June, 2011

Important Questions on Economic and Labour Laws

STUDY I

INDUSTRIES DEVELOPMENT AND REGULATION

Q1 Write note on delayed payments to micro and small enterprises.

Section 15 of THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 provides that where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. However, in no case the period agreed upon between the supplier and the buyer in writing should exceed forty-five days from the day of acceptance or the day of deemed acceptance. The day of acceptance means the day of the actual delivery of goods or the rendering of services; or where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier.

In case the buyer fails to make payment of the amount to the supplier, the buyer, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force should pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank .S. 16.

In the case of dispute regarding payment of any amount section 18 entitles any of the parties to the dispute to make a reference to the Micro and Small Enterprises Facilitation Council The Council on receipt of a reference either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation in terms of sections 65 to 81 of the Arbitration and Conciliation Act, 1996

In case the conciliation fails and stands terminated without any settlement between the parties, Section 18(3) requires the Facilitation Council either to itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration in terms of the provisions of Arbitration and Conciliation Act, 1996.

Section 18(4) vests the Facilitation Council or the centre providing alternate dispute resolution services with jurisdiction to act as an Arbitrator or Conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India. Sub-section (5) stipulates that every reference should be decided within a period of ninety days from the date of making of such a reference.

Section 19 stipulates that no application for setting aside any decree, award or other order made either by the Facilitation Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court. However, this section empowers the court pending disposal of the application to set aside the decree, award or order that such percentage of the amount deposited be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.

Q 2 What is Carry on Business Licence ?

Carry on Business (COB) Licence

A COB licence is required when a small scale unit exceeds the prescribed small scale limit of investment in plant and machinery by way of natural growth and continues to manufacture small scale reserved items(s). Also, if exemption from Industrial licensing granted for any item is withdrawn, the industrial undertakings manufacturing such item(s) require COB licence. The application for COB licence should be submitted in prescribed form to the SIA, Department of industrial Policy and Promotion, along with a crossed demand draft of Rs. 2500/- drawn in favour of the Pay & Accounts Officers, Department of industrial Development, Ministry of Industry, payable at the State Bank of India, Nirman Bhawan, New Delhi.

Q3 Differentiate between Industrial license and COB License

At present industrial licence for manufacturing is required only for the following:
i. Industries retained under compulsory licensing,
ii. Manufacture of items reserved for small scale sector by non-SSI units; and
iii. When the proposed location attracts locational restriction
iv. Industries reserved for the Public Sector

The following industries require compulsory industrial license:

- Distillation and brewing of alcoholic drinks
- Cigars and cigarettes of tobacco and manufactured tobacco substitutes
- Electronic Aerospace and defence equipment: all types
- Industrial explosives including detonating fuses, safety fuses gun powder, nitrocellulose and matches
- Hazardous chemicals
  (a) Hydrocyanic acid and its derivatives
  (b) Phosgene and its derivatives
  (c) Isocyanates and di-isocyanates of hydrocarbon, not elsewhere specified (example: Methyl Isocyanate);
- Drugs and Pharmaceuticals (according to modified Drug Policy issued in September, 1994 and subsequently amended in February, 1999)

COB Licence

Small- scale units by virtue of their natural growth may exceed the investment limit prescribed for small-scale units. In such cases these units need to obtain a Carry-on-Business (COB) License based on the best production in the preceding three years. No export obligation is fixed on the capacity for which the COB license is granted.
The application for COB licence should be submitted in revised form “EE”, along with a crossed demand draft of Rs.2500/-.
However, on further expansion of its capacity beyond the capacity included in COB license, the unit would need to obtain an industrial license.

Q4 Distinguish between Small scale Industrial undertaking and ancillary industrial undertaking.

- An industrial undertaking in which the investment in fixed assets in plant and machinery whether held on ownership terms on lease or on hire purchase does not exceed Rs 10 million.

  (Subject to the condition that the unit is not owned, controlled or subsidiary of any other industrial undertaking)

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where an industrial undertaking is a subsidiary of, or is owned or controlled by, any other industrial undertaking or undertakings in terms of sub-clauses (i); (ii); or (iii) and if the total investment in fixed assets in plant and machinery of the first mentioned industrial undertaking and the other industrial undertaking or undertakings clubbed together exceeds the limit of investment specified in paragraphs (1) or (2) of this notification as the case may be, none of these industrial undertakings shall be considered to be a small scale or ancillary industrial undertaking.

(a) In calculating the value of plant and machinery for the purposes of paragraphs (1) and (2) of this notification, the original price thereof, irrespective of whether the plant and machinery are new or second hand, shall be taken into account.

(b) In calculating the value of plant and machinery, the following shall be excluded, namely:-

i. the cost of equipments such as tools, jigs, dies, moulds and spare parts for maintenance and the cost of consumable stores;

ii. the cost of installation of plant and machinery;

iii. the cost of research and development equipment and pollution control equipment;

iv. the cost of generation sets and extra transformer installed by the undertaking as per the regulations of the State Electricity Board;

v. the bank charges and service charges paid to the National Small Industries Corporation or the State Small Industries Corporation;

vi. the cost involved in procurement or installation of cables, wiring, bus bars, electrical control panels (not those mounted on individual machines), oil circuit breakers or miniature circuit breakers which are necessarily to be used for providing electrical power to the plant and machinery or for safety measures;

vii. the cost of gas producer plants;

viii. transportation charges (excluding of sales tax and excise) for indigenous machinery from the place of manufacturing to the site of the factory;

ix. charges paid for technical know how for erection of plant and machinery;

x. cost of such storage tanks which store raw materials, finished products only and are not linked with the manufacturing process; and

xi. cost of fire fighting equipments.

(c) In the case of imported machinery, the following shall be included in calculating the value, namely:-

i. import duty (excluding miscellaneous expenses as transportation from the port to the site of the factory, demurrage paid at the port);

ii. the shipping charges;

iii. customs clearance charges; and

iv. sales tax.

Ancillary Industrial Undertakings

- The following requirements are to be complied with by an industrial undertaking for being regarded as ancillary industrial undertaking: -

An industrial undertaking which is engaged or is proposed to be engaged in the manufacture or production of parts, components, sub-assemblies, tooling or intermediates, or the rendering of services and the undertaking supplies or renders or proposes to supply or render not less than 50 per cent of its production or services, as the case may be, to one or more other industrial undertakings and whose investment in fixed assets in plant and machinery whether held on ownership terms or on lease or on hire-purchase, does not exceed Rs 10 million.

Q5 Write a note on Industrial Enterprise Memorandum

Industrial Entrepreneurs Memorandum (IEM) is a application for acknowledgment of unit.

The large scale industry having investment more than Rs. 10 crores in manufacturing sector and more thane Rs. 5 crores in service sector are primarily which is out side the purview of the licensing provisions and for the items (s) not exclusively reserved for manufacture by SSI sector have to file an application for Industrial Entrepreneurs Memorandum means IEM.

The promoter can filed IEM in following categories;
1.To set up a new industrial undertaking,
2. To effect substantial expansion of the industrial undertaking,
3. To manufactur a new article
4. To carry on business of existing SSI units after graduating into large scale industry

<u>Procedure</u>

The promoters has to make an application to Govt. of India in prescribed format alongwith Demand Draft of Rs. 1000/- in the name of **Secretariat for Industrial Assistance (SIA), New Delhi** in six copies

After filling IEM to Govt. of India. Govt. of India gives acknowledgment receipt to the applicant and inform to Directorate of Industries. After receipt of acknowledgment, applicant can take further initiative step to set up the unit.

STUDY II

FOREIGN TRADE POLICY AND PROCEDURES

Q 6 Explain the concept of SEZ

Special Economic Zones

The basic idea is to establish the zones as areas where export production could take place free from all roles and regulations governing imports and exports and to give them operational flexibility. Special Economic Zone (SEZ) is a specifically delineated duty free enclave, which shall be deemed to be a foreign territory for the purposes of trade operations and duties and tariffs.

The objective behind an SEZ is to enhance foreign investment, increase exports, create jobs and promote regional development. To put in the government's own words, the main objectives of the SEZs are:
(a) Generation of additional economic activity;
(b) Promotion of exports of goods and services;
(c) Promotion of investment from domestic and foreign sources;
(d) Creation of employment opportunities;
(e) Development of infrastructure facilities.

Q. 7. What is IEC Number?

Importer Exporter Code Number (IEC No)

The Foreign Trade Policy prohibits the export or import by any person without an Importer-Exporter Code (IEC) number unless specifically exempted. The IEC number is granted on application by the competent authority in accordance with the specified procedure.

An application for grant of IEC number is required to be made in the prescribed form alongwith specified documents, by the Registered/Head Office of the applicant to the Regional authority under whose jurisdiction, the Registered office in case of company and Head office in case of others, falls. In case of STP/ EHTP/ BTP units, the Regional Offices of the DGFT having jurisdiction over the district in which the Registered/ Head Office of the STP unit is located has been empowered to issue or amend the IECs. An IEC number allotted to an applicant remains valid for all its branches/divisions/ units/factories as indicated in the format of IEC

Q 8 what is the difference between SEZ and EPZ?

