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JUDICIAL RESPONSE ON IMPACT OF NEW INDUSTRIAL POLICY, 1991 ON INDUSTRIAL RELATIONS

Following the onset of new liberal Industrial policy regime, the workforce in the organized sector of the industrial economy is gradually shrinking and the size of the unorganized sector is expanding.

The profile of the unorganized sector had also undergone certain structural changes over the period. At the initial stage of development, unorganized sector workforce had been mainly engaged in occupations of low-skill, mostly manual jobs in traditional sector, basically different and demarcated from the mechanized production process. The unorganized sector was normally understood as the sector/occupation not usually covered and governed by the industrial and labour related legislations, of course with exceptions. And such exceptions were created by the unionized workforce of that segment of the unorganized sector bringing some relief to the workforce of that segment.

The process of industrialization also developed, in a phased manner, certain occupations in the periphery of industries which were also broadly of the same nature as unorganized

sector occupations but having backward linkage with the activity of the industries at the center. And as the process of industrialization advanced, a new segment of workers gradually emerged within the boundaries of the organized sector industries themselves with fragile and temporary working conditions without much legislative protection. They were being deployed on contract under contractors and subcontractors and though operating within the organized sector, were and are being bracketed as unorganized sector workers owing to the very fragile character of their service conditions.

The vast unorganized sector economy of our country thus reveals a mix of workers of traditional sectors basically dominated by manual labour like beedi, loading/unloading, cashew and coir, leave-plucking, handloom, low-end transport like rickshaw-pullers, manual segment of construction, stone-quarries etc along with unorganized segment of contract and temporary workers of various forms within the framework of organized sector industries. The new liberal Industrial Policy regime is operating to inflate this segment of industry-related unorganized workforce enormously through aggressive pursuit of contractorisation of various forms.

8.1. BEFORE LIBRALISATION

Contractorisation have been spreading fast leading to casulization of majority of the workforce and introduction of 'hire & fire' through backdoor. Such fast track contractorisation and casualization of workplace have led to serious deterioration of the work environment, posing a severe threat to the trade union movement, which it could ignore only at their peril.

The character of contract system has undergone a sea change in the post liberalization period. Prior to onset of new liberal policy regime too, the contract system of work had been widely resorted to in the industrial economy. In fact from the mid-sixties onwards proliferation of contract system surfaced as a prominent phenomenon in the industries in particular, both in public and private sector.

The organized trade union movement reacted effectively against this devise of exploitation through direct industrial action and through judicial forum in the process of which the Contract Labour (Regulation & Abolition) Act 1970 came into being. This act provided for prohibition of deployment of contract worker in permanent/perennial nature of job in any enterprise on the one hand and also reiterated coverage of the contract workers by all labour laws along with making the principal employer responsible for regulating the service conditions of contract workers as per

the laws of the land. Through contract system, the employers sought to make the employment relationship between the principal employer and contract worker indirect and vague, thereby evade responsibility and extract bigger surplus by taking advantage of their fragile service condition and indirect and vague, thereby evade responsibility and extract bigger surplus by taking advantage of their fragile service condition and indirect employment relation with the main employer.

But, under the Contract Labour Act, the triangular employment relationship between the principal employer, the intermediary contractor and the contract worker had been given a recognition thereby making the principal employer responsible for regulation of the service condition of the contract worker on the one hand and seeking to restrain deployment of worker on contract in permanent and perennial nature of jobs on the other.

The Contract Labour (R & A) Act 1970, despite many procedural limitations and loopholes and ineffective implementation by the enforcement authority, could serve some purpose in empowering the organized segment of the contract workers movement to gain many rights including regularization in many places. This Act also paved the way for many landmark judgments by the judiciary at different levels in favor of workers rights in the seventies and eighties.

But the moot point is that during the pre-liberalization period, at least till early eighties, the contract workers were being mainly deployed in peripheral and low-skilled work in any industry/enterprise, although many of those peripheral works had been permanent and continuous in nature. Normally in the core operational jobs in any enterprise, deployment of contract workers was not that widespread. And in this background, through direct organized struggle and also through judiciary, large section of the contract workers deployed in permanent/perennial jobs got regularized in many sectors such as steel (Durgapur, IISCO, Rourkela, Bhilai canteen workers etc.) civil aviation (Air India, Indian Airlines, Airport Authority), electricity (State Electricity Boards in Haryana, Himachal Pradesh and some other states), transport etc. [144]

8.2 AFTER LIBERALISATION

Following the liberalized policy regime, in the nineties, the character of deployment of contract worker within the enterprise/industry has undergone a drastic change covering also the core operational jobs. At the same time the whole work-organization has undergone a restructuring and decentralization in phases drastically increasing the share of workers with indirect employment relationship with

[144] *Gupta S.P. – Liberalization its impact on Indian Eco*

the principal employers in the total workforce in any production process. Principal employer here is the entity that is the ultimate recipient of the benefit of the production process in its final form.

