availability of labour to some extent. The worker now secured, has become efficient.

4.5 SCOPE AND COVERAGE

The Act extends to the whole of India and it applies to railways and other transport establishments, factories establishments engaged in making, altering, repairing, adapting, transport or sale of any articles, mines, docks, establishments engaged in constructions, fire-brigade, plantations, oilfields and other employments listed in Schedule II of the Act. The Workmen's Compensation (Amendment) Act, 1995, has extended the scope of the Act to cover workers of newspaper establishments, drivers, cleaners, etc. working in connection with motor vehicle, workers employed by Indian companies abroad, persons engaged in spraying or dusting of insecticides or pesticides in agricultural operations, mechanized harvesting and thrashing, horticultural operations and doing other mechanical jobs.

4.6 DEFINITIONS UNDER WORKMEN'S COMPENSATION ACT

Dependant: Section 2(d) gives a list of persons who come within the category of "dependant" of a workman. In ordinary language the dependant of a person is one who lives on his earnings. Under Section 2 (d) there are *three* categories of dependants.⁶

⁶ Subs. by Act S of 1959, Sec. 2, for clause (d) (w.e.f. 1-6-1959).

1. The following relations are dependants, whether actually so or not-widow, minor legitimate son, unmarried legitimate daughter, a widowed mother.
2. The following relations come within the category if any were *wholly* dependant on the earnings of the deceased workman at the time of his death-a son or daughter who has attained the age of 18 years and who is infirm.
3. The following relations are dependants if they were *wholly* or partially so at the time of the workman's death-widower; parent, other than widowed mother, minor illegitimate son, unmarried illegitimate daughter or a daughter legitimate or illegitimate if married and a minor or if widowed and a minor, a minor brother or an unmarried sister or widowed sister if minor, a widowed daughter-in-law, a minor child from a predeceased son, a minor child from a predeceased daughter where no parent or child is alive, or a paternal grandparent if no parent of the workman is alive.

Whosoever is dependant "at the time of death" will get the Compensation. It has been held that the widow of deceased workman would not be disentitled to compensation on her remarriage as Subsequent event would not affect the right to claim Compensation.⁷

Minor: According to Section 2(1) (ff), minor means a person who has not attained the age of 18 years.⁸

Employer: Sec. 2(e) provides that the term Employer "includes" the following: (i) anybody of persons, whether incorporated or not (ii) any managing agent of an employer (iii) the legal representatives of a deceased employer, and (iv) any person to whom the services of a workman are temporarily lent or let out, while the workman is working for him. Thus the word 'employer' includes not only natural persons, and body of persons, but artificial and legal persons.⁹

Managing agent: According to Section 2 (1) (f), managing agent means any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business, but does not include an individual manager subordinate to an employer.

⁷ *Ravuri Kotaya v. Dosari Nagavardhanamm*, AIR 1962 A.P. 42.

⁸ Section 2(1) (ff), The Workmen's Compensation Act, 1923.

⁹ *Krishna Aiyer v. The Suprintending Engineer, P.W.D., Madras*, AIR 1949 Mad 427.

The Chief Engineer of the P.W.D. manages the department on behalf of the Government and therefore, he is managing agent of the Government¹⁰. There are two modes of Constituting a managing agent *i.e.* by appointment or by acting as a representative¹¹.

Qualified medical practitioner: According to Section 2(1) (i), Qualified medical practitioner means any person registered under any Act¹² providing for the maintenance of a register of medical practitioners, or, in any area where no such last mentioned Act is in force, any person declared by the State Government, by notification in the Official Gazette, to be a qualified medical practitioner for the purposes of this Act.

Seaman: Under Section 2(1) (K), Seaman means any person forming part of the crew of any¹³ ship, but does not include the master of [the]¹⁴ ship.

Partial Disablement: Disablement, in ordinary language, means loss of capacity to work or move. Such incapacity may be partial or total and accordingly there are two types of disablement, partial and total. In the Act both types of disablement are further subdivided into two classes, temporary and permanent. By Section 2 (g) Temporary Partial Disablement means such disablement as reduces the earning capacity of a workman in *any employment in which he was engaged* at the time of the accident, and Permanent Partial Disablement means such disablement as reduces his earning capacity *in every employment he was capable of undertaking* at that time.

In a case of Partial Disablement it is necessary that (a) there should be. an accident, (b) as a result of the accident the workman should suffer injury, (c) which should result in permanent disablement and (d) as a result whereof his earning capacity must have decreased permanently. In the proportion in which his earning capacity has been decreased permanently he is entitled to compensation. The medical evidence showing loss of physical capacity is a *relevant factor but it is certainly not the decisive factor as to the loss of earning capacity. It is the loss of earning capacity that has to be determined.* The type of disablement suffered is to be determined from the facts of the case. But it is provided that every injury specified in

¹⁰ *P. W. D. v. Kaunsa* 1966(12) F.L.R. 135.

¹¹ *Raghunath Sahai v. Sarup Singh*: 1961(3) F.L.R. 445.

¹² Central Act, Provincial Act or an Act of the Legislature of State.

¹³ The word “registered” omitted by Act 15 of 1933, sec. 2.

¹⁴ Subs. by Act 15 of 1933, sec. 2, for “any such”.

Part II of Schedule I¹⁵ to the Act shall be deemed to result in permanent partial disablement. The schedule also mentions the percentage loss of earning capacity which is to be presumed in each such case.

Total Disablement: According to Section 2(1) (g), total disablement means such disablement, whether of a temporary or permanent nature, as incapacitates a workman 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 the permanent total loss of the sight of both eyes or from any combination of injuries specified in Schedule I, where the aggregate percentage of the loss of earning capacity as specified in that schedule against those injuries, amounts to one hundred per cent. If a Carpenter's left hand above elbow is amputated as a result of a personal injury suffered in the course of his employment, it is total disablement because a carpenter cannot work with one hand¹⁶.

Wages: 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 of a workman towards any pension or provident fund or a sum 'paid to a workman to cover any special expenses entailed on him by the' nature of his employment.¹⁷ The definition of wages is important because an employee whose monthly wages exceed Rs. 1000 is not a workman for the purpose of the Act. The basis for calculation of compensation is monthly "wages".¹⁸

"Batta" paid to a workman per day to cover special expenses incurred by him due to nature of his employment does not amount to "wages" for the purposes of computing compensation.¹⁹

The definition of wages is not exhaustive. Wages include all payment which can be calculated in terms of money, *e.g.*, ordinary wages, extra payment for overtime, bonus and other inducements in the shape of payment for idle time, free meals, allowances for grain and clothing, free or cheap housing, etc., offered to the workman to enter into a contract with the employer. But travelling expenses or

¹⁵ Subs. by Act 64 of 1962, sec. 2, for "in Schedule I" (*w.e.f.* 1-2-1963).

