## *CHAPTER X*

# Disinvestment in India: Other Issues

## *10.1 Introduction*

As seen in the earlier chapters, the success or otherwise of privatization programmes worldwide are largely determined by two issues: ideological and operational. While the first is political in nature and concerns the decision to go in for privatization, the second refers to issues that may arise during the implementation of the programme. Among those falling in the second category, apart from issues relating to valuation of shares and enterprises, which have been examined in the previous chapters, there are also legal and labour issues. For the credibility of the programme, it is imperative that both these issues are successfully resolved. In the present chapter, we shall therefore examine both these issues in relation to disinvestment in India.

## *10.2 Legal Issues in Privatization*

Kikeri points out that legal issues permeate the whole privatization process, from preparation to implementation and follow-up. According to her, these occur primarily at two levels: the *systemic* level and the *transaction* level (1992: 41). Researchers have stressed the need for an enabling legal environment for any policy initiative to succeed. Privatization is no exception. Guislain touches upon this when he says that the 'success of a privatization program is often a function of the soundness of its foundation, especially its legal foundation.' He indicates

that the objectives of the programme must be compatible with the constitutional provisions that underpin the legal framework for business activity in general and privatization in particular. They must also be compatible with the general principles of law and other norms establishing the rule of law and with certain provisions of international law, which may be binding on the legislator. He is of the view that if these basic legal norms hinder achievement of programme objectives, the government must determine whether they can and should be amended. Finally, he points that if they cannot be amended, the government may have to reconsider the program objectives or the choice of specific privatization techniques in order to accommodate these 'higher-order constraints' (1997: 33).

The legal issues related to privatization broadly fall into two categories. The first refers to the basic legal framework referred to by Guislain above, which includes the constitutional and related laws and rules that form the basis for any business-related activity, including privatization. The second would concern specific legal issues encountered while implementing privatization programmes and hence are enterprise-specific, though they may have wider implications that could impact on the programme itself. In other words, while the former applies to the privatization policy of the government, the latter concerns itself with the implementation of that policy. In this section, we shall try and look at both these aspects, from a general angle as well as those specifically related to the Indian experience.

### 10.2.1 Constitutional requirements

Guislain points out that a country's constitution or fundamental law may contain provisions that affect privatization operations either directly or indirectly. These provisions, according to him, may limit the scope of the privatization program, determine to whom decision-making authority belongs, or impose certain controls on privatization authorities, or address all three (1997: 33-34). He indicates that some constitutions continue to prohibit all private-sector activity in what are deemed to be strategic sectors. He gives the example of the Brazilian constitution which gave the state a monopoly on prospecting for hydrocarbons, petroleum refining, import and export of petroleum products and their transportation etc. Similarly, in India too, as was indicated in the earlier chapters, certain sectors have been identified as strategic and retained in the public sector. Also, many constitutions may contain certain restrictions such as limitations on foreign investment in specific activities etc (e.g. restrictions relating to Bumiputra in the Malaysian privatization programme).

According to Guislain, the constitution or constitutional traditions of a country may also require that privatization be approved by parliament. He gives the example of Benin, Morocco, Senegal, Togo, and other countries with a French legal tradition, whose constitutions require that the transfer of majority state-owned enterprises to the private sector be authorized in advance by parliament, by means of a law (1997: 36). Guislain refers to the '*principle of parallelism of forms*', according to which the same legal instrument that was used to establish an SOE should be used to abolish or transform it. He gives the example of Togo,

where the law[1] requires that if an SOE had been established pursuant to a ministerial decree issued by the Council of Ministers, it can only be privatized or liquidated following the same procedure (1997: 92). It may be mentioned in this regard that a similar stand was taken by the Supreme Court of India in the case of HPCL and BPCL where the apex court restrained the government from proceeding with the disinvestment of these PSEs without amending the statutes under which they were acquired.

On the other hand, there are other countries where the country's constitution, legislation, or legal traditions may allow the government or other public agencies to privatize without intervention by the legislature. In that case, no enabling legislation is legally required. This, Guislain points out, is the situation in most of the common-law countries, such as Australia, Malaysia, New Zealand, and the United Kingdom. He indicates that in such systems it is generally considered that, in the absence of explicit prohibition, the government possesses inherent power to privatize public assets and enterprises without the need for special legislative authorization (1997: 37).

Having a similar legal tradition as UK, India would fall in the latter category. However, it may be pointed out that even common-law countries such as Malaysia and UK, have had to enact laws to corporatize SOEs organized under public law, so that they might later be privatized (1997: 38).

Constitutional provisions, according to Guislain, may also help limit the extent of the government's discretionary powers regarding privatization. He

[1] Article 36 of Organic Law no. 82-5 of June 16, 1982, on joint-venture companies

gives the example of France, where the constitutional requirement that implementation of a privatization programme be authorized by law subjects the French government to prior parliamentary control. However, such a requirement would undoubtedly slow down the pace of privatization.

Also, it is not as if the constitutionality of privatization legislation has not been questioned in courts of law. Guislain gives the example of India where members of parliament, public interest groups, labour unions, and operators filed petitions with the Supreme Court contesting the government's telecommunications privatization policy and the award of specific licenses. In this case, however, the Supreme Court ruled in February 1996 that policy matters were in the ambit of the legislative and executive branches and not of the courts. It rejected the petitions against the privatization programme and upheld the validity of the bidding procedures and the government's powers to grant the disputed licenses[2]. Similar views were expressed by the apex court in the BALCO case also, which will be discussed later.

Guislain indicates that lawsuits contesting the constitutionality of privatization legislation or specific provisions thereof, or the government's right to privatize without enabling legislation, have been filed in other countries also. He gives the example of Colombia where the constitutional court ordered the suspension of the privatization of financial SOEs in the absence of enabling legislation[3]. He therefore suggests implementing a privatization law even if

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[2] see *Journal of Commerce*, 18 January 1996 and 22 February 1996 (cited by Guislain 1997: 40)
[3] see *Privatization International*, January 1996, p. 29, (cited by Guislain, 1997: 40)

constitutionally this may not be required, if privatization efforts are to be given a fillip.

Such a law has its own pros and cons. On the positive side, it would provide an 'explicit political support for and commitment to the privatization process.' On the negative side, it would involve lengthy delays in securing parliamentary approval and involve the risk of 'parliamentary micromanagement' (1997: 111). The latter would refer to the scrutiny by the parliament of individual cases of privatization – an activity that would legitimately fall in the domain of executive action. Hence it is doubtful if having such legislation would be a good idea. Guislain realizes this, which is why he says that even if privatization legislation is required, it may be preferable to limit the provisions of the law to broad principles and leave the details and modalities of its application to subordinate instruments or decisions (1997: 112).

