ANSWERS FOR DISCUSSION IN THE WORKSHOP TO BE HELD ON 10.01.2015

: Subject - 2(a) :

Law relating to strike, lock-out, lay-off, retrenchment, closure.

Ans. to Que. No.1 : Yes. provided the strike is legal and justified.

Ref. : **Syndicate Bank and Anr. vs. K. Umesh Nayak and Ors, 1994 II CLR 753 (SC)**.

Ans. to Que. No.2 : Yes. Under Sub-section 2 of Section 42 of MIR Act what is contemplated is a notice by any employee desiring a change in respect of an industrial matter not specified in Schedule I or III in the prescribed form. The said notice is required to be served to the employer through the representative of the employees. The form of such notice is prescribed in Form 'L' in the Rules framed under MIR Act. Industrial matters are defined under clause 18 of Section 3 of MIR Act.

The notice contemplated under Section 42 (2) of MIR Act and notice contemplated by Section 24 (1) of MRTU & PULP Act are completely different not only in form but also in substance. Under MIR Act, it is a notice of change of call for strike. Therefore, a notice under

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Section 24 (1) of MRTU & PULP Act cannot be treated as a notice of change under Section 42 (2) of the MIR Act. Hence, the strike

commenced or continued after issuance of notice under Section 24 (1) (a) of MRTU & PULP Act can be said to be illegal under the provisions of MIR Act for failure of employees to issue notice under Section 42 (2) of MIR Act. This view is supported by case **Ambure P. A. and Ors. Vyapari Sahakari Bank Maryadit, Solapur & Anr., 2014 III CLR 72**.

Ans. to Que. No.3 : There are 9 distinct grounds incorporated in Section 24 (1) of MRTU & PULP Act by virtue of which a strike becomes illegal. Refer Section 24 (1) of the MRTU & PULP Act.

Ans. to Que. No.4 : No. The only remedy for a illegal strike is the prosecution of the workmen under Section 26 of the Industrial Disputes Act, 1947. No other relief under the Act can be claimed by the employer.

Ref. : **Rohtas Industries Ltd. vs. Rohtas Industries Staff Union, 1976 I LLJ 274 (SC)**

Ans. to Que. No.5 : Strike and lock-out are not totally prohibited but certain requirements are required to be fulfilled by the workman

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before resorting to the strike or by the employer before locking out the place of business. Conditions laid down in Section 22 (1) of Industrial Disputes Act, 1947 are to be fulfilled in case of strike in any public utility service and conditions as laid down in Section 22 (2) are to be fulfilled in case of any lock-out by employer carrying on public utility

service.

As per Section 22 (1) of Industrial Disputes Act, 1947, no person employed in public utility service shall go on strike, in breach of contract :

a) without giving notice of strike to the employer within six weeks before strike; or

b) within 14 days of giving such notice; or

c) before the expiry of the date of strike specified in any such notice as aforesaid; or

d) during the pendency of any conciliation proceedings before a Conciliation Officer and seven days after the conclusion of such proceedings.

As per Section 22 (2) of Industrial disputes Act, no employer carrying on any public utility service shall lock-out any of his workmen:

a) without giving notice of lock out as hereinafter provided,

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within six weeks before lock-out; or

b) within 14 days of giving such notice; or

c) before the expiry of the date of lock-out specified in any such notice as aforesaid; or

(d) during the pendency of conciliation proceeding before Conciliation Officer and seven days after conclusion of such proceeding.

Ans. to Que. No.6 : Yes. When the workers have been found guilty of acts of violence and indiscipline causing harm to the officers of the respondent company and causing damages to the property the company can take undertaking from the workers of good behaviour from the employees.

Ref. : Maharashtra General Kamgar Union, Bombay vs. Solid Containers Ltd. & Ors., 1996 I CLR 106 (Bom. H. C.) (D.B.)

Ans. to Que. No.7 : Yes, as held in case of **Premier Automobile Ltd. vs. G. R. Sapare, 1979 (39) FLR 440 (Bom. H. C.) (D.B.).**

Ans. to Que. No.8 : No**. Modistone Ltd. vs. Modistone Employees Union, 2001 I CLR 1009 (Bom. H. c.) (D. B.)**

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Ans. to Que. No.9 : Lock-out is a weapon to the employer to persuade the employees by a coercive process to accept his demands. Lock-out ordinarily involves an element of malice or ill-will.