¹⁶ *Pratap Narain Singh Deo v. Shrinivas* AIR 1976 S.C. 222.

¹⁷ Sec. 2 (m), The Workmen's Compensation Act, 1923.

¹⁸ *Zubeda Bano v. Maharashtra Road Transport Corporation*, 1990 LLR 287 (Bom).

¹⁹ *New India Assurance Co. Ltd., Hyderabad v. Kotam Appa Rao*, 1995 LLR 609 (AP).

employer's provident fund contributions are excluded. Local allowance to a workman for cost of living in a particular place forms part of wages. Share of profit or bonus under a profit sharing scheme is wages.

Dearness allowance is covered by definition of wages. It is attached to the wages. Free quarter, free water are benefits enjoyed by a worker and are, therefore "wages" within the meaning of the definition.²⁰ Bonus falls within the definition of wages.²¹ The observations of the Supreme Court,²² suggest that the claim for bonus is a matter of right and it is not dependent upon the will of the employer, overtime allowance are "wages" as was held in *Hindustan Aeronautics Ltd. v. Bone Jan.*²³

Monthly Wages: Section 5 of the Act defines "monthly wages" and states the methods of calculating it. "Monthly" wages means the amount of wages deemed to be payable for a month's service (whether the wages are payable by the month or by whatever other period or at piece rate). Monthly wages are calculated as follows:

- (a) Where the workman was in service for a continuous period of 12 months immediately preceding the accident, monthly wages shall be one-twelfth of the total wages due for the last twelve months of the period.
- (b) Where the whole of the period of continuous service was less than one month, monthly wages shall be the average monthly amount which during the twelve months immediately preceding the accident was being earned by a workman employed on the same work by the same employer, or if there was no workman so employed, by a workman employed on similar work in the same locality.
- (c) In other cases, including cases in which it is not possible for want of necessary information to calculate the monthly wages under clause (b) the monthly wages shall be thirty times the total wages earned in respect of the last continuous period or service immediately preceding the accident from the employer who is liable to pay compensation divided by the number of days comprising such period.

A period of service is deemed to be continuous which has not been interrupted by a period of absence exceeding 14 days.

²⁰ *Godawari Sugar Mills Ltd. v. Shakuntala*, AIR 1948 Bom. 158.

²¹ *Maharashtra Sugar Mills Ltd. v. Ashru Jaiwant Tribhuvan*, 67 Bom. L.R. 893 (H.C.); AIR 1966 Bom. 240.

²² *The Shri Meenakshi Mills Ltd. v. Their workmen*, Air 1958 S.C. 153.

²³ F.L.R. (1971) 22: p. 808.

Workman: The definition of the term workman is important because only a person coming within the definition is entitled to the reliefs provided by the Workmen's Compensation Act.²⁴

Examples: Persons employed otherwise than in a clerical capacity or in a railway to operate or maintain a lift or a vehicle propelled by steam, electricity or any mechanical power ; person employed otherwise than in a clerical capacity in premises where a manufacturing process is carried on; seamen in ships of a certain tonnage; persons employed in constructing or repairing building or electric fittings; persons employed in a circus or as a diver; etc.

From the definition of 'workman' given in section 2 (1) (n) of the Act, it is clear that for not treating a person as workman, two conditions are required to be proved namely that his employment is of casual nature and he is not employed for the purpose of employee's trade or business and the onus is on the employer to prove these conditions.²⁵

Subject to the exceptions noted below, the term workman means,

- (a) a railway servant as defined in Section 3 of the Indian Railways Act of 1890 who is *not* permanently employed in any administrative, district or sub-divisional office of a railway and *not* employed in any capacity as is specified in schedule II or
- (b) employed on monthly wages not exceeding Rs. 1000 in any such capacity as is mentioned in Schedule II²⁶. The contract of employment may be expressed or implied, oral or in writing. The Act provides that the following categories of persons are *not* to be deemed as workmen for the purposes of the Act:
 - (i) Persons working in the capacity of a member of the Armed Forces of the Indian Union. A Sub-Contractor is not a workman under the factory Owner.²⁷
 - (ii) A person whose employment is of a *casual nature* and who is employed otherwise than for the purposes of the employer's trade or business.

The exercise and performance of the powers and duties of a local authority or of any department acting on behalf of the Government shall, for the purposes of the Act, unless a contrary intention appears be deemed to be the trade or business of

²⁴ Section 2(n) read with Schedule II to the Act.

²⁵ *Mangala Ben v. Dalip Motwani*, 1998 LLR 656.

²⁶ The words "either by way of manual labour or" omitted by Act 15 of 1933, sec. 2.

²⁷ *The Malwa Sugar Factory, Dhuri v. Mst. Bhagwankaur & others* 1972 Lab. I.C. 986.

such authority or department. The State Government has been given power to add to the list in Schedule II any hazardous occupation or specified injuries in such an occupation. The addition may be made by notification in the official Gazette, with not less than 3 months' notice. There are legal decision regarding the question who is a workman. The general rule is that there must be the relationship of master and servant between the employer and the workman. Workman is a person whom the employer can command and control in the manner of performing the work. According to Wills, the following points are to be taken into consideration in determining the question whether a person is a workman: (a) the term of engagement (b) the payment of wages (c) the power of control over the work (d) the power of dismiss.

There must be a contract of employment between the workman and his employer, no matter if the Contract of employment was made before or after the passing of this Act or such contract is expressed as implied, oral or in writing. If a workman is casually employed for the purposes of the trade or business of the employer, he is a “workman”, within the definition. A lorry driver, cleaner, and ‘hamalis’ are workmen within the meaning of this Act²⁸. The mechanic for installing cotton ginning machine and cheff cutting machine is a “workman”. The mere fact that the employee sustained injuries three days after his employment would not be relevant or conclusive for holding that his employment was of a casual nature.²⁹

4.7 WHETHER CONTRACTOR IS A 'WORKMAN'

The broad distribution between a workman and an independent contractor lies in this that while the former agrees him to work, the latter agrees to get other persons to work. A person who agrees himself to work and does so work and is, therefore, a workman does not cease to be such by reason merely of the fact that he gets other persons also to work along with him and that those persons are controlled and paid by him. If a person agreed to work personally, then he is a workman and the fact that he takes assistance from other persons would not affect his status. Thus, where a person entered into a construction contract and agreed to work himself and also to employ his own labour, while construction material was to be supplied by the

²⁸ *The Oriental Fire and General Insurance Co. Ltd. v. Union of India* AIR 1975 AP 222.

²⁹ *Madan Mohan Varma v. MohanLal* 1982 Lab. IC, 1729: All.

owner, and the contractor died while working himself, it was held that the dependents of the deceased were entitled to compensation.