Guislain points out that some countries have opted to enact privatization laws even when privatization could have been implemented without amending the existing legislation. Apart from the advantages already enumerated above, this is because a privatization law also provides an opportunity to introduce changes in legislation that, although not required for commencing the process, may substantially facilitate it (1997: 296). In fact, as Guislain points out, new legislation may be required for operations that cannot be executed (or cannot be executed efficiently) under existing law. He indicates that privatization laws will often embody provisions designed for remedying the main gaps in the rules regulating the market economy or the functioning of the pubic sector or for

introducing support measures deemed necessary for the success of privatization. Provisions of this kind represent what may be called *facilitating provisions*, as opposed to the *enabling provisions* authorizing the privatization process itself (1997: 297).

Apart from the legislation governing the privatization programme, the legal status of the enterprise to be privatized has also to be taken into account. According to Guislain, the legal status of SOEs to be privatized varies greatly and affects the choice of privatization techniques. Guislain distinguishes between three types of SOEs and state holdings, which are as follows:

- **Public-Law Entities**
- **SOEs organized under private company law**
- **Minority Shareholdings**

According to Guislain, entities organized under public law range from ministries without distinct juridical personality to public-law companies with juridical personality. State-owned enterprises organized under private law, on the other hand, would include joint-stock companies and subsidiaries of other SOEs, while companies in which the state or public sector is a shareholder, if not a controlling one, would usually not be included under the heading of SOE (1997: 27).

According to Guislain, the main issue would be whether ownership of the enterprise to be privatized can be transferred without its prior transformation into a new legal entity or not. He points out that public-law bodies are usually set up

as such by law and may, therefore, have to be made subject to company law (that is, private law) before they can be transferred to the private sector as legal entities. He feels that another option could be to sell the assets of the SOE to private buyers without transferring the SOE itself (1997: 27-28). However, this may not qualify as privatization in the strict sense of the term.

Guislain further points out that the legal status of an SOE may have a bearing on the applicability of many other laws, particularly in the areas of labour, social security, and taxation, which can themselves affect the course of the privatization process (1997: 28). Some of these issues, in particular those relating to labour, will be examined in the subsequent sections. However, for the present, let us look at the situation in India.

### 10.2.2 The Indian Experience

#### *10.2.2.1 Constitutional provisions*

So far as the legal status of public enterprises in India are concerned, it is generally held that these are covered under the broad heading of 'other authority,' as defined in Article 12 of the Constitution of India. Article 12 of the Constitution reads as follows:

> 'In this part unless the context otherwise requires, the 'State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.'

Accordingly, Satish Chandra and Mala Chandra point out that public enterprises can be defined as an activity of the Government, whether Union, State or local, engaged in production or services (1997: 2). However, they also point

out that Article 12 of the Constitution does not expressly include within its ambit the 'public sector undertakings' within the term 'State.' According to them, it is only the judicial interpretation of the expression of 'other authorities' that such corporate bodies have come within the purview of Article 12.

D. D. Basu, in his seminal work on *Constitutional Law of India* has pointed out that apart from the executive and legislative organs of the state, department, or local authorities, any type of public authority, created by statute[4] and exercising statutory powers[5], whether such powers are governmental[6] or quasi-governmental[7] or non-governmental[8] and whether such authority is under the control of Government or not[9], and even though it may be engaged in carrying on some activities in the nature of trade or commerce[10], (e.g. a statutory corporation, such as the Road Transport Corporation[11], or the LIC,[12]) having the power to issue rules, by-laws or regulations having the force of law or the power to make statutory appointment[13] would be held as 'State' for the purposes of application of Parts III and IV of the Constitution (1985: 11).

On the other hand, the following were held not to be 'State' within the purview of Art. 12:

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[4] Sukhdev v. Bhagatram, A. 1975 SC 1331; Mysore SRTC v. Devraj, A. 1976 SC 1027 (para. 14); Sabhajit v. Union of India, A. 1975 SC 1329
[5] Rajasthan State Electricity Board v. Mohan Lal, A. 1967 SC 1856
[6] State Trading Corpn. V. C.T.O., A. 1963 S.C. 1811 (1823)
[7] Rajasthan State Electricity Board v. Mohan Lal, A. 1967 SC 1856
[8] Rajasthan State Electricity Board v. Mohan Lal, A. 1967 SC 1856
[9] Ramamurthy v. Chief Commr., A. 1963 SC 1464
[10] Rajasthan State Electricity Board v. Mohan Lal, A. 1967 SC 1856
[11] Sukhdev v. Bhagatram, A. 1975 SC 1331; Mysore SRTC v. Devraj, A. 1976 SC 1027 (para. 14); Sabhajit v. Union of India, A. 1975 SC 1329
[12] Sukhdev v. Bhagatram, A. 1975 SC 1331; Mysore SRTC v. Devraj, A. 1976 SC 1027 (para. 14); Sabhajit v. Union of India, A. 1975 SC 1329
[13] Rajasthan State Electricity Board v. Mohan Lal, A. 1967 SC 1856

(i) A non-statutory body, exercising no statutory powers[14], e.g. a company[15], unless made an agent of the Government.[16]

(ii) A judicial or quasi-judicial authority.[17]

(iii) Private bodies, having no statutory power,[18] or not being supported by any State act.[19] (1985: 12)

According to Basu, several factors are relevant to determine whether a corporation or society is an agency or instrumentality of the Government. These would include: (a) financial assistance; (b) control over the management and policies of the corporation[20]; (c) monopoly granted to it by the State; (d) whether its functions could have been performed by the Government;[21],[22] (e) whether the functions of a Government Department have been transferred to the corporation.[23]

However, according to Jain, to be considered as an instrumentality of the government, the concerned body has to fulfill two basic tests: *funding* and *control*. He states that the structure of the body in question is immaterial. It may be statutory or non-statutory; it may have been set up by or under an Act of the Legislature or even administratively; it may be a registered society, a cooperative society, or a Government company. Neither does it matter what functions it

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[14] Devdas v. K.E. College, A. 1964 Raj. 6 (11)
[15] Sukhdev v. Bhagatram, A. 1975 SC 1331; Mysore SRTC v. Devraj, A. 1976 SC 1027 (para. 14); Sabhajit v. Union of India, A. 1975 SC 1329
[16] Ramana v. I.A.A., A. 1979 SC 1628 (paras. 15-16)
[17] Naresh v. State of Maharashtra, A. 1967 SC 1 (11); Parbhani T.C.S. v. R.T.A., 1980 SC 801
[18] Cf. Shamdasani v. Central Bank f India, 1952 SCR 391 (394)
[19] Kochunni v. State of Madras, A. 1969 SC 225; Mahendra v. State of UP, A. 1963 SC 1019
[20] Sukhdev v. Bhagatram, A. 1975 SC 1331; Mysore SRTC v. Devraj, A. 1976 SC 1027 (para. 14); Sabhajit v. Union of India, A. 1975 SC 1329
[21] Ramana v. I.A.A., A. 1979 SC 1628 (paras. 15-16)
[22] Ajay v. Khalid, A. 1981 SC 487 (paras. 7, 11,15), Minhas v. Indian Statistical Institute, A. 1984 SC 363 (para. 20)
[23] U.P. Warehousing Corpn. v. Vijay, A. 1980 SC 840

discharges: governmental, semi-governmental, non-governmental, educational, commercial, banking, social service. As long as the government foots a substantial part of the bill for the operations of the body, or exercises 'effective and pervasive control' over the body concerned, it would be characterized as an 'instrumentality' of the Government, and falling within the purview of Art. 12 as an 'authority'.[24]

Jain further points out that once a body is characterized as an 'authority', three important effects follow:

1. It becomes subject to the discipline of fundamental rights.
2. It becomes subject to the discipline of Administrative Law.
3. It falls within the writ jurisdiction of the Supreme Court under Art. 32 and of the High Courts under Art. 226.

