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IMPACT OF NOVEL CORONAVIRUS ON LIVELIHOODS IN INDIA

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PART-I

PROLOUGE:

On 31 December 2019, the World Health Organisation (WHO), China Country Office was informed of cases of pneumonia of unknown aetiology (unknown cause) detected in Wuhan City, Hubei Province of China. Based on epidemiological information, WHO confirmed that N-CORONAVIRUS (2019-nCOVID) can be transmitted from one individual to another i.e. human to human transmission through droplets, contact and fomites. WHO assessed the risk to be very high in China, high at the regional level and high at the global level. On 30th January 2020, the Emergency Committee on the novel coronavirus (2019-nCOVID) under the International Health Regulations (IHR 2005) was reconvened which declared the outbreak to be a public health emergency of international concern. On 11th March 2020, Director-General of WHO stated that it was deeply concerned both by the alarming levels of spread and severity of novel coronavirus (2019-nCOVID) & as per WHO assessment nCOVID-19 can be characterized as a pandemic.

After WHO sounded the alarm loud & clear, India progressively shut down schools, shopping malls, cinema halls, restaurants, marriage halls, swimming pools, suspended the entry of commercial international flights into the country and ordered commercial airlines to shut down domestic operations. The Authorities advised people to stay home as much as possible. Major economic events such as the Indian Premier League have been deferred. The restrictive measures to contain the spread of nCOVID-19 have crippled manufacturing, business and transport amongst other commercial activities. The supply chain is completely disrupted. The outbreak of nCOVID-19 forced Governments to take several measures such as restricting number of persons in workplace, restricting access to Public Transport System, social distancing & lockdown of the State for a considerable period of time. All these have employment consequences.

ILO Director-General, Guy Ryder speaking in Geneva via videoconference, stated that nCOVID-19 impact could cause about 195 million job losses. All regions of the world are suffering from the fallout of nCOVID-19 and are witnessing the worst impact on employment in percentage terms. ILO estimates that the biggest losses numerically are in Asia-Pacific region, the most populous region of the world.

Present situation suggests that there will be a spike in the temporary closures of service, assembly & manufacturing facilities. In summary, the country should brace for a major effect on Employment in Industrial & Service Sectors. It will begin to hit full force in a week or two weeks from lifting of lockdown and could last for months.

Anticipating mass termination situation, due to the aftermath of nCOVID-19 outbreak, Central & State Governments, have issued a series of Advisories, Circulars, Notifications & Resolutions directing all establishments not to terminate or deduct wages of employees particularly contract or temporary

workers. During the course of this Article the term Employee and workmen would be used interchangeably.

It is evident that it will take more than a few months before normal working conditions can be restored. All business heads & manpower planning executives are faced with the question of how to deal with surplus employees during the interregnum in view of the conflict between Industrial law regulating lay off & retrenchment of surplus workmen and the diverse circulars, directives & notification issued by Central & State Governments not to terminate or deduct wages of employees.

This Article examines the law relating to the right, liability & obligation of employer in case of temporary or permanent discharge of workmen rendered surplus due to an epidemic. It also attempts to examine the legal efficacy circulars, directives & notifications issued by Central & State Governments not to terminate or deduct wages of employees.

A) LESSON FROM PREVIOUS PANDEMICS OR NATURAL DISASTERS:

1) All Sectors have recurrently faced Pandemic or Natural Disaster which has adversely affected mankind globally. Though mankind has overcome the crisis it may not have absorbed all lessons it required to, along the way. This is now evident by the inability of the Health Care services –both Government & Private - to perform planned surgeries, operate regular OPD, Chemotherapy & radiation, etc. All available Doctors, Para medic, Health care personnel, equipment & facilities are not sufficient to deal with nCOVID-19 afflicted patients. Similarly, Pharma & Health care Industry is unable to supply needed quantity of basic equipment to combat nCOVID-19 as it has overwhelmed the Health care system.

2) In early 2000, mounting pressure to reduce supply chain costs motivated companies to pursue strategies such as lean manufacturing, offshoring, and outsourcing. Such cost-cutting measures meant that when there is a supply-chain disruption, manufacturing will stop quickly because of a lack of parts or Raw Material. The vast majority of global companies have no idea of their risk exposure because few, if any, have complete knowledge of the locations of all the companies that provide parts to their direct suppliers. All sectors & more particularly the Industrial sector faced this issue after a series of natural disasters such as the 2002-2003 SARS epidemic, the March 2010 Iceland's volcano eruption, Japan's earthquake cum tsunami in March 2011, the flood in Thailand in August 2011, etc.

3) Post such disasters, impacting the Globe, majority of the Companies adopted measures to overcome problems leading to stoppage of operations. Companies at individual level assessed the inventory to be kept on hand if supply chain is dislocated due to such calamities. Few Industries adopted backward integration strategy to maintain downstream supply chain thereby assuring guaranteed supply of inputs, but they still require certain critical inputs to maintain production lines. Depending on the raw material required individual companies ensured inventory coverage of two to five weeks which would allow them to match their supplies with demand, with no additional supply of inputs.

4) However, despite all these measures almost all companies shut operations within a week from the date of imposition of restrictive measures. No company had a plan in place to deal with a crisis of this magnitude.

5) Before the novel coronavirus, many momentous epidemics and pandemics altered the course of human history. Mankind has overcome, challenges; but has it absorbed all lessons it required to, along the way? The present pandemic has shown several major shortcomings in all spheres. The Government & Society have failed to soak up past experiences & in devising strategies & measures to overcome challenges posed by Pandemics & global natural disasters. It is clear that society was not ready for a pandemic like the Novel Coronavirus. As Maxwell puts it, "You don't overcome challenges by making them smaller but by making yourself bigger."

B) EVENTS LEADING TO LOCKDOWN:

Maharashtra adopted stage by stage measures in its 'war against virus'.

- On 13th March 2020, The State Government declared the outbreak of nCOVID-19 as an epidemic in Mumbai, Navi Mumbai, Pune, Pimpri-Chinchwad and Nagpur, and invoked provisions of Epidemic Diseases Act, 1897 (Epidemic Act). The State Government appealed to citizen to observe 'Sancharbandhi'. Public & private offices were requested to cut back operations & adopt Work from Home model.

- On 20th March 2020, the state government announced the closure of workplaces, excluding essential services and public transport, in Mumbai, Mumbai Metropolitan Region, Pune, Pimpri-Chinchwad and Nagpur until 31st March 2020.

- On 22nd March 2020, all Indian citizens observed 14 hours voluntarily public curfew on an appeal made by Hon'ble PM. However, the curfew in the State was extended as the State Government imposed Section 144 of the Criminal Procedure Code (CrPC) of 1973 across the state,

with effect from 23rd March 2020, sending the state into a lockdown, in addition authorities issued Orders effectuating total shut down of public transport (trains) for the public and only limited transport was available for those employed with listed essential service providers.

- On 23rd March 2020, the CM announced the closure of borders of all Districts and a strict State wide curfew. Maharashtra became the first State in India to impose 'total lockdown' to counter the spread of nCOVID-19.

- On 24th March 2020, the PM declared 21 days complete Nationwide lockdown from midnight of 25th March 2020.

- On 13th April 2020, the CM has further extended the total lockdown of the State till 30th April 2020.

- On 14th April 2020, The Hon'ble PM extended ongoing nationwide lockdown in consultation with all CM's of the States till 3rd May 2020.


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C) IMPACT OF LOCKDOWN IMPOSED DUE TO PANDEMIC ON EMPLOYMENT:

1) The coronavirus pandemic isn't only affecting people's health and safety, it is also impacting people's livelihoods as the virus hits the economy. The imperative albiet grave measures of cancellations, quarantines, and social distancing are causing many companies to shut

operations, for want of labour, supply of parts, materials and other resources. Pandemics have adversely affected all sectors of the Economy. The challenge is significant in the high-tech industry. If the supply of components is disrupted manufacturing will have to stop. Supply lead times have a direct bearing and impact on operations. Some manufacturers have already had to throttle back production and the list gets longer by the day.

2) The geographical width of coronavirus epidemic is already affecting ports. Service industries such as aviation, Hotel, Travel & Tourism Industries are severely hit with no alternative in sight till the ban on flights & travel restrictions are lifted. BPOs are being hit by a double whammy. The operations or business of BPOs in India are mainly in providing back office support to their customers in India or Abroad. Most BPOs are specially tailored to provide such service, The BPOs have to inter-alia ensure that data is not leaked out or misused. The concept of "Work from Home" is not feasible or practicable. Industrial sector is completely overwhelmed by the need to maintain distance between workmen (Social Distancing), the closure of public transport & lockdown. Further, their customers may also cut back production which will directly & possibly permanently impact operations.

3) From the emerging developments it appears that in India the "sharp end" of the impact of the pandemic will be felt in the Service sector. Federation of Associations in Indian Tourism and Hospitality, in a letter addressed to the Hon'ble Prime Minister, pegs the job losses in the tourism and hospitality sector alone at about 38 million. Economic environment in aviation sector has deteriorated significantly. Pay cuts have been ordered by most of the airlines around the globe. In many airlines Staff has been requested to proceed on leave without pay. GoAir [Go Airlines (India) Ltd] has asked many employees to go on leave

without pay on a rotational basis and terminated services of expat pilots. A major International Consulting Company said that it is deferring increments, promotions, and bonuses for all it's staff in the country.