Above phenomenon has given rise to broadly two different types of situation. One, in any industrial unit/establishment the share of temporary workers of various forms and names (contract, temporary, contingent etc) in the total workforce has increased substantially, in many places crossing the number of regular workers. These temporary workers are being deployed either through contractor or supplied by various employment agencies to any establishment thereby making the employment relationship with the owner of that establishment totally indirect.

As for example, the security and watch & ward jobs in majority cities in almost all public sector units in the country are being manned mostly by private security an agency deploying on 12 hours shift and the principal employer, the ultimate recipient of the security services has made itself free from even the regulatory responsibility of their unlawful 12 hours deployment. For the workers deployed through contractors, the principal employer has got some responsibility under the still existing Contract Labour Act but when the workers on contract or supplied by outside agencies become the majority of the workforce in any enterprise, the employer can ignore its responsibility

under the law with impunity as is the general phenomenon in the workplace today.

The second type of situation pertains to the decentralization and fragmentation of workplace though offloading/outsourcing/distributing various parts or whole of the production jobs/processes of a particular enterprise to different agencies and marketing of the final product in the brand name of the enterprises after assembling and stamping in the main center or sometimes getting that job done by another separate agency. In all the cases, such agencies are small-scale unites and in many cases they wholly depend on the principal company even for credit of working capital and supply of raw materials.

Many enterprises maintain both the system of decentralized production is also manned by majority of contract workers. Maintenance of both the systems of production helps the employer to bargain with both the decentralized agencies and in-house workers and dictate terms to both the entries. For example all the major footwear companies in the country like Bata, Liberty, Baluja, Taj-shoes etc operates in such two-wing production operation. All the three production units of Liberty Footwear at Haryana, mainly catering to northern Indian market as the have been in shut-down condition since June 2006 but there has been no death of Liberty shoes in the show- rooms of Northern Indian cities since the supply has been coming from the

outsourced agencies. In the automobile, engineering, television production sector etc there are many examples of such contract-offloading or decentralized production system. [145]

Suiting the requirements of the employers, contract employment also has been reflecting different patterns. In steel, engineering, and capital goods sector and also in consumer durables, a kind of job-contract system is emerging, where a part of production process is being off-loaded to another agency at a pre-determined rate for that job and in many cases that agency is carrying on its work in the premises of the principal employer. In this manner the principal employer evades his responsibility towers the workers under the job-contract system, through for all practical purposes, the job is carried on wholly for the principal employer.

The newly emerging decentralized production process should not be confused with the ancillary units of a major production unit. For example, major manufacturing plants of BHEL gets fabrication jobs done through ancillary units but cannot yet conceive of getting its main products like turbine, motors etc produced through a decentralized agency. But in the field of light engineering, electronic gadgets, consumer durables etc, this decentralized

[145] *Ibid 144*

production process of manufacturing different parts of the products and assembling the same in different outsourced agencies has emerged as new phenomenon posing a big challenge before the trade union movement.

The whole profit of the workforce has been changing fast owing to this fast track contractorisation and temporarisation of workplace. Even in public sector units, both at the center and in the states, the proportion of contract/temporary workers in the total workforce have already crossed the 50 per cent mark on the average and in most of the cases the contract/temporary workers are being deployed in core operational jobs.

In mining sector, particularly in non-coal mining, the number of temporary contract workforce is much bigger that the regular workers. In coal mining also owing to leasing and outsourcing the mines to private hands, the numbers of contract/temporary workers are increasing at an alarming pace. In BHEL, contract workers involved in core operation jobs is around 20 per cent of the total workforce and if all types of deployment of contract workers, mostly in permanent perennial jobs, are taken into account they represent almost 40 per cent of the workforce and the number is increasing every day.

In case of petroleum sector, contract-workforce has become almost 70 per cent of total. Coal is another sector where a huge number of contract workers were deployed since beginning in transporting, loading/unloading and various other jobs and since mid-eighties itself, contract workers started being deployed in a big way in core production jobs particularly in open cast mines. And these contract workers mostly deployed in regular production jobs are paid less than one-tenth of what is being paid to permanent workers.

