Adv. S. C. Naidu,
C. R. NAIDU & Co.
ADVOCATES HIGH COURT, BOMBAY

23, Examiner Press Building,
3rd Floor, Dalal Street,
Fort, Mumbai 400 001.

LEGAL EFFICACY OF GOVERNMENT ORDER/ RESOLUTION NOT TO DEDUCT WAGES OF EMPLOYEES AND TO TREAT THEM ON DUTY DURING LOCKDOWN PERIOD.

1. On 31st December 2019, cases of pneumonia were detected in Wuhan City, Hubei Province of China. It was found that N-CORONAVIRUS was the causal agent of the disease subsequently dubbed as COVID-19. On 11th March 2020, the World Health Organization (**WHO**) characterized COVID-19 as a pandemic.

2. India, to control the spread of COVID-19, progressively shut down schools, shopping malls, cinema halls, restaurants, marriage halls, swimming pools, and also issued orders restricting number of persons permissible to attend office/workplace, access to Public Transport System, suspending the entry of commercial international flights into the country and shut down of domestic operations. Citizens were advised to observe social distancing and were also requested to stay at home as far as possible. The restrictive measures to contain the spread of COVID-19 have crippled activities in all sectors.

3. Looking to the fact that restrictive measures were not sufficient to contain the spread of COVID-19, Government of India then declared a 21 days Nationwide lockdown, from midnight of 24th March 2020 till 14th April 2020. The Hon'ble Prime Minister then further extended the ongoing nationwide lockdown till 3rd May 2020. All these measures have consequences on salaries and wages of the employees.

4. Anticipating loss of wages to employees in private sector due to the Lockdown, the Ministry of Home Affairs, Government of India issued Order dated 29th March 2020, bearing No.40-3/2020-DMI(A) under section 10(2)(I) of the Disaster Management Act, 2005 (**DM Act**). Additional measure in clause iii, reads as :

> ***"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 establishments are under closure during lockdown period. "

5. The Chief Secretary, Government of Maharashtra, in his capacity as Chairman of State Executive Committee, Maharashtra State Disaster Management Authority, issued Government Resolution No. Misc 2020/ 4/9 Mantralaya dated 31st March 2020, which is reproduced below:

> **"Government Resolution : In reference to the workers and the displaced workers from the other State working in several businesses, shops and other institutions affected by the prior directions of lockdown declared by the Government of Maharashtra for the purpose of stopping the spread of corona virus and in light of powers and functions of chairman,** State Executive Committee **Maharashtra State Disaster Management Authority under section 24 of Disaster Management Rules 2005 following order have been given;**
>
> **All the workers (Either on contract basis or outsourced workers / employees, temporary workers / employee or daily wage workers) working in private organisations , industries, companies, shops (except essential services organizations) etc, who have to stay at their home due to spread of covid - 19 virus shall be assumed to be on work and these workers/ employees shall be given complete salaries and allowances to which they are entitled to. These orders shall apply to all Semi-Governmental, industrial, commercial institution, traders and shops within the State of Maharashtra."**

6. The legal efficacies of the aforesaid Government order/Resolution (collectively referred to as '**the Government Directives'**) are subject matter of this post.

7. At this juncture, it is to be noted that, the view of the Ministry of Corporate Affairs is not in sync with the Order dated 29th March 2020, issued by the Ministry of Home Affairs, GOI. On 10th April 2020, while responding to FAQ's, the Ministry of Corporate of Affairs stated as under:

1.	Whether payment of salary/wages to employees and workers, including contract labour, during the lockdown period can be	Payment of salary/ wages in normal circumstances is a contractual and statutory obligation of the company. Similarly, payment of salary/ wages to employees and workers even during the lockdown period is a moral obligation of the

	adjusted against the CSR expenditure of the companies?	employers, as they have no alternative source of employment or livelihood during this period. Thus, payment of salary/ wages to employees and workers during the lockdown period (including imposition of other social distancing requirements) shall not qualify as admissible CSR expenditure.
2.	Whether payment of wages made to casual /daily wage workers during the lockdown period can be adjusted against the CSR expenditure of the companies?	Payment of wages to temporary or casual or daily wage workers during the lockdown period is part of the moral/ humanitarian/ contractual obligations of the company and is applicable to all companies irrespective of whether they have any legal obligation for CSR contribution under section 135 of the Companies Act 2013. Hence, payment of wages to temporary or casual or daily wage workers during the lockdown period shall not count towards CSR expenditure.