According to Jain, as the range of Art. 12 expands, so does the ambit of judicial review (1994: xcviii). This has had certain implications for the PSEs which would be examined in the subsequent section.

Apart from Art. 12, the other Art. relevant in this context is Art. 19 (6). Art. 19 (g) of the Constitution of India[25] states that 'All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.' Note (6) (ii) under Art. 19 states that

> 'Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making

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[24] see Jain, M. P. (1994), *Indian Constitutional Law*, 4th Edn., Agra & Nagpur: Wadhwa & Co.
[25] see Bakshi, P. M. (2006), *The Constitution of India*, 7th Edition, Delhi: Universal Law Publishing Co. Ltd (p. 34).

any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, —

> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise][26].

This, along with Art. 39 (b) of the Constitution which stipulates that the State shall 'direct its policy towards securing ... that the ownership and control of the material resources of the community are so distributed as best to subserve the common good,' and the inclusion of the term 'Socialist' in the Preamble to the Constitution of India, lays down the basis for the government to carry on certain businesses, either exclusively or in addition to those run by the private sector. Similarly, Item 52 of the Union List (List I of Schedule 7 to the Constitution of India) includes 'Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest' (emphasis added). Item 33 of List III (Concurrent List) also refers to 'Trade and commerce in, and the production, supply and distribution of, — (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest ...' It follows therefrom that constitutional provisions such as these provide for the State to have an overriding stake in controlling the production, trade or business, or services, in such areas as are

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[26] Subs. by the Constitutional (First Amendment) Act, 1951, sec. 3, for certain words (see Bakshi, 2006: 34).

perceived to be expedient in public interest. The corollary is that disinvestment in such areas would require a specific law to be enacted.

#### *10.2.2.2 Implications for PSEs*

Ganesh (2001) points out that being considered as 'other authority' under Art. 12, together with Article 14 of the Constitution, which asserts the right of any person to equality before the law, invites judicial scrutiny of many PSU decisions (2001: 26). Chandra and Chandra also hold that as a result of this, every action of the public enterprises is challengeable (1997: 3).

Ganesh quotes Venkitaramanan (1999) to indicate that once PSUs are attributed the character of a State, they have to be subject to the same judicial tests as the government. Under this interpretation, PSU decisions have to meet the tests of natural justice, lack of arbitrariness and avoidance of discrimination. Appointments, terminations, promotions in PSUs would all be subject to the tests of Articles 12 and 14. Every commercial decision or business judgement of a PSU, according to Venkitaramanan, has to satisfy the 'additional requirements imposed by justifiability' (cited by Ganesh, 2001: 27).

It is generally believed that applicability of Articles 12 and 14 of the Constitution have created innumerable problems for the public sector enterprises. As Ganesh points out, this has put the public sector enterprises at a serious disadvantage as compared to the private sector. Most researchers agree that this has at least in part led the PSE managements taking the safest course in decision-making, resulting in delays, losses and general inefficiency. Ganesh indicates that for instance, in deciding on a tender offer, the PSE management would generally

keep in mind the prospect of their examination of the tender papers being subject to public as well as judicial scrutiny. This would in turn tend to colour their decision-making.

Because of this reason, researchers have suggested the need to take PSEs out of the purview of Article 12. Ganesh quotes Luther (1998) to say that if PSEs 'have to compete with multinationals and private sector, urgent steps will be necessary to take them out of the purview of Article 12' (cited by Ganesh, 2001: 27). While admitting that the public enterprises fulfill the criterion of ownership as stipulated by the Supreme Court in so far as they are owned by the Government, Chandra and Chandra argue that this is not sufficient for us to equate PSEs, which are basically 'business corporate entities,' with the 'State.' According to them, inspite of the jural relationship, the identity is separate and both cannot be treated alike. Therefore, they hold that the Government and its 'Agency' cannot be treated alike under the term 'State' (1997: 80). They, nevertheless suggest that Article 12 of the Constitution may be amended, by way of an explanation or otherwise, so as to exclude the public enterprises from the purview of the term 'State' as 'no sovereign function is being performed by the public enterprises' (1997: 85).

However, to what extent this would be feasible is doubtful since it is indicated that in the 145$^{th}$ Report of the Law Commission the crucial question of amending Article 12 of the Constitution was examined wherein the Law Commission recommended that no amendment was necessary and that *status quo* be maintained (1997: 4). Nevertheless, it is felt that there is a need to amend

Article 12 of the Constitution so as to enable the PSEs to compete with the private sector. However, in the context of privatization, as may be seen from the discussion in the previous section, a specific law enacted by the Parliament would be of greater significance especially in the light of provisions contained in Art. 19 (6) (ii), rather than an amendment to Art. 12.

#### *10.2.2.3 Effect of disinvestment related court judgements*

It needs to be pointed out, however, that a mere amendment of Article 12 of the Constitution if at all the Government decides to go in for it (which in itself is highly unlikely considering the fact that it has not been recommended by the Law Commission), is not going to solve the problems of the PSEs. Perhaps privatization or disinvestment could help, but even here while generally the judgements have been favourable, the judgement in the case of HPCL/BPCL has raised a legal issue that, if unresolved, might affect attempts to disinvest statutory corporations in future. It is necessary, therefore, to examine both the judgements given in the BALCO case, as well as in the HPCL/BPCL case[27].

##### 10.2.2.3.1 The BALCO case

The BALCO case is concerned with both legal issues as well as labour issues. The judgement given by the three-judge Bench of the Supreme Court is also very significant from the disinvestment point of view. Hence it would be proper to look at it in some detail.

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[27] Summaries of disinvestment related court cases may be seen in the Department of Disinvestment website [http://www.divest.nic.in/judgement.htm] while references to all such cases can be seen at http://www.indlaw.com. Both sites have been accessed and are referred to for purposes of this discussion.

The Disinvestment Commission in its 2nd Report submitted in April 1997, had advised the Government of India to privatize BALCO. Though it had recommended disinvestment of 40% of its equity to a strategic partner, this was subsequently increased to 51%. While eight companies submitted their Expression of Interest, only three parties (Alcoa, USA, Hindalco & Sterlite Industries) conducted due diligence of BALCO. When the financial bids were opened, it was found that the bid of Sterlite Industries was the highest at Rs. 551.50 crore, and the bid of Hindalco was Rs. 275 crore, while Alcoa had opted out. Since the offer of Sterlite Industries was higher than the reserve price of Rs. 514.40 crore, it was recommended for acceptance and accordingly, on February 21, 2001, the Cabinet Committee on Disinvestment approved acceptance of the bid of Sterlite Industries at Rs. 551.50 crore.