4) The Lockdown is having a direct impact on National Economy. The Lockdown has & continues to disrupt manufacturing operations affecting supply chains around the world daily. The impact of nCOVID-19 on supply chains is forcing companies to throttle down or temporarily shut assembly and manufacturing plants. The magnitude of nCOVID-19 impact on all Sectors is apocalyptic. The duration for which restrictions imposed will continue & the time required to re-commence working & reach full normalcy is not only unpredictable but most uncertain.

5) As of 2019, 56.79% per cent of India's employed population is working in the Industrial & Service Sectors. Most of the pay cuts & job losses will be from these sectors. Ordinarily, the companies would have addressed the issue of surplus labour by taking recourse to provisions made in that behalf under Labour & Industrial Laws. However, certain directives of the Government have created a legal tangle. The twists and turns that the legal understanding of Lay Off & Retrenchment has undergone, in the past, bring out it's complexity.

D) MEASURES ADOPTED BY CENTRAL GOVERNMENT TO REDUCE REDUNDANCY & PROMOTE CONTINUITY OF BUSINESS :

1) The Government of India, initiated measures which promoted 'Work from Home' concept. This concept achieved two objects. The employee is not required to attend office, thus considerably reducing human to

human transmission, whilst being gainfully employed. The employer is able to utilise service of his employee to maintain/continue operations.

2) The Ministry of Communications, Department of Telecommunications by Circular No. 18-5/2015-CS-I (Pt.), Dated 13.03.2020, in larger public interest, relaxed Terms and Conditions for "Other Service Provider" (OSP), in the wake of Corona virus (nCOVID-19) concerns upto 30.04.2020, in respect of the Work-From-Home (WFH).

E) GOVERNMENT CIRCULARS, RESOLUTION DIRECTING NOT TO SACK EMPLOYEES IN VIEW OF NCOVID-19

1) The Ministry of Labour, GOI, issued Notification D.O. No.M-11011/08/2020-Media, dated March 20th , 2020, which is reproduced below:

> "The World is facing a catastrophic situation due to outbreak of nCOVID-19 and in order to combat this challenge, coordinated joint efforts of all Sections of the Society are required. In view of the above, there may be incidence that employee's/worker's services are dispensed with on this pretext or the employees/workers are forced to go on leave without wage/salaries.
>
> In the backdrop of such challenging situation, all the Employers of Public/Private Establishments are advised to extend their coordination by not terminating their employees, particularly casual or contractual workers from job or reduce their wages. If any worker takes leave, he should be deemed to be on duty without any consequential deduction in wages for this period. Further, if the place of employment is to be made non-operational due to nCOVID-19, the employees of such unit will be deemed to be on duty.

The termination of employee from the job or reduction in wages in this scenario would further deepen the crises and will not only weaken the financial condition of the employee but also hamper their morale to combat their fight with this epidemic. In view of this, you are requested to circulate this Advisory to the Employers/owners of all the establishments registered with your Association of compliance."

2) Based on this DO several State Governments & their functionaries, such as Commissioner of Labour, have in turn issued circulars/ Notifications. These Notifications are advisory in Character.

3) However,

(i) On 20.03.2020, the Ministry of Labour and Employment issued D.O.No. M-11011/08/2020, advising various Industries/enterprises/companies/associations not to retrench any employee and continue paying the wages/salaries.

(ii) On 29.03.2020, the Ministry of Home Affairs issued an order for constituting Empowered Committee under Disaster Management Act, 2005 (DM Act). Accordingly, the Central Government constituted the National Executive Committee under Section 10(2)(l) of the DM Act and issued an order, which inter-alia, included payment of wages by the employers to the employees of any industry, enterprise, commercial enterprise.

To quote the relevant portion of Order dated 29.03.2020

"*Whereas, to deal with the situation and for effective implementation of the lockdown measures, and to mitigate the economic hardship of the migrant workers*

iv) All the employers, be it in the Industry or in the shops and commercial establishments, shall make payment of wages of their workers at their work places, on the due date, without any deduction for the period their establishment is under closure for the lockdown"

(iii) the Chief Secretary, Maharashtra State purportedly in exercise of powers conferred under DM Act issued GR dated 31st March 2020 (in Marathi) the translation reads as under:

'All workers/employees of all private establishments, factories, companies, shops (excluding essential service establishments) etc. establishments (taken on contract basis, employees and workers made available via external source, employees and workers for temporary period, daily wages workers) who are compelled to stay at home/detained due order of Government of Maharashtra because of outbreak of Corona Virus, nCOVID-19 should be treated to be reporting on their duties and entire wages and allowances should be paid to them.'

(iv) The aforesaid Notifications and Government Resolution are collectively referred to as "Government Directives"

F) CONUNDRUM OF EMPLOYERS DUE TO CORONAVIRUS

1) The Rule of Law is considered as one of the key dimensions that determine the quality and good governance of a country. The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers accountability. The government as well as private actors are accountable under the law. In contrast, Rule by Law

is a concept that sees the governing authority as somehow being above the law, and has the power to create and execute law where they find it to be convenient, despite the deleterious effect it has on the established system of law in place. Rule by law is a method that incumbent governments use to shape the behavior of people, and in terms of governing a country. This usually has the end goal of psychologically or forcefully persuading people to agree with policy decisions they otherwise would not agree with. In the case of **Kesavananda Bharati v. State of Kerala [AIR 1973 SC 1461]** the Supreme Court held that the Rule of Law is an essential part of the basic structure of the constitution and as such cannot be amended by any Act of Parliament, thereby showing how the law is superior to all other authority of men. The present Government is oblivious of the adage or legal maxim 'Hard cases make bad law'.

2) Winston Churchill once described Russia as "a riddle wrapped in a mystery inside an enigma". The aforesaid circulars, notification & Government Resolution could perhaps be described in similar terms as they run contrary to statutes & binding decisions of the Supreme Court of India.

3) Before we examine the legal efficacy of the various circulars, notification & Government Resolution which mandate not to retrench surplus workmen and pay wages to workmen for days they have not attended work due to the epidemic or on account of restrictive measures adopted by the Government it will be appropriate to briefly re- visit the law which regulates payment of wages to workmen & employers right, liability & obligation to deal with surplus labour.

LAWS WHICH REGULATES, PAYMENT OF WAGES TO WORKMEN & EMPLOYERS, RIGHTS, LIABILITIES & OBLIGATIONS, TO DEAL WITH SURPLUS LABOUR.

PART II

A) RIGHT TO CARRY ON ANY TRADE OR BUSINESS FUNDAMENTAL FREEDOM GUARANTEED BY ARTICLE 19(1)(g)

1) ***In Hatisingh Mfg. Co. Ltd. & Vs. Union Of India & ors. (AIR-1960-SC 923)*** the Supreme Court was considering the constitutional vires of Section 25 FFF(1) of the Industrial Disputes Act, 1947 ('**ID Act**' for short), which provides for payment of compensation to workmen on the closure of an industrial undertaking.

2) While holding that that Section 25FFF (1) of the ID Act, including the proviso and the explanation, is not violative of Arts. 19(1)(g),14 and 20 of the Constitution and its constitutional validity is beyond question. The Supreme Court observed inter-alia that it is as much a fundamental right of an employer to close down his business as to carry on the business. It is a matter within the discretion of an employer to organize and arrange his business in any manner he considers best including the closure of such business. In case of an actual closure, the termination of services of workmen has to be accepted as inevitable, however, unfortunate. The said freedom to carry on any trade or business is guaranteed to every citizen, but this freedom is not absolute. Operation of any existing law (or any law which the State may make) in so far as such law imposes, in the interest of the general public, reasonable restrictions on the exercise of the right is not affected. In the interest of the general public, the law may impose

restrictions on the freedom of the citizens to start, carry on or close their undertakings.

3) In ***Excel Wear Vs. Union of India*** ***{(1978)-4-SCC-224}*** the constitutional validity of original Section 25 – O of ID Act enacted as part of Chapter V B by Amending Act 32 of 1976 was impugned as being restrictive in nature on the fundamental right of the employer to close down the business. The Supreme Court on examining the nature of restriction observed that:

> **"no doubt true that Chapter VB deals with certain comparatively bigger undertakings and of a few types only. But with all this difference it has not made the law reasonable. It may be a reasonable classification for saving the law from violation of Article 14 but certainly it does not make the restriction reasonable within the meaning of Article 19(6). Similarly, the interest of ancillary industry cannot be protected by compelling an employer to carry on the industry although he is incapacitated to do so. All the comprehensive and detailed information given in the application forms are of no avail to the employer if the law permits the authority to pass, a cryptic, capricious, whimsical and one-sided order"**

and struck down section 25-O inserted by Industrial Disputes (Amendment) Act, 1976 (32 of 1976).

4) The above decision are '***locus classicus'*** **which illustrate that an employer has a fundamental right to re-organise his business**. Implicit in the said right is to discharge workmen –temporarily or permanently.