Section 2 (l) of the Industrial Disputes Act, 1947 defined lock out. The legislature has made it clear that under the present definition, three alternative acts of the employer in the process of collective bargaining constitute a "lock-out" namely, i) closure of a place of employment is of "temporary nature"; ii) Suspension of work or iii) refusal to continue to employ any number of persons employed by the employer.

Ans. to Que. No.10 : No. It has been held in case of **Mazdoor**

Congress vs. S. A. Patil & Ors., 1992 I CLR 408 that- Once it is held that lock-out is not illegal lock-out, there can arise no question of giving a finding in respect of unfair labour practice in regard to the lock-out period. If there is no unfair labour practice during that period, there can arise no question of an entitlement for wages during the said period under MRTU & PULP Act, 1971. The jurisdiction under the Act is limited. It is concerned with the finding of unfair labour practice covered by the Act. It is, therefore, not open to the workers to contend about justifiability or otherwise of the lock-out. Consequently, the workers are not entitled to the wages for the lock-out period.

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Ans. to Que. No.11 : It will amount to lock-out and not closure as held in case of **General Labour Union vs. B. V. Chavan, AIR 1985 SC 297.**

Ans. to Que. No.12 : Yes. The payment of wages during the period of lock-out arises only if the lock-out is unjustified and the Government is within its right to refer the dispute for adjudication.

Ref. : **Bhartiya Kamgar Karmachari Mahasangh, Mumbai vs. G. W. K. Ltd. & Ors., 1999 II CLR 1097**.

Ans. to Que. No.13 : The pre-conditions for closure of undertaking have been laid down in Section 25-FF (A) of the Industrial Disputes Act, 1947.

a) Employer shall serve at least sixty days notice before the date on which the intended closure is to become effective.

b) The notice has to be in prescribed manner.

c) The notice is to be served on the appropriate Government.

d) The said notice shall state the reasons for the intended closure of the undertaking.

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Ans. to Que. No.14 : Yes. Withdrawal of closure application under Section 25-O of the Industrial Disputes Act, 1947, is no bar against subsequent application within a year of the same.

Ref. : **Sarv Shramik Sanghatana vs. State of Maharashtra, 2008 I LLJ 1067.**

Ans. to Que. No.15 : No. The workman who has been appointed for a fixed period does not come under the definition of Section 2 (oo) of the Industrial Disputes Act, 1947.

Ref. : **Bhavnagar Municipal Corporation vs. Salimbhai Umarbhai Mansuri, 2013 III CLR 1 (SC).**

Ans. to Que. No.16 : No. The retrenchment is merely a discharge of surplus labour staff in running/continuing the business or industry for certain reasons. If a workman is discharged for any other reasons such as loss of confidence, it cannot be included in the definition of retrenchment.

Ref. : **Kamleshkumar Rajnikant Mehta vs. Presiding Officer CCIT, (1980) I LLJ 336**.

Ans. to Que. No.17 : Sending money by account pay cheque by registered post with acknowledgment due is a sufficient compliance of

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Section 25-F, even if the amount is received subsequently.

Ref: Parry's (Cal) Employees Union vs. Third Industrial Tribunal, West Bengal, 2001 (89) FLR 192 (Cal. H. C.)

Ans. to Que. No.18 : No, as held in case of **Narsing Pal vs. Union of India, AIR 2000 SC 1401.**

Ans. to Que. No.19 : Yes. It is mandatory to give one months notice to an employee if his services are being retrenched by the employer (vide Section 25-F of the Industrial Disputes Act, 1947). However, an employee can be paid a notice pay in lieu of such notice.

Ans. to Que. No.20 : Termination of an employee employed in a temporary capacity for a fixed period is not retrenchment under Section 2 (oo) of the Industrial Disputes Act, 1947 but it would fall under Section 2 (oo) (bb).

Appointment for a specific period or renewal for some more time does not amount to retrenchment and the employer is not bound to pay compensation.

Ref.: Nilesh M. Mahadeshwar vs. Presiding Officer, Central Government Industrial Tribunal No.1, Mumbai & Anr., 2009 II CLR 381 (Bom. H. C.)

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Ans. to Que. No.21 : If the initial appointment of an employee is void, in that event, it would not be retrenchment under Section 2 (oo) of the Industrial Disputes Act, 1947.