The announcement of the decision to accept the bid of Sterlite Industries led to the initiation of legal proceedings[28] challenging the Government's decision on the ground that the workers had been adversely affected by the decision of the Government of India to disinvest 51% of the shares in BALCO in favour of a private party. It was contended that before disinvestment, the entire paid-up capital of BALCO was owned and controlled by the Government of India and its administrative control co-vested in the Ministry of Mines; accordingly, it was a

[28] Civil Writ Petition No. 1262 of 2001 in the Delhi High Court filed by Dr B. L. Wadhera, Writ Petition No. 1280 of 2001 in the Delhi High Court filed by the employees of BALCO, and Civil Writ Petition No. 241 of 2001 in the Chattisgarh High Court filed by Samund Singh Kanwar. By order dated April 9, 2001, all writ petitions pending in the High Courts of Delhi and Chattisgarh were transferred to the Supreme Court. All references have been taken from the judgement in the Transferred Case (Civil) No. 8 of 2001 between the BALCO Employees Union v. Union of India, along with T.C. (C) Nos. 9 & 10 of 2001 and W.P. (C) No. 194 of 2001 as given in the Department of Disinvestment website [http://www.divest.nic.in/judgementbalco.htm] and at http://www.indlaw.com.

'State' within the meaning of Article 12 of the Constitution. The case law cited in support of this included *Ajay Hasia v. Khalid Mujib Sehravardi* (1980 Indlaw SC 244); *Central Inland Water Transport Corporation Ltd v. Brojo Nath Ganguly* (1986 Indlaw SC 645).

It was also contended that by reason of disinvestment, the workmen had lost their rights and protection under Articles 14 and 16 of the Constitution. This was an adverse civil consequence and it was therefore contended that the workmen had a right to be heard before and during the process of disinvestment. The type of consultation that was considered necessary, according to the Union, was (a) whether BALCO should go through the process of disinvestment, (b) who should be the strategic partner, and (c) how should the bid of the strategic partner be evaluated.

Appearing on behalf of the Union of India, the Attorney General submitted that since 1990-91, successive Governments had gone in for disinvestment. He stated that disinvestment had become imperative both in the case of the Centre and the States primarily for the following three reasons:

- Firstly, despite every effort the rate of return of governmental enterprises was woefully low, excluding the sectors in which the Government has a monopoly and for which they can, therefore, charge any price. In the case of central enterprises, the rate of return came to minus 4% while the cost at which government borrowed money was indicated as 10 to 11%. In the States, it was pointed out that out of 946 State-level enterprises, about 241 were not working at all, while about 551 were making losses and 100 were reported not to be submitting their accounts at all.

- Secondly, neither the Centre nor the States have resources to sustain enterprises that are not able to stand on their own in the new environment of intense competition.
- Thirdly, despite repeated efforts, it had not been possible to change the work culture of governmental enterprises. As a result, even the strongest among them was sinking into increasing difficulties as the environment was becoming more and more competitive and technological change had become faster.

The Attorney General further submitted that the wisdom and advisability of economic policies of Government were not amenable to judicial review. Reliance was placed on several decisions of the apex court in support of this.[29]

The Supreme Court in its judgement declined to interfere with the policy decision of the government to go in for disinvestment unless such a policy was contrary to any statutory provision or the Constitution. It was of the view that for testing the correctness of a policy, the appropriate forum was the Parliament and not the Courts. It observed that in this case, the policy had been tested and the Motion[30] defeated in the Lok Sabha on 1st March, 2001. It also categorically stated that Article 12 of the Constitution did not place any embargo on the instrumentality of the State or 'other authority' from changing its character. It held that under the provisions of the Companies Act, the government as a

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[29] Rustom Cavasjee Cooper v. Union of India (1970 Indlaw SC 575); Fertilizer Corpn. Kamgar Union v. Union of India (1980 Indlaw SC 243); State of M.P. v. Nandlal Jaiswal (1986 Indlaw SC 256); Peerless General Finance and Investment Co. Ltd. V. Reserve Bank of India (1992 Indlaw SC 332); Premium Granites v. State of T.N. (1994 Indlaw SC 1453); R.K. Garg v. Union of India (1981 Indlaw SC 372); Narmada Bachao Andolan v. Union of India (2000 Indlaw SC 3658) etc.

[30] This refers to the Calling Attention Motion on Disinvestment with regard to BALCO that was moved in the Rajya Sabha. Discussions on the calling attention motion took place in the Rajya Sabha on February 27, 2001. The matter was thereafter discussed in the Lok Sabha on March 1, 2001 where the motion disapproving the proposed disinvestment of BALCO was defeated by 239 votes to 119 votes.

shareholder had the right to transfer its shares. Reference was made to the judgement given by the Madras High Court in the case of *Southern Structurals Staff Union v. Southern Structurals Ltd* (1994 Indlaw MAD 332) which held that if the State had invested of its own volition, it could equally well disinvest.

The judgement of the Supreme Court in the BALCO case raises several issues which are both legal and labour-related in nature, that are extremely significant in the context of disinvestment. These may be summarized as under:

- Firstly, it makes it very clear that policy making is the prerogative of the executive, and the right forum to question this is the legislature, and not the courts.
- Secondly, it is the responsibility of the courts to see if there is any illegality in the process or not.
- Thirdly, the decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to this cannot fall within the parameters of Public Interest Litigation.
- As a result of disinvestment of 51% of the shares of a company, while the management control may have gone into private hands, but the employees continue to be under the company and change of management does not in law amount to a change in employment.
- On the question of providing social security to the BALCO employees at par with government employees, it held that 'as a matter of principle, no industrial establishment has any right to be compared with a government establishment. Hence the issue of guaranteeing the social security of such employees at par with the employees of Government establishment may not be possible any time before or after the disinvestment.' This was a very significant statement that calls in question the judicial

pronouncements equating public sector enterprises with the 'State' in terms of Article 12 of the Constitution.

- Even government servants have no absolute right to remain in service. Hence it cannot stand to reason that non-government employees working in a company even if such a company is regarded as a 'State' can claim a superior or better right than a government servant in service-related matters.
- Employees have no vested right in the employer company continuing to be a government company.
- So long as the state holds the controlling interest in a company, the employees may claim the status of a government company. But the status so conferred on the employee does not prevent the Government from disinvesting, nor does it make the consent of the employees a necessary precondition for disinvestment.
- Finally, since it is opined that there is no embargo in the Constitution on any instrumentality of the State from changing its character, it implies that the provisions in the Constitution are adequate for purposes of disinvestment.

In view of the above, while it may be that the provisions in the Constitution are adequate for purposes of disinvestment, whether such disinvestment can be carried out merely by executive action, or there would be need for bringing about necessary legislation or for amending the statutes as would be seen from the HPCL/BPCL case which is discussed below, is an open question. Especially in respect of such industries which have been declared by Parliament by law to be expedient in public interest, as indicated in section 10.2.2.1 above, it is felt that disinvestment in such industries would require specific legislation to be enacted. Even otherwise, it is observed that it may be

preferable to bring about necessary legislation either by way of fresh legislation or amendment, as the case may be, to settle the issue and to provide an enabling environment for disinvestment.