8. From the above answers it is clear that the Ministry of Corporate Affairs, a Nodal Ministry for Companies incorporated under Companies Act, and firms under Limited Liability Partnership Act, is of the clear opinion that payment of wages and salaries to workers and employees is a contractual and statutory obligation of the company and that payment of salary and wages during lockdown period is a part of the humanitarian and moral obligations. Performance of Humanitarian or Moral obligations cannot be compelled by statutory fiat, more so if the performance is impossible.

9. The legal maxim **"*Lex non cogit ad impossibilia*"** means that law cannot compel a man to do what he cannot possibly do. Herbert Broom calls this a "fundamental legal principle". Broom describes the application of the principle in more detail as under:

> *"… that … where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over, the **law will in general excuse him**…."*

10. Supreme Court of India recognized the said principle in the case of Cochin State Power & Light Corporation Ltd. v. The State of Kerala AIR 1965 SC 1688 observed as under:

> *"The performance of this impossible duty must be excused in accordance with the maxim, lex non cogitate ad impossible (the law does not compel the doing of impossibilities)"*

11. Similarly, in the case of Raj Kumar Dey v. Tarapada Dey [1987] 4 SCC 398 the said principle was further elaborated by the Apex Court as under:

> *"The other maxim is "LEX NON COGIT AD lMPOSSIBILIA" (Broom's Legal Maxims-P. 162)-The law does not compel a man to do that which he cannot possibly perform.* ***The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity****; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."*

12. Article 19(1)(g) of the Constitution of India guarantees all citizens the right to practise any profession, or to carry on any occupation, trade or business. This Fundamental right is subject to Article 19(6), which empowers the State to make any law, imposing reasonable restrictions, in the interest of the general public. Any order or direction which amounts to preventing the employer from exercising his right only to protect the interest of workmen, would infringe the fundamentals guaranteed to the employer, under Article 19(1)(g) of the constitution. Such an order would be not only an unreasonable restriction but will also not be in general public interest.

13. A Division Bench of the Hon'ble High Court, Gujarat in **Associated Cement Companies Ltd. vs Union Of India (1989-I-LLJ 599)**, following the decision of the Hon'ble Supreme Court, in the case of M/s. Hatisingh Mfg. Co. Ltd. v. Union of India, the Court held that *Interest of the labour alone cannot be the sole criteria* while considering the interest of the general public.

14. The Payment of Wages Act, 1936 (4 Of 1936) **(PW Act)** was enacted to fix responsibility upon the employer to pay wages, mode, manner and time for payment of wages, provide for payment of wages without deduction, except as authorised by the PW *Act*, prohibiting levy and recovery of fines from wages except in the manner and to the extent provided for, Forum

for redressal of grievance in respect deduction or delay in payment of wages, maintenance of registers and penalty for offences under the PW Act.

15. The validity of pre-Constitutional laws is contingent upon fulfilling the criteria enshrined in Articles 13 and 372 of the Constitution of India. 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 and valid law which regulates payment of wages including deduction of wages in respect of employees who are absent from duty, etc.

16. One of the central provisions of PW Act, is the requirement that no deduction shall be made from wages, except those authorised by Section 7 of PW Act. 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. Thus, there is substantive laws regulating deduction of wages.

17. The Government Directives to pay wages to the workmen for days of absences due to Lockdown is contrary to law and the ratio laid down by the Supreme Court. The aforesaid Government Directives offends the legal maxim *"Expressio unius est exclusio alterius"*, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner, and following any other course is not permissible.

18. The Doctrine of **"No Work No Wages"** is embedded in Section 7(2)(b) r/w Section 9 of PW Act. The Supreme Court in ***Bank Of India vs T.S. Kelawala,*** 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.