Salesman in arrack shop is a workman

A salesman in an arrack shop is a 'workman' in view of clause (iii) of Schedule II as defined under section 2 (1) (n) of the Act.³⁰

Workman does not include his heirs and legal representatives

The workman defined in section 2 (1) (n) of the Act does not include any of his heirs and legal representatives.³¹

4.8 DEFENCES OF THE EMPLOYER

Prior to the passing of this Act, the employer was liable to pay compensation only if he was guilty of negligence. Even in case of proved negligence, the employer could get rid of his liability by using any of the following *defenses*:

- 1. The Doctrine of Assumed Risks:** If the employee knew the nature of the risks he was undertaking when working in a factory, the employer had no liability for injuries. The court assumed in such case that the workman had voluntarily accepted the risks incidental to his work. The doctrine followed from the rule *Volenti Non Fit Injuria*, which means that one, who has volunteered to take a risk of injury, is not entitled to damages if injury actually occurs.
- 2. The Doctrine of Common Employment:** Under this rule, when several Persons work together for a common purpose and one of them is injured by some act or omission of another, the employer is not liable to pay compensation for the injury.
- 3. The Doctrine of Contributory Negligence:** Under this rule' a person is not entitled to damages *for* injury if he was himself guilty of negligence and such negligence contributed to the injury.

The three aforesaid defences and the rule *no negligence no liability* made It almost impossible for an employee to obtain relief in cases of accident. The Workmen's Compensation Act of 1923 radically changed the law. According to this Act, the employer is liable to pay compensation irrespective of negligence. The Act looks upon compensation as relief to the workman and not as damages payable by

³⁰ *Matheto Joseph v. johay Sunny*, 1995 LLR 390 (Ker).

³¹ *Sumuben v. Patel Industries*, 1994 LLR 338 (Guj).

the employer for a wrongful act or tort. Hence contributory negligence by the employee does not disentitle him from relief. For the same reason, it is not possible for the employer to plead to the defence of common employment or assumed risks for the purpose of avoiding liability. Thus the Act makes it possible for the workman to get compensation for injuries, unimpeded by the legal obstacles set up by the law of Torts.

4.9 TWO WAYS OF CLAIMING COMPENSATION

An injured workman may, if he wishes, file a civil suit for damages against the employer. Section 3(5),³² however, provides that if such a suit is filed, compensation cannot be claimed under the Act and if compensation has been claimed under the Act, or if an agreement has been entered into between the employer and the workman for the payment of compensation, no suit can be filed in the civil court. Thus the workman has to choose between two reliefs (i) civil suit for damages and (ii) claim for compensation under the Act. . He cannot have both.

In a civil suit for damages, it is open to the employer to plead all the defences provided by the law of Torts. Therefore, a civil suit is a risky procedure for a workman and is rarely adopted. The legal position of workmen has, however, been improved by two Acts, viz., The Indian Fatal Accidents Act of 1855 and the Employers' Liability Act of 1938.

4.10 EMPLOYER'S LIABILITY FOR COMPENSATION

An employer is liable to pay compensation if personal injury is caused to a workman by accident arising out of and in the course of his employment.³³ An employer is not liable in following cases:

Injury which does not result in total or partial disablement of workman for a period exceeding 3 days.³⁴

Injury caused by an accident directly attributable to workman under influence of drinks or drugs, willful disobedience of express orders for safety, willful removal of safety guard or device.³⁵ [Even if such case, if the workman dies or suffers permanent total disablement, the employer will be liable].

³²The Workmen's Compensation Act, 1923.

³³ section 3(1), Workmen's Compensation Act, 1923.

³⁴ Subs. by Act 8 of 1959, sec. 3, for "seven" (w.e.f. 1-6-1959).

³⁵ Subs. by Act 15 of 1933, sec. 3, for "injury to a workman resulting from"

4.11 CONNECTION BETWEEN ACCIDENT AND EMPLOYMENT

The deceased employee while travelling by public transport to his place of work met with a fatal accident. Nothing has been brought on record that the employee was not obliged to travel in any particular manner under the terms of the employment nor he was travelling in the official transport. Held, no casual connection between accident and employment could be established. Hence, the claimant is not entitled to any compensation.³⁶

Death during the course of employment

If the deceased employee met with his death while he was going to his place of work and the death has arisen during the course of employment, then the employer is liable for compensation.³⁷

Entitlement to claim compensation

Where death was accelerated on account of stress and strain of the working condition, it is not necessary that there should be a direct connection between the cause of death and the nature of duties. Even if a casual connection between the two can be shown then the dependants of the deceased would be entitled to claim compensation from the employer.³⁸

Injury sustained by a workman must be a physical injury on account of accident.³⁹

4.12 LIABILITY FOR COMPENSATION

In order to attract section 3 (1) of the Act, following three conditions must be fulfilled:

- (a) personal injury;
- (b) accident; and
- (c) arising out of and in the course of employment.⁴⁰

In order to succeed in an application for getting compensation under section 3 of the Act the following points are required to be established:

³⁶ *State Bank of India v. Vijay Laxmi*, 1998 LLR 319.

³⁷ *T.N.C.S. Corporation Ltd. v. s. Poomalai*, 1995 LLR 63 (Mad): 1995 I LLJ HC MDS (378).

³⁸ *Divisional Personal Officer, Western Railway v. Asluya Segam*, 1994 LLR 11 (Raj).

³⁹ *Leela Devi v. Ramlal Rahu*, 1990 LLR 213 (HP).

⁴⁰ *Kalayni P. v. Divisional Manager, Southern Railway (Personal Branch), Divisional Office, Madras*, 2004 LLR 207 (Mad HC): 2004 I LLJ 49.

- (1) that the accident must arise out of and in the course of the workman's employment;
- (2) there must be causal connection between the injury and the accident and the work done in the course of the employment;
- (3) the workman has to say that while doing a part of his duty or incidental thereto it has resulted into an accident.

It is necessary that the workman must be actually working at the time of the injury or the accident. Therefore, the three factors, that there must be injury, which must be caused in an accident, it must be caused in the course of and out of the employment must be established⁴¹.

Meaning of the expression “arising out of employment”

- (i) The expression “arising out of employment” means that there must be casual relationship between the accident and the employment. If the accident has occurred on account of the risk which is an incident of employment, it has to be held that the accident has arisen out of the employment⁴².
- (ii) The words “out of employment” is not limited to mere nature of the employment, but it (arising out of employment) applies to its nature, its conditions and obligations and its incidents. An accident which occurs on account of a risk, which is an incident of employment, then the claim for compensation can succeed provided the workman has not exposed himself to an added peril by his own imprudent act⁴³.