Even in the sector engaged in highly sophisticated and mechanized production process, contract workers are being deployed increasingly in the same shop floor with the permanent workers. Alarmingly, a pernicious trend of reconciling with this monstrous reality is surfacing in the trade union movement at some places. [146]

In the private sector, the situation is far worse. In the private sector units, particularly those, which mushroomed from 1991 onwards, the contract (or non-permanent) workers, represent more than 90 per cent of the workers in the concerned unit. Even in the major large-scale production units like Hero Honda Motorcycles & Scooters Ltd, Speedo ax, Shivam Autotech and Amtech Siccardi Ltd- all located in Gurgaon-Dharuheda area of Haryana, 60 per

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[146] *Ibid 144*

cent workers are on contract/temporary/trainee deployed in regular production work. In Ghaziabad, many industrial units reopened after closing down and retrenching all permanent workers to start production with hundred percent workers on contract with a few supervisory workers in regular grade.

In the national capital at Delhi the majority of the factories in the industrial area of Patparganj, Wazirpur, Kirtinagar, Samaypur Badli, Peeragarhi, Okhla etc engaged much more workers on contract that on regular basis. Same is the situation in almost all industrial areas, particularly in newly emerging ones with active state patronage where the very concept of regular jobs has been practically banished from the workplace. This represent the pattern emerging in the industrial employment in the country, where the right to 'hire & fire' at will is allowed surreptitiously for the benefit of the employers.

The data of employment pattern published by official agencies confirms the above trend. As per NSS data, manufacturing sector in our country employ around 4.80 crore of which only 66 lakhs are in the organized sector and the rest 4.14 crore account for unorganized sector.

Given the type of manufacturing units in our country and its employment pattern, it can well be presumed that overwhelming majority of the unorganized sector

manufacturing employment is of contract or temporary in nature.

In the mining & Quarrying, of the 23 lakhs workforce the share of unorganized sector employment is 13 lakhs all working under various contractors and sub contractors. Construction sector is another segment where unorganized sector employment is ten times more than the regular employment in sector, around 1.65 crore-again mostly employed under various contractors and numerous petty sub-contractors. [147]

The character of contracts as revealed by various official reports reveals that most of the contract workforces in the country are outside the boundaries of legal inspection and scrutiny. The number of contract workers working under licensed contractor's employment is increasing sharply all around. This means sharp increase in subcontracting where subcontractors are mostly unlicensed and therefore evading all legal scrutiny by the labour law enforcement machinery. As per Annual Report (2005-06) of the Union Labour Ministry, the contract workers covered by licenses have declined from 13.27 lakhs in 2002-03 to 9.6 lakhs in 2004-05 and the trend is continuing.

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[147] *Ibid 144*

Quite consistent with this mass scale contractorisation and temporarisation of workforces, the share of labour cost in total cost of production is declining steadily over the year and as per the Report of Annual Survey of Industries it has gone down from 7.84 per cent in 1999-00 to 6.82 in 2003-04. The same Survey also exposed that the average daily wage of the contract workers is around 65 per cent less than the total average daily wage of all workers in the industry. This reflects the pitiable condition of the majority of the industrial workforce in our country.

8.3 PROMOTING INDIRECT EMPLOYMENT UNDER LIBERALISATION

UNDER LIBERALISATION

In fact, segmentation and decentralizations of the production/ operational system emerging under neo-liberal economic regime has led to these changing patterns of employment. The employer-employee relationship is getting more and more vague and abstract and indirect, enabling the principal employer to fully expropriate the fruits of production with the least possible obligation towards the labour, which generates those fruits.

This fragile employment pattern that has been emerging in the post liberalization scenario has its roots in the very character of the new liberal economic order dominated and

governed by the finance capital. Finance capital, extremely mobile in character, seeks to multiply itself faster by nesting on most profitable posts and quest for the most profitable makes it more mobile and speculative. Such restlessness of finance capital also reflects in the behavior of industrial capital as well which operates under finance capitals dominance and sometimes overlaps with it. The industrial capital, thus, besides seeking to take part in speculative activities at available intervals, seeks to adjust all the factors of production including labour with every up and down of the market situation to maximize profit and also to maintain the resources at hand in extremely liquid form. For adjustment of labour force with every up and down of the market, what capital needs is total flexibility, rather fragility of employment relations through outright contractorisation and temporarisation of workforce.