19. India is governed by Rule of law. The question therefore is whether during a disaster of extra ordinary magnitude, the DM Act, overrides or repeals or substitutes the provisions of PW Act.

20. The PW Act is a Special Act in comparison to the DM Act, regarding payment of wages. The Government Directives have been issued in purported exercise of powers conferred by DM Act. In case of conflict in respect of deduction from wages between the provisions contained in PW

Act and the mandate of the Government Directives, the former will prevail over the latter, applying the maxim ***"generalia specialibus non derogant"***.

21. On first principles, the Government Directives will not in any manner whittle down or nullify the PW Act, which regulates deduction of wages of workman due to no work, owing to the lockdown enforced to prevent spread of COVID-19.

22. Even otherwise the Government Directives are ultra vires the DM Act. Sections 6, 24, 30 & 34 of DM Act confer power upon the Authorities mentioned therein. None of these sections, 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 without doing any work as a measure of mitigation or measures adopted for management of disaster.

23. Sections 46,47 & 48 of DM Act enjoins the Central Government & State Governments to establish **Disaster Response Fund** at National, State & District levels for being 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. The said funds are the only source of finance to the Authorities under DM Act for managing a disaster including rehabilitation and reconstruction.

24. The Government Directive appears to be a measure of economic redistribution of costs associated with the lockdown to provide economic relief to workmen in Private sector. This is not a means sanctioned by DM Act. These Government Directives are an Extra-Legislative means to "Fund" the package devised for mitigation due to lockdown.

25. 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 order 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 is not an order of requisition as contemplated by Section 65 of DM Act.

26. Section 72 of DM Act provides that DM Act shall have an 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 and relevant provisions of PW Act, it is clear that there is no repugnancy between the DM Act and the PW Act. Hence, question of Government Directives purportedly issued under DM Act cannot override the law absent of any inconsistency.

27. 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.

28. The Government Directives are therefore a deviation from the principles and provisions of the DM Act. However as long as the orders are not recalled or set aside by a Court of law the Authorities can seek compliance & invoke penal provisions in case of disobedience.

29. The Government Directives do not take into account the fact that employer is required to pay Statutory contributions on Salary and wages, such as Provident Fund, ESI, Labour Welfare Fund cess, etc. The Provident Fund has already started demanding contribution for payment made or to be made, during the lockdown period. The Government Directives are therefore confiscatory in nature.

30. The Central Government announced of a financial assistance package named "*Pradhan Mantri Garib Kalyan Yojana Package*", to help the poor fight the COVID-19 pandemic. The yojana envisages Central Government to pay PF Contributions on wage for the months of March 2020, April 2020 and May 2020, only in respect of establishments employing less than one hundred employees, with 90% or more of such employees drawing monthly wages less than Rs.15,000/-. In addition, UAN (Universal Account Number) of Employee employed in any eligible establishment earning monthly wages of less than Rs.15,000/-, should be seeded with his/her Aadhaar.

31. The Government Directives have been extended to all employers. However, relief under PF Act is only available to a handful. Minimum wages for Scheduled Employment in several zones are more than Rs.15,000/-. Majority of the Companies pay wages as per wage settlement. The wages fixed under these settlements are above minimum wages. Considering that various monthly allowances extended under wage settlement are to be considered as PF wages, such companies will not get the benefit of the said yojana. Moreover 60% of the employees in

an establishment are in Semi-Skilled, Skilled or Highly skilled categories. Wages in these categories are way above Rs.15,000/. This is no relief to an employer, especially a loss making company.

32. The magnitude of COVID-19 impact on all Sectors is apocalyptic. Help & Assistance to the distressed from all quarters is the need of the hour. A majority of the employers in private sector may not be averse to pay Advance/Ex gratia amount equivalent to monthly wages/salary. Looking to the daily report of COVID-19 infection in Maharashtra, the lockdown may be further extended. The duration of restrictive measures, after lifting lockdown, is uncertain. The time required to re-commence working and reach full normalcy is unpredictable. Instead of engaging the Private sector, the Government has arbitrarily issued Directives which are now challenged before the Supreme court. Instead of getting into legal tangle, the Government should rope in Private sector Employers to generously contribute in mitigation of the ill effects of lockdown on workmen, which could include payment of an amount equivalent to full wages during lockdown period. A proper scheme can be devised which will be a Win-Win Solution to ensure that the working class is provided for during this stressful time.