Ref. : Kameshwar Roy vs. State of Bihar, 2009 4 LLJ 503 (Patna H. C.) (F.B.)

Ans. to Que. No.22 : No. Because appointment is of contractual nature.

Ref. : National Small Industries Corpn. Ltd. vs. Lakshminarayanan, 2007 I CLR 207.

Ans. to Que. No.23 : No. Termination of a probationer during probation period is not retrenchment under Section 2 (oo) of the Industrial Disputes Act, 1947.

Ref. : **Hydrabad Industries Ltd. vs. State of Zarkhand, 2009 4 LLJ 601 (Zhar. H. C.)**

Ans. to Que. No.24 : No. Section 25-G of the Industrial Disputes Act, 1947 should be read with Rule 81 under Bombay Rules. The employer should prepare a list of workmen, category-wise, from which retrenchment is contemplated. They cannot amalgamate workmen and

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propose retrenchment. According to the seniority of service in the particular category retrenchment can take place. The Rule provides the basis of implementation of that principle- last come first go. Without seniority list, it is impossible to determine who has come first or who has come last. The seniority list will have to be displayed in notice board of the company to enable the workman to get the exact idea of his ranking in the seniority list. The employer shall not cause any discrimination in preparation of the list. The purpose of seven days is to give an opportunity to lodge protest, if anyone has grievance. If there is shortage of 7 days notification, the retrenchment may be quashed as the retrenchment is illegal.

Ref. : Shri Gaffar and Ors. vs. Union of India, 1984 LIC 654.

Ans. to Que. No.25 : Yes. In case of **Anup Sharma vs. Executive Engineer, Public Health Division No.1, 2010 II CLR 1** it has been held :

" The establishment is covered under the Standing Orders.

Although the employer is a public sector undertaking and

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the Ministry of Chemicals have framed service rules, they may not be statutory rules. Statutory Rules if

applicable,

Standing Orders ordinarily do not apply. The action of the employer appears to be retrenchment and is in contravention of Section 25-F. It is illegal. The workman ought to have given one months notice or notice pay and compensation under Section 25-F (a) which is mandatory. In the instance case, the employer has followed only the service rules framed by the Ministry. The service rules by themselves cannot supersede the Standing Orders. Hence, the termination of the workman was held illegal.

: Subject 2 (b):

Powers and duties of Employees' Insurance Court.

Ans. to Que. No.26 : Under Section 54 (a) of the ESI Act, the Corporation shall refer the insured person to the Medical Board for determining of permanent disability and upon submission of permanent disability certificate by the Medical Board- if either party i. e. Corporation or insured person are aggrieved then an appeal is provided under Section 54 (a) (2) of the ESI Act either to Medical Appeal Tribunal or to Employees Insurance court.

The matters specified under Section 75 can be decided by Employees Insurance Court i. e. Section 75 (a) to (g). Thus, two forums are available under Section 54 (a) Medical Appeal Tribunal and secondly directly to ESI Court. What can be decided under Section 54 (a) also can be decided under Section 75 (1) (g) of the ESI Act.

Ans. to Que. No.27 : There is no bar for filing application under Section 75 challenging the order passed under Section 45-A without availing the provisions of appeal provided under Section 45-AA of the ESI Act.

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Ans. to Que. No.28 : There is no time limit prescribed for determining the contribution by the Corporation against the employer**.**

Ref. : Employees State Insurance Corporation vs. C. C. Shantha Kumar, 2007 III CLR 267 (S.C.)

Ans. to Que. No.29 : Yes. Section 78 (4) of the ESI Act provides that the order passed by the Court is enforceable as a decree passed in a Suit by the Civil Court. If an application is filed, it is open to the Insurance Court to grant injunction in appropriate cases after hearing

the parties. In case of **M/s Agrawal Hardware Industries vs. ESIC, 1976 Lab. I. C. 1354**, it was held that,

> "when the Act has conferred jurisdiction on the Insurance Court to adjudicate a dispute specified in Section 75 of the Act, it will be deemed that impliedly it had granted power of doing all such acts and to employing all such means as are essentially necessary for effectively discharging its obligation to adjudicate. It was held that statutory power carries with it the duty in proper cases to make order for stay. Courts and Tribunals which are constituted under different Acts have inherent power to issue appropriate relief by way of injunction to the party before it and it can enforce its orders."

