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Editorial

SHRINKING EMPLOYMENT OPPORTUNITIES

One of the economic disasters in the country is negative growth of employment. The successive Governments have been boasting of the GDP growth which is not at all reflected in the commiserating creation of jobs. It is paradoxical that the existing employments have shrunk over the last 2 decades. The Government has failed to come out with specific plan of action for the purpose of creating job opportunities in all sectors of the economy. The orchestra of the digital revolution by the Government and all the sectors of the economy has only resulted in throwing out the existing workforce in almost all sectors of the economy.The service industry, the manufacturing industry, the agricultural industry etc., have all suffered a major set back in regard to the employment opportunities due to the fact that the technology has destroyed the human labour to a maximum extent. The online onslaught in providing service in all walks of life is a great threat to the retail and whole sale service providers in the country. It is feared that the present infrastructure with brick and mortal ensuring show casing of almost all products which are in use by the common man will disappear in a phased manner with the technological revolution providing online trading of almost all products and services in the country. The online trading will prove to be a monster as regards destruction of employment opportunities for millions and millions of people from the service sector.

The banking, the services in the Public Sector Units, the Governments Departments, the railways, the conventional industries such as garments, the cottage and village industries depicting traditional art and culture of the artisans etc., the defense, the educational institutions, the agricultural and small scale operations, large scale operations in the manufacturing sectors were considered as the potential employment generating institutions to take care of the youths coming out of the educational institutions. The menial jobs have also suffered to a large extent due to the outsourcing of the jobs by both the Private as well as Public sector institutions in the country.

Yet another challenge that we are confronted with is the destruction of permanent jobs in the country. The permanent employments have come down drastically even where the Government has control over such institutions. The Private Sector including the Multinational companies are totally averse for creation of the permanent employment in the country

There is a system of recruitment through the private operators who interview

conduct examination etc., and provide a list of the names to those institutions who require employees to work in their institutions. These workforce which is now in a large number are deputed by these recruiting agencies which will conduct the interviews and select the required number from time to time and they will be provided to the various institutions who will use them purely on a contractual basis with a fixed amount. It is astonishing to know that when the regular employees in the same institution will be getting an emolument to the extent of ₹.30,000/- to ₹.40,000-/ as a starting pay, the employees who have been recruited from outsourcing agencies will get an amount of ₹.12,000/- to ₹.15,000/- with no job continuity and most of them will get removed from service within a period of 1 to 3 years without any improvement in the remuneration. A major chunk of youths who pass out from the colleges are recruited on this basis. The Social Security Measures such as Provident Fund, the ESI, Gratuity etc., are totally denied to them due to the unfair labour practices prevailing in most of the institutions. The employer does not want to take any responsibility towards these recruits and will get fresh batch of recruits from time to time so that the earlier recruits will have to fend for themselves when they are asked to leave the jobs. To-day, there is no law governing this type of recruitment in the bigger establishments.

The Government is one of the major beneficiary of these type of recruitment. The States Governments have recruited a huge number of graduates on stipend basis and they continue to work for years without any benefits that are available to the permanent Government employees in different states. The Government also will hand over several functions to the contractors by inviting tenders from time to time who will recruit their own staff on a meager remunerations and thus the permanent employment is totaly destroyed in the State and Central owned establishment in the country.

The Railways which was also a big employer has now started handing over several operations to the private sector who will recruit employees on temporary basis and pay very meager salary to all of them.

The Central Government is responsible for fixing minimum national wages so that no employer will pay less than the minimum amount fixed under national wage policy. The Government do not have will power to bring a strong legislation insisting for the minimum wages to the labour in the country. The Government also do not intend to regulate the employment on contract basis taking place all over the country.

The Public Sector Units apart from the Banking and Insurance was providing huge opportunities to the youth who pass out of the educational institutions. There were 300 Public Sector units which not only ensured the welfare of the working class in the country but also were models for others in providing welfare facilities to the labour in the country. With the continuous attack on the Public Sector and closure of several good managed Public Sector Units, to-day there is no yardstick for measuring a model employer. Even these institutions have now resorted to reduction of job opportunities and also outsourcing several tasks in these institutions to the private operators on contract basis.