4.13 ASSESSMENT OF LOSS OF EARNING CAPACITY BY THE QUALIFIED MEDICAL PRACTITIONER

The incorporation of words “assessment of loss of earning capacity by the qualified medical practitioner” in section 4 (1) (c) (ii) have some purpose and it is not a case of ambiguity at all. So long as there is no provision which enables the Commissioner to determine the compensation ignoring the medical practitioner's report, there is no question of avoiding it by Commissioner unless he wants a second report from the Medical Board.⁴⁴

⁴¹ *Branch Manager, New India Assurance Co. Ltd. v. Siddappa, Major*, 2004 LLR 731 (Kant HC).

⁴² *Oriental Insurance Co. Ltd. v. Nanguli Singh*, 1995 LLJ HC ORS (298).

⁴³ *Executive Engineer 19th Div. R.C.P., Bikaner v. Heeraram*, 1982 (44) RR 179 Raj; 1980 Raj LW 412.

⁴⁴ *New India Assurance Co. Ltd. v. Sreedharan*, 1995 LLR 376 (Ker).

The interference by High Court with the order of recall by Commissioner for Workmen's Compensation on the ground of fraud by workman is unjustified both on fact and the law.⁴⁵

4.14 OCCUPATIONAL DISEASE

Section 3(2) of the Act recognizes that the workman employed in certain types of industries of occupation risk exposure to certain occupational disease peculiar to that employment. Employer is liable if a workman contracts any specified occupational disease, while he is in service of employer for at least 6 months.

Employer's fault is immaterial

The compensation is payable even when there was no fault of employer. In *New India Assurance Co. Ltd. v. Pennamna Kuriern*, the Court held that the claim of workmen for compensation under Motor Vehicle Act was rejected due to negligence of employee, but compensation was awarded under Workmen's Compensation Act on the principle of 'no fault'.

Compensation payable even if workman was careless

Compensation is payable even if it is found that the employee did not take proper precautions. An employee is not entitled to get compensation only if (a) he was drunk or had taken drugs (b) he willfully disobeyed orders in respect of safety (c) he willfully removed safety guards of machines. However, compensation cannot be denied on the ground that workman was negligent or careless.

Number of workmen employed is not criteria

In definition of 'workman' in schedule II, in most of the cases, number of workmen employed is not the criteria. In most of cases, employer will be liable even if just one workman is employed. The Act applies to a workshop even if it employs less than 20 workmen and is not a 'factory' under Factories Act.

Compensation payable under the Act

Section 4 of the Act prescribes the amount of compensation payable under the provisions of the Act. Amount of compensation payable to a workman depends on:

- 1) The nature of the injury caused by accident.
- 2) The monthly wages of the workman concerned, and
- 3) The relevant factor for working out lump-sum equivalent of compensation amount as specified in Schedule IV (as substituted by Amendment Act of 1984).

⁴⁵ *Roshan Deen v. Preeti Lot*, AIR 2002 SC 33.

There is no distinction between an adult and a minor worker with respect to the amount of compensation.

Section 4⁴⁶, provides for compensation for:

- 1) Death;
- 2) Permanent total disablement;
- 3) Permanent partial disablement; and
- 4) Temporary disablement – total or partial.

1) Compensation for Death: Where death results from an injury, the amount of compensation shall be equal to 50 percent of the monthly wages of the deceased workman multiplied by the relevant factor, or Rs. 85,000 whichever is more.

2) Compensation for Permanent Total Disablement: Where permanent total disablement results from an injury, the amount of compensation payable shall be equal to 60 percent of the monthly wages of the injured workman multiplied by the relevant factor, or Rs. 90,000, whichever is more.

3) Compensation for Permanent Partial Disablement:

i) In the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by the injury; and in other words, the percentage of compensation payable is proportionate to the loss of earning capacity permanently caused by the Scheduled injury. Thus, if the loss of earning capacity caused by an injury specified in Part II of Schedule I is 30 percent, the amount of compensation shall be 30 percent of compensation payable in case of permanent total disablement.

ii) In the case of an injury not specified in Schedule I such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

4) Compensation for Temporary Disablement: A half monthly payment of the sum whether total or partial results equivalent to 25% of monthly wages of the from the injury workman to be paid in the manner prescribed.

5) Compensation to be Paid when due and Penalty for Default: Section 4A provides for the payment of compensation and the penalty for default. It provides

⁴⁶ Substituted by the Amendment Act of 1984.

that compensation shall be paid as soon as it falls due. Section 4 mandates employer to pay compensation amount as soon as it falls due to victim or his or her legal heirs.

However, where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of workman to make any further claim.

Delayed payment or deposit of compensation entails interest as well as penalty

Delayed payment or deposit of compensation entails interest @ 6 % p.a. as well as penalty not exceeding 50% of the amount.⁴⁷

Payment of compensation either to the workman or to deposit it with the Commissioner

Section 4A (2) states that, in the first place, the employer has to accept the extent of his liability for payment of compensation and on that basis he has to make payment either to the workman or to deposit with the Commissioner. The requirement of this sub-section is payment to the workman and not to any other person including his heirs and legal representatives. It takes within its sweep the case where the workman has not breathed his last on account of the accident met with by him in the course of his employment.⁴⁸

Sub-section (3) of section 4A is a beneficial provision

It is apparent that sub-section (3) of section 4A is beneficial provision made for the benefit of the employee, having regard to the scheme of the Act, the provision for payment of interest and of penalty have been enacted with a view to deter the employer from taking pleas and avoiding payment of the compensation which becomes payable.⁴⁹

Sub-section (3) of section 4A is not applicable for fixing rate of interest in a claim under the Motor Vehicles Act

Section 4A(3) of the Workmen's Compensation Act is not applicable in the matter of fixing rate of interest in a claim under the Motor Vehicles Act.⁵⁰

⁴⁷ *Jayanti Lal & Co. v. Garesia Rajvirba*, (1992) 1 Lab 1C 1225 (Guj).

⁴⁸ *Sumuben v. Patel Industries*, 1994 LLR 338 (Guj).

⁴⁹ *Divisional Forest Officer v. Baijanti Bai*, 1995 1 LLJ MP (837).

⁵⁰ *Abati Bezbaruah v. Dy. Director General, GSI*, (2003) 3 SCC 148.

Liability of Principal Employer

Principal Employer is liable to pay the amount of compensation for the injury suffered by workman employed through contractor, if the accident arises as a result of accident arising out of and during the course of employment.

Payment of Compensation Only Through Commissioner

A Commissioner for Workmen's Compensation is appointed by Government. The compensation must be paid only through the Commissioner in case of death or total disablement. Any lump sum payment to workman under the Act must be made only through Commissioner. Direct payment to workman or his dependents is not recognized at all as compensation. However, in case of death, if employer has paid some compensation to dependent, that will be refunded to employer. Expenditure made by employer for medical treatment of workman is not considered for purposes of the compensation.