The present trend of changes in the employment relationship, the indirectification and decentralization of production relations, along with growing concentration of economic power and wealth has become the distinctive feature present day neo-liberalism, which represents the most barbarous form of extraction of surplus by the capitalist order.

8.4 MOVE TO CHANGE LABOUR LAWS TO PROMOTE CASUALISATION

The Executive, Legislative and Judiciary together have been nursing such atrocious inhuman employment relationship to gain larger grounds. All the labour laws are being sought to be changed in that direction at the centre point of which remains the motive to completely flexibly the labor market and making the employment relationship as fragile and indirect as possible. The UPA Government is trying to push ahead with its design of bringing pro-employer changes in various labour laws. It has incorporated anti-labour provisions in various Bills already introduced or under process for introduction in Parliament.

In the background of widespread opposition and campaign launched by the trade union movement, the representatives of Left Parties have consistently been intervening against such moves. They have succeeded installing such anti-labor moves in some instances. The Bill on Special Economic Zones and the Small and Medium Enterprises Bill contained retrograde provisions on taking out the workers in the concerned areas/establishments/zones from the purview of all labour laws. Owing to staunch opposition by the Left Parties inside the Parliament, such anti-labor provisions had to be dropped from that Bill before it could be legislated.

There have been some more Bills pending for passage by Parliament, which also contain several anti-labor provisions. The Labor Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Amendment and Miscellaneous Provisions bill 2005, seeks to provide for exemptions to employers in furnishing various returns, registers, statements, mostly pertaining to employees and employment conditions, thus empowering the employers to violate them in a big way. Further the Bill contains a general clause empowering the governments both at the Centre and the states to exempt any establishment from whatever obligations remain with the employers even after various exemptions under the proposed legislation.

In fine, in the name of simplifying forms and procedures, the Bill aims at giving a free hand to the employers to casualties the workforce at will and completes exemption from their substantive obligations under various labour laws. This Bill also has to be stoutly opposed by the trade union movement. [148]

Besides the above Bills already introduced in Parliament, the UPA Government has been working overtime to bring in labour-law-free or 'hire & fire' regime in the workplace in a multidimensional route. Despite repeated chasing, the

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[148] *Ibid 144*

Government has not yet rescinded the notification on "Fixed Term Employment Workman" introduced by the NDA Government, despite an assurance by the Labour Minister on the floor of Parliament in July 2005. in the 40th session Indian Labour Conference held in December 2005, all the trade unions assertively rejected *in toto* the Gov proposals for pro-employer changes in Industrial Disputes Act. Despite this, the Union Labour Ministry had again sought to push through these retrograde proposals in a tripartite meeting held on June 21, 2006, and subsequently in the meeting of the Standing Labour Committee on December 20, 2006, where all the trade union representatives reiterated their rejection of these proposals. The Industry Ministry has again initiated an exercise for developing so called "Manufacturing Investment Zone" (MIR), where all the labour laws will be made ineffective under the dubious garb of 'simplification'. [149]

8.5 ROLE OF JUDICIARY

Side by side the Judiciary has become pro-active to cover-up the failure of the Government to yet bring about the changes in labour laws as desired by the employers. There are numerous examples of apex court's judgments undermining and in many cases nullifying basic labour rights recognized over couple of decades. Not only that, in

[149] *Ibid 144*

many cases, the implication of such judgment has been one of changing the provisions concerned statues instead of disposing of the complaints in terms of those statues. To oblige the capitalist class, the judiciary is now desperately transgressing its boundaries defined by the constitution and usurping the role of the Government in the event of their failure to change the labour laws in favor of capital.

The Apex Courts order setting aside its own judgment on regularization of contract workers (Air India case) while responding to a subsequent petition of SAIL, the judgment in the case Vs Karnataka State Government, denying the daily wage workers working continuously for several years the right of being regularized, and reiteration of similar judgments in all subsequent cases of similar nature reflected in clear manner more a proactive legislature's role by the judiciary than its constitutional role as arbitrator under the existing laws of the land. And all such judgments are aimed at one single point destination-to make the employment relationship permanently indirect and freely adjustable in the interests of capital.

Apparently such developments may be surprising but not an unexpected one. The above judgments reflect endorsement of the ethos of ongoing new liberalism, which domesticates all the wings of the 'State' under the forces of capital. And after all, the judiciary is the inseparable segment of the 'State'. A separate Commission of the 12th

Conference of CITU is dealing the role of judiciary vis-à-vis working class.