The Government should own the responsibility for creation of jobs not only in their own establishments but also elsewhere on a permanent basis. The unrest which is prevailing to a large extent in the industrial cities and also the urban cities is mainly due to the absence of job opportunities and protection to the labour who are migrating from the interior parts of the country. The social unrest which is cropping up everywhere due to these developments should be taken care and appropriate remedial measures will have to be adopted to avoid frequent disturbtances in the society in different parts of the country.

The Government should also intervene in regard to the employment provided by the private agencies since the Government was having a

well knit employment exchanges under the labour departments in the earlier days which were catering to the needs of the common man in almost all parts of the country. The open market recruitment which initially created lot of hopes is now afflicted by several unfair labour practices by the employment providing agencies as well as the contractors who recruit workers on contract basis. The regulatory mechanism to tackle the unfair labour practice should once again be revisited by the Government and appropriate measures are taken to strengthen the labour department to avoid unfair labour practices in the country.■

EASE OF DOING BUSINESS WILL BECOME EASIER ON LABOUR REFORMS

In order to streamline labour laws, the Government has decided to go for much awaited labour reforms. And in this process the Union Cabinet has already approved the Wages Code Bill. The Government has proposed to remove the multiple labour laws and replace them with four sets of labour Codes. This will ensure the process of registration, filing of returns and standardisation of labour definitions, which will ultimately result into less disputes. In this exercise 44 labour laws will be reduced to 4 broad Codes.

With the clearance of the wages Bill by the Union Cabinet, it will pave the way for its introduction in the ongoing session of Parliament. The Government has thus sent the signal to reform India's labour policies, widely considered a difficult and potentially controversial second- generation reform. The Government hopes to clear the bill at the earliest as it has already undergone the scrutiny of a Parliamentary Standing Committee after it was first introduced by the NDA Government in August, 2017. Union Minister for Information and Broadcasting Prakash Javadekar confirmed that the Cabinet has cleared the bill and that the Governrnent would share details of the legislation after tabling it in Parliament. While the current minimum Wages Act and the Payment of Wages Act apply only to employees engaged in certain kinds of jobs, the Code on Wages allows provisions of minimum wages and payment of wages to cover employees in both the organised and unorganized sectors. The bill also allows payment of wages by depositing the same in the bank account of the employees, electronically or by cheque.

The Wages Code was of originally envisaged during the UPA era and it replaces four existing laws, the payment of Wages Act, 1936, the minimum Wages Act, 1948, the Payment c! Bonus Act 1965, and the Equal Remuneration Act, 1976. The legislation allows the Central Government to decide the national floor rates for wages in some sectors including the railways and mines, while the State Governments can Decide the minimum wages for others. And it sets the overtime rate at twice the standard wage rate. The Centre is also going to recommend a 'national minimum floor rate and states cannot pay less than this. The bill also allows the Centre to set different national minimum wages for different parts of the country. The bill says that minimum wages must be revised by the central or State Governments every five years.

Among the changes suggested by the Standing Committee were to remove the distinction between 'employees; and 'workers', and to eradicate gender discrimination not just in wages but also in recruitments and transfers. As on today, the situation is 'employees' (those in managerial and administrative roles) and 'workers' (others) are defined and it is expected that this definition will remain unchanged.

The UPA Government had originally planned to simplify the complex and archaic labour laws into just four Codes. The plan, however, could not see the light of day as the Congress-led coalition, surviving on outside support didn't have the numerical strength to push labour reforms through Parliament. The NDA Government's first attempt in the area of labour reforms in 2017 was also met with similar opposition. Rationalising the labour laws was seen as such a cumbersome and politically risky work that even in the era of economic liberalisation in 1991, the labour sector remained untouched.

The Wage Bill was introduced in the Lok Sabha in August, 2017 but lapsed at the end of the 16th Lok Sasha because it was not possible to muster enough support from the Rajya Sasha. Now when things have become more favourable for the changes, it is expected that it will go through without any hitch and hindrance. Wage and other three codes are aimed to further enhance the ease of doing business in the country, one of the pet projects of Prime Minister Narendra Modi. In the President's speech to the joint sitting of both Houses last month, President Kovind remarked, "Work is underway in full earnest to transform India into a Global Manufacturing club. Keeping in view Industry 4.0, a New Industrial Policy will be announced shortly.