Ans. The major differences between Export Processing Zones (EPZs) and Special Economic Zones (SEZs) are (i) no minimum export performance stipulation for SEZ units, (ii) domestic sales on payment of fully duty allowed for SEZ units against a ceiling of 50% of exports for EPZ units (iii) retention of 100% export earnings by SEZ units in EEFC account; for EPZs this is restricted to 70% (iv) simplified custom and central excise procedure in SEZs.

While SEZs are generally open to all activities, EPZs appear to focus more on manufacturing and trading
SEZs offer more attractive tax benefits than EPZs
Companies in SEZs would have better control over foreign currency in relation to purchase of imported inputs. Companies in SEZ enjoy more leeway in meeting export performance requirements SEZs enjoy greater access to domestic market More flexibility in production and inventory planning for companies in SEZs.

STUDY III

TRADE, COMPETITION AND CONSUMER PROTECTION

Q9 Write notes on

Division of undertakings

By the MRTP (Amendment) Act, 1991, the provisions relating to Central Government's power to direct division of undertakings or severance of interconnection have been modified such that they apply to all undertakings (hitherto, they applied only to MRTP undertakings).

The amended . Section 27 provides that:

The Commission may

(i) Upon receiving a complaint of facts from any trade association or from any consumer or a registered consumers association whether such consumer is a member of that consumers association or not, or

(ii) Upon a reference made to it by the Central Government or a State Government, or

(iii) Upon its own knowledge or information,

if it is of opinion that the working of an undertaking is prejudicial to the public interest, or had led, or is leading, or is likely to lead, to the adoption of any monopolistic or restrictive trade practices, inquire as to whether it is expedient in the public interest to make an order

(a) for the division of any trade of the undertaking by the sale of any part of the undertaking or assets thereof, or

(b) for the division of any undertaking or inter-connected undertakings into such number of undertakings as the circumstances of the case may justify.

The MRTP Commission may, after such hearing as it thinks fit, report to the Central Government its opinion thereon and shall, where it is of opinion that division ought to be made, specify the manner of the division and compensation if any, payable for such division.

It may be noted that while requirement of prior approval of Central Government by certain undertaking before embarking upon expansion plans has been omitted, the Central Government continues to be vested with power to divide an undertaking.

Section 27(2) empowers the Central Government to direct, by an order in writing, the division of any trade of the undertaking or of the undertaking or inter-connected undertakings, if the MRTP Commission so recommends.

The order of the Central Government shall provide for all such matters as may be necessary to give effect to the division of any trade of the undertaking or of the undertaking or inter-connected undertakings, including (a) the transfer or vesting of property rights, liabilities or obligations; (b) the adjustment of contracts either by the discharge or reduction of any liability or obligation or otherwise; (c) the creation, allotment, surrender or cancellation of any shares, stock or securities; (d) the payment of compensation; (e) the formation or winding up of an undertaking or the amendment of the memorandum and articles of association or any other instrument regulating the business of any undertaking; (f) the extent to which and the circumstances in which provisions of the order affecting an undertaking may be altered by the undertaking and the registration thereof; (g) the continuation with such changes as may be necessary to any legal proceeding.

The Central Government has also been empowered to take certain interim measure to prohibit or restrict the doing of anything that might impede the process of division or making of the order for division and to impose on any person such obligations as to the carrying on of any activities or the safeguarding of any assets, as it may think fit. The Central Government can also appoint a person to supervise or conduct the activities of any trade or undertaking under consideration. An officer of a company who ceased to hold office as a consequence of the division of an undertaking or inter-connected undertakings is not entitled to claim compensation for such ceaser.

Provisions of Section 27 cannot be resorted to if the undertaking is indulging in any unfair trade practice because the provisions cover only monopolistic and restrictive trade practices. The Central Government has however been empowered under Section 27 to prohibit or restrict the doing of anything by any person which may impede the process of division. In this regard the Central Government is under obligation to form a subjective opinion on the basis of material available with it before making a reference to the Commission. While a reference to the Commission and inquiry by the Commission are prerequisites before any order can be passed by the Central Government, it is not obligatory for the Government to accept the recommendations of the Commission. The Commission's findings and the report is in the nature of an expert opinion to enable the Central Government to take a decision. Before making an order, the Central Government should give a reasonable opportunity of being heard to any person who is or may be in its opinion interested in the matter.

Study V

TRADE, COMPETITION AND CONSUMER PROTECTION
(THE COMPETITION ACT, 2002)

Q 10. Write note on competition policy

The raison detre of the Competition Act is to create an environment conducive to competition .The Competition Act has been designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objects are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade of other participants in the market, all against the backdrop of the economic development of the country.

Anti-Competitive Agreements

No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or likely to cause an appreciable adverse effect on competition within India .

Prohibition of abuse of dominant position

The concept of dominant undertaking prevailing in the MRTP Act has been discarded. Entity having dominant position is not per se bad or illegal, but abuse of such dominance is illegal . Dominance is said to be abused when there is an appreciable adverse effect on competition due to the actions of a dominant undertaking.

Regulation of Combination

The Act is also designed to regulate the operation and activities of Combinations, a term which contemplates acquisition, mergers, joint ventures, take overs or amalgamations. The Act mandates that No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Unfair Trade Practices

The provisions relating to the unfair trade practices as enumerated in Secs. 36 to 36E in the MRTP Act have been omitted and
pending complaints against such trade practices before the MRTP Commission have been transferred to relevant consumer forum after the commencement of the Act.

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Q 11 Completion Advocacy

Ans. Competition Commission shall also take up Competition Advocacy for creating awareness and imparting training on competition issues. Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. In this context, Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within sixty days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central Government/State Government in formulating such a policy. The Commission is also empowered to take suitable measures for the

(a) promotion of competition advocacy;
(b) creating awareness about the competition; and
(c) imparting training about competition issues.

The creating awareness about benefits of competition and imparting training in competition issues is expected to generate conducive environment to promote and foster competition, which is *sine-qua non* for accelerating economic growth.

Q 12 Objectives of competition Act, 2002

The Act seeks to provide, keeping in view the economic development the country, for the establishment of Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto besides repeal of MRTP Act and the dissolution of the MRTP Commission. Further, the Commission shall also take up Competition Advocacy for creating awareness and imparting training on competition issues in short h objective is to ensure that any barriers to trade and competition are removed and healthy competition is encouraged .

Q 13 Write note on . Anti Competitive Agreements

Ans. Anti Competitive Agreements

Section 3(1) of the Competition Act that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. Section 3(2) further declares that any anti competitive agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as 'void' if it contains anti-competitive clauses having appreciable adverse effect on competition. Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or associations of persons or person or enterprise or practice carried on, or decision taken by any association of enterprises or association of persons, including "cartels", engaged in identical or similar goods or services which –

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and

(d) directly or indirectly results in bid rigging or collusive bidding;

shall be presumed to have an appreciable adverse effect on the competition and onus to prove otherwise lies on the defendant.

Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including ––

(a) tie-in agreement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance;

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Q14. What are the functions of the Competition Commission of India ?

(1) Inquiry into certain agreements and dominant position of enterprise

The Commission may inquire into any alleged contravention of Section 3(1) or 4(1) on its own motion or on

(a)receipt of any information in such manner and accompanied by such fee, from any person, consumer or consumer association or trade association; or

(b)a reference made to it by the Central Government or State Government or a statutory authority.

(2) Inquiry into Combination by Commission

The Commission under Section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination either upon its own knowledge or information (*suo motu*) or upon receipt of notice under Section 6(2) relating to acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b) or merger or amalgamation referred to in Section 5(c) of the Act. It has also been provided that an enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the law has provided a time limit within which *suo moto* inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

(3) Inquiry into certain agreements and dominant position of enterprise

The Commission may inquire into any alleged contravention of Section 3(1) or 4(1) on its own motion or on (a)receipt of any information in such manner and accompanied by such fee, from any person, consumer or consumer association or trade association; or (b)a reference made to it by the Central Government or State Government or a statutory authority.

The Director General is not vested with a right to move an application for institution of an enquiry relating to anti-competitive agreements or abuse of dominance.

Section 19(3) provides that while determining whether an agreement has appreciable adverse effect on competition, the Commission shall give due regard to all or any of the following factors, namely -

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

The first three factors are anti-competitive, while the latter three factors deal with benign effects.

"Adverse appreciable affect on competition" is a key factor while enquiring into anti-competitive agreement. The touch stone of appreciable adverse effect on competition need not be proved while enquiring into abuse of dominance.