5) The Supreme Court in ***(i) D. Macropollo & Co. v. Their Employees' Union (A.I.R. 1963 SC 1723) ,(ii) Ghatge & Patil Concern's Employees' Union v. Ghatge & Patil (Transport) (Pvt) Ltd. & Anr. (1968 – I- L.L.J-566) & (iii) Parry & Co. v. P. C. Pal (A.I.R.***

1970 SC 1334) *observed that* the Legislature realised no employer is expected to carry the burden of surplus employees and retrenchment has to be accepted as inevitable, however unfortunate it is, and therefore provided by Sec. 25F compensation to soften the blow.

6) **It is to be noted that the Fundamental Right guaranteed by Article 19(1)(g) of the Constitution,** all citizens of India implicitly have the right to practise any profession or to carry on any occupation, trade or business, However, Article 19(6) empowers the State to make any law imposing (in the interest of general public) reasonable restrictions on the exercise of this right.

7) Therefore, any restriction to enjoy a Fundamental Right guaranteed can be imposed

(i) by law.
(ii) reasonable &
(iii) in Public Interest.

The principle on which the power of the State to impose restriction based is that all individual rights of a person are held subject to such reasonable limitations and regulations as may be necessary for the protection of the general welfare. Indeed there has to be a balance between individual rights guaranteed under Art 19(1) and the exigencies of the State which is the custodian of the interests of the general public, public order, decency or morality and of other public interests which may compendiously be described as social interest.

8) In Indian Labour Laws derive their origin, authority and strength from the provisions of the Constitution. The relevance of the dignity of humans and the need for protecting and safeguarding the interest of labour as human beings has been enshrined in Chapter-III (Articles 16, 19, 23 & 24) and Chapter IV (Articles 39, 41, 42, 43, 43A & 54) of the

Constitution of India keeping in line with Fundamental Rights and Directive Principles of State Policy. Labour law reforms are an ongoing and continuous process and the Government has been introducing new laws and amending the existing ones in response to the emerging needs of the workers in a constantly dynamic economic environment. The Employees' Compensation Act, 1923 (earlier called 'the Workmen's Compensation Act, 1923) is one of the oldest Labour Welfare Statutes.

B) HISTORY OF PAYMENT OF WAGES ACT

1) In 1926 the Government of India addressed local governments with a view to ascertain the position with regard to the delays which occurred in the payment of wages to persons employed in industry, and the practice of imposing fines on them. The investigations revealed the existence of abuses in both directions and the material collected was placed before the Royal Commission on Labour. The Commission collected further evidence on the subject and submitted a Report. The Government of India re-examined the subject in the light of the Commission's Report and in February, 1933 a Bill, embodying the conclusions then reached, was introduced and circulated for the purpose of eliciting opinion. The Payment of Wages Bill, 1935 having been passed by the Legislative Assembly received its assent on 23rd April, 1936 & came on the Statute Book as THE PAYMENT OF WAGES ACT, 1936 (4 of 1936) (***PW Act***). The Payment of Wages Act, 1936 is generally considered as the second oldest Labour Welfare Statute. The Act has been amended on several occasions to meet the needs of the time. A recent initiative by the Central Government is to bring in line the practice on payment of wages with the requirements of a cashless society.

2) The Act mandates that in every establishment, the employer shall fix the period for payment of wages and that no wage period shall be more than one month. The key provision of the Act is the requirement that wages shall be paid before the seventh day of the month in establishments with less than 1000 workers and before the tenth day in other establishments.

3) Another central provision is the requirement that no deduction shall be made from wages except those authorised by PW Act. Section 7 of PW Act enumerates the deductions which an employer is authorised to make from wages payable to an employee.

4) Section 7(2)(b) of PW Act entitles an employer to deduct wages in respect of employees who are absent from duty. Section 9 of PW Act prescribes the mechanism for deduction of wages in respect of such employees. This pre-Independence Statute has not been repealed after the people of our country adopted the Constitution. The validity of pre Constitutional laws is contingent upon fulfilling the criteria enshrined in Articles 13 and 372 of the Constitution. Thus any law in force at the time of coming into force of the Constitution of India which is inconsistent with or in derogation of the fundamental rights will be void to that extent. The PW Act does not suffer from the said vice. It is a substantive & valid law which regulates payment of wages including deduction of wages in respect of employees who are absent from duty, etc.

5) The Government Notifications/ Resolution also proscribes termination of any employee (surplus) and continue paying wages/salaries. Ordinarily, if an employer is unable to provide work to the workmen for a temporary duration, he may “Lay Off” such workmen. If the employer is of the opinion that employees are surplus to his requirement then he

may resort to retrenchment of such surplus employees. It is well settled law that the Employer has the right to re-organize and re-arrange his business in any manner he considers best. If in such a scheme workman are rendered surplus then the employer would be justified in retrenching such surplus employees. This right is however regulated by law. The Employer has to comply with conditions & obligations imposed by statute which are mandatory in nature and pre-condition required to be fulfilled.

C) LAY-OFF: What does *layoff* mean?

1) *Lay-off is* employer's failure, refusal or inability on account of the shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or **natural calamity** or for any other reason to give employment to a workman whose name is borne on the muster rolls of the industrial establishment and who has not been retrenched. That is, they are let go (*laid off*) from their jobs. Historically, the term *layoff* did indeed mean temporary discharge from service. But today, the word *layoff* is generally used when a person is directed not to report for work on account of employer's inability to provide work. In a way the contract of employment cannot be temporarily performed.

2) The freedom of contract theory, emerged out of the laissez-faire principle, authorised the employer to discharge his workmen due to breakdown of machinery or such other reasons beyond the control of the employer. This invariably exposed the workmen to frequent risk of involuntary unemployment. At common law employer was always at liberty to put an end to the service contract of employee, and his liability, if any, for wrongful termination of such a contract was in damages only. The concept of "lay off" arose only because the above

unquestioned general right of employer to put an end to the service contract has been almost completely wiped off by reason of the relevant labour legislation such as The Industrial Employment (Standing Orders) Act, 1946 (SO Act) & The Industrial Disputes Act, 1947 (ID Act).

D) THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) CENTRAL RULES, 1946 (SO ACT).

1) This is one more pre-independence statute which continues to remain in force post adoption of the Constitution. This Act has been amended from time to time to ensure that statutory condition of service is in line with modernisation of work place. The object of the SO Act was to require the employers to make the conditions of employment precise and definite and the Act ultimately intended to prescribe these conditions in the form of standing orders so that what used to be governed by a contract is now governed by the statutory Standing Orders. The SO Act provides for framing Certified Standing Orders (CSO) which constitutes uniform statutory terms and conditions of service between the employer and his employees.

2) Section 12- A of SO Act provides that for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders are finally certified under the SO Act & come into operation in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment. Therefore, in respect of industrial establishment which do not have Certified Standing Orders, the terms & conditions prescribed in Model Standing Orders (MSO) shall constitute statutory conditions of service.

3) Under Section 15 of SO Act, the Appropriate Government has the rule making power for carrying out the purposes of the Act. In exercise of said powers the Central Government framed "The Industrial Employment (Standing Orders) Central Rules, 1946" (Central Rules).

4) Schedule I appended to the Central Rules contains the Model Standing Orders in respect of industrial establishment, not being industrial establishment in coal mines, in relation to which Central Government is the Appropriate Government, (CSO)

5) SO 12 of CSO provides for Stoppage of work and reads thus:

"12. Stoppage of work :-

(1) The employer may, at any time, in the event of fire, catastrophe, breakdown of machinery or stoppage of power supply, epidemics, civil commotion or other cause beyond his control, stop any section or sections of the establishment, wholly or partially for any period or periods without notice.

(2) In the event of such stoppage during working hours, the workmen affected shall be notified by notices put upon the notice board in the departments concerned [and at the office of the employer and at the time-keeper's office, if any], as soon as practicable, when work will be resumed and whether they are to remain or leave their place of work. The workmen shall not ordinarily be required to remain for more than two hours after the commencement of the stoppage. If the period of detention does not exceed one hour the workmen so detained shall not be paid for the period of detention. If the period of detention exceeds one hour, the workmen so detained shall be entitled to receive wages for the whole of the time during which they are detained as a result of the stoppage. In the case of piece-rate workers, the average daily earning for the previous month shall be taken to be

the daily wage. No other compensation will be admissible in case of such stoppages. Wherever practicable, reasonable notice shall be given of resumption of normal work

(3) In cases where workmen are laid off for short periods on account of failure of plant or a temporary curtailment of production, the period of unemployment shall be treated as compulsory leave either with or without pay, as the case may be. When, however, workmen have to be laid off for an indefinitely long period, their services may be terminated after giving them due notice or pay in lieu thereof."

E) THE MAHARASHTRA INDUSTRIAL EMPLOYMENT (STANDING ORDERS) RULES 1959.

1) The State of the Maharashtra in exercises of powers conferred upon it vide Section 15 of SO Act framed "The Maharashtra Industrial Employment (Standing Orders) Rules 1959". Schedule I Part (A) prescribes Model Standing Orders (MSO) "For workmen doing manual or technical work" and Part B prescribes Model Standing Orders "For workmen doing clerical or supervisory work".