In 'Ease of Doing Business', India has leapfrogged 65 positions during the past five years, from a ranking of 142 in 2014 to 77. Now our goal is to be among the top 50 countries of the world. In order to achieve this process of simplification of rules will be further expedited in collaboration with the States. In this sequence, necessary amendments are also being brought in the Companies Law." The four Codes — wages, industrial relations social security and industrial safety & welfare—will also protect the rights of workers.

The Luddite trade unions, as they are in India, suffer from the mental blocks and they resist any change in the status quo. The Wage Code Bill, therefore is bound to get opposition from the trade unions but this has been welcomed by and large by all stakeholders with some reservations and misgivings. For instance, Confederation of Indian Industries (CII) wants that state should have more powers to have minimum wages because in its view the concept of National Minimum Wage will affect job creation. The minimum wages should be decided on the basis of three criteria, geographic location, skill and occupation. It has also suggested that the Government should fix the minimum wages for unskilled workers, but the wages of skilled and semi-skilled labour force should be left to be determined by market forces. There is a section which has also called for a comprehensive employment mission and setting up of an inter- ministerial and all State National Employment board to drive job creation in the country. The National Employment Board should have the representatives from the ministries, State Governments, industry experts and trade unions.

In India the labour is included in the concurrent list which implies that both the central and State Governments can make laws, but the implementation of laws is squarely on the State Governments. Currently, the Minimum Wages Act allows the State Governments flexibility in deciding when to revise as long as it is not more than five years.■

H.L. Kumar Advocate

INTERPRETATION OF SECTION 4 (5) OF PAYMENT OF GRATUITY ACT, 1972 ; BETTER TERMS OF GRATUITY, THE DOCTRINE OF BLUE PENCIL AND LEGAL PERSPECTIVE : AN APEX JUDICIAL DICTUM

PRELUDE: The esteemed readers of this journal are aware of the fact that Payment of Gratuity Act. 1972 is a social welfare legislation. While interpreting any of the proviso of the Act, if two views are found out, that view, which advances the policy of the statute, should be adopted. Alternatively, the proviso of the Act should be interpreted in such a manner that it benefits the working class. What is the universe of the benefit to be extended to the working class by way of interpretation? What is the scope of such interpretation? Whether such an interpretation is illimitable and can be applied irrespective of the nature of the case? Now, I am confronted with a situation wherein one of my officers has awarded a gratuity of nearly 24 lakhs to a retired officer of a Gramm Bank in Jharkhand State. What he has done is very strange viz. by going through some judgments delivered by some junior officers and also some senior officers he has take best parts from the gratuity scheme of the bank and the Act and awarded ' 24 lakhs which is unprecendented. While delivering a judgments the authorities should necessarily see the following:

1. Whether the organisation in question can afford

such huge amount?

2. The nature and size of the organization and its profitability.

3. The nature of job performed by the employee and the scale of operation and size of the firm.

4. Whether the job/function of the employees of the Gramm Bank are exactly the same as in the case of the sponsoring banks? This is due to the fact that Rural Banks' operation is confined to rural areas whereas the sponsored banks have global presence. In such a situation there is a wide variance in nature of jobs and also level of responsibility.

5. The Authorities are not there to do charity at the cost of tax payers' money and to get 5 minutes bravado that they are concerned about the workers.

6. What is the provision of law and the proviso of regulations of the Gramin Banks. If according to the regulation the employees get some more amount that is all. Better terms of gratuity does not mean two and half times of the gratuity. There should be resonability. The P G Act, 1972 has not told what should be the quantum of gratuity under 'better terms".

It is giver who should decide. In my opinion the ideal amount is 20 to 25% more than the Act. None in this country gets such amount of huge gratuity. To my knowledge only SAIL gives ₹ 20 lakhs as gratuity to its employees who are within the wage bracket.