#### 10.2.2.3.2 The HPCL/BPCL case

In this case, two writ petitions were filed in public interest[31] where the petitioners had challenged the decision of the Government to sell majority of shares in Hindustan Petroleum Corporation Limited (HPCL) and Bharat Petroleum Corporation Limited (BPCL) to private parties without parliamentary approval or sanction as being contrary to and violative of the provisions of the provisions of the ESSO (Acquisition of Undertaking in India) Act, 1974, the Burma Shell (Acquisition of Undertaking in India) Act, 1976 and Caltex (Acquisition of Shares of Caltex Oil Refining India Limited and all the Undertakings in India for Caltex India Limited) Act, 1977.

The petitioners submitted that acquisition of HPCL and BPCL had taken place in pursuance of Article 39 (b) of the Constitution which subserved the object of building a welfare state and an egalitarian social order and consequently that it was not open to the Government to disinvest the same without first changing the law in this regard either by repealing the enactments or by making appropriate changes by way of amendments in the enactments.

The argument of the petitioners was that in the enactments referred to above, it had been provided that oil distribution business be vested in the State so that the distribution subserves the common general good, and also that the

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[31] Writ Petition (Civil) No. 171 of 2003 & Writ Petition (Civil) No. 286 of 2003

enactments further mandate that the assets and the oil distribution business must vest in the State or in Government companies. While indicating that they were not opposed to the policy of disinvestment, the petitioners stated that they were only challenging the manner in which the policy of disinvestment was being given effect to in respect of HPCL and BPCL. They pleaded that unless the enactments were repealed or amended appropriately, the Government should be restrained from proceeding with the disinvestments resulting in HPCL and BPCL ceasing to be Government companies. They contended that disinvestments in HPCL and BPCL could result in the State losing control over their assets and oil distribution business and, therefore, it was contrary to the object of the enactments.

In the counter-affidavits filed on behalf of the respondents, it was urged that the policy of disinvestment followed by the Government of India had been upheld by the Supreme Court in *BALCO Employees' Union v. Union of India*, (2001 Indlaw SC 20366); that the decision to disinvest and the implementation thereof was purely an administrative decision relating to the economic policy of the State and that it was the prerogative of each elected Government to follow its own policy. It also submitted that prior approval of Parliament for disinvesting Government's holdings in HPCL and BPCL was not necessary. It was indicated that the said companies were registered under the Companies Act, 1956, and that the sale of shares thereof do not require parliamentary approval, and that there was no express or implied prohibition in Section 7 of the Act on the transfer by the Central Government of its shares in these companies. It was further pointed out that shares of HPCL and BPCL had been sold in the period from 1991-92 to

1993-94 through executive decisions, and that similarly, another public sector undertaking, Maruti Udyog Ltd where acquisition was through an Act of Parliament, had been disinvested through executive decision over the last two decades, and that parliamentary approval had not been necessary.

It was stated that while the assets of HPCL and BPCL might have been acquired through Acts of Parliament, but in course of time these assets had changed their nature and hardly bore any resemblance to the assets originally acquired. It was emphasized that disposal of these changed assets would be governed only by the provisions of the Companies Act, 1956 and that there was no need for any parliamentary approvals or sanction.

However, this was not accepted by the Supreme Court who held that the question was not whether assets can be transferred or not, but whether the undertaking can change its character from a Government company to ordinary company without parliamentary clearance in the light of the statute of acquisition. They indicated that in the case of BALCO, executive action to disinvest was not challenged probably due to the fact that there was no statutory backing of the nature which was there in the case of HPCL/BPCL. On the other hand, in the case of Maruti Udyog Ltd, though this was acquired under an enactment, there was no challenge to disinvest merely by executive action.

The Bench also pointed out that there was no challenge to the Government's policy of disinvestment. The legal issue raised was whether the method adopted by the Government in exercising its executive powers to disinvest HPCL and BPCL without repealing or amending the law was

permissible or not. Based on a reading of the language of the Act, the Court was of the opinion that such a course of action was not permissible at all. As a result, it restrained the Government from proceeding with the disinvestment resulting in HPCL and BPCL ceasing to be Government companies without appropriately amending the statutes concerned suitably.

The HPCL/BPCL judgement which, according to Barua,[32] dealt a 'body blow' to the privatization process of the government, has several implications that need to be examined. In India, there are two types of public sector undertakings:

(i) statutory corporations (e.g. Food Corporation of India, Central Warehousing Corporation or the State Warehousing Corporations etc.), and

(ii) government-owned or controlled companies, which are established under the Companies Act, with not less than 51 per cent of paid-up share capital being held by the Central Government or by the State Government or partly or wholly by both and which include holding companies with more than 50 per cent of the share capital of their subsidiaries[33].

Unlike government companies, statutory corporations are generally set up through an act of Parliament. Also, certain private companies have in the past been nationalized with parliamentary approval. The judgement in the HPCL/BPCL case would imply that such undertakings or statutory corporations cannot be privatized without amending/repealing the Act under which they were

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[32] see Barua, Samir K., "The Disinvestment Story" in 3iNetwork (2004), *India Infrastructure Report 2004: Value for Money*, New Delhi: Oxford University Press

[33] see Sezhiyan, Era, "Assaulting public accountability" in *Frontline*, Vol. 22, No. 24 dated Nov 19-Dec 2, 2005, p. 95

established/ acquired. The judgement was also based on the argument that since the acquisition of these corporations was made using funds from the Consolidated Fund of India that is appropriated by the Parliament, parliamentary approval was required for disinvestment of government stakes from such corporations.

Such an interpretation could create problems for the Government's privatization programme. Thus though a specific privatization law as prescribed by Guislain may not be necessary to enable the government to disinvest partly or wholly its shareholding in selected PSEs falling in the category of companies under the Companies Act in areas not stipulated as being expedient in public interest, as seen while discussing the BALCO case, bringing about such a legislation would help in ironing out some of the issues involved in privatization such as the one highlighted here. In fact the apex court in its judgement referred to Guislain's suggestion to bring about such legislation. However, keeping in view the problems associated with coalition politics, it would appear unlikely that such legislation would have smooth sailing in the parliament even if the government were to decide to opt for it. Nevertheless, it is submitted that a new piece of legislation or an amendment to an existing statute would be mandatory for disinvestment in some cases, as discussed above.

## *10.3 Labour Issues*

In the earlier chapters we have examined several arguments that were advanced in favour of privatization. While undoubtedly there are certain positive aspects to privatization, there are some negative aspects as well. As Remesh points out, of its demerits, the negative impact on labour is by far the most prominent as it

directly brings in the 'immediate social tensions of privatisation' (2006: 3). He indicates that the social effects of privatization would be far-reaching with increased worker redundancy, stagnation or decline in employment in the organized sector, increase in 'casualisation and informalisation' of labour, apart from setback on worker organizations, leading to loss of bargaining strength of the workers (2006: 2).

