

Rights of the Unorganised Workers Engaged in Tourism: A Study with Special Reference to the State of Sikkim

An empirical research based on the analysis of the international instruments, the Constitution, statutory provisions and the direction of justice and based on the case study of the unorganised workers engaged in tourism in the east district of Sikkim.

This thesis submitted for the ~~partial~~ fulfillment of the requirement for the degree of Doctor of Philosophy (Ph.D.) of the University of North Bengal.

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Certified that the research work presented in this thesis entitled "Rights of the Unorganised Workers Engaged in Tourism: A Study with Special Reference to the State of Sikkim" has been carried out under my supervision and is a bonafide work of Mr. Deepan Pandey. This work is original and has not been submitted for any other degree to this or any other University.

Further certified that the candidate Mr. Deepan Pandey in character is a fit and proper person for the award of Ph.D. degree.

13.4.09

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INTRODUCTION

Tourism is a multi-sectoral activity that requires inputs from various activities like construction, manufacturing, agriculture and other activities providing goods and services used by the tourist. Tourism has no clearly determined boundaries. It has no physical output but involves various inputs. The activities involved in tourism vary from place to place.

The recommendations of the World Tourism Organization¹ define tourism. It says that "Tourism comprises activities of people traveling to and staying in places outside their usual environment for more than one consecutive day for leisure, business, and other purposes."

Today tourism is a major economic activity, globally, for developing and developed countries alike. It has become a major source of foreign exchange earnings, a generator of personal and corporate incomes, a creator of employment and a contributor to government revenues. In 1994 itself the World Tourism Organization estimated that there were 528.4 million tourist arrivals world wide which generated US \$ 321,466 millions in receipts. According to the World Tourism Organization the year 2005 saw more than 800 million international tourist arrivals, and the tourism receipts were of the

¹ (Adopted by the United Nations Statistical Commission on March 4, 1993) cited in Report of the Working Group on Tourism (11th Five Year Plan 2007-12), Ministry of Tourism, Government of India

order of US \$ 682 billion.² The World Travel and Tourism Council (WTTC) for 2006 forecasted that travel and tourism will generate 234 million direct and indirect jobs world-wide, accounting for 8.7% of the global employment, and it will contribute up to 10.3% of the global GDP. According to the same estimate, the global travel and tourism activity is expected to increase by 4.7% between 2007 and 2016.³

There has been a remarkable growth in the last three years, in foreign tourist arrival to India due to the various efforts made, including promoting India through the 'Incredible India' campaign in overseas markets. It has increased by about 65% from a level of 2.38 million in 2002 to 3.92 million in 2005, while the foreign exchange earnings have grown by about 96% during the same period. The Tourism satellite accounting for India has brought out that Tourism's contribution to GDP of the country has been 5.9% in 2003-04, while employments in tourism sector both direct and indirect has been 41.8 million in the same year which accounts for 8.78% of total employment in the country⁴. Though the growth in tourism in India has been impressive, India's share in global tourist arrivals and earnings is quite insignificant. It is universally acknowledged that the tourism resources in the country have the potential to generate significantly higher levels of demand from the domestic

² Cited in Report of the Working Group on Tourism (11th Five Year Plan 2007-12), Ministry of Tourism, Government of India.

³ Ibid

⁴ Ibid

and international markets, and, if exploited intelligently in a sustainable manner, can prove to be the proverbial engine of growth-for the economy.⁵

The growth of tourism has brought with it problems too, particularly relating to its impact on societies and natural environment. Links between tourism and prostitution are mostly common in developing countries. Amidst these, since the tourism in the developing world is mostly unorganized, the protection and welfare of the facilitators of tourism attains equal importance. Tourism is overwhelmingly an industry of private sector service providers, although the public sector has a significant role to play in infrastructure areas either directly or through Public Private Partnership mode. It is a multi-sectoral activity characterized by multiple services provided by a range of suppliers. It is quite similar to manufacturing industry, where the supply chain is as important as the end product. The related sectors include airlines, surface transport, hotels, basic infrastructure and facilitation systems, etc. Thus, the growth of tourism cannot be attained unless the issues related to all the sectors are addressed simultaneously. However there is no reason to believe that tourism will decline as a major economic activity in the future. All indications are that it will increase to become a significant feature of economic and social development in many countries. The challenge then is *inter alia* to ensure that such growth can be accommodated with adequate protection and welfare of the workers.

⁵ Ibid

All economic activities are undertaken for profit. It is a harsh fact that in all such profit systems, the interest of workers always remains in stake, in all profit systems the capitalists are the policy makers and in order to achieve maximum profits the workers who actually and actively participate in making profit are generally ignored, in such a state of affair the profit system becomes highly unprofitable to them.

Like concern in all other economic activities, the concern in tourism is *inter alia* the protection of the rights and interests of the workers. Though there are no special laws to protect the workers engaged in tourism in India, and since tourism involves various activities, the responses can be found in various provisions under various laws. Further the provisions of laws relate to each problem in a peculiar and distinct way and in an area like labour which is so vast the laws should be broadly and widely interpreted in order to ensure protection of workers. Labour area which is so vast and diverse is difficult to regulate, however the protection of working people is of utmost necessity for the development or even survival of the mankind.

The present work is concerned with rights of the unorganized workers engaged in tourism. Therefore it is essential to first conceive the meaning of the word "Unorganized". The area of labour is divided mainly into two parts- Organized Sector and Unorganized Sector. This division is not effected by any

law or regulations. It is in the course of time that the areas which could be organized came under Organized Sector and the areas which were left unorganized came under Unorganized Sector. In the early 1970s the International Labour Organization (ILO) started studying and identifying the unorganized sector through its World Employment Program missions in Africa. This was the time when the concept of unorganized sector began to receive world-wide attention. The ILO's effort strengthened and succeeded when the Director General of ILO submitted a report containing matters like the role of this sector in promoting employment, the absence of adequate laws for providing protection to the workers in this sector and the absence of scope for application of International Labour Standards in this area. However in India, the Unorganized Sector has assumed recognition and importance only during the last few decades. The unorganized Sector includes a variety of employments and very little information is available about the conditions of work in many employments in this Sector. The Unorganized Sector is generally referred to one which falls outside the purview of Organized Sector. The Sector cannot be defined on the level of organization because there may be enterprises with very few workers and who may be working dispersedly.⁶ In many cases an employer is not identified and hence no employer employee relationship can be established. As such the study of the area becomes difficult right at the identification which persists at the point of providing any protection or welfare to these workers.

⁶ Para 5. Chapter VII, Report, Second Labour Commission

There are two main approaches of defining Unorganized Sector. The first one is based mainly on the number of workers employed in an undertaking. In India some studies have restricted the Informal Sector to enterprises employing less than 10 or more persons.⁷ The other approach in defining Unorganized Sector is based on the belief that the number of workers in an undertaking or employment cannot be the factor that enables one to distinguish the Unorganized Sector from the Organized Sector. This approach attempts to distinguish Unorganized Sector from the Organized Sector by the presence of legal protection, size of establishments, capacity of the workers to organize themselves in unions and the systematic manner which production processes are organized in perceptible patterns⁸.

It may be argued that the number of workers in an undertaking cannot be the factor in distinguishing the Unorganized Sector from the Organized Sector. The word Unorganized *per se* denotes the unorganized nature of work concerned. The number of workers employed in an enterprise cannot and should not be the basis of defining Unorganized Sector simply because such an enterprise based definition does not take into account a vast number of unorganized labour who work as agricultural workers, cultivators, construction workers, self employed vendors, artisans, traditional crafts persons, home based workers, traditional service workers etc. Almost the entire non-

⁷ See generally Report, Second Labour Commission

⁸ Ibid

agricultural activity in rural India is unorganized. All these sub-sectors are mostly unorganized in terms of organization, employment and labour participation.⁹

The Unorganized Sector is also called the informal Sector. In our country the terms Unorganized Sector and Informal Sector are used interchangeably in research literature. In official records and analyses the term Unorganized Sector is commonly used. The official definition of the Informal Sector enterprises here consists of Directory Establishments which employ five persons or less and Own Account Enterprises that employ oneself. Officially, these constitute the Unorganized Sector in industries. However, the available database and hence, the modes of estimation of the unorganized workforce are not so dependable.¹⁰

The Unorganized Sector is too vast to come within the confines of a definition. Hence descriptive means are often used. It cannot be denied that labour legislations do not provide enough protection to the Unorganized Sector. Despite the existence of various labour laws, for various reasons the workers in this sector do not get adequate social security and other benefits. The workers in this sector are highly exploited, they are mostly employed on casual basis and there hardly any trade union to fight for their rights. Collective bargaining is almost non-prevalent in the Unorganized Sector. As these workers and

⁹ See generally, Para 22, Chapter VII, Report, Second Labour Commission

¹⁰ Para 28, Chapter VII, Report, Second Labour Commission

particularly women have not been able to organize themselves, they are further discriminated against.

As a consequence of new economic policies, a section of permanent workers are getting casualised and contractualised. At the same time there are sections of workers in the Unorganized Sector, who are getting Organized and Unionized. However, the practical purposes cannot be fulfilled if both these workers are not brought under the purview of Unorganized Sector.¹¹ Thus, the workers in Unorganized Sector include all the workers in Unorganized Sector irrespective of Unionization or the reforms for getting organized, as well as the casual and contract workers in the Organized Sector who, for one reason or another, have failed to get benefits under the protective, welfare or social security legislations.

The First Labour Commission defined the Unorganized Sector as the part of the workforce "who have not been able to organize in pursuit of a common objective because of the constraints such as:

1. casual nature of employment,
2. ignorance and illiteracy,
3. small size of establishments with low capital investment per person,
4. scattered nature of establishments, and

¹¹ See generally, Para 23, Chapter VII, Report, Second Labour Commission

5. Superior-strength of the employer operating singly or in combination.”

Illustrative categories of unorganized labour were listed in the First Labour Commission Report. These consisted of contract labour including construction workers, casual labour, labour employed small scale industries, handloom/power loom workers, beedi and cigar workers, employees in shops and commercial establishments sweeper and scavengers, workers in tanneries, tribal labour and other unprotected labour.

The Second Labour Commission *inter alia* to proposed a legislation which would build around the unorganized work force, a system, that will assure at least minimum protection and welfare to workers in the unorganized Sector and has observed that the “Unorganized Sector “ is a term that eludes definition. It said that its main features can be identified and the sector and processes where unorganized labour is used can be listed though not exhaustively. Apprentices, casual and contract workers, home based artisans and a section of self employed persons involved in jobs such as vending, rag picking, rickshaw pulling etc., according to the Report, came under Unorganized Sector. Agricultural workers, migrant labour and those who perform manual and helper jobs also came under the category of Unorganized Sector workers.

The Sample Study of economic activities that the study groups of the Second Labour Commission has brought out some general characteristics of the employments in the Unorganized Sector.¹²

1. It is in general a low wage and low earning sector.
2. Women constitute an important section of the workers in this sector.
3. Family labour is engaged in some occupations such as home based ones.
4. Economic activities, which engage child labour, fall within this sector.
5. Migrant labour is involved in some sub-sectors.
6. Piece-rate payment, home based work and contractual works are increasing trends in this sector;
7. Direct recruitment is on the decline. Some employees are engaged through contractors. An increasing trend to recruit workers through contractors is visible in areas of home based work. There is a short convergence of home based work and engagement in work through contractors.
8. If some kinds of employment are seasonal, some others are intermittent. As such, underemployment as well as under payment is a serious problem.

¹² Para 30, Chapter VII, Report, Second Labour Commission

9. Most of the jobs in this sector are for the greater part, on a casual basis.
10. Both employed and self employed workers can be found in a number of occupations.
11. Workers are not often organized into trade-unions. The self employed are seldom organized into associations. There is not much recourse to collective bargaining.
12. There are many cooperatives of self-employed workers which fall within this sector.
13. Very often, others supply raw materials, production by self employed workers, therefore, become dependent on, or linked with enterprises or individuals active in other sectors.
14. Debt bondage is very common among the employed as well as the self employed worker in the Unorganized Sector.
15. The self employed have less access to capital, whatever capital they manage is mostly from non-banking and usurious sources, especially from the trader contractor.
16. Health hazards exist in a majority of occupations.

There are certain other factors specific to some of the sub sectors in the unorganized sector. For instance the Hawkers and vendors face harassments from authorities such as police, traffic police and local self Governments.

Some analysts differentiate the terms Unorganized and Informal. However, it must be pointed out that it has almost become universally accepted practice to treat the words "Unorganized Sector" and "Informal Sector" as denoting the same area. They are therefore regarded as interchangeable words. In this work too the practice is followed.

Only a small percentage (6-7%) of the total workforce of our country is employed in the Organized Sector. ¹³ Rest of the workers, therefore belong to Unorganized Sector. These workers have not been able to organize themselves and are further discriminated against. Under the existing labour laws, they cannot be benefited. For various reasons the workers in this Sector cannot get social security and other benefits, as do their counterparts in the organized sector. There is hardly any trade union or other institutional machinery to fight for their rights and interests. Finding that legislation for the unorganized workers would be a definite answer to the poverty of our country the Unorganized Sector Workers Social Security Bill, 2007 has been introduced in the Parliament. Though the Bill has not been able to come up as a law and is still lying in the table for discussion, the commitment of the present government has thrown a ray of hope. ¹⁴

¹³ Refer to the Report of the National Commission for Enterprises in the Unorganised Sector; also refer the Second Labour Commission Report

¹⁴ The prime Minister reaffirmed the commitment in his speech on the occasion of the Independence day, 2007

In the Bill the Unorganized Sector has been defined as *an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such worker is less than ten.*¹⁵

The Bill defines Unorganized Sector Worker as *a home based worker, self-employed worker or a wage worker in the Unorganized Sector.*

The Bill has drastically failed to incorporate all unorganized works within the ambit of Unorganized Sector. It does not recognize casual and contract workers in the Organized Sector as unorganized workers. There are various employments in the country where, though ten or more workers are engaged but are never given benefits under the labour laws. They are unorganized in the real sense of the term but are not recognized under the Bill as unorganized workers.

The main problem of the workers in the Unorganized Sector is that there is no specific law to regulate the working hours, wages, social security and other benefits for the workers in this sector; The variety, complexity and dimensions of the Unorganized Sector and paucity of information about the conditions of work in this sector is such that in-order to work in this field, one requires to undertake a comprehensive if not an exhaustive study of the

¹⁵ Section 2 (k)

different kinds of employments and the conditions and needs of the workers in this sector.

The workers engaged in Unorganized Sector are impregnated with various other problems. There are wide variations of wages on the regional basis. There is also variation of wages on the basis of the gender of the workers. The workers working in this sector receive lesser wages as compared to the workers engaged in similar works in the Organized Sector. There is no regulation for healthy working conditions. The workers in this sector have to work for long hours. They have no time for leisure or holidays. They are either illiterate or less educated and have low bargaining power. In many cases, an employer is not identified and even if a law applies to a particular employment, in the absence of an employer, the law which mostly bases itself on the employer-employee relationship becomes helpless. The safety dragnet which covers a worker in the organized sector is lacking in the Unorganized Sector. Schemes and opportunities that still available are conspicuous by absence of compliance. Truly, since about 92-93 percent of the total workforce in our country is engaged in Unorganized Sector, if properly conceived and effectively implemented a law for the unorganized workers will make a definite contribution to the eradication of poverty.¹⁶

¹⁶ See generally, Chapter VII, Report, Second Labour Commission

Tourism being a multi-sectoral activity, the unorganized workers engaged in tourism would include workers engaged in all unorganized areas that contribute to tourism. The responses identified in various chapters in this work would apply to all these workers. However for the purpose of giving justice to the present work selective employments are studied through the collection of responses. The workers engaged in:

1. Travel agencies and tourist information centers,
2. Tourist guides,
3. Hotel workers
4. Telephone booth workers,
5. Drivers,
6. Porters,
7. Yak and horse attendants,
8. Trekking guides,
9. Tourist amusers,
10. Singers and dancers
11. Other persons contributing to the village tourism, and
12. Various workers contributing in tourist festivals, rafters, gliders, etc.

All have a direct role to play in tourism in the state of Sikkim. With a view to expand tourism, many activities are being carried on in the State. These include location and development of the tourist destinations which involves a great deal of construction works. Thus the construction workers form a part of

the present study. The traditional decorative and handmade traditional articles are the main attraction of tourist in the state therefore traditional artisans and those engaged in the sale of such products fall within the ambit of the present study. Further, the list is only illustrative and not exhaustive.

The unorganized workers especially in the hill state of Sikkim face different and distinct problems. The unorganized workers engaged in tourism in the hill state of Sikkim like those working in construction works, trekking guides, rock climbers, porters, taxi drivers etc. are vulnerable to accidents. The victims and dependents of the victims of such accidents do not have adequate social security. The geographical and climatic conditions of the place make working in various employments extremely difficult. During winters, in places of high altitudes working in construction sites becomes very difficult due to chilling weather. Those engaged in restaurants have to give in many times the labour under the normal conditions to be able to cater quality service. Cleaners work in extremely challenging conditions. The work conditions in other employments too are no far better.

As already pointed out a great majority of the total workforce in the county are engaged in Unorganized Sector. Despite their numerical strength, they are extremely vulnerable to exploitation. Most of them are poor, illiterate or less educated and have low bargaining power. The position of the unorganized workers engaged in tourism in the state of Sikkim, as everywhere

else revolves around issues relating to reasons for the workers to remain unorganized and the impediments for their being thus, the scheme to ensure their welfare, and the remedy to their present status. These basic questions define the area of the research of the present work.

The inquiry into the above issues is achieved through a critical analytical study of the International Labour Laws, the Constitution and the general Indian statutes. A close look is given to the case laws and milestones of judicial decisions. As the present work includes a special reference to the state of Sikkim, to know the ground realities, a field study is done in different unorganized employment sectors under the tourism industry in the East district of Sikkim. Further the applicable State Acts, Rules thereto and State Rules under the national legislations that are being implemented in the State are also analyzed to get the taste of the legal and institutional safeguard to these workers.

An attempt has been made to find the responses to the challenges faced by the unorganized workers engaged in tourism under the globally recognized labour laws. The relevant international instruments and international movements are discussed in the light of prevailing conditions. The responses to the problems of the unorganized workers can be found in various UN instruments. The human rights are recognized universally as well as by our national Constitution and other legislations. Further International Labour

Organization is a specialized agency for labour welfare which works under the umbrella of United Nations. There are various ILO instruments too in this regard. The United Nations Charter itself aims at promoting higher living standards and full employment in Article 55(a). The UN instruments and the ILO instruments together ensure adequate protection of the rights and interests of the workers. However International laws have their own limitations. The implementation of these laws is subject to the discretion of the national Governments. Despite this fact they are important as all these instruments seek to indicate the areas where legislative measures need to be taken.

Different ILO conventions, declarations and covenants including International Covenants on Economic Social and Cultural Rights, International Covenants on Civil and Political Rights and Universal Declaration of Human Rights have been analyzed for the purpose of the present study. Thus in this work Chapter I forms a comprehensive account of the international instruments and movements with regard to the rights of the unorganized workers being studied.

The constitutional responses to the challenges being faced by the unorganized workers in tourism have been incorporated in chapter II of this work. In this chapter an attempt is made to locate the relevant constitutional

provisions applying to the different challenges in the work world. The Preamble of our Constitution sets out broad objectives to secure to all the citizen of India social, economic and political justice and equality of status. The equality spirit of the Preamble has been elaborately dealt with under Part III of the Constitution. It not only guarantees equality before law and equal protection of laws to the unorganized workers but also confers certain affirmative rights. Whereas, Articles 14, 15 (1) and (2) and 16 (1) and (2) prohibits discrimination against any person, the state is empowered to make special provisions for women, children and the classes which are not at par with the people in general and are identified as backward. Under Article 16 (4) such backward classes can be given reservations in Public appointments. Women can be given special protection under both of these sections. Right to freedom of speech and expression, of assembly and of association and also of profession, occupation, trade and business have been protected as fundamental rights. Broad recognition of life and personal liberty has been made in Article 21. The right to life includes right to live with human dignity and all that goes with it such as bare necessities of life. The judicial activism has given new dimensions to these rights. Beggar and other similar forms of forced labour have been specifically prohibited.

Non justiciable rights are contained in Part IV of the constitution. In this part of the Constitution the State is given direction to achieve certain broad objectives through appropriate policies including laws. In particular the State is

directed to minimize inequalities in income, eliminate inequality of status, facilities and opportunities. Equal pay for equal work has also been set as an objective to be achieved. The Directives also pose a duty on the State to ensure right to work, to education and to public assistance in certain cases. Just and human conditions of work, maternity benefits etc. have also been recognized as objectives to be achieved. The State has also been directed to promote the welfare of the people by securing and protecting as efficiently as it may a social order in which justice-social, economic and political informs all institutions of national life. Living wage, decent standard of life and full enjoyment of leisure and social and cultural opportunities all find place in Directive Principles.

Elaborate analyses of these provisions of the Constitution are done in the light of the prevailing work conditions in our country. The analyses of these provisions help in identifying the areas where the State has succeeded in making and executing policies in the realization of the constitutional goals and where the duties still remain due on the State. It may be worth mentioning that the broad and numerous provisions in the Constitution along with the broad and liberal interpretation of these provisions by the judiciary makes the Constitution, the best guardian of the rights of these workers.

The labour legislations being innumerable much of which applying to the Unorganized Sector, any attempt to give an exhaustive treatment to all of them would be futile. The unorganized area of labour being so huge and

diverse, and tourism being a multi-sector activity, some provisions in one or more of these laws may apply to a particular section of unorganized workers engaged in tourism and thus become relevant for the determination of the rights of these workers. But in the present work earnest attempt is made by picking up a few notable labour legislations having a direct bearing with the labour relations particularly with the unorganized workers engaged in tourism. Though because of the requirement of certain number of workers, these legislations do not apply to all workers engaged Unorganized Sector, they are so made that they comprehend and cover almost all important issues relating to the unorganized workers engaged in tourism.

The Workmen's Compensation Act, 1923 imposes liability on the employer to pay compensation in cases of accidents resulting in death or injury to the workmen and creates a right on the part of workmen or his dependents to receive the same. The Act also formulates the amount of compensation to be paid prescribing the principles to decide the quantum of compensation. It also set out procedure, machinery and the modes of realization of compensation. The Payment of Wages Act, 1936 makes provisions to ensure that wages are duly paid to the workmen in time and without unauthorized deductions. The Act also creates machinery to check the exploitation of workmen by employer in relation to wages. The Payment of Gratuity Act, 1972 comes with a scheme for the payment of gratuity to the employees in different establishments. Payment of Bonus Act, 1965 requires payment of bonuses stipulated in the Act.

Elaborate provisions to prescribe eligibility, disqualifications, procedure to calculate the quantum of bonus and mode of payment thereof have been stipulated in the Act. Machinery to ensure the observation of the provisions of the Act has also been created. Similarly, the Minimum Wages Act, 1948 ensures the payment of certain minimum wages which is to be fixed by the appropriate Government, to the employees engaged in different employments and different class of work in the same employment. Elaborate methodology has also been provided in the Act for the fixation of minimum rates of wages. The Maternity Benefits Act, 1961 sets out provisions to facilitate the working women in times of maternity. The Act requires the employer to ensure benefits to the working women before, during and after the delivery of child.

With a view to regulate and in certain cases abolish Contract labour and to facilitate them with basic amenities, the Contract Labour (Regulation and Abolition) Act, 1970 has been enacted by the legislature. It aims to abolish a variety of malpractices indulged in by the contractors/ sardars/ khatadars/other intermediaries. The Act attempts to provide the required facilities to these workers in view of the peculiar circumstances they work in. The Equal Remuneration Act, 1976 has been brought into force for the implementation of the provisions the Constitution¹⁷ and Convention on Equal Remuneration, 1951 of which India is a signatory¹⁸. The Act basically concerned with discrimination in remuneration on the grounds of sex is now used to ensure

¹⁷ Article 39 (d)

¹⁸ India has ratified this convention on September 25, 1958

equal remuneration generally. The Act seeks to protect the right of equal remuneration for the work of equal value. The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1986 is a comprehensive law dealing with the employment and conditions of service of the construction workers. These Acts are comprehensively dealt with and the interpretations of the courts are also cited wherever necessary.

As stated earlier, the Unorganized Sector as an important area of work world was recognized in our country only recently. Therefore, not much has been done by the legislature with a view of protecting particularly the unorganized workers. A bill as an outcome of the Second Labour Commission's recommendations is lying in the table of the Parliament for discussion¹⁹. The Protection of Women against Sexual Harassment at Workplace Bill, 2007 which came as an outcome of the celebrated decision of the Hon'ble Supreme Court in the case of *Vishaka v State of Rajasthan*²⁰ is also lying in the table for discussion. Both of these bills are relevant for ascertaining the rights of unorganized workers engaged in tourism. Courts are the guardians of justice. Therefore the fountain of justice flows from the courts. It is the courts that interpret law, declare unjust law as void, give effect to just law, and in cases of some legislative gaps existing, fill the vacuum and direct the appropriate Government to enact law in the area. Here again, the area of labour being so huge and diverse, there are innumerable decisions of different courts

¹⁹The Unorganized Sector Workers' Social Security Bill, 2007.

²⁰ AIR 1997 SC 3011

that deserve consideration. It is not possible to exhaustively cover all those decisions in a work like this. Therefore an earnest attempt is made by selecting some landmark decisions particularly those of the Supreme Court. The decisions are categorized under different heads to show the direction of justice in different areas of concern.

The Indian judiciary led by the Supreme Court has made great contribution in the area of labour through its pronouncements. The glimpses of the decisions of various courts can be found all through this work. However in chapter IV the landmark decisions of the Apex Court in the area of labour, best fitting the problems of unorganized workers engaged in tourism, are included.

An attempt is made to investigate the position of the unorganized workers engaged in tourism in the State of Sikkim by analyzing the State Acts, Rules thereto and the State Rules under the national legislations that are being implemented in the State. To understand the ground realities and the problems of the unorganized workers engaged in tourism in the state of Sikkim, an empirical study was also done. For this four hundred workers engaged in various unorganized sub-sectors under tourism in the East district of Sikkim were interviewed through a questionnaire for the purpose of collection of data. The data so collected are tabulated in different groups. The tables so prepared are then analyzed and are utilized for ascertaining the real position of the

existing rights of unorganized workers engaged in tourism in the state of Sikkim.

As stated earlier tourism involves various inputs varying from place to place. For example in Singapore shopping is a major tourist activity but not entertainment whereas in London, both shopping and entertainment are important inputs. In Sikkim the main attractions of the tourist involve snow and Rhododendrons. Many tourists shop on handicrafts. With the development in village tourism many tourists visit villages wherein the villagers cater them with traditional food and amusements. Thus the activities involved in tourism in the state of Sikkim mostly requires the role of drivers, tourist guides, hotel workers, sales persons, traditional artisans, telephone booth workers, workers engaged in tourist information centers, trekking guides and porters. In village tourism the role of dancers and singers and amusers is prominent. The role of cooks, cleaners etc. are also equally significant. In the state of Sikkim tourism is in the initial phase of development. Tourism in the state is being seen as a major revenue generator for the future. Therefore various projects supporting various types of tourism like village tourism, eco-tourism, pilgrimage tourism, heritage tourism, etc. in the state are being carried on as input to tourism. This involves a lot of construction works. Therefore construction workers become inseparable form tourism workers in the State. In the wake of these facts, the present work concentrates on the work environment of persons engaged in the informal sector of the tourism industry. Due regard has also given to the

government reports and also to the conclusions attained from the informal interactions with the workers, employers and Government Officers in the State. The work ends with the findings, conclusions and suggestions.

INTERNATIONAL CONCERNS FOR PROTECTION OF RIGHTS OF THE UNORGANIZED WORKERS

International law is that body of legal rules which apply between sovereign states and such other entities as have been granted international personality by sovereign states. The most important entity of international personality that concerns with labour laws is International Labour Organization.

International law can be universal, regional or bilateral. Although there is some duplication between universal and regional labour law, the practical value of regional law lies mainly in the possibility it offers to establish standards which are more progressive than worldwide standards for dealing with the special problems of the region concerned; to secure greater uniformity of law within a region; or to provide more extensive reciprocal advantages. Bilateral law has a different purpose. It mainly concentrates on determining the conditions of entry and of employment in each contracting country for the nationals of the other.

The first initiative towards international labour laws started in the beginning of the 19th Century. This idea was put forward systematically by David Legrand, an industrialist from Alsace. He defended it and developed it in

his repeated appeals addressed to the governments of the main European countries from 1840 to 1855. Later the idea was taken up by private associations. Thereafter a number of proposals to promote international regulations of labour matters were made in French and German Parliaments. In consultation with other European countries Switzerland took the first official initiative by convening a conference in Bern in May, 1890. Later the Swiss Government organized two other conferences in 1905 and 1906 in Bern, where the first two international Conventions were adopted.¹

During the First World War trade unions insisted on the inclusion of clauses for improving the conditions of workers in the Peace Treaties. To recommend on the labour matters Commission on International Labour Legislation was appointed, the work of which led to the inclusion of labour matters in the Treaty of Versailles and other peace treaties. The treaties provided for establishment of an international organization on labour with powers to adopt conventions and recommendations. Thus the International Labour Organization was born, the constitution of which was adopted by Peace Conference in April 1919.

Since then, the International Labour Conference is working for the welfare of workers. It has met regularly in general once a year, except during

¹ One related to the prohibition of night work for women in industrial employment and the other to the prohibition of the use of white phosphorus in the manufacture of matches

the Second World War. The Philadelphia Declaration adopted by the International Labour Conference in May 1944 reaffirmed the following:

1. that labour is not a commodity,
2. that freedom of expression and of association are essential to sustained progress,
3. that poverty anywhere constitutes a danger to prosperity everywhere, and
4. that the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join them in free discussions and democratic decision with a view to the promotion of the common welfare.

The Declaration affirmed that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of dignity and freedom, of economic security and equal opportunity. The Declaration also referred to the social aspect of economic and financial measures.

The specific objectives of the International Labour Organisation were also defined in the Declaration. These included:

1. full employment and the raising of living standards,
2. facilities of training policies in regard to wages, hours of work and other conditions of work calculated to ensure a just share of fruits of progress to all,
3. the effective recognition of the right of collective bargaining,
4. the co-operation of management and labour in the continuous improvement of productive efficiency, and
5. the collaboration of workers and employer in the preparation and application of social and economic measures, the extension of social security measures to provide a basic income to all in need of such protection, and comprehensive medical care, etc.

These affirmations of workers' basic rights in the Philadelphia Declaration in 1944 renewed the role of International Labour Organization. The Organization joined the UN system in 1946.

Instruments of the International Labour Organization:

ILO Conventions:

The conventions adopted by the International Labour Organization can be categorized on the following broad areas:

1. Basic human rights;
2. Employment;
3. Social Policy;
4. Labour administration;
5. Industrial relation;
6. Conditions of work;
7. Social security;
8. Employment of women;
9. Employment of children and young persons;
10. Migrant workers;
11. Indigenous and tribal people;
12. Special categories of workers.

Core Conventions:

Some conventions of the ILO were identified and given prominence in the Conclusion of the World Summit for Social Development in 1995. These conventions can be regarded as the core conventions. These conventions are of

great prominence as they deal with the primary and basic rights and protections of the workers.

ILO Conventions can be categorized according to the hierarchy. In the first category fall the conventions dealing with freedom of association and collective bargaining, forced labour, non discrimination in employment and child labour. In the second category are the technical standards, which establish norms to improve working conditions.

Freedom of Association and Protection of the Right to Organize Convention (No. 87):

Freedom of Association and Protection of the Right to Organize Convention adopted in 1948 is one of the Core Conventions of ILO. This Convention establishes right of all workers and employers to form and join organizations of their own choosing² without prior authorization, and lays down a series of guarantees for the free functioning of organizations without interference by the public authorities.³ Article 3 of the Convention specially requires that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Right to Organize and Collective Bargaining Convention (No. 98):

² Article 2

³ Article 3

Right to Organize and Collective Bargaining Convention was adopted by the ILO in 1949. The Convention provides for protection against anti-union discrimination, protection of workers' and employers' organizations against acts of interference by each other, and for measures to promote collective bargaining. Article 1 of the Convention reads "*Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.*" Workers and employers' organizations have been ensured adequate protection against acts of interference by each other.⁴ Measures are to be taken to encourage and promote voluntary negotiation between employers' and workers' organizations, with a view to regulation of terms and conditions of employment by means of collective agreements.⁵

For the implementation of Conventions No 87 and 98 as discussed above the countries that have ratified the Conventions, have to submit regular reports to the ILO on measures taken to give effect to the Conventions. Review of such reports is made by Committee of Experts and Governing Body. From the year 1997 special procedure for reporting on Core Convention by non ratifying countries has been introduced.⁶

The Constitution of International Labour Organization has provisions for the submission of complaints by workers' or employers' organizations or

⁴ Article 2

⁵ Article 4

⁶ Reports under this procedure are received in every two years

other countries on Freedom of Association.⁷ Such complaints are received by the ILO irrespective of whether the country concerned has ratified the Convention or not. The Committee on Freedom of Association treats such cases. The Committee meets three times a year and submits report to the Governing Body of the International Labour Organization after contacting the government concerned. Then the Governing Body makes recommendations to the concerned government on how to conform the Conventions:

The Governing Body recognizes that it may be legitimate to place restriction on trade union actions. Limits can be set on right to strike where interruption of services “endangers the life, personal safety or health of the population.” However the Governing Body has stressed that governments have responsibility for encouraging and promoting collective negotiation between employers’ and workers’ associations and that just allowing the same would not suffice. The Governments have to ensure independence of parties in collective bargaining *i.e.* prohibition of employee bargaining representatives under the domination of employers. Undue emphasis must not be placed by the governments on individual responsibility for bargaining to the detriment of collective bargaining.⁸

Forced Labour Convention (No. 29):

⁷ Article 24 and 26

⁸ Governing Body’s decision on New Zealand in 1994 referred to in a presentation at NAALC Workshop, Toronto, February 1-2, 2001

Forced Labour Convention was adopted by the International Labour Organization in the year 1930. The Convention requires the signatories to take steps for the suppression of forced labour or compulsory labour in all its forms. Certain exceptions are permitted, such as military service, emergencies like wars, earthquakes and convict labour duly supervised, etc.

Abolition of Forced Labour Convention (No. 105):

The Abolition-of Forced Labour Convention was adopted in the year 1957. The Convention prohibits the use of any form of force or compulsory labour as a means of political coercion or education, punishment for the expression of political or ideological views, workforce mobilization, labour discipline, punishment for participation in strikes or discrimination.

Discrimination (Employment and Occupation) Convention (No. 111):

Discrimination (Employment and Occupation) Convention was adopted in 1958. The Convention requires specific national policies to eliminate discrimination in access to employment, training and working conditions, on grounds of race, colour, sex, religion, political opinion, national extraction or social origin and to promote equality of opportunity and treatment. India has ratified this Convention on June 6, 1960.

Equal Remuneration Convention (No. 100):

Equal Remuneration Convention was adopted by the International Labour Organization in the year 1951. The Convention calls for equal pay for men and women for work of equal value. The Convention also defines 'remuneration' and explains 'equal remuneration for men and women for the work of equal value'. The term 'remuneration' includes the ordinary basic or minimum wage, or salary and any additional emoluments whatsoever payable directly or whether in cash or kind by the employer to the workers and arising out of worker's employment.⁹ The term equal remuneration for men and women for the work of equal value on the other hand refers to the rates of remuneration established without discrimination based on sex. India has ratified the Equal Remuneration Convention on September 25, 1958.

Minimum Age Convention (No. 138):

Minimum Age Convention was adopted by the International Labour Organization in the year 1973. The Convention aims at the abolition of child labour, stipulating that the minimum age of admission to employment shall not be less than the age of completion of compulsory schooling, and in no case be less than 15 years (14 years for developing countries). In India the completion of the age of compulsory education is the completion of 14 years.

⁹ Article 1 (a)

Other ILO Conventions:

Apart from the above main conventions, there are various other conventions that seek to protect the workers. To protect children from exploitation from the employment in vocations unsuited to their age and strength and hazardous employment the International Labour Organization adopted Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour Convention (No. 182) in 1999. The ILO has also adopted Employment Policy Convention (No. 122) in 1949.¹⁰ There is Convention (No. 135) concerning Protection and Facilities to be afforded to Workers' Representatives in the Undertaking adopted by the ILO in 1971. Convention (No. 141) concerning Organization of Rural Workers and Their Role in Economic and Social Development adopted in 1975, apart from providing foundation for the protection of the most neglected rural workers, led the developing world to review their policies concerning rural areas and people.¹¹ The International Labour Organization has also adopted Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers in 1975. ILO Convention (No. 151) concerning Promotion of Collective Bargaining was adopted in 1978 whereby in addition to the allowance of collective bargaining opportunity to the workers stress was given on directing policies towards its promotion.

¹⁰ India has ratified this Convention on November 11, 1998

¹¹ India has ratified this Convention on August 18, 1977

Employment Promotion and Protection against Unemployment Convention (No. 168) which was adopted by the International Labour Organization in 1988 reminds the role of welfare state in the 21st Century. It requires the states to direct their polity towards the promotion of employment and requires the state to give protection against Unemployment. ILO Convention (No. 102) adopted in 1952 concerns with Minimum Standards of Social Security.

ILO Declarations:

Apart from the Core Conventions and other conventions, the International Labour Organization has adopted a number of Recommendations. Conventions and Recommendations are different in their nature and purpose. Conventions are instruments designed to create international obligations for the states which ratify them. Recommendations do not create obligations but provide guidelines for action. Some of the ILO Recommendations worthy of mention in the present work are as follows:

1. Vocational Rehabilitation and Employment Service recommendation (No 83), adopted on June 9, 1948;
2. Vocational Rehabilitation (Disabled Recommendation (No. 99), adopted on June 22, 1955;
3. Discrimination (Employment and Occupation Recommendation (No 111), adopted on June 25, 1958;

4. Employment Injury Benefit Recommendation (No.121), adopted on July 8, 1964;
5. Employment Policy Recommendation (No. 122), adopted on July 9, 1964;
6. Invalidity, Old Age and Survivors' Benefits Recommendation (No.131), adopted on June 29, 1967;
7. Medical Care And Sickness Benefits Recommendation (No. 134), adopted on June 25, 1969;
8. Human Resources Development Recommendation (No. 150), adopted on June 23, 1975;
9. (Disabled Persons) Recommendation (No. 168), adopted on June 20, 1983;
10. Employment Policy (Supplementary Provisions) Recommendations (No. 169), adopted on June 26, 1984;
11. Employment Promotion And Protection Against Unemployment Recommendation (No. 176), adopted on June 21, 1988;
12. Private Employment Agencies Recommendation (No. 188), adopted on June 19, 1997.

In the 86th Labour Conference in 1998 ILO adopted Declaration on Fundamental Principles And Rights at Work, whereby it committed the member states to respect, to promote and to realize in good faith the right of workers and employers to freedom of association and the effective right of

collective bargaining, and to work towards the elimination of all forms of forced and compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation, Under the Declaration all the member states are obliged to respect the fundamental principles evolved, whether or not they have ratified the relevant conventions.

The Declaration includes provision for follow-up like:

1. Annual follow-up concerning non-ratified fundamental conventions, which will cover each year the four areas of fundamental principles and rights specified in the Declaration. It will be based on reports requested from governments which have not ratified one or more of the fundamental conventions, on any changes which may have taken place in their law and practice. These reports will be reviewed by the Governing Body with a view to presenting an introduction to the reports thus compiled, drawing attention to any aspect which might call for more in depth discussion; the office may call upon a group of experts appointed for this purpose by the Governing Body.
2. Global report which will cover each year, one of the four categories of fundamental principles and rights. The report will be drawn up under the responsibility of the Director General and will be submitted to the Conference for discussion.

With this Declaration the ILO has given itself “the means to address the social consequences of the globalization of economy.”¹² It is seen as a “powerful searchlight which will illuminate those areas that have previously remained in darkness.”¹³

No matter how good the provisions of such recommendations are, the International Labour Organization has limited powers for ensuring their implementation. Where any recommendation is given by International Labour Organization in cases where a concerned state fails to implement it, the Governing Body can set up a commission of enquiry leading to further recommendations. As the ultimate recourse the Governing Body can invoke Article 33, and recommend “such action as it may deem wise and expedient to secure compliance” with recommendations of Commission of Enquiry.

Instruments of the United Nations Organization:

The United Nations does not deal with Labour matters itself but provides an umbrella and recognizes the ILO as the specialized agency for taking necessary actions for achieving the goals set in its Constitution. Some United Nations Instruments though general in nature have also covered labour matters. Apart, the French Declaration of Rights of Men and Citizens, 1791 which provided

¹² Michel Hansenne, Director General, ILO, in his address in the 86th International Labour Conference, (1998)

¹³ Bill Brett, Chairperson of the Workers' Group, in his address in the 86th International Labour Conference, (1998)

inspiration to enactment of many of the international instruments declares that men are born free and are equal in respect of rights.¹⁴ The Declaration of Independence of United States of America states that all men are created equal. The United Nations' Charter aims at promoting the higher standard of living and full employment.¹⁵ It aims at promoting universal respect and observance of human rights and fundamental freedoms without distinction of any kind.¹⁶ The same principle of equality and non discrimination has become a constituent of the preamble of the constitution of the International Labour Organization back in 1919 thereby giving these principles international recognition.

International Covenant on Economic, Social & Cultural Rights, 1966:

International Covenant on Economic, Social & Cultural Rights requires the states Parties to recognize the right to work, the right of everyone to the opportunity to gain his living by work which he freely chooses, to just conditions of work, fair wages and equal remuneration for work of equal value without distinction of any kind, a decent living, and safe and healthy working conditions.¹⁷ It also appeals the states parties to recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure fair wages and equal pay for equal work to enable the workers to achieve a decent

¹⁴ Article 1, French Declaration of Rights of Men and Citizens, 1789.

¹⁵ Article 55 (a), the United Nations Charter

¹⁶ Article 1 and 55, the United Nations Charter

¹⁷ Article 6

living for themselves and their families. Safe and healthy working conditions, equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence, rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays, all have been recognized in the Covenant.¹⁸

The Covenant also requires the states parties to undertake to ensure (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests, the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.¹⁹

International Covenant on Civil and Political Rights, 1966:

¹⁸ Article 7

¹⁹ Article 8

International Covenant on Civil and Political Rights also provide important provisions relating to labour. Under Article 8 the Covenant prohibits forced or compulsory labour. It also ensures right to freedom of association, including the right to form and join trade unions.²⁰

Declaration on Elimination of all forms of Racial Discrimination, 1969:

An instrument which requires the State Parties to take all necessary and appropriate steps for the realization of right to work, free choice of employment, just and favourable conditions of work and protection against unemployment is the Declaration on Elimination of all forms of Racial Discrimination, 1969. The Declaration attempts to curb the discriminations made in the work arena that are targeted at the workers of a particular race.

Convention on Elimination of All Forms of Discrimination against Women, 1979:

Convention on Elimination of All Forms of Discrimination against Women, 1979 comprehensively covers rights of working women. It appeals the State Parties to take appropriate measures to eliminate discriminations against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights in particular, the right to work, equal

²⁰ Article 22

opportunities including the application of same criteria for selection in matters of employment,²¹ the right to free choice of employment²² right to promotion, job security and other benefits.²³ The Declaration on Elimination of All Forms of Discrimination Against Women, 1979 defines "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their status, on the basis of equality of men and women, of human rights and fundamental freedom in political, social, cultural, civil or any other field.²⁴ The Declaration under Article 11 (1) appeals the State Parties to create conditions for the realization by working women, apart from the abovementioned protections and rights all benefits and conditions of service, the right to receive vocational training and recurrent training, the right to receive equal remuneration and benefits and of equal treatment in respect of work of equal value as well as equality of treatment in the evaluation of work. The Declaration also recognizes the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age. Provisions have been made for the recognition of right to paid leave, the right to protection of health and to safety in working conditions including the safeguarding of the function of reproduction.