Therefore, the Authorities should do some empirical studies. It is not that easy or child's play to become a Quasi-judicial Authority. In Raipur, there was an ALC (C) who was giving very ultra socialistic judgments. When Employers used to tell that the Hon'ble Supreme Court has told like this, in reply, very shamelessly he would say that "we do not go by Supreme Court judgments, we by the Act"

7. The spirit of beneficial legislation does not mean to grant huge amounts which may ruin the industry.
8. There can be two rules for officers and employees as per the Regulation as the Regulation is a "law" within the meaning of article 13 (3)(a) of the Constitution of India. If an organisation make two Regulations on gratuity for officers and staff members where is the inconsistent or incongruency? Whether any law or our Constitution has barred any law/rule making Authority to have different laws for officers and non-officers?!!!

9. The Authorities under the Act can declare 'what the law is, not what the law ought to be. What the law ought to be is the work of legislature. The Authorities should not venture to usurp the power of the legislature.

10. I remember one episode in NLI where we were undergoing training in 2001.There was ALC(C) from Dhanbad. At that time sweeping, cleaning was a prohibited category of employment but' he granted a licence to a contractor for the same job. He was flaunting himself as to how he did it. He told that he advised the contractor to write in application under head, nature of job "disposal of biological wastes".

That means there are such authorities who do not hesitate to flout the law for their personal benefit/ gain. In our system we have such officers. With such morally bankrupt officers how the system can deliver justice!!!

In the year 2007, a case came up before the Hon'ble Supreme Court of India, in Civil Appeal No. 4327/ 2006 between Beed District Central Co-operative Bank Ltd. v. State of Maharashtra and others.

In this case, the Hon'ble Supreme Court had the occasion to interpret the statutory meaning of section 4(5) of Payment of Gratuity Act, 1972 which pertains to 'better terms of gratuity'. The author feels that it would be quite appropriate to reproduce the pedagogy of section 4(5) which reads as follows:

"Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer"■

By...Ajaya Kumar Samantaray
Deputy Chief Labour Commissioner (Central),
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SUCCESS COMES TO THOSE WHO DARE AND ACT

GOVT MOVE TO DEFINE WAGES IN EPF ACT MAY LEAD TO MORE CONFUSION: EXPERTS

The government's efforts to clarify what constitutes wages in the proposed amendments to the Employees' Provident Funds Act could potentially lead to more confusion and also litigation, according to experts, even as there is growing opposition to the proposed move to allow EPFO subscribers opt for the National Pension Scheme.

Code on Wages 2019

Hoping to bring uniformity with the Code on Wages 2019, which was recently passed by Parliament, the Ministry of Labour and Employment has introduced a new definition of wages in the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019.

The new definition would replace the existing definition of 'basic wage'.

"In the present form, the computational basis for determining provident fund contribution is basic wage, daily allowance, and retaining allowance.

"The amendment seeks to fix computational basis at 'wage' with the further stipulation that allowances paid above 50 per cent or as notified percentage of all remuneration will be included in wage," the ministry has explained in a note on the preliminary draft of the Bill.

"With the passing of the Code on Wages 2019 and the assurance of the government to have uniform simple definitions that are easy to understand and implement... but the revised definition of wage in the wages code does not bring any clarity since what is covered and what is not covered has not been defined," said the Employers' Association of India (Delhi) in its representation to the ministry.

It also noted that while the first part of the definition says wages would include all remuneration, the second part makes exclusions, pointing out there is need for more clarity.

Noting that the alignment of the definition of 'wages' with that of the Code on Wages 2019 is a prudent step from the perspective of ensuring consistency among various labour laws, Vikram Shroff, Head, HR Laws Practice, and Preetha S, Leader, HR Laws Practice at Nishith Desai and Associates, said it is likely to continue posing challenges in terms of what allowances would be subjected to PF contributions. "This question would become more pertinent especially in situations where the allowances are such that they have not been specifically included or excluded under the new definition," they said.

BMS up in arms

The Bill also proposes to insert new sections in the Act to give option to EPFO subscribers opt for NPS in the light of an announcement for the same in the Union Budget 2015-16.

The Bharatiya Mazdoor Sangh, on Thursday, said it has rejected the new amendment in a tripartite consultation meeting of the Labour Ministry held at Delhi, which was chaired by Labour Minister Santosh Gangwar.