One of the immediate implications of privatization, according to Remesh, is worker redundancy. This can take the form of retrenchment or voluntary retirement. It is a known fact that most PSEs are overstaffed, and there is a genuine fear among unions and workers that restructuring and privatization would be accompanied by lay-offs. Guislain points out that the program of restructuring and privatization of the East German economy was attended by large-scale layoffs. It was seen that of the 4.1 million jobs in the enterprises in the Treuhandstalt's portfolio in 1990, only 1.5 million remained four years later[34]. This is the reason why unions and workers are generally opposed to privatization[35].

Guislain points out that in case the enterprise identified for disinvestment/ privatization has a severe problem of overstaffing, potential investors may require that the government or the SOE lay off redundant employees before privatization, especially if the legislation or the social climate makes it difficult for private

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[34] see *New York Times*, 12 August 1994 (cited by Guislain, 1997: 31)

[35] The BALCO disinvestment was followed by a strike that lasted for 67 days (3.3.2001 to 8.5.2001). More recently, the AAI staff had gone on strike to protest against the awarding of contracts for modernization of the airports at Delhi and Mumbai to private consortia fearing large-scale retrenchments (see newspaper reports between February 2-6, 2006).

employers to dismiss workers. He observes that the rights of laid-off workers, including severance pay and unemployment benefits, may vary significantly depending on whether they were laid off by the new private owners or by the SOE before privatization. In the latter case, he feels there will also be a difference depending on whether these workers were governed by general labour legislation or by special public-sector legislation (1997: 75).

The other reason for apprehension if not opposition among the staff to any privatization proposal is because they are reluctant to lose the special benefits, which they had been enjoying in the PSEs. Guislain points out that public sector employees often enjoy special civil service benefits (such as pension entitlements, for instance) which would normally have to be repealed and may be replaced by other, private-law benefits granted by the new company. He indicates that it may be necessary to confirm or modify other contractual (or statutory) rights of employees, including, in particular, wage levels, seniority rights, and other benefits (1997: 74). The problem is further compounded by the fact that agreements entered into by the earlier management may have to be honoured by the subsequent management regardless of whether or not the employment relationship continues.

According to Guislain, tradeoffs may be necessary between the protection afforded by labour law to incumbent workers and the need to create new jobs. He gives the example of Germany where ordinary labour law restricts the acceptable grounds for dismissal; however, to facilitate implementation of the privatization program the parliament granted buyers of privatized enterprises temporary

exemption from such restrictions. At the same time, he points out that Treuhand inserted a binding undertaking in many privatization contracts, under which the buyer guaranteed to keep or create a specified number of jobs in the privatized company, subject to penalties in the event of default. He is of the opinion that such a negotiated formula would be generally preferable to protecting jobs by prohibiting all dismissals following privatization. He gives the example of Pakistan where, under an agreement between the government and unions, new owners are prohibited from laying off any employees in the 12 months following privatization of an SOE. A similar provision was also built into the shareholder's agreement entered into by the Government of India with Sterlite Industries in the case of BALCO.

Other countries have come up with similar arrangements. Guislain indicates that in Malaysia, buyers can neither modify the terms of the employment contract nor dismiss employees of the privatized enterprise for five years after privatization. Similarly, in Sri Lanka, since March 1992 new owners have been required to extend the same benefits to employees, up to retirement age, that they enjoyed before privatization. Though he feels that uniform requirements of this kind make the privatization process unnecessarily inflexible and expensive, nevertheless some governments see them as essential for gaining the labour support deemed necessary to push through privatization (1997: 76).

The scope of employees' rights in the company including union rights and representation in management organs could also, according to Guislain, affect privatization and investment decisions. He points out that a major reason for

initial union opposition to Mexico's rail privatization program was the government's proposal to set up separate unions for each privatized rail company. Because of this reason, most privatizing governments have tried to involve workers and their unions in the preparation and implementation of the privatization process (1997: 77). However, as we have seen in the BALCO case, there has to be limits to such involvement. The implications of the BALCO case on labour issues relating to privatization will be discussed in the subsequent section.

Guislain further points out that while potential layoffs have tended to create labour opposition to privatization, potential employee ownership has had the opposite effect. He refers to a study of privatization in Poland which suggested that workers' councils in poorly performing firms (with a higher likelihood of bankruptcy or liquidation) generally opposed privatization and pursued aggressive wage policies. In the better performing SOEs, however, 'the promise of participation in the privatized firms reduced the incentives for workers to carry out an aggressive wage strategy' (Albrecht and Thum, 1994). In this case, according to Guislain, employee participation led not only to support for the privatization program but also to more reasonable wage demands (1997: 77). Because of these reasons, he says 'employee participation in privatization typically figures among the key provisions of a privatization law' (1997: 78).

Other connected issues, according to him, would include terminal benefits and pension entitlements, and matters relating to the social safety net such as social services and benefits, including heath, education, and housing.

### 10.3.1 The Indian experience

According to Ganesh, in India the only examples of privatization so far (as distinct from disinvestment) have been the electricity privatization in Orissa and the privatization of Modern Foods Ltd. He points out that in the former case, the State Government gave an undertaking that staff would not be retrenched, while in the case of Modern Foods Ltd., the shareholders' agreement provides for retention of existing workers (2001: 38)[36]. Similarly, Clause 7.2 (e) of the BALCO Shareholders Agreement stipulated that there would be no retrenchment of any part of the labour force of the company for a period of one year after disinvestment. However, it has been seen that very often conditions stipulated in shareholders' agreements are not adhered to by the new management. This would be evident from a review of the BALCO case.

So far as India is concerned, Ganesh is of the view that since under Indian laws, no retrenchment can be done, the fear that privatization would lead to large scale retrenchment is baseless. However, as Remesh points out in his recently published monograph on the *Impact of Privatisation on Labour: A study of BALCO disinvestment*, even if retrenchment is not possible, managements can and do adopt alternative strategies by (a) not filling up vacancies resulting from retirements and superannuation, and (b) introduction of early retirement packages or voluntary retirement schemes (VRS). In fact, as the study revealed, if employees did not opt for such schemes on their own volition, coercive methods were resorted to by the management to 'persuade' workers to opt for the same.

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[36] The reality is of course very different. See in this connection Dutta, Sanjib, "Modern Foods: Disinvestment and After" in Chowdary, Nagendra V. (2003), *PSU Disinvestment: Concept and Cases*, Hyderabad: ICFAI University, pp. 93-101

According to the study, employees were 'coerced' into opting for VRS and those who stayed back faced harassment from the new management.

The study indicates that various forms of coercion were used, such as transfers, stoppage of salaries etc, and other forms of humiliation. While managements usually hold transfers to be non-discriminatory and an administrative necessity, the perception of the staff can be very different. For instance, in the case of BALCO, the study report mentions that a large number of employees from BALCO's New Delhi and Bidhanbag units were transferred to Korba. When the employees of the Delhi unit protested against their transfer to Korba, the report indicates that their salaries were stopped and remained unpaid for more than seven months. Such actions are seen to be methods of coercion on the part of the management.