²¹ Article 11 (1) (a)

²² Article 11 (1) (b)

²³ Article 11 (1) (c)

²⁴ Article 1

Under Clause (2) of Article 11 of the Declaration it is made clear that in order to prevent discrimination against women on the ground of marriage or maternity and to ensure effective right to work to all working women, State Parties have to take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the ground of pregnancy or denial of maternity leave and discrimination in dismissals on the basis of marital status. The State Parties are asked to introduce maternity leave with pay or comparable social benefit, security or social allowances, to provide special protection to the working women during pregnancy in types of work proved to be harmful to them. The State Parties are asked to renew such protective legislation periodically so that it fits the demand of time by revising, repealing or extending them as per the situation and development.

Universal Declaration of Human Rights, 1948:

Universal Declaration of Human Rights, 1948 covers more comprehensively, the labour matters. Article 1 of the Declaration declares that all human beings are born free and equal in dignity and rights, thereby declaring equality principle to be inherent human rights. Right to life, liberty and security of person as in Article 21 of the Indian is also ensured by the Declaration.²⁵ 'Life' in the Declaration has the same meaning as is interpreted in the word in Article 21 of the Indian Constitution and is capable of

²⁵ Article 3

encompassing within itself all those rights that are essential for a normal and human living. The Declaration specifically declares that no one should be held in slavery or servitude and that slave trade should be prohibited in all their forms.²⁶ Equality Principle is also recognized in the Declaration as a fundamental human right. The Declaration gives protection to this right and declares that all are equal before law and are entitled without any discrimination to equal protection of the law.²⁷ Right to freedom of opinion and expression that is protected under Article 19 of the Indian Constitution as a fundamental right is declared as a fundamental human right in the Universal Declaration of Human Rights, 1948. It says that everyone has the right to freedom of opinion and expression.²⁸ The right without which the right to freedom of speech and expression would become meaningless for the workers moving towards the achievement for a common goal of their protection is the right to freedom of peaceful assembly and of association. This right in the aid of right to freedom of speech and expression provides the basis of all the rights of the workers and provides basis of realization of those rights, through collective bargaining. "The (workers) have nothing to lose but their chains."²⁹ To provide basis for this chain whereby the working people of all countries can unite the Declaration recognizes the right of all people to the freedom of peaceful assembly and of association.³⁰ However, no one may be compelled against his wish to belong to an association. Every person, as a member of

²⁶ Article 4

²⁷ Article 7

²⁸ Article 19

²⁹ Karl Marx, *The Communist Manifesto*, Cited in Malay Chaudhury and Arindham Chaudhury, *The Great Indian Dream*, (2003) Macmillan India Ltd, at 98

³⁰ Article 20

society, has the right to social security and is entitled to realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.³¹ Thus right to social security has been recognized as a human right in the Declaration.

Basic rights of the workers like right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment for the realization of which massive revolutions coupled with judicial activism is being carried on in the developing world, have been recognized and protected in the Universal Declaration of Human Rights. Under the Declaration everyone has the right to just and favorable remuneration and specific rights to form and join trade unions for the protection of his interests.³² The Declaration also recognizes right to rest and leisure including reasonable limitation of working hours and periodic holidays with pay.³³

A standard of living adequate for the health and well-being of oneself and of family is the minimum requirement of every person. Therefore the governments of all countries notwithstanding how weak its economy is should strive to achieve this for its people. In the wake of the fact that the realization of this right is among the basic functions of the Government, the Declaration has recognized this as an inalienable right. This right is supported by right to security in the event of unemployment, sickness, disability, widowhood, old-

³¹ Article 21

³² Article 23

³³ Article 24

age or other lack of livelihood in circumstances beyond one's control. These rights have also received recognition under the Declaration making the former right more meaningful.³⁴

For the full development of human personality, meaningful realization of human rights and fundamental freedoms the Declaration declares right to education as a fundamental human right. The Declaration says that education should be free and compulsory at least the elementary stage.³⁵ The words "at least" in the Article suggest that free and compulsory education only at the elementary education is for the weaker economies to save them from heavy financial burden. However, it is the duty of the governments of the States with stronger economies to strive towards making education free and compulsory even at the higher levels.

The Declaration declares that everyone is entitled to a social and international order in which the rights and protections set forth in the Declaration are fully realized.

Thus it can be seen that the Universal Declaration of Human Rights recognizes almost all the rights that are attempted to be protected through various other internal instruments relating to the protection and welfare of workers. It must be noted that the purposes of the Universal Declaration of

³⁴ Article 25

³⁵ Article 26

Human Rights and conventions aiming different areas of concern are different in so far as the Universal Declaration of Human Rights, sets forth basic human fundamental and inalienable rights which every human being is entitled to by virtue of his being human. The areas of concern set forth in conventions on the other hand are those areas where the governments of states are to take steps for the realization of the purposes set forth therein. However, the modes realizations of the rights under both of these instruments are same i.e. by recognizing them in the domestic instruments.

The U.N. General Assembly has adopted a number of other conventions containing labour matters. The most important of them deserving mention are Convention on Rights of Child (1989), Convention on Status of Refugees (1954) and Convention of Status of Stateless Persons (1960). These instruments deal with the rights of workers of particular groups and under peculiar conditions.

Eight of the ILO human rights conventions have been defined by ILO Declaration of Fundamental Principles and Right at Work (1998). The same fundamental labour rights are endorsed by UN Conference on Social Development in Copenhagen in 1995. These Core Conventions are considered to be joint and mutually supportive. All ILO Member Countries are required to abide by these Conventions whether they have ratified them or not. These Conventions are:

1. Prohibition of Forced Labour: Convention No 29 (1930) and Convention No. 105 (1957);
2. Elimination of Child Labour: Convention No 138 (1973) and Convention No. 182 (2000);
3. Non-Discrimination in Employment and Remuneration: Convention No. 100 (1951) and Convention No. 111 (1958);
4. Freedom of Association and Right to Collective Bargaining: Convention No. 87 (1948) and Convention No. 98 (1949);

Thus we find that at the international level much has been done on the rights of the workers. Yet not much concern has been shown on the unorganized sector workers in particular. The international instruments do not differentiate between the unorganized and organized sector workers. The ideal rights emanating from the international instruments are the rights equally pampering all the workers-organized and unorganized. There is a need for the international agencies to show greater concern on the unorganized sector. However it should not be understood that the State Parties are immune from taking steps to ensure those rights to unorganized workers. As already pointed, the rights flowing from the international instruments should reach the organized and unorganized workers alike. As the international instruments can be implemented only through the domestic constitutions and other municipal legislations, the responsibility of realizing the commitment made at the

international level rests with the State Parties. For the effective realization of the goal of reaching the contents of these instruments in the national constitutions and statutes, creation of conditions through economic and other sanctions apart from assistance both the economic and expertise from the international level may be desirable in many cases. If governments fail to secure minimum protection and secure old age of their country people, they are inefficient. In such cases international bodies should be capable to direct (not only recommend) those governments to act or to face. Introduction of minimum protection and social security to all need to be made mandatory for the participation in international affairs.

PROTECTION OF RIGHTS OF THE UNORGANIZED WORKERS ENGAGED IN TOURISM UNDER THE CONSTITUTION OF INDIA

An investigation into the rights of a person both as an individual and as a person belonging to a particular class begins at the portals of the Constitution. As a fountain head of all laws as well as their ultimate validator, the Constitution contains principles fundamental to governance. Therefore, it is inevitable that the quest of rights of the unorganized workers engaged in tourism sector should originate in the Constitution.

Preamble:

The people of India through their Constitution sought secure to themselves- Justice- Social, Economic and Political;

Liberty- of Thought and Expression, and

Equality- of Status and Opportunity.

They have also assured dignity of individual. All these broad objectives have been given protection in Part III and Part IV of the Constitution. Social, Economic and Political justice has a great bearing upon the workers engaged in Unorganized Sector. Unorganized Sector is an area where justice is most

difficult to assure. As the border line between the Organized and Unorganized Sector was drawn, differences in the conditions of work, social security etc. became apparent. Apart from economic justice to individual workers, the fact that a huge majority of the working population in India is engaged in Unorganized Sector raises the questions of economic condition of the whole country regarding fair and equitable distribution of national wealth. Social justice and political justice are closely related to economic equality.

Equality of status and opportunity is another question of concern for the Unorganized Sector workers. The inadequate laws, lack of implementation of the laws for protection of these workers and ineffective mechanism among others are main cause of India's poverty. Adequate protection and social security to this sector which employs 93-94 per cent¹ of the working population in the country can be definite answer to poverty.

Dignity of individual can only be ascertained when all of the above conditions are satisfied. A person's dignity can be groomed only when equality in all fronts is ascertained: when there is equality of status and opportunity, justice and security. The protection of dignity of working women in Unorganized Sector is a matter of greater concern. Creating conditions where there is justice- social, economic and political and equality of status and

¹ Reoprt of the National Commission for Enterprises in the Unorganised Sector

opportunity is a concern that goes hand in hand with the realization by these workers the dignity of their self.

The objectives that are laid down in the Preamble of the constitution of India are largely unrealized as far as the workers in unorganized sectors in general and those engaged in unorganized sectors of tourism industry in particular are concerned. The workers engaged in Unorganized Sector are generally those who belong to the socially, educationally and economically in a backward footing as compared to those working in the Organized Sector. Further due to the multifaceted factors prevailing in this Sector and in our Country, the creation of conditions for realization of these goals by the State has not been possible.

The problems of the workers in Unorganized Sector including of those engaged in tourism are in conflict with the ideals laid down in the Preamble of the Indian Constitution. The workers engaged in the unorganized sectors face the problems of unemployment, discrimination on various fronts, low wages, health and safety problems, lack of leisure etc and the female workers that of maternity benefits and sexual harassment. In brief every protection that the Organized Sector workers avail is goals to be achieved for the unorganized workers. For the realization of the ideals in the Preamble of the Constitution of India, to secure to all citizen of India, social, economic and political justice, equality of status and opportunity and to secure dignity of individual the State

has to fade the margin of distinction between the workers in Organized and Unorganized Sector. The truth is what the people of India wanted to secure for themselves still remains to be secured. It is only when this contrast is reduced "we the people of India" will start marching towards equality.

Fundamental Rights:

The challenges before the workers engaged in the Unorganized Sector particularly in tourism which invoke the Fundamental Rights are essentially of discrimination on various fronts, denial of various rights and most of all the wide variation of wages, inadequate facilities, protection, social security and conditions of work in contrast to that of the Organized Sector. For the female workers most talked about yet most unattended subject of protection against sexual harassment at workplaces is the biggest concern. The founding fathers of the Constitution of Indian had before them various leading constitutions of the world, international conventions, covenants, agreements, treaties and treatises to incorporate into the bulkiest Constitution, the best possible principles and parts thereof that fitted the Indian society and removed the impediments that obstructed the way of developments. Thus various provisions were incorporated for the protection of workers in general who have their definite contribution in building the Society.

There are certain provisions in the Constitution of India protecting and providing rights to the workers including those unorganized workers engaged in tourism in the Fundamental Rights Chapter. Right to equality² guarantees to every person the right to equality before law and equal protection of laws. Thus every person, including unorganized workers engaged in tourism the right not to be deprived of equality before law. Equality before law means that amongst equal the law should be equal and it should be equally administered and that like should be treated alike.³ On this analogy, the workers in Unorganized Sector [most of whom do jobs of equal value to that of any workers in similar jobs in the Organized Sector for far inferior wages and work conditions] are denied their right to equality which entails equal treatment and equal protection. It may be noted that the Unorganized Sector contributes about 60 percent to the Country's GDP⁴. The conditions of these Sectors for similar work are vastly different in terms of wages, collective bargaining, health and safety working hours, maternity benefits, pensions etc. and as such the protection under Article 14 is completely obliterated for these workers. However if we look back we see that the areas which were unorganized yesterday have gradually become organized and as such the areas which are unorganized today deserve to be organized tomorrow. Nevertheless the realization of the guarantee of Fundamental Right to equality is a distant dream for any area of employments that is unorganized in a particular point of time.

² Article 14

³ Jennings, *Law of Constitution*, cited in M.P. Singh (ed.), V.N. Shukla, *Constitution of India* (13th ed), Eastern Book Company (2001) at 201

⁴ Report of the National Commission for Enterprises in the Unorganised Sector

Further it should-be noted that the Unorganized Sector is expanding much rapidly than the Organized Sector.

The concept of equality has within it the ideal of equal pay for equal work, and also the equals are to be treated equally. The logical extension of this would be that workers who are engaged in the unorganized sector and do the same work should enjoy parity of wage with each other. However this does not happen. Thus a worker in the unorganized sector earns differential wage from his fellow worker in the same sector as well as that of his colleague in the organized sector. In many cases the workers are paid lesser even than the minimum wages. Women workers irrespective of the value of their job are paid lesser than the men workers. There are no trade unions in this Sector and the nature of work is not conducive to the formation of Unions as they do not have the pre-requisite conditions required under the Trade Union Act. Very few of these workers are registered in unions comprising of workers in other areas. The guarantee of equality in Article 14 includes the guarantee of equal pay, minimum wage protection, equal terms and conditions of work and equal opportunity to form associations as under Article 19. Unlike in Organized Sector, maximum working hours, leisure, bonuses, maternity benefits, pensions, health and safety provisions and other facilities are almost non prevalent in this Sector. Thus it can be seen that the workers in Unorganized Sector are in far more disadvantaged position than their counterparts in organized Sector.

On the analogy that "like should be treated alike"⁵, it can be said that unlike should be treated unlikely. Thus classification can be made between advantaged and disadvantaged section of people in which such disadvantaged section shall constitute a special and separate class and for their benefit a separate law can be made. Such differentiation may be made between men and women where women would constitute such class. The classification between men and women for the purpose of legislation was held valid by the Apex Court in *Kedar Nath v. State of West Bengal*.⁶ The Court observed:

"The equal protection of laws guaranteed by Article 14 of the Constitution does not mean that all laws are general in character and universal in application and that the State shall no longer have the power of distinguishing and classifying persons or things for the purpose of legislation."

This decision gives the State power to distinguish and classify persons or thing. Therefore, organized workers and particularly those engaged in tourism can be taken as a class to enact laws for their protection and betterment.

⁵ *Ibid*

⁶ AIR 1953 SC 404

Article 14 permits classification or differentiation which is based upon reasonable grounds of distinction but it forbids class legislation. The principle of equality attends to the varying needs of different classes of persons requiring different treatment.

In *Maneka Gandhi v. Union of India*⁷ the Supreme Court went a step forward and brought about the principle of fairness and reasonableness into Article 14. It observed:

“Article 14 strikes at arbitrariness in the state action and fairness and equality of treatment. The principle of reasonableness which logically as well as philosophically is an essential element of equality or non arbitrariness pervades Article 14 a brooding omnipresence.”

Equality is antithetic to arbitrariness.⁸ Arbitrariness belongs “to the whim and caprice of an absolute monarch”. In a rule of law republic arbitrariness violates equality. Thus arbitrariness violates Article 14 of the Constitution. In *Ajay Hasia v. Khalid Mujib*⁹, Bhagwati, C.J. expressed the opinion of a Constitution bench of the Court in these words:

⁷ AIR 1978 SC 597

⁸ *E.P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3 at 38; AIR 1974 SC 555

⁹ (1981) 1 SCC 722 at 741; AIR 1981 SC 457

“It must...be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality... wherever ... there is arbitrariness in state action whether it be of the legislature or of the executive or of an “authority” under Article 12, Article 14 springs into action and strikes down such state action.”

Therefore any arbitrariness whether through legislation or at the implementation level or denial of any of the rights arbitrary in any manner violates Article 14. On the other hand, a legislation protecting a section of workers like the Unorganized Workers would amount to intelligible differentia having rational relation with the object of protecting these workers' rights and interests. The nature of employment, conditions of work, protections available under the mainstream labour laws etc enable these workers to form a class for differentiation permitted under Article 14.

The other important concern can be recognized as that of the women workers in the unorganized sector who can again be differentiated for the purpose of legislation. Though many legislations are in force for the protection of these women workers most of which would apply to the Unorganized woman workers engaged in tourism, the casual nature of work, highly unregulated conditions in this area, the educational and economic status of these women workers etc. debar these workers from availing those protections

and welfare provisions. The differentiation between men and women in which women constituting a special and for the purpose of legislation was held valid in *Kedar Nath v. State of West Bengal*.¹⁰

While in the context one cannot ignore the need for a legislation to protect women from the social menace of sexual harassment at workplace and elsewhere. Though not a legislative measure, the Supreme Court of India has through the exercise of its power under Article 141 has given a law for the protection of working women in workplaces in the celebrated case of *Vishaka v. State of Rajasthan*.¹¹ Finding the existing civil and penal laws in India inadequate to provide for the specific protection of women from the inhuman act of sexual harassment at work place and that enactment of legislation on the subject would take considerable time, the Apex Court issued detailed guidelines to curb the evil of sexual harassment at work place. The guidelines *inter alia* necessitate the constitution of a Complaint Committee in every work organization. It may be noted here that the guidelines of the Apex Court are so designed as not to cover a majority of the unorganized sector workers. Since the constitution of a committee requires a work organization and since the majority of workers in unorganized sector have casual nature of work and mostly not in the work organizations, the law laid down in the *Visakha* case is of little or no avail to these workers.

¹⁰ Supra note 6

¹¹ AIR 1997 SC 3011

The Constitution of India specifically prohibited discrimination *inter alia* on the ground only of sex, race, caste or religion.¹² Through this provision the State has specifically promised not to discriminate the unorganized women workers engaged in tourism and any discrimination is explicitly prohibited. The difference of wages and other facilities on the basis of sex race, caste, religion etc. is most common in the Unorganized Sector. Thus relying on the letters of Article 14, protection can be said to be available to the workers in general on this basis. The right guaranteed in this Clause of Article 15 is confined to a citizen as an individual against his or her being subjected to discrimination in matters of rights, privileges and immunities. Therefore the working women as citizen have a right not to be discriminated on the basis only of sex.

Discrimination involves an element of unfavorable distinction showing bias. If there is any bias in existence based on the grounds of race, religion, sex, caste etc in any provision of law, such law will be struck down as against the mandate of Article 15 (1). But nothing in Article 15 prevents the State from making special provisions for women and children.¹³ The Supreme Court in *Yusuf Ali v. State of Bombay*¹⁴ held:

Sex is sound classification and although there can be no discrimination in general on that ground, the constitution itself provides for special provision in case of women”

¹² Article 15 (1)

¹³ Article 15 (3)

¹⁴ AIR 1954 SC 321

The same applies with the children.

The Constitution of India also provides for equality of opportunity in the matters of public employments.¹⁵ The right is guaranteed to all citizens. This provision deals with the employment of persons in public employment. The guarantee in this Clause covers initial appointments, promotion, termination of employment and matters relating to salary, periodical increments, leave, gratuity, pension, age of superannuation, equal pay for equal work etc. Reservation in favour of Scheduled Tribes and Scheduled Castes for the purpose of advancement of socially educationally backward citizens to make them equal with other segment of community in educational and job facilities is enjoined in Article 15 (4) is the mandate of the Constitution. Equality is the dictate of our Constitution.¹⁶ Under the Constitution the Citizen falling under the backward classes are protected right form education to the job opportunity giving them certain percentage of quota an almost all services. But due to various constraints they are not able to come up. In Article 15 (4) and 16 (4) there are provisions on which the State can legislate for the advancement of the educationally and socially backward classes for their adequate representation in the public offices and other places.

¹⁵ Article 16

¹⁶ *Inari Chandra v. G.S. Medical Colleges*, (1990) 3 SCC

Though the Principles are applied by the state only on the matters of appointment in public offices, the private sectors are free to apply these principles no matter is not binding on them. However, the issue of reservation in private establishment has taken its move¹⁷ and indications are there that these establishments would not be immune form this liability particularly in view of the fact that private establishments are today employing far greater population as compared to the governmental establishments. Further there has been a huge expansion of the areas of operation of the private sector establishments and many governmental undertakings are being given in the private hands. This is where Article 15 (4) and 16 (4) show greater bearing with the workers in Unorganized Sector including those engaged in tourism.

The Unorganized area of tourism under government constitutes mainly o the government contract works, tourist information centers managed directly by the government, government managed hotels, lodges, resorts, restaurants, shops, places of amusements etc. The rest constitutes of purely private works. In such works though there are certain provisions¹⁸ these principles are not made binding. Though difficult, these principles can be and should be extended to all areas.

Article 19 (1) (a) guarantees the Unorganized workers engaged in tourism the right to freedom of speech and expression whereby they have a right

¹⁷ Recently the question of reservation in admissions of students in the Country's leading management institutes made headlines for several days.

¹⁸ Sec, section 5, Equal Remuneration Act 1976 (No. 25 of 1976).

to express their convictions. Article 19 (1) (b) guarantees them right to assemble peacefully without arms and Article 19 (1) (c) guarantees them the right to form associations or unions. All these three rights under right to freedom form the very basis of social and economic justice for the working class. These rights are weapons at the hands of workers for the protection of the interests of their group and collective bargaining. It is seen that they are being paid lower wages because of their low bargaining power. This deficiency can be done away by collective bargaining through unions.

The right to form associations implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interest.¹⁹ Chief Justice Waite of the Supreme Court of America observed:

“The very idea of a government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect of public affairs.”

The purpose of public meetings being the education of the public and the formation of opinion on religious, political, economic or social problems, the right to assembly has a close affinity to that of free speech.

¹⁹ M.P. Singh (ed), V.N. Shukla, *Constitution of India*, (10th ed) Eastern Book Company 200, at 126

The right extends *inter alia* to the formation of association or union. Though our country did not recognize collective bargaining at the time of independence, Constitutional compulsions of social justice and welfare state prompted its adoption and promotion. Even the Industrial Disputes Act, 1947 which provides the very basis of collective bargaining for the industrial workers and had been the base to industrial relation in the country did not recognize the collective bargaining principle in the beginning. Later, working towards ensuring humane living and working conditions and a dignified status to the labour we developed statutory remedies to them.²⁰ However, in a country like ours, where a greater part of the labour force as large as 92-93 percent of the total workforce is engaged in Unorganized Sector, the principle of collective bargaining adopted and recognized as a fundamental right could not benefit this mass. The benefits of collective bargaining have remained confined to a smaller portion of workforce leaving the greater part particularly in private sector and co-operative sector of our economy struggling for their better future.

The right to freedom of trade and occupation under article of trade and occupation under Article 19 (1) (g) of the Constitution guarantees to all citizens the right to practice any profession or to carry on any occupation, trade or business. Under this Article where the workers have right to the choice of profession, occupation, trade or business, the same rights of others endanger the dignity of their labour; debar them of their basic rights and protections.

²⁰ See generally, Gulab Gupta J., Vol XI CILQ 253 (1998).

Thanks to the exception in the same Article and wide range of judicial decisions that have explained the letters of this Article and protected this weaker and downtrodden section of the population in many occupations. The right under Article 19 (1) (g) must be exercised consistently with human dignity. Therefore sexual harassment in the exercise of this right at work place amounts to its violation.²¹

The right to freedom of profession, occupation, trade or business can be restricted reasonably in the interest of general public. The dignity of human labour ... is a social measure in the interest of general public.²² Therefore these restrictions may amount to the welfare of the workers. A classic example in this regard is the decision of the Apex Court in *U. Unichoyi v. State of Kerala*²³ where the Court holding the Minimum Wages Act, 1948 reasonable observed:

“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 that the Act is to prevent the employment of such minimum wage rate the capacity of the employer need not be considered. What is being prescribed is minimum wage rates which a welfare state assumes every employer must pay before he employs labour’

²¹ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011

²² *Municipal Corporation v. Jan Md. Usman Bhai* (1986)-3 SCC 20 at 31

²³ AIR 1962 SC 12 at 17 also see *Crown Aluminum Works v. Workmen*, AIR 1958 WC 30

Similarly the provision in Payment of Gratuity Act, 1972 requiring the employer to pay gratuity to the employee after five years of continuous service not an unreasonable restriction.²⁴ The provisions in the Industrial Disputes Act, 1947 requiring prior permission of concerned authorities by the employer before effecting lay off of employees is also a reasonable restriction.²⁵

In all of the above cases reasonable restriction on the fundamental right of freedom of the practice of any profession, or to carry on any occupation trade or business of the employer have been imposed in public interest for the protection of the working people.

The freedom of profession, trade, occupation or business not only excludes any outside encroachment on the free exercise of this right but also ensures humane environment in the workplaces. Humane work environment free from exploitation, healthy working conditions, leisure, proper working hours, work environment free from sexual harassment etc. implies work environment where the dignity of labour is protected.

Protection of life and personal liberty is guaranteed under Article 21 of our Constitution. Right to life and personal liberty is available to all persons. This is the most widely interpreted Article in the Constitution. The words "no

²⁴ *Bakshish Singh v. M/S Darshan Engineering Works*, AIR 1994 SC 251

²⁵ *Papnasam Labour Union v. Madura Coats Ltd.*, AIR 1995 SC 2200

one shall be deprived of his life or personal liberty except according to the procedure established by law"²⁶ contain two rights, right to life and liberty. The right to life which is most fundamental of all is difficult to define. It is certain that right to life cannot be confined to a guarantee against the taking away of life; it must have a wider application. While interpreting the similar provision²⁷ in the U.S. Constitution in *Munn v. Illions*,²⁸ Field, J. spoke for the right to life in the following words:

"By the term 'life' we mean something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed... through with the soul communicates with the outside world."

These words have been in a number of decisions quoted with approval by the Supreme Court of India.²⁹ The meaning was further extended in *Francis Coralie v. Union Territory of Delhi*³⁰ where Bhagwati J. observed:

"We think that the right to life includes right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter

²⁶ Article 21, The Constitution of India

²⁷ Refer to the 5th and 14th Amendments of the Constitution of USA

²⁸ 94 US 113

²⁹ See, *Kharag Singh v. State of U.P.*, AIR 1963 SC 1295; *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494; *Francis Coralie v. Union Territory of Delhi*, (1981) 1 SCC 608; AIR 1981 SC 746;

Maneka Gandhi v. Union of India, AIR 1978 SC 597

³⁰ (1981) 1 SCC 608; AIR 1981 SC 746

over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingle with fellow human beings.”

This decision opened up wide scope of application of the right to life in diverse cases involving diverse situations. A great deal of welfare actions, have been taken by the Apex Court for the benefit of workers, under this Article. In *Bandhua Mukti Morcha v. Union of India*,³¹ where the question of bondage and rehabilitation of some labourers was involved, Bhagwati, J. held:

“It is the fundamental right of everyone in this country... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clause (e) and (f) of Article 39 and Articles 41 and 42 and at least therefore, it must include protection of health and strength of the workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and human conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.”

³¹ AIR 1984 SC 802

This decision has been endorsed by the Court in a number of cases. The right to appropriate relief against the ill effects of X-ray radiations on workers has also been provided under Article 21.³² The right to health and medical aid to protect the health and vigour of a worker while in service or after retirement is also a fundamental right under Article 21 read with Articles 39 (e), 41, 43, 48-A and all related Articles and fundamental human rights to make the life of workmen meaningful and purposeful with dignity of person.³³

The right to live in Article 21 has also given birth to right to livelihood. The Court has held that the right to livelihood is included in the right to life "because no person can live without the means of³⁴ living that is the means of livelihood."

The right to live also includes right to education³⁵ and reasonable accommodation³⁶ to live in including the necessary infrastructure to live with human dignity.³⁷ Protection from sexual harassment at workplace being the basic facet of human dignity and thus of life itself has been recognized by the Supreme Court in *Vishaka v. State of Rajasthan*.³⁸

³² *M.K. Sharma v. Union of India*, AIR 1987 SC 1792

³³ *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42

³⁴ *Ogla Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180; also see *Delhi Transport Corporation v. DTC Mazdoor Congress* AIR 1991 SC 101

³⁵ *Unni Krishnan v. State of Andhra Pradesh* (1993) 1 SCC 645 at 732

³⁶ *Shantisar Bulders v. Narayan Khimalal Totame*, AIR 1990 SC 630

³⁷ *Chameli Singh v. State of U.P.* (1996) 2 SCC 549

³⁸ *Supra* Note 21

Article 21 is also frequently taken recourse of by the court to support equal pay for equal work principle. However equal pay for equal work does not have a mechanical application in every case. In *State of Haryana v. Chiranjit Singh*³⁹ the court held that the party who claims benefit of said principle must take necessary averments and prove that all things are equal. The application of the principle of equal pay for equal work requires consideration of various dimensions of a given job. The persons employed on contract cannot claim equal pay on basis of equal pay for equal work principle.

Similarly in *Secretary, State of Karnataka v. Umadevi*⁴⁰ the Court held that daily wagers constitute a class in themselves and thus they cannot claim parity vis-à-vis regularly recruited. Permanent absorption cannot be claimed as of right under Article 21. Right to life will not include right to employment.

Any restriction imposed on the right to life and personal liberty must be according to the procedure established by law. Such law must again be "right, just and fair, and not arbitrary, fanciful or oppressive."⁴¹

The horizons of Article 21 and with it the horizons of the concept of life have been ever expanding. Right to free legal aid⁴² for the persons who cannot afford legal services for reasons of poverty, indigence or incommunicado-

³⁹ AIR 2006 SC 161

⁴⁰ AIR 2006 SC 1806

⁴¹ *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675

⁴² *Hussainara Khatoon v. Delhi Administration*, AIR 1978 SC 1675

situation is regarded as a part of Article 21. Right to speedy trial is also interpreted in Article 21. In this Article the Court read the right of the release and rehabilitation of bonded labour with the help of the Directive Principles of State Policy enshrined in Articles 39, 41 and 42 as well as Bonded Labour System (Abolition) Act, 1976. The Court opined that these provisions oblige the State to identify, release and suitably rehabilitate the bonded labourers.⁴³ Similarly, right to monetary compensation for the violation of rights in Article 21 has also been recognized in several cases.

The right against exploitation of Labour is provided as a fundamental right in Article 23 of the Indian Constitution. Clause 1 of Article 23 prohibits traffic in human beings and forced labour. Any contravention of this provision has been made an offence punishable according to law. The prohibition under this Article applies not only to the State but also to private persons, bodies and organizations. The laws punishing acts prohibited by this article will be made only by the parliament⁴⁴ until there are some existing laws on the subject, until the parliament alters or repeals it.

Traffic in human beings would cover slavery.⁴⁵ In pursuance of this Article the bonded labour system has also been abolished and declared illegal by the Bonded Labour System (abolition) Act, 1976.

⁴³ See, *Bandhua Mukti Morcha v. Union of India* supra note 31

⁴⁴ Refer to Article 35, the Constitution of India

⁴⁵ *Dabur v. Union of India*, AIR 1952 Cal 496

“Begar” means involuntary work without payment. It is a fundamental right of a person citizen or non citizen, not to be compelled to work without wages, the only exception being commonly imposed public services.⁴⁶ The guarantee is not restricted to begar alone but includes “other similar forms of forced labour”. Begar commonly connotes forced labour for which no wages are paid or, if some payment is made, it is grossly inadequate. But a voluntary agreement to do extra work for payment is not beggar or forced labour.⁴⁷ In *People’s Union for Democratic Rights v. Union of India*,⁴⁸ popularly known as *Asiad Workers’ Case*, where non payment of minimum wages to construction was successfully challenged, inter alia for the violation of Article 23 of the Constitution. The Apex Court, after an elaborate discussion on the background, philosophy and scope of the Article, held that the prohibition against traffic in human beings and beggar and other similar forms of forced labour is a general prohibition, total in its effect and all pervasive in its range. The Court held that where someone works for less than minimum wages, the presumption is that he is working under some compulsion. The compulsion may be either the result of physical force or of legal provisions or of want, hunger and poverty. The Court added:

“Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may

⁴⁶ Refer to Article 23 (1), the Constitution of India

⁴⁷ *Shama Bai v. State of U.P.*, AIR 1959 All. 57

⁴⁸ AIR 1982 SC 1473

properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be forced labour."

In *Sanjit Roy v. State of Rajasthan*⁴⁹ relying on the decision in *Asiad Workers' Case* the Court invalidated the Rajasthan Famine Relief Works Employees Act, 1964 which exempted the application of the Minimum Wages Act, 1948 in famine relief works. Again in *Bandhua Mukti Morcha v. Union of India*⁵⁰ the Court declared bonded labour crude form of forced labour and held that such forced labour is prohibited by Article 23. In *Neerja Chaudhary v. State of Madhya Pradesh*⁵¹ the Supreme Court has even went to the extent of declaring that failure of the State to identify the bonded labourers, to release them from their bondage and to rehabilitate them as envisaged by Bonded Labour System (Abolition) Act, 1976 violates Articles 21 and 23.

The gateway to the Fundamental Rights lies in Article 32 of the Constitution. If any-right mentioned in Part III are violated, the concerned person can directly approach the Supreme Court. The Supreme Court is empowered in such cases to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate.

Directive Principles:

⁴⁹ AIR 1983 SC 328

⁵⁰ Supra note 31

⁵¹ (1984) 3 SCC 243

Article 43 of the Indian Constitution specifically directs the State to secure by suitable legislation or economic organization or any suitable way-work, living wage, conditions of work ensuring a decent standard of life, full enjoyment of leisure etc. It cannot be disputed that if labourers are to be protected against exploitation some regulation should be made whereby the wages etc. of the workers should be protected. Since the economy of our Country has not been able to ensure fair or living wage, the employers should be compelled, to pay minimum wages even if the labourers on account of their poverty are willing to work for less than minimum.

In *Standard Vacuum Refining Co. of India v. Workmen*⁵² the Supreme Court attempted to clarify the concept of living wage, Gajendragatkar, J. observed:

“The concept of living wage is not a static concept; it is expanding and the number of its constituents and their respective contents are bound to expand and widen with the development and growth of national economy.”

Similar observations were made in *Express Newspaper (P) Ltd. v. Union of India*.⁵³ In these cases living wage were held to mean wage which enable a

⁵² AIR 1961 SC 895 at 901

⁵³ AIR 1958 SC 578 at 600

workmen "to provide his family with all material things which are needed for their health and physical well-being, enough to enable him to qualify and discharge his duties as a citizen. The amount of living wage in money terms will vary as between trade to trade."⁵⁴

Participation of workers in management of Industries is also a directive to the State to secure.⁵⁵ The State has to secure this through suitable legislation or by other appropriate manner. This is to be secured for all workers in any undertakings, establishments or other organizations engaged in any industry. This norm is growing to becoming generally acceptable. In the tourism sector, the new approaches particularly with the advent of ideas like village tourism, eco tourism, heritage tourism, pilgrimage tourism etc., the participation of workers in the management has grown in importance. Such tourism is unthinkable without the active participation of workers in the management and in most cases they are managed by workers alone in a particular area.

The State has a duty to raise the level of nutrition and the standard of living and to improve public health⁵⁶ as among its primary duties. The prohibition on sale and consumption of intoxicating drinks⁵⁷ and drug etc. would facilitate the realization of this directive.

⁵⁴ M.P. Singh (ed.), V.N. Shukla, *Constitution of India* (13th ed), Eastern Book Company (2001) at 307

⁵⁵ Article 43 A

⁵⁶ Article 47

⁵⁷ Also a directive under Article 47

Under Article 51 (C) of the Constitution the State is directed to foster respect for international law and treaty obligations in the dealings of organized people with one another. This provision has been relied upon to introduce various international instruments on human rights, political and civil rights and economic, social and cultural rights. The instruments become part of Indian law so long as they are not inconsistent with it.⁵⁸ This means that in the absence of domestic law occupying any field, it is constantly valid to implement any treaty, agreement or convention or declaration etc. to cover the existence of any legislative vacuum. It may be noted here that the Parliament has power under Article 253 of the Constitution to make law for whole or any part of the territory of India for implementing any decision taken by international conferences, associations or other bodies. Further the Seventh Schedule of the Union List vide entry 14 empowers Central Government to enter into treaties, agreements and conventions with the foreign countries.

Fundamental Duties:

Part IV A of the Indian Constitution added by the Constitution Forty Second (Amendment) Act, 1976 under Article 51-A creates duties on every citizen of India "to abide by the Constitution and cherish its noble ideals and institutions..."⁵⁹; "to cherish and follow the noble ideals which inspired our

⁵⁸ See, *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535; *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; *Peoples Union for Civil Liberties v. Union of India*, (1997) 3 SCC 433; *Apparel Export Promotion Council v. A.K. Chopra* (1999) 1-SCC 759

⁵⁹ Clause a

national struggle for freedom"⁶⁰; "to promote harmony and the spirit of common brotherhood amongst the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women"⁶¹; "to value and preserve the rich heritage of our composite culture"⁶²; and "to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to the higher levels of endeavor and achievement."⁶³

Thus we find that constitutionally, the protection of the unorganized workers engaged in tourism is well ensured. There are provisions guaranteeing them certain basic fundamental rights. State has been given clear directions to ensure the protection and welfare of workers generally and also on some specific points. The State is required to secure these objects through directing its policies including laws in these directions. Elaborate provisions in the Directive Principles of State Policy point towards the areas of concern for the legislature to legislate on. Absolute freedom has been given to the State to tackle these problems- legally, politically, through economic policies or any other appropriate method. Further, duties have been cast on every citizen of the Country on different counts- on very broad points. The directives relating to workers under Part IV of the Constitution have been enforced by the State through various laws. However, for various constraints these measures taken by

⁶⁰ Clause b

⁶¹ Clause e

⁶² Clause f

⁶³ Clause j

the state have not been able to ensure protection and welfare of the unorganized workers particularly those engaged in tourism. Therefore, the duties under various provisions in part IV of the Constitution are still due on the State because the Provisions in Part IV not only need the state to direct the policies towards certain directions but more importantly lays down certain objectives to be achieved.

No one will deny that labour standards comprise a necessary framework for balanced economic and social development. The Constitution of India contains principles and provisions that would allow the State to honour nearly all major standards set out in the international labour laws. Legislature in this country has not lagged behind in fulfilling its commitment to the international community and has vigorously legislated on various areas of concern. The irony however is that the legislations have only covered a small portion of the workworld. The legislature have an obligation to exercise more of its wisdom to ensure that the rights evolved at the international level is ensured to all its workers. The commitment is not to legislate. It is rather to ensure rights and justice to all its workers. A strong political will is needed to ensure that the workers in the unorganised sector including those engaged in tourism are ensured with equal rights as their counterparts in the organised sector.

LEGISLATIVE PROTECTION OF WORKERS

Various legislative measures have been designed to ensure the protection and welfare of workers envisaging the accomplishment of socio-economic justice inevitable in a developing country with huge working population like India. As stressed earlier in this work, labour legislations in our country are so innumerable that any attempt to analyze and give an exhaustive treatment to all of them in a work like this would be futile. The legislations mention here have no direct bearing with the workers in Unorganized Sector in general and those unorganized workers engaged in tourism in particular. It must be mentioned here that in this work the definition of unorganized worker is not confined to the customary residual approach of the concept of Unorganized or Informal Sector that has been followed in the Unorganized Sector Workers' Social Security Bill, 2007. Keeping with the argument in Chapter I, it is stressed that the residual approach of the definition of Unorganized Sector is no longer dependable. The term Informal itself denotes the informal nature of activity irrespective of the actual number of workers employed. A liberal approach to the definition of the term "Unorganized Sector" will enable a large number of workers to get protection through these legislations and will enable the regulation of a huge work area through existing machinery. In Sikkim there is very little industry. Apart from the government employees, most of the people, if not all are engaged directly or indirectly with

the tourism industry. Thus Sikkim becomes a state which employs the largest number of persons in tourism industry i.e. are unorganized worker. The residual approach of the definition of worker in the Unorganized Sector as seen in Unorganized Sector Workers' Social Security Bill, 2007 does not cover this large populace in Sikkim. Relaxing the number requirement through the reduction of the number so required can enable another large chunk of workforce under the umbrella of these legislations. To enable the employers to meet up the financial burden they can be benefited through proper policies such as through giving them certain subsidies or protection. Then the areas out of the reach of these legislations can be taken care of in a better manner through newer initiatives.

A. Workmen's Compensation Act, 1923:

Workmen's Compensation Act, 1923 receives full credit as the first piece of important social security legislation. It attempts to effectuate the principle of social justice as declared by the International Labour Organization. The Universal Declaration of Human Rights, 1948, also proclaims the importance of social security and assistance. The Act ensured social security to workers.

The main object of the Act is to impose legal obligation on the employers to pay compensation to workmen for accident arising out of and in

the course of their employment. The comparative poverty of the worker and social ideas of modern times necessitate protection of workers and his dependants from hardship arising from accidents. Compensation provided by the Act is in the nature of insurance of the workmen by certain reasons of accidents. Therefore, after the enactment of Employee's State Insurance Act, 1948, the workmen's Compensation Act, 1923 does not apply to those areas which are covered by the Employee's State Insurance Act, 1948.

The Royal Commission on Labour explained the object of the Act in the following words:

"The Workmen's Compensation Act was framed with a view to provide for compensation to a workmen incapacitate by injury from accident. But compensation is not the only benefit flowing from the Act; it has important effect in furthering work on prevention of accident; in giving workmen greater freedom from anxiety and in rendering industry more attractive."¹

The Act spells out limited liability of the employer to pay compensation to a workman which is subject to the provisions of the Act. Section 3 of the Act states that the employer is liable to pay compensation only when the following conditions are fulfilled:

¹ Report, The Royal Commission on Labour in India, 298, cited in K. Madhavan Pillai, *Labour and Industrial Laws* (7th ed.), Allahabad Law Agency (1998) at 328

1. personal injury is caused to a workmen;
2. such injury is the result of an accident; accident has arisen out of and in the course of employment; and
3. the injury has resulted either in death of the workmen or in his total or partial disablement for a period exceeding three days.

The liability of the employer to pay compensation arises only when there is personal injury to the workman. Personal injury referred is not merely physical or bodily injury but also includes psychological injuries like nervous shock, strain etc. Contracting of any of the occupational diseases specified in Schedule 3 of the Act will be deemed to be personal injury.

The word 'accident' is of wide import. It generally means some unexpected event happening without design even though there may be negligence.² Therefore for the purpose of law relating to compensation, the term 'accident' includes any injury, which is not designed by the workman himself and it is of no consequence that the injury was designed and intended by the person inflicting the same.³

Compensation is payable only in case of personal injury by accident which arises out of and in the course of employment. The expression 'arising

² *Padma Devi v. Ragunath Roy*, AIR 1950 Orissa 207

³ *Verkeyercham v. Thomas* (1979) 1 LLJ 373 (Kar)

out of' conveys the idea that there must be some sort of connection between the employment and the injury caused to the workman as a result of the accident. The expression covers cases where there may not be direct connection between the injury caused and the employment of the workman.⁴

The test of the question that whether the injury by accident arose out of employment is whether it was a part of the injured workman's duty to risk, to suffer and to do that which caused the accident. If the answer to this question is yes, the accident will arise out of the employment.⁵ In the Case of *Simpson v. Sinclair*,⁶ where a woman was injured by the fall of a wall which had no connection with her employment but the immediate cause of the injury was the collapse of the shed in which he was working and the collapse of shed was due to the fall of wall, the House of Lords held that the accident arose out of employment.

To be able to successfully claim compensation under Workmen's Compensation Act, the accident must arise both out of and in the course of employment. The expression "in the course of employment" means in the currency of the employment. The test, therefore, is in the course of discharge of duties incidental to the contract of service. The employee has to show that he was at the time of the accident engaged in employer's business or in furthering with business and was not doing something his own benefit or accommodation,

⁴ K. Madhavan Pillai, *Labour and Industrial Laws* (7th ed.), Allahabad Law Agency (1998) at

⁵ *Lankashire and Yorkshire Railway v. Hightley*, 1917 AC 352

⁶ 1917 AC 127

that he was doing something in discharge of his duty to his employer directly or indirectly imposed upon him by his contract of service.