2) MSO 18 to MSO 20 - **Part A** being are reproduced below:

"18. (1) In the event of a fire, catastrophe, breakdown of machinery, stoppage of power supply, an epidemic, civil, commotion or other cause beyond the control of the Manager, the Manager may, at any time without notice or compensation in lieu of notice stop any machine or department wholly or partially or the whole or part of the establishment for a reasonable period.

(2) In the event of a stoppage under clause (1) during working hours, the workmen affected shall be notified as soon as practicable, when work will be resumed and whether they are to remain or leave the establishment. The period of detention in the establishment shall not ordinarily exceed one hour after the commencement of the stoppage. If the period of detention does not

exceed one hour, workmen so detained shall not be paid for such period. If the period of detention in the establishment exceeds one hour, workmen so detained shall be entitled to receive wages (including all allowances) for the whole of the time during which they are detained in the establishment as a result of the stoppage. In the case of piece-rate workmen the average daily earning for the previous months shall be taken to be the daily wages.

(3) Whenever practicable reasonable notice shall be given of the resumption of normal work, and all such workmen laid off under this Standing Order who present themselves for work, when work is resumed, shall be given preference for employment.

(4) All notices required to be given under this Standing Order shall be displayed on notice-boards at the time-keeper's office and at the main entrance to the establishment. Where a notice pertains to a particular department or departments only, it shall be displayed in the department concerned.

19. In cases where workmen are laid off under Standing Order 18, they shall be considered as temporarily unemployed and the period of such unemployment shall be treated as leave with pay to the extent such leave is admissible and leave without pay for the balance of the period. When, however, workmen have to be laid off for an indefinite period exceeding two months their services may be terminated after giving them due notice or pay in lieu thereof.

20. Workmen may be laid off due to shortage of orders, temporary curtailment of production or similar reasons and consequent stoppage of any machine or department, for a period not exceeding six days in the aggregate (excluding statutory holidays), in any month, provided that seven days notice is given. A workman laid off under the Standing Order for more than five days in a month may, on being laid off, leave his employment on intimation of his intention to do so."

F) ANALYSIS OF
<u>MSO 18 to MSO 20 - Part A</u>

1) MSO 18 suggests and implies that an industrial employer who is confronted with a situation or cause set out in Clause (1) of MSO 18 may stop department/s & suspend employment of his workmen. That suspension is termed as "lay off".

2) MSO 19 stipulates that workmen laid off under MSO 18 shall be considered as temporarily unemployed and the period of such unemployment shall be treated as leave with pay to the extent such leave is admissible and leave without pay for the balance of the period. When, however, workmen have to be laid off for an indefinite period exceeding two months their services may be terminated after giving them due notice or pay in lieu thereof.

3) MSO 20 - speaks of lay off due to shortage of orders, temporary curtailment of production or similar reasons and consequent stoppage of any machine or department. Lay off due to the said reason cannot exceed six days in the aggregate (excluding statutory holidays), in any month, provided that seven days' notice is given.

4) MSO 18 envisages lay off without any durational limit. MSO 20 carves out an exception & provides that if lay off is due to ***'shortage of orders, temporary curtailment of production or similar reasons'*** then the duration of lay off cannot exceed six days in the aggregate (excluding statutory holidays), in any month.

5) MSO - **Part B** contains identical standing orders. The reason for lay off is crucial. If lay off is due to reasons stipulated in MSO 18 - Part A or MSO 19 - Part B, save & except lay off due to **'**shortage of orders, temporary curtailment of production or similar reasons' then duration of lay off may be indefinite and the period of unemployment shall be

treated as compulsory leave either with or without pay, as the case may be.

6) The rights and liabilities of employers and workmen in so far as they relate to lay off under MSO shall be determined in accordance with the provisions of Chapter V-A of the Industrial Disputes Act, 1947.

7) The Legislature by Amending Act 43 of 1953, Parliament inter- alia inserted Section 2(kkk) & engrafted Chapter V-A in the Industrial Disputes Act, 1947 (ID Act) entitled "LAY-OFF AND RETRENCHMENT" containing Sections 25-A to 25-J.

8) Section 2(kkk) of ID Act defines the term Lay off thus:

"2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(kkk) "lay-off" (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery 5 [or natural calamity or for any other connected reason] to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched.

Explanation.—Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause:

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during the second half of the shift for the

day and is given employment then, he shall be deemed to have been laid-off only for one-half of that day: Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day;

9) Section 25- A exempts three types of Industrial Establishments from the purview of S. 25-C to S.25-E of ID Act. viz.

(i) in which less than fifty workmen on an average per working day have been employed in the preceding calendar month; or

(ii) which are of a seasonal character or in which work is performed only intermittently.

(iii) to which Chapter V-B applies.

10) By virtue of the provisions of Section 38-B of the Bombay Shops & Establishments Act, 1948, the Standing Orders prescribed under the SO Act are applicable to establishments engaging 50 or more employees. As more specifically explained hereafter the S.O. shall continue to apply to such establishments.

11) Compensation payable to workmen of 'industrial establishment' employing fifty or more workmen for the period of Lay off is governed by S. 25-C of ID Act & reads thus;

"25C. Right of workmen laid-off for compensation.- Whenever a workman (other than a badli workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid- off, whether continuously or intermittently, he shall be paid by the employer for all days during which he is so laid- off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent of

the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid- off:"

12) A Division Bench of the Bombay High Court in the case of **Castophene Mfg. Co. vs Janaki Gillumal And Ors. (1972-II-LLJ 417)** while analysing Section 2 (kkk) & Sections 25-A to 25-J of ID Act observed thus:

"The phrase 'rights and liabilities of employers and workmen in so far as they relate to lay off and retrenchment shall be determined in accordance with the provisions of this chapter' sub- (2) of S. 25J has the effect of statutorily negating liability of employers to make payment and right of workmen to receive payment when laid off or retrenched except when the liability to pay and right to receive are created by the provisions in the chapter. The true effect of the phrase is that in every case where it is ascertained that when an employer fails, refuses or expresses inability to give employment to workmen whose names are borne on the muster roll of his establishment on account of shortage of coal, power or raw material or the accumulation of stocks or the breakdown of machinery or for similar reasons, the consequent rights and liabilities of employers and workmen must be determined only in accordance with the provisions in Chapter VA. In other words, in every case of "lay off" to be able to get cause of action for payment of money on the ground that the employer has failed, refused or expressed inability to give employment to him the workman must base his claim on the provisions in S. 25C. There is corresponding liability imposed on employer ..."

13) **Section 25C of** ID Act, lays down that if a legal lay-off is imposed by the employer, the permanent workman covered by sweep of sub-section (1) of Section 25C would be entitled to be paid by way of lay-off compensation 50% of the total of basic wages and dearness allowances during the relevant period of lay-off**.** The quantum of compensation payable to a workman laid off is a reasonable restriction imposed upon

the employer in public interest. This is permissible in view of Article 19(6) of the Constitution.

14) By Industrial Disputes (Amendment) Act, 1976 (32 of 1976), Parliament engrafted Chapter V-B in the Industrial Disputes Act, 1947 entitled "***Special Provisions Relating To Lay-Off, Retrenchment And Closure In Certain Establishments "*** containing Sections 25-K to 25-S. The said provisions have been further amended by Amending Acts 46 of 1982 & 49 of 1984. Chapter V- B applies to Industrial Establishment engaging 100 or more employees. Section 25 M(1) sets out condition precedent for laying off employees in such Industrial Establishment and sub- section (10) of Section 25M provides for the payment of compensation to employees laid off.

15) Sections 25 M(1) & (10) are reproduced below**:**

"25M. Prohibition of lay-off.-

workman (other than a badli workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment to which this Chapter applies shall be laid-off by his employer except 3[with the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority), obtained on an application made in this behalf, unless such lay-off is due to shortage of power or to natural calamity, and in the case of a mine, such lay-off is due also to fire, flood, excess of inflammable gas or explosion]."

(2) to (9) ……..

(10) The provisions of section 25C (other than the second proviso thereto) shall apply to cases of lay- off referred to in this section. Explanation.-- For the purposes of this section, a workman shall not be deemed to be laid- off by an employer if such employer offers any alternative employment (which in the opinion of the employer does not call for any special skill or previous experience and can

be done by the workman) in the same establishment from which he has been laid- off or in any other establishment belonging to the same employer, situate in the same town or village, or situate within such distance from the establishment to which he belongs that the transfer will not involve undue hardship to the workman having regard to the facts and circumstances of his case, provided that the wages which would normally have been paid to the workman are offered for the alternative appointment also."

16) Section 25- M (10) incorporates, by reference, the liability to pay compensation as prescribed in S. 25-C of ID Act.