BMS also opposed dilution of the latest Supreme Court judgment on the question of inclusion of allowances in calculation of contribution, it said.■

Source: Business Line, dated 27/9/2019

SHIFT WORK TIED TO POOR MENTAL HEALTH, SUGGESTS NEW STUDY

People who work night shifts or varied schedules that disrupt their sleep may be more likely to develop depression than individuals with 9-to-5 jobs, a research review suggests.

Researchers examined data from seven previously published studies of work schedules and mental health involving a total of 28,438 participants. Overall, shift workers were 28% more likely to experience mental health problems than people with consistent weekday work schedules.

"We know that shift-work alters the circadian rhythm, that is our normal sleep-wake cycle which matches day-night cycle," said Luciana Torquati, lead author of the study and a researcher at the University of Exeter in the UK.

"This disruption can make people moody and irritable, and lead to social isolation as shift-workers time-off matches family and friend's work and life commitments," Torquati said by email.

In particular, the study found, shift workers were 33% more likely to have depression than people who didn't work nights or irregular schedules.

Shift workers also had a higher chance of developing anxiety, but in this case the difference was too small to rule out the possibility that it was due to chance. Women appeared particularly vulnerable to the negative mental health effects of shift work, researchers report in the American Journal of Public Health.

Compared to women who worked consistent weekday schedules, women who worked nights or split shifts were 78% more likely to experience adverse mental health outcomes.

Men, however, didn't appear to have an increased risk of mental health issues when they worked nights or irregular schedules.

The study wasn't a controlled experiment designed to prove whether or how work schedules might directly impact mental health.

It's possible that people with poor mental health wound up in jobs with irregular schedules, rather than developing mood disorders after they started working nights or inconsistent shifts.

Even so, the results suggest that workers and employees should be aware of the potential for work schedules to impact mental health, Torquati said.

"Your brain is programmed to sleep during night hours (absence of light) to recover from all the information it has processed during the day," Torquati said. "Conversely, day light tells your brain it's time to be awake and process information."

"With shift-work you turn this cycle upside down: process information & being awake at night, sleep during the day, and this means that body functions that follow such cycle are disrupted," Torquati added. "This disruption of functions can result in irritability, nervousness, depressed mood, and ultimately mental disorders.■

Source: Business Standard. Dated 29/9/2019

TIME TO HIKE BANK DEPOSIT INSURANCE COVER

The recent PMC bank crisis has raised questions about the problems in the India's financial sector. Let us, however, emphasise that Indian banks are sound and are largely protected from the global vagaries given the very nature of regulations. For example, money markets in India are shielded from global spillovers by statutory liquidity ratio (SLR) requirements, allowing banks to get access to central bank liquidity as well as to secured markets, thus obviating a collateral constraint. Furthermore, banks largely fund themselves through retail deposits rather than wholesale funding, a source of vulnerability to external contagion.

Insured deposits

Time is now appropriate for some changes in the financial market architecture. Studies suggest that

since 1993, there has been a paradigm shift in the profile of customers and the conduct of business by banks. Over the years, the level of insured deposits as a percentage of assessable deposits has declined from a high of 75% in FY82 to 28% in FY18. Given this backdrop, there is a dire need to revisit the insurance coverage of bank deposits.

The current upper limit of Rs 1 lakh per depositor has outlived its shelf life and there is a need to revisit it. Further, the composition of the bank deposits has undergone massive changes. The Deposit Insurance and Credit Guarantee Corporation (DICGC) coverage should be revised and bi-furcated into two categories: 1) Desirable coverage of at least Rs 1 lakh for savings bank deposits (around 90% of the total SB accounts) and 2) desirable coverage of at least ₹ 2 lakh for term deposits (around 70% of the total TD accounts).

Senior citizens

There should also be a separate provision for senior citizens. This revision in DICGC coverage becomes all the more desirable in the Indian context, where senior citizens / retired people have no social security in place and mostly keep fixed deposits for earning interest income. Apart from this, it is also suggested that depositors should get an incentive to spare a part of their total deposits to buy Bank Bonds that provide guaranteed coupon rates on a half yearly basis and are tax free. This will herald a new paradigm in the Indian deposit banking sphere, since tax free and guaranteed payments of a certain income will do much to encourage depositors to come forward with offers to provide a part of their savings in exchange for the shares in the banks.