Judicial Response regarding Foreign Direct Investment and Globalization *(See, Halsbury's Law Monthly, ed. Jan. 09, available at http://www.halsburys.in/judicial-perspectives.html, last visited on 13/1/10)*

As India is poised to enter the year 2009 in the backdrop of tragic events in Mumbai which have overwhelmed the nation, the importance of Foreign Direct Investment [both inward and outward] and India's pivotal role as an emerging economy in an intensely global world, need hardly be emphasised. Post liberalisation of the Indian economy since 1991, globalisation in the context of Foreign Direct Investment [FDI] has to be seen in the Indian scenario in a dual manner

Regulatory Framework: Foreign Direct Investment

There is a labyrinthine web of laws and policies that encapsulate the FDI policy of the Government of India, ever since the process of liberalisation commenced in 1991. While there did exist various laws and regulations prior to 1991, there has been a manifold increase in the FDI regulatory framework post 1991. One of the primary sources of the regulatory framework of FDI is the *Foreign Exchange Management Act, 1999* [FEMA] accompanied by various regulations and the Circulars and Notifications

issued from time to time by the Reserve Bank of India. The Press Notes of the Ministry of Commerce and Industry of the Government of India also provide the investor with a constant update on FDI policy.

Significance of judicial interpretation and judicial perspectives of the Indian Courts qua FDI and globalisation

While practising this area of law, it has been my experience that the judicial interpretation and judicial perspectives of the Indian courts qua foreign direct investment and globalisation need to be carefully considered while understanding the subtle and occasionally ambiguous nuances in the FDI policy and FEMA. Indeed I would submit that there is a pressing need for clarity in the interpretation of the FDI policy, particularly in certain inevitable ambiguities that unfold while interpreting India's FDI policy. This clarity can, in my view, be sought through judicial interpretation and analysis, which is gradually gaining momentum, as disputes find their inexorable avenue into the area of FDI as well.

Economic policy: a pristine preserve of the Government: Supreme Court of India

It is interesting to note the rather conservative approach of the Supreme Court of India while interpreting the economic policy of the Government of India. The most celebrated case in this context is *Balco Employees Union vs. Union of India and others, [the "Balco case"];* the relevant extract is quoted hereafter: "47. Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed...."

Wholesale trading: B2B: Federation of Unions of Maharashtra and others vs. Union of India *(A Letters Patent Appeal was filed in the Division Bench of the Delhi High Court being LPA No. 458 of 2005. On 11th March 2008, this Appeal and the stay application were dismissed in default and on the ground of non-prosecution.)*

This cautious approach in the *Balco* case has been relied upon by the Delhi High Court in a leading decision of this court on certain aspects of FDI, which is *Federation of Associations of Maharashtra and others vs. Union of India and others*.v Justice Sanjay Kishan Kaul has delivered a detailed exposition of the concept of wholesale trading vis-à-vis retail trading, upholding the right of the Government of India to include the concept of business to business in the definition of wholesale trading while dismissing the Petition of the Petitioner. In the court's pithy observations, the right of the Government to frame its own policy has been reiterated in the following terms:

"64... This being the position, it is the stand of the Government, which has to be given the greatest weight in such matters. There cannot be any knit-picking on this issue of the definition when the stand of the Government has come clearly in its affidavit as enunciated by its clarification. The Government wants B2B sales to form a part of wholesale cash and carry business. So be it."

Wholesale Trading vs. Retail Trading: Radio House, Bangalore, and others vs. Union of India *2008 (146) CC 236 = 2008 (2) Karnataka Law Journal 695*

This writ petition was filed by the Petitioners inter alia against the wholly owned subsidiary of Metro Cash and Carry in Bangalore and it was contended in this litigation that the permission granted by the Government of India to the wholly owned subsidiary to carry on wholesale trading [which is permissible under the FDI policy], was being violated by this subsidiary which was, according to the Petitioners, allegedly conducting retail trading. Relying on the aforesaid decision of the Delhi High Court in *Federation of Associations of Maharashtra and others vs. Union of India and others*, the Karnataka High Court upheld the letter of approval and the clarificatory letter of the FIPB. While disposing of the Petition, the court directed the Government to meaningfully consider the grievances of the Petitioners and also to evolve an appropriate policy; it further directed the Government to monitor the activities of the subsidiary for the purpose of ensuring compliance with FEMA and to take action in accordance with law if the Petitioners pointed out specific breaches of FEMA, the Regulations and the terms of the letter of approval.