17) The Supreme Court in **Papnasam Labour Union vs. Madura Coats Ltd. and Ors. (AIR 1995 SC 2200)** held**:**

"18. In our view, the aforesaid observations in upholding the validity of Section 25-N squarely apply in upholding the validity of Section 25-M. It is evident that the legislature has taken care in exempting the need for prior permission for lay off in Section 25-M if such lay off is necessitated on account of power failure or natural calamities because such reasons being grave, sudden and explicit, no further scrutiny is called for." (emphasis supplied)

18) The said ratio was also followed by the Division Bench of Orissa High Court in the matter of **Ferro Alloys Corporation Ltd. vs. Labour Commissioner and Ors. (2002) III LLJ 551.**

19) If Lay Off is due to epidemic then the industrial establishment coming within the sweep of chapter VB of ID Act is exempted from applying for permission. However, the Employer would be liable to pay workmen of Industrial Establishment falling within Chapter V-A or V-B of ID Act compensation, for the days laid off, as per Section 25-C of ID Act.

G) <u>RETRENCHMENT: what does it mean?</u>

1) Retrenchment is the employer downsizing the employment strength of the establishment. by Amending Act 43 of 1953, Parliament also inserted Section 2(oo) in the ID Act.

2) Section 25-G of ID Act prescribes the procedure for retrenchment. The said provision requires the employer to observe the rule of **'Last In (come) First Go'.** The rule effectively prevents the employer from utilising the weapon of 'Hire & Fire.' Section 25-F of ID Act stipulate conditions precedent to be complied while effecting retrenchment. Section 25-H of ID Act gives preferential right of re-employment to a retrenched workman.

3) Section 25 N of ID Act, inserted as a part of Chapter V B, sets out condition precedent for Retrenchment of employees in Industrial Establishment engaging 100 or more employees. Prior permission of Appropriate Government is Sine- qua –non for effecting retrenchment.

4) Unlike 25 –M epidemic is not specifically provided as a ground for exemption from seeking prior permission for retrenchment of surplus labour. However Sub section (8) empowers the appropriate Government to exempt an establishment from making application for permission in exceptional circumstances such as "***accident in the undertaking or death of the Employer or the Like***". Normally, the death of an employer will be relevant where establishment is carried on by an individual. It will not be available to corporate bodies or large scale establishment having a structured managerial set up. However the phrase "accident or the Like" used in the said sub-section will take within its ambit a Natural Disaster like collapse of factory building, earthquake or floods which renders the establishment inoperative.

Whether Epidemic will come within the amplitude of the phrase "accident or the Like" requires a detailed study.

5) The consequence of retrenchment of a workman sans permission will be deemed to be illegal and *ab-intio* inoperative in law. Apart from being exposed to penal consequences for illegal retrenchment under section 25- Q such retrenchment will not affect the right of the workman to wages & benefits under the contract as if he was not retrenched.

6) Section 25 N of ID Act also provides for Notice & payment of compensation to employees permitted to be Retrenched.

7) **In Workmen Of Meenakshi Mills Ltd. vs Meenakshi Mills Ltd. (AIR 1994 SC 2696) the Supreme Court held that** Section 25-N of the ID Act, did not suffer from the vice of unconstitutionality on the ground that it was violative of the fundamental rights guaranteed under Article 19(1)(g) of the Constitution or that it was not saved by Article 19(6) of the Constitution. The Supreme Court held that object underlying the enactment of section. Section 25-N is to introduce prior scrutiny of the reason for retrenchment to prevent avoidable hardship to the employees resulting from retrenchment by protecting existing employment, check the growth of unemployment which would otherwise be the consequence of retrenchment in industrial establishments employing large number of workmen and to maintain higher tempo of production and productivity by preserving industrial peace and harmony. Section 25-N seeks to give effect to the mandate contained in the Directive Principles of the Constitution. The restrictions imposed by Section 25-N on the right of the employer to retrench the workmen must, therefore, be regarded as having been imposed in the interest of general public.

8) Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest. A restriction imposed on the employer's right to terminate the service of an employee, by law, is not alien to the Constitutional scheme which indicates that the employer's fundamental right is not absolute.

9) The above discussion demonstrates that there is a substantive law on the statute books which regulate payment of wages, lay off & retrenchment if employer is unable to provide work to the workmen.

10) Hence the question that arises, in present special circumstances, is whether various abovementioned GR's, purportedly issued in exercise of powers under The Disaster Management Act, 2005 (DM Act), overrides or substitutes the statutory terms & condition of service prescribed under Model Standing Orders & the law relating to payment of lay off compensation stipulated in Industrial Disputes Act, 1947.

SPECIAL LEGISLATION

PART III

1. A conflict between statute law and administrative decisions, purportedly based on law, is generally resolved by Courts on basis of first principles. First-principles reasoning cuts through dogma and removes the blinders. Legal Maxims have been a valuable tool in conflict resolution. A Division Bench of the Bombay High Court while deciding a Sales Tax Appeal succinctly observed

   "At this juncture, let us test the above view on the touchstone of general cannons of statutory constructions. It would not be out of place to mention that the maxims in law are said to be somewhat like axioms in geometry. They are principles and authorities and part of general customs and common law of land. These are sorts of legal capsules useful in dispensing justice. In other word, maxims can be defined as established principle or of interpretation of statutes." **(M/S R. J. Rim Pvt. Ltd vs. The Commissioner Of Sales Tax).**

   Doctrine of "NO WORK NO WAGES"

2. The well settled doctrine of **"No Work No Wages"** is implicit in any contract of employment. It is recognised by Law. It is basic that a workman has to earn his wages by doing the work for which he has entered into the contract with the employer. The provisions of the Payment of Wages Act and the Maharashtra Shops and Establishments Act constitute only restrictions on the common law right of an employer to cut/deduct wages of the employees in case of breach of contract. If an employer has not prevented a workman from reporting for duty but the workman has remained absent from duty then the employer cannot be saddled with the burden to pay wages.

That a workman is not entitled to wages is such a deeply ingrained & widely accepted principle that there is hardly any industrial dispute on this count.

3. The Supreme Court applying the principle of **"NO WORK NO PAY"** held that employees even if present at the place of work are not entitled to wages if they do not perform work for which they are engaged.

4. The relevant facts in ***Bank Of India vs T.S. Kelawala {1990 (4) SCC 744}*** were that the employees' Unions gave a call for a four-hours strike. The Bank issued an Administrative Circular warning the employees that they would be committing a breach of their contract of service if they participated in the strike and that they would not be entitled to draw the salary for the full day if they did so, and consequently, they need not report for work for the rest of the working hours on that day. Notwithstanding it, the employees went on a four hours strike from the beginning of the working hours. There is no dispute that the banking-hours for the public, covered the said four hours. The employees, however, resumed work on that day after the strike hours, and the Bank did not prevent them from doing so. The Bank issued a Circular directing its managers and agents to deduct the full day's salary of those of the employees who had participated in the strike. The respondents filed a writ petition in the High Court for quashing the circular. The petition was allowed. The Bank preferred a Letters Patent Appeal in the High Court which also came to be dismissed. The Bank preferred an appeal to the Supreme Court.

5. The Supreme Court quoted the observation of Lord Denning MR in the case of Secretary of **State for Employment v. Associated Society of Locomotive Engineers and Firemen and Ors**. [1977] 2 All ER 949,

"...It is equally the case when he is employed as one of many's to work in an undertaking which needs the service of all. If he, with the others, takes steps wilfully to disrupt the undertaking to produce chaos so that it will not run as it should then each one who is a party to those steps is guilty of a breach of his contract. It is no answer for any one of them to say 'I am only obeying the rule book', or 'I am not bound to-do more than a 40 hour week'. That would be all very well if done in good faith without any wilful disruption of services; but what makes it wrong is the object with which it is done. There are many branches of our law when an act which would otherwise be lawful is rendered unlawful by the motive or object with which it is done. So here it is the wilful disruption which is the breach. It means that the work of each man goes for naught. It is made of no effect. I ask: is a man to be entitled to wages for his work when he, with others, is doing his best to make it useless? Surely not. Wages are to be paid for services rendered, not for producing deliberate chaos. The breach goes to the whole of the consideration, as was put by Lord Campbell CJ in Cuckson v. Stones, (1983-60) All ER Rep 390 at 392 and with other cases quoted in Smith's Leading Cases (13th Edn., Vol. 2, p. 48), the notes to Cutter v. Power, [1795] 6 Term Rep 320, (1775-1802)All ER Rep 159)".