33. A scheme, factoring the financial capacity or permitting them to source interest free funds to meet the liability on the following lines can be considered:
    a. Firstly, the financial capacity to pay should be a consideration for paying wages during the lockdown period.

    b. Companies should be permitted to pay an amount equivalent to full wages during lockdown period, as advance against salary, **subject to a celling of Rs. 50,000/- per month**, with right to recover the entire, or a portion of the advance, by adjustment against future wages/salaries. Adjustment of advance may be permitted as follows:
        i. Companies which have incurred cash losses in FY 2018-19, should be permitted to recover the entire amount of advance by adjustment against wages payable during 12 months following the month in which the unit resumes full working, i.e. it is operational on all working days of the month;

        ii. Companies which have no reserve, but have made profit in FY 2018-19 up to 25% of their capital, be permitted to

recover the 75% amount of advance by adjustment against wages payable during 12 months following the month in which the unit resumes full working, i.e. it is operational on all working days of the month; the balance 25% as Ex-gratia payment to be considered as business expenditure under Income Tax Act.

iii. Companies which having reserves not exceeding their capital & profit for said FY is between 25% to 35% of their capital, be permitted to recover the 50% amount of advance by adjustment against wages payable during 12 months following the month in which the unit resumes full working, i.e. it is operational on all working days of the month; the balance 50% as Ex-gratia payment to be considered as business expenditure under Income Tax Act.

iv. Companies having reserves exceeding their capital & profit for said FY exceeds 35% of the capital should pay the amount equivalent to wages during lockdown period as Ex-gratia payment to be considered as business expenditure under Income Tax Act.

c. Secondly, the payment for the lockdown period, which is not to be recovered, should be labelled as "Ex –Gratia Payment". This is a one-time payment due to an extra ordinary situation and therefore should not attract any statutory contributions. Today, an employer has to bear an indirect expense of 40% on salary and 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 for 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. The days for which payment is being made should not be treated as "days on which work is performed" under Section 79 of the Factories Act, 1948. There is no bonus on ex-gratia payment.

d. Thirdly, companies who must pay ex-gratia payment without right of recovery, be permitted to use accumulated CSR funds for meeting the entire burden of payment of wages during Lockdown period. Presently companies compulsorily 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 as part of item 12 activity. However, payment from CSR Fund will not be a business expenditure under the Income Tax Act.

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

f. Fifthly, companies having multiple business verticals should be permitted to transfer non-CSR funds from a cash rich business vertical of the Company, to other business vertical in need of fund to facilitate Ex-gratia payment. Such transfer should be treated as business expenditure under Income Tax Act for the Transferor Company.

g. 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 the COVID-19 outbreak and dwindling revenues, has decided a huge pay cut for its employees ranging from 10% to 75%, 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.

h. A scheme on similar lines can be brought by settlement between the employer and workmen. 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 proper scheme is presented showing anticipated losses, turnaround time, sacrifices on the part of management and 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.

i. Lastly, a scheme entitling workmen, to proceed on long unpaid leave. This is akin to a furlough in USA. The long leave may be for bettering skills, acquiring higher qualification or domestic reason. Workmen who request for long unpaid leave, get to return to their job after the period of leave. They are not paid during the leave, but they do keep employment benefits, such as PF, health insurance and Gratuity. Leave without pay can be for two months to a year, at the maximum.

34. Before the novel coronavirus, many momentous epidemics and pandemics have altered the course of human history. Mankind has overcome numerous challenges. The present pandemic has shown several major shortcomings in all spheres/sectors. The Government and Society have failed to soak up past experiences and in devising strategies and measures, to overcome challenges posed by Pandemics and 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*." The Authorities under DM Act, ESIC & Insurance companies will have to devise a policy for payment of an amount equivalent to a month's salary for at least six months in case of a disaster of this magnitude.

****