Employees Entitled

Every employee, including those employed through contractor, but excluding casual employees who is engaged for purpose of employer's business is eligible. The Act does not cover employees employed in clerical capacity. However, workmen in manufacturing processes, mines, ships, construction, tractor or mechanical appliances in agriculture, circus etc. and also drivers, watchmen etc. are covered. The compensation is payable if accident arises out of and during the cause of employment, and such accident causes either death or disablement. Injury arising out of and during the course of employment. The employee is eligible to get 'disablement benefit' only when the injury arises out of and during the course of employment. Similarly, a workman is entitled to get compensation only if accident is 'arising out of and during the course of employment'.

Employer Not To Pay Compensation Directly To the Deceased Heirs and Legal Representatives

No compensation has to be paid in respect of a workman whose injury has resulted in death except by deposit with the Commissioner and no such payment made directly by an employer shall be deemed to be a payment of compensation; the employer should not make any payment of compensation directly to the deceased's heirs and legal representatives or to any of them.⁵¹

⁵¹ *Sumuben v. Patel Industries*, 1994 LLR 338 (Guj).

4.15 DISTRIBUTION OF COMPENSATION: OBJECT

- (i) Section 8 of the Act is designed to protect the heirs and legal representatives of the deceased workman against any kind of exploitation or fraud likely to be practiced on them by or on behalf of the employer or any third party;⁵²
- (ii) Section 8 of the Act lays down the format for quantum of compensation payable by an employer when an employee meets with an accident. Its object is that unscrupulous employer should not take advantage of the ignorance of the employee in making payment of a paltry sum. Therefore the Act safeguards the interest of the workers and any private payment will not discharge the statutory obligation.⁵³

4.16 RULES REGARDING THE DISTRIBUTION OF COMPENSATION

Section 8 lays down the following rules regarding the distribution of compensation:

1. Compensation for death and lump sum payment due to a woman or to a person under a legal disability must be deposited with the Commissioner.
2. But in the case of a deceased workman, an employer may make to any dependent advances on account of compensation not exceeding an aggregate of one hundred rupees. So much of such aggregate as does not exceed the compensation payable to that dependent shall be deducted by the Commissioner from such compensation and repaid to the employer.
3. Any other sum amounting to not less than Rs. 10 which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.
4. The receipt of the Commissioner shall be sufficient discharging respect of any compensation deposited with him.
5. After the deposit of the compensation, the Commissioner shall deduct there from the actual cost of the- workman's funeral expenses to an amount not exceeding Rs. 50 and pay the' same to the person by whom the expenses were incurred.
6. The Commissioner may serve notices calling upon the dependents to appear before him for the purpose of determining the distribution of the compensation.

⁵² Ibid.

⁵³ *May-field Estate Nalhollah Nilgiris v. Krishan*, 1984 (48) FLR.

7. If the Commissioner is satisfied that no dependent exists, he shall repay the balance of the money to the employer.
8. The Commissioner shall on application by the employer, furnish a statement showing in detail all disbursements made.
9. The compensation money is to be distributed among the dependents in such proportions as the Commissioner thinks fit. The whole of it may be given to one person.
10. Except in the case of a woman or a person under a legal disability, the compensation money is to be paid to the person entitled thereto.
11. Money payable to a woman or a person under a legal disability may be invested or otherwise dealt with as the Commissioner thinks fit. Half-monthly payments payable to a person under a legal disability may be paid to a dependent of the workman or to any other person whom the Commissioner thinks best fitted to provide for the welfare of the workman.
12. The orders of the Commissioner regarding the distribution of compensation may be varied later if necessary.
13. Notice must be given to the parties affected.

4.17 DETERMINATION OF LOSS OF EARNING CAPACITY

Loss of earning capacity has to be determined by taking into account the diminution or destruction of physical capacity as disclosed by the medical evidence and then it has to be seen to what extent such diminution or destruction should reasonably be taken to have disabled the affected workman of his class ordinarily performs. The medical evidence as to physical capacity is an important factor in the assessment of loss of earning capacity, in the absence of medical evidence by doctors examining the claimant on behalf of either side, it is difficult to measure the physical disability of the claimant and thus also the diminution or otherwise of the earning capacity.⁵⁴

Medical Examination

It is the responsibility of the employer to get for medical examination of the workman receiving injuries in an accident.⁵⁵ No doubt section 11 provides that medical examination can be ordered by the Commissioner under the Workmen's

⁵⁴ *Bengal Coal Co, Ltd. v. Barium Gopel*, 1983 II LLJ 86 Cal.

⁵⁵ *Madhya Pradesh Mining Corporation v. Munda Kol*, 1990 I.L.K 115 (MP).

Compensation Act but it has been held that it is the responsibility of the employer to press for the medical examination of the workman.⁵⁶

4.18 SPECIAL PROVISIONS RELATING TO WORKMEN ABROAD OF COMPANIES AND MOTOR VEHICLES⁵⁷

- (i) in the case of workmen 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 workmen, subject to the following modifications, namely:—

- (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 workman 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 had 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 workman 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;

⁵⁶ *Madhya Pradesh Mining Corporation through Manager Mines, Satve v. Munda Kol Son of Kutti*, 1990 LLR 115 (MP).

⁵⁷ Ins. by Act 30 of 1995, sec. 8 (w.e.f. 15-9-1995).

(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.

Legislative Mandate Cannot Be Bypassed In Exercise of Supervisory and Extraordinary Jurisdiction under Article 227 of the Constitution

The Legislative mandate to protect rights of workman cannot be bypassed in exercise of supervisory and extraordinary jurisdiction under Article 227 of Constitution.⁵⁸

4.19 DOCTRINE OF NOTIONAL EXTENSION AND ADDED PERIL

The principal behind compensation to the injured worker under the Employee's State Insurance Act, 1948 and Workmen's Compensation Act, 1923 is considered according to the Doctrine of Notional Extension. This doctrine throws light on the course of employment of a worker.

Section 3(1) of the Workmen's Compensation Act, 1923 provides that the injury must be caused to workman by an accident arising out of and in the course of employment. Employment does not necessarily ends when the tool down signal is given or when the workman leaves the actual workshop. There is a notional extension at both the entry and exit time and space. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and egress to and from the place of employment. As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. It is now well-settled, however, that this is subject to the theory of notional extension of

⁵⁸ *Roshan Deen v. Preeti Lal*, (2002) 1 SCC 100.

the employer's premises so as to include an area which the workman passes and re-passes in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension.

Various judgments of Supreme Court and different High Courts have considered the concept of notional employment and said that if the employee dies due to accident while going to work place from residence or while returning from work place to residence, as an accident arising out of and during the course of employment and as such entitled for compensation in accordance with provisions of the Act.⁵⁹ Although this doctrine is not specifically enshrined under the Employees State Insurance Act or Workmen's Compensation Act. Notional extension is yet to be amended either in Employees State Insurance Act or Workmen's Compensation Act. Under Employees State Insurance, if any accident happens outside the premises within one kilometer radius from the work premises during reasonable office related hours it will be considered as employment injury. Same logic will be applicable for Workmen's Compensation Act, 1923.