In Miles v. Wakefield Metropolitan District Council, the facts were that the plaintiff, Miles was the Superintendent Registrar in the Wakefield Metropolitan District Council. His duties included performing marriages. As part of trade union action, he declined to perform marriages on Saturdays which day was very popular with marrying couples. However, on that day he performed his other duties. The Council, not wanting to terminate his services, imposed a cut in his remuneration. He sued the Council for payment but failed. He appealed to the Court of Appeal and was successful. The appellate court held that he was a statutory official and there was no contractual relation and the only action against him was dismissal. Aggrieved by this appellate decision, the Council went before the House of-Lords in appeal. The House of Lords held that the salary payable to the plaintiff was not an honorarium for the mere tenure of office but had the character of remuneration for work done. If an employee refused to perform the full duties which could be required of him under his contract of service, the employer is entitled to refuse to accept any partial performance. In an action by an employee to recover his pay, it must be proved or admitted that the employee worked or was willing to work in accordance with the contract of employment or that such service as was given by the employee, if falling short of his contractual obligations was accepted by the employer as sufficient performance of the contract. In a contract of employment wages and work go together. The employer pays for the work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay- In an action by a worker to recover his pay, he must allege and prove that he worked or

was willing to work. In the instant case, the plaintiff disentitled himself to salary for Saturday morning because he declined to work on Saturday morning in accordance with his duty. Since the employee had offered only partial performance of his con- tract, the employer was entitled, without terminating the contract of employment, to decline partial performance, and in that case the employee would not be entitled to sue for his unwanted service.
In this connection, Lord Templeman stated as follows:
"The consequences of counsel's submissions demonstrate that his analysis of a contract of employment is deficient. It cannot be right that an employer should be compelled to pay something for nothing whether he dismisses or retains a worker. In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work ..... "

6. The Supreme Court held that when the employees came back to work after their four-hours strike, they were not prevented from entering the Bank premises. But admittedly, their attendance after the four-hours strike was useless because there was no work to do during the rest of the hours. It is for this reason that the Bank had made it clear, in advance, that if they went on strike for the four-hours as threatened, they would not be entitled to the wages for the whole day and hence they need not report for work thereafter- Short of physically preventing the employees from resuming the work which it was unnecessary to do, the Bank had done all in its power to warn the employees of the consequences of their action and if the employees, in spite of it, chose to enter the Bank's premises where they had no work to do, and in fact did not any, they did so of their own choice and not according to the requirement of the service or at the direction of the Bank. In fact, the direction was to the contrary. Hence, the later resumption of work by the employees was not in fulfilment of the contract of service or any obligation under it. The Bank was therefore not liable to pay either full day's salary or even the pro rata salary for the hours of work that the employees remained in the Bank premises

without doing any work. ***It is not a mere presence of the workmen at the place of work but the work that they do according to the terms of the contract which constitutes the fulfilment of the contract of employment and for which they are entitled to be paid.*** Although the employees may strike only for some hours but there is no work for the rest of the day as in the present case, the employer may be justified in deducting salary for the whole day. On the other hand, the employees may put in work after the strike hours and the employer may accept it or acquiesce in it. In that case the employer may not be entitled to deduct wages at all or be entitled to deduct them only for the hours of strike. If further statutes such as the Payment of Wages Act or the State enactments like the Shops and Establishments Act apply, the employer may be justified in deducting wages under their provisions. Even if they do not apply, nothing prevents the employer from taking guidance from the legislative wisdom contained in it to adopt measures on the lines outlined therein, when the contract of employment is silent on the subject.

7. The Government Directives to pay wages for days of absences due to nCovid-19 epidemic situation, demonstrates that their understanding of a contract of employment is deficient.

GENERALIA SPECIALIBUS NON DEROGANT

8. Let us test the Government Directives by applying the maxim ***Generalia specialibus non derogant.*** This maxim is classified as one of the Rules of Logic, because it results from a very simple process of reasoning and indeed, may be considered as axiom, the truth of -which is self-evident. Literally the maxim means “the general does not detract from the specific.” This maxim suggests that courts prefer specific provisions over provisions of general application where the provisions

are in conflict. The rule may apply either to two separate statutes**,** or to provisions within the same Act. However, the principles may be applied to resolve a conflict between a statute & Government decision based on another statute.

9. The PW Act is a special act. Section 7(2) of the said act authorises "**Deduction for absence from duty**". Section 9(1) of the said Act clarifies that such deduction may be made "**only on account of the absence of an employed person from the place or places where, by the terms of his employment, he is required to work, such absence being for the whole or any part of the period during which he is so required to work."** The provision is clear & specific**.** It authorises deduction due to absence from place of work without any exception.

10. Broadly, applying the principles laid down by the Supreme Court in ***The Pharmacy Council of India V Dr. S.K. Toshniwal Educational Trusts Vidarbha Institute of Pharmacy and Ors. (2020 SCC OnLine SC 296)*** it can be safely concluded that

    - The PW Act is a complete code in respect of Payment of Wages;
    - the ID Act is a complete code in the field of Industrial & Labour Relation & settlement of Industrial Disputes;
    - SO Act is in the nature of a code governing terms & conditions of contract of employment;

11. The PW Act, the ID Act & SO Act are Special Acts in their respective field .

12. In comparison to PW Act, the ID Act & SO Act, The Epidemic Diseases Act, 1897 (EA Act) & Disaster Management Act, 2005 (DM Act) are general statute.

13. The DM Act though a subsequent enactment there is no specific repeal of PW Act, ID Act or SO Act which are Special Acts.

14. Evidently, there is no repugnancy or inconsistency between EA Act & DM Act on one hand & PW Act, the ID Act & SO Act, as well as MSO framed under SO Act.

15. In case of inconsistency between the said Acts, then the PW Act, the ID Act & SO Act as well as MSO framed under SO Act will prevail & govern the right, liabilities & obligations of parties in respect of Payment of Wages, Lay off or Retrenchment.

16. The upshot of the above discussion is that PW Act is a special statute in relation to Payment of wages as compared to EA Act which is on the subject of prevention, control, management & eradication of epidemic or the DM Act which enables the authority to make plans & take steps or measures for mitigation to reduce "*risks, impacts and affects*" of the disaster. The Government Directives have been issued in purported exercise of powers said to have been conferred by EA Act/ DM Act. In case of conflict in respect of deduction from wages between the provisions contained in PW Act & the mandate of the Government Directives, the former will prevail over the later.

17. Similarly, ID Act/SO Act being "Special Legislation" in comparison with EA Act or DM Act any measure adopted by the Employer on the basis of ID Act & SO Act will have to be held as legal & proper notwithstanding

directives to the contrary issued by the Government in exercise of powers either under EA Act or DM Act.

18. On first principles the directives issued by the Government are unsustainable & will not in any manner whittle down or nullify the law which regulates deduction of wages due to absence of workman or temporary or permanent discharge of surplus workmen due to aftermath of nCovid -19.

19. Apart from above, the moot question is whether the Government Directives issued purportedly in exercise of powers DM Act is intra-vires the said act? We may briefly examine the Object, salient features & purpose of the DM Act.

PROVISIONS OF Disaster Management Act, 2005 (DM Act).

20. DM Act was enacted by invoking **Entry 23** namely ***'Social security and social insurance, employment and unemployment'*** in the Concurrent List for the effective management of disasters and for matters connected therewith or incidental thereto. DM Act empowers the Central government to declare the entire country or part of it as affected by a disaster and to make plans for mitigation to reduce "*risks, impacts and affects*" of the disaster. DM Act covers all man-made and natural disasters which are beyond the coping capacity of a community. It inter-alia enables the Central government to take effective steps & adopt measures in response to a disaster. It also provides powers to the government to act against anyone not abiding by government orders and regulations.

21. ***The Prime Minister, as chairperson of NDMA, invoked Sections 6 and 10 of DM Act, to declare Covid-19 as a national disaster so***

that the entire country has uniform lockdown regulations, which are easier to implement. For instance, before the national lockdown was enforced under the law, state specific lockdowns and a lockdown of 82 districts by the federal government -- both under the epidemics law -- were inconsistent about the use of private vehicles. However now States, under DM Act, are required to implement the national disaster management plan.

22. The expression "disaster management" defined in section 2(d) of DM Act means a continuous and integrated process of planning, organising, coordinating and implementing measures which are necessary or expedient for—

"

i. prevention of danger or threat of any disaster;
ii. mitigation or reduction of risk of any disaster or its severity or consequences;
iii. capacity-building;
iv. preparedness to deal with any disaster;
v. prompt response to any threatening disaster situation or disaster;
vi. assessing the severity or magnitude of effects of any disaster;
vii. Evacuation, rescue and relief;
viii. Rehabilitation and reconstruction*;* "

23. The definition is expansive & will take within its amplitude all measures for "Rehabilitation and reconstruction" post disaster. In order to achieve the objects of the DM Act the Government established the National Disaster Management Authority (NDMA), State Disaster Management Authority (SDMA) & District Disaster Management Authority (DDMA).

24. Sections 6, 24 & 34 of DM Act confer power upon NDMA, SDMA & DDMA respectively. The Authorities in turn have constituted Committees at National, State & District level to carry out process of planning, organising, coordinating and implementing measures which are necessary or expedient for Disaster Management. Analysis of Sections 6, 24, 30 & 34 of DM Act does not expressly or impliedly confer power upon the said Authorities to order or direct an employer to pay wages to workmen for period of enforced absence due to the disaster notwithstanding that the Employer is not at fault. The act also does not empower the Authorities to direct the Employer as to how he should carry on his business or trade post the disaster.

25. CHAPTER IX of DM Act entitled "FINANCE, ACCOUNTS AND AUDIT" empowers the Central & State Governments to constitute different funds to be applied towards meeting the expenses for emergency response, relief and rehabilitation.

26. **Section 46 of DM Act** enjoins the Central Government to establish **National Disaster Response Fund** to be applied towards meeting the expenses for emergency response, relief and rehabilitation in accordance with the guidelines laid down by the Central Government in consultation with the National Authority.

27. **Section 47 of DM Act** permits the Central Government to establish **National Disaster Mitigation Fund** to be utilized for projects exclusively for the purpose of mitigation.