For the purpose of determining whether an enterprise enjoys dominant position or not under Section 4, the Commission shall have due regard to all or any of the following factors, namely –

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

The present law makes explicit the issues and the parameters which will be considered while deciding "abuse of dominance". The Commission shall have due regard to the, "relevant geographic market" and "relevant product market" for determining as to what constitutes a "relevant market".

(4) Inquiry into Combination by Commission

The Commission under Section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination either upon its own knowledge or information (*suo motu*) or upon receipt of notice under Section 6(2) relating to acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b) or merger or amalgamation referred to in Section 5(c) of the Act. It has also been provided that an enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the law has provided a time limit within which *suo moto* inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

(5) Competition Advocacy

Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. In this context, Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

Q 15 What is predatory pricing

The term "predatory price" has been defined as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors. Thus, the two conditions precedent to bring a case with the ambit of predatory pricing are:

(i) selling goods or provision of service at a price which is below its cost of production and

(ii) that practice is resorted to eliminate the competitors or to reduce competition.

STUDY VI

TRADE, COMPETITION AND CONSUMER PROTECTION

(CONSUMER PROTECTION – LAW AND PRACTICE)

Q 16 Outline the jurisdiction of various forums under Consumer protection Act, 1986

The Act provides for a three-tier quasi-judicial redressal machinery at the District, State and National level for redressal of consumer disputes and grievances. The District Forum has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, is less than Rs.20 lakhs, the State Commission for claims exceeding Rs. 20 lakhs but not exceeding Rs. 1 crore; and the National Commission for claims exceeding Rs.1 crore.

Q 17. Who is a consumer under Consumer Protection Act, 1986?

Consumer means any person who

(a) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(b) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose. [Section 2(1)(d)].

It has been clarified that the term commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment. Therefore, to be a 'consumer' under the Act:

(i) the goods or services must have been purchased or hired or availed of for consideration which has been paid in full or in part or under any system of deferred payment, i.e. in respect of hire purchase transactions;

(ii) goods purchased should not be meant for re-sale or for a commercial purpose.

(iii) in addition to the purchaser(s) of goods, or hirer(s) or users of services, any beneficiary of such services, using the goods/services with the approval of the purchaser or hirer or user would also be deemed a 'consumer under the Act.

. In *Laxmi Engineering Works* v. *P.S.G. Industrial Institute,* Supreme Court held that the explanation to Section 2(1)(d) is clarificatory in nature. It observed that whether the purpose for which a person has bought goods is a 'commercial purpose' is always a question of facts and to be decided in the facts and circumstances of each case. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self employment such purchaser of goods would yet be a consumer. The Supreme Court further observed that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.

Q18 Write a note on deficiency in service

Under Section 2(1)(g) of the Consumer Protection Act, 1986 it is defined to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.
1. *Maina Devi Bairlaia* v. *Life Insurance Corporation of India* [decided by the National Commission on 11.5.1993].undue delay in settling insurance claim was held to be deficiency in service
2. *Ajmer Singh, Cotton and General Mills* v. *Manager, United IndiaInsurance Co. and Others Held* that, two months time could be taken as reasonableafter the surveyor's report. Nine months to one year was toolong a period and, therefore, amounted to deficiency of service.
3. *Telecom District Manager* v. *Umesh Chandra Patnaikit wasHeld*, in the absence of any provision in the Telegraph Act, onthe basis of the rules requiring that telephone bills should be dispatched by registered post, the Department could not be said to have committed any deficiency in service when the bills were dispatched by ordinary post.
4*Skypack* Couriers Pvt. Ltd. v. CERS and*Others* (1992), compensation of Rs.1,000 was awarded for nondeliveryof consignment containing the complainant's visas,air tickets, passport, etc.
5 In *Special Machines* v. *Punjab National Bank* mere failure to provide nursing and financing facilities to asmall-scale industry which consequently became sick wasnot held to be a deficiency in service

Q19. Write a note on the following:

(i) Complainant
(ii) Power of redressal agencies
(iii) Limitation period for filing of complaint.

Ans. (I)

Complainant means

(i) a consumer, or
(ii) any voluntary consumer association registered under the Companies Act, 1956, or under any other law for the time being in force; or

(iii) the Central Government or any State Government, who or which makes a complaint; or

(iv) one or more consumers where there are numerous consumers having the same interest;

(v) in case of death of a consumer, his legal heir or representative;

who or which makes a complaint

(II) Powers of the Redressal Agencies

The District Forum, State Commission and the National Commission have been vested with the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters:

(i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document or other material object producible as evidence;

(iii) the reception of evidence on affidavits;

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness; and

(vi) any other matter which may be prescribed

(III **)** **Limitation Period for Filing of Complaint**

Section 24A provides that the District Forum, the State Commission, or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However, where the complainant satisfies the Forum/Commission as the case may be, that he had sufficient cause for not filing the complaint within two years, such complaint may be entertained by it after recording the reasons for condoning the delay.

STUDY VII

REGULATION OF PRODUCTION, SUPPLY AND DISTRIBUTION OF ESSENTIAL COMMODITIES

Q20 Distinguish between seizure and confiscation under Essential Commodities Act

Ans. The Act uses the expressions 'confiscation' and 'seizure' in Section 6A and under this section a commodity which has been seized in pursuance of an order under Section 3 can be confiscated under the circumstances mentioned in Section 6A.

. The expression 'seize' means to take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing. The person from whom anything is seized loses, from the moment of seizure, the right or power to control or regulate the use of that thing. The dictionary meaning of the word 'seize' means to lay hold of suddenly or forcible, to take hold of, to reach and grasp, to clutch'. It also means 'to take possession of or appropriate in order tosubject to the force or operation of a warrant, order of Court or other legal process'.
Code of Criminal Procedure shows that the term seizure had been used therein in connection with the taking of actual physical possession of moveable property.

'Confiscation' according to Wharton's Law Lexicon, is condemnation and adjudication of property to the public treasury as of goods seized under the Customs Act. Confiscation, according to Strouds judicial Dictionary, must be an act done in some way on the part of the Government of the country where it takes place and in some way beneficial to that Government, though the proceeds may not strictly speaking be brought into its treasury. In *State of Kerala* v. *Mathai* (1961 K.L.T. 169) it Was pointed out that confiscation is not to be considered part of the sentence for an offence but is only a mode by which Courts can dispose of property which comes before it in criminal trials.

That being the general distinction between confiscation and seizure, in the context of the Essential Commodities Act, it could be seen that an essential commodity which has been seized, could be confiscated. Therefore, confiscation is an action posterior to the seizure of the essential commodity. A commodity that has not been seized cannot be confiscated. Seizure itself does not imply confiscation. The seizure should have been made by virtue of an order passed under Section 3 of the Act. Clause (j) of Section 3 empowers the Government to make an order for seizure of any essential commodity if an order made by the Central Government controlling production, supply, distribution etc. of essential commodities has been or is about to be contravened. Therefore, any contravention or intended contravention of an order passed by the Government under the Act may lead to seizure, and under the circumstances mentioned in Section 6A such seized commodity could be confiscated.

STUDY VIII

STANDARDS OF WEIGHTS AND MEASURES

Q 21 Write a note on Principal Display Panel

'Principal display panel', in relation to a package, has been defined under section 2(w) to mean the total surface area of the package where the information is required to be given. For this purpose, all the information could be groped together and given at one place; or the pre-printed information could be grouped together and given in one place and on line information grouped together in other place.

Rule 7 specifies the area, size, letter, etc. of the principal display panel in different cases. This rule specifies that in the case of a package having a capacity of five cubic centimeters or less, the principal display panel may be card or tape affixed firmly to the package or container or bearing the required information.

Rule 7(4) provides that the height of any numeral in the declaration on the principal display package should not be less than that specified in Table I to this rule.
The height of letters in the declaration should not be less than 1mm height. When blown, formed, moulded, embossed or perforated the height of letters should not be less than 2mm. However, the width of the letter or numeral should not be less than one third of its heights, except in the cases of numerals/letters specified under the rule.

Q 22. What is legal metrology?

Legal Metrology

Legal Metrology is the name by which the law relating to weights and measures is known in international parlance.. In most of the countries, however, legal metrology encompasses measurements which have a bearing on the protection of individuals from the financial and environmental points of view.
Legal metrology can be defined as that part of metrology which deals with units of measurement, methods of measurement and measuring instruments in so far as they concern statutory, technical and legal requirements which have the ultimate object of assuring public guarantee from the point of view of security and of appropriate accuracy of measurements

STUDY IX

MANAGEMENT OF FOREIGN EXCHANGE TRANSACTIONS

Q 23 Distinguish between current account transactions and capital account transactions.

Current Account Transaction

The term current account transaction has been defined to mean a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Under the Act freedom has been granted for selling and drawing of foreign exchange to or from an authorized person for undertaking current account transactions. However, the Central Government has been vested with powers in consultation with Reserve Bank to impose reasonable restrictions on current account. The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000 dealing with various aspects of current account transactions

Capital Account Transaction

'Capital account transaction' has been defined to mean any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.