Zippers Karamchari Union vs. Union of India, *2000 [10] SCC 619 at page 632*

This is another important milestone in the judgments delivered by the Supreme Court of India. This case dealt with a challenge by trade unions dealing with zip fasteners, to the approval granted to YKK Zippers [Singapore] Private Limited, by the Foreign Investment Promotion Board [FIPB] to set up its own subsidiary in India. In the words of Justice S P Kurdukar speaking for the Bench: *"It is a matter of government policy and in our opinion no sustainable ground was urged before us to hold that the approval granted to YKK was contrary to the government policy. The Court would not be justified in interfering in such matters when it is satisfied that a grant of approval to YKK was neither irrational, nor for any extraneous consideration."*

Judicial interpretation of Press Notes 18 of 1998":

i. *(1) Putzmeister India Private Limited and others vs. Union of India and others; (2) Putzmeister AG and another vs. Union of India and others.* Justice Ravindra Bhat of the Delhi High Court has analysed the aforesaid three Press Notes and has ruled that these three Press Notes "fall in the domain of enunciation of executive policy". The court has further observed that the "terms of the Press Notes are clear". It declined the relief sought by the Petitioners

describing these as "speculative reliefs, without disclosing any conceivable legal injury" and dismissed the writ petition. The Petitioners have filed a Letters Patent Appeal No. 387 of 2008 against the order of the Single Judge, which appeal is still pending adjudication. By its order of August 4, 2008, the Division Bench of the Delhi High Court has restrained the Respondents from taking any coercive action pursuant to the impugned letter of April 2, 2007, issued by the Government of India.

Restraint by the Delhi High Court in setting up a wholly owned subsidiary in the "same field" Modi Rubber Ltd vs. Guardian International Corporation:
In an interesting analysis of various issues, including aspects of FDI, Justice Gita Mittal has restrained Guardian International Corporation ["Guardian"] from setting up a wholly owned subsidiary in India for manufacturing in the same field as Modi Rubber Ltd. This order has been challenged by Guardian in the Division Bench of the Delhi High Court by way of an appeal, being FAO (OS) 187 of 2007, which is still pending adjudication. There has been no stay of the order of the Single Judge.

Land Acquisition and FDI: SC's approach:

In a trenchant observation made by the Supreme Court of India on November 19, 1996, i.e. almost five years post-liberalisation, in *Ramniklal N. Bhutta and another vs. State of Maharashtra and others, 1997 (1) SCC 134*

Justice B P Jeevan Reddy, has eloquently commented on the *"ambitious programme of all-round economic advancement to make our economy competitive in the world market."* The court has advised caution while adjudicating cases of land acquisition in the context of FDI and has opined that the powers of the High Courts under Article 226 are discretionary.

The Indian judiciary has in its judgments consistently preserved as unassailable the economic and industrial policy of the Government of India, and its natural concomitant, i.e. the FDI policy. It is evident from an analysis of these decisions and also during the course of my practical experience that in the event of any *mala fides*, arbitrariness or gross illegality in any decision or order concerning FDI policy issued by the Government, investors have resorted to filing appropriate legal proceedings, including writ petitions in the High Courts and appropriate legal relief has been sought. It is hoped that some of the legal conundrums that do arise in the interpretation of the FDI policy and FEMA can and are resolved by a proper, just and fair interpretation and adjudication by the Indian Courts.

8.6 THE TASK BEFORE US

Now, the question before us – how to address such fast changes in the employment pattern? Unionization of workers under such fragile pattern of employment relationship in the workplace is rendered more and more difficult. This creates an environment, which is making the workers reconcile, through for the time being, with this extremely predatory order.

There have been instances, where workers themselves have approached the court for getting a stay on the order prohibiting deployment of contract workers in permanent and perennial work as per the Contract Labour (Regulation & Abolition) Act because such order leads to loss of jobs.

Simultaneously, a kind of opportunism is also being noticed among the permanent workers to take an indifferent attitude towards the contract workers in the same workplace, which, if allowed to continue as it is, would also damage the permanent workers' movement as well. Particularly in public sector units such kind of opportunism is noticed in many places.

At workplace level

The General Council meeting of CITU held in May 1998 at Chennai, while dealing on the issue of unorganized sector workers' movement, formulated correctly that the regular workers' trade unions have to take effective initiative in organizing and unionizing the contract workers of all forms in the concerned industry and must remain actively associated with their struggles.