28. **Section 48 of DM Act** empowers the State Authority and the District Authorities, to establish for the purposes of this Act the following funds, namely:—

(*a*) the State Disaster Response Fund;

(*b*) the District Disaster Response Fund;

(*c*) the State Disaster Mitigation Fund;

(*d*) the District Disaster Mitigation Fund.

29. The aforesaid funds have been established so that the Authorities constituted under the DM Act is able to defray all expenses incurred towards disaster management. The funds constituted under the Act are the only source for managing a disaster including rehabilitation and reconstruction.

30. In other common law jurisdctions (such as Australia and Canada) the Government has subsidised estbalishments post the invocation of their respectiver disaster mangement protcols resulting a lockdown in their territory. As duly reported "*To avoid large-scale job losses, Australia has announced a wage-subsidy scheme, under which certain employers will be able to receive a $1,500 payment per retained worker every two weeks. Canada has introduced a 75 percent wage subsidy to eligible employers for up to 12 weeks, retroactive to March 15, 2020. This is in addition to 10 percent temporary wage subsidy, which will allow businesses to reduce payroll deductions. Similar reliefs have been announced by several other countries like the U.S., the U.K., Singapore, Ireland, etc*".

31. In comparison under the Union and State Governments in India have *merely redistributed its co*st and have not provided any financial assistance by passing directions and orders under the Diasaster Management Act, 2005 and Epidemic Diseases Act, 1897 directing the Employers (be it industry, shops, or comemrcial establishments)

thereby unjustly burdening the establishment during these trying economic times coupled with the pandemic.

32. An employer may be called upon to generously contribute to the fund but the act does not contemplate payment of wages by an employer to the workmen for period of absence as a measure of mitigation of the effects of disaster. The act definitely does not empower the Authorities to direct the Employer how to carry on or re-organise his business or trade, post the disaster.

33. Section 64 of DM Act empowers that if any provisions of any rule, regulation, notification, guideline, instruction, order, scheme or bye-laws, as the case may be, are required to be made or amended for the purposes of prevention of disasters or the mitigation thereof, it may require the amendment of such rules, regulation, notification, guidelines, instruction, order, scheme or bye-laws, as the case may be, for that purpose, and the appropriate department or authority shall take necessary action to comply with the requirements. This provision rightly does not empower it to recommend amendment of Law. That is a Legislative Function. None of the Authorities sought amendment of MSO which constitutes statutory terms & conditions of service. The Government directives are inconsistent with the CSO & MSO. Absent any amendment to the CSO & MSO the Government directives have no legal efficacy.

34. Section 65 of DM Act empowers the Authorities to requisition resources, services, premises &/or vehicles after following the procedure laid down therein. The Authority is required to pay compensation as provided in Section 66. Section 65 does not empower the authorities to issue any direction of general nature calling upon an employer to pay to the workmen wages for period of absence as a measure of mitigation of the

effects of disaster. This provision definitely does not empower the Authorities to direct the Employer not to layoff or retrench surplus workmen post the disaster notwithstanding that the workmen are surplus & is a drag on the finances of the employer.

35. Section 72 of DM Act provides that DM Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act**.** In case of repugnancy, the other law would be void only to the extent of repugnancy. Considering Sections 2(d), 6, 24,34,64 & 65 of DM Act & relevant provisions of PW Act, ID Act & SO Act (Labour Laws) it is clear that there is no repugnancy between the DM Act and the Labour Laws. It is clear that the Government Directives are ultra vires the DM Act.

36. Assuming that power to issue the Government Directives are implicit in DM Act then it amounts to conferring unfettered powers on the executive, without laying down any criterion or guidelines to enforce the DM Act. This tantamounts to abdication of legislative powers.

37. It is trite law that the Government Directive authorising payment of wages to workmen for days of absence as a rehab measure amounts expropriation of the property of private individuals. This is a serious measure. It will be lawful only if confined to expropriation **for public purpose** and if compensation is determined either in the first instance or in appeal by some independent authority thenPayment of wages for days of absence or preventing termination of services of workmen is not considered as an act for public purpose.

38. The question what is meant by the phrase 'in the interest of the general public' fell for consideration before a Division Bench of the Gujrat High

Court in the case of **Associated Cement Companies Ltd. vs Union Of India (1989-I-LLJ 599).** Adverting to the decision of the Supreme Court in the case of M/s. Hatisingh Mfg. Co. Ltd. v. Union of India (Supra) observed that:

"..... the Supreme Court rejected the contention that over and above the dominant interest of labour, the restriction seeks also to protect the interest of ancillary industry and prevent fall in production of a particular commodity which may affect the economic growth. Therefore, it can be said without any hesitation that what the Legislature wanted to protect by imposing the restriction is mainly the interest of labour. No doubt, as held by the Supreme court, public interest and social justice do require protection of labour, but interests of other members of the public are also required to be considered. That becomes apparent from the following observations made by the Supreme Court in that case

> "But is it reasonable to give them protection against all unemployment after the interests of so many persons interested and connected with the management apart from the employers? Is it possible to compel the employer to manage the undertaking even when they do not find it safe and practicable to manage the affairs? Can they be asked to go on facing tremendous difficult of management even at the risk of their person and property? Can they be compelled to go on incurring losses year after year?"

The Supreme Court after considering the effect of addition of the word 'socialist' in the preamble of the Constitution, has observed as under:

> "But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, is it possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interest of another section of the public, namely, the private owners of the undertakings ? Most of the industries are owned by limited companies in which a number of shareholders, both big and small, hold the shares. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does socialism go to the extent of not looking to the interests of all such persons? In a State-owned undertaking the Government or the Government company is the owner. If they are compelled to close down, they, probably, may protect the labour by several other methods at their command, even sometimes at the cost of the

public exchequer. It may not be always advisable to do so but that is a different question. But in a private sector obviously the two matters involved in running it are not on the same footing. One part is the management of the business done by the owners or their representatives and the other is running the business for return to the owner not only for the purpose of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. Does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored ? The questions posed are suggestive of the answers."

Therefore, while considering the interest of the general public, the appropriate Government and the Tribunal will have to bear in mind all these aspects. *Interest of the labour alone cannot be the sole criteria*. As pointed out by the Supreme Court in all cases of closures, there will be resultant unemployment. If prevention of unemployment is regarded as the sole basis or paramount consideration, then in no case closure can be or should be permitted. Such a construction would render the restriction unreasonable and make it ultra vires Art. 19(1)(g). If for small or purely temporary difficulties the employer applies for closing down his undertaking, then in order to prevent unemployment, the appropriate Government may be justified in refusing permission on the ground that it is not in the interest of the general public. But the appropriate Government cannot and should not forget while deciding to grant or refuse to grant permission that refusal on the ground of the interests of the general public amounts to preventing the employer from exercising his right which, though not fundamental, is an integral part of it**."**

39. Therefore one of the facet of public interest may require protection of labour, but *Interest of the labour alone cannot be the sole criteria* . Hence, any order or direction which amounts to preventing the employer from exercising his right only to protect the workmen would infringe the fundamental guaranteed to the employer under Article 19 (1)(g) of the constitution. Such a restriction is neither reasonable nor in the general interest of the public.

40. The Government Directives do not take into account the fact that employer is required to pay statutory contributions on Salary & wages,

such as Provident Fund, ESI, Labour Welfare Fund etc. The Provident Fund has already started demanding contribution for payment made & to be made during lockdown period. The Government Directives are therefore confiscatory in nature.

41. The GR issued by Chief Secretary, Maharashtra is demonstrably improper and not in consonance with statutory laws. It introduces an **invidious discrimination**. The said GR has no Extra territorial application. Companies having establishments/undertakings in Maharashtra may have establishment in other states of India (Multi State Companies). As per mandate of the GR the employer may be compelled to pay wages to employees engaged by it in the state of Maharashtra but there is no such compulsion to pay to employees engaged by the same company in other States. This is constitutionally impermissible.

42. It is therefore clear that the Government directives are ultra vires DM Act. It infringes the fundamental right guaranteed under Constitution to the employer. The restriction sought to be placed on **the employer from exercising his right is neither reasonable nor in general public interest.** It is also violative of the provisions of various statutory Labour Laws. The Government Directives may not be legally sustainable.

IMPACT OF NOVEL CORONAVIRUS ON LIVELIHOODS IN INDIA

PART IV

A. THE WAY FORWARD

1. nCOVID-19 pandemic has shattered the Nation's confidence. There is no clarity on how long it will take for the nation to emerge from this crisis and how much damage it will inflict on the economy. We, in our living memory, have not seen lives and livelihoods being lost at such a large scale before, and this is shattering the confidence of the Nation. Investment in the economy has been slowing down significantly. The complete lockdown of economic activity at such a time not only brings in considerable hardship and misery, but also makes recovery much more difficult. The lockdown has created a serious sense of uncertainty, insecurity and sheer helplessness among people. The unfolding of the COVID-19 pandemic has brought to the fore several issues of concern. It also offers a number of lessons. The most important issue of concern continues to be the poor capacity of the state to deal with an unexpected crisis like this. A pandemic like this has to be fought on multiple fronts, and both, the central and state governments should join in to combat this enemy. While the immediate lockdown was unavoidable, announcing the package up front and taking states into confidence will help in skilful management of the disaster.