For problems in the NBFC sector, time has now come to think of an NCLT-like framework to enhance investor confidence and provide a fillip to lending to the NBFCs. However, this must be done in conjunction with identifying NBFCs with a weak balance sheet and working on a quick resolution. This could be, say, facilitating an ownership change or bringing in a financially strong promoter. In 2017, the government introduced "The Financial Resolution and Deposit Insurance (FRDI) Bill" in Parliament but has withdrawn it in 2018 due to the bail-in clause and mass protest across the country. We believe that the government should again promulgate the FRDI bill without the "bail-in" clause since, in India, the average income of a vast majority of depositors is modest.

(The writer is group chief economic adviser, SBI. Edited extracts from SBI Economic Research Department's report: 'Time for a hike in deposit insurance and a resolution platform for NBFCS?')■

TREAD WARILY ON PRIVATIZATION

The government's privatisation drive seems poised to move into higher gear.Itis pushing ahead with the sell-off of Air India. It has also announced strategic sales — or the sale of a controlling equity stake — in five public sector units (PSUs) including profitable companies such as Concor and Bharat Petroleum Corporation Limited (BPCL).

The reforms brigade is cheering wildly. The government must be careful not to get carried away by the applause. Privatisation that is not carefully designed does little to help the economy — and it can be politically costly.

Take the case of Air India. There was much carping over the government's failure to sell in the last attempt. It is plausible that the attempt failed precisely because the deal was correctly structured. Privatisation has a higher chance of success where assets are under-valued and the buyer stands to reap windfall gains. The sweetener snow proposed for the Air India sale promise to do just that— confer windfall gains on the buyer.About half of the ₹ 59,000crore of debt of Air India was transferred last year to a special purpose vehicle. Of the remaining debt, another ₹.15,000crore is now planned to be moved out. With some of Air India's debt moved out of its books, bidders will offer a higher price than they would have done otherwise. This may make for good optics — the public may get the impression that a good price is being paid for Air India. However, from the point of view of the fisc, it is the sale value net of debt taken over by the government that counts.

Analysts and opposition parties will not be taken in by the sale value for Air India alone.

Another sweetener planned is selling 100 percent of the government's stake at one go. Nothaving the government as an equity owner in Air India will certainly appeal to potential buyers. However, it's not the best way to maximise revenues for the government. The point about selling in tranches—after selling a controlling stake at the outset— is that it makes for better price discovery. As performance improves with time, the government can earn more on its residual stakes. For this reason, share issue privatisation, where there is gradual disinvestment of the government's equity, has been preferred worldwide to asset sale, that is, the sale of all or a significant government stake at one shot.

The sweeteners proposed could well come to haunt the government. The government faces two other challenges in completing the sale. It as to ensure that Air India's valuable real estate is moved off the books prior to the sale. It also has to find ways to address job security and benefits of Air India's employees. Ignoring either can invite a serious political backlash.

The primary argument for privatising Air India is that a government-owned airline will make repeated demands on the exchequer. This is not such a compelling argument in an economy in which the public sector dominates banking. Several private airlines have gone bust, inflicting huge losses on the public sector banks that financed them. In the Indian economy, there is a cost to the tax payer regardless of whether an airline is publicly-owned or privately-owned.

What is missing in the current drive towards privatisation is a rigorous conceptual framework. It does not suffice to say that the government should not be in business. We need to be clear about what we want privatisation to achieve. Privatisation is driven by one or more objectives: Increasing efficiency in the economy; raising revenues for the government and bridging the fiscal deficit; promoting the development of the capital market; increasing private initiative in the economy in general. The last two objectives have been substantially met in the decades following economic liberalisation in 1991.

It is the first two objectives that are relevant to the Indian economy today.

If efficiency improvement is the primary objective, it is the more inefficient and loss-making PSUs that should be privatised. Yet, the proposal now is to privatise well-run and highly profitable companies such as Concor and BPCL. The major goal clearly is bridging the fiscal deficit at a time when tax revenues are running way below projections for the second year running. It's all about selling the family silver.