The forms of organizing the contracts workers, i.e., whether in a single union along with the permanent workers or in a separate union for the contract workers alone, may vary from place depending on the situation; but preferably, contract workers should be organized in a separate union if their demands are to get the required focus and priority and for developing leadership from among them. But active association and initiative of the permanent workers' movement in the activities among and struggle of the contract workers is a must if that exercise is to succeed and advance effectively. This formulation was drawn on the basis of concrete grass root level experiences.

Industry level Initiatives

In steel industry, the permanent workers unions took initiative in organizing the contract workers in Durgapur, IISCO, Rourkela, Bhilai, Bokaro, Visakhapatnam and iron

ore mines of Orissa and MP and that experience revealed that such initiative strengthened both the contract workers and regular workers movement in most of the places except Rourkela and Bhilai.

In Rourkela and Bhilai, contract workers and regular workers were organized under single union and lack of balance among the plant level leadership in the matter of priority and inaction in organizational activity could not deliver the desired result.

In petroleum industry, particularly in the eastern and north eastern segment, and to some extent in the southern units contract workers' issues got some attention from regular workers' movement and the contract workers could be organized in a better way than other places and this has given dividend to the overall movement in the concerned units.

There are other examples too. On the whole, wherever, the regular workers took active initiative in organizing the contract workers, both the contract workers and regular workers movement benefited from the same and the trade union movement in that particular unit could play a more assertive role. Owing to increase in contractorisation across the industry, the contract workers position in the industry have become decisive in carrying on the

production process and without organizing them, the trade union cannot achieve effective striking capacity.

The recent anti-privatization struggle in NALCO and Naively Lignite could become successful since the contract workers in both the industries joined enmesh in the strike action. The composition of workforce in the petroleum sector has so changed owing to proliferation of contract system, that complete strike only by the regular workers would have little effect on production if the contract workers stay away from the strike.

The trade union movement has to draw appropriate strategy to combat such situation, as otherwise this will overpower the trade union movement, however temporary a phase that may be. We have to study the situation thoroughly both at the enterprise and industry level and also on national plane to formulate our demands for legislative measures for redefining employment relationship based on the link between the recipients of the gains of production vis-à-vis the producer at the lowest rung of the production process. At the same time we have to evolve appropriate strategies to organize the contract/casual/indirect/non-permanent workers.

This may require vigorous efforts both at the workplace and even beyond that periphery extending to workers' dwelling places.

As we have noted, temporarisation process of employment pattern has taken broadly two routes. One—deployment of workers through contractors or job contractors in the same workplace, and the second type—is through decentralization of the production process through outsourcing various segments of production. The two types of situation have to be tackled with different strategies. But it is the trade unions in the principal enterprise that have to take interest in organizing the workers of the agencies operating for the principal enterprise.

The regular workers' movement has to take direct initiative in organizing the contract and job-contract workers operating within the enterprise. They have also to coordinate the efforts in unionizing the workers in the outsourced agencies and build up move mental coordination between the unions and workers of those agencies. [150]

At Sect oral and National Level

Already some initiative in that direction has been taken by CITU in the public sector. The All India Coordination

[150] *See, Eco & Political Weekly July, 1995*

Committee of Public Sector Unions (CITU) in its last session held in December 2005 have stressed upon the need for vigorous initiative by the regular workers' movement for organizing the contract workers in the industry and also raise and agitate over the demands of the contract workers along with regular workers' own demands.

The idea could also be popularized and at least formally adopted by the joint platform of public sector workers – the CPSTU in its sessions held in March and November 2006, at CITU's pioneering initiative. In the run up to the seventh round of wages negotiation in the PSUs, the charter of demand formulated by the permanent workers' union also raised the demand that the contract workers deployed in different PSUs have to ensure that this basic demand of the contract workers is pursued seriously in the forthcoming wages negotiations and agitation programmes.

At National Level

But when the retrograde process of changing the employment relationship in workplaces through all out contractorisation is being promoted as a part of policy drive by the governance, all our grass-root level initiative to organize the contract and temporary workers have to be combined with appropriative strategy-initiative at the national level for reversal of the policy and projection of an alternative policy for governance of the workplace. In the

face of Government's demand for changing the Contract Labour (Regulation & Abolition) Act to universalized contract system in all jobs, trade union movement should make concrete alternative proposal for pro-workers changes in the concerned statute. [151]

Projecting Alternative

Our alternative proposal must also take due note of the phenomenon of outsourcing of the production jobs in parts to various agencies as enumerate above. The same may be inter alia,

1. Redefining employment relationship on the basis of the linkage between the final recipients of the gains of production, i.e., the principal employer, vis-à-vis the production process deployed through various decentralized agencies.
2. Outsourcing should be treaded as contract and should be covered by Contract Labour Legislation.
3. Reiterating the equal pay for same and similar work both for regular and contract/temporary workers in the main body of the legislation at present similar provision is there in the rules framed under the present statute.