Notional extension of time and space in relation to employment was evolved by the Court in *General Manager, BEST v. Mrs. Agnes*.⁷ In this case, the workman, driver of BEST after his day's work left the bus in the depot and boarded another bus to go to his residence. The bus collided with a lorry and he was injured and died after five days. It was held that the accident occurred in the course of employment. Thus it is a settled law that the employment does not necessarily end when the down tool signal is given or when the workman leaves the actual workshop where he is working. There is notional extension both at entry and exit by time and space.⁸

The notional extension of time and space cannot have pervading application. Its application is limited according to the facts and circumstances of each case. In the case of *Alderman v. Great Western Railway Company*⁹ a Traveling Ticket Collector of the Railway Company had in the course of his duty to travel from Oxford where his home was, to Swam Sea where he had to stay overnight to return to Oxford the following day. While proceeding from his lodging to Swam Sea station to perform his usual duties he fell on the street and sustained injury for which he claimed compensation. It was held by the

⁷ AIR 1964 SC 193

⁸ See, *National Iron and Steel Company v. Manorama*, AIR 1953 Cal 143; *Sri Jayaram Motor Service v. Pitchamma* (1982) II LLJ 849 (Mad); *Superintending Engineer, Parambikulam Allur Project; Pollachi v. Andammal* (1983) II LLJ 326

⁹ 1937 AC 454

House of Lords that while in the street proceeding from his lodging to the station he was not performing any duty under the control of service and therefore the accident did not arise in the course of employment, and that he was not entitled to compensation. Similarly, in *General Manager, Eastern Railway v. R.R. Verma*¹⁰ where the claimant was posted as Asst. Station Master at Bhanpur Railway Station and one day while boarding a train at Rura Railway Station for coming back to Bhanpur for rejoining his duties, he slipped and came under the wheels of a train, causing serious injuries. The Compensation Commissioner held that the accident arose out of and in the course of employment. The High court while hearing an appeal held:

“.....since the claimant had come to Rura in connection to his private work and it was open to him to reach Bhanpur by any mode or in any manner that suited him. So it was held that when the claimant went to Rura Railway Station with a view to proceed to Bhanpur, it cannot be said that he was performing any duty for which he had been employed. The accident in question therefore did not arise in the course of employment.”

The proviso to Section 3 (1) specifically mentions the situations when the employer will not be liable to pay compensation. The employer is not liable:

¹⁰ 1979 Lab IC 1099 cited in K. Madhavan Pillai, *Labour and Industrial Laws*, (7th ed.) Allahabad Law Agency, 1996

1. if the injury did not result in total or partial disablement for a period exceeding three days; and
2. in respect of any injury not resulting in death or permanent disablement caused by an accident which is directly attributable to:
 - i. the workmen having been at the time of accident under the influence of drink or drug; or
 - ii. the willful disobedience on the part of the workman to an order expressly given, or to a rule expressly framed for the purpose of securing the safety of the workmen; or
 - iii. the willful removal or disregard by the workmen of any safety guards or other devices which he knew to have been provided for the purpose of securing safety of workmen.

Mere negligence cannot be regarded as willful disobedience. Therefore mere negligence of workman is not a defense to the employer. Further willful disobedience needs to be specifically and undoubtedly proved. In *Aryamuni v. Union of India*¹¹ where the company notice written in English required use of goggles for works in which workman sustained injury to his eye due to spark, and where the company did not provide any such goggles and the injured workman did not know English either, it was held that the workman was not willfully disobedient.

¹¹ (1963) 1 LLJ 24

The claim of compensation under the Workmen's Compensation Act is optional with the claim under the Law of Torts or under the Employer's Liability Act. There is bar for recovering the compensation by a workman twice for the same injury thereby putting the employer in double jeopardy.¹²

The amount of compensation that a workman is entitled to is provided in Section 4 of the Act. Amount of compensation depends upon the gravity of injury and the nature of disablement. The injuries have been divided under four categories:

- i. Death
- ii. Permanent Total Disablement
- iii. Permanent Partial Disablement, and
- iv. Temporary Disablement (Total or Partial)

Compensation on Death:¹³

Where death results from the injury, the amount of compensation payable by the employer to the dependants of the workmen is calculated by multiplying the relevant factor with an amount equal to fifty percent of the monthly wages. The relevant factor means the factor specified in the Second

¹² Refer to Sec 3 (5)

¹³ Section 4 (1) (a)

Column of Schedule IV of the Act against the entry in first column specifying the age of the workmen. The minimum amount of compensation payable in cases of death is eighty thousand rupees. Therefore, the calculated amount is paid if it exceeds eighty thousand rupees. If on the other hand the calculated amount happens to be less than eighty thousand rupees, an amount of eighty thousand rupees is paid as compensation.

Compensation on Permanent Total Disablement:¹⁴

In cases of Permanent Total Disablement the amount of compensation is calculated by multiplying the relevant factor with an amount equal to sixty percent of the monthly wages of the workman. In Permanent Total Disablement, minimum compensation payable is ninety thousand rupees.

The maximum amount of wage to be taken into consideration for the purpose of calculation of compensation under Clause (a) and (b) of Sub Section 1 of Section 4¹⁵ is rupees four thousand. Therefore if the monthly wages of a worker exceed four thousand rupees, only four thousand rupees is taken into consideration as monthly wages of the worker for the purpose of calculation.

Thus the death compensation of a worker who has not exceeded the age of sixteen years and whose factor as specified in Schedule IV is 228.54 and who receives monthly wages exceeding four thousand rupees can be calculated as:

¹⁴ Section 4 (1) (b)

¹⁵ for calculating death compensation and compensation for permanent total disablement

$$1/2 \times 4000 \times 228.54$$

$$= 2000 \times 228.54$$

$$= 457080$$

Therefore the amount payable would be 457080/- (Rupees Four Lakhs Fifty Seven Thousand Eighty only). This would be the highest amount payable as death compensation because the factor of the age group is highest in schedule IV and highest permissible wage structure is taken into consideration.

Compensation for permanent total disablement can be similarly calculated, the only difference being that 60% of the monthly wages of the injured is taken into consideration.

Compensation on Permanent Partial Disablement:

Where Permanent Partial Disablement results from an injury, in case the injury happens to be one specified in Part II of Schedule I, the amount of compensation is determined taking into account the percentage of loss of earning capacity as specified in the corresponding column in the same schedule. The amount of compensation is determined by determining the amount payable in case of Permanent Total Disablement and reducing it to make the compensation proportionate to the loss of earning capacity

permanently caused by that injury. In cases of injuries not specified in the Schedule the loss has to be determined according to the assessment of a qualified medical practitioner.

The expression "loss of earning capacity" has been explained by Calcutta High Court in *Calcutta Licensed Measures v. Mohammed Hussain*¹⁶ where the Court laid down the following propositions:

- a. earning is not the same as earning capacity;
- b. the rise in earning may be because of various factors and rise in wages is not decisive of no loss of earning capacity
- c. loss of physical capacity is not co-extensive with loss of earning capacity;
- d. loss of physical capacity or physical incapacity may be relevant not as to which extent there is loss of earning capacity, for every employment which the workman was capable of undertaking at that time or the employment in which he was engaged at the time of the accident as the case falls for consideration.

Compensation on Temporary Disablement (whether Total or Partial):

¹⁶ AIR 1967 Cal 378

For Temporary Disablement whether Total or Partial, compensation is payable in the form of recurring half monthly payments. The amount of each payment is equal to 25% of the monthly wages of the workman. Such half monthly payment is payable on the sixteenth day from the date of disablement where the disablement lasts for a period less than twenty eight days. The first payment becomes due on the 16th day after a waiting period of three days. Thereafter payments are made in half monthly installments during the period of disablement lasts or during the period of five years whichever is shorter.¹⁷

Compensation under Section 4 is to be paid as soon as it falls due.¹⁷ In cases where the employer does not accept the liability for compensation to the extent claimed, he is bound to make provisional payment based on the extent of liability which he accepts. Where the employer is in default, the Commissioner has power to direct the concerned employer to pay the amount of arrears and also and also simple interest thereon at the rate of 12% per annum or such higher rate not exceeding¹⁸ the maximum lending rates of any Scheduled Bank. The Commissioner also has power to direct in addition to the aforesaid amount, a further sum not exceeding 50% of such amount by way of penalty.¹⁹

For the purpose of the calculation of compensation payable to a workman it is important to calculate his wage because the amount of compensation for Permanent Total or Permanent Partial Disablement or half

¹⁷ Section 4 A (1)

¹⁸ Section 4 A (3) (a)

¹⁹ Section 4 A (3) (b)

monthly payments for Temporary Disablement depends upon the wage group to which the concerned worker belongs.

Under Section the expression monthly wages denotes the amount of wages payable for a month's service and may be based on wages payable for a month or other period of even at piece rates. The monthly wages are calculated as follows:

- i. where the workman who was in the service of the employer during continuous period of not less than 12 months immediately preceding the accident, his monthly wages shall be $1/12^{\text{th}}$ of the total wages which have fallen due for payment for him by the employer in such 12 months period;
- ii. if the workman was in continuous service of one employer for less than one month then his monthly wages will be the average monthly amount during the 12 months immediately preceding the accident earned by a workman employed on same work with the same employer. In case there was no such workman with the same employer, than the monthly wages earned by a workman employed in similar work in the same locality will be the monthly wages of the concerned workman;
- iii. in other cases including those where it is not possible to calculate monthly wages due to want of information, the monthly wages shall

be 30 times the total wages earned in respect of the last continuous period of service immediately preceding the accident divided by the number of days comprising such period.

A period of service is continuous unless interrupted by a period of absence from work exceeding fourteen days.

The Act also makes provision for the review of the amount of compensation.²⁰ When the nature of disablement is temporary it is very likely that the condition of the workman may either improve or deteriorate. Therefore, in cases of half monthly payments being made under an agreement between the parties or under the order of the Commissioner, either party can make an application to the Commissioner for review. Such application is required to be accompanied by a certificate from a qualified medical practitioner.

On such an application made for the review of compensation as stated above, the Commissioner may increase, decrease, end or continue the half monthly payments. If it is found that the accident has resulted in permanent disablement, the Commissioner can convert the half monthly payments into lump sum compensation.

²⁰ Section 6

The Act also makes provision for commutation of half monthly payment.²¹ After the half monthly payments have been made for six months, either the employer or the workman can get the recurring payments commuted at any time to a single payment.

Compensation granted to a workman under the Workman's Compensation Act, 1923 cannot be assigned, attached or charged by any process of law and is also not liable to set off against any claim.²² This provision provides protection to the amount of compensation received by a workman or his dependents thus making them able to realize the social security provided under the Act.

Under the Workmen's Compensation Act, to avail the benefit of compensation, the first thing that a workman must do is to give a notice in writing.²³ As soon as may be practicable after the occurrence of accident, a notice must be served by the workman injured as a result of accident. Such notice must contain:

1. the name and address of the workman injured;
2. the date of accident; and
3. the cause of injury

²¹ Section 7.

²² Section 9.

²³ Section 10.

The notice is to be served on the employer or any one of the several employers or any person responsible for the management of the branch where the workman is employed.²⁴ The claim of compensation must be made within 2 years of the occurrence of the accident or from the date of death.²⁵

The scheme of the Workmen's Compensation Act, 1923 is to make employer liable to compensate a worker for injuries suffered by him as a result of an accident arising out of and in the course of employment. But it is provided under Section 12 (1) where a contractor is engaged to do wholly or partly work which ordinarily forms part of the trade or business of the principal, than, the principal would be liable to pay compensation as if he was the direct employer. The principal on the other hand is entitled to be indemnified by the contractor to the extent of the liability thrown upon him. Likewise the contractor is entitled to be indemnified by sub-contractors for compensation paid by him or for indemnity to the principal employer. All questions of indemnity are to be settled by the Commissioner for Workmen's Compensation.

Where some third party is responsible for the accident injuring the workman, the employer has a right to recover from that third party any compensation he has paid to the workman, in addition to any damages.

²⁴ Section 10 (2)

²⁵ Section 12 (2)

There is a bar on the jurisdiction of Civil Courts to settle, decide or deal with any question which is by or under this Act required to be so settled, decided or dealt with by the Commissioner. The Civil Court also has no jurisdiction to enforce any liability incurred under the Act.

The Commissioner while deciding any claim deemed to be a Civil Court and authorized to exercise the powers under the Civil Procedure Code, 1908 or taking evidence on oath, for enforcing the attendance of witnesses, and for compelling the production of documents and material objects. The Commissioner is to follow the procedure prescribed by the rules framed under the Act but he may vary the procedure provided he is satisfied that the interest of the parties will not be prejudicially affected.²⁶

An appeal against the orders of the Commissioner would lie in the High Court. Such appeal is allowed on limited orders such as:²⁷

1. orders allowing as compensation a lump sum, or disallowing a claim in full or part of a lump sum;
2. orders refusing to allow redemption of half-monthly payments;
3. orders awarding interest or penalty under Section 4 A;

²⁶ Section 23

²⁷ Section 30

4. orders providing for the distribution of compensation among the dependants of a deceased workman or disallowing any claim of a person alleging himself to be a dependant;
5. orders allowing or disallowing any claim for the amount of indemnity under the provisions of Section 12; and
6. orders refusing to register a memorandum of agreement or registering the same providing for registration of the same subject to conditions.

Further no appeal would lie against any such order as stated above unless the following conditions are fulfilled:²⁸

1. a substantial question of law is involved in the appeal;
2. excepting an order refusing to allow redemption of half monthly payments the amount in dispute in appeal is not less than 300 rupees;
3. the parties have not agreed to abide by the orders of the Commissioner;
4. Order of the Commissioner does not give effect to an agreement arrived at between the parties;
5. in case of appeal awarding compensation in lump sum, the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him

²⁸ ibid

the amount payable under the order appealed against. This provision is mandatory and not merely declaratory;²⁹

6. appeals filed within the limitation period, that is within sixty days from the date of the order limitation would begin from the date the party is informed of the order.³⁰ The delay can be excused by the high Court if it is satisfied that there is sufficient cause for not filing the appeal in time.

The State Government is vested under the Act with powers to make rules on various matters.³¹ The rules as soon as they are made are required to be laid before the State Legislature. The rules made by the Central Government are to be laid before the Parliament. The rules are also to be published in the Official Gazette and after such publication they will be deemed to have been enacted under the Act.

The provisions contained in the Workmen's Compensation Act, 1923 are applicable irrespective of the number of workers employed in an establishment. Therefore it applies to unorganized workers also. However the benefits flowing from the Act are best reached to the workers in unorganized sector if the complaints and claims are received locally through the local self government or through some other institutional machinery created or designated for this purpose.

²⁹ *Bihar Journals v. Natya Nand*, AIR 1959 Pat 112

³⁰ *C.E. Corporation v. Doadi Raj* 1960 Orissa 39

³¹ Refer to Section 32

B. The Payment of Wages Act, 1936:

The Payment of Wages Act, 1936 is an enactment to protect the wages earned by workers while working in factories and other establishments. The Act applies in the first instance to the persons employed in any factory or railway or a person fulfilling contract with a railway administration;³² but the State Government has power to extend the provisions of the Act to any class of persons employed in any industrial establishment or in any class or group of industrial establishments. Section 2 (ii) defines industrial establishments to mean *inter alia*, any tramway service or motor transport service engaged in carrying passengers, goods or both; any workshop or other establishment where articles are produced for use, transport or sale; establishments in which any work relating to construction, development, maintenance of building, roads, bridges, canals etc. are carried on; or any other establishment or class of establishments which the Central Government or the State Government as the case may be may specify by notification, in the Official Gazette.³³ Such establishments need not be permanent.³⁴

“Wages” in economics means price paid for labour. Wages consist of all payments that compensate individuals for time and effort spent in the

³² Section 1 (2)

³³ Section 1 (5)

³⁴ *Matber Singh v. Bhola Dutt* 1980 Lab IC 393 (All) cited in K. Madhavan Pillai, *Labour and Industrial Laws* (7th ed.), Allahabad Law Agency (1998)

production of economic goods and services. The payment include not only wages in ordinary, narrow sense like the earnings computed generally on hourly, daily, weekly, or output basis but also covers bonuses added to regular earnings, premiums for night or holiday work or for work exceeding stated norms or quality and quantity; fees and retainers for professional services; and that part of the income of business owners that compensates them for time devoted to business. The Payment of Wages Act, 1936 also give a comprehensive definition of wages to cover all remunerations by salaries or allowances including any remuneration under any award, over-time payment, bonuses, compensation on termination of employment or on retirement etc. or any sum to which a person is entitled under any law for time being in force.

The wages according to the Act does not include:

- i. The value of any house accommodation or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages
- ii. Any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;
- iii. Any bonus which does not form part of the remuneration payable under the terms of the employment or which is not payable under any wage or settlement between the parties or order of a court;

- iv. Any T.A. or the value of any travel concession;
- v. Any sum paid to the employed person to defray special expenses incurred by him by the nature of his employment; or
- vi. Any gratuity payable on termination of employment.

Any amount claimed by employees for the periods of lay-off falls within the definition of wages.³⁵

The primary responsibility for the payment of wages under the Act lies with the employer but in the case of industrial establishments the person responsible to the employer for supervision and control of the establishments will be liable for the payment of wages.³⁶

The Act requires the person responsible for the payment of wages under Section 3 of the Act to fix wage periods in respect of which such wages shall be payable. The wage period so fixed should not exceed one month.³⁷

Under Section 6 of the Act, wages are required to be paid in current coins or current notes. However, if the employee gives the authority in writing to this effect, the employer can pay wages by cheque or crediting the wages in his bank account.

³⁵ *Junior Labour Inspector v. Appellate Authority* (1976) 1 LLJ 512.

³⁶ Section 3

³⁷ Section 4

Regarding the time of payment, the Act says that if the number of persons employed in an industrial establishment etc. is less than one thousand, wages must be paid before the expiry of seventh day and in other industrial establishments etc the wages should be paid before the expiry of tenth day from the last day of the wage period: Where the employment of a person is terminated then the wage due to him must be paid before the expiry of the second working day from the day of termination of work. All payments of wages are required to be made on a working day.

Every payment made by the employed person to the employer or his agent will be deemed under the Payment of Wages Act, 1936 to be deduction from wages.³⁸ The Act has prohibited the employer from making any deduction from the wages of the employees except those permitted under the Act.³⁹ The loss of wages resulting from withholding of increment or promotion (including stoppage of increment or efficiency bar); reduction to a lower post or time scale or to a lower stage in a time scale; and suspensions will not be held as deductions under the Act.⁴⁰ The Act also allows following deductions:

Fines: fines for the acts and omissions which are approved by the Government and notified at the establishments can be imposed by the employer upon the employee. As per Section 8 no such fine can be imposed except for such acts.

³⁸ Explanation (i) to Section 7

³⁹ Section 7 (1)

⁴⁰ Explanation (ii) to Section 7

or omissions as approved by the Government. Notice specifying such acts and omissions is also required to be exhibited in the premises. The employee must, before the imposition of fine, be heard as to why such should not be imposed on him. In one wage period the total permitted amount of fine is one *anna* in a rupee of the wages. For the employees below the age of 15 no imposition is allowed under the Act. No fine can be recovered in installments or after the expiry of 60 days from the day of its imposition. All such fines and realizations thereof are required under the Act to be recorded in a register and such realized amount should be spent for the purposes beneficial to the employees.

- ii. **Deduction for Absence from duty:** The payment of Wages Act, 1936 authorizes the employer to make deductions for the absence of the employee.⁴¹ If the employee abstains from carrying out his work in pursuance of stay in strike without any just cause or a tool down strike without a reasonable cause he is deemed to have absented his duty. Such deduction should be proportionate to the absence. However, where ten or more

⁴¹ Section 7 (2) (b), also refer to Section 9

workers acting in concert absent themselves without any just cause and without any notice the deduction may include such amount not exceeding his wage for 8 days.⁴²

iii. **Deduction for house accommodation, amenities and services:** deductions may be made from the wages of the employee for house accommodation provided by the employer or by the Government or by any housing board set up under any law as notified by the State Government. Such deduction should not exceed the value of the accommodation.⁴³ Further deduction in the same manner may be made for amenities and services.

iv. **Deduction for recovery and adjustments:** advances or any other overpayment can be recovered or adjusted through deductions. Deductions under this head is subject to the following conditions:

a. Recovery of advance made before the employment can be deducted from the first payment of wages in respect of a complete wage period. But no deduction

⁴² Prviso to Section 9 (2)

⁴³ Section 11

can be made to recover advance given for traveling expenses.

- b. Advance of money given after employment can be recovered in accordance with the conditions laid down by State Government.
- c. Advance of wages not already earned can be recovered subject to the rule made by the State Government.

The employer has authority to recover loans with interest made from any fund constituted for the welfare of labour in accordance with the rules approved by the State Government.⁴⁴ Likewise, loans granted for house building or other purposes can be recovered with interest subject to the rules made by State Governments.

v. **Deduction of Income Tax**

vi. **Deduction by order of court or other competent authority**

⁴⁴ Section 7 (2) (ff)

vii. **Deduction for payment to co-operative societies etc:** deductions are authorized for payments to co-operative societies of advance from any provident fund recognized by Provident Fund Act, 1925 or approved by the State Government.⁴⁵ Deductions are also allowed for payment to co-operative societies or insurance scheme or E.I.C.⁴⁶ All such deductions are subject to the conditions imposed by State Government.⁴⁷

viii.- **Deduction for Contribution to Prime Minister's National Relief Fund or other funds:** deduction can be made for contribution to Prime Minister's National Relief Fund or such other fund notified by the Central Government in the Official Gazette. Such deduction can be effected only after obtaining a written authorization of the employee concerned.⁴⁸

Permissible Total Deduction:

The total amount of deduction which can be made under Section 7 (2) in any wage period should not exceed:

⁴⁵ Section 7 (2) (i)

⁴⁶ Section 7 (2) (i) (k)

⁴⁷ Section 13

⁴⁸ Section 7 (2) (p)

- i. in case where such deduction are wholly or partly made for payment to co-operative societies, 75% of such wages; and
- ii. in all other cases 50% of such wages.

The excess in the above cases may be recovered in the manner prescribed.

The employer is required under Section 13-A of the Act to maintain registers and records of the details of persons employed, nature of work, wages, deductions, receipts and other prescribed particulars. However so long as the rules do not make it obligatory to maintain such registers, non maintenance of such registers will not attract the offence under Section 20.

The payment of Wages Act empowers the State Government to appoint inspectors for enforcing the provisions of the Act. Such inspectors are empowered to examination and enquiries, search any premises at reasonable times, supervise the payment of wages to persons, require by written order the production of any register or record maintained pursuant to the Act, to seize or take copies of such records and to exercise such other powers as may be prescribed. The Act also requires the Constitution of a Payment of Wages Authority. The Authority has all powers of a civil court under Civil Procedure Code, 1908 for:

1. taking evidence;
2. enforcing the attendance of witness; and
3. Compelling the production of documents.

If the payment of wages is delayed beyond the due date or deductions are made from wages contrary to the provisions of the Act an application for recovery can be filed by the employee or legal practitioner or official of a registered trade union authorized by the employee or by inspector or by any other person with the permission of the Authority appointed by the State Government for hearing the claim under this Act. Such application has to be presented within one year from the date on which the payment of wages was due or from the date on which deductions were made. The Authority, however, has power to condone the delay on its being satisfied on applying proper legal principles that there was sufficient cause for such delay.

The Authority under the Act has power of appointing whom lies with the State Government should be:

1. presiding officer of a Labour Court or Industrial Tribunal; or
2. any Commissioner for Workmen's Compensation; or
3. other officer with experience as judge of a civil court or as a stipendiary magistrate.

The State Government has power to appoint more than one authority for the same specified area.

Section 20 of the Act stipulates fines for contravening the provisions of the Act. The years old provisions stipulating the amount of fines do not fit in the present situations. Mere sums of a few hundred rupees do not adequately give the wrongdoer feeling of punishment. Thus the amounts of fines need adequate increments.

The Payment of Wages Act also is not designed to help the unorganized workers. The benefits flowing from the Act do not adequately help the unorganized workers because of the casual nature of the employment. The unorganized workers do not have institutional machinery like trade unions to fight for their rights. As such they cannot agitate to fight for their rights without losing their job.

C. The Payment of Gratuity Act, 1972:

In the simple meaning gratuity may be understood to mean money given in appreciation. It is a small gift, usually of money, given to somebody as

thanks for service given. The Oxford Dictionary the word gratuity has been interpreted to mean "money given in recognition of services rendered or a tip.

The scheme of payment of Gratuity to employees engaged in factories, mines, shops and establishments etc. in India started with the State Government legislation in Kerala and Governor's Promulgation of Ordinance in West Bengal in 1971. After these enactments some other State Governments also voiced their intention to bring similar legislations. Therefore for the uniformity of the pattern of payment of gratuity to the employees throughout the Country, need for a central legislation was felt. The proposal of central legislation on gratuity was formally discussed in the Labour Ministers' Conference held in New Delhi on 24th and 25th August 1971 and also in the Indian Labour Conference at its session held on the 22nd and 23rd October, 1971. There was general agreement at the Labour Minister's Conference and the Indian Labour Conference on an urgent need of a central legislation on the subject. The Legislation was passed by both the house of the Parliament in 1972 which came into force on 16.09.1972.

The benefits under the Act is available to any person (other than an apprentice) employed in wages in any establishment, shops, factories etc to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or electrical work whether the terms of such employment are express or implied and whether or not such person is employed in managerial or administrative

capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

The Act is applicable to shops and establishments within the meaning of any law for time being in force in relation to shops and establishments in a state, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.⁴⁹

The term 'establishment' has a wide meaning. According to Oxford Dictionary it means organized body of men maintained for a purpose. Section 1 (3) (b) of the Act empowers the Central Government to extend the coverage of this Act to any establishment. 'Establishment' under the Clause means an organization employing persons between whom relationship of employer and employee exists. Thus the Act if extended can be applicable to all cases where an employer employee relationship can be identified. A shop or establishment to which the Act becomes applicable will be governed by this Act even when the number of persons falls below 10.⁵⁰

⁴⁹ Section 1 (3)

⁵⁰ Section 1 (3)

Gratuity is payable to an employee on the termination of his employment⁵¹ after he has rendered continuous service for not less than five years-

1. on his superannuation; or
2. on his retirement or resignation; or
3. on his death or disablement due to accident or disease.

Completion of continuous service of five years is not required where the termination of service is due to disablement or death.⁵² In case of death of the employee, gratuity payable to him will be payable to his nominee or where no nominee is appointed, to his heir, or such nominee or heir is minor, has to be deposited with the Controlling Authority who has to invest the same for the benefit of minor in such bank or other financial institution as may be prescribed, until such minor attains majority.

For every completed year of service, or part of it, in excess of six months, the employer is required to pay gratuity to an employee at the rate of fifteen days' wages as per the rate of wages last drawn by the employee concerned.⁵³ In the case of a piece-rated employee, daily wages shall be computed on the average of the total wages for a period of three months immediately preceding the termination of his employment and for this purpose

⁵¹ Section 4

⁵² Proviso (first) to Section 4 (1)

⁵³ Section 4 (2)

the wages paid for any overtime work is not to be taken into account. In the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer has to pay the gratuity at the rate of seven days' wages for each season.

For deriving the fifteen days wages in cases of monthly rated employee, wages last drawn by him has to be divided by twenty-six and the quotient derived has to be multiplied by fifteen. The calculation in this case would be thus-

$$\text{Monthly Wages}/26 \times 15$$

The amount of gratuity payable to an employee should not exceed three lakhs fifty thousand rupees.⁵⁴

The provisions under the Act do not debar the right of an employee to receive better gratuity under any award or agreement or contract with the employer.

Where services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction, of property belonging to the employer, the gratuity of an employee has to be forfeited only to the

⁵⁴ The amount of rupees fifty thousand was increased to rupees one lakh in 1994 and it was further increased to rupees three lakhs fifty thousand in 1998.

extent of the damage or loss so caused. Further, the gratuity may be wholly or partly forfeited:

- i. if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part;
- ii. for any act constituting an offence involving moral turpitude provided that such offence was committed in the course of employment.⁵⁵

The right to gratuity has been held by the Supreme Court as a statutory right.⁵⁶ In *Pattehurila v. K. Damodaran*⁵⁷ it was held that by the change of ownership, the relationship of employer and employees subsists and the new employer cannot escape from the liability of payment of gratuity to the employee. Therefore, it is the uninterrupted tenure of service that is determining factor of the right to gratuity under the Payment of Gratuity Act and that changes of managements are irrelevant on the point.

In the year 1987 a provision for compulsory insurance was added in the Act to come into effect from such date as is notified by the appropriate Government.⁵⁸ The insurance is for the employer's liability of payment towards

⁵⁵ Section 4 (5) (b)

⁵⁶ *D.K. Kapoor v. Union of India*, AIR 1990 SC 1923

⁵⁷ (1993) 1 LLJ 1211

⁵⁸ Section 4 A

gratuity. Where the employer fails to pay any premium he will be liable to pay the amount of gratuity due under the Act including interest, if any, for delayed payments, to the Controlling Authority appointed by the appropriate Government.⁵⁹ Any contravention to this provision attracts the punishment of fine which may extend to ten thousand rupees and in the case of continuing offence a further fine extending to one thousand rupees for each day of continuation of the offence.

The appropriate Government may by notification (which may have prospective or retrospective effect) exempt any establishment, shop etc or any employer or class of employees employed in any establishment, shop etc from the application of this Act if it has the opinion that the employees in such establishment, shop etc are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

A person who has become eligible for payment of gratuity or any authorized person acting on his behalf has to send a written application to the employer.⁶⁰ As soon as the gratuity becomes payable when the application as stated above has been made or not, the employer has to determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the Controlling Authority specifying the amount of gratuity

⁵⁹ Section 4 A (5)

⁶⁰ Section 7 (1)

so determined.⁶¹ The case of any dispute with regard to the amount of gratuity, or any claims, or with regard to the person entitled to receive such amount, etc., the employer has to deposit with the Controlling Authority such amount as he admits to be payable by him as gratuity. The Controlling authority has to decide the dispute duly observing principles of fair hearing.

The proceedings of enquiry will be deemed to be judicial proceedings and the Controlling has been entrusted with the power of a civil court in the matters of enforcing attendance of any person and his examination on oath, requiring the discovery or production of documents, receiving evidence on affidavits and for issuing commissions for the examination of witnesses.

The appeal lies with the appropriate Government or such appellate authority as specified by the appropriate Government.⁶² The limitation period for such appeal is 60 days which can be extended by a further period of 60 days on being satisfied of the sufficient cause of such delay.⁶³

The employer has to arrange to pay the amount of gratuity within 30 days from the date it becomes payable.⁶⁴ For the delayed payment, except in the cases where the delay was due to employee's own fault, simple interest at the rate of the percentage as notified by the Central Government from time to

⁶¹ Section 7 (2)

⁶² Section 7 (7)

⁶³ Proviso (first) to Section 7 (7)

⁶⁴ Section 7 (3)

time or as the appropriate Government may notify, is also required to be paid to the employee.

The Controlling Authority should pay the amount deposited including the excess amount, as soon as it may be after the deposit⁶⁵

1. to the applicant where he is the employee; or
2. where the applicant is not the employee, to the nominee or the guardian or heir of such nominee, if the Controlling is satisfied that there is no dispute as to the right to receive the gratuity.

Nomination has to be made by each employee for the payment of gratuity.⁶⁶ Such nomination has to be made in the in favour of one or more member of the family. Any nomination outside the family, if the employer has a family is void. If at the time of making a nomination the employee did not have a family and where he subsequently acquires a family, such nomination would become invalid and the employee has to make a fresh nomination in favour of one or more member of the family.⁶⁷ Nomination can be modified. If the nominee predeceases the employee, the interest of the nominee will revert to the employee who has to make a fresh nomination.⁶⁸

⁶⁵ Section 7 (4) (c)

⁶⁶ Section 6 (3)

⁶⁷ Section 6 (4)

⁶⁸ Section 6 (6)

Gratuity amount payable to an employee is protected against attachment in execution of any decree or order of any court, revenue or criminal court.

In the cases of non payments the Controlling Authority, on an application made by the aggrieved person, has to issue a certificate for that amount to the Collector who will collect the amount along with interest as arrears of land revenue and pay the same to the person entitled.

To facilitate the execution of the provisions of the Act provisions have been made for the appointment of inspectors who have been given adequate powers. Further penalties have been prescribed for various offences under the Act. Any person who for the purpose of avoiding any payment to be made under this Act or to avoid such liability of another person knowingly makes or causes to be made any false statements or false representation will be punishable with imprisonment extending to six months or fine extending to ten thousand rupees or both.⁶⁹ An employer who contravenes or makes default in complying with, any of the provisions of this Act or any rule or order made thereunder is liable for punishment of imprisonment for a term which should not be less than three months but which may extend to one year or with fine which should not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.⁷⁰ Where the offence relates to non payment of gratuity the punishment prescribed is imprisonment which should

⁶⁹ Section 19 (1)

⁷⁰ Section 19 (2)

not be less than six months but which may extend to two years unless the court trying the case, for reasons to be recorded, is of the opinion that lesser term of imprisonment or imposition of fine would meet the ends of justice.⁷¹

All offences punishable under this Act should be filed through the Controlling Authority to a court not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of First Class.

The provisions of this Act have an overriding effect on all other enactments, instruments or contracts. The power to make rules under this Act has been vested on the appropriate Government.

D. The Payment of Bonus Act, 1965:

The consistent demand of workmen for social justice to render due share in the profits of the industry in which they have a major hand side by side the enterprise and the capital and the observation of the Hon'ble Supreme Court of India in *Associated Cement Companies v. Workmen*⁷² in 1959 made the Government of India to set up a Tripartite Commission on December 6, 1961 to consider in a comprehensive manner, the question of payment of bonus based on profits to employees employed in establishments, and to make

⁷¹ Proviso to Section 19 (2).

⁷² (1959) 1 LLJ 644 (SC)

recommendations to the Government. The Supreme Court in the above case observed:

“If the legislature feels that the claims for social and economic justice made by labour should be redefined on a clear basis, it can step in legislature in that behalf. It may also be possible to have the question comprehensively considered by a high powered commission which may be asked to examine the pros and cons of the problem in all its aspects by taking evidence from all industries and bodies of workmen.”

On the recommendations of the Commission as stated above the Parliament passed payment of Bonus Act, 1965 with the following objectives:

1. to impose statutory liability upon the employer of every establishment covered by the Act to pay bonus to employees in the establishment;
2. to define the principle of payment of bonus according to the prescribed formula; and
3. to provide for payment of minimum and maximum bonus and linking it with the scheme of set off and set on.

Bonus is a payment made by the employer to maintain industrial harmony. It is the workmen's share of prosperity of the concern for which they have their contribution. The concept of payment of bonus is not the product of any generosity of the employer but it is one paid in the interest of industrial peace and to make available to every employee a living wage which is generally more than the actual wages.⁷³

The Payment of Bonus Act applies to every factory and every other establishment in which twenty or more persons are employed on any day during an accounting year.⁷⁴ Keeping in view the area of the present work, it is important to note that this Act now will apply to the employees through contractors on building operations.⁷⁵ Further the appropriate Government has powers to exempt any establishment or class of establishments from the operation of all or any provisions of the Act⁷⁶

Every employee who has worked in an establishment for not less than 30 working days in a year is entitled to bonus.⁷⁷ For the purpose of the Act "employee" means any person other than an apprentice employed on salary or wage not exceeding ten thousand rupees⁷⁸ in any industry to do any skilled or

⁷³ S.K. Puri (Dr.), *Labour and Industrial Law* (8th ed.), Allahabad Law Agency, 2004 at 542

⁷⁴ Section 1 (3)

⁷⁵ The amendment in Section 32 for deletion of entry vi to include employees employed through contractors in building operation has been announced by the Union Cabinet Minister for Labour on October 1, 2007

⁷⁶ Section 36

⁷⁷ Section 5

⁷⁸ Increased from three thousand and five hundred rupees: announced by the Union Minister for Labour on October 1, 2007

unskilled, manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment is express or implied.

Where the establishment consists of different departments or undertaking or has branches, whether situated in the same place or in different places, all such departments or undertakings or branches are to be treated as parts of the same establishment.⁷⁹

The Act has elaborately explained the process of computation of bonus. Where the salary or wages of an employee exceeds one thousand and six hundred per month the bonus payable to such employee has to be calculated as if the salary or wages are two thousand and five hundred rupees per month.⁸⁰ Further for the purpose of computation of the days in which he has been off under an agreement (permitted by any law) or on which he has been on leave with salary or wages, or he has been absent due to temporary disablement caused by accident arising out of and in the course of employment or on maternity leave with salary or wages; the employee concerned would be worked in the establishment concerned.

⁷⁹ Section 9
⁸⁰ Section 13

For the newly set up establishments the right of bonus to the employee is partially governed by separate provisions. The Act says that in such cases:⁸¹

1. in the first five accounting years in which the employer sells the goods produced or services rendered, the bonus becomes payable only in respect of the year in which the employer derives profits. For this period the application of the provisions relating to set on and set off of allocable surplus enumerated in Section 15 of the Act will not be applicable;
2. For the sixth and seventh accounting years the provisions in Section 15 will be applicable subject to following modifications:
 - i. for the sixth accounting year, the set on or set off principle will be applicable as against the allocable surplus of fifth and sixth accounting year; and
 - ii. for the seventh accounting year, the set on or set off principle will be applicable as against the allocable surplus of fifth, sixth and seventh accounting year.⁸²
3. From the eighth accounting year following the accounting year in which the employer starts selling goods produced the provisions of Section 15 will apply.⁸³

⁸¹ Section 16 (A)

⁸² Section 16 (1-B)

Section 11 speaks about maximum bonus. It says that in an accounting year if the allocable surplus exceeds the amount of minimum bonus payable under Section 10 then the employer will be bound to pay bonus of an amount in proportion to the salary or wage of the employee during the year subject to a maximum of 20 percent of such salary or wage. Under Section 15, the excess amount after giving maximum bonus under Section 11 may be set on for the succeeding year. Similarly the deficiency to pay even the minimum bonus under Section 10 may be set off in the succeeding year if there is excess after meeting the minimum bonus in that succeeding year.

Minimum bonus for the above purpose is 8.33 percent of the salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher. For an employee who has not completed fifteen years such minimum bonus is sixty rupees.⁸⁴

In cases where the employee has not worked for all the working days, the minimum bonus if higher than 8.33 percent of his salary or wages has to be proportionately reduced.

Computation of gross profits derived by an employer from an establishment in respect of the accounting year in cases other than that of a

⁸³ Section 16 (I-C)

⁸⁴ Section 10

banking company should be calculated according the procedure provided in the second schedule.

Section 6 provides the sums that have to be deducted form gross profit as prior charges. They are:

1. any amount by way of depreciation admissible under the Income Tax Act etc;
2. any amount by way of development rebate or investment allowance or development allowance which the employer is entitled to deduct from his income under the Income Tax Act;
3. any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year;
4. such further sums as are specified in the third schedule.

Direct tax payable by the employer should be calculated at the rates applicable to the income of he employer for that year. In calculating such tax rates no account should be taken of:⁸⁵

1. any loss incurred by the employer in respect of any previous accounting year and carried forward under any law;

⁸⁵ Section 7 (a)

2. any arrears of depreciation which the employer is entitled to add to the amount of depreciation under Sub Section (2) of Section 32 of the Income Tax Act;
3. any exemption conferred on the employer under Section 84 of the Income Tax Act.

Further, where the employer is an individual or Hindu Undivided Family the tax payable by such employer under the Income Tax Act should be calculated on the basis that the income derived by him from the establishment is his only income.⁸⁶ Rebates other than development rebate or investment allowance or development allowance have also been saved from being accounted in the calculation of the direct tax.

The Payment of bonus must be in cash. In a case where there was a dispute as to liability to pay bonus, the bonus must be paid within a month of the award of the authority trying the dispute. In all other cases it must be paid within 8 months from the date of closing of the accounting year. However on sufficient reasons the Government or the authority as the case may be, can extend the period of such payment beyond eight months but it should not in any case exceed two years.⁸⁷

⁸⁶ Section 7 (c)

⁸⁷ Section 19

The Bonus is recoverable from the employer. On an application by the employee or his authorized agent or his assignee or his legal heirs and on satisfaction the appropriate government or the authority as the case may be would issue a certificate of the amount to collector. The collector would collect the same as arrears of land revenue.⁸⁸ Apart from the authorities as already referred to the Act also requires the appointment of inspectors for the purpose of carrying on the provisions of the Act.⁸⁹

For the contravention of the provisions of the Act or failing to comply with the direction or requisition of any direction the punishment prescribed is imprisonment extending to six months or fine which may extend to one thousand rupees or both.⁹⁰

The disputes under the Act are deemed to be industrial disputes within the meaning of Section 2 (k) of the industrial Disputes Act. Therefore the settlement method of Industrial Disputes or any corresponding state law would apply.⁹¹ In a dispute referred under Section 22 of the Act regarding bonus payable under the Act, the Tribunal is under a duty to decide the rate of bonus payable by the employer. In the absence of the rate being specified, the

⁸⁸ Section 21

⁸⁹ Section 27 (1)

⁹⁰ Section 28

⁹¹ Section 22

employer would be handicapped in carrying out the directions contained in the award.⁹²

Recent steps of the Government to include workers employed through contractors in building operation and rising of the basic wages for eligibility for bonus from less than Rs. 3, 500 to less than Rs. 10, 000 opens up new hopes for the betterment of the conditions of workers employed in various employments. Government employees and Contract labourers are the ones who have a cause to celebrate. More such bold steps are necessary for a country which has a potential to change the shape of its economy through its massive workforce.

E. The Minimum Wages Act, 1948:

There are different theories of wages explaining us the concept of wages and elements and determining factors. Just Wage Theory of the noted Italian philosopher St. Thomas Aquinas, Subsistence Theory of Adam Smith later developed by David Ricardo, Bargaining Theory, Purchasing Power Theory, Marginal Productivity Theory largely developed by the American economist John Bates Clerk, Wages Fund Theory, etc. all explain many aspects of wage problems. However none of these theories can be used to shoot all problems.

⁹² *Md. Hanif v. J.B. Majdoor Union*, 1980 Lab IC (All), cited in K. Madhavan Pillai, *Labour and Industrial Laws* (7th ed.), Allahabad Law Agency (1998) at 455

In *Express Newspapers v. Union of India*⁹³, the Supreme Court classified wages into three categories viz. Living Wage, Fair Wage and Minimum Wage. Living Wage is one which is appropriate for normal needs of the average employee regarded as a human being living in a civilized community. A living wage should enable a male earner to provide for himself and his family (of about five persons) not merely the bare essentials of food, cloth and shelter but a measure of frugal comforts including education for children, protection against ill health, requirements of essential social needs and a measure of insurance against more important misfortunes including old age. Fair wage is another concept of wage which stands between living and minimum wage. Fair wage is said to be a step towards the progressive realization of a living wage. A fair wage is settled above the minimum wage and goes through the process of approximating towards the living wage while the lower limit to fair wage must obviously be the minimum wage; the upper limit is set by capacity of the industry to pay. Minimum wage differing from these two provide for bare subsistence. Minimum wage is sufficient to cover the bare physical needs of a worker and his family. This minimum wage is paid to the worker irrespective of the paying capacity of the industry. No right to exist can be attributed to an industry which is not in a position to pay its workmen minimum wage.

⁹³ AIR 1958 SC 576

Minimum wage generally means rate of pay fixed either by a collective bargaining agreement or by governmental enactment as the lowest wage payable to specified categories of employees. The setting of a minimum wage does not preclude the right of employees to demand wages above the established minimum. The method of establishing a minimum wage by collective bargaining method suffers from serious drawbacks. The realization of these shortcomings led trade unions to demand minimum wage programmes in several countries.

The first minimum wage law was enacted by the government of New Zealand in 1894. Subsequently Victoria State, Australia in 1886 followed the trend. Inspired by Australian law British Trade Boards was enacted in 1909. In the United States, Massachusetts enacted the first minimum wage law in 1912.

In India, law on minimum wages cannot be prescribed to correspond to the concept of living wage because of the level of income is very low. The Report of the National Commission on Labour recommends fixation of different minima for different industries which would have greater appeal and function fixing a minimum wage for the country's economy as a whole.⁹⁴ But after so many years of economic reforms it is certainly a time to progress towards the achievement of this end.

⁹⁴ Report of the National Commission on Labour (1969)

The question of minimum wages was studied in depth by the Whitley Commission in India. It observed:⁹⁵

“it is likely that there are many trades in which a minimum wage may be desirable but not immediately practicable.”

Thereafter many committees were formed to consider the issue. Finally, Indian Labour Conference gave shape to the Minimum Wages Bill which was enforced as an Act in 1948.

The whole philosophy underlying the enactment of Minimum Wages Act is to prevent exploitation of labour through the payment of unduly low wages. The Act empowers the Central and the State Governments to fix minimum rates of wages for different employments listed in the Schedule to the Act. Thus the Act ruled out the determination of wages entirely to the market forces.