Q.24 State the rules for Prohibition of drawl of foreign exchange

Prohibition on drawl of foreign exchange for certain transactions

Rule 3 prohibits the drawl of foreign exchange for the purposes of transactions specified in the Schedule I or a travel to Nepal and/or Bhutan or a transaction with a person resident in Nepal or Bhutan. However, in the case of transaction with a person resident in Nepal and Bhutan, the prohibition may be exempted by RBI subject to such terms and conditions as it may consider necessary. Schedule I to the Rules enumerate the situations in which the drawal of foreign exchange is prohibited. These are as follows:

(a) Remittance out of lottery winnings;

(b) Remittance of income from racing/riding etc. or any other hobby;

(c) Remittance for purchase of lottery tickets, banned/prescribed magazine, football pools, sweep stakes etc.

(d) Payment of commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries abroad of Indian Companies.

(e) Payment of Commission on exports under Rupee State Credit Route, except commission upto 10% of invoice value of exports of tea and tobacco.

(f) Payment related to 'call back service' of telephone.

(g) Remittance of interest income on funds held in Non-resident Special Rupee Scheme Account.

Q 25. Write notes on (a) Person Resident in India under FEMA (b) foreign security (c) Powers of reserve Bank to compound contraventions of foreign exchange transactions

Ans.

(a) Person Resident in India under FEMA

The expression 'Person resident of India has been defined to mean a person residing in India for more than 182 days during the course of the preceding financial year. However, two categories of persons are excluded from the purview of definition.

The first category includes any person who has gone out of India or who stays outside India for or on taking up employment outside India, or for carrying on outside India a business or vocation. The definition also includes person who stays outside India for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period. The second category of persons which have been excluded from the definition of person resident in India include:

A person who has come to stay or stays in India, in either case otherwise than—

(i) for or taking up employment in India; or

(ii) for carrying on in India a business or vocation in India; or

(iii) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

(b) **Foreign Security**

The term Foreign Security has been defined to mean any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency but where redemption or any form of return such as interest or dividend is payable in Indian currency.

(c) Powers of Reserve Bank to Compound Contravention

Rule 4 of Foreign Exchange (Compounding Proceedings) Rules, 2000 empowers the RBI to compound only quantifiable contravention committed by any person of the provisions of Section 7 or Section 8 or Section 9, or Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 in the following manner:

(a) where the sum involved in such contravention is five lakhs rupees or below, by the Assistant General Manager of the Reserve Bank of India;

(b) where the sum involved in such contravention is more than rupees five lakhs but less than rupees twenty lakhs by the Deputy General Manager of Reserve Bank of India;

(c) where the sum involved in the contravention is rupees twenty lakhs or more but less than rupees fifty lakhs by the General Manager of Reserve Bank of India; and

(d) the sum involved in such contravention is rupees fifty lakhs or more, by the Chief General Manager of the Reserve Bank of India.

Q26 Distinguish between Person and Authorised person under FEMA

Section 3 of FEMA prohibits any person other than an authorised person from dealing in or transferring any foreign exchange or foreign security to any person or making any payment to or for the credit of any person resident outside India in any manner or receiving otherwise through an authorised person any payment by order or on behalf of any person resident outside India in any manner except as provided in the Act, rules or regulations made thereunder or with the general or special permission of the Reserve Bank of India.

Section 3(d) prohibits a person to enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person, except as otherwise provided in the Act and rules or regulations made thereunder. For this purpose, financial transaction has been defined to mean making any payment to or for the credit of any person or receiving any payment for, by order or on behalf of any person. Financial transaction also include drawing, issuing or negotiating any bill of exchange or promissory note or transferring any security or acknowledging any debt.

Q. 27. Jolly has been found guilty of contravention of Section 4 of FEMA Explain if Jolly can get any immunity or relief from the consequences of said contravention?

Ans. Yes. Section 9 contains exemptions from the application of provisions relating to holding of foreign currency and realisation and repatriation in certain circumstances, as provided under Sections 4 and 8 of the Act respectively. Accordingly, possession of foreign currency or coins by any person or class of persons, as the Reserve Bank may specify is not prohibited. A person or class of persons may hold and operate foreign currency account within the prescribed limits as may be specified by the Reserve Bank. Foreign exchange acquired or received before 8th July, 1947, or any income arising or accruing thereon which is held outside India, in pursuance of a general or special permission of RBI, is also exempted.

Provisions relating to holding of foreign exchange, realisation and repatriation of foreign exchange are not applicable to person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from certain persons mentioned above and any income arising there from. Reserve Bank may also specify the exemption limit up to which the foreign exchange earned by a person from employment, business, trade, vocation services, honorarium, gifts, inheritance or other legitimate means may be possessed. Reserve Bank may also exempt such other receipts as it thinks fit.

Q 28. Issue of shares under ESOP to employees outside India

Ans. **Issue of shares under Employees Stock Option Scheme**

Listed Indian companies are allowed to issue shares under the Employees Stock Option Scheme (ESOPs), to its employees or employees of its joint venture or wholly owned subsidiary abroad, other than citizens of Pakistan. Shares under ESOPs can be issued directly or through a Trust subject to the condition that:

(i) The scheme has been drawn in terms of relevant regulations issued by the Securities and Exchange Board of India; and

(ii) The face value of the shares to be allotted under the scheme to the non-resident employees does not exceed 5 per cent of the paid-up capital of the issuing company.

If the company is not listed, it has to follow the provisions of the Companies Act, 1956. The Indian company can issue ESOPs to employees who are resident outside India, other than citizens of Pakistan and Bangladesh. The issuing company is required to report the details of such issues to the concerned Regional Office of the Reserve Bank, within 30 days from the date of issue of shares under ESOPs.

Q 29. Advise on the following with reference to FEMA Regulations

(i) Rekha an NRI is interested in buying the shares of an Indian Company

(ii) XYZ Limited a company incorporated in India issues shares to non residents under ESOP

(iii) Vaibhav an Indian citizen is seen to possess foreign coins

(iv) Maha Lakshmi Bank Limited wants to remit sale proceeds to the seller who is resident outside India

(v) Remo intends to export goods on deferred payment basis

Ans (i) Permissible provided it does not cross sectoral limits

(ii) Permissible subject to the condition that:

(a)The scheme has been drawn in terms of relevant regulations issued by the Securities and Exchange Board of India; and

(b)The face value of the shares to be allotted under the scheme to the non-resident employees does not exceed 5 per cent of the paid-up capital of the issuing company.

(iii) Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 provides no limits for possession and retention of foreign coins

(iv) Yes if Maha Lakshmi Bank Limited is authorized dealer

(v) Regulation 18 deals with project exports and provides that where the export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the Working Group, or the Exim Bank or Authorised dealer, as the case may be, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank from time to time.

Q 30. ABC Limited wants to make direct investment in joint venture in England.

Ans. In terms of section 6(3) of FEMA, the Direct investments by residents in Joint Venture (JV) and Wholly Owned Subsidiary (WOS) has been allowed

Q 31. Damodaran a person resident outside India wants wants to open a branch office of his company in India

Ans. A person who is resident outside India and permitted by the Reserve Bank to establish a branch or a liaison office in India may undertake or carry on any specified activity

Q32. Rohit, a person resident in India inherits immovable property from a person who was resident outside India

Ans. A person resident in India may acquire immovable property outside India by way of inheritance from a person who was resident outside India.

Q33 Mention the rules under FEMA regarding acquisition of immoveable property outside India

Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2000 prescribes the rules regarding the acquisition and transfer of immovable property outside India. It provides that no person resident in India shall acquire or transfer any immovable property situated outside India without special or general permission of Reserve Bank. It further prescribes that a resident in India may acquire immovable property outside India out of Resident Foreign Currency Account maintained in accordance with Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2000.

STUDY X

(FOREIGN CONTRIBUTIONS AND HOSPITALITY–LAW AND PRACTICE)

Q 34. Restrictions on acceptance of foreign hospitality.

Ans. No member of a Legislation, office-bearer of a political party, [Judge, Government servant] or employee of any corporation shall, while visiting any country or territory outside India, accept, except with the prior permission of the Central Government, any foreign hospitality: Provided that it shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India, but, where such foreign hospitality has been received, the person receiving such hospitality shall give, within one month from the date of receipt of such hospitality an intimation to the Central Government as to the receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received by him

Q35 Power of Central Government to prohibit receipt of foreign contributions

Ans.Power of the Central Government to Prohibit Receipt of Foreign Contribution

Section 10 deals with the powers of Central Government to prohibit the receipt of foreign contribution, etc. in certain cases. Accordingly, the Central Government has been empowered to

(a) prohibit any association not specified in Section 4 or any person from accepting any foreign contribution;

(b) require any association specified in Section 6(1), to obtain prior permission of the Central Government before accepting any foreign contribution;

(c) require any person or class of persons or any association, not being an association specified in Section 6, to furnish intimation within such time and in such manner as may be prescribed as to the amount of any foreign contribution received by such person or class of persons or association, as the case may be, and the source from which and the manner in which such contribution was received and the purpose for which and the manner in which such foreign contribution was utilised;

(d) require any person or class of persons, not specified in Section 9, to obtain prior permission of the Central Government before accepting any foreign hospitality;

(e) require any person or class of persons, not specified in Section 9 to furnish intimation, within such time and in such manner as may be prescribed as to the receipt of any foreign hospitality, the source from which and the manner in which such hospitality was received.