If accident happens in the company provided vehicle, irrespective of the location and time it is employment injury for consideration under ESI and WC. The employee cannot claim wages for the loss of pay period. The employee can claim (or company can give) compensation under Workmen's Compensation Act registering a case with Labour Commissioner. Any payment made by the employer directly to the employee under any outside settlement will not be considered as a legal compensation. The payment has to be made before the labour commissioner and it's mandatory. If the employee is covered under ESI, the employee has to approach ESI for benefit - employer should have given accident notification to ESI. However, there is no proper test for application of this doctrine. The scope of such extension depends on the facts and circumstances of each case.

⁵⁹ Workmen's Compensation Act, 1923.

4.20 DOCTRINE OF ADDED PERIL

This doctrine is contrary to the doctrine of notion extension. While the doctrine of notional extension benefits to the employee, the doctrine of added peril is for the benefit to the employer. It contemplates that if a workman while doing his masters work undertakes to do something which he is not ordinarily called upon to do and which involves extra danger he cannot hold his master liable for the risk arising there from. The doctrine of added peril is dis-entitled an injured worker from compensation on the ground that he had taken a greater risk than he had been required by his employer to assume. Therefore, where the injury is not caused to workman by an accident arising out of and in the course of employment, he/she is not entitled to get any benefit or compensation under the Employee's State Insurance Act, 1948 and the Workmen's Compensation Act, 1923.

4.21 OTHER PROVISIONS REGARDING COMPENSATION

Payment of Compensation

Compensation shall be paid as soon as it falls due. Where the employer does not accept the liability to the extent claimed, he must make provisional payment based on the extent of liability which he accepts. This is without prejudice to the right of the workman to make any further claim. If an employer fails to pay the compensation within one month of the date on which it fell due, the Commissioner may direct the payment of simple interest thereon at 6%. *If* the Commissioner thinks that there is no justification for the delay, he may direct the payment of a further sum, not exceeding 50% of the sum due, by way of penalty⁶⁰.

Protection of Compensation

Save as provided by this Act, no lump sum or half-monthly payment payable under the Act shall in any way be capable of being assigned or charged or be liable to attachment or pass to any person other than' the workman by operation of law, nor shall any claim be set off against the same⁶¹. This section has been framed, to protect as far as possible the workman from moneylenders.

Notice and Claim

Section 10 of the Act provides that no claim or compensation shall be

⁶⁰ Section 4A, The Workmen's Compensation Act, 1923.

⁶¹ Section 9, The Workmen's Compensation Act, 1923.

entertained by the Commissioner unless notice of the accident has been given in the manner provided as soon as practicable. The required notice must be served upon the employer or upon any 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 workman was employed. The notice shall give the name and address of the person injured the cause of the injury and the date of the accident. The notice may be given by the injured workman or by anybody on his behalf. It may be served by delivering it or sending it by registered post.

The State Government may require that any prescribed class of employers shall keep at the place of employment a notice book (accessible to all workers or persons acting *bonafide* on their behalf) where the occurrence of accidents may be recorded. An entry in the notice book is sufficient notice. The want of notice or any defect or irregularity in it shall not be a bar to a claim in the following cases:

- (1) Where a workman dies or an accident occurring in the premises of the employer or while working under the control of the employer or of any person employed by him and the workman died on the premises or without leaving the vicinity of the premises.
- (2) If the employer or anyone of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed, had knowledge of the accident from any other source at or about the time when it occurred.
- (3) If the Commissioner is satisfied that the failure to give notice was due to sufficient cause.

A workman is bound to give notice of any accident which is not merely trivial, and it is not for him to decide whether it is likely to give rise to a claim for compensation. Section 10 also provides s that a claim for compensation must be preferred before the Commissioner within two years of the occurrence of the accident or the date of death as the case may be. In case the accident is the contracting of a disease the date of its occurrence is the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease. The Commissioner may entertain a claim filed after the prescribed time, if he is of opinion that the failure to file it within time, was due to.

Fatal Accident

Section 10 A provides that where a Commissioner receives information that a workman has died as a result of an accident arising out of and in course of his employment, he may send by registered post a notice to the workman'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 workman, and indicating whether in the opinion of the employer, he is or is not liable to deposit compensation on account of the death. If the employer is of opinion that he is liable, he shall make the deposit within thirty days of the service of the notice. If he is of opinion that he is not liable, he must state his grounds. In the latter case, the Commissioner, after such enquiry as he may think fit inform any of the dependents of the deceased workman that it is open to them to prefer a claim and may give them such further information as he may think fit. Section 10 B provides that 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, at any accident resulting in death or serious bodily injury, the person required to give the notice shall also send a report to the Commissioner. The report may be sent alternatively to any other authority prescribed by the State Government. The State government may extend the scope of the provision requiring reports of fatal accidents to any class of premises. But Sec. 10 B does not apply to factories to which the Employees' State Insurance Act applies.

Medical Examination

1. After a workman gives notice of an accident, the employer may, within three days of the service of the notice, offer to have him examined free of charge by a qualified medical practitioner.⁶²
2. Any workman in receipt of half-monthly payments may also be required to submit for examination from time to time.
3. The Examination must be in accordance with the rules framed for the purpose.
4. If the workman refuses, without sufficient cause, to submit to the examination or if he leave the vicinity of the place in which he was employed, his right to receive compensation shall be suspended during the continuance of the refusal or until his return to the vicinity and examination.
5. In case 1he workman, who refused medical examination, subsequently dies, the

⁶² Sec. 11, The Workmen's Compensation Act, 1923.

Commissioner has discretionary powers of direct payment of compensation to the dependents of the deceased workman.

6. The condition of an injured workman may be aggravated by refusal to submit to Medical examination or refusal to follow the instructions of the medical examiner or failure to be attended by or follow the instructions of a qualified medical practitioner.
7. In such a case he would get compensation, not for the aggravated injury, but for what the injury would have been had he been properly treated.

Remedies of Employer Against Stranger

Where a workman has recovered compensation in respect of any injury caused under circumstances creating a legal liability of some person over than the person by whom the compensation was paid and any person who has been called on to pay an indemnity under Section 12 shall be indemnified by the Person so liable to pay damages as aforesaid.⁶³

Insolvency of Employer

The liability to pay workmen's compensation can be insured against. If an employer who has entered into a contract of insurance for this purpose, becomes insolvent or enters into a scheme of composition or arrangement or (being a company) is wound up, the rights or the employer as against the insurer shall be transferred to and vest in. the workman. The liability to pay compensation to a workman is to be treated as a preferred debt under insolvency and winding" up for this purpose, the liability to pay half-monthly payments is to be taken as equivalent to the lump sum payment into which it can be commuted. This section does not apply where a company is wound up voluntarily merely for the purpose of reconstruction or amalgamation with another company.⁶⁴

4.22 APPOINTMENT OF COMMISSIONERS

The Act provides for appointment of Officers to be known as Commissioners of Workmen's Compensation. The Commissioners are to determine the liability of any person to pay compensation (including the question whether a person is or is not a workman) and the amount or duration of compensation (including any question as to the nature or extent of disablement). No civil court has jurisdiction to deal with

⁶³ Section 13, The Workmen's Compensation Act, 1923.