In Minimum Wages Act, it may be noted that the powers to fix minimum wages has been vested on the appropriate Government only for a few employments relating to Tourism. In the context of the present work Construction and maintenance of roads and buildings⁹⁶ and public transports⁹⁷ are the only areas in tourism which is covered by the Minimum Wages Act

⁹⁵ Cited in the Report of the Royal Commission on Labour at 214

⁹⁶ Entry 7 and 17 of Part I of the Schedule to the Act

⁹⁷ Entry 21 of Part I of the Schedule to the Act

However under Section 27 of the Act, State Government is empowered to add other employments in the Schedule and the added employments would come under the purview of the Act.

The Act enumerates the methodology of fixing of minimum wages. In fixing or revising the minimum rate of wages different rates of wages may be fixed for different employments; different class of work in same employment; adult, adolescents, children and apprentice and for different localities. We may note here that wages for women cannot be different only on the ground of sex. However if she happens to work in a different class of work in same employment she may have different wage.

The appropriate Government has power under Section 3 of the Act to fix minimum wages for the employees employed in employments specified in either part of the Schedule or employments added in the Schedule by Notification of the State Government under Section 27. It also has power to review and revise minimum wages at such intervals not exceeding five years. Such minimum wage with regard to any employment may be fixed by the hour, by day, by month or by such longer wage period as may be prescribed.⁹⁸

⁹⁸ Section 13 (1)

On a minute study of the numerous decisions we find that the courts have insisted the following considerations to be irrelevant in fixation of minimum wages:⁹⁹

1. an employer may find it too difficult to carry on his business on the basis of minimum wages;
2. the financial capacity of the employer;
3. the employer company having incurred losses in the previous years;
4. employer's difficulty in importing raw materials;
5. the region-cum-industry principle;¹⁰⁰
6. the Financial condition of the establishment or the availability of the workmen in lower wages;
7. the minimum wage levels prevalent at other places.¹⁰¹

The appropriate Government is required to adopt any of the following procedures in fixing minimum rates of wages in respect of Scheduled employment for the first time i.e. in fixing or in revising rates of wages already fixed.¹⁰²

⁹⁹ *Karnataka Film Chamber of Commerce v. State of Karnataka* (1987) 1 LLJ 182 -

¹⁰⁰ *Kamini Metals & Alloys Ltd. v. The Workmen*, AIR 1967 SC 1175 -

¹⁰¹ *New Bhopal Textiles v. State of M.P.*, AIR 1960 M.P. 358

¹⁰² Section 5

- a. appoint as many committees and sub-committees as it considers necessary to hold inquiries and advise in respect of fixation of wages or revising them, as the case may be; or
- b. by notification in the official Gazette publish its proposals for the information of persons likely to be affected thereby and specify the date, not less than 2 months from the date of notification, on which the proposal is to be taken into consideration.

After considering the advice of the committees appointed for all representations received by it before the date specified in the official Gazette, the appropriate Government has to fix or revise the minimum rates of wages in respect of each scheduled employments.¹⁰³

Minimum wages payable under the Act has to be paid in cash. However where there is such a custom, with the authorization of the appropriate Government it can be paid wholly or partly in kind. Likewise supply of essential commodities in concession rates can also be authorized by the appropriate Government the cash value of which should be estimated in the prescribed manner.¹⁰⁴

¹⁰³ Section 5 (2)

¹⁰⁴ Section 11

Where minimum rates of wages in respect of a scheduled employment is fixed, the employer has to pay for that class of employees, wages not less than the specified minimum rate of wage without any deductions except as authorized.¹⁰⁵

The appropriate Government may also fix the number of hours of work in a working day, one or more intervals, a day rest in seven days for all or any specified class of employees and payment of remuneration for such rest, and payment of work on day of rest at not less than overtime rate. Exceptions may be provided for employees of certain class depending on the nature of employment.¹⁰⁶

The employee whose minimum wage has been fixed under this Act will receive overtime payments fixed under this Act or any other law whichever is higher.¹⁰⁷

A worker who works for less than normal working day except where his failure to work is caused by his unwillingness to work and not by omission of the employer to provide him work or other prescribed circumstances is entitled to receive wages for a full normal working day.¹⁰⁸

¹⁰⁵ Section 12

¹⁰⁶ Section 13

¹⁰⁷ Section 14

¹⁰⁸ Section 15

Where an employee is employed on piece work for which time rate and not piece rate has been fixed is entitled to receive wages not less than the minimum time rate.¹⁰⁹

In order to carry into effect the scheme of the Act, provisions have been made in the Act for the appointment of Advisory Board, Central Advisory Board and inspectors.¹¹⁰ The main function of the Advisory Board is to advise the Government as regards to the revision of minimum wages.¹¹¹ As the name itself implies it is only advisory in character and the Government is not bound by the advice tendered by such Board not is consultation with Advisory Board Compulsory. The inspectors appointed are required to exercise functions assigned to them. They enjoy adequate powers of entering any premises for the purpose of examining and production of register or records of wages, examine employees, require workers to give information regarding other employees, work and payments etc., seizure of documents and such other powers as prescribed.

The Minimum Wages Act, 1948 also requires the employer to maintain registers and records containing the following:

1. particulars of employees employed by him;
2. the work performed by them;

¹⁰⁹ Section 16

¹¹⁰ Section 7, Section 8 and Section 19 respectively

¹¹¹ *Chandrabhavan Boarding & Lodging v. State of Bombay* AIR 1962 Bom 97

3. the wages paid to them;
4. the receipts given by the employees; and
5. any other information as prescribed.

The employer who employs the workers in the scheduled employment is also required to exhibit the prescribed notices in premises containing prescribed particulars.¹¹²

The Minimum Wages Act contains specific provisions for the enforcement and implementation of the minimum wages prescribed by notifications. With regard to disputes arising out of any claim preferred by a worker against the employer the Act has provided for the settlement machinery. The Act is primarily concerned with fixing of rates of minimum wages, overtime rates and rate of payment for work on a day of rest done by a worker and is not really intended to be an Act for which provisions are made in other laws, such as Payment of Wages Act, 1936 and Industrial disputes Act, 1947.¹¹³ Therefore, all claims relating to above matters can be enforced against the employer by a worker if a dispute arises by preferring a claim before an authority appointed by the appropriate Government for this purpose.

Under the scheme of the Act, both, individual employers, as well as companies or other corporate bodies who employ the workers in the scheduled

¹¹² Section 18

¹¹³ Section 22 (a)

employments can be prosecuted and punished for contravening the provisions of the Act or any rule or order made under Section 13 of the Act. Therefore, any employer whether an individual or a company or other corporate body, who pays to any employee wage less than the minimum rate fixed for the concerned class of work or less than the amount due to him can be punished under the Act. Similarly any employer who contravenes any rule or order issued by the appropriate Government relating to normal working day, rest day and the payments at prescribed rules on rest day can also be punished. For the above-stated offences, the punishment prescribed is imprisonment upto 6 months or fine upto Rs. 500/- or both.¹¹⁴

Section 25 of the Act keeps alive the spirit of the Act by declaring all contracts and agreements whereby an employee relinquishes or reduces his minimum wages or any privilege or concession under this Act as null and void.

Many countries today have national minimum wages and more still have minimum wages for certain occupations. The main concern with minimum wage legislation is that it will hurt those it is designed to protect by reducing the number of low-skilled jobs. Critics point to the plentiful labour force in the developing world and fear that minimum wage legislation will result in further increases in unemployment in developed countries. However, evidence is mixed on the exact impact of minimum wage legislation. Studies done in the

¹¹⁴ Section 22

United States in the 1990s for example, gave contradictory results on the impact.¹¹⁵ Much depends on economic strength of the companies forced to pay a higher wage and thus their ability to remain competitive.

The Act applies to the Unorganised Sector including the workers engaged in tourism. The Act considerably is capable to protect the minimum wage of the unorganized workers. However the result may be more effectively realized if the local self government or some machinery created at the local level is made active with the responsibility of working as a watchdog and ensuring that the minimum wages are actually paid and also empowered to forward reports and complaints of non payments of minimum wages to the appropriate forums. Such machinery would ensure the best interest of the unorganized workers. In the Act Section 21 imposes penalty of three months' imprisonment or fine upto rupees five hundred or both for the contravention of the provisions of the Act. The prescribed amount of fine seems inadequate in the present time and therefore the amount of fine also needs adequate increment.

F. Maternity Benefits Act, 1961

With the aim of implementing the directive laid down in Article 42 of the Constitution of India, the Indian Parliament enacted Maternity Benefits Act,

¹¹⁵ Microsoft Encarta Encyclopedia, Microsoft Corporation, 2006.

1961 providing for maternity benefits to the women workers. According to the Supreme Court "(any act of) denial of maternity benefits (may) be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of."¹¹⁶

The maternity Benefits Act, 1961 is an Act with the object of regulating the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefits and other benefits. The Act applies to every establishment being a factory, mine or plantation including any such establishments belonging to Government. It will also be applicable to other establishments industrial, commercial or agricultural or otherwise if the State Government with the approval of the Central Government extends its application after giving not less than two months notice by notification in the official Gazette but will not be applicable to any factory or establishment to which the provisions of Employee's State Insurance Act, 1948 apply.

Under the Act, the employer is prohibited from knowingly employing any women in any establishment during six weeks each immediately and immediately following the day of delivery or miscarriage. In case, a request is made by a pregnant woman she will not be given any work:

¹¹⁶ Reiterated in the case of *Municipal Corporation of Delhi v. Female Workers*, AIR 2000 SC 1274

1. of arduous nature;
2. involving long hours of standing, and
3. which is in any way likely to interfere with her pregnancy or in development of fetus or is likely to cause her miscarriage or otherwise adversely affect her health-

one month immediately preceding the six weeks before the date of her expected delivery and during the said period of six weeks for which the pregnant woman does not avail leave under Section 6.¹¹⁷

Every woman, under the Act is entitled to, and her employer is liable for the payment of maternity benefit at the rate of average daily wages for the period of her actual absence immediately preceding and including the day of her delivery and for six weeks immediately following that day. For this the average wage means the average of the women's wage payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, or one rupee per day whichever is higher.

A woman is eligible to maternity benefits only if she has worked in the establishment for not less than 160 days during the 12 months immediately preceding the date of her expected delivery. Those days during which she was held laid off should also be included in these 160 days.¹¹⁸

¹¹⁷ Section 4

¹¹⁸ Section 5

Maximum period of maternity benefit is fixed at 12 weeks- six weeks before the delivery and six weeks after the delivery. If the woman dies during this period the maternity benefit will be confined to the date of her death. If she dies after the delivery of the child than the maternity benefit continues to the entire period. If the child also dies then the maternity benefit will extend to the death of the child.¹¹⁹

Under Section 6, a woman entitled to maternity benefit may give notice to her employer claiming the amount and giving date of availing of the leave. The employer has to permit her absence till the expiry of six weeks after delivery; the employer is bound to pay maternity benefit amount in advance for the period before delivery on proof of pregnancy. The amount towards the subsequent six weeks must be paid within 48 hours of the production of proof that she delivered a child. It may be noted that child under the Act includes a still born child.¹²⁰

If a woman who is entitled to maternity benefit on any other amount under the Act dies before receiving such benefit or amount, the benefit or amount will be payable by the employer to her nominee or legal representative as the case may be.¹²¹

¹¹⁹ Section 5 (3)

¹²⁰ Section 3 (b)

¹²¹ Section 7

Section 8 of the Act provides that every woman entitled to maternity benefit under the Act is also entitled to receive from her employer a medical bonus of Rs. 25/- in case no prenatal confinement and postnatal care is provided by the employer free of charge.

Even in the case of miscarriage, leave with wages at the rate of maternity benefit for a period of six weeks immediately following the day of her miscarriage available.¹²² A woman is entitled to leave for one month with maternity benefit over and above the leave under Section 6, on proof of illness due to pregnancy, delivery, premature birth or miscarriage.¹²³

Every woman who has delivered child and who returns to duty after such delivery should be allowed in the course of the daily work to avail two breaks of prescribed duration for nursing the child over and above to the interval for rest allowed to her. Such nursing breaks should be allowed until the child attains the age of fifteen months.¹²⁴ Thus the Act also protects the child's health and ensures natural psychological attachment and growth mother child relationship.

The Act prohibits the employer from discharging a woman worker due to her absence permitted by the Act. Such dismissal or discharge or dismissal or any notice to that effect or any variation of the condition of her service to her

¹²² Section 9

¹²³ Section 10

¹²⁴ Section 11

disadvantage is unlawful. Further, such dismissal or discharge will not deprive the woman of her right to maternity benefit and medical bonus. However, if the dismissal is due to proved misconduct of the woman, she will not be entitled to the above right. In the former case, the woman can appeal to the prescribed authority against such dismissal or termination of employment order. Section 13 makes it clear that the usual daily wages of a woman entitled to maternity benefit should not be reduced due to assignment to her of less arduous work or due to giving of two nursing breaks.

Section 21 imposes penalty to the employer to the extent of three months imprisonment or fine upto Rs. 500/- or both for contravention of any provisions of any provisions of the Act Acts like obstructing the inspector appointed under the Act in discharge of his duties or failure to produce any register or document on demand or concealing of any fact or document etc. or preventing any person from appearing before such inspectors; are also punishable under the Act in the same tune.

Prosecution for an offence punishable under the Act or rules made thereunder may be instituted before the expiry of one year from the date of commission of the offence. However, the Act bars prosecution without previous sanction of the inspector.

The appropriate Government has been given wide powers to make rules for carrying out the purposes of the Act. The validity of such rules is subject to the previous publication and notification in the official gazette.

A woman is eligible for maternity benefits under the Act only when she has worked for not less than 160 days during the preceding 12 months from the date of her expected delivery. Though the Act covers a few unorganized employments, and the State Government has powers to extend the provisions of the Act to various other employments in the Sector, the application would not benefit a larger portion of women workers in this Sector. Since, the works in unorganized sector are mostly casual in nature and tourism in most places is seasonal, the Act would hardly cover a few unorganized women workers engaged in tourism.

The Act reaffirms India's commitment in the Convention on Elimination of All Forms of Discrimination Against Women which requires the States to commit themselves to undertake a series of measures to end discrimination against women in all forms, including incorporation of the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women. Most importantly the Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -- including education, health and

employment. By ratifying the Convention States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

G. The Contract Labour (Regulation and Abolition) Act, 1970:

The system of employment of contract labour is impregnated with various problems. The employment in this system is abused in various ways. Certain recommendations were made by the planning commission in the Second Five Year Plan, namely, undertaking of studies to ascertain the extent of the problem of contract labour, progressive abolition of system and improvement of service conditions of contract labour where the abolition was not possible.¹²⁵ All these directed towards creation of a general consensus of opinion that the system should be abolished altogether; and in the areas where this system cannot be abolished, the working conditions of contract labour should be regulated so as to ensure payment of wages and provisions for essential amenities.

The Government of India has been deeply concerned about the exploitation of workers under the contract labour system. With a view to remove the difficulties of contract labour and bearing in mind the

¹²⁵ Refer to the Object Clause of the Contract Labour (Regulation and Abolition) Act, 1970

recommendations of various commissions and committees and the decisions of the Supreme Court, particularly in the case of Standard Vacuum Refining Company¹²⁶ in 1960, the Contract Labour (Regulation and Abolition) Act was enacted in 1970. This Act seeks to regulate the employment of contract labour in certain establishments and to provide for its abolition under certain circumstances. The Contract Labour (Regulation and Abolition) Act was brought into force on September 5, 1970. The main objective of the legislation was to abolish various malpractices indulged in by the Contractors/ Sardars/ Khatadars/ other intermediaries and to provide required facilities to these workers in view of the peculiar circumstances in which they work. The Act is applicable to every establishment where twenty or more workmen are employed in preceding twelve months as contract labour and to every contractor employing such number of workmen in such manner. However the Act is not applicable to establishments in which work only of an intermittent or casual nature is performed. A question in that respect is to be decided by the appropriate Government after the consultation of the Central Board or State Board as the case may be and such decision is final. It may be noted that the work will not be deemed intermittent where it has been performed for 120 days in preceding 12 months or where it is seasonal, more than 60 days in a year. In such cases the Act applies.¹²⁷

¹²⁶ *Standard Vacuum Refining Co. of India v. Workmen*, AIR 1961 SC 895

¹²⁷ Section 1

The Act creates responsibility on every employer (Principal) under this Act to make an application for registration of the establishment within the period fixed by the appropriate Government. An application of registration has to be made to the Registering Officer appointed under Section 6. On such an application which must be complete in all respects such Registering Officer has to register the establishment.¹²⁸

The Act empowers the appropriate Government with consultation of the appropriate Board to prohibit by notification in the official gazette, employment of contract labour in any process, operation or other work in any establishment. Before doing that the appropriate Government has to take into consideration conditions of work and benefits to such labour in the establishment and other factors such as:

- a. whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on;
- b. whether it is of sufficient duration having regard to its nature;
- c. whether the work is done ordinarily through regular workmen in that establishment or other similar establishments;
- d. whether it is sufficient to employ considerable number of whole-time workmen.¹²⁹

¹²⁸ Section 7

¹²⁹ Section 10

The primary object of the Act is to stop exploitation of contract labourers by contractors or establishment. The Act does not purport to abolish contract labour in its entirety, but it provides for abolition of contract labour in appropriate cases. Such power has been given to the appropriate Government and it is only the appropriate Government which has the authority to abolish contract labour system.

For regulating the areas where complete abolition is not possible or desirable, provisions have been made for registration of establishments as discussed earlier and licensing of contractors. Every contractor under the Act is required to undertake or execute any work through contract labour under and in accordance with a license issued by Licensing Officers appointed under Section 11. Such license may contain conditions including conditions as to hours of work, fixation of wages, and other essential amenities. A security amount may also be required to be deposited while the grant of such license.¹³⁰ No contractor, to which the Act applies, can undertake or execute any work through contract labour without such license. Contravention of this provision is punishable under the Act.

Under the Act powers have been vested on the appropriate Government to make rules requiring that in every establishment under the Act, one or more canteens shall be provided and maintained by the contractor, for the use of such

¹³⁰ Section 12

contract labour, including the standards in respect of construction, accommodation, furniture etc. and foodstuffs and charges thereof.¹³¹ In every place wherein contract labour is required to halt at night in connection with the work of an establishment such number of rest rooms or alternative accommodation as may be prescribed has to be provided and maintained by the contractor for the use of such contract labour.¹³² Such accommodation has to be sufficiently lighted and ventilated and has to be maintained in a clean and comfortable condition. The Act also makes provisions for the other facilities such as supply of wholesome drinking water, sufficient number of latrines and urinals, washing facilities etc.¹³³

The Act ensures that the first aid facilities are provided and maintained by the contractor so as to be readily accessible at all working hours. The first aid box equipped with the prescribed contents at every place where contract labour is employed has to be available.

A contractor under the Act has to be responsible for payment of wages to each worker employed by him as contract labour and such wages have to be paid before the expiry of such period as may be prescribed. The mode and manner of the payment has also been provided in the Act to ensure total security of the wages of the contract labour.¹³⁴

¹³¹ Section 16

¹³² Section 17

¹³³ Section 18

¹³⁴ Section 19

The requirement of maintaining registers and records is provided by the Act under Section 29. The Principal employer or the contractor is responsible to maintain registers and records giving prescribed particulars in the prescribed form.

For the contravention of the provisions of the Act or rules there under, the punishments have been provided under the Act. Whoever contravenes any provision of the Act or any rules made there under prohibiting or regulating the employment of contract labour or contravenes any condition of a license granted under the Act, would be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both and in the case of continuing contravention, with an additional fine which may extend to one hundred rupees for each day during which such contravention continues after conviction of first such contravention will be levied.

If a person contravenes any of the provisions of this Act or rules made thereunder for which no other penalty is elsewhere provided, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees or with both.¹³⁵

¹³⁵ Section 24

Keeping with the argument regarding the definition of Unorganized Sector in the first chapter of this work, it can be said the Contract Labour (Regulation and Abolition) Act, 1970 is an Act which is entirely devoted to a section of unorganized workers. Though Unorganized Sector encompasses a much larger area of workforce, the Act takes into account all problems in the contract labour system to regulate the work conditions and abolish the system wherever possible. Such an Act should be properly implemented the Act is capable of being a definite answer to the existing exploitation of a large section of the workforce in our Country.

H. Equal Remuneration Act, 1972:

Article 39 of the Constitution of India directs the State to take steps through its policies, inter alia to secure that there is equal pay for equal work. To give effect to this provision the President promulgated the Equal Remuneration Ordinance, 1975 on 26th September, 1975 so as to enable its implementation in the International Women's Year. The Equal Remuneration Act replaced the ordinance in 1976. The Act was enacted to prevent discrimination between workers only on the ground of gender. The Preamble of the Act describes it as an Act to provide for the payment of equal remuneration to men and women workers and or the prevention of discrimination on the

ground of sex, against women in matter of employment and for matters connected therewith and incidental thereto.¹³⁶

The purpose of the Act therefore is to make sure that employers do not discriminate the employees on the basis of gender, in matters of wage fixing, transfers, training and promotion. It provides for payment of equal remuneration to men and women workers, for same work or work of similar nature and for the prevention of discrimination against women in the matters of employment.

Section 5 of the Equal Remuneration Act specifically forbids the employee from discriminating of women during recruitments etc. it states:

“On and from the commencement of this Act, no employer shall while making recruitment for the same work or work of similar nature, or any condition of service subsequent to recruitment such as promotions, training or transfer, make any discrimination against women...”

The Act also imposes duty on the employer to pay equal remuneration to men and women workers for same work or work of similar nature. It says:

¹³⁶ Vide the Object Clause to the Act

“No employer shall pay to any worker employed by him, remuneration, whether payable in cash or kind, at rates less favourable than those at which remuneration is paid by him to workers of opposite sex in each establishment or employment for performing the same work of similar nature.”¹³⁷

For the purpose of evading the possibility of reduction of wages, in order to ensure compliance with the requirement of equal pay, the Act specifically forbids any reduction of wages to that effect.¹³⁸

The Act, for the purpose of providing increased employment opportunities to women, directs the appropriate Government to constitute one or more advisory committees to advise it¹³⁹ with regard to the extent to which women may be employed in such establishments or employments. Such advisory committee should consist of not less than 10 persons to be appointed by the appropriate Government, of which half should to be women.¹⁴⁰ Such committee should regulate its own procedure.¹⁴¹ The appropriate government may, after giving to persons concerned in the establishment or employment, an

¹³⁷ Section 4 (1)

¹³⁸ Section 4 (3)

¹³⁹ Section 6 (1)

¹⁴⁰ Section 6 (2)

¹⁴¹ Section 6 (4)

opportunity of heard, issue such directions in respect of the employment of women workers, as it thinks fit.¹⁴²

The Act also empowers the appropriate Government to appoint authorities for hearing and deciding claims and complaints.¹⁴³ An employer or worker aggrieved by any order made by an authority so appointed may prefer, within thirty days of the date of such order, an appeal to such authority as the appropriate Government may specify. The power to confirm, modify or reverse the order so appealed against has been vested on such appellate authority. No further appeal is recognized and allowed under the Act.¹⁴⁴

Under Section 8 of the Act, every employer is required to maintain such registers and other documents in relation to the workers employed by him as may be prescribed.

The appropriate Government has powers to appoint inspectors for the purpose of making investigation as to whether the provisions of this Act, or rules made thereunder are being complied with by the employers.¹⁴⁵ They have been given adequate powers for effective functioning.¹⁴⁶

¹⁴² Section 6 (5)

¹⁴³ Section 7

¹⁴⁴ Section 7 (6)

¹⁴⁵ Section 9 (1)

¹⁴⁶ Refer to Section 9 (3)

The Act provides penalties for any contravention of the provisions under the Act. A simple imprisonment which may extend to a term of one month or fine which may extend to ten thousand rupees or both may be imposed on any employer for failing to maintain any register or other documents or for omitting or refusing to give any evidence or preventing his agent or servant or any other person and for omitting to give any information.¹⁴⁷ For making any appointment or recruitment in contravention to the provisions of this Act, for making any discrimination between male and female regarding payment of wages, for making such discrimination in contravention to the provisions of the Act and for omitting from carrying any direction made by the appropriate Government under Sub Section (5) of Section 6, the punishment prescribed is fine amounting not less than ten thousand rupees but which may extend to twenty thousand rupees or imprisonment which may extend to one year or both for the first offence and for all subsequent offences the fine is such as aforesaid and imprisonment which may extend to two years.¹⁴⁸ Any person omitting or refusing to produce to an inspector any register or other document or the give any information is also punishable with fine which may extend to five hundred rupees.¹⁴⁹

No court inferior to the Court of Metropolitan Magistrate or Judicial Magistrate of First Class is empowered under the Act to try any offence punishable under the Act. The Court is required to take cognizance of an

¹⁴⁷ Section 10 (1)

¹⁴⁸ Section 10 (2)

¹⁴⁹ Section 10 (3)

offence punishable under the Act upon its knowledge or on a complaint made by the appropriate Government or an officer by it or a person aggrieved or by any welfare institution or organization.¹⁵⁰

The power to make rules has been vested with the Central Government.¹⁵¹ The Central Government is also empowered to give directions to the State Governments as to the carrying on of the provisions of this Act in the States. The power to remove difficulties by notification is also reserved with the Central Government.¹⁵²

Many Countries have introduced legislations embodying the principle of equal pay for equal work. Equal Remuneration Act in India seeks equal remuneration for "the same work or work of similar nature." Thus unlike in many other countries the requirement of the 'same output' is not insisted upon in the Act. In United Kingdom the Equal Pay Act 1970 insists on "non discrimination on all forms and conditions of employment of a woman, if she is engaged in "like work" with a male or if her job has been rated equivalent to the job of a male counterpart following a job evaluation study. The Act was amended in 1983 to include instances where the woman's work was of equal value to the man's. In India though the Central Government can exercise its rule making power under Section 13 to do the same, such provision is desirable

¹⁵⁰ Section 12

¹⁵¹ Section 13

¹⁵² Section 17

in the Act itself. A work can be defined in terms of such things as skill, effort and responsibility. Thus an adequate amendment in Section 4 is desirable.

Despite improvements in the level of women's wages, average male wages is generally higher. Explanation to low pay among women include the fact that many work are part time in nature. Further due to the fact than women performs a major portion of household works like cooking, child care, cleaning, washing, care of the aged etc. at home, they are generally unable to equate with men at the workplace in terms of work. In an establishment which employs only women workers there are no men with whom a woman can compare her wages or value of work.

In a developing country like ours, where the socio-legal status of women in many cases is inferior to that of men, where major portion of women workforce is engaged in Unorganized Sector and where poverty and weak institution make enforcement of such laws impossible, efforts to establish the principle of equal pay have made little headway.

I. Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996:

Development of tourist spots is a direct input to tourism. This involves a great deal of construction works. Construction workers, therefore, become

major contributors of tourism in any country. More so in a country like ours where tourism is receiving greater attention in the financial planning and where tourism infrastructures are being developed on a large scale through thousands of mega projects all over the country.

The building and other construction workers are one of the most numerous and vulnerable segment of the Unorganized Sector in India. The building and other construction works are characterized by their inherent risk to life and limb of the workers. The work is also characterized by casual nature of work, temporary relationship between employer and employee, uncertain working hours and inadequacy of welfare facilities. Although the provisions of various labour laws are available to these workers, a need was felt for a comprehensive central legislation for this category of workers.

To regulate the employment of the building and other construction workers; to provide them safety, health welfare measures and to provide social security and various benefits to these workers, Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 was enacted by the Parliament. The Act came into force on 1st March 1996. Under this Act, a building worker includes any person to do any skilled, semi-skilled or unskilled-manual, technical or clerical work for hire (for) new or in connection any building or construction work and does not include any person employed in managerial or administrative capacity or supervision category or

who draws wages exceeding Rs. 1600/- per month or a person with functions mainly of a managerial nature.

Building and Other Construction Workers Act applies to every establishment which employs or has employed 10 or more workers.¹⁵³ The workers covered under the Act include workers engaged in construction, alteration, repairs, maintenance or demolition of streets, roads, bridges, air fields, embarkment and navigation works etc. and also includes those engaged in works relating to electric lines, telephone lines etc. The appropriate Government has power to further extend the application of the Act to the workers engaged in other employments.

The Act makes provision for the constitution of a Central Advisory Committee to advise the Central Government on such matters arising out of the administration of the Act as may be referred to it.¹⁵⁴

Provision for registration of establishment within a period of sixty days from the commencement of work to ensure that there are no malpractices and to discourage non-compliance of law is an important provision under the Act. However, if the Registering Officer is satisfied that the registration of the establishment is obtained by misrepresentation or suppression of material facts

¹⁵³ Section 1

¹⁵⁴ Section 3

or that the provisions of the Act are not complied with; he can revoke the registration of the establishment.¹⁵⁵

The Act also makes provision for registration of building workers as beneficiaries under this Act.¹⁵⁶ Such registered workers are entitled to the benefits provided by the Worker's Welfare Board from its fund under the Act. Under Section 13 of the Act provisions have been made requiring issue of identity cards to the beneficiary wherein the employer concerned is required to write the details of the work done by the beneficiary.

A building worker registered as a beneficiary under this Act is required to contribute to the fund at such rate per month as prescribed by the State Government. He has to pay such amount until he attains the age of 60 years.¹⁵⁷ On attaining 60 years of age a worker under the Act will cease to be a beneficiary. Such cessation will also take effect when the worker is not engaged in work for 90 days.¹⁵⁸ Further, in cases where the beneficiary fails to pay the contribution for a continuous period of one year, he ceases to be a beneficiary. But in this case, if the Secretary of the Welfare Board is satisfied that the non-payment was on reasonable grounds and that the worker is willing to deposit arrears, he may restore the registration.¹⁵⁹

¹⁵⁵ Section 8

¹⁵⁶ Section 12

¹⁵⁷ Section 16

¹⁵⁸ Section 14

¹⁵⁹ Section 17

An employer is required to maintain a register, in such form as may be prescribed, showing the details of the employment of beneficiaries. The Secretary of the Welfare Board or any other officer authorized by the Board has been authorized under the Act to inspect such registers without any prior notice.

For the purpose of exercising powers and functions assigned under the Act, the Act requires the constitution of State Boards. The Board should consist of a Chairperson who should be a person appointed by the Central Government and such number of members not exceeding 15 as may be appointed by the State Government.¹⁶⁰ The Board should give equal representation to the State Government, the employers and the workers. Provision has been made for the representation of at least one woman in the Board

Functions of the Board have been elaborately provided in Section 22.

The Board may:

1. provide immediate assistance to the beneficiary in case of accident,
2. make payment of pension to the beneficiary who have completed the age of 60 years,
3. sanction loans and advances for a prescribed sum to a beneficiary for construction of a house on prescribed terms and conditions;

¹⁶⁰ Section 15

4. pay such sum as premier to the beneficiaries of group insurance as it deem fit,
5. give such financial assistance for the education of children of the beneficiaries as may be prescribed,
6. meet such medical expenses for treatment of major ailment of beneficiaries or such dependants as may be prescribed,
7. make payment of maternity benefit to the female beneficiaries, and
8. make provision and improvement of such other welfare measures and facilities as may be prescribed.

The Board is also empowered to grant loan or subsidy to a local authority or an employer in aid of any scheme approved by the State Government for the purpose connected with the welfare of building workers in any establishment.¹⁶¹ In addition to this the Board may, if a local authority or an employer has provided any welfare measures or facilities to the workers, which has satisfied the Board, it may pay annual grants-in-aid not exceeding the amount actually spent on such activities or any prescribed amount whichever is less.¹⁶² In order facilitate the Board to perform these functions, the Central Government may after due appropriation made by the parliament by law in this behalf make it grants and loans of such amount as it may deem necessary.

¹⁶¹ Section 22 (2)

¹⁶² Section 22 (3)

All the income of the Board discussed hereinabove as grants and loans made by the Central Government, contributions made by the beneficiaries and sums received by the Board from other sources as may be decided by the Central Government, would form the Workers Welfare Fund.¹⁶³ The Fund should be utilized to meet the expenses towards the legitimate business of the Board specifically enumerated in the Act.

With a view to ensure that the funds be utilized in the welfare of the workers alone, there are express provisions to restrain the Board from incurring expenses towards salaries and other administrative expenses in any financial year of more than 5% of the total expenditure of the Board in that financial year.¹⁶⁴ Further the Board is required under the Act to maintain proper accounts and records and prepare a report giving full accounts and records and prepare a report giving account of the activities during the previous year and submit a copy to the State Government and the Central Government.¹⁶⁵

An important provision can be found in Section 28 of the Act. Under this Section the State Government has been given powers to fix the number of hours of work constituting normal working day inclusive of one or more specified intervals. It has powers to provide for a day to rest with wages in every seven days. Payment of the day of rest at the rate of not less than overtime wages can also be provided in the rules by the State Government.

¹⁶³ Section 24.

¹⁶⁴ Section 24 (3)

¹⁶⁵ Section 25

The building and other construction workers must be paid for their overtime work. The workers for such overtime work are entitled to twice the ordinary rate of wages. In calculating the overtime wages all allowances to which the worker is entitled except bonus should be taken into account with the basic wages.¹⁶⁶

The Act ensures the safety of the workers as it prohibits the employment of any person whom the employer knows or has reason to believe to be deaf or has a defective vision or has a tendency to giddiness in any work which is likely to involve a risk of accident.¹⁶⁷ The employer is also required to make available at the workplace first-aid facility containing such first aid equipments and medicines as prescribed by the rules.

For the welfare of the workers the Act requires the employer to provide wholesome drinking water and latrines and urinals at the workplace.¹⁶⁸ The appropriate Government may by rules require the employer provide canteen facilities.¹⁶⁹ Further the employer is required to provide living accommodation free of charge to the workers within or near the workplace. Such accommodation must have separate cooking place, bathing, washing and

¹⁶⁶ Section 29

¹⁶⁷ Section 31

¹⁶⁸ Section 32 and 33

¹⁶⁹ Section 37

lavatory.¹⁷⁰ For every workplace where fifty female building workers are ordinarily employed, the employer has to provide adequately lighted and ventilated rooms with adequate accommodation for the use of children of such workers as crèches. Such rooms should be maintained in a clean and sanitary condition and should be in charge of a workman trained in the care of children and infants.¹⁷¹

For every establishment where one hundred or more building workers are employed there is a requirement stipulated by the Act for the constitution of a safety committee consisting of the representatives of the workers and employers wherein the workers representation should not be less than that of the employer. The employer is also required under the Act to appoint qualified safety officers for the purpose of ensuring adequate safety to the workers.¹⁷²

Section 45 of the Act holds the employer responsible for the payment of wages and compensation. Under this Section the employer is responsible for payment of wages on or before the prescribed date.

The Act also deals with compensation and allied matters. Where in any establishment an accident occurs which causes any bodily injury which prevents the workers from working for period of 48 hours or more, the employer has to give notice of such accident to the prescribed authority within

¹⁷⁰ Section 34

¹⁷¹ Section 35

¹⁷² Section 38

prescribed time. On the receipt of the notice the authority has to make necessary investigation. In cases where such accidents results in the death of five or more persons the Act requires such investigating authority to investigate within one month of such notice.¹⁷³ The payment of compensation as required under the Act has to be made according to the provisions of the Workmen's Compensation Act, 1923.¹⁷⁴

On the commencement of the Building and Other Constructive work, the Act requires the employer to give information to the inspector having jurisdiction, of such commencement with details relating to contractor etc., nature of work, arrangements at the workplace, number of workers employed etc. Where any change occurs in the information so given, the employer has to immediately inform the said inspector of such changes. Thus arrangement for constant vigil in the conditions of work at workplace has been ensured.

Stringent penalties have been prescribed for the contravention of the provisions of the Act. Elaborate provisions prescribing suitable punishments for different offences under the Act have been incorporated in the Act. Proper implementation of these provisions may deter the commission of the offences and ensure proper compliance of the objects sought under the Act.

¹⁷³ Section 39

¹⁷⁴ Section 45 r/v Section 58

The operation of any law in the state which is more beneficial to the workers than the present Act is specifically allowed by the Act. Any corresponding State law providing welfare schemes which are more beneficial to the worker are allowed to operate.

Building and other construction workers contribute largely in tourism. They are one of the most numerous and most neglected workers in the work world. Though the present law seeks to provide a safety net and social security hopes to the workers, in reality in most states there is neither the Worker's Welfare Board nor the Contributory Fund and Schemes as stipulated under the Act are existent. The reason behind this is that the Labour Departments in the States are financially not in a position to initiate such schemes. When the developed world is working on living wages it is high time that we spend a little on minimum requirements of our workers like their safety, security and minimum wages.

J. The Protection of Women against Sexual Harassment at Workplace Bill, 2007:

Sexual harassment in workplace is a serious and common problem. The work places have always been hostile to working women, their dignity and personality. They often face problems of being sexually harassed. This harassment may come either from their male co-workers or from their bosses or

from any third party. The act of sexual harassment varies in its form. It is in the form of humiliation, eve teasing, molestation etc. The boss or senior tries to gain sexual favour in appointment, promotion or in the workplace itself. Such harassment is morally and legally blameworthy because it causes detrimental and long lasting adverse effects on the victims.

Though bills aiming the prevention of sexual harassment at workplaces are being introduced in the Parliament in almost every session since the last few years, the legislatures have, till date, not been able to come up with a law in this regard. The Protection of Women against Sexual Harassment at Workplace Bill is presently lying in the Parliament's table for discussion.

The Bill aims to provide prevention and redressal of sexual harassment of women at workplace. The Bill extends to the Unorganized Sector too¹⁷⁵ and it also provides for the notional expansion of time and place as the definition of workplace in the Bill includes the places where the employee visits for the works arising out of and in the course of employment.¹⁷⁶

Section 3 of the Bill says-

“ No woman employee at a workplace shall be subjected to sexual harassment including unwelcome sexually determined behavior, physical

¹⁷⁵ Section 2 (l) (v)

¹⁷⁶ Section 2 (l) (iv)

contacts, advances, sexually coloured remarks, showing pornography, sexual demand, request for sexual favours or any other unwelcome conduct of sexual nature whether verbal, textual, physical, graphic or electronic or by any other actions which may include-

- i. implied or overt promise of preferential treatment in employment, or
- ii. implied or overt threat of detrimental treatment in employment, or
- iii. implied or overt threat about the present or future employment status,
- iv. conduct which interferes with work or creates an intimidating or offensive or hostile work environment, or
- v. humiliating conduct constituting health and safety problems.”

The Bill requires the constitution of Internal Complaints Committee in every workplace. Where the offices or administrative units of the workplace are located at different districts or sub-divisions, the Committee should be constituted in all such units.¹⁷⁷ The Committee should have the following composition:

1. a chairperson from amongst the employees who should be a senior level woman and should be committed to the cause of women. In case such a senior level woman is not available, the chairperson should be appointed from a sister organization or a non-governmental organization.

¹⁷⁷ Section 4 (1)

2. not less than two members amongst employees committed to the cause of women or who have had experience in social work; and
3. one member from other interest committed to the cause of women, as may be specified.

In such Complaints Committee at least fifty percent of the members should be women. The responsibility of constitution an Internal Complaints Committee rests on the employer.¹⁷⁸

The Bill also makes provision for the appointment of District Magistrate or Additional District Magistrate or the Collector or Deputy Collector of the respective jurisdiction as District Officer for every District to carry out the functions under the Bill.¹⁷⁹

In a workplace where the constitution of the Internal Complaints Committee is not possible or practicable, or where the complaint is against the employer himself, the District Officer may, constitute at every Block, a Local Complaints Committee.¹⁸⁰ Such Local Committee should consist of:¹⁸¹

1. a chairperson to be appointed by the appropriate Government from amongst women committed to the cause of women;

¹⁷⁸ Section 5 (1)

¹⁷⁹ Section 5

¹⁸⁰ Section 6 (1)

¹⁸¹ Section 6 (2)

2. one member to be appointed by the appropriate Government from amongst the registered trade unions or workers' associations functioning in that block or district;
3. two members, of whom at least one should be a woman, from amongst such non-governmental organizations or associations or other interests committed to the cause of women, as may be specified.

Section 7 of the Bill provides for the manner in which the complaint is to be made. A complaint of sexual harassment is to be made by the aggrieved woman to the Internal Complaints Committee or the Local Complaints Committee, as the case may be, in writing. The Chairperson or any member of the Committee or Local Committee as the case may be should render all reasonable assistance to the woman making the complaint, to reduce the same in writing. Where such aggrieved woman is not in a position to make a complaint on account of her physical or mental incapacity or death or otherwise, her heir or such other person as may be prescribed may make a complaint under this Section.¹⁸²

Section 8 of the Bill incorporates a provision for the amicable settlement of the case through conciliation. It says "at the request of the aggrieved woman the Committee or the Local Committee, as the case may be, may before initiating enquiry under the Bill, take steps to settle the matter between her and

¹⁸² Section 7 (2)

the respondent through conciliation." On such settlement, the Committee or the Local Committee, as the case may be, should record the settlement and recommend the employer not to take any action in the matter. The copies of settlement should also be provided to the aggrieved woman and the respondent. No further enquiry into the matter should be done after the settlement.¹⁸³

Where the conciliation is not arrived at, the Committee or Local Committee as the case may be, should proceed to make enquiry into the complaint in such manner as may be prescribed. In the cases where the respondent does not comply with any of the terms or condition of the conciliation arrived at, the Complaints Committee or Local Committee as the case may be should proceed into the complaint.¹⁸⁴ The Bill makes the enquiry time bound. Every such inquiry is required under the Bill to be completed within ninety days.¹⁸⁵

During the pendency of enquiry, on a written request made the aggrieved woman, the Committee or the Local Committee, as the case may be, may recommend to the employer to:¹⁸⁶

1. transfer the aggrieved woman or the respondent to any other workplace,
- or

¹⁸³ Section 8 (4)

¹⁸⁴ Section 9

¹⁸⁵ Section 9 (3)

¹⁸⁶ Section 10

2. grant leave to the aggrieved woman, or
3. grant to the aggrieved any other relief as may be prescribed.

On the basis of the recommendation, the employer or the District officer may take such action as may be deemed proper.

After the completion of an enquiry under the Bill, the Committee or the Local Committee, as the case may be should provide a report of the findings to the employer or, as the case may be, to the District Officer.¹⁸⁷ Where the Committee or the Local Committee arrives at the conclusion that the allegation against the respondent has been proved, it should recommend to the employer or the District Officer as the case may be to:¹⁸⁸

1. take action for misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed;
2. deduct from the salary of the respondent such sum of compensation to be paid to the aggrieved woman or to legal heirs, as it may determine, or direct the respondent to pay such compensation to the aggrieved woman.

¹⁸⁷ Section 11 (1)

¹⁸⁸ Section 11 (3)

The employer or the District Officer is required under the Bill to act upon the recommendation made by the Complaints Committee or the Local Committee within a period of ninety days.¹⁸⁹ However, if the employer or the District Officer is not in agreement with any conclusion or recommendation in consultation arrived at or recommendation made, he may alter the conclusion or recommendation in consultation with the Committee or the Local Committee as the case may be.¹⁹⁰

The Bill also contains provisions for the action to be taken in cases of false or malicious complaints and false evidence where the Committee or the Local Committee, as the case may be, arrives at a conclusion that the allegation against the respondent is false or malicious or the woman concerned or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or the District Officer to take action against the woman or the person who has made the complaint in accordance with the service rules or where no such service rules have been made, as may be prescribed by the rules under this Bill. If during the enquiry any witness has given false evidence or produced any forged or misleading document, similar action has been prescribed under the Bill.¹⁹¹

For the determination of compensation under Section 11 (3) (b) the Bill requires certain things to be given regard to. Section says that in determining

¹⁸⁹ Section 11 (4)

¹⁹⁰ Proviso to Section 11

¹⁹¹ Section 12 (1) & (2)

the compensation the Complaints Committee or the Local Committee as the case may be should have regard to:

1. the mental trauma, pain, suffering and emotional distress caused to the aggrieved woman;
2. the loss of the career opportunity due to the incident of sexual harassment;
3. medical expenses incurred by the victim for physical or psychiatric treatment;
4. the income and financial status of the respondent;
5. feasibility of such payment in lump sum or in installments.