Coming to the reasons for opting for VRS, the report, which is based on interviews with 280 VRS beneficiaries, indicates that 35.71% opted for VRS because of 'direct or indirect pressures' from the management, 21% due to peer pressure, 19% due to panic and tension that they had to undergo after their redeployment and transfer, and 8% due to ill-health. Further, it is stated that out of 1302 employees who were granted VRS, 1281 were paid under deferred terms where their dues were disbursed in five instalments with a gap of six months between each payment. The report goes on to point out that not only did the new management fail to provide post-VRS support to the workers, the new management also lagged behind in its social responsibility.

Another impact of the privatization process on labour is referred to by Remesh as the 'casualisation or informalisation of labour.' He indicates that increasingly managements are turning to casual or contractual workers so as to avoid the obligations on account of provision of normal benefits available to regular employment. He points out that sometimes the workers who are laid off are hired back on contractual basis, without the extra-wage benefits that are admissible to permanent workers (2006: 3).

Remesh's study comes to the conclusion that so far as BALCO was concerned, the process of disinvestment had negatively impacted on the work and livelihood aspects of the staff. Not only did VRS result in downsizing of the manpower, but in the post-VRS period also, efforts towards reskilling, retraining, rehabilitating the manpower was found to be lacking.

The need for retraining and rehabilitating the manpower that is rendered redundant as a result of privatization cannot be over-emphasized if the programme itself is to succeed. The government would not only have to ensure availability of adequate funds through the National Investment Fund (NIF) for this purpose, but may also have to establish a regulator to ensure that conditions stipulated in Shareholders Agreements are adhered to and that manpower rendered redundant are rehabilitated and made productive.

Finally, before concluding, we shall examine the labour implications of the BALCO judgement.

### *10.3.1.1 Labour implications of the BALCO judgement*

While reviewing the legal issues involved in the BALCO case, we found that the Supreme Court judgement addressed several labour related issues such as the workers' rights of protection under Articles 14 and 16 of the Constitution and their right of consultation before and during the process of disinvestment.

The petitioners in the BALCO case had referred to the decision of the Court in the case of *National Textile Workers Union and Others vs. P. R. Ramakrishnan* (1982 Indlaw SC 185) wherein it had been observed that whenever a company should wind up or change its management, the Court must take into consideration not only the interests of the shareholders and creditors but also the interests of the workers. In this regard the apex court observed that while it may be fair and sensible to consult the workers in a situation of change of management, there was in law no such obligation to consult in the process of sale of majority shares in a company. The apex court referred to the judgement of the Karnataka High Court in the case of *Prof. Babu Mathew v. Union of India* (1997 Indlaw KAR 180) where the Court had remarked that while any policy of the Government should be in public interest, it is not shown how prior consultation with employees of a PSE before disinvestment is a facet of such public interest.

The apex court observed that merely because the workmen may have protection of Articles 14 and 6 of the Constitution, by regarding BALCO as a State, it does not mean that the erstwhile sole shareholder viz. Government had to give the workers prior notice of hearing before deciding to disinvest. It held that there was no principle of natural justice which requires prior notice and hearing to

persons who are generally affected as a class by an economic policy decision of the Government. It pointed out that if the abolition of a post pursuant to a policy decision does not attract the provisions of Article 311 of the Constitution as held in the case of *State of Haryana v. Des Raj Sangar* (1975 Indlaw SC 300), on the same parity of reasoning, the policy of disinvestment cannot be faulted if as a result thereof the employees lose their rights or protection under Articles 14 and 16 of the Constitution. In other words, it stated that the 'existence of rights of protection under Articles 14 and 16 of the Constitution cannot possibly have the effect of vetoing the Government's right to disinvest.'

The Court also held that the employees had no vested right in the employer company continuing to be a government company or 'other authority' for the purpose of Article 12 of the Constitution of India. It was of the view that while so long as the State holds a controlling interest in the shareholding of a company, employees of that company may claim the status of employees of a government company or 'other authority' under Article 12 of the Constitution, the status so conferred on the employees does not prevent the Government from disinvesting, nor make the consent of the employees a necessary precondition for disinvestment. Reference was made to the judgement given by the Madras High Court in the case of *Southern Structurals Staff Union v. Southern Structurals Ltd* (1994 Indlaw MAD 332) in this regard.

The unions had desired that their demands be accepted and put in the form of a written agreement between the representatives of recognized unions before finalizing any agreement with the prospective buyers. The Court clarified that the

Government and BALCO were two different legal entities, and hence under the law no enforceable agreement can be entered into between the Government and the workers of BALCO as any such agreement would not have the force of law. It pointed out that for an agreement to have the force of law, it should be a written agreement between the employer and the workers, which was not possible in this case as the Government was not the employer of the workers employed in BALCO. Hence it held that any such agreement was 'neither desirable nor necessary and not enforceable.'

The apex court mentioned that it had gone through the shareholders agreement between the Union of India and the strategic partner and was satisfied that the workers' interests were 'adequately protected in the process of disinvestment.' It drew reference to Clause 7.2 (e) of the Shareholder's Agreement which stipulated that the Company would not retrench any part of the labour force for a period of one year after the closing date, and Clause 7.2 (f) according to which in the event of any reduction of the strength of its employees, the Company shall offer its employees an option to voluntarily retire on terms that were not less favourable than the VRS scheme offered by it. It further mentioned that BALCO would remain an industrial establishment even after disinvestment and that all the provisions of the Industrial Disputes Act would automatically apply to it.

Regarding guaranteeing that there would be no closure of any establishment of the company for a minimum period of 10 years, it noted that the closure of any undertaking of an industrial establishment such as BALCO was

governed by Section 25 (O) of the Industrial Disputes Act, by virtue of which BALCO management before and after disinvestment was not free to close down any part of BALCO at their sweet will. However, it noted that no industrial establishment had any right to be compared with a government establishment. It observed that while as a result of disinvestment of 51% of the shares of the company, the management and control had gone into private hands, it cannot, in law, be said that the employer of the workmen had changed. It held that the employees continued to be under the company and that change of management did not, in law, amount to a change in employment.

To summarize, it can be said that the Supreme Court's judgement in the BALCO case clarifies the following labour related issues in the context of privatization:

- While it may be good practice to have consultations with workers' unions before taking policy decisions, such a step is not mandated by law;
- The service conditions bind the employees of an organization to abide by the decisions of the management regarding change of ownership or any other policy decision as long as such decisions were not contrary to law;
- The employees had no vested right in the employer company continuing to be a government company or 'other authority' for the purpose of Article 12 of the Constitution of India;
- Written agreement between the workers and the Government was not warranted as this would be legally void;
- There was no bar to the Government disinvesting its stake in a PSU as long as such a decision was taken judiciously and was in consonance with the law of the land.