However, the Central Goverment is not authorised to make any such prohibition, unless it is satisfied that the acceptance of foreign contribution/foreign hospitality by such association or person or class of persons, as the case may be, is likely to affect prejudicially the sovereignty and integrity of India; or the public interest; or freedom or fairness of election to any Legislature; or friendly relations with any foreign Slate; or harmony between religious, racial, linguistic or regional groups, castes or communities.

Any order under Section 10 is required to be passed on objective material and facts disclosed to the concerned association. A show-cause notice and an opportunity of explaining alleged objective material must be given to the person concerned. The final order must disclose that the satisfaction is founded on objective material and must furnish proper reasons for non- acceptance of the explanation of the person/association against which the order is to be passed. [Association of Voluntary Agencies for *Rural Development* v. *Union of India* (1991) 72 Comp. Cas. 369].

STUDY XI

POLLUTION CONTROL AND ENVIRONMENTAL PROTECTION

Q 36 State the provisions of Environmental (Protection) Act, relating to offences by companies

Ans. Offences by Companies

Section 16 deals with offences by the companies and provides that where any offence has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, and the company itself, shall be deemed to be guilty of the offence and shall be liable to be proceeded against. When an offence has been committed by a company, and it is proved that the offence was committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officers shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly

Q 37 Write note on regulatory framework for Environmental Protection

Environment (Protection) Act, 1986 (EPA)

This Act is an umbrella legislation designed to provide a framework for the co-ordination of central and state authorities established under the Water (Prevention and Control) Act, 1974 and Air (Prevention and Control) Act, 1981. Under this Act, the central government is empowered to take measures necessary to protect and improve the quality of the environment by setting standards for emissions and discharges; regulating the location of industries; management of hazardous wastes, and protection of public health and welfare.

From time to time the central government issues notifications under the EPA for the protection of ecologically-sensitive areas or issues guidelines for matters under the EPA.

The Environment (Protection) Rules, 1986

These rules lay down the procedures for setting standards of emission or discharge of environmental pollutants. The Rules prescribe the parameters for the Central Government, under which it can issue orders of prohibition and restrictions on the location and operation of industries in different areas. The Rules lay down the procedure for taking samples, serving notice, submitting samples for analysis and laboratory reports. The functions of the laboratories are also described under the Rules along with the qualifications of the concerned analysts.

The National Environment Appellate Authority Act, 1997

This Act provided for the establishment of a National Environment Appellate Authority to hear appeals with respect to restriction of areas in which any industry operation or process or class of industries, operations or processes could not carry out or would be allowed to carry out subject to certain safeguards under the Environment (Protection) Act, 1986.

Public Liability Insurance Act (PLIA), 1991

The Act covers accidents involving hazardous substances and insurance coverage for these. Where death or injury results from an accident, this Act makes the owner liable to provide relief as is specified in the Schedule of the Act. The PLIA was amended in 1992, and the Central Government was authorized to establish the Environmental Relief Fund, for making relief payments.

National Environment Tribunal Act, 1995

The Act provided strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to give relief and compensation for damages to persons, property and the environment and for the matters connected therewith or incidental thereto

Q 38 Write note on impact noise pollution on the health of the people

Noise health effects are the health consequences of elevated sound levels. Elevated workplace or other noise can cause hearing impairment, hypertension, ischemic heart disease, annoyance and sleep disturbance. Although some presbycusis may occur naturally with age, in many developed nations the cumulative impact of noise is sufficient to impair the hearing of a large fraction of the population over the course of a lifetime. Noise exposure has also been known to induce tinnitus, hypertension, vasoconstriction and other cardiovascular impacts .Beyond these effects, elevated noise levels can create stress, increase workplace accident rates, and stimulate aggression and other anti-social behaviors. The most significant causes are vehicle and aircraft noise, prolonged exposure to loud music, and industrial noise. Road traffic causes almost 80% of the noise annoyances

Q 39 Write a note on liability for compensation under National Environment Tribunal Act, 1995.

Compensation for Death, Injury to a Person and Damage to Property and Environment

Section 3(1) states that where death of or injury to any person (other than workman) or damage to any property or environment has resulted from an accident, the owner shall be liable to pay compensation for such death, injury or damage.

A claimant in any claim for compensation, is under no obligation to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person. In this context the term injury includes, permanent total or permanent partial disability or sickness resulting out of an accident.

Sub-section (3) provides that if the death, injury or damage caused by an accident cannot be attributed to any individual activity but is the combined and resultant effect of several such activities, operations and processes, the Tribunal may apportion the liability for compensation amongst those responsible for such activities, operations and processes on an equitable basis

Q 40. Environmental clearances for industrial projects

Ans. Rule 5 of the Environment Protection Rules, 1986, read with Section 3(1) and Section 3(2) empowers the Central Government to prohibit or restrict the location of industries and carrying on of processes and operations in different areas, after taking into consideration factors, such as standards for quality of environment in an area, the maximum allowable limits of concentration of environmental pollutants (including noise) for an area, the likely emission or discharge from the proposed industry, process or operation, the topographic and climatic features of an area, the net adverse environmental impact likely to be caused by the proposed industry process, or operation, the proximity of the proposed project to protected areas and human settlements, etc.

In exercise of the powers under Sections 3(1) and 3(2)(v) of the Act and Rule 5, the Ministry of Environment and Forests has issued notifications restricting location of any industry, mining operations, cutting of trees, grazing by cattle in certain areas, construction of any clusters of dwelling units, farm ewishing to undertake any of these operations in the said area is required to submit an application in the prescribed form along with an Environment Impact Statement and an Environmental Management Plan. It has also been notified that the setting up of any new industrial project or the expansion or modernization of any existing industry shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central or any State Government, as the case may be. Clearance would be so accorded only on the basis of an Environmental Impact Assessment of the project and the necessary Environmental Management Plan for the prevention, elimination or mitigation of the adverse impacts, right from the inception stage of the project.

Q 41 Write a note on Environmental Audit

Ans.Rule 14 of the Environment Protection Rules, 1986 inserted w.e.f. 13.3.1992 provides for the submission of environmental audit report. Accordingly, every person carrying on an industry, operation or process requiring consent under Section 25 of the Water (Prevention and Control of Pollution) Act or Section 2 of the Air (Prevention and Control of Pollution) Act or both or authorisation under the Hazardous Wastes (Management and Handling) Rules, 1989 is required to submit an environmental audit report in Form V (inserted in the Rules) for the financial year ending on 31st March every year on or before the 15th of May, beginning 1993 to the concerned State Pollution Control Board.

Q 42. W hat is the function of Environmental Laboratories

Ans. Section 12 of the Act empowers the Central Government to establish by notification in the official Gazette, one or more environmental laboratories or recognise one or more laboratories or institutes as environmental laboratories to carry out certain functions under the Act.

Functions of Environmental Laboratories

Rule 9 of the Environment (Protection) Rules, 1986 specified the following functions of environmental laboratories:

(i) To evolve standardised methods for sampling and analysis of various types of environmental pollutants;

(ii) To analyse samples sent by the Central Government or the Officers empowered under Sub-section (1) of Section 11;

(iii) To carry out such investigations as may be directed by the Central Government to lay down standards for the quality of environment and discharge of environmental pollutants, to monitor and to enforce the standards laid down;

(iv) To send periodical reports regarding its activities to the Central Government;

(v) To carry out such other functions as may be entrusted to it by the Central Government from time to time.

These rules also specify the procedure for submission of samples to the laboratories for analysis/tests, form of the laboratory report, fees payable therefor etc.

The Central Government has also been empowered to appoint or recognise, by notification in the Official Gazette, such persons having the prescribed qualifications as Government analysts for the purpose of analysis of samples of air, water, soil or other substances sent to the environmental laboratories. The qualifications of a Government analyst have been prescribed in the Environment (Protection) Rules, 1986. As per the provisions of Section 14, any document purporting to be a report signed by a Government analyst may be used as evidence of facts in any proceeding under Act.