Section 14 prohibits the publication or circulation of the complaints and enquiry proceedings under the Bill. Notwithstanding anything contained in the Right to Information Act, 2005 the identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and enquiry proceedings, recommendations of the Complaints Committee or the Local Committee and the action taken should not be published, communicated or made known to the public, press and media. However, the information regarding the justice secured to any victim of sexual harassment under the Bill may be disseminated without disclosing the identity and address of the aggrieved woman, respondents and witnesses.¹⁹² In cases where any person

¹⁹² Section 14

entrusted with the duty to handle or deal with the complaint, enquiry or any recommendations or action to be taken under the Act fails to observe the above requirement, action should be taken against such person in accordance with the service rules or in the absence of such service rules as prescribed.¹⁹³

Section 17 of the Bill casts certain duties on the employer. The employer is under duty to:

1. provide a safe working environment at the workplace;
2. display at any conspicuous place in the workplace the office order constituting the Complaints Committee;
3. Undertake workshops and training programmes at regular intervals for sensitizing members;
4. provide necessary facilities to the Committee or the Local Committee as the case may be;
5. ensure the attendance of respondent and witnesses before the Committee or the Local Committee as the case may be; and
6. make available such information to the Committee or the Local Committee as the case may be, as it may require with regard to the complaint made.

¹⁹³ Section 15

The Complaints Committee and the Local Committee are required to prepare an annual report and submit the same to the employer. The employer should include the report so submitted in the annual report of his organization.¹⁹⁴

Where it is felt necessary in the public interest to do so, the appropriate Government may call upon the employer or the District Officer to furnish information in writing or authorize any officer to make inspection of records and the employer or the District Officer are under the obligation to co-operate such investigating officer with records and other documents or information as required by him.¹⁹⁵

In cases where the employer or the District Officer fails to constitute Committee or fails to take action under Sections 11, 12 and 19 or contravenes the provisions of the Bill or rules made under the same, the Bill proposes a penalty of fine which may extend to ten thousand rupees:

The power to make rules under the Bill is rests on appropriate Government.

Though the Bill aims at prevention of "sexual harassment of women in workplaces,"¹⁹⁶ it is not free from loopholes. One of the loopholes in the Bill

¹⁹⁴ Section 18 & Section 19

¹⁹⁵ Section 20

¹⁹⁶ Vide the Object Clause

can be seen in Section 3 (2) (a) which requires the Chairperson of the Committee to be a "senior level woman". It is unclear as to what the words "senior level woman" mean. If it is deemed that this means a woman holding high post, it is highly impracticable in many work organizations. Further, in the Committee under Section 3 (2) the outside participation is restricted to one. The fact that three members are to be from amongst the employees, in a committee of four members, where the participation of third interest is limited to one the Committee will in all probability fail to pronounce bold decisions.

The Bill also provides for the conciliation of the cases of sexual harassment and where any settlement is arrived at, the Bill says "no further enquiry shall be conducted". Such a provision guarantees encouragement to the wrongdoers to pressurize through treats or other means for a settlement.

The biggest loophole in the Bill can be seen in the Proviso to Section 11. This provision says that were the employer or the District Officer is not in agreement with any conclusion arrived at or recommendation made by the Committee or the Local Committee "he may alter the conclusion or recommendation." This provision contravenes the very purpose of the Bill. Conferring of such powers on the employer defies the very logic of the constitution of the Committees. Such a provision in the Bill not only marginalizes the authority of the Committee or the Local Committee to reach

an impartial decision and to take stringent action against the wrongdoer but also causes the stringency of the Act to be loosened.

The Bill reduces the act of sexual harassment to a mere compoundable offence. Though the word "workplace" in the Bill covers all the places visited by the employee for works arising out of and in the course of employment, it does not contain a single provision with regard to third party harassment. The responsibility of the employer to initiate legal proceeding as rested in the decision of the Apex Court in *Vishaka v. State of Rajasthan* and earlier Bills have been done away with. It can safely be concluded that the Bill is an emasculated version of law on sexual harassment which in all probability will fail to achieve the objective of ensuring safe working environment to women.

K. The Unorganized Sector Workers' Social Security Bill, 2007:¹⁹⁷

The Unorganized Sector is contributing 59 percent in the Gross Domestic Product of Our Country. It employs 92¹⁹⁸ to 93¹⁹⁹ percent of the total working population in our country. Some estimates say that 94 percent of the total working population in India works in Unorganized Sector.²⁰⁰

¹⁹⁷ As introduced in the Rajya Sabha, 10th September 2007

¹⁹⁸ Estimate of the Second Labour Commission

¹⁹⁹ Estimate of the National Commission for Enterprises in the Unorganised Sector

²⁰⁰ As estimated in the Unorganised Sector Workers' Social Security Bill, 2007

The unorganized workers on account of their nature of employment do not get adequate social security. Some welfare schemes are being implemented by the Central Government for specific groups of Unorganized Sector workers. State Governments are implementing welfare programmes for certain categories of Unorganised Sector workers and some Non Government Organizations also provide social security to certain categories of workers. Despite all these efforts, there is a huge deficit in the coverage of the Unorganized Sector workers in the matters of labour protection and social security measures ensuring the welfare and well being of workers in the Unorganized Sector including various employments in tourism.²⁰¹

The growth and the quality of the jobs in the Unorganized Sector has been very much hit by the timely low cost credit, improved infrastructure and technology, quality consciousness, modern marketing, proper organization and a synergy with large organized industries. Most of the education and skill development in the past have been geared to satisfy the need of the Organized Sector. The education and skill need to be oriented towards the needs of the Unorganized Sector in the traditional areas like agriculture, small industry, service, and self-employed and also the new areas like tourism, information technology and financial sectors. In this there is a need for a legislative and administrative framework for the unorganized Sector, besides new initiatives

²⁰¹ See generally, the Object Clause, the Unorganized Sector Workers' Social Security Bill, 2007

by the Employees' Provident Fund Organization and Employees' State Insurance Corporation to reach this segment.

In response to the above stated facts the Unorganized Workers Social Security Bill, 2007 has been introduced in the Parliament.²⁰² The Unorganized Sector Workers Social Security Bill, 2007 aims to provide for social security and welfare of the Unorganized Sector workers and for matters connected therewith or incidental thereto. The Bill *inter alia* proposes for the following matters, namely:

1. The Central Government to constitute a National Social Security Advisory Board to recommend suitable welfare schemes for different sections of Unorganized Sector workers, and upon consideration of these recommendations, the Central Government may notify suitable welfare schemes relating to life and disability cover, health and maternity benefits, old age protection or any other benefits.²⁰³
2. The State Government to constitute State Social Security Advisory Board to recommend suitable welfare schemes for different sections of unorganized workers in the State and the

²⁰² Bill No. LXVII of 2007

²⁰³ Section 5 r/w Section 3 (1)

State Government may notify suitable schemes for one or more sections of the unorganized workers.²⁰⁴

3. A worker in the Unorganized Sector to be eligible for social security benefits if, he is duly registered. Every registered worker in the Unorganized Sector to be issued an Identity Card which is to be a smart card carrying a unique number of identification.²⁰⁵
4. The Central Government and the State Government to have powers to make rules for the purpose of carrying out the objects of the Bill.²⁰⁶

Any scheme notified by the Central Government may be:²⁰⁷

1. wholly funded by the Central Government, or
2. partly funded by the Central Government and partly funded by the State Government, or
3. partly funded by the Central Government, partly funded by the State Government and partly funded through contributions collected from the beneficiaries of the scheme or the employers as may be prescribed in the scheme by the Central Government.

²⁰⁴ Section 6 r/w Section 3 (4)

²⁰⁵ Section 9

²⁰⁶ Section 12 & Section 13

²⁰⁷ Section 4 (1)

In Central Board in addition to the Chairman who is to be appointed by the Central Government and the Director General, Labour Welfare who will hold the office of the ex-officio Member Secretary, the Bill requires the nomination of thirty one members to be nominated by the Central Government out of whom:²⁰⁸

1. seven members would represent Unorganized Sector workers;
2. seven members would represent employers of Unorganized Sector;
3. seven members would represent eminent persons from civil society;
4. five members would represent the State Governments; and
5. five members would represent Central Government Ministries and Departments concerned.

The Bill stresses for adequate representation of the persons belonging to the Scheduled Castes, the Scheduled Tribes, the minorities and women.²⁰⁹

Similarly, in the State Board except the Chairperson to be appointed by the State Government and the Principal Secretary or Secretary, Department of Labour who will hold the office of ex-officio Member Secretary, the Bill requires the nomination of twenty six members out of whom:²¹⁰

²⁰⁸ Section 5 (2)

²⁰⁹ Section 5 (4)

²¹⁰ Section 6 (2)

1. seven would represent the Unorganized Sector workers;
2. seven would represent the employers in the Unorganized Sector;
3. five would represent eminent persons of civil society; and
4. seven would represent State Government Departments concerned.

Adequate representation of the persons belonging to the Scheduled Castes, the Scheduled Tribes, the minorities and women in the State Board has also been stressed in the Bill.²¹¹

The Central Government has powers to give direction. It can give direction to the National Board or the State or the State Board in respect of matters relating to the implementation of the provisions of the Bill.²¹²

Some schemes have been recognized as the welfare schemes under the Bill and are enumerated in the Bill itself. The schedule appended with the Bill contains following schemes:

1. National Old Age Pension Scheme,
2. National Family Benefit Scheme,
3. National Maternity Benefit Scheme,
4. Mahatma Gandhi Bunker Bima Yojna,
5. Health Insurance Scheme For Handloom Workers,
6. Scheme For Pension To Master Craft Persons,

²¹¹ Section 6 (4)

²¹² Section 10

Second Labour Commission. The Bill is too wide in scope and breadth and is too abstract. The Bill also talks of tripartite participation, employers being one of them which are difficult to identify in many cases and thus is not feasible to protect the interests of various employments.

The Financial Memorandum presented with the Bill states that the financial implications for funding of the schemes would be determined "as and when such schemes are formulated." Further the Memorandum also says that "the fund for the schemes, as and when they are announced, will be channelised through the existing channels of funding as is being done for other schemes of the Government." Our experiences with the building workers reveal contrary outcome. In the absence of clear provisions for funding, the schemes cannot be implemented. Though the central legislations on construction workers was passed in the year 1996, even upto the present day most of the States do not have any welfare schemes under that Act. The welfare provisions in the present Bill are also sure to be limited by the want of adequate funds. In the want of adequate funds, the welfare measures in the Bill will only remain mirages.

The concern with the Unorganized Sector workers including the unorganized workers engaged in tourism is not just limited to social security. Protection is also a major concern in this sector. Though the regular labour laws apply to Unorganized Sector, the Indian legislature is all set to recognize

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the workers who are left out from the coverage of these laws as Unorganized Sector. It would be improper to presume that the areas targeted by the regular labour laws are immune of all difficulties and that these laws have really been implemented in all places. The areas covered by the regular labour laws are also prone to many difficulties. Therefore the proper approach would be to further extend the operation of these laws through proper amendments in the provisions and through reducing the requirement of the number of persons employed and giving the employer certain subsidies, concessions and protection to meet up the burden arising therefrom. If the intention of the legislature is honest through the present attitude the social security goal would be realized in large area of the Unorganized Sector, but the protection of workers would be best ensured through making the employer liable/accountable. The workers who remain unprotected through any law can be protected through newer initiatives. The present approach of the Government does not attend to the problems of casual and contract labourers who work in the establishments employing ten or more persons. Further, there are numerous establishments in the country where though the number of employees exceed nine but are not provided any protection or welfare under the laws. In some States many labour laws are not implemented. In such a state of affairs, though such policies seem to cover all working people, the workers generally remain devoid of the benefits flowing therefrom.

The unorganized workers engaged in tourism, do not have much to benefit from the regular labour laws. The casual nature of employment, their

ignorance etc. debar them from availing the rights under these laws. As most of the laws apply to the establishments employing 10 or more persons, a huge majority of the unorganized workforce in the country is excluded. Even in the establishments employing more than 10 persons the casual and contract labourers cannot be benefited under the existing laws. The casual and contract labourers in the organized sector are also excluded by the Unorganized Sector Workers Bill. In many cases the employments themselves are not identified. There arise many new employments daily in the unorganized sector. It is true with the tourism industry too. Therefore the laws cannot get in tune with the changing needs. There is also a huge difficulty in implementation of the laws in this sector. It cannot be disputed that the regular labour laws cannot cover the entire unorganized sector. Therefore a new legislation to cover this lot of the workforce is the need of the hour. However, a huge portion of the unorganized workforce can be benefited under the regular labour laws if the requirement of the 10 or more workers for the application of these laws is dropped to seven or eight. For the rest of the workforce a new legislation may be planned.

Legislative steps to tone up the stringency of the regular labour laws are also desired. Particularly, the penalties stipulated in the Acts are outdated. The discretionary penalties of fines stipulated in the Acts adequate increments. For example in Payment of wages Act 1936, Section 20 stipulates fines for contravening the provisions of the Act. The outdated provision stipulating the amount of fine does not fit the present situation. Mere sums of a few hundred

rupees do not adequately give the feeling of punishment to the wrongdoer. Similarly in Payment of Bonus Act, 1965 Section 28 prescribes a discretionary penalty of imprisonment for a term of six months or fine upto rupees one thousand. The penalty of fine being discretionary with the penalty of imprisonment is too small. In minimum wages Act Section 21 imposes penalty of three months' imprisonment or fine upto rupees five hundred or both for the contravention of the provisions of the Act. In Contract Labour (Regulation and Abolition) Act, under Section 23 the prescribed punishment is imprisonment which may extend to three months or fine where the upper limit is fixed at one thousand rupees. In all of these Acts where the penalties of imprisonment are adequate but fines are too low. Therefore the amounts of fines need adequate increments.

The Unorganized Sector Workers Social Security Bill, 2007 entirely ignores the 'Single Comprehensive Universal Scheme' covering entire Unorganized Sector as proposed by National Commission for Enterprises in the Unorganized Sector (NCEUS) and the Second Labour Commission. The Bill is too wide in scope and is too abstract. The Bill speaks of the tripartite participation. It is not practical in many cases as it is difficult to identify an employer in many cases. Where many employments are sure to be never represented, it is not feasible to protect their interests. The financial implications for funding of the schemes as stated in the Financial Memorandum would be determined "as and when such schemes are

formulated." Financial implications are hard to be formulated in our country. In the absence of clear provisions for funding, the schemes cannot be implemented. The welfare provisions in the present Bill face threats because of the paucity of funds.

It is an irony of this giant nation that workers are expected to move places for the vindication of their rights. A person struggling for a piece of bread cannot afford to move places for the vindication of their rights. Making them to travel places in search of justice would be to guarantee them injustice. Therefore it should be ensured that a worker is able to file complaint locally.

A new outlook and strong political will is required to ensure that the aspirations of workers, dreams of the founding fathers of the Constitution and India's commitments at the international level are realized. It certainly would create a huge financial burden on the State. But spending on labour is worthwhile. Workers are builders of civilizations and the backbone of the country's economy. Peaceful working environment and satisfaction among the workers would enlarge production. Enlarged production would add to the economy and bring prosperity in the country.

DIRECTION OF JUSTICE: JUDICIAL ACTIVISM IN THE WORK-WORLD

The Constitution and Statutes are not complete in themselves for the protection of rights and interests of individuals. In the modern system of governance, to make the rights effective, interpretation of the provisions of law guaranteeing the rights are of greatest importance. Judiciary utilizes all its knowledge and resources to the best so that the individuals shall not suffer a wrong. The judiciary has gone a long way to protect poor and innocent, to make them free from the claws of injustices and social dogmas. If there is absence of law in any area thereby leaving a legislative vacuum, it has to be filled by the directions of the Courts so as to be followed as precedent till a law is enacted to fill the vacuum.

Indian judiciary has taken positive steps to ensure that the workers shall not suffer a wrong encroaching upon their rights. There are various decisions where the Courts, particularly the Supreme Court and the High Courts, have delivered opinions in favour of better protection of working mass. On many occasions the Courts have interpreted non-justiciable rights under the Directive Principles Chapter of the Constitution of India to test the rights of workers and protections available to them under the general legislations. The cases being innumerable cannot be cited in their entirety but the glimpses of some

important decisions can be shown by categorizing them under some broad heads. But before this, it is important to discuss the powers of the Courts and limitations thereof.

Like any other policy, labour policy too is not unqualified. Any labour legislation should not be inconsistent with or in derogation of the Fundamental Rights. To the extent of such inconsistency it is void.¹ Further the rights are enforceable by the Courts under Articles 32 and 226 and cannot be denied in the case of violation of Fundamental Rights. The Constitutional powers of the Supreme Court and the High Courts cannot be taken away or whittled down by any legislation² but at the same time where adequate alternative remedy is available, the Court will, unless fundamental rights are involved, refuse to issue a writ. Therefore an alternative remedy is no bar where the violation of fundamental right is involved. Apart from powers under Article 226, the High Courts have the power of superintendence over all courts and tribunals. The power of superintendence over judicial and quasi-judicial orders should not interfere unless there is any grave miscarriage of justice or flagrant violation of law requiring interference.³

The Supreme Court has power under Article 136 of the Constitution of India to grant special leave of appeal from any judgment, decree, determination etc. Though the power was traditionally exercised only in matters of

¹ Article 13, The Constitution of India

² *Raj Krishna Boase v. Binod*, AIR 1964 SC 202

³ *Ram Roop v. Vishwanath*, AIR 1958 All 456

jurisdiction⁴ but later the scope was enlarged to cover various matters as a result of judicial activism.

Bonded Labour:

The Feudal exploitative system resulting in domination of a few socially and economically powerful persons over the large number of illiterate, socially and economically weak people spells the very concept of bonded labour system. In this system the debtor or his descendants or dependants have to work for the creditor without reasonable wages or no wages. Sometimes several generations work under such bondage. Such a system has deep roots in our country because of poverty, illiteracy and social backwardness of a large chunk of its population and various dogmas prevalent in the society. The judicial activism has resulted in tracking of their deep rooted problem in our society.

A landmark decision in the area of bonded labour came in *Bandhua Mukti Morcha v. Union of India*.⁵ In this case the Supreme Court stretched its protective arms to various aspects of the problem such as its identification, release and rehabilitation. This case demonstrates the benevolence of the Supreme Court for the downtrodden and at the same time the callousness of the executive for such vulnerable section of the society. The Government in this

⁴ See *Bharat Bank v. Employees of Bharat Bank*, AIR 1950 SC 118

⁵ AIR 1984 SC 802

case raised a preliminary objection that no fundamental right was violated. The Court rejected the contention. Justice Bhagwati observed:⁶

“When a complaint is made on behalf of workmen that they are held in bondage and are working and living in miserable conditions without any proper or adequate shelter over their heads, without any protection sun and rain, without two square meals per day or with only dirty water falling from ‘nallah’ to drink, it is difficult to appreciate how such a complaint can be thrown out on the ground that it is not violative of the fundamental rights of the workmen. It is the fundamental right of every one in this country, assured under the interpretation given to Article 21 in Francis case (AIR 1980 SC 849) to live with human dignity, free from exploitation. The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least therefore, it must include protection of health and strength of workers, men and women and of tender age of children against abuse; opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity; educational facilities; just and humane conditions of work and

⁶ *Ibid* at 811

maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.”

Though no advance economic consideration was made in this case, the court interpreted the provisions of Bonded Labour System (Abolition) Act, 1976 and observed that if a labourer is made to provide forced labour, the Court would presume that he is required to do so in consideration of an advance or other economic consideration.

The Court pointed out that the State Government was under an obligation to identify, release and rehabilitate the bonded labourers. The writ petition was allowed and the Court *inter alia* directed the State Government (Haryana) to do the following:

1. Constitute Vigilance Committee in each sub-division of a district, as required by Section 13 of the Bonded Labour System (Abolition) Act, 1946;
2. Instruct the District Magistrates to take up the work of identification of bonded labourers as on top priority, map out areas of concentration of bonded labourers, and assign task forces for their release;

3. Take the help of non-political social action groups and voluntary agencies for the implementation of the Act; and
4. To draw up programme for rehabilitation.

It may be noted that though the State is under a duty to implement Court's directions there is no stringent law in this regard and as such in cases like this it is neither feasible for the Court to keep the case pending for a long time, nor it is feasible for the Court to initiate contempt proceeding. The helplessness of the Court peeped in the judgment when the Court stated;

“If any of these directions is not properly carried out by the Central Government or the State of Haryana we shall take serious view of the matter”

In *Neerja Chaudhury v. State of M.P.*⁷ about 135 bonded labourers had been released from bondage by the courts order and brought back to their respective villages in the State of M.P. for rehabilitation. Later it was found that most of these labourers were not rehabilitated and were starving. Accepting a writ petition, Justice Bagwati observed:

“The plainest requirement of Articles 21 and 23 of the Constitution is that the bonded labourers must be identified and

⁷ AIR 1984 SC 1093

released and on release, they must be suitably rehabilitated. The Bonded Labour System (Abolition) Act, 1976 has been enacted pursuant to the Directive Principles of State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implementing the provisions of this legislation would be the clearest violation of Article 21 apart from Article 23 of the Constitution.”

The Court accordingly directed the State Government to representation of the non political social action groups in the Vigilance Committee to identify, release and rehabilitate the bonded labourers. The Court said that the job of deciding the nature of rehabilitative assistance rested upon the Vigilance Committees. Thus the Court took the realist approach in tackling the socio-economic problems of bonded labourers instead of using usual legal and formalistic approach.

In *P. Shivaswamy v. State of Andhra Pradesh*⁸ the Supreme Court stressed that the failure to provide effective rehabilitation of identified bonded labourers would not only lead to frustration among them but would further worsen their position. The Court feared that uprooted bonded labourers from one place are likely to be subjected to the same mischief at another place. The

⁸ 1988 Lab IC 1960 (SC), cited in Suresh C Srivastava, “Constitutional Protection to Weaker and Disadvantaged”, Vol. 42:2-, JIL1 (2000)

result would be that the steps taken by the Court would be rendered ineffective and there would be mounting frustration among the bonded labourers.

The Court further observed that laws however beneficial they may be are difficult to be implemented unless the requisite social consciousness has grown. The Court warned the State of Karnataka that “the matter shall be strictly viewed in the event of continued failure.”

In the above cases recourse was taken *inter alia* to Article 21 of the Constitution and the Court has taken the view that the failure of action on the part of the Government to implement the provisions of the Bonded Labour System (Abolition) Act, 1976 is violation of Article 21. This no doubt is a broadened scope of Article 21 but if such socio-economic conditions are shown to exist in the Country even today as not sufficient to provide safety to the very persons who build civilizations, the Courts are bound to broaden the arms of justice to draw the working people under the protective umbrella of Article 21.

Child Labour:

In a country with vast economic disparity, like ours the employment of children becomes common. They are at times employed in hazardous activities and are exploited by the profit makers for their personal gain. They are paid

low wages, denied breaks, made to work for long hours and exploited in all possible ways.

The Courts have shown their concern in the child workers too. In *People's Union for Democratic Rights v. Union of India*⁹ the Supreme Court has ruled that Article 24 is enforceable against everyone and by reason of its compulsive mandate no one can employ a child below 14 years in a hazardous employment.

The common sight in India of employment of children in construction works has been prohibited by the decision of the Supreme Court in *Salal Hydro Project v. State of Jammu and Kashmir*.¹⁰ The Court opined that construction work is a hazardous employment and no children below the age of 14 can be employed in such works. The employment of children in construction work was held to be in violation of Article 24.

In *M.C. Mehta v. State of Tamil Nadu*,¹¹ where the employment of children in the manufacture of match boxes in violation of various Constitutional and Statutory provisions was involved, the Court observed:

⁹ 1982 SC 1473

¹⁰ AIR, 1984 SC 177

¹¹ 1996 (6) SCC 756

“Till an alternative income is assured to the family, the question of abolition of child labour would really remain a will-o-the-wisp.”

The Court further added that if it was the scheme of the Constitution to exclude the employment of children from the hazardous works, if they are to be educated till the age of 14, if the tender age of children is not to be abused and citizens are not forced by economic necessity to enter avocations unsuited to their age, and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected against exploitation the least we ought to do is to see to the fulfillment of legislative intendment behind the enactment of the Child Labour (Prohibition and Regulation) Act, 1986.

The right of the children against employment (in hazardous works) is not sufficient unless he has the fundamental right to education. The Supreme Court in *Mohini Jain v. State of Karnataka*¹² has recognized primary education as a part of Article 21. The Court in this case has stressed on the obligation of the State to endeavor to provide education facilities at all levels. However in *Unni Krishnan v. State of Andhra Pradesh*¹³, a decision given by the same court a year later the right to education was held to be available till the completion of 14 years and which thereafter was held to be subject to the limits of economic capacity and development of the State. Thus children are not only

¹² AIR 1992 SC 1858

¹³ (1993) 1 SCC 645

entitled to protection against employment in hazardous works, but at the same time are also guaranteed right to education till the completion of the age of 14 years. Through this the Court has logically directed the State to move towards eliminating child labour in all employments.

Contract Labour:

Contract labour is characterised by low wages, longer hours of work, unsanitary working conditions, denial of benefits and facilities, insecurity of tenure, victimization etc. This is one of the most exploited sections of workforce. They are not entitled to benefits and amenities to which the regular workmen are entitled. There is wide disparity in emoluments and working conditions between these workers and their counterparts working on regular basis.

With an aim provide security to contract labour, to abolish contract labour in the areas where it is possible to abolish and in other areas where such abolition is not possible to regulate the employments, legislative measure has been taken¹⁴. The judiciary has also taken positive steps in this direction. In *Peoples Union for Democratic Rights v. Union of India*¹⁵ the Supreme Court of India held that the violation of the provisions of Contract Labour (Regulation and Abolition) Act, 1970 and denial of the rights and protections therein is

¹⁴ See Contract Labour (Regulation and Abolition) Act, 1970

¹⁵ Supra note 9

violative of Article 21 of the Constitution of India. The Court opined that the provisions under the Act are clearly intended to ensure basic human dignity to the workmen and if the workmen are deprived of any of these rights and benefits, that would amount to violation of Article 21.

In *Air India Statutory Corporation v. United Labour Union*¹⁶, the Supreme Court of India delivered a landmark judgment on contract labour. The Court ruled that after abolition of the contract labour system; if the principal employer fails to absorb the working labourers on regular basis the workmen can seek redress under article 226 of the Constitution of India by moving the High Courts. The workmen have a fundamental right to life. Meaningful right to life springs from continued work to earn livelihood. The right to employment therefore is an integral facet of right to life.

Women Workers:

Women play an important role in economic and social life. The problems relating to the employment and conditions of work is a concern that binds workers both men and women yet, especially with regard to women special attention to certain aspects of the problems inherent in the work sector is desirable. Promotion of the conditions and facilities at their workplace to place them on equal footing to men counterparts in terms of opportunity and

¹⁶ AIR 1997 SC 645

treatment in economic and social life and insuring that their partition in economic and social life does not adversely affect their health and welfare and their maternity are two broad bases on which the problems of women workers can be viewed.

The welfare of women constituting a huge segment of the workforce in our country has been an area of vigil for the judiciary. The Supreme Court in *Government of A.P. v. P.V. Vijay Kumar*¹⁷ explaining the inserting of Clause (3) to Article 15 of the Constitution of India observed¹⁸:

The insertion of Clause (3) of Article 15 in relation to women is recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result they are unable to participate in the socio-economic activity of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women. Its object is to strengthen and improve the status of women.

For the protection of working women the long arms of justice have reached different areas to ensure that the existing laws complied with. Further

¹⁷ AIR 1995 SC 1648

¹⁸ Ibid at 1651

in areas where there existed a legal vacuum, the courts have evolved measures through directions.

Sexual Harassment of Women Workers at Workplace:

Workplace is the place where discrimination based on sex is most commonly found. Sexual harassment of working women is none of such discrimination. It often includes the use of position of power by the harasser towards the victim. Often the employers or seniors are to the perpetrators of such acts. Though the feminist thinking has succeeded in drawing public attention to inequality between women and men, has led to reconsideration of women's role in the workplace, and has identified the problem of sexual harassment at work, the problem has not been adequately tackled.

The Courts in India have been concerned in this direction. In fact it's the judiciary who responded to this problem for the first time and evolved effective measures to check the evil of sexual harassment in all work places.

In *Vishaka v. State of Rajasthan*¹⁹ an incident of brutal gang rape of a social worker in a village of Rajasthan prompted a Non Governmental Organization to file a Social Action Litigation in the Hon'ble Supreme Court of India with an aim of finding suitable method for realization of the true concept

¹⁹ AIR 1997 SC 3011

of gender equality and to prevent sexual harassment of working women in all work places through judicial process. In this case the Court for the first time ventured to throw light on the subject of sexual harassment and defined sexual harassment. The Court observed:

“any act of sexual harassment is a clear violation of rights under Articles 14, 15 and 21 of the constitution and logically it is also the violation of the victim’s fundamental right under Article 19 (1) (g) of the Constitution to practice any profession or carry on any occupation, trade or business with dignity.”

Finding the existing civil and penal laws in India inadequate to provide for the specific protection of women from the inhuman act of sexual harassment at work place and that enactment of legislation on the subject would take considerable time, the Apex Court issued detailed guidelines to curb the evil of sexual harassment at work place. The guidelines *inter alia* necessitate the constitution of a Complaint Committee in every work organization. The responsibility of constituting such committee lies with the head of the organization. The committee should be headed by a woman and not less than half of its members should be women. Further, in order to prevent the possibility of any undue pressure or influence from the senior levels, such Complaint Committee is required to involve a third party, either a NGO or other body familiar with the issue of sexual harassment.

The offence of sexual harassment according to the Hon'ble Court includes "such unwelcome sexually determined behaviour as:

1. physical contacts and advances;
2. demands or request for sexual favours;
3. sexually coloured remarks;
4. showing pornography; or
5. Any other unwelcome physical, verbal or non verbal conduct of sexual nature."

In this pronouncement the Court has ordered the employer or the person in charge of the workplace to take preventive measures by publishing and circulating the guidelines in appropriate ways, so that a sense of fear could be created in the minds of the persons daring to violate the dignity of working women.

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer is directed to initiate appropriate actions. In other cases where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules. The Court has also stressed that an annual report at the end of the year containing

the details of all such cases and steps taken should be submitted to the Government so that an idea of the ground realities could be conceived and it could also be conceived that proper action were taken. The Court stressed that the workers can initiate awareness and may take other initiatives to curb this act towards working women jeopardizing their right to work with human dignity. Directions were also given by the Court to protect the women workers against third party harassment and the employer or the person in charge has to take all steps necessary and reasonable to assist the affected person in terms of preventive measures and supports.

Though the Supreme Court has used its powers under Article 141 of the Constitution which renders these guidelines as law declared, most of the work organizations in the country have not implemented them. The work environment of women workers is still hostile and they are still prone to sexual harassment. The fact that there is a hostile work environment created by the acts of sexual harassment is major responsible factor of a problem of perhaps more far reaching effect: sex segregation in jobs. Women understand that behind the symbolism of masculine job descriptions lays a very real force: the power of men to harass belittle; ostracize; dismiss; marginalize; discard and just plain hurt them as workers.²⁰ There is no legislation till date to adequately protect women from this harassment and abuse. An effort of the Hon'ble Supreme Court to provide temporary guidelines to fill in the existing legislative

²⁰ Vicki Schultz, "Telling Stories About Women and Work", Vol. 103: 1749 Harvard Law Review.

gap has been futile because the directions are not given effect to in most of the work organizations in the Country and in those organizations where they are implemented a very poor result has been realized. The work environment of women workers is still hostile. This has become a means whereby men control women in the office or the boardroom.²¹

In *Apparel Export Promotion Council v. A.K. Chopra*²² the Supreme Court ruled that sexual harassment is a form of sex discrimination. It is an unreasonable interference with her work performance. It has the effect of creating intimidating or hostile working environment for her. Indeed each incident of sexual harassment of female worker at work place is violation of the fundamental right to gender equality and right to life with personal liberty. It is incompatible with the dignity and honour of a female and should be eliminated.

Equal Pay for Equal Work:

Equal remuneration doctrine cannot be fulfilled only through legislative and Constitutional provisions. Thus the interpretation of the provisions keeping alive the doctrine with wise judicial logic and reasoning is also felt important. Judiciary has played an active role in enforcing and strengthening this Constitutional goal. The Courts through various provisions have evolved new

²¹ See generally, Namrata Singhai, "Problem of Sexual Harassment at Workplace", Vol. XII Central India Law Quarterly

²² AIR 1999 SC 625

and varied reasoning to support the application of the principle of equal pay for equal work.

In *People's Union for Democratic Rights v. Union of India*²³ the Supreme Court ruled that equal pay for equal work is based on the equality principle contained in Article 14 of the Constitution. The same principle has found expression in the provisions of the Equal Remuneration Act, 1976. Thus the non observance of the Act would amount to violation of Article 14 of the Constitution.

In *Randhir Singh v. Union of India*,²⁴ Construing Article 14, and 16 in the light of the Preamble and Article 39 (d), the Supreme Court observed:

“The principle of ‘equal pay for equal work’ is deducible from Articles 14 and 16 and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification”

The Apex Court through various decisions²⁵ has ruled that persons doing similar work cannot be denied equal pay on the ground that mode of recruitment was different. Further a temporary or casual employee performing

²³ Supra note 9

²⁴ AIR 1982 SC 879 at 882

²⁵ See, *Bhagwan Das v. State of Haryana*, AIR 1987 SC 2049; *Jaspal v. State of Haryana*, AIR 1988 SC 1504

the same or similar duties and functions is entitled to the same pay as paid to regular or a permanent employee.

In *Dharwad District PWD Literate Daily Wage Employees Association v. State of Karnataka*²⁶ it was held that the equal remuneration act, 1976 was enacted for providing equality of pay for equal work. The daily rated employees and monthly rated employees in the State of Karnataka were therefore entitled to pay like regular employees. But in *State of Haryana v. Jasmer Singh*²⁷ the Court held that daily wagers cannot be treated at par with regular employees holding similar posts. No distinction can be made in respect of wages between casual workers appointed directly by the employers and casual workers employed through contractors. However, a junior is justified in drawing higher salary due to the grant of selection grade.

In the case of *Mewa Ram Kanojia v. All India Institute of Medical Science*²⁸ it was held that if the employer is not the same the principle of equal pay for equal work would not be applicable. The pay may also be different when there is a difference in duties and responsibilities. In *Randhir Singh v. Union of India*²⁹ it was held that if the rank is same and if the functions are different they may be treated differently.

²⁶ 1991 (II) LLJ 318

²⁷ (1996) 11 SCC 77

²⁸ *Govt. of Andhra Pradesh v. P.V.M. Pandurang*, (1996) 7 SCC 11

²⁹ AIR 1982 SC 879

In *State of U.P. v. J.P. Chaurasia*³⁰ the Court observed that primary inter alia evaluation of duties and responsibilities of the respective posts (would reveal that) more often functions of two posts may appear to be same or similar, but there may be difference in degree in the quantity of performance. The quantity of work may be same but quality may be different that cannot be determined by relying upon the averment in affidavits of the interested parties. Further explanation on the point may be traced in the decision of the Supreme Court in *Tarsemlal v. State Bank of Patiala*³¹ where the Court observed that the quantitative differences in regard to the degree of reliability and responsibility cannot be put aside as irrelevant.

The principle of Equal Pay for Equal Work envisages equality of pay for men and women for equal work and the courts have delivered in this respect too. The principle is now applied to enforce equality of pay generally.

Gender Discrimination:

Gender discrimination in various areas of employment is a common problem. Women are exploited and denied their rights. Gender discrimination in the work area begins right from the appointment, lasts all through the working life and continues even on retirement or termination. Gender

³⁰ AIR 1989 SC 19

³¹ AIR 1989 SC 31

discrimination has roots in the mindset of the people and the laws are not always sufficient to tackle the problem.

Judiciary has been the guardian of women workers' right against gender discrimination and has taken serious steps to reinforce the rights of these workers.

*Air India v. Nargesh Mirza*³² is an example of judicial intervention for the enforcement of rights of women workers against gender discrimination. In this case the Supreme Court declared that the condition of termination of service on first pregnancy is invalid as it was unreasonable and arbitrary and compelled the air hostess not to have any children and diverted ordinary course of human nature. The Court also invalidated the condition of terminating the employment at the age of thirty five and held that air hostesses could work upto the age of forty five unless they are found unfit.

In *C.B. Muthumma v. Union of India*³³ the Court held that the rule debarring a married women from being appointed to a post requiring her to resign on marriage would be unconstitutional as there was no such bar in case of man who too was likely to be involved in domestic commitments after marriage. In *Maya Devi v. The State*³⁴ the mandate of equality of sexes and

³² AIR 1981 SC 18 at 29

³³ AIR 1979 SC 1868

³⁴ 1988 (6) SLR 421, cited in Lotika Sarkar, "Woman and the Law", Annual Survey of Indian Law, XXIV (1988), 377

right of women workers against gender discrimination was again reinforced. In this case the Court held the requirement of husband's written permission for joining mid-wifery training by wife as discriminating on the ground of sex alone and was quashed by the Court.

In *Pandya Pranshanker v. Director of Education*³⁵ the Court stated that when the regulation provides for the appointment of female candidate to a particular post and even if a male candidate was appointed to the post under grants-in-aid code, the Court had to be satisfied that there was no female candidate and it would not suffice saying that the male was a better candidate.

Right to Health and Medical Aid:

Health of workers is becoming a matter of bigger concern with the growing recognition of role of human factor in production. Health is more than an absence of sickness in the individual and indicates the state of harmonious functioning of the body and the mind in relation to his/her physical and social environment, as to enable him/ her enjoy work to the fullest extent possible and to reach his/her maximum level of productivity.

Health of workers has been a concern for the judiciary too. In *Consumer Education and Research v. Union of India*³⁶ the Supreme Court observed:

³⁵ 1988 SLR 697 cited in *ibid* at 377

³⁶ (1953) 3 SCC 42

“The jurisprudence of personhood or philosophy of the right to life envisaged in Article 21 of the Constitution of India enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. The expression ‘life’ assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. The health of the worker is an integral facet of right to life. Medical facilities, therefore, is a fundamental and human right to protect health”

The right to health and medical assistance was reinforced by the Supreme Court in *Kirloskar Brothers Ltd. v. Employees State Insurance Corporation*.³⁷ The Court observed:

“In expanding economic activity in liberalized economy, Part IV of the Constitution covers not only the State and its instrumentalities but also the private industries to ensure safety to

³⁷ (1996) 2 SCC 682

the workmen and to provide facilities and opportunities for health and vigour of the workmen assured in relevant provisions in Part IV which are integral part of right to equality under Article 14 and right to life under Article 21 which are fundamental rights to the workmen.”

Right to Livelihood, Right to Work and Right to Employment:

The judicial activism has led the courts in India to take innovative steps by giving wide interpretation to the articles in Fundamental Rights Chapter. With the Fundamental Rights the courts have also interpreted Directive Principles which though non justiciable are taken by the court as relevant in testing the effectiveness of the governmental actions towards the realization of the Constitutional rights of the people and the directives being directions to the State are relevant in this regard. Such activism has evolved right to work, right to livelihood and many other rights in right to life itself. The quoted decision of Supreme Court of USA by Field, J in *Munn v. Illions*³⁸ gives the justification:

“By the term life as here used means something more than mere animal existence. The inhibition against the deprivation of life extends to all limbs and faculties by which life is enjoyed.”

³⁸ (1877) 94 US 113

This observation of the American Supreme Court has become the basis of the expansion of the rights contained in Article 21 of the Indian Constitution. The Supreme Court of India in *Ogla Tellis v. Bombay Municipal Corporation*³⁹ held that equally important fact of life is livelihood because no one can live without the means of living. To deprive a person of his right to livelihood would amount to depriving him of his right to live. Further in *Francis Colaric v. Union Territory of Delhi*⁴⁰ the Supreme Court asserted:

“right to life something more than mere animal existence and said that it includes right to live with human dignity and all that will go with it namely the bare necessities of life such as adequate nutrition, clothing and shelter over head and facilities for reading, writing and expressing...”

Through all these cases the course of justice is directing towards the recognition of right to employment. Though right to work have now been justified as containing various rights of workers which are guaranteed in Article 21 and thus right to work also stands guaranteed in Article 21, right to employment could not be recognized. The right to life under Article 21 is coined for all persons and is not confined to citizens. Therefore right to employment could not emerge as a right under Article 21. It is not practical for the Indian economic condition to guarantee employment even to the citizens. In

³⁹ AIR 1986 SC 180

⁴⁰ AIR 1981 SC 746

*Ogla Tellis*⁴¹ the Court opined that the deprivation of a person of his right to work for earning his livelihood would virtually amount to depriving his life which is duly protected by article 21. Thus right to work cannot be said to be non-existent in Article 21. The non-justiciable right to work under Article 41 surely glitters as a gem in Article 21 guarding all rights of workers, except that it does not include right to employment. Thus it is for the judiciary to have recourse to some other provision to recognize right to employment to citizens in a manner practical to the Indian economic conditions.

Right to Minimum Wages:

To provide basic necessities of life to workers, guarantee of certain minimum wage is necessary. If no protection of minimum wage is assured, workers will be open to exploitation at the hands of employers. Though there are concepts of Fair Wage and Minimum wage which have come up and which guarantee better wages to the workers, but the Indian economy has not been strong enough to guarantee anything better than the Minimum Wages.

Though there are laws Minimum Wages, in India the poverty, illiteracy and ignorance of the working class often cause them to settle for less than Minimum Wages. They are exploited by the employers and paid very low.

⁴¹ *Supra* note 39

The earliest case showing judicial concern in this area is *Bijay Cotton Mills Ltd. v. State of Ajmer*⁴² where the Supreme Court observed:

“The fixation of Minimum Wages of labourers by legislature is in the interest of the general public and therefore it is not violative of the freedom of trade secured to citizen under Article 19 (1) (g).”

The Court further added:

“If the laborers are to be secured in the enjoyment of Minimum wages and they are to be protected against exploitation by their employers, it is absolutely necessary that restraints should be imposed upon their freedom of contract and such restraints cannot be in any sense said to be unreasonable. On the other hand, employers cannot be heard to complain if they are compelled to pay Minimum Wages to their labourers, even though the labourers on account of their poverty and helplessness are willing to work in (fewer) wages.

In *Express Newspapers (Pvt.) Ltd. v. Union of India*,⁴³ the Court upheld the validity of Statutory Minimum Wages under Working Journalists

⁴² AIR 1955 SC 33

⁴³ AIR 1958 SC 578

(Conditions of Service and Miscellaneous Provisions) Act, 1955 and machinery set up therein. The capacity to pay is one of the decisive factors in determining wages, but statutory minimum wage is the minimum which must be paid.

In *Peoples Union for Democratic Rights v. Union of India*⁴⁴ the Court gave new dimension to Minimum Wage by justifying it under Article 23. The Court observed:

“What Article 23 prohibits is ‘forced labour’ or service which a person is forced to provide and ‘force’ may arise in several ways the word ‘force’ must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice or alternative to a person in want and compels him to provide labour or service even though the remuneration received for it is less than minimum wage. Where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and admit of the words ‘forced labour’ under Article 23. Such a person would be entitled to come to Court for enforcement of his fundamental right under Article 23 by asking the Court to direct payment of the minimum wage to him so that

⁴⁴ Supra Note 9

labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied."

The judicial cognizance and recognition of various rights of the workers shows the judicial concern in the work world. The Courts have exhibited dynamic attitude in ensuring the realization of the rights of workers, sometimes even at the cost of encroaching upon the domain of the legislature. The Courts have played the role of catalyst in ensuring the workers are protected in an effective manner. Such welcome judicial attitude should be a continuous process because if in the past constitutional policy making by the judiciary has been an essential matrix of human rights of working people, it will be no less in the future. The role of judiciary in the protection of rights of workers has been tremendously appreciable.

Like that of the legislative measures, tremendous judicial activism also has been of a little or no avail for the workers in the unorganised sector including those engaged in tourism. Because of the nature of employment it becomes difficult to identify them. In the same context, lack of access to legal services and courts, add to the problems of unorganised workers. It is evident from the judicial attitude that the future of justice in the area of labour will draw the attention of the Courts more in the unorganized sector. However this will not be an easy task.