[151] *Dynamics of Industrial Relations (MMG)*

4. Regularization of contract workers deployed in permanent /perennial jobs in the permanent roll of the company and stringent punishment (This is required to negate the pernicious impact of the Supreme Court Judgments on rights of the contract workers)
5. Payment of the minimum wages prevalent in the company/establishment to the contract workers of the said company if it is higher that the statutory minimum wage.
6. All contractors must obtain license from the appropriate authority for running its operation.
7. Even if contractor changes, the contract workers engaged by previous contractor should continue to be deployed without any interruption and change in service conditions: this provision should be incorporated as a condition in the tender to be invited for appointment of contractors.
8. The Annual Return on employment to be submitted to labour department by the principal employer should compulsorily include details of the contract workers including the contractors and their license details.
9. In case of death owing to accident or otherwise in course of employment, contract workers should be paid some compensation as the regular workers.
10. The Principal employer should be held responsible for implementation of all labour laws for the contract workers including maintenance of employment

register, submission of annual returns to labour department, PF, ESI and other social security measures and workmen's compensation any violation of those laws should attract stringent punishment on the principal employers as well.

11. A separate inspectorate with adequate manpower has to be established in all states only for the purpose for inspection of the contract-employment related matters.
12. Contract labour monitoring board must be constituted in all states and central level with the representatives of unions, employers and government to monitor implementation of labour laws in respect of contract worker etc. [152]

The above is illustrative and not exhaustive. Finalization and giving our proposal a structured form would require more consultation at the grass root level and also with experts in the field. But the basic spirit of our approach should be like above and we should not be confused by so called idea of flexibility theory on the labour market dubiously touted as instrument for employment generation. Based on above alternative we have to build up massive mobilizations at National, State and Regional levels. Fight back the Ideology of Contractorisation Drive.

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[152] *Dynamics of Industrial Relations (MMG)*

We have to develop a unified understanding as to how to confront the phenomenon of Contractorisation or temporarization of the workforce in various forms and unleash a countywide campaign against the barbarous form of exploitation through outsourcing and contractorisation.

While doing so we must explode the theory touted by protagonists of the flexible labour regime that "temporary employment is better than no employment" which is designed to smuggle a social sanction for perpetual temporization of the workplace. Another satanic theory is that unproductive and repressive labour laws help generating more employment. None of these theories stand the test of reality so far as the empirical grass root level experiences are concerned, not only of our country but also all over the world.

The General Council meeting of CITU held at Nasik in July 2005 conceived the idea of holding an all India convention on contract workers issues to exchange ideas and formulate strategy to effectively address the problems both organizationally and with a move mental perspective. The working committee of CITU held in Bhopal in December 2006 reiterated the same. It is very much imperative that we should hold such exercise and adopt a strategy to build up strong countrywide campaign against the onslaught of contractorisation and outsourcing by the capitalist lobby with active indulgence of the Government on the one hand

and unleash aggressive organizational drive at the grass-root level with focus on the contract and temporary workers of all form on the other and the entire CITU organization must be geared up in that direction. [153]

8.7 CASE LAWS

No Entry for Foreign Law Firms

The long debate on the issue regarding Foreign law firms practicing in India without enrolling at the Indian Bar has finally come to an end with the Bombay High Court judgment delivered on 16 December 2009 in the case of *Lawyers Collective v. Bar Council of India and others*, Writ Petition No. 1526 of 1995, *(See, No Entry for Foreign Law Firms, available at http://www.lawyerscollective.org/magazine/jan-feb2010/cover-story, last visited on 15/12/09)* decided by Chief Justice Swatanter Kumar and Justice J.P Devadhar.

The case filed in 1995 by Lawyers Collective challenged the practice of law in India by foreign law firms in view of their non compliance with the provisions of the Advocates Act, 1961 (Advocates Act). The Bombay High Court held that the Advocates Act, 1961 regulated the entire realm of the "practice of the profession of law", practice of litigious matters as well non-litigious matters. Consequently, it ruled that foreign law firms could not practice law in India

[153] *Ibid 152*

unless they complied with the requirements of enrollment of the foreign lawyers at the Indian bar and subjected themselves to the jurisdiction of the Bar Council of India.