Q 43. Write a note on Impact assessment and Management plan

In exercise of the powers under Sections 3(1) and 3(2)(v) of the Act and Rule 5, the Ministry of Environment and Forests has issued notifications restricting location of any industry, mining operations, cutting of trees, grazing by cattle in certain areas, construction of any clusters of dwelling units, farm houses, roads etc. and electrification in the Aravalli range (vide notification dated 9.1.1992). Any person wishing to undertake any of these operations in the said area is required to submit an application in the prescribed form along with an Environment Impact Statement and an Environmental Management Plan. It has also been notified that the setting up of any new industrial project or the expansion or modernisation of any existing industry shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central or any State Government, as the case may be. Clearance would be so accorded only on the basis of an Environmental Impact Assessment of the project and the necessary Environmental Management Plan for the prevention, elimination or mitigation of the adverse impacts, right from the inception stage of the project

Q 44 Write a note on the concept of sustainable development.

Concept of Sustainable Development

Universe is one of the rarest gift that the nature has given to the human being. Even after prolonged experiments the scientist could not establish, that human can survive in any other planet except earth. Therefore humanity must live within the carrying capacity of the earth. It is essential for the people who live now to use the resources of earth sustainably and prudently so that they do not deny certain benefits to future generations. Modern states use the natural resources of the earth recklessly. This will result that the Earth will not be able to support everyone unless there is less waste and extravagance. We should, therefore have, a new approach to future, that is, to secure a widespread and deeply held commitment for sustainable living. We have to integrate conservation and development, conservation to keep our actions within the earths capacity and development to enable the people everywhere to enjoy long, healthy and fulfilling lives.

Q 45Write a note on hazardous substances.

Hazardous Substance has been defined under Section 2(d) and include any substance or preparation which is defined as hazardous substance under the Environment (Protection) Act, 1986 and exceeding such quantity as may be specified, by notification, by the Central Government.

Handling in relation to hazardous substance has been defined under Section 2(c) to include manufacture, processing, treatment, package, storage, transportation by vehicle, use, collection, destruction, conversion, offering for sale, transfer or the like of such hazardous substance.

STUDY XII

POLLUTION CONTROL AND ENVIRONMENTAL PROTECTION

(PREVENTION AND CONTROL OF AIR AND WATER POLLUTION)

Q. 46 Write note on Water Pollution

Water Pollution means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of acquatic organisms.[Section 2(e)]

Q 47 write short note on Air pollutant.

Air Pollutant [Section 2(a)]

Air Pollutant means any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.

48 Write a note on trade effluent and sewage effluent

Trade effluent includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system, other than domestic sewage. [Section 2(k)].

Sewage effluent means effluent from any sewerage system or sewage disposal works and includes sewage from open drains. [Section 2(g)]

(vii) Sewer means any conduit, pipe or channel, open or closed, carrying sewage or trade effluent. [Section 2(gg)]

Q. 49 Discuss the powers of the State pollution Control Board to enter and inspect premises under Air (Prevention and Control of Pollution) Act,1981

Under Section 24 of the Act, the State Board is empowered to authorise any person to enter into any place, with such assistance as he considers necessary, for the purpose of:

(a) performing any of the functions of the State Board;

(b) determining whether and if so in what manner, any such functions are to be performed or whether any provisions of the Act or Rules made there under or any notice, order, direction or authorisation served, made, given or granted under the Act is being or has been complied with;

(c) examining and testing any control equipment, industrial plant, record, register, document or any material object or for conducting a search of any place in which he has reason to believe that an offence under this Act or the Rules made there under has been or is being or is about to be committed and for seizing any such control equipment, industrial plant, record, register, document or other material object, he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the Rules made there under.

Every person is bound to render all assistance to the person empowered by the State Board to enter such premises for inspection. A person who willfully delays or obstructs entry of such person into the premises shall be guilty of an offence under the Act. The provisions of the Code of Criminal Procedure 1973 or any other similar code where the Cr. P.C. is not in force, shall apply so far may be to any search or seizure, as they apply to any search or seizure under the authority of a warrant issued under Section 94 of the Cr. C.P. or as the case may be, under the corresponding provision of the State law.

Q 50 How does Water (prevention and control of Pollution) Act 1974 seek to control water pollution?

Section 3 of the Act empowers the Central Government to constitute a Central Pollution Control Board to exercise such powers and functions as may be conferred upon it. Section 4 of the Act empowers the State Government to constitute the State Boards.

Section 16 of the Act specifically deals with functions of the Central Board. It empowers the Central Board to promote cleanliness of streams and wells in different areas of the States

Section 17 of the Act dealing with functions of the State Boards, enumerates the following functions of the State Boards:

The functions of the State Board as prescribed under Section 17 of the Act are:

(a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof;

(b) to advise the State Government on any matter concerning the prevention, control or abatement of water pollution;

(c) to collect and disseminate information relating to water pollution and the prevention, control and abatement thereof;

(d) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control and abatement of water pollution;

(e) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organise mass education programmes relating thereto;

(f) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by the Act;

(g) to lay down, modify or annual effluent standards for the sewage and trade effluents and for the quality of receiving waters (not being water in an inter-State stream) resulting from the discharge of effluents and to classify waters of the State;

(h) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in stream and wells which render it impossible to attain even the minimum degree of dilution;

(i) to evolve methods of utilisation of sewage and suitable trade effluents in agriculture;

(j) to evolve efficient methods of disposal of sewage and trade effluents on land, as are necessary on account of the predominant conditions of scant stream flows that do not provide for major part of the year the minimum degree of dilution;

(k) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair whether dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents;

(l) to make, vary or revoke any order:

  (i) for the prevention, control and abatement of discharges of wastes into streams or wells;

  (ii) requiring any persons concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution;

(m) to lay down effluent standards to be compiled with by persons while causing discharge of sewage or sullage or both and to lay down, modify or annual effluent standards for the sewage and trade effluents;

(n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well;

(o) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the State Board or the State Government.

The Board may establish or recognise a laboratory or laboratories to enable the Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents.

Section 24 prohibits any person to knowingly cause or permit any poisonous, or noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter whether directly or indirectly into any stream or well, or sewer or on land. This section also prohibits any person to knowingly cause or permit to enter into any stream any other matter which may tend either directly or in combination with similar matters to impede the proper flow of water of the stream in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or of its consequences.

STUDY XIII

MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS

Q 51. Explain the provision of Trade Marks Act relating to infringement of registered trade mark.

Ans. Infringement of Registered Trade Marks

Section 29 dealing with infringement of trade marks, explicitly enumerates the grounds which constitute infringement of a trademark. This section lays down that when a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement. This section clearly states that a registered trade mark is infringed, if

(a) the mark is identical and is used in respect of similar goods or services; or

(b) the mark is similar to the registered trade mark and there is an identity or similarity of the goods or services covered by the trade mark; or

(c) the trade mark is identical and is used in relation to identical goods or services;

and that such use is likely to cause confusion on the part of the public or is likely to be taken to have an association with the registered trade mark. Additionally in respect of cases falling in category (c) above, there will be a legal presumption of likelihood of confusion on the part of the public.

A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark. A person has also been prohibited from adopting someone elses trade mark, as his trade name or name of his business concern or part of the name of his business concern dealing with goods or services in respect of which trade mark is registered.

A person shall be deemed to have used a registered trade mark in circumstances which include affixing the mark to goods or packaging, offering or exposing the goods for sale or supply of services, importing or exporting the goods, the use of the mark as trade name or trade mark on business paper or in advertising. A person shall be deemed to have infringed a trade mark if he applies such registered trade mark knowing that application of such mark is not authorised by the proprietor or licensee. Advertising of a trade mark to take unfair advantage of, or against the reputation of the trade mark also constitutes an infringement under Section 29(8) of the Act. Where the distinctive element of a registered trade mark consists of words, the spoken use of such words as well as visual representation for promoting the sale of goods or promotion of service would constitute infringement under Sub-section (9) of the Act.

Q52 Mention any five inventions which are not patentable under the Indian Patents Act, 1970

Ans. (a)an invention which is frivolous or which claims anything obviously contrary to well established natural laws;

(b) an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;

(c) the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature;

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any property or mere new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. Explanation to clause (d) clarifies that salts, esters, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

(e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance

Q53 What are the circumstances in which registered trademarks are deemed to be infringed?

Ans. Infringement of Registered Trade Marks

Section 29 dealing lays down that when a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement. This section clearly states that a registered trade mark is infringed, if

(a) the mark is identical and is used in respect of similar goods or services; or

(b) the mark is similar to the registered trade mark and there is an identity or similarity of the goods or services covered by the trade mark; or

(c) the trade mark is identical and is used in relation to identical goods or services;

and that such use is likely to cause confusion on the part of the public or is likely to be taken to have an association with the registered trade mark. Additionally in respect of cases falling in category (c) above, there will be a legal presumption of likelihood of confusion on the part of the public.

A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark. A person has also been prohibited from adopting someone elses trade mark, as his trade name or name of his business concern or part of the name of his business concern dealing with goods or services in respect of which trade mark is registered.

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Q54 Distinguish between Trade Mark, Patent and copy right.