The workers in the unorganised sector they enjoy little or no legal benefits. They also do not have access to finance as easily as organised industry. Further a number of laws are interpreted or applied in a manner that adversely affects their interests. Two propositions need elimination. Positive laws, benefits and schemes are not available to these workers because they are unorganised or not recognised. Negatively, existing laws regulating trade and business, licensing of self employed, law and order, public nuisance, obstruction etc. are all applied to the detriment of unorganised workers and their interest and right to carry on trade and business peacefully.

It is evident that the legislature has not been able to come up with a law for the unorganised workers. Whenever there is a question of the basic rights of workers judiciary has always upholding the spirit of the constitution taken cognizance and come to the rescue. Strong judicial concern may evolve wise precedents for the protection of workers in this neglected area of work and may also remind the legislature of this country the role and importance of this sector in the development of this nation apart from reminding them of their duty to ensure rights and protections to these workers.

WORKING CONDITIONS AND ASPIRATIONS OF THE UNORGANISED WORKERS IN TOURISM INDUSTRY IN THE STATE OF SIKKIM

The Kingdom of Sikkim, which earlier enjoyed the status of Protectorate of the Union of India, became the 22nd state of the Indian Union on 16th May 1975.¹ Prior to its merger in the Indian Union, the Kingdom of Sikkim had good relation with the Kingdom of Tibet, and bilateral trade between the two Kingdoms supplied their people with consumable and durable goods. Tourism though was not seen as an economic activity, many tourists visited Sikkim. The main visitors consist of Tibetans relatives of the Sikkimese people and those come for business and British expedition teams from India (as it is the position prior to the merger of the Kingdom of Sikkim into the Indian Union) and tourists from rest of the country. During this time many practices of forced labour were witnessed in the kingdom of Sikkim. The labour was forcibly obtained from the workers. The workers were usually not paid for the work. The ones who protested or denied work were to be severely punished. The main forms of such evil practices were “Jharlangi”, “Bhethi”, “Kuruwa” and “Kalo Bhari”. “Jharlangi” was the system of unpaid labour recruited by the

¹ Vide the Constitution Thirty-Eighth Amendment Bill, which received the assent of the President of India on 16th May 1975

Government for the purpose of construction of road and bridges.² It also included the workers employed for the purpose of carrying goods³ and British expeditions resorted to "Jharlangi" extensively. "Bhethi" was the system of each household providing unpaid labour to *Mandals* and *Kazis*⁴ for a fixed number of days in a year. "Kuruwa" was a type of labour conscripted to carry the luggage of Government officials passing through the villages. "Kalo Bhari", as its name implies, were goods that were packed in black tarpaulin to be illegally exported to Tibet.⁵

The system of "Kuruwas" in the whole of Sikkim was formally abolished by the Sikkim *Darbar*⁶ on 31st January, 1947, by a notification by the General Secretary to His Highness the Maharaja of Sikkim.⁷ The system of "Bhethi" and "Kalo Bhari" were also abolished during the rule of Maharaja Tashi Namgyal.⁸ The most controversial system of labour that also resulted in the public agitation against the *Darbar* was the system of "jharlangi". "Jharlangi" labour could be availed of only by Government Officials on duty, and State officials for transport purposes and for no other. Also on emergent occasions it was allowed be utilized for Public Works Department or for any other administrative purpose.⁹ However the labour was exploited by these

² Rajesh Verma, Sikkim- a guide and Handbook, Narendra Bhatia & Company, New Delhi, 12th ed. January 2005 at 27

³ Refer to Notification No. 3590-4089 G issued by the General Secretary of the Maharaja of Sikkim on 31st December 1946

⁴ Landlords

⁵ Supra note 101

⁶ Royal Court

⁷ Vide Notification No. 4816 G (M), General Department (Misc. Branch), dated 31st January 1947¹¹

⁸ Supra note 101

⁹ Refer to Notification No. 1 060/G., dated 16th July, 1943

officials. Such exploitation caused massive public agitation. After the public agitation compelling any person to labour against the will of that person was made punishable with imprisonment of either description for a term which extended to one year, or with fine, or with both.¹⁰ However, such labour could be requisitioned for any administrative purpose and ceremonial occasions. The power of such requisition lay on Landlords, Managers and their "Kamdaries".¹¹ For transportation the "Jharlangi" labour could now only be requisitioned on the payment of the wages fixed by the *Darbar*. Later with the merger of the kingdom of Sikkim into the Indian Union all evil practices relating to labour gradually disappeared.

The post-merger Sikkim not only witnessed various labour reforms but also huge development in many other fields. Of late, tourism has received a massive development. Today tourism is one of the fastest growing sectors in the State of Sikkim and holds tremendous potential for future economic growth with equity and employment generation. Realizing this potential of tourism sector the State Government has accorded top most priority to this sector with adequate policy and financial support. Sikkim has been witnessing a steady and healthy rate of growth of 15% per annum tourist arrival, both domestic as well as foreign and the total arrival stood at 3.2 lakhs for domestic and around 18,000 for foreign tourist during 2006.¹² The tourist inflow reportedly

¹⁰ In the tune of Section 374 of IPC

¹¹ Employee; refer to Notification No.3590-4089 G issued by the General Secretary of the Maharaja of Sikkim on 31st December 1946

¹² Annual Report 2006-2007 Department of Tourism, Government of Sikkim.

increased by 10% in 2007. Of 3.51 lakh tourists visiting the State in 2007, 3.31 lakh were domestic visitors, while the number of foreign tourists stood at 19,844.¹³

For the last few years the state of Sikkim has been following a policy of Development of tourism infrastructure in the public domain and that of tourism trade infrastructure, which includes hotels, restaurants, tourist agent and tour operators in the private domain. Along with the State Government of Sikkim, Ministry of Tourism, Government of India has been very supportive of the efforts of tourism Department and has been quite liberal in their financial support for Development of tourism infrastructure in the State. As a result of this Sikkim has been able to upgrade its tourism infrastructure considerably. Spurred by the demand of tourism trade infrastructure coupled with positive policy initiative of the State Government the private sector has responded with enthusiasm in creating the required tourism trade infrastructure. Tourism is one of the most important economic sectors of the State; the wealth of natural resources the third highest mountain in the world, the rich flora and fauna, cultural festivals and festivities and a rich tradition are some of the tremendous potentials that is available in Sikkim for the promotion of Tourism. Further the State is also developing tourism infrastructures with many mega projects targeting eco tourism, pilgrimage tourism, village tourism etc..

¹³ Annual Report 2007-2008 Department of Tourism, Government of Sikkim

The lack of large and medium industries ensures tourism as one of the most sustainable industries in the State capable of contributing immensely to the revenue and creating tremendous employment opportunities. With these potentials, the Government has not lagged behind and has therefore declared tourism is one of the topmost priorities in the over all developmental scenario of the State. In order to bring about a long term perspective plan on the development of tourism sector, the Department has prepared a perspective plan for 15 years beginning 1997 -98 and terminating in the year 2011-2012.

During the course of the present research, in order to understand the ground reality and the problems of the unorganised workers engaged in tourism in the state of Sikkim an empirical study was done. For this purpose four hundred workers engaged in different employments were interviewed for the purpose of collection of data. The data was collected through a questionnaire. The data so collected was tabulated. Further informal interactions were made with the workers, employers, government officials of the Department of Labour, Government of Sikkim and the leaders of the welfare associations in some employments. The expenses for the empirical study were met through the contingency grant granted under the fellowship scheme of the Human Resource Development, Department, Government of Sikkim. The conclusions of the study on the condition of the main contributors of tourism in the present time in the state of Sikkim may be briefly discussed under the following heads:

Travel Agents and Tourist Guides:

Until recently no systematic arrangement to generate revenue from tourism in the State of Sikkim was made. Now that tourism in Sikkim is flourishing and it is being carried on more systematically. Apart from heavy boost to all the sub sectors, the development in tourism and influx of tourists in the State has resulted in tremendous growth of employments in the front players of tourism industry. The special mention may be made of the travel agents and tourist guides. The travel agents arrange packages for the tourists or simply arrange transportation for them. They employ guides for the tourists and seldom work as guides themselves. They are mostly self employed and make good earning. However, the seasonal nature of tourism in the State causes many of them to remain unemployed during the off season. Some of the travel agents work all year through and organize off season packages. Both male and female travel agents can be found in the State but the percentage of male Agents is many times higher than the female Agents.

Travel agents are mostly well educated. The data collected for the present work reveals that about 100% of the travel agents have completed secondary education, about 83.33% have completed Senior Secondary education and about 50% of them are graduates. Travel agents have good monthly earning. They also have a larger contribution to the monthly income of

the family. The empirical study conducted for the present work shows that about 33.33% of the travel agents belong to joint family.¹⁴

Though no trade union law is in force in the State of Sikkim, most of the travel agents are the members of travel agents associations. These Associations operate as welfare associations and are not in the nature of trade unions. There are two Associations in the State working for the welfare of the Travel Agents viz. Sikkim Association of Adventure Tour Organizers (SAATO) and Travel Agents' Association of Sikkim (TAAS).

Tourist guides can broadly be classified into two classes viz. travel guides and trekking guides. In contrast to the travel agents tourist guides in the State of Sikkim are mostly employees of the travel agents. Though a few unemployed and students work as self employed guides seasonally, they do not get much work. Since a registered tour operator receives more tourists and is generally trusted by the tourists, the guides working in the agency have more work in hand and thus more income through salary and tips. Tourist guides work on permanent nature of employment or in casual nature of employment. According to the data collected for the present work about 68.18% of the guides work on permanent employment and 31.81% of them work on casual employment. The term of payment however is found to be monthly in all

¹⁴ Table 1.3 Family Structure of Travel Agents

Total interviewed	06	100%
Joint Family	02	33.33%
Nuclear Family	04	66.66%

cases.¹⁵ The guides work for long hours. They do not have holidays. They have uncertain working hours and have to continuously travel distances. The landscape of the State and the road conditions in the far flung places exposes them to the treat of accidents. They work hard and on many occasions do not get adequate rest.

A few tourist guides are paid lesser minimum wages. In the present study about 6.66% of the tourist guides in permanent employment and about 9.09% working in casual employments received wages lesser than the Statutory Minimum Wage. Out of the total tourist guides interviewed about 90.90% responded that they receive Minimum or More than Minimum Wages. Tourist¹⁶ guides have a large contribution to the monthly income of the family. The data collected for the present study shows that about 31.81% of them have joint family structure.¹⁷

Most tourist guides in the State of Sikkim are educated upto primary level. The study conducted for the present work shows that 100% of them have

¹⁵ Table 1.1 Wage Structures of Tourist Guides

	Permanent	Casual	Total
Total interviewed	30 100%	14 100%	44 100%
Receiving Min Wages 90.90%	28 93.33%	12 85.71%	40
Not Receiving Min Wages	02 6.66%	02 14.28%	04 9.09%

¹⁶ ibid

¹⁷ Table 1.2 Family Structure of Tourist Guides

	Permanent	Casual	Total
Total interviewed 100%	30 100%	14 100%	44
Joint Family 31.81%	10 33.33%	04 10%	14
Nuclear Family 68.18%	20 66.66%	10 90%	30

completed primary schooling, about 84.9% have completed junior high schooling, about 65.90% have completed secondary schooling, about 25% have completed senior secondary schooling and about 6.81% of them are graduates.¹⁸ Unlike Travel Agents Tourist Guides do not have any welfare associations.

Taxi Drivers:

Transportation in the state of Sikkim is mostly dependant on taxis. Though a few buses ply in the State and though a helicopter service is also available, taxis serve most of the tourists visiting the State. Taxi drivers are thus the main contributors of tourism in the state of Sikkim. In many cases drivers also serve as tourist guides and porters. These workers have indefinite and long hours of work. On many occasions they have to work till late night. Sometimes they have to be away for work for many days.

¹⁸ Table 1.6 Literacy and Education of Tourist Guides

	Permanent		Casual		Total	
Total interviewed	30	100%	14	100%	44	
100%						
Illiterates	00	0%	00	0%	00	0%
Literates	30	100%	14	46.66%	44	
100%						
Primary Schooling	30	100%	14	100%	44	
100%						
Jr. High Schooling	24	80%	13	92.85%	37	
84.09%						
Secondary Schooling	18	60%	11	78.57%	29	
65.90%						
Sr. Secondary Schooling	08	26.66%	03	21.42%	11	25%
Graduation	02	6.66%	01	7.14%	03	
6.81%						

Both employee and self employed taxi drivers may be found in the state of Sikkim. The sample study conducted for the purpose of the present work shows that about 22% of the taxi drivers in the state are self employed. The remaining about 78% therefore are employees. Though the self employed taxi drivers make good income and have quite independent working hours the case with employees is just the opposite. They do not enjoy weekly holidays or even holidays during the festivals. They are paid very low wages, even lower than the statutory minimum wages and made to work for long hours. The study conducted shows that only 11.53% of the total taxi drivers (employees) are paid Statutory Minimum Wages. The data collected for the present work shows that about 92.30% of the employee drivers and 95.45% of the self employed drivers have completed primary schooling. About 23.07% of the employee drivers and about 72.72% of the self employed drivers have completed secondary schooling. There are quite a few graduates and post graduates in both the class of taxi drivers. Despite their education they are discriminated on various fronts. They often face police harassment. The very nature of job is such that these workers are vulnerable to accidents. The victims and dependants have no adequate social security.

When asked about the low wages of taxi drivers the employers responded that since the drivers work independently the whole day and they do not have any supervision on the income made by them during the day, the drivers often do not hand over the entire proceed to them and thus share a much

larger part of the employer's income through the taxi than the amount of wage they receive. Many drivers confided this to be true during the interaction which according to them was due to the low wages they received. It was found that the taxi drivers with higher wages normally brought in better fare proceeds. The taxi drivers are highly unaware of the labour laws.

Most of these workers have problems relating to digestion. Irregular eating hours, constant working, smoking, drinking alcohol, constant exposure to cold weather etc. causes problems relating to stomach, liver etc. Sitting in the same posture for long hours causes problems like lower and upper back pain. Constant limited motion of their hands on the steering wheel causes repetitive strain injury (RSI) or tenosynovitis. They are most prone to sexually transmitted diseases. They constantly come in contact with sex workers and often indulge in unsafe sexual practices. This causes them to contract STDs including HIV/AIDS.

The absence of trade union law in the state has deterred the taxi drivers from unionizing. However, there are numerous welfare associations working for the welfare of drivers in the state. About 64% of the taxi drivers are members of such associations.

Hotel Workers:

Hotel workers are one of the main contributors in the tourism industry. The workers include unskilled, semi-skilled and skilled workers. The workforce in hotel industry in the state of Sikkim is clearly male dominated. Though a few females work in hotels but most of them are self-employed engaged in their own establishments on managerial or supervisory capacities. Since the hotel work goes on till late night, employers prefer male workers. Further the regulatory provision under Sikkim Shops and Commercial Establishment Rules deter the women workers working at night.

Hotel workers work hard for long hours. Generally, hotel workers start work at 4 A.M. to 5 A.M. in the morning and which goes on till 11 P.M. or midnight. Though a few big hotels engage workers on shifts, medium and small establishments same workers are engaged for the entire business hours.

Hotel workers in the state of Sikkim work both on permanent and casual basis. The responses collected for the present work shows that about 12% of the hotel workers work on seasonal employments. These workers are relatively more educated than the workers in various other sub sector of tourism. The collected data shows that only 6% of the workers are illiterates and about 67% of the workers have completed primary schooling. Many literate workers however are not functionally literate.¹⁹

¹⁹ Table 4.4 Literacy and Education of the Hotel Workers

	Permanent		Casual		Total
Total Interviewed	88	100%	12	100%	100
100%					

Hotel workers have significant contribution in the monthly income of their families. About 31% of the workers have joint family structure.²⁰ The workers in some hotels receive good wages but many workers do not receive even the minimum wages. Mostly workers engaged in unskilled works as cleaners, helpers etc and those newly employed do not receive minimum wages. The responses collected for the present work shows that about 37% of the hotel workers do not receive minimum wages.²¹

There is no trade union law in force in the state of Sikkim. No welfare association is in existence either to work for the welfare of the hotel workers. During the interaction with them for the present work most of them wished to have an organization for collective bargaining and welfare.

Illiterates	06	6.81%	00	0%	06	6%
Literates	82	93.18%	12	100%	94	94%
Primary Schooling	59	67.04%	08	66.66%	67	67%
Jr. High Schooling	28	31.81%	05	41.66%	33	33%
Secondary Schooling	13	14.77%	02	16.66%	15	15%
Sr. Secondary Schooling	02	2.27%	00	0%	02	2%
Graduates	01	1.13%	00	0%	01	1%

During the collection of data, an informal interaction done with them revealed that 3% of the total workers knew only to write their names.

²⁰ Table 4.2 Family Structure of Hotel Workers

	Permanent		Casual		Total	
Total Interviewed	88	100%	12	100%	100	
100%						
Joint Family	27	30.68%	04	33.33%	31	31%
Nuclear Family	61	69.31%	08	66.66%	69	69%

²¹ Table 4.1 Wage Structure of Hotel Workers

	Permanent		Casual		Total	
Total Interviewed	88	100%	12	100%	100	
100%						
Receiving Min Wages	55	62.5%	08	66.66%	63	63%
Not Receiving Min Wages	33	37.5%	04	33.33%	37	37%

The hotel workers mostly stay in the place of their work. Some attend their work from their private residence. The living accommodation or house rent allowance is generally not provided by the employer. Those staying in the hotels sleep in the rooms of the lodges which remains unoccupied by the customers. During the peak seasons many workers share a single room and beds. On many occasions they cannot get adequate sleep at night.

The workers in hotels as workers in other sub sectors of tourism are highly unaware of labour laws. The essentials under the laws are not properly maintained. The name of the inspector having jurisdiction is also not known to the workers. The first aid boxes are not maintained in many hotels. The hotels in towns managed their first aid facilities from medical shops. In the areas away from towns first aid boxes were found in many hotels, though many articles required under the law were missing from the boxes.

Hotel workers generally are exposed to sexually transmitted diseases including HIV/AIDS. They frequently come in contacts with the sex workers and indulge in unsafe sexual intercourse. Therefore there is a need also to take steps towards protecting these workers from such diseases.

Construction Workers:

Construction workers may be broadly classified as skilled and unskilled. Usually couples work on the same worksite. Children are often engaged in unskilled jobs. Most of these workers are employed on casual basis. In the state of Sikkim, most of the construction workers work on casual basis on daily wages. A few work on monthly basis but their employment remains primarily casual. In the present study 96% of the construction workers were found to be engaged on casual basis on daily wages. The remaining 4% were engaged on casual basis on monthly wages. Females were found working mostly on daily basis. Employment and earning in this sector is highly unstable and shifting of workplace is basic characteristic of work. The fluctuating requirement of labour force results in periodic unemployment. The workers engaged in unskilled works were found to be paid wages lesser than the Statutory Minimum Wages. 8% of the male workers and 12% of the female workers interviewed responded that they receive wages lesser than the Minimum Wage fixed under the Minimum Wages Act.²² This percentage with the total workers interviewed stands at 16%. Construction workers interviewed mostly were the members of nuclear family. About 30% of the male workers and about 18% of the female workers interviewed have joint family structure. With the total number of workers interviewed the percentage stands at 24%.²³

²² Table 3.4 Rates of Wages of the Construction Workers

	Male		Female		Total	
Total Interviewed	50	100%	50	100%	100	
Minimum Wages or More	46	92%	38	76%	84	84%
Less than Minimum	04	8%	12	24%	16	16%

²³ Table 3.1 Family Structure of Construction Workers

	Male	Female	Total
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Female construction workers are more exploited. Frequent changes in their work and instability deprive them and their children of primary facilities like health, water, sanitary facilities, education and ration cards. They are constantly exposed to sexual harassment. The responses collected for the present work shows that about 8% of the women workers have faced sexual harassment. Both married and unmarried women workers between the age of 15 and 35 years were found to have faced sexual harassment in workplace.²⁴ It is noteworthy here that women workers generally did not know what amounts to sexual harassment. They generally regard most of the acts amounting to sexual harassment as moral wrong and have no idea that such acts amount to specific offences under the laws. Further, many workers were reluctant to reveal that they have been subjected to such inhuman treatment. Therefore the percentage shown above may quite be underestimated.

The workers engaged in construction works serious long term health effects the workers engaged in stone breaking (chips) suffer from problems

Total interviewed	50	100%	50	100%	100
100%					
Joint Family	15	30%	09	18%	24
Nuclear Family	35	70%	41	82%	76
					76%

²⁴ Table 3.5 Sexual Harassment of Women Workers Engaged in Construction

Total interviewed	50	100%	
Victims	4	8%	100%
Co-workers Perpetrated	2	4%	50%
Third Party perpetrated	3	6%	75%
Employer Perpetrated	0	0%	0%
No. of Married Victims	3	6%	75%
No. of Unmarried Victims	1	1%	25%

related to posture like lower and upper back pain, spondylitis and repetitive strain injury (RSI) or tenosynovitis. Their spinal columns bent from constant stooping. Women workers engaged in construction also face problems relating to lifting of weights like prolapse of the uterus, miscarriages. The construction workers generally suffer from back problems. They also face respiratory problems and skin diseases due to dust and fumes.

The temporary sheds or barracks put up by contractors lack separate cooking space, drinking water, lavatories, bathing and washing places. Crèche facilities are also not available. The barracks found in the worksite were made up of bamboo with tin sheets on the roof and tin sheets or gunny bags to serve as walls. Some of the sheds did not have windows. In most cases the contractor provides the articles and the workers and they are asked to build a hut for himself and his family. The site visited for the purpose of this work (one of the biggest tourism project in the State) did not have any sign boards. Notice boards or abstracts of the Acts were also not found in the workplace. The workers did not know the name of the inspector having jurisdiction of their worksite under the labour laws.

Construction workers are mostly illiterate or less educated. The data collected for the present work shows that about 24% of the male workers and 36% of the female workers are illiterate. The percentage of illiterate workers with the total number of workers interviewed stands at 30%. Only 31% of the

workers have completed primary schooling. Most of the literate workers are not functionally literate. 7% of the total workers know only to write their names.²⁵

Workers engaged in tourist spots:

Tourist spots provide a platform for a wide variety of activities. These spots support numerous kinds of employments and income sources. In the state of Sikkim various types of activities are carried on in such spots. The main employments here may be identified to include shop keeping, fruit vending, tea stalling, ticket selling, night and day guarding, gardening and maintenance of spots, yak and horse attending, photography, renting traditional costumes, fast food and other eating houses etc.

The workers in tourist spots are mostly self employed workers. Some workers also work as employees but the number of such workers is far less than the self employed. The employees in most employments have low wages. With the development of tourist spots and expanded need for educated workforce well educated people are also working in tourist spots. About 80% of the

²⁵ Table 3.6 Literacy and Education of the Construction Workers

	Male		Female		Total	
Total Interviewed 100%	50	100%	50	100%	100	
Illiterates	12	24%	18	36%	30	30%
Literates	38	76%	32	69%	70	70%
Primary Schooling	21	42%	10	20%	31	31%
Jr. High Schooling	12	24%	02	4%	14	14%
Secondary Schooling	05	10%	00	0%	05	5%
Sr. Secondary Schooling	01	2%	00	0%	01	1%

employees interviewed have completed junior high schooling and about 40% have completed secondary schooling.

Some self employed workers in the tourist spots earn handsomely. With the growth in the number of tourist visiting the state, the businesses in these spots have flourished remarkably. This flourishing has resulted in tremendous growth in the income of the self employed workers in such spots. The self employed workers in the tourist spots include people from various age groups. About 55% of the workers have completed primary schooling

The workers in tourist spots face various difficulties. Working in high altitudes during winters is extremely difficult. Since the main attraction of the state is snow and rhododendrons and orchids all of which are found in high altitudes, the spots mostly develop in highly altitudes. The workers engaged in such spots are constantly exposed cold weather and often fall prey of the diseases caused by such exposure.

Some workers walk long distances to reach their workplace. In most of such spots there is no provision for temporary or permanent stay near workplace. The tourist spots in many places lack sanitary facilities, toilets and clean drinking water. The workers like yak and horse attendants have difficult time during the winter rains. There are no sheds for the animals and workers to protect them from rain. In such situation they either leave the workplace

sacrificing the income of the whole day or stay under the open sky in chilling weather in the rain waiting for it to stop. There is no trade union or other institutional machinery to fight for the right of these workers. Neither self employed workers nor employees have any welfare association.

Women workers in tourist spots are not immune from the acts of sexual harassment. About 26.31% of the women workers interviewed for the purpose of data collection responded that they have faced sexual harassment at workplace. Mostly young girls are made victims of such inhuman treatment. The perpetrators are mostly third party visiting the spots. Co-workers also perpetrate such acts but it is comparatively less common. In all cases the harassment came by way of verbal expression in the form of sexually coloured remarks. Most of the workers did not know what amounts to sexual harassment. The women workers were generally reluctant to respond freely on this matter.

There are numerous other employments in the tourism sector. The workers like trekking guides and porters, rock climbers, cable car operators, gliders, jumpers, rafters and rescue workers have their own peculiar problems. These workers are prone to accidents. Their dependants have no adequate social security. Workers engaged in village tourism, home face different and distinct problems. Dancers, singers and amusers village guides, and other casual workers engaged in village tourism do not get paid adequately. The

workers engaged in the manufacture of traditional decorative are also not paid adequately for their skill and labour. Various other workers engaged in various other employments have problems distinct and peculiar to their employments.

Most of the sub-sectors under tourism are unorganized in the developing countries. More so in the Indian state of Sikkim as not much legal protection is available to the workers in tourism in the state. As a matter of fact barring governmental institutions and a few large establishments in the work-world state of Sikkim is largely Unorganized. Though not many labour legislations are being implemented in the State, it has a Department for Labour and Employment. The Government of Sikkim had established the Department of Labour in the year 1976. During the year 1976 to 1977, the Department had worked under the overall administrative supervision and control of the Secretary and one Labour Welfare Officer. At the inception, the Labour Department was linked with the Department of Heavy Industries. The first Labour Inspector of the Department was appointed in the year 1978. Objectives of the Labour Department is to ensure cordial relation between employers and employees, good hygienic conditions and safety measures at work sites, welfare and beneficial wages to workers in time and thereby to improve socio-economic condition of the working class in the State.²⁶

A good number of Central labour legislations are in force in the State of Sikkim. Till the present day 15(fifteen) labour legislations including two State

²⁶ Annual Report, Department of Labour and Employment, Government of Sikkim, (2005-2006)

Acts are in force to protect the rights and interests of the workers in the State.

The Central legislations which are in force in the State are:

1. Bonded Labour System (Abolition) Act, 1976;
2. Equal Remuneration Act, 1976;
3. Inter-State Migrant Workmen Act, 1979;
4. Sikkim Shops and Commercial Establishments Act, 1983;
5. Workmen's Compensation Act, 1923;
6. Fatal Accidents Act, 1855;
7. Employers' Liability Act, 1938;
8. Child Labour (Prohibition and Regulation) Act, 1986;
9. Payment of Wages Act, 1936;
10. Employees' Provident Fund and Miscellaneous Provisions Act, 1952;
11. Payment of Gratuity Act, 1972;
12. Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996;
13. Building and Other Construction Workers Welfare Cess Act, 1996;
14. Minimum Wages Act, 1948;
15. Sikkim Labour Protection Act, 2005.

Among the Central laws that are relevant for the purpose of present study and thus included in Chapter IV in the present work, barring those Acts

which are implemented by the Central Government, the only Acts which are actually being implemented in the State are:

1. Workmen's Compensation Act, 1923;
2. Payment of Gratuity Act, 1972;
3. Payment of Wages Act, 1936; and
4. Minimum Wages Act.

These Acts have been implemented in the State with the appropriate Rules made in the years 1996, 2002, 1992 and 2005 respectively. Apart from these Central Acts, there are two State Acts which are also being implemented in the State of Sikkim.

The Sikkim Labour Protection Act, 2005:

With an aim to regulate the employment and conditions of services of employed workers and self employed workers and to protect them from exploitation and for the statistical purpose, by registration of individual workers and to make provisions for certain matters in the interest of public order thereto,²⁷ the Sikkim Labour Protection Act was enacted in the year 2005.²⁸ The Act applies to all the workers employed or self-employed within

²⁷ Vide the Object Clause, the Sikkim Labour Protection Act, 2005

²⁸ Refer to Notification No. 20/LD/2005 dated 24.09.05, Extraordinary Gazette No. 360 dated 29.09.2005

the state of Sikkim but does not apply to the Muster Roll and Work Charged workers in Government Departments.²⁹

Section 3 of the Act requires the appointment of Registering Officers. The requirement and procedure of registration can be found in Section 4. For the employed workers, the principal employer or the employer or the contractor or the owner of an establishment is required to apply for registration. Self employed workers are required to apply themselves. The Registering Officer under the Act has to register the workers within six months of the submission of the application. If the application is complete in all respects the authority may consider to keep a record in the register or other prescribed form. The authority may also issue a token or receipt of such application. Where such registration of any worker has been obtained by misrepresentation or suppression of any material fact, it may be revoked provided that previous approval should be taken from the Government for such revocation.³⁰

Section 6 prohibits the employment of workers without registration. The registration remains valid upto the end of Financial Year and an application for renewal has to be submitted not less than 15 day before the expiry of such registration.³¹

²⁹ Section 1 (4)

³⁰ Section 5

³¹ Section 7

A person aggrieved by the order of the Registering Officer may prefer an appeal to the Secretary in the Department of Labour, Government of Sikkim within 30 days. The order of such Appellate Authority would be final.³²

The Principal employer or the employer or the owner of establishment or the individual workers as the case may be have duty under the Act to furnish the prescribe particulars about workers within 15 days of the employment. They are also required to surrender the token or receipt of application of registration if any worker leaves Sikkim on vacation or forever as the case may be. On occurrence of any change in the particulars so furnished, they are required to furnish particulars of such change. They also have duty under the Act to maintain a record register with particulars such as name, father's name, sex, age, temporary address, permanent address, designation, rates of wages, date of employment, and nature of work and also keep a passport size photograph in the record.³³

Chapter IV of the Act enunciates provisions for payment of wages, welfare measures and other facilities to be provided to workers. The Act requires that the wage rates, holidays, hours of work and other conditions of service of workers should be same for all workers in an establishment who perform the same of similar kind of work.³⁴ Where a male and a female worker do the same and similar nature of work, the Act requires the employer to pay

³² Section 8

³³ Section 9

³⁴ Section 10 (1) (a)

equal remuneration without discrimination on the ground of sex.³⁵ Workers must not be paid less than the wages fixed as per the existing policy and law of the State Government of Sikkim.³⁶ If a worker works without being absent during the period of 6 (six) days consecutively in a week, she/he is required under the Act to be given one paid holiday either on Sunday or any other holidays.³⁷ Normal working hours of workers as enunciated by the Act is 8 (eight) hours a day.³⁸ The Act also bears a provision prohibiting the employment of any person below the age of 14 years from all works.

Regarding the wages, the Act says that in all establishments in which less than one thousand persons are employed the wages should be paid before the expiry of the seventh day of the succeeding month. In other establishments employing more than one thousand persons, wages should be paid before the expiry of the tenth day of the succeeding month. All the wages payable to workers are to be paid in cash.³⁹

The Act casts a duty on every principal employer or employer or contractor or the owner of establishment as the case may be to:⁴⁰

- a. ensure suitable conditions of work to such workers having regard to the fact that they are required to work;

³⁵ Section 10 (1) (b)

³⁶ Section 10 (1) (c)

³⁷ Section 10 (1) (d)

³⁸ Section 10 (1) (e)

³⁹ Section 10 (2) & (3)

⁴⁰ Section 11

- b. to provide and maintain suitable residential accommodation to such workers during the period of their employment;
- c. to provide prescribed medical facilities to the workers free of charge;
- d. to provide such protective clothing and other amenities to the workers, as may be prescribed.

Under Section 11 (2), in case of fatal accident or accident resulting in serious bodily injury to any worker on duty the employer is liable to give notice to the Commissioner for Workmen's Compensation, Sikkim under Section 10 (B) of the Workmen's Compensation Act, 1923.

The Act makes provision for the nomination by the principal employer a representative at the time of disbursement or payment of wages. The contractor is under a duty to ensure disbursement of wages in the presence of the authorized representative of the principal employer. In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer is liable to pay the wages in full or pay the balance due, as the case may be, and recover the amount from the

contractor either by deduction from any amount payable to the contractor or as debt.⁴¹

Under Section 13 the State Government is required to appoint inspectors for the purpose of carrying on the provisions of the Act.

Chapter VI of the Act deals with cognizance of offences and penalties. Cognizance of offences committed under the Act may be taken on complaint filed before the Court of Judicial Magistrate. The original Act empowered a registered worker or a NGO or an inspector to file such complaint but the worker and NGO are no more empowered under the Act to file such complaints.⁴² Penalties for contravention of the provisions of the Act are provided in Section 21. Different penalties have been categorized according to the severity of the offences. An appeal would lie in the Court of District and Sessions Judge. The period of limitation for appeal is 60 days.⁴³

Section 26 necessitates the maintenance of registers and records by the employer and display in the premises of the establishment of the prescribed notices. Section 27 empowers the State Government to make rules.

On a comprehensive study of the Sikkim Labour Protection Act, 2005 and the Amendments Acts of 2006 and 2007 one can safely conclude that the Act does not bear any special protection or welfare provision. The Act seems to

⁴¹ Section 12

⁴² Section 3, the Sikkim Labour Protection (Amendment) Act, 2006, Notification No. 43/LD/2007 dated 10.01.2007, Extraordinary Gazette No. 3 dated 17.01.2007

⁴³ Section 20

serve more the Department of Labour for securing statistics than to serve any good for the workers. The only way the Act goes beyond the existing laws like Minimum Wages Act, Equal Remuneration Act, Workmen's Compensation Act and Payment of Wages Act, is that this Act applies to all establishments irrespective of the number of workers employed. The Act, except for the special provision of registration, restates provisions of the abovestated Acts.

The Act does not provide any provision for regulation. Except the provision for registration no regulatory scheme is pronounced in the Act. There is no provision for protection of the workers. The purpose that the Act desires can mush easily be achieved if a few national legislations which are already in force in the State are seriously implemented. The Act has no provision pointing towards collective bargaining. Since Trade Unions Act is not in force in the State and since almost the entire workforce in the State is unorganized, a protective legislation which is named as "the Sikkim Labour Protection Act" was expected to spell out concrete provisions in this regard.

It is clear that the present Act is hardly of any advantage to the workers. The crucial guarantee of justice to the workers lie in minimum wages, safety, job security and at least an elementary or basic level of security to the workers which the present Act simply does not point at. The Act was emasculated

further by its amendment in the year 2006.⁴⁴ The Amendment curtailed the *locus standi* of the workers and NGOs to register a case or the offences committed under this Act. Thus the Act has only remained a guarantee of registration of the workers.

The Sikkim Labour Protection Rules, 2006:

In exercise of its powers under Section 27 of the Sikkim Labour Protection Act, 2005 the State Government of Sikkim has made Sikkim Labour Protection Rules, 2006.⁴⁵ As nothing concrete is spelt out in the parent Act, the Rules amply fulfill the purpose of the Act. Chapter III of the Rules deals with the manner of making application for registration of workers, grant of certificate of registration of workers etc. According to Rule 5 (1) and Rule 5 (2) the application for registration may be rejected by the Registering Officer on the following grounds:

- i. if the application is not complete in all respects
- ii. if the applicant, on being required by the Registering Officer to amend his application for registration, fails or omits to do so.

In granting or refusing the application the Registering Officer has to take following matters into consideration:⁴⁶

⁴⁴ The Sikkim Labour Protection (Amendment) Act, 2006, Notification No. 43/LD/2007 dated 10.01.2007, Extraordinary Gazette No. 3 dated 17.01.2007

⁴⁵ Vide Notification No. 1/DL dated 18.04.2006, Extraordinary Gazette No. 110 dated 18.04.2006

⁴⁶ Rule 7 (1)

1. whether the applicant is a minor and has not attained the age of 14 years;
2. whether the applicant is of unsound mind and stands so declared by a competent Court;
3. whether the applicant is an undercharged insolvent;
4. whether the applicant has been convicted at any time during the period of five years immediately proceeding the date of application, for an offence which, in the opinion of the State Government, involves moral turpitude;
5. whether any order has been made in respect of the applicant under Section 5 of the Act and if so whether a period of three years has elapsed from the date of order;⁴⁷ and
6. whether the prescribed fees have been deposited.⁴⁸

Under Rule 9 terms and conditions for grant of Certificate of Registration have been stipulated. Though the parent Act has been amended to exclude the Certificate of registration and in lieu of the Certificate only token or receipt of the application is to be given to the applicants, the process of registration is kept intact. However, for want of amendment in the Rules the word 'certificate' still subsists. The (Certificate of) Registration granted is subject to following conditions:

1. the (Certificate of) Registration is non transferable;

⁴⁷ Rule 7 (2)

⁴⁸ Rule 7 (3)

2. the Registration (Certificate) of individual worker granted is valid for a period of one year from the date of issue;
3. the application for renewal shall be submitted to the Registering Officer not less than fifteen (15) days before the date of expiry of the registration or the renewed registration or token number as the case may be;
4. fees paid for the grant of registration is non-refundable;
5. individual workers should abide with all instruction given by the Department of Labour from time to time;
6. the workers should produce original copy of Registration Certificate, Identity Card, Token Number as the case may be whenever required by Registering Officer and other officer equivalent to or above the rank of Inspector of the Labour Department.

In conformity with the provisions relating to the registration of workers, Chapter III of the Rules imposes certain duties on the principal employer, or the employer, or the contractor or the owner of establishment or as the case may be to the self employed individual worker. The duty of furnishing particulars of the employee rests on the principal employer or employer or contractor or owner of establishment. Such particulars are to be submitted in Form I within 15 days of the commencement of employment. Self employed workers are required to submit such particulars in Form II. Any change in the

particulars of information so given, as may occur in time is to be furnished in Form VI within 15 days. The list of workers leaving the State of Sikkim is to be furnished in Form IX to the Registering Officer. A copy each of the Form should also be submitted to the police station and to the inspector of respective jurisdiction.

Rule 15 (1) requires the principal employer or employer or owner of establishment or contractor to ensure provision of suitable and adequate medical facilities of out-door treatment of the worker free of cost of any ailment from which the worker may suffer during his employment in the establishment. Whenever any medicine is purchased by a worker from the market on the prescription issued by any doctor "provided" by principal employer/ employer/contractor or any registered medical practitioner, the cost of such medicine should be reimbursed by the contractor to the worker concerned within a period of seven days from the date of presentation of the bill by the worker. In the event of worker suffering from any ailment requiring hospitalization during his employment in establishment/ workplace, the contractor is required under Rule 15 (2) to promptly arrange for the hospitalization of the worker. The contractor has to bear the entire expenses on treatment, hospital charges including diet and travel expenses for patient from the place of his/her residence to the hospital and back.

The Rules also require the contractor to provide and maintain first aid boxes at the rate of not less than one box per every fifty workers. The person in charge of the first aid box should be a person trained in first aid treatment.

The provisions relating to medical benefits in the Rules are unclear in terms of liability of providing these benefits. The provisions creating liability of providing medical facilities do not name employer or owner of the establishment and it seems that only contractors are liable for providing these facilities. Therefore the rights of a number of workers in the State working in different establishment in direct employment under the employer to medical benefit remains shadowed.

The Rules require the contractor or employer to provide to every worker where the temperature falls below 20 degree centigrade, protective clothing consisting of one woolen coat and one woolen trousers and one pair of gumboot in every tow years.⁴⁹ Provisions are also made for the facilities like respiration masks and helmets in necessary circumstances.⁵⁰

Rule 20 casts certain other duties on the principal employer or the employer or the contractor or the owner of the establishments as the case may be. They have duty under the Rules to;

- 1: provide ensure suitable conditions of work to the workers having regard to the fact that they are required to work;

⁴⁹ Rule 16(1)

⁵⁰ Rule 16(3)

2. provide and maintain suitable residential accommodation to such workers during the period of their employment with separate latrine and bathrooms for male and female workers;
3. ensure adequate supply of clean and wholesome drinking water in the quarters or barracks as the case may be;
4. provide a canteen in every establishment wherein work is likely to continue for six months and where one hundred or more workers are ordinarily employed.

All workers performing in any establishments, the same or similar kind of work should have same wages and conditions of service.⁵¹ If there is any dispute with regard to rate of wages, applicability of wage rate etc. the same is to be decided by the Secretary to the Government of Sikkim; Department of Labour, whose decision shall be final.⁵² In case where a male worker and a female worker do the same and similar nature of work, the employer or the contractor or the owner of establishment and in default of the contractor, the principal employer has to pay equal remuneration to both male and female workers without discrimination on the ground of sex.⁵³ Payment of minimum wages and one weekly paid holiday are also required by the Rules.⁵⁴

Where the employment of any worker is terminated by or on behalf of the contractor, the wages earned by the worker should be paid before the expiry

⁵¹ Rule 21 (1)

⁵² Proviso to Rule 21 (1)

⁵³ Rule 21 (2)

⁵⁴ Rule 21 (3) & (4)

of the second working day from the day on which his employment is terminated.⁵⁵

Since the Act and the Rules have stipulated a eight hours working day excluding one hour rest, Rule 26 provides for payment of overtime wages for works over and above the ordinary work period. For such overtime work, the worker is entitled to wages at the rate of twice his ordinary rate of wages.⁵⁶ Such overtime should not spread more than ten and half hours in any day.⁵⁷ However, the Registering Officer may, for the reasons to be specified in writing, increase such time upto twelve hours.⁵⁸

The periods of intervals should be so fixed that no worker shall work for more than five hours before he has had an interval for rest of at least one hour.⁵⁹

The workers under the Rules are entitled to the following paid holidays over and above one weekly paid holiday.⁶⁰

1. 26th January- Republic Day
2. 1st May- May Day (Labour Day)
3. 16th May- State Day
4. 15th August- Independence Day
5. 2nd October- Gandhi Jayanti

⁵⁵ Rule 24

⁵⁶ Rule 26

⁵⁷ Proviso to Rule 26

⁵⁸ Second Proviso to Rule 26

⁵⁹ Rule 27

⁶⁰ Rule 28

The employer or contractor is required under the rules to maintain following registers:

1. attendance register;
2. payment register;
3. register of advance payment;
4. register of overtime work;
5. register of deduction; and
6. register of medical expenses.

The employer or contractor is also required under the Rules to display the abstract of the Act and the Rules in English and in the language spoken by the majority of workers in such form as approved by the Department of Labour, Government of Sikkim.⁶¹ Notices showing rates of wages, hours of work, wage periods, date of payment of wages, name and address of inspector having jurisdiction are also required to be displayed in similar manner.⁶²

Every employer or contractor or owner of establishment are required under Rule 40 to submit half yearly returns in Form XII (in triplicate) so as to reach to the Registering Officer concerned within 30 days from the day of close of half year i.e. a period of six months commencing from 1st of July every year. The Secretary or the Registering Officer has powers under the Rules to call for

⁶¹ Rule 38

⁶² Rule 39

any information or statistics in relation to workers from any principal employer or employer or contractor or owner of establishment at any time by an order in writing. Any person so called upon to furnish information is legally bound to do so.

The Sikkim Labour Protection Rules, 2006 has successfully carried on the provisions of the Sikkim Labour Protection Act, 2005. The Act was amended twice in 2006 and 2007. The Bill needs adequate amendments to tune it with the provisions of the parent Act. The requirement of the issuance of Registration Certificate is done away with in the Act. Therefore a necessary change in the Rules is desirable. Ambiguity in the Rules can be seen in the provisions relating to medical benefits in Rule 15 (1) and 15 (2). In these provisions, though it seems that every employer is required to ensure suitable and adequate medical facilities of outdoor treatment to the workers free of cost, on point of refunding of the expenses in Rule 15 (2) only the word “contractor” is used. Therefore, adequate amendment in Rule 15 (1) and (2) is also desirable.

The Sikkim Shops and Commercial Establishment Act, 1983:

With the increase of shops and commercial establishments in the state of Sikkim and employment of large number of people in these establishments need for legislation to protect the interest of these people was seriously felt. As

a result the Sikkim Shops and Commercial Establishments Act, 1983 was enacted by the Sikkim Legislative Assembly. The Act provides for the regulation of conditions of work and employment in shops; commercial establishments; residential hotels; restaurants; eating houses; theatres; other places of public amusement or entertainment and other establishments. The Act applies to the whole of Sikkim.

The Act requires for the registration of every establishments to which it applies.⁶³ The hours of work in establishments have been fixed under Section 13 of the Act. It says that no employee should be required or allowed to work in any shop or commercial establishment for more than nine hours in any day and forty eight hours in any week. An employee may be required to work in a shop or commercial establishment for any period in excess of the limit fixed if such period does not exceed three hours in any week.⁶⁴ Further the State Government may fix not more than six days in a year on which for the purposes of making of accounts, stock taking settlements or other prescribed occasions, any employee may be required or allowed to work in a shop or commercial establishment in excess of the period fixed if such period does not exceed twenty four hours.⁶⁵

The Act also provides for the period of at least one interval for rest after five hours of continuous work. No employee should be required or allowed to

⁶³ Section 6

⁶⁴ Section 13 (2)

⁶⁵ Section 13 (3)

work for more than five hours before he has had an interval for rest of at least one hour.⁶⁶ However, in the case of employee in a commercial establishment engaged in any manufacturing process, interval for rest may be of half an hour. Further the State Government has power to reduce the interval for rest of any other employee to half an hour if he so applies for.⁶⁷

The spread over time of an employee in a shop should not exceed eleven hours in any day. In case where an employee works on any day, for an excess time as permitted under Sub-Section (2) of Section 13 or Sub-Section (3) of Section 13 the spread over should not exceed fourteen hours or sixteen hours as the case may be.⁶⁸

The Act requires the shops or establishments to be closed on any one day of the week. Such day may also be fixed by the Government by notification in the official gazette. If the day notified is a holiday happens to be a public festival the employer may keep the shop or establishment open and in turn keep the same closed on some other day within three days before or after such holiday. On such day of closure it will not be lawful on the part of the employer to call an employee at or send the employee to any other place for any work in connection with the business of such shop or commercial establishment. The employer should not make any deduction from the wages of any employee on account of any day on which it has remained closed. The

⁶⁶ Section 14

⁶⁷ Proviso (a) and (b) to Section 14

⁶⁸ Section 15

employee should be paid his daily wages for such day. Where the employee works on piece rate wage he shall be paid his wage for the day at the rate equivalent to the daily average of his wages for the days on which he actually worked during the six days immediately preceding such closed day exclusive of any earning in respect of overtime.⁶⁹

Keeping in mind the nature of establishment separate provisions have been made for the residential hotels, restaurants and eating houses. In these establishments except on the ten days of festive or special occasions declared by the State Government by notification in the official gazette the normal working hour of an employee is nine hours in a day. However, if the employee so wishes he may work for three hours over and above his normal working hours. On the festive or special occasions as stated above any employee may be required or allowed to work for a period of three hours over and above his normal working hours or over and above his normal working hours plus the excess working hours of three hours as stated above as the case may be.⁷⁰ The spread over of an employee in such establishments should not exceed fourteen hours.⁷¹ The Act also requires that on each day there must be an interval for rest of at least one hour at or before five hours of continuous service of the employee.⁷²

⁶⁹ Section 17

⁷⁰ Section 20

⁷¹ Section 22

⁷² Section 21

Separate provisions have been made in the Act for theatres or other places of public amusement or entertainment. In such establishments an employee may work for a period in excess of his normal working hours of nine hours if such period does not exceed six hours in any week.⁷³ The spread over of an employee should not exceed eleven hours in any day.⁷⁴ Interval of at least one hour for rest at or before five hours of continuous service⁷⁵; one weekly paid holiday⁷⁶ etc. have also been ensured.

The Act prohibits the employment of any child in any establishments.⁷⁷ Young persons and women, whether as employee or otherwise, can be required or allowed to work only from 6 a.m. to 7 p.m.⁷⁸ Young persons cannot be required or allowed to work for more than six hours in any day. They are entitled to an interval for rest of at least half an hour before at or before three hours of continuous service.⁷⁹ Women or young persons cannot be required or allowed whether as an employee or otherwise work which is declared by the State Government as involving danger to life, health or morals.⁸⁰

The Act also includes provisions on maternity benefits: Section 35 of the Act says that no woman should engage herself in employment in any establishment during six weeks following the day on which she has delivered a

⁷³ Section 26

⁷⁴ Section 28

⁷⁵ Section 27

⁷⁶ Section 29

⁷⁷ Section 31

⁷⁸ Section 32

⁷⁹ Section 33

⁸⁰ Section 34

child and no owner or manager etc. of an establishment should knowingly employ such woman. Where any woman employed is pregnant and gives notice in writing to the employer that she expects to deliver a child within six weeks from the date of such notice, the employer is required to permit her leave if she so desires upto the day of her delivery.⁸¹ Every woman employed in an establishment who has been continuously employed in such establishment or in establishment belonging to the owner of such establishment for not less than six months preceding the date of delivery, is entitled to maternity benefit for every day during the six weeks immediately preceding and including the day of her delivery and for each day of the six weeks following her delivery at such rate as fixed by the State Government.⁸² However no payment may be made for any day on which she attends work and receives payment during the six weeks preceding her delivery.⁸³ A woman employee who has delivered a child, should while she is nursing such child, be allowed half an hour twice a day during her working hours for purposes of such nursing in addition to regular intervals for rest.⁸⁴

The Act prohibits the dismissal of a woman employee on account of absence from work owing to her maternity.⁸⁵ In the case of miscarriages or operation for medical termination of pregnancy the concerned woman is also

⁸¹ Section 36

⁸² Section 38

⁸³ Proviso to Section 38

⁸⁴ Section 39

⁸⁵ Section 40 (2)

entitled to leave for six weeks or such period as may be medically certified and here absence will be treated as authorized absence or leave.⁸⁶

Any employee who undergoes sterilization operation is entitled under the Act to special casual leave with wages for a period not exceeding six days in case of male employee and fourteen days in case of a female employee with effect from the day on which the operation is undergone.⁸⁷

Every employee in a shop or other commercial establishment is entitled after twelve months of continuous service to holidays with wages for a period of twenty days in the subsequent period of twelve month. Further such employee is also entitled to leave with wages for a period not exceeding 12 days on ground of any sickness or accident sustained by him and also to a casual leave with wages for a period not exceeding 12 days on any reasonable ground.⁸⁸

The Act rests the responsibility of the payment of wages on the employer who is required to fix a wage periods not exceeding one month.⁸⁹ Where any person employed in any establishment is required to work overtime

⁸⁶ Section 41

⁸⁷ Section 42

⁸⁸ Section 49

⁸⁹ Sections 53 and 54

he is entitled in respect of such overtime work to wages at twice the ordinary rate of wages.⁹⁰

The Act also provides for the payment of gratuity. An employee who has completed ten or more years of continuous service with full wages in the event of quitting the service is entitled or on death his legal heirs are entitled to gratuity equivalent to fifteen days' wages last drawn for each year of service.⁹¹

The wages of every person employed should be paid before the expiry of the fifth day after the last day of the wage period in respect of which the wages are payable. Where the employment of any person is terminated by or on behalf of the employer, the wages earned by such person should be paid before the expiry of the second working day from the day on which his employment terminated. All payments of wages should be made on a working day.⁹² Further all wages should be paid in current coins or currency notes or in both.⁹³

Similar to the Payment of Wages Act the Sikkim Shops and Commercial Establishments Act authorizes certain kinds of deductions from the wages. The manner of making deductions is also similar to that provided in the Payment of Wages Act.

⁹⁰ Section 55

⁹¹ Section 56

⁹² Section 57

⁹³ Section 59

The Act incorporates detailed provisions for enforcement including the creation of enforcement agency and procedure for prosecution. The contravention of the provisions of the Act is punishable with fine which on first conviction extends from fifty rupees to five hundred rupees and on second or subsequent conviction extends from one hundred rupees to one thousand rupees.⁹⁴

Though the Act is an attempt to regulate the service condition of the workers engaged in shops and other commercial establishments in the state of Sikkim, it is not free from shortcomings. The provisions relating to the working hours may need reconsideration. The provisions relating to maternity benefits can be criticized on the point that though there is provision for two nursing breaks, unlike the Maternity Benefits Act, the present Act does not provide for the number of months during which such breaks must be allowed.

Till date, around 5,400 shops and commercial establishments have been registered in Sikkim. The days of weekly closures of different Bazaars as per Section 17(2) of the Act have been notified by the Government. Required modifications are also notified from time to time. The concerned Statutory Authorities under the Act have already been notified by the Government. The powers and functions of Appellate Authority under the Act will be exercised by the Secretary, Labour Department, Joint Secretary, Labour will be deemed

⁹⁴ Section 73

to be Chief Inspector under the Act and the powers and functions of Inspectors will be exercised by the Deputy Directors, Labour Enforcement Officers and Labour Inspectors.⁹⁵

The Sikkim Shops and Commercial Establishments Rules, 1984:⁹⁶

The Sikkim Shops and Commercial Establishments Act, 1983 was implemented through the Sikkim Shops and Commercial Establishments Rules, 1984 made under Section 80 of the Act and the Rules came into force on 16th April 1985.

The Rules under Rule 6 allows an employee or allows the employer to require the employee to work in a Shop or Commercial establishment under of in excess of the period fixed under Section 13 (1) on any of the following days for the purpose of making accounts, stock, taking or settlements if such excess period does not exceed twenty four hours:

- i. the 31st day of March;
- ii. the 30th day of June;
- iii. the 31st day of December; and
- iv. the tree days proceeding the *Rama Nawami* day.

⁹⁵ Annual Report, Department of Labour and Employment, Government of Sikkim, (2005-2006)

⁹⁶ Refer to Notification No. 11/DI. dated 16. 04.1985, Extraordinary Gazette No. 56 dated 16.04.1985

Further the operation of the provisions of the Sikkim Shops and Commercial Establishments Act, 1983 may be under Rule 3 by the State Government by notification exempted on the following holidays, namely;

1. Maghey Sankrati Mela;
2. Tibetan New Year's Day;
3. Saga Dawa;
4. Id-ul-Fitr;
5. Dukpa Thechi;
6. Pang Lhabsol;
7. Durga Puja;
8. Lahab Thuchen;
9. Dewali;
10. Christmas;
11. Any occasion on which a public emergency is declared in this behalf by the State Government;
12. Public fairs or exhibitions or religious festivals recognized in this behalf by the State Government;
13. Any other occasion which the State Government deems fit.

Thus in abovementioned dates too overtime work as stated above may be required by the employer.

Notice of the intention to require employees in a Shop or Commercial Establishment to work under Sub Section (3) of Section 13 in excess of the period fixed under Sub Section 13 and Sub Section 2 of Section 20 on any day as specified should be given by the employer in English or in any of the official languages of the State of Sikkim to the Inspector within whose jurisdiction such establishment is situated at least 24 hours in advance.⁹⁷

The Rules requires identity card to be issued under Section 23 and 30 of the Act, to the employees after necessary verification.⁹⁸

An inspector may require an employer to produce in respect of any person employed by him whom the inspector suspects to be child or young person as proof of his age an authentic extract from the school record, or a certificate of age from a registered medical practitioner in form G.⁹⁹

The Rules prescribes first aid appliances for the first aid box as required to be maintained in the shop or commercial establishment under Section 48 of the Act. The box should contain:¹⁰⁰

1. 3 small sterilized dressings,
2. 2 medium size sterilized dressings,

⁹⁷ Rule 7

⁹⁸ Rule 8

⁹⁹ Rule 10

¹⁰⁰ Rule 12

3. 2 large size sterilized dressings,
4. 2 (1/2 dozen) packets sterilized cotton wool,
5. 1 pair of dressing scissors,
6. 1 (1 oz.) bottle containing solution of iodine or mercurochrome,
7. 1 (1 oz.) bottle containing solution salvolative having the dose and mode of administration indicated on the label;
8. 1 (1 oz.) bottle containing potassium permanganate crystals,
9. any antidote for burns.

Rule 15 requires maintenance of registers and records and display of notices. Every employer or manager of a shop or commercial establishment is required to maintain *inter alia* a register of employment in form I provided that where the opening and closing hours and period of interval for rest are ordinarily uniform, the employer or manager may maintain such register in form K. Every employer or manager of a residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment has to maintain a register of employment in form J provided that where the opening and closing hours and period of interval for rest are ordinarily uniform the employer or manager may maintain such register in form L. Such employer or manager of a residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment is also required to exhibit in his establishment a notice in form M, specifying the day or days of the week on which his employees shall be given a holiday (such notice being exhibited

before the employee to which it relates cease work on the Saturday immediately preceding the first week during which it is to have effect). Every employer or manager is also required to maintain a register of leave in form N. The employer or manager is required to provide each employee a book called "Leave Book" in form O. The book should be the property of the employee and the employer or his manager should not demand it except to make entries therein and should not keep it for more than a week at a time.

Every employer or manager should exhibit in his establishment a notice containing such extracts of the Act and these rules, in any of the languages understood by of the majority of his employees, as the Government may direct.¹⁰¹ Such notice should be so exhibited that it is readily seen and read by any person whom it affects and shall be replaced whenever it becomes defaced or otherwise ceases to be clearly legible.¹⁰² In the registers or record which an employer or manager is required to maintain under these rules, entries relating to any day should be made on such day and should be authenticated under the signature of the employer or manager on the same day. Entries relating to overtime work should be made immediately after the completion of such overtime work in the same manner.¹⁰³

The employer or the manager as the case may be is also required to maintain a visit book in which an inspector visiting the establishment may

¹⁰¹ Rule 15 (6)

¹⁰² Rule 15 (7)

¹⁰³ Rule 15 (8) and Proviso thereto

record his remarks regarding any defects that may come to light at the time of his visit or give directions regarding the production of any documents required to be maintained or produced under the Act.¹⁰⁴

The Sikkim Workmen's Compensation Rules, 1986:

In exercise of the powers conferred under Sub Section (1) of Section 34 of the Workmen's Compensation Act, 1923, the State of Sikkim has made Sikkim Workmen's Compensation Rules, 1986 to carry on the provisions of the Said Act.¹⁰⁵

Part I of the Rules deal with the review of half monthly payments and computation thereof. Rule 3 clarifies who and on what ground can make an application for the review of half monthly payments without medical certificate. Such an application can be made:

- a. by the employer, on the ground that since the right to compensation was determined the workmen's wages have increased;
- b. by the workman, on the ground that since the right to compensation was determined his wages have diminished;

¹⁰⁴ Rule 15 (10)

¹⁰⁵ Vide Notification No. 18/ DL dated 20.10.1986, Extraordinary Gazette No. 116 dated 23.10.1986

- c. by the workman, on the ground that the employer, having commenced to pay compensation, has ceased to pay the same, notwithstanding the fact that there has been no change in workmen's conditions such as to warrant such cessation;
- d. either by the employer or by workman, on the ground that the determination of the rate of compensation for time being in force was obtained by fraud or undue influence or other improper means;
- e. either by the employer or by the workman on the ground that in the determination of compensation there is a mistake or error apparent on the face of record.

If on examining an application for review by an employer in which the reduction or discontinuance of half-monthly payments is sought, it appears to the Commissioner that there is reasonable ground for believing that the employer has a right to such reduction or discontinuance, he may, at any time issue an order withholding the half monthly payments in whole or in part pending his decision on the application.¹⁰⁶

The Rules also formulate the procedure on application for computation. Rule 5 of the Sikkim Workmen's Compensation Rules, 2005 says that where

¹⁰⁶ Rule 4

an application is made to the Commissioner under Section 7 for the redemption of a right to receive half-monthly payments by the payment of a lump sum, the Commissioner shall form an estimate of the probable duration of the disablement and shall award a sum equivalent to the total of the half monthly payments which would be payable for the period during which he estimates that the disablement will continue, less one half percent of that total for each month comprised in that period. The fractions of a rupee in the sum so computed should be disregarded. Where in such cases, the Commissioner is unable to form an approximate estimate of the probable duration of the disablement; he may from time to time postpone a decision on the application for a period not exceeding two months at any one time.¹⁰⁷

Part II of the Rules provide for the deposit of Compensation with the Commissioner under Sub Section 1 of Section 8 of the parent Act. In respect of a workman whose injury has resulted in death, the employer depositing compensation has to furnish a statement in Form A along with the amount. In both cases receipt should be given in Form C. the statement of disbursements are to be furnished in Form D.

The Commissioner is required to publish the list of deposits together with the names and addresses of the depositors and the workman in respect of whose death or injury the deposits have been made.¹⁰⁸

¹⁰⁷ Rule 5 (2)

¹⁰⁸ Rule 7

A dependant of a deceased workman may apply to the Commissioner for the issue of an order to deposit compensation in respect of the death of the workman which has to be made in Form I. if the compensation has not been deposited, the commissioner is required under the Rules to dispose such application in accordance with the provisions of Part V of the Rules, provided that:¹⁰⁹

- a. The Commissioner may at any time before the issues are framed cause notice to be given in an appropriate manner to all or any of the dependants of the deceased workman who have not joined in the application, to join therein.
- b. If on such notice any such dependant fails to appear and to join the application on a specified day he/they shall not be permitted to claim that the employer is liable to deposit compensation unless shown sufficient cause of being prevented from appearing.
- c. After the Commissioner issues an order requiring the employer to deposit compensation in accordance with Section 8 (1) of the Act nothing in Sub Rule 2 will prohibit the allotment of any part of the sum deposited as compensation to a dependant.

¹⁰⁹ Rule 8 (2)

The employer depositing compensation under Section 8 (2) of the Act has to furnish a statement in Form E and he has to be given a receipt in Form F.¹¹⁰ The money so deposited may be invested for the benefit of the dependants of diseased workman in the State Bank of Sikkim or State Bank of India.

Part II of the Rules deal with the report of accidents. The report of the accident as required under Section 10 (B) of the parent Act has to be submitted in Form G.¹¹¹ the employer has a right to present a memorandum when the information is received.¹¹²

Part IV of the Rules stipulates the conditions under which a workman is required to submit to medical examinations. In cases where the workman and medical practitioner both are in the premises of the employer and the employer offers to have him examined free of charge, the workman has to submit himself for examination.¹¹³ In other cases the employer may send the medical practitioner to the place where the workman is residing. In such a case the workman has to submit himself for medical examination on the medical practitioner's request.¹¹⁴ The employer may also send to the workman an offer in writing for such examination free of charge and in which case the workman has to submit to such examination at the employer's premises or any other

¹¹⁰ Rule 9

¹¹¹ Rule 11

¹¹² Rule 12

¹¹³ Rule 14

¹¹⁴ Rule 15 (a)

place as proposed. However, the time of such examination should not be between the hours of 7 P.M. to 6 A.M.¹¹⁵

Where the examination in question is that of a woman, she should not be examined by a male practitioner without her consent or unless there is another woman present at the place of such examination. If the woman wishes to be examined by a woman practitioner and deposits a sum to cover the expenses of such examination, it is the duty of the employer to arrange for a female medical practitioner for such examination.

Part V of the Rules contains general procedure to be followed by the Commissioner in the disposal of cases under the Workmen's Compensation Act, 1923 and regulates the parties in such cases. The Commissioner has power to examine the applicant on oath or have such examination done by any officer authorized by the State Government and require a report therefrom.¹¹⁶ The Commissioner can summarily dismiss the application if he is of the opinion that there are no sufficient grounds for proceeding thereon. If the application is not so dismissed the Commissioner has to make a preliminary inquiry into the application¹¹⁷ and give notice to the opposite party.¹¹⁸ The opposite party may be called upon to file a written statement.¹¹⁹ If no such written statement is filed, the Commissioner has to examine him and reduce the result in writing. The issues should be framed and judgment should be made accordingly.

¹¹⁵ Rule 15 (b) and Proviso to Rule 15

¹¹⁶ Rule 23

¹¹⁷ Rule 25

¹¹⁸ Rule 26

¹¹⁹ Rule 27 (2)

Where any party to a proceeding is under the age of 15 years or is unable to make an appearance, the Commissioner has to appoint a representative.¹²⁰ In the interest of the party the Commissioner may also appoint a new representative.¹²¹

In Sikkim, during the financial year 2005-2006, Rs. 38, 05,151/- (Rupees thirty-eight lakhs five thousand one hundred fifty one) only have been realized in respect of 13 deceased and 5 injured workmen and Rs. 38, 05,810/- (Rupees thirty eight lakhs five thousand eight hundred ten) only have been disbursed to 3 injured workmen and to the dependants of 14 deceased workmen, who met with fatal accidents in the course of duties.¹²²

The powers conferred on the Commissioner for Workmen's Compensation under the Act and the Rules as notified are exercised in the State by the Secretary, Department of Labour and Employment Government of Sikkim.¹²³

The Sikkim Payment of Gratuity Rules, 2002:

Payment of Gratuity Act, 1972 has been extended to the State of Sikkim. For the implementation of this Act, the State Government of Sikkim has in

¹²⁰ Rule 46

¹²¹ Rule 47

¹²² Annual Report, Department of Labour and Employment, Government of Sikkim, (2005-2006)

¹²³ Ibid

exercise of its powers under Sub Section (1) of Section 15 of the Act, made Payment of Gratuity Rules, 2002.¹²⁴

Rule 4 requires the display of a notice at or near the main entrance of the workplace, in English, Nepali and in a language understood by the majority of the employees specifying the name of the officer with designation authorized by the employer to receive on his behalf notices or applications under the Act and the Rules. The abstract of the Act and Rules are also required to be displayed in similar manner.

The nomination for the purpose of payment of gratuity can be made by any employee completing one year of service in Form D in duplicate either to the employer or any officer authorized by him, ordinarily within one year of service or after such date.¹²⁵ On receipt of such nomination the employer or the authorized officer after necessary verification of the particulars has to return the duplicate copy to be kept by the employee as a token of recording of the nomination by the employer. The other copy has to be recorded by the employer.¹²⁶

If the employee has no family at the time making a nomination or if a nominee predeceases the employee the employer concerned has to make fresh nomination in Form E. Any modification of the particulars in Form E should be submitted in Form F. A nomination or a fresh nomination or a notice of

¹²⁴ Vide Notification no. 1/DL/2002 dated 23. 05.2002, Extraordinary Gazette No. 160 dated 07.06.2002

¹²⁵ Rule 5 (1)

¹²⁶ Rule 5 (2)

modification has to be signed or thumb impressed in the presence of two witnesses who have to sign a declaration to that effect in the document.¹²⁷

An employee, who is eligible for payment of gratuity under the Act has to apply ordinarily within one hundred and twenty days from the date on which the gratuity becomes payable, in Form G. In cases where the date of superannuation, retirement or resignation of an employee is known, the employee concerned may, before thirty days of the date of such superannuation, retirement or resignation, apply in Form G for the payment of gratuity.¹²⁸ Where a nominee of an employee is applying for the payment of gratuity, he is required to apply ordinarily within one hundred and eighty days from the date the gratuity becomes payable to him, in Form H.¹²⁹ An heir of an employee who is eligible for payment of gratuity has to apply ordinarily within one year from the date on which the gratuity becomes payable to him in Form I to the employer concerned.¹³⁰

An application for payment of gratuity filed after the specified periods should also be entertained if the applicant adduces sufficient cause for such delay. No claim is invalid merely because the claimant failed to present his application within the specified period. Any dispute in this regard should be referred to the Controlling Authority whose decision will be final.¹³¹ An application for payment of gratuity should be presented to the employer or any

¹²⁷ Rule 5 (3) & (4)

¹²⁸ Rule 6 (1)

¹²⁹ Rule 6 (2)

¹³⁰ Rule 6 (3)

¹³¹ Rule 6 (5)

officer authorized by him in this behalf either by personal service or registered post with acknowledgement due.

Within thirty days of the receipt of such application the employer is required to:¹³²

1. if the claim is found admissible on verification, issue a notice in Form J to the applicant specifying the amount of gratuity payable and fixing a date not being later than forty fifth day from the date of receipt of the application for payment, or
2. if the claim is not found admissible, issue a notice in Form K to the applicant specifying reasons why the claim for gratuity is not considered admissible.
- 3.

In each case a copy of the notice has to be endorsed to the Controlling Authority.

The gratuity payable under the parent Act has to be paid ordinarily in cash. If the payee so desires, the amount may be paid in Demand Draft or bank cheque which should be given personally to the eligible employee, nominee or heir as the case may be. If the amount of gratuity so payable is less than one thousand rupees and if the payee so desires the payment of the amount may be made by postal money order after deducting the postal money order commission for such money order from the amount. The employer and the

¹³² Rule 7

payee are also allowed under the Rules to devise any other mode of payment mutually acceptable to them.¹³³

The employer is required to maintain a register recording details of payment made on account of gratuity and intimate the Controlling Authority, the details of payments made.¹³⁴

If any employer refuses to accept nomination or issue a notice specifying an amount which is less than what is payable to the applicant according to the applicant's estimate or having received an application fails to issue notice or in the vent of other disputes, the applicant can within ninety days of the occurrence of the cause or the application, apply in triplicate in Form L to the Controlling Authority for a direction under Section 7 (4) of the Act.

The Rules comprehensively provide for the procedure for dealing with application. Adequate powers have been given to the Controlling Authority for dealing with the matters under the Act. An appeal against the orders of Controlling lies with the Appellate Authority.

The concerned Statutory Authorities under the Payment of Gratuity Act have already been notified by the State Government. The powers of the Appellate Authority under the Act are to be exercised by the Secretary,

¹³³ Rule 8 (1)

¹³⁴ Rule 8 (2)

Department of Labour and Employment, Government of Sikkim. Deputy Directors in the Department of Labour and Employment will exercise the powers and functions of Controlling Authority while the Labour Inspectors will be deemed to be the Labour Enforcement Officers under the Act.¹³⁵

The Sikkim Payment of Wages Rules, 1992:

The Sikkim Payment of Wages Rules has been made by the State Government of Sikkim in exercise of the powers conferred by Sub Section (2) of Section 26 of the Payment of Wages Act, 1936, in the year 1992.¹³⁶ For the implementation of the Payment of Wages Act, 1936 comprehensive rules have been made covering various areas under the Act

The Rules require the maintenance of following registers by the employer:¹³⁷

1. Register of deduction for damage or loss;
2. Register of wages including *inter alia* the following-
 - a. the rate of wages of each person employed,
 - b. the gross wages earned by each person for each period,

¹³⁵ Supra note 55

¹³⁶ Vide Notification No. 3/ DL dated 29.04.1992; Extraordinary Gazette No. 33 dated 15. 05. 1992

¹³⁷ Rule 4 & 5

- c. wages actually paid to each person for each period, and
- d. date of payment.

The registers are required to be maintained either in English or Nepali language.¹³⁸

The employer is required under the Rules to display in a conspicuous place in or at the main entrance of the establishment, wage periods and dates on which wages are to be paid.¹³⁹

Rule 9 prescribes the Secretary of the Department of labour as the Authority competent to approve acts and omissions in relation to which fines may be imposed under Section 8 of the parent Act. Therefore every employer requiring the power to impose fines in relation to any acts and omissions on the part of employed persons should send to the Labour Secretary a list, clearly defining such acts or omissions.¹⁴⁰

The Secretary, Department of Labour and Employment, Government of Sikkim has powers to enquire on such lists and pass orders either:¹⁴¹

1. disapproving the list, or

¹³⁸ Rule 6

¹³⁹ Rule 8

¹⁴⁰ Rule 10

¹⁴¹ Rule 11

2. approving the list either in the original form or with necessary amendments in which case the employer should be given an opportunity of showing cause only in writing as to why the list submitted should be approved without any amendments.

The list so approved has to be displayed in the main entrance of the workplace in English language and in the language understood by the majority of the employees in the workplace.¹⁴² No person except the employer or the person authorized by the Labour Secretary in this behalf is empowered to impose fine.¹⁴³

Any person desiring to impose fine on an employed person or to make a deduction for damage or loss has to explain personally to the said person the act or omission or damage or loss in respect of which the fine or deduction is being imposed and the amount of such fine or deduction. If such employed person has any explanation to offer, he should be heard in the presence of at least one person.¹⁴⁴

Deduction of wages for breach of contract by an employed person who is under the age of fifteen years or is a woman has been specifically prohibited by the Act.¹⁴⁵ Further, no deduction for breach of contract can be made from

¹⁴² Rule 12

¹⁴³ Rule 13

¹⁴⁴ Rule 14

¹⁴⁵ Rule 16 (1)

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¹⁴² Rule 12

¹⁴³ Rule 13

¹⁴⁴ Rule 14

¹⁴⁵ Rule 16 (1)

the wages of any employed person unless there is a provision in writing forming part of the terms of the contract of employment requiring him to give notice of the termination of his employment or unless the rule has been displayed in the main entrance in English language and in a language understood by the majority of the employed persons for not less than one month from the commencement of absence for which the deduction is made or unless a notice is displayed at or near the main entrance giving the names of the employees from whose wages such deduction is proposed to be made and details of the such deduction.¹⁴⁶

Deduction for breach of contract should not exceed the wages of the person employed for the period by which notice of termination of service given falls short of the period of such notice required by the contract of employment.¹⁴⁷

Form VII forming part of the Sikkim Payment of Wages Rules, 1992 contains abstract of the Payment of Wages Act, 1936 and the Rules. The same has to be made available for the employers to display at the workplace.

The Authorities under the Payment of Wages Act, 1936 have been notified by the State Government of Sikkim. The Appellate Authority under the Act would be the Secretary, Department of Labour and Employment,

¹⁴⁶ Rule 16 (2)

¹⁴⁷ Rule 16 (3)

Government of Sikkim and the Deputy Directors would be the Controlling Authority. Labour Enforcement Officers and labour Inspectors of the Department would be deemed to be Inspectors under the Act.¹⁴⁸

Sikkim Minimum Wages Rules, 2005:

The Minimum wages Act, 1948 has been implemented in the State of Sikkim since the year 2005 through the Sikkim Minimum Wages Rules, 2005¹⁴⁹ made by the State Government in exercise of its powers under Section 30 (1) of the Act.

Chapter IV of the Rules provides for the computation and payment of wages. In computing the wages under the Act, the average retail prices in the district or sub division where the place of employment is situated should be taken into consideration while computing the value of wages paid in kind and of essential commodities supplied in concessional rates.¹⁵⁰ The wage period with respect to any scheduled employment should not exceed one month and wages of a worker in such employment should be paid on a working day, before the expiry of seventh day where less than one thousand persons are employed and before tenth day, after the last day of the wage period in other cases.¹⁵¹ Where the employment of any person is terminated by or on behalf of

¹⁴⁸ Supra note 55

¹⁴⁹ Vide Notification No. 1/DL dated 21.05.2005, Extraordinary Gazette No. 221 dated 01.06.2005

¹⁵⁰ Rule 21

¹⁵¹ Rule 22 (1)

employer, the wage earned by him should be paid before the expiry of second day after the day on which his employment is terminated.¹⁵²

The Rules specifically state that the wages of an employed person should be paid to him without deductions of any kind except those authorized under the Rules.¹⁵³ Every payment made by the employed person to the employer or his agent would be deemed to be deduction from wages. The permissible deduction under the Rules may be any one of the following:

1. fines for acts or omissions on the part of employed persons as specified by the State Government;
2. deductions for absence from duty;
3. deductions for damage to or loss of goods expressly entrusted to the employed person for custody, or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default;
4. deductions for house accommodations supplied by employer or by the State Government for providing housing accommodation and for land for cultivation supplied by the employer;

¹⁵² Rule 22 (2)

¹⁵³ Rule 22 (3)

5. deductions for such amenities and services excluding tools and protective clothing etc. supplied by the employer as the State Government may authorize;
6. deduction for recovery of advances or for adjustment of over payment of wages provided that such advances do not exceed an amount equal to wages for two calendar months of the employed person and, in no case, should the installment of deduction exceed one fourth of the wages earned in that month;
7. deductions of income tax payable by the employed person;
8. deductions required to be made by order of a court or other competent authority;
9. deduction for subscriptions to, and for repayment of advances from any Provident Fund to which the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 applies or any other recognized Provident Fund or any Provident Fund approved by the State Government in this behalf;
10. deductions for payment to co-operative societies or deductions made with the written authorization of the person employed for payment of any premium on his life insurance policy to the Life Insurance Corporation of India established under the Life Insurance Act, 1956;

11. deductions for recovery or adjustment of amount other than wages paid to the employed person in error or in excess of what is due to him.

Where any fine or deduction for damage or loss caused by the workman is being made such damage or loss and the amount of deduction with other necessary details has to be communicated to him in writing. All such deductions and realizations are also required under the Act to be recorded in register.¹⁵⁴

The Rules require the publicity of the minimum wages fixed under the Act, the extracts of the Act and Rules made thereunder and the name and address of the Inspector having jurisdiction, in English language and in a language understood by the majority of workers in the establishment.¹⁵⁵

For the protection of the wages of the workers and to prevent any exploitation and to facilitate inspection the Rules require the following registers to be maintained:¹⁵⁶

1. a Register of Wages with particulars, namely,
 - a. the minimum rates of wages payable to each person,

¹⁵⁴ Rule 22 (6) & (7)

¹⁵⁵ Rule 23

¹⁵⁶ Rule 24

- b. number of days for which each employed person worked,
 - c. overtime for each wage period,
 - d. the gross wages of each person employed for each wage period,
 - e. all deductions made from wages with an indication in each case of the kinds of deductions mentioned in Rule 22 (5),
 - f. the wages actually paid to each person for each wage period and the date of payment;
2. an overtime register in Form IV;
 3. a Muster Roll in Form V;
 4. a Register of Employees in Form XIV.

The employer has to get the signature or thumb impression of every person employed on the Register of Wages. Entries in the Register should be authenticated by the employer or any person authorized by him in this behalf.

The Rules also provides for the procedures to be followed in hearing claims under the Act and also the scale of costs in proceedings under the Act. The Rules comprehensively deals with members and staff of the Board and Committee stipulated under the Act, their qualifications and disqualifications etc.

- b. number of days for which each employed person worked,
 - c. overtime for each wage period,
 - d. the gross wages of each person employed for each wage period,
 - e. all deductions made from wages with an indication in each case of the kinds of deductions mentioned in Rule 22 (5),
 - f. the wages actually paid to each person for each wage period and the date of payment;
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The Rules also provides for the procedures to be followed in hearing claims under the Act and also the scale of costs in proceedings under the Act. The Rules comprehensively deals with members and staff of the Board and Committee stipulated under the Act, their qualifications and disqualifications etc.

The Minimum Wages Act, 1948 was extended to the State of Sikkim on 31st October 2003 and enforced on 1st October 2004. As required under the provisions of the Act, the Advisory Committee has been constituted and the Sikkim Minimum Wages Rules, 2005 have been framed and the State Govt. has fixed the minimum rates of wages at the rate of Rs. 85/- per day to the unskilled workers in 26 Scheduled Employments effective from 01.09.2005. Further, the authorities also have been appointed. The Secretary, Labour has been appointed as Hearing and Deciding Authority and the Joint Secretary, Deputy Directors, Labour Enforcement Officers and Labour Inspectors will be deemed to be Inspectors under the Act.¹⁵⁷

Labour Clearance Certificate

Of late, there have been, rise in number of complaints from the labourers about non-payment of wages by the contractors and as such keeping in view the interest of labourers, the Government of Sikkim vide Notification No. 188 (Home) 78, dated 9.11.1978 empowered the Labour Department to issue Labour Clearance Certificate to contractors for the settlement of their Bills only after confirming full payment of wages to the labourers. Further, since the Financial Year 2005-06, all the Works Departments are also required to obtain the Labour Clearance Certificates for release of bills of the Departmental

¹⁵⁷ Supra note 55

Works. In other words, the Labour Clearance Certificate became a check-point in the process of payment of wages.

This has helped the Department to generate some revenue by way of levying fees while issuing such Labour Clearance Certificates.

Committees on Sexual Harassment

In pursuance of the order of the Supreme Court of India dated 17.01.2006 in the matter of Writ Petition (Crl. No. 173-177) of 1999, the Labour Department has issued notification for constitution of Committees in the Factories, Shops and Commercial Establishments having 50 or more workers to look into the matter of sexual harassment to the women workers.

The Annual Report of the Department of Labour (2005-2006) states that the Labour Department has also been successful in settling the disputes amicably between the employers, management and the workers. The Labour Department had in the Financial Year 2005-06 amicably settled 19 cases of non-payment of wages. The Labour Department has proposed to conduct seminars at major industrial units and construction sites to educate the workers regarding their rights and their duties. Basically the seminars are on workers education, workers awareness, welfare, safety, hygiene, awareness towards the provisions of Labour Law and the duties of workers towards the management

and their establishments. However, due to limited departmental budget, the task of conducting such seminars and workshops are yet to be started.

The Department of Labour in Sikkim works with a very low strength in the enforcement section. The Department has one Labour Commissioner, four Labour Enforcement Officers, three Labour Inspectors and nine Sub-Inspectors catering to the need of the whole State. Until recently the Department used to work centrally from its head office at Gangtok but now it has set up two more District Offices. These offices along with the Head Office at Gangtok cater the need of four districts in the State.

Newer Initiatives

Recently the Government of Sikkim has taken initiatives through a notification¹⁵⁸ to classify the workers engaged in the Scheduled Employments under the Minimum Wages Act, 1948 (11 of 1948) and Rules thereunder into four categories. Category-wise daily minimum rate of wages have been provided. Table I of the said notification provides rates of wages which are as under:

Category

Daily Rate of Wages

¹⁵⁸ Notification No. 01/DL dated 15.04.2008 Extraordinary Gazette No. 128 dated 15.04.2008

1.	Unskilled	Rs. 100/-
2.	Semi Skilled	Rs. 115/-
3.	Skilled	Rs. 130/-
4.	Highly Skilled	Rs. 150/-

The unskilled workers include workers engaged in various sub sectors of tourism as Sweeper (*Safai Karmachari*), Waiter (*Bera*), Cleaner, ordinary worker, Helpers, *Mali*, *Khalasi*, Shop Assistant, Cook, Horse Attendant, Yak Attendant, Room Attendant, Driver (Donkey, Mule, Horse, Yak, Ponies etc.) and any other tourism worker by whatever name called performing work which is of an unskilled nature. Workers such as sales man, cooking Assistant, and any other categories of workers performing works of semi skilled nature fall under Semi Skilled Workers. Skilled workers include Electricians, Head Cook, Head *Bera*, Blender, Dancer, singer, musician, light vehicle driver or any other category of workers performing worker of skilled nature. Heavy Vehicle Driver falls under the category of Highly Skilled worker.

The Notification also defines “Unskilled work”, “Semi Skilled work”, “Skilled work” and” Highly Skilled work”. “Unskilled work” is defined as work which involves simple operation requiring little or no skill or experience in the job. “Semi Skilled work” is defines as work which involve some degree of skill or competence, acquired through experience on the job and which is capable of being performed under the supervision or guidance of skilled

employee and includes unskilled supervisory work. "Skilled work" according to the Notification means work which involves skill or competence acquired through experience on the job or through training as an apprentice in a technical or vocational institute and the performance of which calls for initiative and judgment. Finally, "Highly Skilled work" means work which calls for degree of perfection and competence in the performance of certain jobs including clerical work acquired through intensive technical or professional training or adequate work experience for certain reasonable period and also require an employee to assume full responsibility of his judgement/decision involved in the execution of his job.

A Notification dated 17.04.2008¹⁵⁹ restates different welfare measures to be adopted by different industries/Factories/ establishments/ enterprises etc. engaging workers which includes the following:

1. That the workers/labourers needing accommodation should be provided with accommodation and the same should have bare minimum regular supply of drinking water, toilet facilities and also it should be hygienic. The quarters whatsoever should be maintained by the employer organization.

¹⁵⁹ Notification No. 2/DL dated 17.04.2008 Extraordinary Gazette No. 137 dated 17.04.2008

2. that whenever any worker/ labourer is forced to retire from service on medical ground or some unavoidable reason, some amount in the form, like golden han shake should be given to such person.
3. That worker/ labourers should be granted medical leave especially during maternity at least for two (2) months.
4. That the workers who have been provided with accommodation should be given 2 points free power supply.
5. That the employer/organization should ensure that the labourers get ration in subsidized rate on regular basis.
6. That the Doctor should be made available for check up regularly at least once a week and whenever the number is quite large a medical practitioner should be engaged in such organizations.
7. That if the numbers of workers/labourers in the Factories/ industries are more than 200 numbers, then a Medical Practitioner should be posted on regular basis.
8. that the Minimum Rate of Wages as prescribed should be paid duly granting one paid holiday for six (6) days of continuous work in a week.

The above requirements were communicated by the Government¹⁶⁰ as part of State Government policy for ensuring welfare of the workers. It is therefore, obligatory on the part of all the concerned state institutions or other organizations to ensure their implementation.

¹⁶⁰ Vide Communication No. GOS/ DL/97/03-04/601 to 636 dated 10.08.2007

Sikkim has tremendous boon of nature. It has rarest varieties of flora, fauna, beautiful landscapes, rare tribal people, rich traditions and hospitable people, all conducive for the growth of tourism. The Government has declared tourism is one of the topmost priorities in the over all developmental scenario of the State. Tourism is the single largest industry in the state and is being seen as a major revenue generator by the State. But, since tourism is a labour intensive industry the State has the responsibility to ensure sound labour relations. Sound labour relations would in turn ensure increased productivity and would ensure increased revenue generation.

There certainly have been a lot of reforms in the different legal and administrative matters having a bearing with the labourers in the past few years like the extension of thirteen national labour legislations, introduction of Labour Clearance Certificate, Minimum Wage of a handsome Rs. 85/- for the unskilled workers¹⁶¹ (which is further increased to Rs 100/-)¹⁶² and Committees on Sexual Harassment at workplaces. However, comparing the scenario in Sikkim with the rest of the country would let one to conclude that a little has been achieved and much has to be done. Many of the central labour legislations though extended in the State are not being implemented. The Department falls short of adequate budget, lacks proper expertise on the field, lacks adequate workforce, works centrally from its headquarter in

¹⁶¹ Notification No. 3/DL dated 26.08.2005 Extraordinary Gazette No. 330 dated 07.09.2005

¹⁶² Vide Notification No. 01/DL dated 15.04.2008 Extraordinary Gazette No. 128 dated 15.04.2008

the Capital, lacks proper data on the conditions of work and workers in the State. Meeting proper requirements for ensuring sound labour relations is the most important concern for the State. Implementing laws and accelerating enforcement machinery would improve the overall scenario.

The proper implementation of trade union laws is primary requirement. This would give the workers a platform for placing their demands. Apart from ensuring protection to the workers it would facilitate the departments concerned to prepare data, conduct studies and communicate with the workers. It may also be emphasized that there is an urgent need for enunciating and articulating policy perspectives on skill development and for undertaking comprehensive skill deficit mapping in Sikkim. Increase in investment in infrastructure such as power, road and railways etc. may also be suggested.

The fundamental rule of development is that it is only the work that generates development. For obtaining maximum output the workers need to be facilitated. This certainly would involve spending. But spending on workers is equal to spending on work.

CONCLUSION AND SUGGESTIONS

Tourism has been a major social phenomenon of the societies all along. It is motivated by the natural urge of every human being for new experience, adventure, education and entertainment. The motivations for tourism also include social, religious and business interests. The spread of education has fostered a desire to know more about different parts of the globe. The basic human thirst for new experience and knowledge has become stronger, as communication barriers are getting overcome by technological advances. Progress in transport systems and development of tourist facilities has encouraged people to venture out to the foreign lands.¹

World over tourism is recognized as an important instrument for economic development and employment generation, particularly in remote and backward areas. It is known as the largest service industry globally in terms of gross revenue as well as foreign exchange earnings. Tourism can play an important and effective role in achieving the growth with equity objectives which we have set for ourselves in our Country.

In India tourism is the economic sector that has the potential to grow at a high rate and is capable of ensuring consequential development of the infrastructure of the destinations. It has the capacity to capitalize on the

¹ Chapter I, Report of the working group on tourism, 11th Five Years Plan (2007-2012), Ministry of Tourism, Government of India

country's success in the services sector and provide sustainable models of growth.

Tourism, when it develops has a potential to encourage other economic sectors to develop through its backward and forward linkages and cross-sectoral synergies with sectors like agriculture, horticulture, poultry, handicrafts, transport, construction, etc. Expenditure on tourism induces a chain of transactions requiring supply of goods and services from these related sectors. The consumption demand, emanating from tourist expenditure, also induces more employment and generates a multiplier effect on the economy. As a result, additional income and employment opportunities are generated through such linkages. Thus, the expansion of the tourism sector can lead to large scale employment generation and poverty alleviation. The economic benefits that flow into the economy through growth of tourism in shape of increased national and State revenues, business receipts, employment, wages and salary income, buoyancy in Central, State and local tax receipts can contribute towards overall socio-economic improvement and accelerated growth in the economy.²

Although the public sector has a significant role to play in infrastructure areas, tourism is overwhelmingly an industry of Private sector service Providers. It is a multi-sectoral activity characterized by multiple inputs given through a range of suppliers. The concept of tourism is quite similar to manufacturing industry, where the supply chain is as important as the end

² Ibid

product. The tourism related sectors include airlines, Surface transport, hotels, basic infrastructure and facilitation systems, etc. Thus, the growth of tourism cannot be ensured unless paving the ways of growth of these related sectors.

Another important feature of the tourism industry, which is of particular significance to India, is its contribution to national integration and preservation of natural as well as cultural environments and enrichment of the social and cultural lives of people. Over 382 million domestic tourists visiting different parts of the country every year return with a better understanding of the people living in different regions of the country. They have a better appreciation of the cultural diversity of India. Tourism also encourages preservation of monuments and heritage properties and helps the survival of arts forms, crafts and culture.³

Tourism has also become an instrument for sustainable human development. Being an employment generating and income insuring sector it has become an instrument of poverty elimination. The newer concepts in tourism like eco-tourism etc. have helped in environmental regeneration. Tourism has also become a potent instrument of job creation and advancement of women and other disadvantaged groups.

It is noteworthy that most of the activities in tourism fall in Unorganized Sector. This is more so in a developing country's like ours. Modern governments follow the policy non intervention in the economic activities in

³ Ibid

the private sector. In the current phase of globalization, governments are trying to confine itself to the basic functions like education, infrastructure, welfare etc. Therefore not only that Unorganized Sector is growing but it promises to grow uninterrupted in the times to come.

In the process of finding the solution for the protection of rights and interests of the unorganized workers engaged in tourism, it is found that at the international level, the protection of labour assumes great importance and there are various organizations working continuously for the protection and welfare of working people. Though the International Labour Organization (ILO) is known to be an organ of the United Nations, it is the specialized agency that works independently and works exclusively on labour. The International Labour Organization through its various instruments has responded to the problems on areas like basic human rights; employment; social policy, labour administration, industrial relation, conditions of work, social security, employment of women, employment of children and young persons, migrant workers, indigenous and tribal people, special categories of workers.

The United Nations' instruments are not immune from the labour matters. The United Nations' Charter aims at promoting the higher standard of living and full employment. It aims at promoting universal respect and observance of human rights and fundamental freedoms without distinction of any kind. The International Covenant on Economic, Social & Cultural Rights requires the states Parties to recognize the right to work, the right of everyone

to the opportunity to gain his living by work which he freely chooses, to just conditions of work, fair wages and equal remuneration for work of equal value without distinction of any kind, a decent living, and safe and healthy working conditions. The instrument comprehensively covers other basic rights of workers including right to organize and collective bargaining and allied rights. International Covenant on Civil and Political Rights also provide important provisions relating to labour. Under Article 8 the Covenant prohibits forced or compulsory labour. It also ensures right to freedom of association, including the right to form and join trade unions. Among the UN instruments the most comprehensive pronouncement of the rights of workers can be found in Universal Declaration of Human Rights, 1948 covers comprehensively, the various areas of concern. Guarantee of all human rights through its recognition in the national instruments is sure to solve all problems relating to work and workers.

No matter how good the provisions are the international labour laws can be implemented only when they are recognized in the domestic constitutions and other statutes. There is no effective implementation machinery at the international level. Ironically, various international labour laws have not been recognized in the national instruments in various countries.

At the national level the Constitution can be recognized as the best guardian of the rights of citizens including these workers. The constitution has

through directive principles of state policy and fundamental rights have provided safeguards to protect the interest of the weaker and disadvantaged class of labour. In the Preamble itself, the Constitution lays down the objectives of social, economic and political justice, liberty of thought and expression, equality of status of opportunity, dignity to be secured to all citizens of India. The Constitution has clearly kept in view equality generally and equality between men and women in all respects. Article 14 guarantees equality before law and equal protection of laws. Discrimination on the grounds of religion, race, caste, sex or place of birth has been prohibited. Equality of opportunity in matters of public employment has also been ensured. Recognizing the concept of distributive justice, the Constitution empowers the state to make special provisions in respect of women. Unfortunately this equality has not found fulfillment in many respects. The Constitution protects the rights of the workers regarding freedom of speech, of association and of peaceful assembly. It also guarantees free choice of employment, profession or business. It protects life and personal liberty, human dignity and a number of rights emanating from the broadest interpretation of right to life and personal liberty enshrined in Article 21. Begar and other similar forms of forced labour have been prohibited. Employment of children in the hazardous employments has also been prohibited.

Remedies for the enforcement of rights conferred by Part I of the Constitution have been provided in Articles 32 and 226. Courts have been given wide powers to ensure effective realization of the Fundamental Rights.

In its directives to the State under Part IV, the Constitution speaks of equality of men and women, adequate means of livelihood, equitable distribution of material resources for common good, operation of the economic system for the common advantage and non concentration of wealth, equal pay for equal work, protection of health and strength of workers and tender age of children.

The constitution also speaks of Equal justice and free legal aid, provision for just and humane conditions of work and maternity relief, living wage, decent standard of life and full enjoyment of leisure. To ensure participation of workers in the management of industries is a directive to the State. Under article 45 a directive of free and compulsory education for children has been given to the State. The State is also required to raise the level of nutrition and the standard of living and also the public health.

Certain duties have also been posed on the individual citizen of India. These duties ensure the better realization of the objectives contained in the Constitution.

Article 253 deals with the legislation giving effect to the international agreements and entry 14 in the Union List in the Seventh Schedule for implementing the agreements, treaties, conventions and declarations with the foreign states. These two when read together conclude that in case of absence of domestic law occupying a particular field, even these international agreements, treaties, conventions and declarations can be adopted to evolve some mechanism or law to cover the gap. The guidelines declared by the Supreme Court for the enforcement of fundamental rights under Article 32 should be treated as law unless there is an enactment in this regard.

The response of the legislature for fulfilling the Constitutional mandates has been appreciable so far. However, there is much left to be done. We have witnessed judicial activism producing new and myriad dimensions in the existing rights of the working people. A huge legislative activism is desired to shape these outcomes to fit the prevailing situation. In addition to this administrative activism ensuring effective implementation of the laws would definitely ensure effective realization of the rights of workers.

The workmen's Compensation Act, 1923 imposes legal obligation on the employers to pay compensation to workers for the accidents arising out of and in the course of employment. The Payment of Wages Act, 1936, provides for the payment of wages to the employees in time, in proper manner and without any unauthorized deductions. The Payment of Gratuity Act, 1972

provides for the payment of gratuity to the workers completing five years of continuous service on retirement or termination of service. The Payment of Bonus Act, 1965 requires the payment of Bonus to the employees and stipulates the mode and manner of the calculation and payment of such bonus. Minimum Wages Act, 1948 requires the fixation of certain minimum rate of wages for different employments by the government and requires the employer to pay at least the minimum wages so fixed to the employees. Maternity Benefits Act, 1961 sets out strict provisions to facilitate the working women in times of maternity and requires the employer to ensure different benefits to the working women before, during and after the delivery of the child. Contract Labour (Regulation and Abolition) Act, 1970 to wipe away variety of malpractices indulged in by the contractors, *sardars*, *khatadars* and other intermediaries. It provides for abolition of contract labour wherever feasible and provides for regulation of the employment in other cases. Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 comprehensively deals with the employment and conditions of service of construction workers. It incorporates various protective and welfare measures for these workers.

There are few other initiatives newer initiatives by the Indian legislature. The important ones deserving mention here are the Protection of Woman against Sexual Harassment at Workplace Bill, 2007 and the Unorganized Sector Workers' Social Security Bill, 2007. The initiatives further strengthened

when a budget provision of rupees two lakhs eighty thousand crores was announced for the Unorganised Sector workers in Annual Budget 2008-09.

The courts, particularly the Supreme Court and the High Courts have in the process of judicial interpretation played a creative role not only by protecting the interest of workers but also by invoking new concept of public interest litigation. Indeed the court assumed the role of protector of weaker, poor and struggling masses of the country. Furthermore the Courts through judicial process have tried to uphold the human dignity. It has brought social justice and just and humane conditions of work. The Supreme Court has stretched its protective arms to all aspects of work. Committed judicial pronouncements with wide interpretation given to the constitutional and legal provisions have succeeded in preventing exploitation of labour to a large extent.

Amongst others, the main problem in the Unorganized Sector is that most of the laws do not apply to this Sector. Most of the laws in India are applicable to establishments employing 10 or more persons. This excludes major portion of the unorganized workforce in the country. In the establishments employing more than 10 persons, the casual and contract labourers cannot be benefited under the existing laws. In many cases the employer-employee relationship cannot be established as a principal employer is not identified. In other cases employments themselves are not identified.

Numbers of new employments arise daily in the unorganized sector making it difficult for the laws to tune with the emerging needs. Further there is a bigger difficulty in the implementation of laws in the Unorganized Sector.

In India though the State has come up with various economic and labour reforms including the enactment of laws, very little could reach to the Unorganized Sector. There has not been any significant increase in the productivity of this Sector. The sector which employs around 93 to 94 percent of the total working population in the country contributes merely around 59 percent of the country's GDP. There has not been any significant growth in the efficiency of the workforce in the Unorganized Sector. There is very little technological, financial and expertise support in this Sector. An initiative to direct training, financial and technological help can multiply the country's GDP many times.

It is clear that to protect the rights and interest of the workers engaged in the Unorganized Sector generally and unorganized workers engaged in tourism in particular and to step towards effective performance of its duties under the mandate of the Constitution the State has constantly move with its initiatives in this direction. The task is not easy and the State has to utilize all its resources and wisdom for taking effective steps in this direction. In this regard a few suggestions may be forwarded thus:

Taking Newer Initiatives

Skill Development:

Productivity depends almost equally on the energy and skill of labour force as on the level of technology applied. An industrious and skilled worker who produces a more valuable output than workers of lesser capabilities is also worth more to an employer and is usually paid more. Further employers must pay the price for special training. Since tourism is more a labour intensive concept than being technology intensive one, the skill of the labour is a matter of utmost importance. A skilled workforce in tourism can not only ensure huge profits to the concerned employers and thus ensure better wages and incentives for itself but also contributes in large revenue earnings to the nation. Therefore, the employers and the Government both should take steps through mutual co-operation and contribution to develop the skill level of the workers. The Non Governmental Organizations should also be encouraged to work in this direction.

Encouraging Unionizations:

A union may lift the wages of its members above the scales paid to the un-unionized workers of same skill. Further a union acts as the guardian of the rights and interests of the workers. Thus unionization should be encouraged.

Conducive environment for this should be created through proper steps including implementation of relevant laws. It should be ensured that workers are free in the undertaking to take steps towards unionization. The laws governing unionizations¹ should be effectively implemented. The workers should be adequately informed about the provisions in the law and specific steps should be taken by the governmental Departments to help the unionization of workers in all possible areas.

Mobilizing Labour:

Mobility of labour should be encouraged. Where the working population is immovable the wage differentials are wide. On the other hand where the workers are ready to change jobs to move to other places for better paying positions the wage differentials tends to narrow down among firms, occupations etc.

Change in the Mindset:

Human beings like to be treated as human beings, and not like cogs in a machine or pawns in the pursuit of profits. Human beings expect to be treated with respect, as persons with individuality. It is imperative then, that old perceptions and mindsets about the workers should change, and new methods

¹ Like Trade Unions Act, 1926

have to be identified and pursued to elicit co-operation and respect. Old forms of organization may also need scrutiny and reform. Reform is also desirable in old forms of interaction and means of dispute resolution.

Promoting Work Culture:

High level of work culture leads to the well being of workers and employers and contributes to the development of the country. A high level of work culture is essential to increase our competitiveness in the current phase of globalization. The systematic arrangements that should be made to achieve this include fair wages, equitable profit sharing, effective organs of participatory management and opportunities to interact freely. The level of work culture in any undertaking depends on the level of awareness or realization of identity, or commonality of interest, or at the least, the sense of belonging, and the sense of interdependence.⁵

Legal Aid and Awareness:

One of the main reasons for the exploitation of unorganized workers engaged *inter alia* in tourism is their sheer ignorance of law. In many cases, in the unorganised sector, the employers too are not aware of their duties and liabilities. Therefore, legal aid and awareness programmes should be

⁵ Para 15 & 16, Chapter V, Report of the Second Labour Commission

extensively conducted to educate the workers and the employers, their rights, duties and liabilities. Such an initiative should be executed through proper fronts otherwise this may lead to disputes and further deterioration of work culture. Thus for such initiative the help of law students studying labour and industrial law should be taken, who should conduct such programmes under the supervision of law teachers. The help of Non Governmental Organizations would be essential in meeting the expenses thereto.

The Universities can be requested to include such programmes in their syllabus for which some fund may be made available to them directly by the Government or through NGOs working in the area of labour. Such initiatives would not only be helpful in achieving the aim of educating workers but also would give law students exposure and opportunity to interact with people which would help in making them better law professionals.

Revitalizing the Enforcement Machinery:

It is necessary to revitalize the enforcement machinery under various labour laws. The arm of protective legislations should reach the Unorganized Sector in every possible area including those in tourism. The social security legislations, similarly, should reach every worker who qualifies in the conditions provided therein. Laws are there, and the laws do not discriminate between Organized and Unorganized Sectors. If implemented properly, the

existing laws can benefit considerable number of the unorganized workforce in the country.

The very fact the 93 to 94 percent of the total workforce in the country is engaged in Unorganized Sector and that this lot of the workforce is not adequately protected through legislations causes one to conclude that this is one of the biggest causes of poverty in the country. If properly conceived and effectively implemented a law for the unorganized workers can make a definite contribution towards removing poverty. Based on similar recommendation of the Labour Commission a Bill for the unorganized workers has been introduced in the parliament.

Formulating Credit policies for the Unorganized Sector enterprises engaged in tourism:

One of the main constraints for enterprises in the Unorganized Sector is that they lack financial support. Adequate financial support to the small unorganized sector enterprises is essential to enable them to compete in the current phase of globalization. Tourism sector is immensely contributed through small enterprises. However, these enterprises have not been able to grow because of the lack of financial resources. The effect undoubtedly is also being faced by the workers engaged in these enterprises. Formulation of credit

policies to these enterprises would go a long way in eliminating poverty in our country.

Targeting subsidies and other programmes:

A major concern in India about formulating any policies or subsidies etc. is that it does not reach to the people whom it is designed for. Subsidies and other programmes should be targeted towards the right people. Proper policies are not enough unless that reach to the right people. Change in delivering mechanism is the challenge of the present day. A system of popular monitoring and social audit are not easy to create, but if created it would be a major step in this direction.

Policies for the children of the workers in Unorganized Sector:

Children form major section of working population in Unorganized Sector. It is only the compulsory enrolment of children in schools that can prevent the exploitation of children in sweatshops. It is necessary to eradicate child labour completely from all vocations. Policies for their health, nutrition, sanitary facilities etc. need also be formulated.

Creation of political will:

Much has to be done in the field of labour in India. Laws on basic rights of the workers like trade union laws are not being implemented all over the Country. Other labour laws also need uniform implementation all over the Country. There is a need for a comprehensive law to cover workers the unorganized sector. There is a need to design protection for the self employed. There are other areas of concern and measures including political and legal need to be taken. There is a need to create a strong political will not only for the protection and welfare of the Unorganized Sector workers but also for improving the productivity in this sector.

Understanding Basic Areas of Concern:

Minimum Wages:

A high rate of pay does not ensure large annual earnings. There are other factors which limit the wages of the workers. In the Unorganized Sector, the annual income is low because the employment is irregular. Tourism in most places is a seasonal activity, thus the workers often remain unemployed. Further, sometimes the real value of wages fall because of the rise in the cost of living.

The main concern with the minimum wage legislation is that it tends to hurt those it is designed for, by reducing the number of low skilled jobs.

However, the evidences are mixed on the impact of such legislation. In India the unemployment can be attributed much to the population of workers rather than the employer's quest for better employees as a result of his liability to pay minimum wages.

In India we have a law on minimum wages which applies to workers in the scheduled employments falling both in the Organized as well as Unorganized Sectors. The system of supervision and complaint mechanism stand adequate for effective realization of the object of such a legislation. It is essential to rely on the local authorities like *Panchayats*. Complaints if forwarded by these authorities would make the procedure simple and within the reach of these deprived workers.

Equal Remuneration:

The law on equal remuneration in India contains stringent provisions to ensure that no discrimination takes place against women as regards to wages or during recruitment. However such discrimination is ever prevalent in the formal as well as informal sectors. The fact that women worker cannot work as hard as the men can, and that they avail more leave than the men, they are not preferred by the employer in the first place. Even after recruitment they are paid lesser wages. From the employer's perspective it is logically justifiable. No employer would take such steps as would reduce profit. As such the only

way in which it would be possible for the employer to follow policies that are potentially profit reducing would be if he received certain benefits from government in the form of subsidy or protection. To ensure equal remuneration to women employees, the policy of the government should be in this direction.

The workers in Unorganized Sector get lesser wages as compared to their counterparts in the Organized Sector. The disparity of wages is also prevalent between the workers within the Unorganized Sector. Further women and children are generally paid lesser wages. There is need to regularly monitor the working of the Act and taking of periodic information. The inspection machinery should be adequately strengthened. Further the inspection machinery should be made answerable to the findings of such period periodic information as aforesaid. To evade the possibility of bias such periodic information can be collected through an independent sources. For this the resources of millions of educated unemployed in the country can be utilized.

Sexual Harassment:

The acts of sexual harassments at work places create hostile working environment for women. Despite clear guidelines of the Supreme Court, the State has not been able to bring a law to deal with the menace of sexual harassment. Further, though the Court has used its power under Article 141 in the judgment and the mechanism created therein for dealing with the cases of

sexual harassment by virtue of this Article becomes “law declared”, in reality a great majority of the work organizations in the country do not have such mechanism.

Configuring the offence of sexual harassment is not an easy task. A conclusive list of behaviors, gestures, words or literatures etc. to the offence of sexual harassment cannot be prepared. Further what may be acceptable to one person may not be acceptable to another. Everyone has different threshold of these things. Though the right to label a particular behavior as “unwanted” lies with the victims, they often fail to conclude whether the offence has been committed. Even if they did, the most of them are so ashamed to the public that they prefer to remain silent. Further, the influence of superiors who are often involved in such acts deters the victims from filing complaints.

If we honestly intend to wipe the menace of sexual harassment at workplace the first and foremost requirement is that the guidelines of the Supreme Court in *Vishaka v. State of Rajasthan* should be seriously implemented. A law for the prevention of the Sexual harassment at workplace has become very necessary. Therefore the legislature should as soon as possible come up with a law in this regard.

Further women workers in general and the unorganized women workers engaged in tourism in particular should also be provided with education and

training including that of self-defense. Women workers who claim that they have been sexually harassed should be supported and help should be offered as regards how to handle the perpetrator and how to lodge complaints. The courts should pronounce exemplary punishments. The presence of legal provisions and the attitude of judiciary towards such crimes should be widely publicized through media. Awareness programmes should be conducted at workplaces and educational institutions.

Understanding Unorganized Sector

The first hurdle in planning any protective or welfare measure for the workers in the unorganized sector including those engaged in tourism comes right in the beginning i.e. in the definition and identification phase. This is the only biggest reason why any study work on the Unorganized Sector becomes so difficult. The definition cannot be based on the number of workers, it cannot be based on the enterprises or employment because such a definition would not take into account a large number of workers who contribute to the work-world but are not identified. Further a large number of occupations come into existence everyday in the unorganized work-world. Therefore Unorganized Sector must be conceived through the parameters of its main features. In the Bill the Unorganized Sector has been defined as *an enterprise owned by individuals or self-employed workers and engaged in the production or sale of*

*goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such worker is less than ten.*⁶

The Bill does not take into account all unorganized works within the ambit of Unorganized Sector. It does not recognize casual and contract workers in the Organized Sector as unorganized workers. Further, there are various enterprises in the country where, though ten or more workers are engaged but are never given benefits under the labour laws. They are unorganized in the real sense of the term but are not recognized under the Bill as unorganized workers. Proper understanding of the Unorganized Sector is required before directing any policies.

Modifying Legislations:

The analyses of the legislative provisions reveal that there are various provisions safeguarding the unorganized workers engaged in tourism. Though these laws do not cover all unorganized workers engaged in tourism or that they are not free from lacunas they ensure various rights and welfare measures a great many of the workers. However the laws, and systems created thereby are so numerous and so complicated that they are not properly understood by these illiterate masses. Thus the workers remain unaware of the legal protection in the first place; the result obviously being the denial of the rights to them. The

⁶ Section 2 (k)

mass depravity of the rights and welfare facilities of these workers necessitates awareness to these workers of their rights under the existing legal set up.

The above arguments holds true mostly in the case of workmen's compensation Act, 1923. The Act contains adequate provisions and imposes legal obligation on the employers to pay compensation to workers for death or injuries from the accidents arising out of and in the course of employment. However, the workers generally and workers engaged in various unorganized employments in tourism in particular are often deprived of their right to compensation. Many of these workers do not even know that they have a right to compensation. The workers remain ignorant of the concept of accidents arising out of and in the course of employment and often relinquish their right to compensation.

In most of the labour laws covered in the present work the fines stipulated are too meager in the present times. Though the penalty prescribing imprisonment stand adequate, the amount of fines which in many cases discriminatory with the penalty of imprisonment have over the time, due to the decreased valuation of money, become inadequate. Though attempts have been made by the legislature to review the penalties from time to time to fit the existing situation they are not really done.⁷

⁷ In payment of wages Act 1936, Section 20 stipulates fines for contravening the provisions of the Act. The outdated provision stipulating the amount of fine does not fit the present situation. Mere sums of a few hundred rupees do not adequately give the feeling of punishment to the wrongdoer. Thus the amounts of fines need adequate increments. Similarly in Payment of Bonus Act, 1965 Section 28

In labour matters in most cases involving default on the part of employer fines would be sufficient to give him a sense of punishment. For a profit maker nothing will hurt more than losing a considerable portion of his profit. Though provisions for imprisonment is necessary and in most cases they are adequate, the logic behind the fines have failed in so far as it does not take into account the paying capacity of the wrongdoer. For example the amount of fine in the Payment of Bonus Act amounting to rupees one thousand would adequately give a sense of punishment to an employer of a small undertaking. However, such a meager sum would be insufficient for the employer in a undertaking making crores in profit. Thus understanding the nature of profit system in different economic activities the range of punishments should be very high and amount should be fixed considering the economic capacity of the wrongdoer.

Apart from the provisions prescribing punishments there are other loopholes in the abovementioned Acts. In Minimum Wages Act, 1948, the fixation of different minimum wages for different minimum wages for different employments has not been made compulsory. Different works need different

prescribes a discretionary penalty of imprisonment for a term of six months or fine upto rupees one thousand for contravention of any provision of the Act or in case of failure to comply with the direction or requisition under the Act. The penalty of fine being discretionary with the penalty of imprisonment is too small. Thus an adequate increment in the fine is desirable. In the Minimum Wages Act also the prescribed punishment of imprisonment upto six months or fine upto five thousand rupees. In minimum wages Act Section 21 imposes penalty of three months' imprisonment or fine upto rupees five hundred or both for the contravention of the provisions of the Act. In Contract Labour (Regulation and Abolition) Act, under Section 23 the prescribed punishment is imprisonment which may extend to three months or fine where the upper limit is fixed at one thousand rupees. In all of these Acts where the penalties of imprisonment are adequate but fines are too low.

level of knowledge, skill and labour. Same minimum wages for different employments may not be justifiable at all times.

In Maternity Benefits Act, every women covered under the act fulfilling the criteria are entitled to maternity benefits at the rate of average daily wage for the period of her actual absence immediately proceeding and including the day of her delivery and for six weeks immediately following that day. Average daily wage means the average of the women's wages payable to her for the days on which she has worked during the period of three months immediately proceeding the date from which she absents herself on account of maternity, or one rupee whichever is higher. It may be mentioned here that the women workers not only those engaged in tourism but also in other sub-sectors of Unorganized Sector usually receive lower wages. As such the minimum amount of maternity benefit if increased would benefit the women workers without causing losses to the employers. Such minimum amount of maternity benefit should be so fixed as to evade the possibility of women workers circumventing their duty to work and thereby causing the employer to suffer losses. Further, a loophole in the Act is also seen in Section 11. Under this Section the employer is required to give two nursing breaks everyday to a women worker who as delivered a child until the child attains the age of 15 months. It is worth mentioning here that adequate breast feeding a child is vital for the child's health as well as for psychological attachment of both for the development of mother child relationship. Two nursing breaks would not

suffice the proper feeding of the child. The medical experts suggest only breastfeeding till the child attains the age of six months. As such the child may require at least three times feeding during the day's work of the mother. Thus at least three breaks should be allowed till the child attains the age of six months and after six months till the child attains the age of fifteen months, two nursing breaks may be allowed.

In Equal Remuneration Act, 1976, good provisions have been made to ensure that no discrimination as regards to the wages or recruitment etc. to the women workers takes place. The advantages in the Act are considerably reduced by the provision contained in Section 7 (6). The decision of the authority appointed by the appropriate Government can be appealed against only once to yet another authority appointed by the appropriate Government. No further appeal has been allowed. Thus the cause of justice has been limited.

Building And Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, though a comprehensive legislation for the construction workers which makes bold provisions for the welfare of these workers, is not free from limitations. The first and the biggest lacunae in the Act is that it applies only to the workers drawing wages not exceeding Rs. 1600 per month. Here if we deem all weekly holidays as paid holiday, the daily wages is targeted at a little over Rs. 53. If we see the ground reality Construction workers are in many places are paid good wages. In many states

the statutory minimum wage itself exceeds the abovestated sum.⁸ Thus the Act excludes a large number of construction workers from its operation. Further the Act does not apply to any establishment employing less than 10 persons. The act for this reason becomes applicable to a few construction workers in many states.

The Act requires the constitution of a Safety Committee. But such safety committee is required to be constituted only in the establishments employing 100 or more workmen. A safety committee to ensure measures for safety of the workers is a reasonable provision in the establishments employing 10 persons. A safety committee of three members, one from the employer and two from the employee can reasonably be provided in an establishment employing 10 construction workers. The number of members in the safety committee may vary according to the number of the workers employed. In every establishment employing fifty or more workers and where the construction work is expected to continue for a period exceeding one year such Safety Committee should involve members from any NGO or other interest.

The main provision in the Act is undisputedly the constitution of Workers' Welfare Fund. However in reality in most of the States such fund could not be created for lack of financial resources. No matter how good the provisions are, they are tangled and have lagged behind due to the lack of

⁸ The Statutory Minimum Wage for unskilled worker in the state of Sikkim was Rs. 85/- which is recently increased to Rs. 100/-

political will. The welfare of workers engaged in the building and other construction works desire the State to review the flow of resources in such schemes and spend more on it by creating and encouraging newer pools.

In the Prevention of Sexual Harassment of Women at Workplace Bill, 2007, Section 3 (2) (a) requires the Chairperson of the Complaints Committee to be a "senior level woman". The words "senior level woman" has not been explained in the Bill. If it is deemed that this means a woman holding high post, it is highly impracticable in many work organizations. Further, in the Committee under Section 3 (2) the outside participation is restricted to one. The fact that three members are to be from amongst the employees, in a committee of four members, where the participation of third interest is limited to one the Committee will not be able to pronounce strong decisions.

The Bill also provides for the conciliation of the cases of sexual harassment and where any settlement is arrived at, the Bill says "no further enquiry shall be conducted". Sexual harassment is a heinous offence. The perpetrator of such acts deserves stringent punishments. Further, such a provision also encourages the offenders to pressurize the victims through threats and other means for settlement. Such a provision would encourage the offence rather than to prevent it. The Proviso to Section 11 of the Bill says that were the employer or the District Officer is not in agreement with any conclusion arrived at or recommendation made by the Committee or the Local

Committee “he may alter the conclusion or recommendation.” This provision contravenes the very purpose of the Bill. Conferring of such powers on the employer defies the very logic of the constitution of the Committees. Such a provision in the Bill not only marginalizes the authority of the Committee or the Local Committee to reach an impartial decision and to take stringent action against the wrongdoer but also causes the stringency of the Act to be loosened.

The Bill has reduced the act of sexual harassment to a mere compoundable offence. Though the coverage of the Bill is wide enough as it covers all the places visited by the employee for works arising out of and in the course of employment, it does not contain a single provision with regard to third party harassment. The responsibility of the employer to initiate legal proceeding as rested in the decision of the Apex Court in *Vishaka v. State of Rajasthan* and earlier Bills have been done away with. On a comprehensive study of the Bill, it cannot be said that the Bill will be able to achieve its objective of providing safe working environment to women.

The Unorganized Sector Workers Social Security Bill, 2007 entirely does away with the ‘Single Comprehensive Universal Scheme’ covering entire Unorganized Sector as proposed by National Commission for Enterprises in the Unorganized Sector (NCEUS) and the Second Labour Commission. The Bill is too wide in scope and is too abstract. Tripartite participation as proposed in the Bill is not practical in many cases as it is difficult to identify an employer in

many cases. Where many employments are sure to be never represented, it is not feasible to protect their interests. The Financial Memorandum presented with the Bill states that the financial implications for funding of the schemes would be determined "as and when such schemes are formulated." Financial implications cannot be so easily formulated in our country. In the absence of clear provisions for funding, the schemes cannot be implemented. Our experiences with the construction workers prove it. Though the central legislations on construction workers was passed in the year 1996, even upto the present day most of the States do not have any welfare schemes under that Act. The welfare provisions in the present Bill are also sure to be limited by the want of adequate funds.

Creating Forum to Empower the Workers in Unorganized Sector:

There is a felt need to have a forum to empower the workers in the Unorganized Sector. Such forum should work towards unionization of the workers including women workers in all possible areas of Unorganized Sector. In the areas where unionization is not possible such forum should help workers to bargain effectively though counseling and educating them of their rights. Women workers need special attention. Such forum should have a women wing to work for the areas of concern for the women workers.

Strengthening the Unorganized Workers through policies:

The State should take steps towards educating this lot including such steps as providing them vocational trainings, increasing their literacy through adult education schemes and career planning etc. Such steps would not only enable these workers to perform better and thus ensure better life for themselves but would also result in manifold expansion of the country's economy.

Involving women while formulating and implementing policies:

In policy making adequate women representation must be made compulsive so that the problems of women workers can be effectively conceived and taken into consideration. Likewise during the implementation too adequate women representation must be made

Creating a brand new fund exclusively for the workers in Unorganized Sector:

The Commission on Enterprises in Unorganized Sector has suggested a brand new fund exclusively for the workers in Unorganized Sector. In the report a social security net to the entire Unorganized Sector on a contributory basis is proposed which has convincingly estimated a mere 0.5% of the GDP to be enough to formulate it. Having conceived the area of unorganized work

world, the strength of workforce, the economic conditions of workers and above all the potential of this Sector to contribute in the Country's economy, the Government should be more than happy to spend this meager amount towards long felt need of providing social security to the workers in this Sector.

Enlarging the operation of the regular labour laws:

The applicability of the existing labour laws is limited by size of the enterprises and geographical limits. Most of the labour laws apply to the enterprises employing 10 or more persons. The numerical strength is stipulated in these laws to ensure monitoring and it also supposes the enterprises covered therein as economically capable of providing protection and welfare measures therein. However today due to good infrastructure, expansion of business in all activities, manifold increment in the profit, and other developments in the Post Liberalization Economy many enterprises employing even less than 10 persons are capable of providing basic protection and welfare to the workers. Considering the present profit systems, economic capacity of the employer, consciousness of the general public etc. it is not necessary for the State to rely on the ideas that fitted in our society at the time when most of these laws were enacted. There has been a tremendous change in the economic and social conditions of the people of our country. No law can be as effective as the laws that are already in implementation. Therefore the State should now think towards extending the regular labour legislations to enterprises employing less

than 10 persons. For the practical purposes the lower limit may be fixed at 5 or 7. The enterprises facing financial burden may be provided with some subsidies or protection.

Spending on Labour

The area of labour requires adequate spending. India has a huge working population. Various policies and plans including laws relating to workers in the Country face financial constraints. The Building Act could not be implemented for want of adequate fund. The social security plan for 93 to 94 percent of the working population is languishing for want of fund worth a mere 0.5 percent of the GDP.⁹ Adequate budget is not allotted to the Labour Departments in the States. The programmes of the Departments postpone for want of adequate budget. The Labour Departments in the States work with inadequate staffing. The area of labour needs adequate spending. The State should be generous towards the people who work for strengthening its economy.

State of Sikkim

⁹ Refer to the Report of National Commission for Enterprises in the Unorganized Sector.

There have been a lot of reforms in the different legal and administrative matters having a bearing with the labourers in the past few years. These include extension of thirteen national labour legislations, introduction of Labour Clearance Certificate, Minimum Wage of a handsome Rs. 85/- for the unskilled workers¹⁰ (which is further increased to Rs 100/-)¹¹ and Committees on Sexual Harassment at workplaces. The Government is also working towards spending 2% of the total fund allocation to the concerned department on capacity building.¹² However on a closer look at the implementation of the laws one would find that though as many as thirteen labour legislations are in force in the State only four are being actually implemented. The condition of working people engaged in Unorganized Sector in the State is not far better as compared to the national scene. Though the above suggestions are also relevant a few suggestions peculiar to the State of Sikkim may be forwarded as under:

Implementing Laws:

As stated above, though many national labour laws have been extended in the State of Sikkim, only a few are being implemented. The better condition of unorganised workers in Sikkim needs actual implementation of these laws.

Allotting adequate budget:

¹⁰ Notification No. 3/DL dated 26.08.2005 Extraordinary Gazette No. 330 dated 07.09.2005

¹¹ Vide Notification No. 01/DL dated 15.04.2008 Extraordinary Gazette No. 128 dated 15.04.2008

¹² Speech by the Chief Minister of Sikkim on International Labour Day, May 1, 2008

The reason why the labour departments in India fail to come up with policies and implement laws many times is that the labour departments are always short of budget. The case with the Department of Labour in the State of Sikkim is no different. The Annual Report (2005-2006) of the Department specifically mentions about the financial constraints which have caused the Department to be unable to pursue its proposal to conduct seminars at major industrial units and construction sites to educate the workers on workers education, workers awareness, welfare, safety, hygiene, awareness towards the provisions of labour laws and the duties of workers towards the management and their establishments.

Workers are the builders of societies. They are the builders of civilizations and earners of the national income. Adequate budget should be allotted for the welfare of these people.

Setting up Research Cell in the Department of Labour:

The area of labour is witnessing rapid changes all over the world. Since the work area is expanding day by day, constant vigil over the work, productivity, new developments, rights and interest of the workers, their protection is essential. There are various organizations at the international and the national level which are constantly studying these things. These organizations are constantly finding newer areas of concern and addressing

them. It is a long felt requirement for the state machinery in the country to track these developments. Further, labour scenario differs from place to place and so differ the challenges before workers and modes of addressing them. Therefore at the local level too constant vigil is required in the work areas. It is advisable in the State's Labour Department to have a research cell which will not identify newer areas of concern and find ways to address them. There is no proper research support for the legislators in Sikkim. Proper framing of policies and laws need the legislators to be well informed. Therefore there is a serious need of setting up research cells in all departments under the State including the Department of Labour.

Adequate staffing at the implementation level:

It is felt that the department of Labour in Sikkim working with inadequate workforce. Adequate staffing at the implementation level would ensure better implementation of laws. Effective implementation of laws is most important to ensure sound labour relations. Working on labour involves dealing with various laws which are sometimes too complicated for the officers without a legal background. This necessitates appointment of law literates at the implementation level.

Establishing District Offices of the Department of Labour in all districts of the State:

Workers cannot afford to move places for the vindication of their rights. Making them to travel places in search of justice would be to guarantee them injustice. In a State where no trade union law is in force and where there is no other institutional machinery to represent the workers in their dealings with the Government, it is of utmost importance that the Governmental Department should work in close proximity with these workers. Thus it is suggested that the Department of Labour should immediately establish at least one office at every District. All disputes arising in a district should be resolved in the District Office itself.

Enacting social security law for the tourism workers:

Tourism in the State of Sikkim is a major and hugely profitable economic activity. A closer look at the profit system in various activities under tourism would enable one to safely conclude that the employers in most of the undertakings are economically in a position provide basic social security to the workers. Further since the State Government has accorded topmost priority to this sector, the welfare of the true contributors to it cannot be ignored. Therefore it is advisable that the State should come up with a law targeting basic social security on a contributory basis involving workers, employers and the Government.

Introducing insurance schemes:

Though insurance scheme to cover life, health and accidents is desirable for all unorganized workers engaged in tourism, workers in some employments desperately need such initiatives from the Government. The tourism workers such as rock climbers, rafters, cable car operators, drivers etc. work under the inherent risk of accident resulting in permanent disablement or even death. The victims of such accidents and their dependants do not have adequate social security. Therefore it is urgently required that the state should come up with compulsory insurance scheme with low premium policy for these workers.

Pronouncing concrete provisions for the protection of labour:

The Sikkim Labour Protection Act, 2005 does not pronounce any concrete provision for the protection of the workers. It simply restates parts of the provisions in the national legislations which though are extended in the State but are never implemented. In the wake of the fact that most of the national labour legislations are not being implemented in the State it is essential to pronounce concrete provisions for the protection of the workers. Such provisions can be added in the State in the Sikkim Labour Protection Act, 2005 or a new legislation can be enacted to achieve this purpose.

Training tourism workers:

Though tourism in Sikkim is not a new economic activity, it was not as big an activity as it is today. Tourism in the state of Sikkim is capable of ensuring not only huge revenue collection to the State but also immense employment opportunities. This is why the State Government has accorded top priority to tourism. However, the benefits of tourism cannot be fully reaped unless the workers engaged in it are properly trained. People engaged in hospitality, food production, guiding etc. need special training. The newer concepts of eco tourism and adventure tourism need specialized workers. It is essential therefore to direct policies and funds in this direction.

Developing infrastructures:

Good infrastructures for tourism like roads, airports etc. would attract more tourists in the state and thus ensure more profits to the employer and thus ensure better wages and incentives to the workers.

Introducing newer tourism concepts:

Tourism in Sikkim is seasonal. Tourists do not visit the state all through the year. This causes the unorganized workers engaged in tourism to remain unemployed during off season. There is a need to introduce newer tourism concepts like off season packages. Ensuring considerably cheaper tourism

during off seasons would ensure the arrival of tourists all through the year and ensure employment to the workers all through the year. The newer initiatives of the Government to develop infrastructure for pilgrimage tourism, village tourism adventure tourism, entertainment tourism etc. are right steps towards this direction. More such steps are desirable.

Involving independent agencies to track labour practices:

The area of labour generally and the area of labour under tourism in particular is so wide that it is impossible to track the labour practices solely through governmental agencies. The involvement of the independent agencies like NGOs can be helpful in tracking unlawful labour practices and bringing the persons responsible thereof to justice. Thus the NGOs should be encouraged to work in this field through adequate funding wherever necessary.

Helping the poor:

The government should formulate policies to help the self employed and enterprises in the Unorganized Sector in tourism who is not credit worthy or who does not have collateral for a loan.

Directing banks to formulate loans for the enterprises in the Unorganized Sector including the enterprises engaged in various sub-sectors under tourism:

The banks operating in the State of Sikkim should be made to formulate low interest loan policies for the enterprises in Unorganised Sector in general and those Unorganised Sector enterprises engaged in tourism in particular. This would allow the tourism in the State to boost and thus would ensure better wages and incentives to the workers.

Collecting Data:

It is found that the Department of Labour does not have any data whatsoever regarding workers in the State. A centralized department working thorough its office in the capital is not expected to have clear picture of the ground realities in all four districts. Further the area of labour in the State being mostly unorganized the collection of data is not an easy task. Though through the implementation of the Sikkim Labour Protection Act, 2005 an earnest attempt is being made to collect data, it is not expected to be anything more than numerical. The collection of complete data is essential to evade blind investments and to frame correct policies for the welfare of workers. In this help of thousands of educated unemployed in the state can be taken who will collect data under the supervision of the officers of the Department.

Reconsidering hours of work:

Hours of work should be reconsidered in employments like waiters, cooks, shop assistants, etc. The hotel workers work generally from 4 or 5 A.M. and 11 P.M. or midnight. This amounts to 18 to 20 hours of work. Though some hotels employ workers in shifts, majority of hotels engage the same workers for the entire business hours. Even the law allows¹³ nine hours of working day which may extend to twelve hours if the worker consents to work. The normal working day in a shop or commercial establishment is allowed to be eleven hours. The hours of work in these areas need immediate reconsideration.

Accelerating enforcement machinery:

Despite legal provisions the workers in Sikkim are exploited on various counts. One of the main reasons it seems is the ineffectiveness of the governmental machinery in implementing laws. Various laws which though are in force in the state of Sikkim are not being implemented. Routine visits of the sites are not made as a result of which the labour laws are generally disregarded. As such it is desirable to accelerate the enforcement machinery through proper fund allocation and trainings etc. to achieve the result.

¹³ Refer to Sikkim Shops and Commercial Establishments Rules , 1984

Ensuring health of workers:

Health of the workers should be prime concern. A person with sound health can work better. The occupational diseases must be prevented through proper precautions. Workers engaged in hotels and taxi driving are prone to sexually transmitted diseases. Special programmes should be initiated to protect these workers from such diseases. The workers should be made aware through special awareness programmes about the occupational diseases, symptoms and their prevention.

Extending trade union laws:

Laws will not be flagrantly violated if workers are united. Trade unions provide base to the workers for collective bargaining and systematic fighting for their rights. In some cases collective agreements specify wages, hours, working conditions, and benefits in great detail. In other cases unions have used their political power to win enactment of laws that provide benefits and protection—increased pensions and unemployment compensation, safety regulations, extended holidays, educational and maternity leave, housing, health insurance, and, perhaps most important, employment tribunals and other grievance procedures to protect workers against any unfair action. Trade unions in China have acted as arms of the government, helping to achieve production

programmes in the planned economy; many of these unions are also charged with administering social-welfare programmes.

Trade unions play important role in creating better working conditions for the workers. It acts as machinery for systematic dealing between employers and workers and between workers and the Government. Thus, it is very important not only to bring forth trade union laws but it is also essential to encourage the workers to unionize.

It is heartening that our country is witnessing huge economic growth for the last few years. The economic growth cannot be appreciated unless it is coupled with social justice. All people have an equitable share in the growth of the national economy. It is necessary for the Country's development to ensure that the benefits of this tremendous growth reach the poor and the downtrodden. The Unorganized workforce in our Country has its contribution in this growth. This Sector needs special attention in terms of protection and social security. The need of the time is to direct the economy to this Sector to which a huge majority of the Country's poor belong.

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Appendix

**Rights of the Unorganised Workers Engaged in Tourism: A Study with
Special Reference to the State of Sikkim**

1. Sex:
2. Age:
3. Occupation:
Nature of employment and term of payment:
4. Education:
5. Marital Structure:
6. Family Structure
Joint: Nuclear:

Total Number of Family Members:

Number of earning members:
Male: Female: Children:
7. What compensation do you receive in cases of
Death:

Permanent Partial Disablement:

Permanent Total Disablement:
8. What is your wage per day? Is the wage received by you is equivalent to the wage received by a male worker engaged in the same class of work in the same employment? Are any deductions made at times? What?
9. Do you face any inhuman treatment or sexual harassment in your workplace?

Never: Sometimes: Often:

If yes, who perpetrates?

Employer: Co-workers: Third Party:
10. Is the present income you make is sufficient for your livelihood?

11. Are you satisfied with the present job or you want to go for other jobs?

12. Do you have any health problems? What?

13. Do you have membership with any trade union/Labour wing of any political party?

14. What do you think are the areas which need to be improved in your job? What type of protection do you think you need?

Date

Signature

Researcher's Notes