Those with long memories will recall the recommendations of the Disinvestment Commission (DC), set up in August 1996 and headed by G V Ramakrishna. The DC came out with a series of reports that provided a framework for disinvestment, strategic sales and restructuring of PSUs. Two recommendations of the DC are worth recalling.

One, the disinvestment process should be de-linked from the Budget and, indeed, the proceeds of disinvestment must go into a disinvestment fund that would be used for restructuring PSUs and creating assets in rural areas. Two, there should be no strategic sale in "core" industries (such as the oil sector) or in the cases of the bigger, blue-chip PSUs.

The DC was informed by the philosophy that the public sector should be strengthened, not dismantled. The first National Democratic Alliance (NDA) government under Atal Bihari Vajpayee appeared to move away from this philosophy by pushing for strategic sales of PSUs. Following the NDA's defeat in the general elections of 2004, Shiv Sena chief Bal Thackeray remarked bitterly that he had warned the government against the political costs of overdoing privatisation. One wonders whether old-timers in the Sangh parivar will resurrect the warning after the results of the two recent Assembly elections.■

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2019-II-LLJ-151 (Mad)
LNINDORD 2019 BMM 135
IN THE HIGH COURT OF MADRAS
Present:
Hon' ble Mr. Justice G.R. Swaminathan

W.P. (MD) No. 2186 of 2009 **4th January,2019**
P. Perumal **Petitioner**
Versus
Presiding Officer, Labour Court, Madurai and Another **Respondents**

Backwages — .Ex grata and Gratuity Benefits - Payment of Gratuity Act -Petitioner-workman dismissed from service on ground of misconduct - On dispute raised by Petitioner, Labour Court directed reinstatement to workman, however, denied backwages, hence this petition — Whether, Petitioner entitled for grant of backwages-Held, Labour court held that charges framed against workman did not stand and set aside findings of enquiry officer – On other hand, Labour Court observed that Petitioner was negligent — No basis for finding of Labour Court that Petitioner gainfully employed elsewhere – Labour Court laboring under erroneous impression that Petitioner still having few years of service ahead — Labour Court not in-formed that Petitioner already reached age of superannuation on date when award passed, therefore, relief granted by Labour Court was of no consequence – Petitioner must be deemed to have been in service for long period and entitled to retirement benefits and consequential benefits such as gratuity - Respondent no. 2 directed to quantify benefits such as gratuity, etc. payable to Petitioner and pay same within certain period - Management directed to pay backwages as ex gratia to Petitioner Petition partly allowed.

ORDER

The Writ petitioner Thiru. P. Perumal was employed as a watchman in the second respondent mill. He joined service in the year 1981. While so, he was issued with a charge memo that on 19.12.1996, he had allowed a vehicle bearing Registration No.TN 59-D-1246 to take out two more cone bags instead of the permitted 76 cone bags. Alleging that it would actually constitute a misconduct in terms of the standing orders, action was taken against him. After conducting the domestic enquiry, he was dismissed from service by order dated 27.05.1997. The Writ petitioner raised an industrial dispute. It was taken on file by the Labour Court, Madurai, in I.D.No.65 of 1998. The Labour Court by award dated 22.12.2008 came to the conclusion that the punishment imposed on the Writ petitioner was liable to be set aside. It also came to the conclusion that the finding of the enquiry officer with regard to the claim of the Writ petitioner was not sustainable in law. However, the Labour Court made an observation that there was some negligence on the part of the Writ petitioner. Therefore, the Labour Court also surmised that the Writ petitioner/workman would have been gainfully employed elsewhere. In that view of the matter, the Labour Court while directing reinstatement to the workman, denied him backwages. This award is challenged at the instance of the workman. It is to be noted that the mill management did not choose to question the award.