The judgement of the Supreme Court in the BALCO case throws up certain basic legal questions in relation to the rights of employees which need to be examined in relation to other statutes such as the Industrial Disputes Act and the Companies Act. The first point to be noted is that a company is a separate legal entity as distinct from its members, including shareholders [ref *Salomon v. Salomon & Co. Ltd*][37]. This is applicable not only to private companies but also to Government companies. Section 617 of the Companies Act defines Government companies as those companies where 51% of the paid-up share capital is held by the Government (whether Central or State, or jointly by both). However, as in the BALCO case above, in the case of *Electronics Corporation of India v. Secretary, Revenue Deptt, Government of A.P.*, [1999] 97 Comp. Cas. 470, a distinction is sought to be made between the Government as owner and the company:

> 'Even though the entire share capital of the Government companies has been subscribed by the Government of India, it cannot be predicated that the companies themselves are owned by the Government of India. The companies which are incorporated under the Companies Act, have a corporate personality of their own, as distinct from that of the Government of India.'[38]

While Section 82 of the Companies Act empowers every shareholder to transfer his shares in the manner laid down in the Articles of Association and in accordance with the various provisions of law, Section 25FF of the Law of

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[37] [1895-99] All ER 33 (HL) - see Majumdar, A. K. and Kapoor, G. K. (2004), *Student's Guide to Company Law*, New Delhi: Taxmann, p. 9

[38] see Majumdar & Kapoor, 2004: 47

Industrial Disputes provides for compensation to workers in case of transfer of undertakings. As Malhotra points out[39], the effect of section 25FF as it at present stands is that if an industrial undertaking is transferred, the employees of the transferred undertaking shall be entitled to compensation, unless if the continuity of their service or employment is not disturbed. However, such a claim would lie against the transferor and not against the transferee of the undertaking. Also, as the Madras High Court held in the case of *Workmen of Mettur Beardsell v. Management of Mettur Beardsell Ltd,*[40] the consent of the employees for transfer was not necessary because in law there would be no transfer of the workers to the transferee concerned and the relationship of master and servant between the company and the workmen did not cease and there was no severance of the said relationship. This is also in keeping with the stand taken by the apex court in the BALCO case, and according to the principal of perpetual succession as contained in the Companies Act.[41]

The other important legislation in this regard pertains to the Industrial Disputes Act (IDA) 1947, and in particular to Chapter V-B which was added in 1976. As Tendulkar and Bhavani point out, till 1976, lay-off, retrenchment, and closure subject to the payment of prescribed compensation to the workers under the IDA did not require the permission of the government. However, Chapter V-B was added during the Emergency in 1976, according to which large industrial establishments, namely factories, plantations, and mines employing not less than

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[39] see Malhotra, O.P. (2004), *The Law of Industrial Disputes*, 6th Edition (ed E.M. Rao), New Delhi: LexisNexis Butterworths India, Vol II, p. 1967

[40] (1992) 1 LLJ 1, 8 (Mad), per Raju J. – quoted in Malhotra, 2004: 1969

[41] see para 2.3-7 as given in Majumdar and Kapoor, 2004: 11

300 workers, have to seek prior permission from the government to undertake lay-offs, retrenchment, or closure. It is further pointed out that subsequently, Chapter V-B of the IDA was made more restrictive by making it applicable to industrial establishments employing 100 or more workers. This, according to them, 'accentuated labour market inflexibility in the organized segment' (2007: 141). However, as we have seen from Remesh's findings earlier, there are more subtle and insidious methods of dealing with the labour than lay-offs, retrenchment, or closure.

The judgement of the Supreme Court in the BALCO case has been analyzed in some detail since it is felt that this is an extremely significant judgement in the context of privatization/disinvestment in India and has important implications both legally as well as from the labour point of view. It clarifies both the rights of the employees in the context of PSUs being considered as 'State' under Article 12 of the Constitution, as well as upholds unequivocally the right of the Government to disinvest. This is what makes this judgement so significant in the context of disinvestment in India.

Subsequently, there have been two other disinvestment-related cases before the apex court which have had labour implications. The first related to the case filed by the employees of Hotel Agra Ashok (*All India ITDC Workers Union and Others v. ITDC and Others*)[42] where the petitioners sought maintaining of status quo in respect of their service conditions and enforcement of VRS in respect of employees of Hotel Agra Ashok. With regard to the former the

[42] Transfer Case (Civil) 73 of 2002 and Transfer Case (Civil) No. 76/2002

respondent had replied that in terms of the settlement, the wages of the employees had been restructured and revised, while so far as VRS was concerned, it was submitted that after disinvestment, it was for the buyer to float the scheme of VRS.

The apex court noted that as per clause 9.4 in Article 9 of the share purchase agreement, the company was to continue all the regular employees on the terms and conditions as applicable to regular employees on the date of transfer of the unit including with respect to the voluntary retirement scheme; that the services of the regular employees would not be interrupted; that the terms and conditions of service applicable to the regular employees would not be in any way less favourable than those applicable to them before disinvestment; and that in the event of retrenchment of regular employees, the company shall pay them such compensation as was required under applicable labour laws. In view of this, the court held that the apprehension of the employees was baseless and liable to be rejected. It further opined that the respondents were under no obligation to float a VRS scheme because VRS is to be given only when a company retrenches its regular employees.

Taking a cue from the BALCO case (2001 Indlaw SC 20366), the apex court held that the existence of rights of protection under Articles 14 and 16 of the Constitution could not possibly have the effect of vetoing the Government's right to disinvest, nor could the employees claim a right of continuous consultation at different stages of the disinvestment process. It held that if the disinvestment

process was gone through without contravening any law, then the normal consequences as a result of disinvestment must follow.

On the other hand, the case of *Prasar Bharti and others v. Amarjeet Singh and Others* [2007 (3) SCJ 643],[43] related to the powers of the Corporation (Prasar Bharti) regarding transfer of employees who although working in its establishment, continued to be employees of the Central Government. Referring to the judgement in the case of *Jawaharlal Nehru University v. Dr K.S. Jawatkar and Others* (1989 Indlaw SC 719), the apex court stated that while there cannot be any doubt that ordinarily no employee can be transferred without his consent from one employer to another, this principle had no application in the present case. The apex court also went on to make a distinction between 'transfer' and 'deputation.' It felt that the situation in the case of Prasar Bharti amounted to 'deemed deputation' since the functions of the Central Government had been taken over by the Corporation in terms of Section 12 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990. The employees were being paid their salaries and other remunerations by the Corporation and were, for all purposes, under the functional control of the Corporation. In the circumstances, the apex court held that the Corporation had the power of transfer.

The success or failure of disinvestments world over has depended to what extent the government has been able to resolve the labour issues emerging from such a move. As was seen earlier, the two issues that primarily agitate the labour

[43] Case No. Appeal (Civil) 3244 of 2002; Civil Appeal Nos. 3245-3248 of 2002 and Civil Appeal No. 432 of 2007 (arising out of SLP (Civil) No. 15830 of 2003)

in the event of any disinvestment relates to their service conditions, and fear of redundancy. If disinvestment were to succeed in India, both these issues would need to be addressed. Labour would have to be assured that their interests would be taken into account in any such transaction. Only then would it be possible to make some headway with disinvestment in India.