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Ans. to Que. No.30 : Section 75 of the ESI Act provides that if any question or dispute arises as to the various matters illustrated therein such questions and disputes shall be decided by ESI Court in accordance with the provisions of the Act. The question or dispute may arise as, namely, a) Whether any person is an employee within the meaning of the Act or whether he is liable to pay employees contribution, or b) The rate of wages or average daily wages of an employee for the purposes of the Act, or c) The rate of contribution payable by a principal employer in respect of any employee, d) The person who is or was the principal employer in respect of any employee, or e) The right of any person to any benefit and as to the amount and duration thereof or any direction issued by the Corporation under Section 45-A on a review of any payment of dependents benefits, or g) Any other matter which is in dispute

between an employee and principal or immediate employer in respect of any contribution or benefit or other dues payable or recoverable under this Act or any other matter required to be or which may be decided by ESI Court under the Act.

Ans. to Que. No.31 : Yes, vide Section 85-B.

Ref. : Regional Director, ESIC & Anr. vs. Managing Director, M/s. Qetcos Ltd. 2008 III CLR 294 (Kerala H.C.)

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Ans. to Que. No.32 : Yes, vide Section 77 of the ESI Act.

Ref. : Agostinho Menezes vs. Regional Director, ESIC, Goa & Anr., 2004 I CLR 417 (Bom. H.C.)

Ans. to Que. No.33 : Yes. Section 75 (2-B). However, the said provision provides a proviso by which the Court may for reasons to be recorded in writing waive or reduce the amount to be deposited under this sub-section.

Ans. to Que. No.34 : No. The Scheme or ESI Act is that the Corporation itself should in a case where there is omission on the part of the employer to maintain records in accordance with Section 44 of the Act which determines the amount of contribution and on the strength of such information it may make a demand under Section 45-A. The Inspector who visited the employer should have made a report to the Director of the Corporation. He ought to have given a copy of

the report to the employer and given him an opportunity of hearing. This was not done. In these circumstances, ESI Court cannot decide the matter simply on the basis of demands made by the Corporation.

Ref. : 1] ESI Corporation, Bhopal vs. Central Press, AIR 1977 SC 135

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Ans. to Que. No.35 : Yes. As per Section 85 of the ESI Act, if the employer commits an offence under Clause (a) of section 85, the Insurance Court has a power to impose punishment of imprisonment for a term which may extend to six months but shall not be less than three months or fine which may extend to Rs.1000/- or both.

Ans. to Que. No.36 : No. There is no such provision under ESI Act .

Ref.: Employees State Insurance Corporation & Anr. vs. Surendra Sharma, 2003 Lab. I.C. 525.

Ans. to Que. No.37 : No. The provisions of ESI Act are not applicable to Municipality/ Municipal Corporation as held in case **Nagar Parishad, Saharanpur vs. Deputy Director, ESIC, 2013 I LLJ 626 .**

Ans. to Que. No.38 : Yes. The provisions of ESI Act are applicable to the Architect Firm which prepares plans using there profession skill

in accordance with specification of the customers and then sale it to them.

Ref.: 2013 III LLJ 463 .

Ans. to Que. No.39 : Yes. Race Club is an establishment as held in case of **ESIC vs. Hydrabad Race Club (2004) 6 SCC 191**.

Ref. : **Banglore Turf Club Ltd. vs. Regional Director, ESIC,**

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2014 III CLR 802.

Point to be Noted : i] The term "establishment" would mean the place for transaction in business, trade or profession or work connected with or incidental or ancillary thereto.

ii] "Shop" is a business establishment where systematic or organized commercial activity takes place with regard to the sale or purchase of goods or services and includes a establishment that facilitates the above transactions as well.

Ans. to Que. No.40 : No. The ESI Court acting under Section 75 of the Act is not competent to consider validity of the order of dismissal from service of an employee, on the ground of violation of Section 73 of the Act.

Ref. : Kerala State Co-op. Coir Marketing Federation vs. Sree Kumar 2002 III CLR 91 (Kerala H. C.)

This is because in the instant case there is no dispute between the principal employer and the Corporation or between the principal employer or the employee in respect of any contribution or benefits or other dues payable or recoverable under the Act. Therefore, on plain

meaning of Section 75 of the Act, this dispute will not come under Section 75 of the Act. The proceedings under Section 75 of the ESI Act is not maintainable questioning dismissal of an employee even if there is violation of Section 73.

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