2. Due to the calamitous outbreak of COVID-19 the world is in throes of death & distress, Employers are anticipating huge losses & worried about viability of their unit, Employees/workers frantic to meet challenges posed on account of disruption & to boot the never ending worry as to whether he/they will be thrown in the rank of unemployed sooner than later.

3. It is evident that a statesman like approach is the need of the hour. All players will have to tackle the issue with a broad & open mind. The problem requires a morally excellent leadership skilful approach of a diplomat to promote the widest possible common good or in legal parlance, the general public interest.

4. As a consequence of lockdown nearly all business activities have come to halt due to the restricted movement and shutting down off all non-essential services. This has impacted the income of business entities and economy at large. The entities have fixed overheads, such as servicing bank loans, paying rent, Property taxes, Municipal fees Licence fees, etc. which they have to pay irrespective whether they generate income or not. The following measures can easily be implemented within existing legal frame work or by appropriate clarification or amendment to the existing law.

5. At First, the capacity to pay, except while fixing minimum wages, is a vital factor while imposing financial burden on an employer. This element has to be factored while directing payment for Lockdown period. Industries should be broadly classified on basis of gross profit/reserves & Employment strength. Depending on this twin factor amount ranging from 50% to 100% of wages can be prescribed for payment during lockdown period.

6. For example an MSME engaging less than 50 employees should pay prescribed percentage of the wages during lockdown period if during for FY 2018-19 the unit is;

   i. having no reserve & no profit or profit upto 25% of the capital should pay 50% of the wages during lockdown period.
   ii. Having reserve which is twice the capital & profit for said FY is between 25% & less than 40% of the capital should pay 75% of the wages during lockdown period.
   iii. Having reserve which is twice or more than the capital & profit for said FY exceeds 40% of the capital should pay 100 % of the wages during lockdown period.

7. Secondly, the payment for lockdown period should be labelled as "Ex – Gratia Payment" or "Lockdown Allowance" or "Retaining Allowance" or "Special Allowance nCOVID-19". This payment or Allowance shall not attract any statutory contributions or computed for payment of Bonus or Leave. Today an employer has to bear an indirect expense of 40% on salary & Wages including Provident Fund (12%), ESI (4%), Privilege (paid) Leave (8.33%) & Bonus (8.33%). It is beyond cavil that these benefits are intended as part of the wages earned by the workman in fulfilling the contract of employment. Now that payment is to be made without undertaking the basic obligation under the contract it is unfair to the employer to bear indirect burden. The injustice is manifest. Let's assume that due to the Lockdown & continued restrictive measures, factories continue to remain shut for 90 days, then the workman in that case is paid for 90 days. As per section 79 of the Factories Act, 1948 the said 90 days shall be considered as 'days of work performed'. In the following year the workman will be entitled to leave at the prescribed rate. That is leave on Leave. Similarly bonus would be payable on the amount paid for the lockdown period. PF & ESI contribution on payment which is purely a humanitarian measure is stretching the measure too far. This indirect burden can easily be exempted for all Industries without condition by the National Executive Committee constituted under DM Act issuing appropriate guidelines in exercise of powers vested under section 64 of the DM Act. (*The Central Government has announced that PF contributions – both Employer & Employee shall be paid by it in respect of establishments employing less than 100 employees and in which 90% employees are drawing salaries less than Rs. 15,000/-for 3 months i.e. March, April & May 2020*)

8. Thirdly, companies to be permitted to use accumulated CSR funds for ex gratia payment or allowances equivalent to 100% wages during

lockdown period. Presently companies have to expend CSR Fund relatable activities mentioned in Schedule VII of the Companies Act 2013. The items enlisted in the said Schedule are broad-based and are intended to cover a wide range of activities. It has been clarified that the entries in the said Schedule VII must be interpreted liberally so as to capture the essence of the subjects enumerated. Item 12 of the said Schedule reads "Disaster management, including relief, rehabilitation and reconstruction activities." Companies should be permitted to utilise CSR fund to meet the liability of payment to workmen for lockdown period without restriction.

9. Fourthly, the National Executive Committee should declare a one-year holiday from payment of License Fees, Property Taxes, any other central & local taxes, fees or cess (Save & except Income Tax & GST) to entities who pay amount equivalent to full wages without taking recourse to CSR fund,

10. Fifthly, companies having multiple business verticals should be permitted transfer non-CSR funds from a cash rich business vertical of the Company to another business vertical in need of fund to facilitate payment of Allowance during lockdown period. Such transfer should be treated as business expenditure under income tax act for the Transferor Company.

11. Sixthly, a scheme for voluntary pay cut/reduction. The Government in the State of Telangana in the wake of the State's financial situation amid nCOVID-19 outbreak and dwindling revenues has decided a huge pay cut for its employees ranging from 10% to 75% and 10% cut in the salary for the Class IV retired employees and for all the Public Sector Undertakings (PSUs). The Government of Maharashtra has also announced a 60 % cut for all Ministers and representatives of local

bodies whereas a cut by 50 % in the salaries of Class I and II employees and by 25% of Class III employees. Public entities are required to act as per the statutory or Constitutional obligations, however, yet in the present situation owing to revenue deficit, State Governments have taken the policy decision to deduct the remuneration of its employees as permissible by law.

12. An Employer in the private sector does not have a right to reduce wages except by agreement or settlement. Workmen or Trade Unions would never desire "to kill the goose which lays the golden eggs". If a scheme is presented showing anticipated losses, turnaround time, sacrifices on the part of management & a proposal for reasonable pay cut for a limited duration which in any event should not be more than one year it will be possible to arrive at a settlement for voluntary pay cut/reduction

13. Lastly, a scheme entitling workmen, to proceed on long unpaid leave. This is akin to a furlough in USA. workmen who request for long unpaid leave get to return to their job after the period of leave. In general, workmen opt for such leave for enhancing skills or educational qualification. They are not paid during leave but they do keep employment benefits, such as PF, health insurance & Gratuity. Leave without pay can be for two months to a year at the maximum.

B. EPILOUGE

1. As the world prepares for the 'new normal' after CoVID-19, More and more companies will now depend on technology as an alternate channel to continue with the same pace of productivity,

2. The challenging task before all companies, once major restrictive measures are lifted, will be to re-commence working. Besides restoring supply chain, planning for sufficient back up, identifying new source of supply of raw material closer to the plant etc. the Management will be required to devise new health protocols for staff & workmen in place.

3. Where the business is continuing its capacity to meet the obligation to pay wages, allowances, gratuity and provident fund, etc., in the new scenario it will have to be taken into account; the reason being that if the capacity to pay is not taken into account, the business itself may come to an end and the very purpose of setting up the Industry would be lost forever.

4. Combating this pandemic is equivalent to fighting a war with an unknown enemy; it requires a war room for strategic combat to foresee the actions of the enemy and prepare for the combat, and relief and rehabilitation of the injured.

5. The most important fact staring us in the face is the historical neglect of the healthcare sector. The States have always underfunded the sector. The aggregate annual spending on medical and public health, including water supply and sanitation, is just around 1.3% of the GDP when the actual requirement is estimated to be 3%. The time has come to shift the focus of Ayushman Bharat towards augmenting healthcare infrastructure and wellness centres instead of taking the insurance route. The acute shortage of protective gear, testing kits, ventilators and

hospital beds is a major handicap, and these have to be provided to frontline soldiers in this war.

6. Besides lives, protecting the livelihoods of the large number of workers and small and medium enterprises who may loose their employment and income, measures suggested in this article if implemented may avoid such a situation and it will help the private employer to keep going.

7. In fact, informal sector workers have suffered the most; they have lost their sources of income, faced severe hardships and are now confronted with enormous economic and emotional insecurity. The government will have to handhold informal sector workers and small businesses in this time of distress. The Central Government will have to frame a scheme to subsidise such employees for a period of one year or till they are gainfully employed, whichever is earlier.

8. Due to the advent of the outbreak of the nCOVID-19 virus, all the businesses have come to a complete standstill and the direction issued to these business establishments of not retrenching workers and to continue paying their wages, it has become virtually impossible to implement the said direction especially when many establishments are fighting to survive or are nearing the brink of extinction/permanent closure. Pursuant to such Force Majeure events, employers may be released from their contractual obligations to, pay workers or continue their employment. Besides Labour Law, Section 56 of the Contracts Act, 1872 would be applicable in the present scenario where due to the outbreak of Pandemic and cessation of work, thus relatable to the doctrine of frustration, which would entail the Employer to discharge himself from the contractual obligations for reason of supervening impossibility. Under Force Majeure conditions, the performing party is

excused from the performance or discharge, as a supervening circumstance has rendered the performance of the said obligation temporarily/permanently or wholly/ partially impossible, as being frustrated and should be entitled to suspend performance or to claim extension of time for its performance.

9. The Government therefore needs to immediately undertake measures for effective implementation of its Directives so that it can be executed in its letter & spirit. Only such well-crafted measures will ensure true relief & rehabilitation of the Employee, Employer, the Industry & the National Economy on which this Country relies heavily.

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