2. Heard the learned counsel on either side.

3. The learned counsel appearing for the Writ petitioner pointed out that the case on hand is rather peculiar. The Writ petitioner reached the age of superannuation on 12.10.2008. The award itself came to be passed only on 22.12.2008. Neither the learned counsel appearing for the workman nor the learned counsel appearing for the management informed the Labour Court about the fact that the workman had already reached the age of superannuation by then. Under the impression that

the workman can be still employed by the mill management, the order for reinstatement was made. Obviously the said order for reinstatement was not feasible of compliance. The only issue that is to be considered is whether the Writ petitioner ought to have been awarded backwages or not.

4. The learned counsel appearing for the Management placed reliance on the decision of the Hon'ble Supreme Court reported in Kendriya Vidyalaya Sangathan and Another v. S.C.Sharma CDJ 2005 SC 157: AIR 2005 SC 768: (2005) 2 SCC 363: LNIND 2005 SC 35. In the aforesaid decision, the Hon'ble Supreme Court held as follows:-

> "14. In P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar JT 2001 (1) SC 336, this Court found fault with the High Court in setting aside the award of the Labour Court which restricted the back wages to 60% and directing payment of full back wages. It was observed thus:
>
> 'The Labour Court being the final Court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recovered with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect.'

Again at paragraph 12, this Court observed:

'Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety.'

> 15. The position was reiterated in Hindustan Motors Ltd., v. Tapan Kumar Bhattacharya and another (2002) (6) SCC 41, Indian Railway Construction Co. Ltd., v. Ajay Kumar (2003) 4 SCC 579 and M.P. State Electricity Board v. Jarina Bee(Smt.) (2003 (6) SCC 141.
>
> 16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in this regard.

5. According to the learned counsel appearing for the management, the aforesaid decision of the Hon'ble Supreme Court is squarely applicable to the case on hand. It is true that the Writ petitioner/ workman did not examine himself as a witness before the Labour Court. He contented himself by marking certain documents, namely, Ex.W.1 to Ex.W.4. Even in the I.D. petition, the Writ petitioner had not claimed that he was not gainfully employed elsewhere, after he was dismissed from service by the mill management. Of course the Writ petitioner had claimed in the I.D. petition that he should be paid backwages. Unfortunately, even in the affidavit filed in support of the Writ petition, there is no claim that he was not gainfully employed elsewhere.

6. No doubt, the stand of the learned counsel appearing for the management is that the backwages cannot be ordered as a matter of course and that the claimant will have to make out a case, is correct and sound. It is further fortified by the aforesaid decision of the Hon'ble Supreme

Court. But then, this Court will have to take into account the totality of circumstances. The Labour Court came to the conclusion that the charges framed against the workman do not stand. The findings of the enquiry officer were set aside. The punishment imposed on the workman was also nullified. The Labour Court ought to have stopped with the said finding. On the other hand, the Labour Court observed that the Writ petitioner was negligent. There is also absolutely no basis for the finding of the Labour Court that the Writ petitioner could have been gainfully employed elsewhere. The Labour Court was labouring under the erroneous impression that the Writ petitioner was still having a few years of service ahead. The Labour Court was not informed that the claimant had already reached the age of the superannuation on the date when the award was passed. Therefore, the relief granted by the Labour Court was of no consequence.

7. The Writ petitioner joined service in the year 1981. He reached the age of superannuation on 12.10.2008. Since the Labour Court had ordered reinstatement by setting aside the order of dismissal, the Writ petitioner must be deemed to have been in service for a period of 27 years. He is therefore entitled to retirement benefits and consequential benefits such as Gratuity, etc. It would be most unfair to relegate the Writ petitioner to go before the controlling authority under the Payment of Gratuity Act, for claiming his Gratuity benefits. Since these facts are beyond dispute, this Court directs the second respondent/ mill management to quantify the benefits such as Gratuity, etc. payable to the Writ petitioner and pay the same within a period of four weeks from the date of receipt of a copy of this order.

8. Even though this Court holds that the Writ petitioner is not entitled any backwages, the petitioner cannot be allowed to return empty handed. The petitioner even according to the Labour Court, was unjustifiably dismissed from service. He may not be entitled to backwages. He must be entitled to some benefit as ex gratia. This Court therefore directs the management to pay 25% of the backwages as ex gratia to the Writ petitioner.

9. With these directions, the Writ petition is partly allowed. No costs.■

Petition partly allowed.

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