⁶⁴ Section 14, The Workmen's Compensation Act, 1923.

matters which are required to be dealt with by a Commissioner. Certain powers have been given to the Commissioners, *e.g.*, the power to call for further deposits. The Commissioner has the *powers* of a Civil Court.

4.23 POWERS OF COMMISSIONERS

The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence on oath (which such Commissioner is hereby empowered to impose) and of enforcing the attendance of witnesses and compelling the production of documents and material objects, ⁶⁵[and the Commissioner shall be deemed to be a Civil Court for all the purposes of ⁶⁶[section 195 and of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)]]].

Form of application

No application for settlement of any matter by a Commissioner shall be made, if the parties have been able to settle it by agreement. An application to the Commissioner⁶⁷ shall be made in the prescribed form according to the rules, and accompanied by a prescribed fee. The following particulars must be given namely- (a) concise statement of the circumstances and the relief claimed; (b) in case of claim for compensation against an employer, the date of service of notice of accident, with its due time of notice and the reason why notice was not given; (c) the names and addresses of the parties; and (d) except in case of application by dependent for compensation a concise statement of the matter on which, agreement has and of those on which agreement has not been come to. If the applicant is illiterate or for any reason is unable to furnish the required information, the application, if the applicant so desires, shall be prepared under the direction of the Commissioner⁶⁸.

Power to require from employers statements regarding fatal accidents⁶⁹

Where a Commissioner receives information from any source that a workman 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 workman's employer

⁶⁵ Added by Act 5 of 1929, sec. 5.

⁶⁶ Subs, by Act 30 of 1995, sec. 12, for "section 195 and of Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1890)" (*w.e.f.* 15-9-1995).

⁶⁷ Subs, by Act 15 of 1933, sec. 15, for "Where any such question has arisen, the application".

⁶⁸ Sec. 22, The Workmen's Compensation Act, 1923.

⁶⁹ Ins. by Act 15 of 1933, sec. 8.

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 workman, and indicating whether, in the opinion of the employer, he is or is not liable to deposit compensation on account of the death.

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. 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. Where the employer has so disclaimed liability, the Commissioner, after such inquiry as he may think fit, may inform any of the dependants of the deceased workman that it is open to the dependants to prefer a claim for compensation, and may give them such other further information as he may think fit.

Reports of fatal accidents and serious bodily injuries

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 on 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, Provided that where the State Government has so prescribed the person required to give the notice may instead of sending such report to the Commissioner send it to the authority to whom he is required to give the notice.

Award of compensation by Workmen's Compensation Commissioner

It is within the competence of the Workmen's Compensation Commissioner and he is also bound to award compensation as prescribed under Schedule 4 read with sec. 4 (1) (a) of the Act even if heirs of deceased workman claim less compensation than prescribed under the Act and the Schedule⁷⁰.

Principle of Waive or Acquiescence

Even if the claimant has made a claim of lesser amount than due, his right to claim or the power of the Commissioner to enhance the compensation is neither

⁷⁰ *Mostt. Chhatiya Devi Gowalin v. Rup Lal Sao*, 1978 Lab 1C 1368; 1978 BLR 502; 1978 ACJ 481; 1978 BJR 622.

waived nor curtailed since the principle of waive or acquiescence has no application to such type of cases.⁷¹

Refusal by Commissioner to Record Memorandum of Agreement

Where it appears to the Commissioner that an agreement as to the payment of lump sum whether by way of redemption of a half-monthly payment or otherwise, or an agreement as to the amount of compensation to a workman or a person under a legal disability ought not to be registered because of inadequacy of the sum or amount or by reason of the agreement having been obtained by fraud or undue influence or other improper means, the Commissioner may refuse to record the memorandum of the agreement. He may pass such order including an order as to any sum already paid under the agreement, as he thinks just in the circumstances⁷².

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 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 part of the record, Provided further that the evidence of any medical witness shall be taken down as nearly as may be word for word.

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.

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.

⁷¹ *Balavandra Patra v. Chief Engineer Orissa*, 1987 (I) LLN 634; *Mohd. Koya v. Balan*, 1987 (I) LLN 353.

⁷² *Amarshi jeram v. M/s. Hazarat and Co.*, AIR 1962 Guj 262: 1962 II LLJ 187.

Registration of agreements

Where the amount of any lump sum payable as compensation has been settled by agreement whether by way of redemption of a half-monthly payment or otherwise, or where any compensation has been so settled as being payable⁷³ to a woman, or a person under a legal disability⁷⁴, a memorandum thereof shall be sent by the employer to the Commissioner, who shall, on being satisfied as to its genuineness, record the memorandum in a register in the prescribed manner.

4.24 BHOPAL GAS TRAGEDY

One of the most tragic industrial disasters in the past few centuries, the Bhopal Gas Tragedy, was witnessed just after the midnight on 3rd of December, 1984 when a highly toxic gas Methyl Isocyanate (MIC) escaped from a tank killing many thousands and devastated the lives of tens of thousands of people.

One reason for injustice to the people is that tort law is undeveloped in India. There has been little doctrinal development and tort is little used and has remained largely outside the consciousness of Indian lawyers and public. There has been little connection between tort law and disasters in India. What typically happens in disasters is that the government announces that it is making *ex gratia* payments of a specified amount to the victims. The attributions of responsibility would be done by Governmental investigations, commission of inquiry or a criminal prosecution. Similarly, in Bhopal's case there has been insufficient inquiry and due to the inadequate compensation mechanisms the people were deprived of compensation for their damages. In comparison to the American system, claiming damages in tort law would have been much simpler and easier. If a disaster such as Bhopal had happened in the United States of America, it would have been much simpler to extract a substantial amount of money, and possibly resulting in Union Carbide's bankruptcy.

Night between 2nd and 3rd of December, 1984, Union Carbide Pesticide plant located in the northern part of Bhopal, Madhya Pradesh, India, leaked 40tons of a highly toxic gas known as Methyl Isocyanate (MIC) from the tank E610 killing thousands of people the very first day of the tragic event. Approximately 3828 died on the day of the disaster and over 30000 injured. This figure has increased unbelievably ever since. It cost several thousands of lives in the next few days and

⁷³ Subs. by Act 5 of 1929, sec. 6, for "to a person under a legal disability".