Ans. The intellectual property includes Trade Mark, Patent and copy right

Trade Mark:

A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination thereof. Since a trade mark indicates relationship in the course of trade, between trader and goods, it serves as a useful medium of advertisement for the goods and their quality. The object of trademark law is to permit an enterprise by registering its trademark to obtain an exclusive right to use, share, or assign a mark. Closely related to trademarks are service marks which distinguish the services of an enterprise from the services of other enterprise.

Patent:

Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. Underlying economic and commercial justification for the patent system is that it acts as a stimulus to investment in the Industrial innovation. Innovative technology leads to the maintenance of and increase in nations stock of valuable, tradeable and industrial assets.

Copy right:

The copyright deals with the rights of intellectual creators in their creation. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information. The copyright law, however, protects only the form of expression of ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours, shapes and so on. In India, the law relating to copyright is contained in Copyright Act 1957, which was last amended in the year 1999.

Q55. Write a note on Intellectual property rights

Ans. The term intellectual property relates to the creations of human mind and human intellect, this property is called Intellectual property. In other words, intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property right does not vest in those copies but in the information reflected in those copies. Similar to property rights in movable and immovable property, intellectual property is also characterised by certain rights as well as limitations such as right to use and licence and also limited duration in the case of copy right and patents.

(i) literary, artistic and scientific works;

(ii) performances of performing artists, phonograms and broadcasts;

(iii) inventions in the field of human endeavour;

(iv) scientific discoveries;

(v) industrial designs;

(vi) trademarks, service marks, commercial names and designations;

(vii) protection against unfair competition; and

all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Q56 when can lapsed patent be restored?

Ans. Section 60 provides that where a patent has ceased to have effect by reason of failure to pay any renewal fee within the period prescribed under section 53 or within period as may be allowed under section 142(4), the patentee or his legal representative and where the patent was held by two or more persons jointly, then with the leave of the Controller one or more of them without joining the others, may within eighteen months from the date on which the patent ceased to have effect, make an application for the restoration of the patent.

If, after hearing the applicant in cases where the applicant so desires or the Controller thinks fit, the Controller is prima facie satisfied that the failure to pay the renewal fee was unintentional and that there has been no undue delay in the making of the application, he shall publish the application in the prescribed manner; and within the prescribed period, any person interested may give notice to the Controller of opposition thereto on either or both of the following grounds that —

(a) the failure to pay the renewal fee was not unintentional; or

(b) there has been undue delay in the making of the application.

If no notice of opposition is given within the prescribed period aforesaid or if in the case of opposition, the decision of the Controller is in favour of the applicant, the Controller shall, upon payment of any unpaid renewal fee and such additional fee as may be prescribed, restore the patent and any patent of addition specified in the application which has ceased to have effect on the cesser of that patent. The Controller may, if he thinks fit as a condition of restoring the patent, require that an entry shall be made in the register of any document or matter which has to be entered in the register but which has not been so entered.

Q57 Write a note on rights of co-owners of a patent

Ans. Where one of the two or more joint applicants for a patent dies at any time before the patent has been granted, the Controller may upon a request made by the survivor or survivors and with the consent of the legal representative of the deceased direct that the application shall proceed in the name of the survivor or survivors alone.

If any dispute arises between joint applicants for a patent whether or in what manner the application should be proceeded with, the Controller may upon an application made by any of the parties, and after giving to all parties concerned an opportunity of being heard, give such directions as he thinks fit for enabling the application to proceed in the name of one or more of the Where one of the two or more joint applicants for a patent dies at any time before the patent has been granted, the Controller may upon a request made by the survivor or survivors and with the consent of the legal representative of the deceased direct that the application shall proceed in the name of the survivor or survivors alone.

If any dispute arises between joint applicants for a patent whether or in what manner the application should be proceeded with, the Controller may upon an application made by any of the parties, and after giving to all parties concerned an opportunity of being heard, give such directions as he thinks fit for enabling the application to proceed in the name of one or more of the parties alone or for regulating the manner in which it should be proceeded with.

Q 58 Mention the grounds on which application for Registration of trade mark may be refused.

Ans Section 9(1) of the Act containing provisions relating to absolute grounds for refusal for registration prohibit the registration of those trade marks which are devoid of any distinctive character or which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, etc., or which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade. However, a trademark shall not be refused registration, if the mark has in fact acquired a distinctive character as a result of use or is a well known trade mark before the date of application. In short, a trade mark which has been demonstrated to be distinctive in the market place shall be regarded as distinctive in law as well and be registerable.

Sub-section (2) contains provisions similar to those contained in Section 11 of the Trade and Merchandise Marks Act, 1958 (prohibition of registration of certain marks) but with minor addition of reference to the Emblems and Names (Prevention of improper Use) Act, 1950 to make the law self-contained. Sub-section (3) prohibits registration of a mark, if it consists exclusively of shape of goods which result from the nature of the goods themselves or which is necessary to obtain a technical result or which gives substantial value to the goods. It is, however, explained that the nature of goods or services in relation to which the Trade Mark is used or proposed to be used shall not be a ground for refusal of registration.

Relative Grounds for Refusal of Registration

Section 11 stipulates that where there exists a likelihood of confusion on the part of the public because of the identity with an earlier trade mark or similarity of goods or services, the trade mark shall not be registered. The registration of a mark which is merely reproduction or imitation of well-known mark is also prohibited. Accordingly, it has been stipulated that a trade mark which is identical with or similar to an earlier trade mark and is to be registered for good or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered if and to the extent the earlier trade mark is well known trade mark in India and the use of the later trade mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark. Sub-section (3) prohibits the registration of a trade mark, if or to the extent that, its use will be prevented by law of passing off or under the law of copyright unless the proprietor of earlier trade mark consents to such registration.

The Explanation to this section defines the term Earlier trade mark as to mean a registered trade mark or a convention application which has a date of application earlier than the trade mark in question, or a trade mark, which on the date of application or on the date of priority claimed was entitled to protection as a well known trade mark. Sub-section (5) entitles the proprietor of earlier trade mark, to oppose the registration and prove it. The Act provides that in an opposition proceeding the Registrar shall protect a well-known trade mark against identical or similar trade marks and take into consideration the bad faith of either the applicant or the opponent affecting the rights relating to the trade mark. This section also lays down the factors which the Registrar is required to take into account while determining the status of a well-known trade mark. The Act also lays down the facts to be considered by the Registrar in determining whether a trade mark is known or recognised in a relevant section of the public.

Q 59 Discuss the provisons of the Trade Marks Act, 1999 with regard to assignment and transmission.

Ans. Section 37 entitles the registered proprietor of a trademark to assign the trade mark and to give effectual receipts for any consideration for such assignment. Section 38 deals with the assignability and transmissibility of a registered trade mark with or without goodwill of the business either in respect of all goods or services or part thereof. Section 39 provides that unregistered trade mark may be assigned or transmitted with or without the goodwill of the business concerned.

Section 40 contains restriction on assignments or transmissions of trade mark where multiple exclusive rights would be created in more than one person in relation to same goods or services; same description of goods or services; goods or services or description of goods or services which are associated with each other, which would be likely to deceive or cause confusion. Nevertheless, such assignment is not deemed to be invalid, if having regard to the limitations imposed, the goods are to be sold in different markets - either within India or through exports.

The Act under Section 42 stipulates conditions for assignment of a trade mark without goodwill of business. Such an assignment shall not take effect unless the assignor obtains directions of the Registrar and advertises the assignment in accordance with the directions of the Registrar and as per the prescribed manner.

Section 43 deals with the assignability and transmissibility of certification trade marks and provides that the assignment of certification trade mark can only be done only with the consent of the Registrar. Section 44 states that associated trade marks shall be assignable and transmissible only as a whole but they will be treated as separate trade marks for all other purposes. Section 45 deals with the procedure for registration of assignment and transmission and provides that where the validity of an assignment is in dispute between the parties, the Registrar may refuse to register the assignment or transmission unless the rights of parties are determined by the competent court.

Q 60 Write a note on term of copy right

Term of Copyright

Sections 22-29 deal with term of copyright in respect of published literary, dramatic, musical and artistic works; anonymous and pseudonymous; posthumous, photographs, cinematograph films, sound recording, Government works, works of PSUs and works of international organisations.

The Copyright (Amendment) Act 1992, has extended the period of copyright by another 10 years. Now literary, dramatic, musical or artistic works enjoy copyright protection for the life time of the author plus 60 years beyond i.e. 60 years after his death. In the case of joint authorship which implies collaboration of two or more authors in the production of the work, the term of copyright is to be construed as a reference to the author who dies last.

In the case of copyright in posthumous, anonymous and pseudonymous works, photographs, cinematograph films, sound recordings, works of Government, public undertaking and international organisations, the term of protection is 60 years from the beginning of the calendar year next following the year in which the work has been first published.

The Copyright (Amendment) Act, 1994 has given special right to every broad- casting organisation known as broadcast reproduction right in respect of its broadcasts. This right is to be enjoyed by every broadcasting organisation for a period of twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. In terms of Copyright (Amendment) Act, 1999 if any performer appears or engages in any performance, he has a special right in relation to such performance called performers right to be enjoyed for a period of fifty years.

Q61Write note on Term of patents

Ans TERM OF PATENT

Section 53 provides that the term of every patent granted after the commencement of the Patents (Amendment) Act, 2002 and the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement, shall be twenty years from the date of filing of application for the patent.

Explanation to Section 53(1) clarifies that the term of patent in case of international applications filed under the Paris Convention Treaty (PCT) designating India, shall be twenty years from the international filing date accorded under the Patent Cooperation Treaty.

A patent shall cease to have effect on the expiration of the period prescribed for the payment of any renewal fee, if that fee is not paid within the prescribed period or within such extended period as may be prescribed. Further on cessation of the patent right due to non-payment of renewal fee or on expiry of the term of patent, the subject matter covered by the said patent shall not be entitled to any protection.

STUDY XIV

PREVENTION OF MONEY LAUNDERING

Q 62 Explain Concept of money laundering, the money laundering process

Ans. Money laundering is the processing of criminal proceeds to disguise its illegal origin. Terrorism, illegal arms sales, financial crimes, smuggling, and the activities of organised crime, including drug trafficking and prostitution rings, generate huge sums. Embezzlement, insider trading, bribery and computer fraud also produce large profits and create an incentive to legitimise the ill-gotten gains through money laundering. When a criminal activity generates substantial profits, the individual or group involved in such activities route the funds to safe heavens by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention.

Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.

How is Money Laundered?

The process of money laundering can be classified into three stages, namely, placement, layering and integration.

In the initial or placement stage of money laundering, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments that are later collected and deposited into accounts at another location.

After the funds are entered into the financial system, the layering takes place. In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments, or the launderer might simply wire the funds through a series of accounts at various banks across the globe.

After successful processing of criminal profits through the first two phases of the money laundering process, the launderer moves them to integration. In this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures

Q63 write a note on KYC norms

KYC enables banks to know/ understand their customers and their financial dealings to be able to serve them better and manage its risks prudently.

Objective of KYC Guidelines

The objective of KYC guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently. Banks should frame their KYC policies incorporating the following four key elements:

(i) Customer Acceptance Policy;

(ii) Customer Identification Procedures;

(iii) Monitoring of Transactions; and

(iv) Risk management.

For the purpose of KYC policy, a 'Customer' may be defined as :

— a person or entity that maintains an account and/or has a business relationship with the bank;

— one on whose behalf the account is maintained (i.e. the beneficial owner);

— beneficiaries of transactions conducted by professional intermediaries, such as Stock Brokers, Chartered Accountants, Solicitors etc. as permitted under the law, and

— any person or entity connected with a financial transaction which can pose significant reputational or other risks to the bank, say, a wire transfer or issue of a high value demand draft as a single transaction

STUDY XV

MINIMUM WAGES ACT, 1948

Q 64 Discuss the procedure for fixation of minimum wages.

Ans. **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.].

Q 65 What is the object of fixing minimum wages

> "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

STUDY XVI

PAYMENT OF BONUS ACT, 1965

Q 66. Examine whether the following can claim bonus as per the Payment of Bonus Act 1965.

Ans. (a) ward boys of a District hospital.No. as per Section 32(v) (C) of the Act it is not institutions (including hospitals, chambers of commerce and social welfare institutions) established not for the purpose of profit;

(b) Peons of university are not eligible as per Section 32

(c) Printers in a news paper press are eligible

(d) Pilots of air force are not eligible since all the employees of public sector are exempted.

(e) cattle catchers employed by municipality would not get Bonus under the Act

(f) employees employed by an establishment engaged in any industry called on by a local authority are also ineligible pursuant to Section 32

(g) teachers of private secondary are not eligible since the payment of Bonus Act is not applicable to employees of universities and educational institutions

Q 67 Does good beaviour condition apply for payment of bonus?

.

Ans.Yes . 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).

Q 68 Explain the provisions of payment of Bonus Act regarding minimum and maximum bonus

Ans. **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.).

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)

Q 69. Explain the set off and set on under Payment of Bonus Act, 1965

Ans. Set on and set off of allocable surplus

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)

Q 70. Explain the provisions of bonus Act with regard to employees drawing salary of more than Rs 3,500 per month and those who worked a part of year.

Ans. 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)) 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)

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)

Q 71. Write note on allocable surplus under the Payment of Bonus Act, 1965.

Ans. 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)]

STUDY XVII

PAYMENT OF GRATUITY ACT, 1972

Q 72. Can gratuity be forfeited?

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.

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

Q 73. Can the gratuity be withheld for employee not vacating the quarter provided by the company?

Ans. No. Gratuity can not be forfeited for any other ground other than grounds mentioned under Section 4(6) (a) and 4(6) (b) Air India versus Authority under the Act.

Q 74 To whom gratuity is payable by the Company?

Ans. Gratuity 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.

Q 75 Bhushan who had put in 10 years of service was dismissed on the ground of misconduct and whole of the amount payable to him as gratuity was forfeited. He was not issued any show cause notice. He was also not given any opportunity to be heard. He wants to file a case against management will he succeed?

Ans. The action of the management of terminating services of Bhushan without giving a show cause notice and without giving the delinquent employee the opportunity to be heard is against the principle of natural justice. Such dismissal without following the principle of natural justice is liable to be set aside and forfeiture of gratuity on that ground is not allowed under section 4(6) of the Act.

STUDY XVIII

EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

Q 76. Write short note on basic wages under Employees Provident Funds and Miscellaneous Provisions Act, 1952

Ans. 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)]

Q 77 Is statutory protection provided to amount of contribution to provident fund from attachment by court?

Ans. 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.

This 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.

Q78 What is mean by contribution under EPF Act

Ans. 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.

STUDY XIX

EMPLOYEES' STATE INSURANCE ACT, 1948

Q79 What are the different kinds of benefits provided under the E.S.I. Act?

Ans. 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 Rs. 1,500/-.

Q.80. How is the Employees' Insurance Court constituted and what are the matters to be decided by such a Court?

Ans. 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.

STUDY XX

WORKMEN'S COMPENSATION ACT, 1923

Q81. Explain employers liability to pay compensation to an employee.

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 a workman 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 workman 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 workman ceased to be in the service of the employer, if such disease arose out of the employment.

(iii) If a workman 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 a workman 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 a workman 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 a workman by accident arising out of and in the course of his employment.

(i) Personal injury

There must be personal injury caused to a workman.

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.

Q 82. Write a note on 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

STUDY XXI

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

Q83 What is the liability of contractor regarding the health and welfare of the workmen employed by him

The contractors are required to take certain specific measures for the welfare and health of contract labour

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)

Q. 84 What are the liabilities of principal employer in respect of contract labour

Ans. *Liability of the principal employer in certain cases:*

If the prescribed amenities (canteens, rest ooms 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)

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.

Q,85 A court directs an employer to absorb the workmen concerned in regular service after abolition of contract labour . Discuss the legality of the order?

This is well considered 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.

Q 86. State the steps to be taken by the appropriate Government before issuing a notification prohibiting employment of contract labour in any process, operation or other work.

Ans. Following steps are 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 incidental 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 whole time 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.

STUDY XXII

INDUSTRIAL DISPUTES ACT, 1947

Q.87 Write a note on Matters within the jurisdiction of industrial tribunals constituted under Industrial Disputes Act. 1947.

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.

Q 88 What are the tests for determination of Industry under the Industrial Disputes Act, 1947

Ans. "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 in depth study of the definition of the term industry in a comprehensive manner in the case of (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 *Bangalore Water Supply and Sewerage Board* v. *A Rajiappa,* AIR 1978 SC 548, the Supreme Court, laid down triple test to determine whether an activity is covered by the definition of "industry" or not. It is also referred to as the

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 *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.

Q 89 What is retrenchment under Industrial disputes Act, 1947?

"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)]

. 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.

Q 90 Distinguish between individual dispute and 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

Q.91. Write a note on lay off compensation.

Ans. "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.

Q 92. What are different types of strike?

(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.

(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.

STUDY XXIII

THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

Q 93. What matters must be covered under standing orders?

Ans. 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 there from.
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 judgment 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.

Q 94.Certification of standing orders

Ans. 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 is of similar nature, a group of employers owning those industrial establishments 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.

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.

STUDY XXIV

FACTORIES ACT, 1948

Q. 95. Discuss the restrictions on working hours under the Factories Act, 1948.

Ans

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

2. According tSection 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.

3. 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.

4 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)]

5. 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.

() 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)

Q 96. Write a note on Occupier under Factories Act.

Ans. 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 appointed to be the occupier;

(ii) in the case of a company, any one of the directors, shall be appointed 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

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.

Q 97 What are the duties of the occupier?

(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.

Q 98. What are the provisions of factories Act, relating to annual leave with wage.

Ans. 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)]