⁷⁴ The words "or to a dependant", rep. by Act 7 of 1924, sec. 3 and Sch. II.

led to long term medical effects such as eye problems, respiratory difficulties, immune and neurological disorders, cardiac failure's, and birth defects among children born to affected women.

As the night passed by, hundreds of American lawyers flocked to the rescue of the affected and resulted in claims filed over various US courts. The Indian government now declared itself as “parent spectra” by passing the Bhopal gas Disaster (processing of claims) Act 1985 to avoid such independent claims. The Indian Government made itself the sole Plaintiff for all the claims from Bhopal. On 8th of April, 1985, the Union of India filed a suit in the U. S. District Court of New York to claim for damages for the affected. Indian government's preference for an American Court was mainly due to the chances of heavier damages being awarded by an American jury, uncertainty about whether the multinational giant Union Carbide Corporation (UCC) would submit itself to the Indian jurisdiction of the Indian courts and also the lack of confidence in the Indian Judicial System. The appeal was dismissed in favor of UCC by Judge John F. Keenan on the grounds of *forum non conveniens* (inconvenient forum); pointing out that such a suit could be definitely more conveniently tried in Indian courts.

The primary base for Judge Keenan's estimation to lay out such dismissal was by the judgment made in Shriram Gas Leak case in New Delhi (also known as the Oleum Gas Leak case or M. C Mehta Vs. Union of India⁷⁵) just a year after Bhopal. The Supreme Court in Shriram case laid down the principle of “Absolute Liability” in preference to the rule of “Strict Liability” laid down in an English case, *Rylands v. Fletcher*⁷⁶. The court looked at the principles of liability and the compensations applicable to such cases and evolved new principles such as the “Absolute Liability”. This new principle laid down is that an enterprise engaged in a hazardous or inherently dangerous industry owes a strict, absolute and non-delegable duty and if any harm results on account of such activity, the enterprise is absolutely liable to compensation for such harm. As regard to compensation, the court said that the measure of compensation must be correlated to the magnitude and the capacity of the enterprise because such compensation must have a deterrent effect. A question to be asked from a law and economic perspective is whether Bhopal's burden of

⁷⁵ (1987) 1 ACC 157; 1987 1 SCC 395; AIR 1987 SC 965.

⁷⁶ (1868) LR 3 HL 330.

precaution exceeded the costs of injury that could be avoided. If this precaution to take such a burden exceeds the probability of the injury depending on the seriousness of the injury, that should have occurred, then the precaution is not cost justified.

Investigation of the Bhopal catastrophe showed that the responsibility of both the Government as well as the company went far too beyond the mere neglect of elementary safety measures. In an analysis in the British trade publication Project Management, a UN expert enumerated 16 factory shortcomings, 13 operational errors, 19 failures in communication and 26 shortcomings. A multi-billion dollar reputed company like UCC⁷⁷ shocked the society with the mistakes it committed. The UCC, the defendant in these suits, applied that the suits be dismissed on the grounds of *forum non conveniens* pointing out that the suits can be more conveniently tried in Indian Courts. The doctrine of *forum non conveniens*⁷⁸ allows a court to decline jurisdiction when there is an alternative more convenient forum which can give adequate and satisfactory relief. The cooling system which was supposed to keep the MIC at a temperature of zero degrees Celsius to prevent a reaction, had been turned off six months before the accident; same had been done for the burner in the tower for burning off the poison. Both steps had been taken with approval of the company headquarters. The scrubbers capable of neutralizing MIC exhaust fumes had been placed in passive mode two months before the disaster. This shows the lack of responsibility which should be compensated with larger amount of punitive damages than what was cheaply settled for as compensation.

Justice Bhagwati in the case of absolute liability said “the measure of compensation must be co-related to the magnitude and the capacity of the enterprise because such compensation should have a deterrent effect. The larger and more prosperous the enterprise the greater must be the amount payable by it.”

The Indian Government plays a multiple role in this disaster. It was encouraging transnational corporations like Carbide to set up in India hoping it would create jobs and draw new technology and industry into this rapidly developing country. The government is also responsible for overseeing the construction and management of the Carbide plant, ensuring that it takes good standards of health and

⁷⁷ UCC, (Union Carbide Corporation) , registered in USA.

⁷⁸ *Spiliada Maritime Corp. v. Consulex Ltd., The Spiliada*, (1986)3 All ER 843; (1987) AC 460; *De Dampierre v. De Dampierre*, (1987)2 All ER 1 (HL), 10.

safety. The government for its negligence in this case would have had to face a lot of litigation but it made itself the sole plaintiff in all litigation arising out of the gas disaster by passing the Bhopal Act. This created enormous conflict in interest but finally as a sovereign nation responsible for the welfare of its citizens; the government had and continues to have the duty of care for its victims.

4.25 CONCLUSION

Social justice theorists consider tort law as a device for correcting imbalances in political powers. In a corrupt society as India's, ruling political parties take advantage of their power and get all the necessary provisions for an enterprise like Carbide which would readily fund their party in return. As a result these interests of parties pursue self-interest at the expense of public by producing dangerous products and hiding critical information about their dangerousness. By aiding citizens with the power to sue corporations for misconduct outside of the legislative and regulatory process, tort law serves to correct this imbalance of power. Negligence is the failure to take adequate care and this care requires one to take cost-justified precautions. Precautions can be cost-justified whenever their cost is less than the costs of the harm risked; by not taking precautions, discounted by the probability of the harm's occurrence. Once this concept of negligence is understood as the failure to take the cost justified precautions we need to decide what decides imposing liability on those who have failed to take these precautions. The economic analysis primarily relies on this concept of negligence. In conclusion, I see a great level of negligence by Carbide and its failure to take cost justified precautions led to this disaster. Union Carbide should be held liable for all the damages to the people of Bhopal. The least the Indian Government can do for the people of Bhopal is to provide them with clean drinking water, clean up the hazardous chemicals from Bhopal and most important is to introduce an efficient compensating machinery to help the victims financially. Indian Government can also introduce an empowered national commission with the necessary authority and the funding for all the activities related to Bhopal. As far as my knowledge is considered this is already introduced but pending. In a democratic government like India this is a long process which requires clearance from the Cabinet. The most important pointer the government should take by this disaster is to

avoid such hazardous enterprises to enter into India and if it cannot, it should take every precaution to avoid such catastrophic disaster!

Life cannot be valued. Similarly no human being can put any monetary value of his limb or of any other human being. How does one assess the value of the loss of all faculties when some victim of an accident loses his mental faculties and lives in vegetative state. The courts can only grant compensation for the pecuniary and monetary loss caused and some other expenses, but no court can even attempt to grant compensation for loss of life or limb. Mainly pecuniary loss has to be assessed. Nominal damages for funeral expenses, loss of consortium and conventional damages. Long expectation of life is connected with earning capacity. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused.