

Chapter - 5

Analysis of Problems and Prospects of Disinvestment

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Introduction

Having discussed the methodology followed in conducting the present research; in this chapter efforts have been made to provide major issue resulting from the decision of policy makers to disinvest from PSUs. Legal issues, employees related issues and other miscellaneous issues have been discussed followed by the effect of disinvestment in subsequent chapters.

5.1 Major General Issues

The toll of the public sector disinvestment is becoming forbidding. The decision to sell the equity of the Gas Authority of India, a company in the public sector listed as a Navratna, to foreign business interest at a heavily discounted price of Rs 70 as against the market value of more than Rs 300 per share was remarkable. This has been followed up by the sale under a privately negotiated deal of it PSU to Hindustan Lever, subsidiary of a Transnational corporation already operating in India and the move to hand over the management control of Indian Airlines to private business interest with the only 26 per cent stake in its equity.

The disinvestment of the government equity in commercial and industrial undertakings has been underway as a part of what is called the "structural adjustment" of the Indian economy which was initiated in 1991 under the policy guidance of the IMF/World Bank combine. It was designed for the step-by-step transfer to transnational corporations (TNCs) the majority holding of the equity and management control of the country's public sector undertakings (PSUs) which were set up and developed after India gained political independence and embarked on a path of socio-economic development on a self reliant basis. The objective of the disinvestment of the PSUs is to bring the Indian economy, especially its industrial sector, under the domination of TNCs.

The PSU disinvestment programme, to begin with, merely attempted to raise revenue for the government as a part of a soft option to contain its fiscal deficit from becoming unmanageable Jha, A. (2003). The stock market in India has not been an effective

instrument to raise investment resources for private business enterprise let alone public sector investment. There are few takers in the Indian private corporate sector who are in a position to take advantage of PSU disinvestment. They are neither willing nor able to take over the management even profitable PSUs. They do not have the funds, technological tools or management skills for running the giant industrial and commercial undertakings in the public sector.

The move to sell government equity in PSUs (Nanjundapa 2002) to shore up the revenue position of the government has not achieved the desired results either. But it has held up public investment for the development of the economic and social infrastructure in India. The sharp cut in government funding as well as the failure to generate internal savings in the existing PSUs 'has blocked their expansion and modernisation.

The ability of the PSUs to face (Nanjundapa 1998) up to the hostile competition posed by the TNCs has thus been crippled. The position of not only PSUs but of even the private Indian domestic corporations has also been gravely weakened. This has helped the TNCs to maximise the profitability of their operations in India and take over the PSUs cheaply. The sale of the equity of the Gas Authority of India and the sale of the Modem Foods company in the public sector by the Hindustan Lever a subsidiary of Lever Brothers, a TNC and the privatisation of the management of Indian Airlines emphasizes this position very well.

Disinvestment schemes devised from time to time to raise substantial revenues for the government by selling the equity of PSUs has obviously lost its charm for the self-styled economic reformers in the government of India, according to Najudappa (1998) The idea of the creation of a "special purpose vehicle" for the holding of the government equity in PSUs, before their sale at a reasonable price as well as arrangements for buy back and cross holdings by PSUs which was toyed with for sometime, has also been dropped. The official policy has now been geared' for the outright sale of PSUs to the TNCs. The talk of the, "drain on the fiscal resources" of the government because of the setting up of the PSUs is, of course, a myth which has been assiduously spread to pave the way for the privatisation-globalisation process to make unhindered headway. There really are not any valid economic or social welfare reasons in official policy making but ideological preference for

privatisation of the economy which the ruling elite in India has now accepted and is vigorously pursuing.

Public investment to build industrial and commercial undertakings was inspired by the imperative need to serve social and economic priorities and overcome the impediments left behind by colonial rule in the way of the growth of the Indian economy and mass welfare (Pandey 2001). The "multiple objectives" of the PSUs, which are so vociferously derided by the votaries of the privatisation, globalisation process, are all about import-substitution in critical areas of the economy, optimal utilisation of domestic resources, material and human, opening up of economically backward areas, development of indigenous capabilities in construction of large projects and technological skills, especially in respect of infrastructure for economic growth and social advance on a broad front. This visibly helped the growth of productive enterprise both in the public as well as private sector in the two decades after India had won political freedom. The effort made in these directions is now; being emasculated. The public sector industries and services are being systematically demolished.

The question of strengthening the management autonomy and efficiency of PSUs, for long a matter of concern, has lost all relevance in government policy. It is facile and deceptive to talk of it being preferable to close down the large public sector undertakings employing more than four lakh workers and save the Rs 15,000 crore which may be required for their rehabilitation for new investment to create as many as 15 lakh new jobs. Whatever revenue is raised by the sale of the assets of PSUs or whatever losses are avoided by closures so far has not been used for meaningful investment on the basis of a well-conceived order of priorities Nayar, B.R. (1992). Deceptive, too, is the talk of creating and enlarging opportunities for gainful employment by scaling down public investment and finding resources for the development of the social infrastructure, priority in the design of development. What has been happening really, is the transformation of the role of the Indian state from an agency of development and equity into an instrument of law and order so that the private business interests, Indian and foreign thrive and those who sell their labour do so meekly Nayar, B.R. (2001). Considering the debilitated conditions and nature of 'private Indian business enterprise, it is the foreign TNCs, if and when and to the extent they come to India, which are making the maximum gains.

There is, of course, a strong and sound case for adequate returns from investment in public enterprises and generating surpluses for reinvestment to accelerate the development process. There is also no manner of doubt that returns from investment in industrial and commercial enterprises so far have not been adequate. But this no alibi to absolve the political authority in India of the responsibility to provide adequate budgetary support for planned development. Even sensible Indian private business interests want are indeed clamoring for step up of public investment for the development of economic infrastructure for them to function efficiently and face foreign competition in the domestic market.

It is a simplistic view of the role of public enterprise in economic development and the principles that should govern the measurement of its efficiency that the yardstick of commercial profitability alone should be considered. The fact must be reckoned with that while public enterprise should operate in such a way as to augment public savings, they have also to put up with planned losses in order to provide essential goods and services to the mass of the people which the private enterprises, guided by only the profit maximization motive, will not do. Pathak (2001) suggests that the PSUs indeed provide relatively cheap inputs to the private sector and thus help the generation of surpluses in the economy. The point is that PSUs may not directly generate financial surpluses. But those who make large profits by using subsidized inputs provided by the PSUs to them should be required to contribute a fair part of these profits by way of taxes and other savings instruments to augment resources for stepping up overall investment for economic growth according to right order of social priorities. It is indeed wrong mindlessly to flog the PSUs. The easy path of raising the prices of goods and services provided by the PSUs in order to extract surpluses for investment -may tend in many cases to be counterproductive and self-defeating. Returns from PSUs can be enlarged meaningfully only by improvements in the efficiency of their operations and fuller utilisation of their capacity which should not be blocked by imports that are competitive to indigenous production capacities, both in the public and private sectors.

Disinvestment Blues

Mr. George Fernandes, the honorable Union Minister for Defense and the convener of the ruling coalition, has thrown a spanner in the way of Mr. Arun Shourie riding the high horse

in the disinvestments ministry. Disinvestment blues to emerge in the mid-term for the NDA government is very disconcerting for the so-called economic reformers inside and outside the government.

The frantic search by Mr. Arun Shourie for "strategic partners" with the help "global advisors" to hand over the management control of the PSUs to big Indian and multinational corporations was bound to create problems. This was conceived as the first step for eventual transfer of ownership of PSUs to private hands with moderate investment and takeover their huge assets and market value. This suits the corporates far more than disinvestment of government equity in drip lets at competitive market prices.

The strengthening of the management and operating efficiency of PSUs too is then loses its appeal, even relevance, for official policy on disinvestments of PSUs which are driven into sickness for want of investment for renovation to become attractive pickings for selected Indian and foreign corporations on payment of negotiated prices in installments. The original idea of disinvestments to raise revenues for the government for spending on alternative priority areas, such as education, health, roads and irrigation has also been shelved. After the winding up of the Disinvestment Commission, which tended to give some importance to enhancing the market value of PSUs before their privatisation and collect larger revenue for the exchequer, the disinvestments policy has now indeed developed novel features and wider dimensions.

The entire scheme of disinvestment privatisation as has been implemented by Mr. Shourie is inspired by ideological preferences and not cost or efficiency criteria. There was, therefore, I bound to be stronger political-ideological opposition to the disinvestment policy of the NDA government sooner than later. The working people and their trade union have opposed PSU divestment sharply and unreservedly. So have the left parties. But Congress Party, which initiated the disinvestment process, too has now developed reservations on the disinvestment in the case of profit-making PSUs. Some of the partners of ruling coalition and elements close to the BJP have misgivings about the working of the department of disinvestment. There too are allegations of corruption in disinvestment deals with foreign and Indian big business interests.

The case for public investment in general and development of large industrial, commercial and financial infrastructure in the public sector in particular for economic growth process is however sound. Its fundamental basis is of social equity and sustainability at the present level and stage of India's social, economic and political development. The returns from public investment in some industrial and commercial undertakings may not have been so far adequate. But this can be no alibi for absolving the Indian State to divest itself of the responsibility to mobilise necessary resources, material, human and financial, for economic growth on the basis of the right-order of economic and social priorities. Even sensible Indian private business interests clamor from time to time for a step up of public investment in PSUs for providing a reliable infrastructure to enable them to function and face foreign competition in the domestic and global markets Pathak, R. (2002).

The talk of loss-making and profit-yielding PSUs is gibberish. It is a simplistic, indeed misleading and mischievous view to measure the efficiency of PSUs in the narrow term of commercial profitability. The fact that must be reckoned with is that while PSUs should operate in such a way as to augment public savings. Many well managed PSUs do make profits. But they are also required to put up with planned losses in the larger public interest economic as well political.

In order to provide essential goods and services to the mass of the people, for instance, PSUs are often called upon to suffer losses' which private business is unable and unwilling to accept. The support and protection of the State too is necessary for the development of private industry, after India gained political independence from colonial rule. PSUs and public financial institutions have provided this support and protection to the private business enterprise in India to develop. The PSUs have provided essential inputs on a large-scale at low the cost of production to private industry.

It is indeed not fortuitous that PSUs and private corporates as well as small-scale industry grew in tandem during the era of planned economic development. This laid the foundation for strong and stable industrialisation. The disinvestment and privatisation of PSUs can only undermine this foundation. This has, in fact already resulted in serious set-back to machine-making and manufacturing industry as well as the research and development effort for industrial development on sound, steady and sustainable basis. What is happening

is that while public investment and management and technological enterprise is being strangled, private big business is going away from productive enterprise into trading, in imported goods and services, speculation in stocks and shares and junior partnership with multinational corporations.

The claim Rajesh, J. (2002) of the economic reformers that once public investment, especially in industry is withdrawn and industrial development is left to private enterprise, the resource constraint on the government for investment in social sectors would be removed. This is a false claim. It was also argued by them that disinvestment would benefit the mass of the people and make privatisation and market driven growth of Indian industry acceptable and popular. This has not actually happened. The disinvestment and privatisation drive has certainly and often wantonly allowed diversion of public funds to selected private business corporations to extract high profits from meager investment in takeover of PSUs. The privatisation of VSNL to the Tata House is a case in point. .

The funds raised by PSU Ramkirshnan. C, (1997) disinvestment have been absorbed into the general budgets mainly of the central and partly also of the state governments which have recycled these funds back to the private corporations through financial institutions and cut in tax demand on large incomes and wealth. No part of the revenue raised by PSU disinvestments or saved by the government by scaling down public investment in industrial growth has gone to the development of the social sector.

The privatisation, Rangarajan, C. (1997) side by side, of trade in public goods, among them electricity and drinking water as well as commercialization of education, health services public transport and communications has far-reaching implications, not only economic and social but also political. Essential goods and services under this policy dispensation are reserved for only those who can afford to pay for them. This has barred the access to these goods and services for the mass of the people without adequate incomes and purchasing power. It is not at all surprising or fortuitous, that rural electrification, rural telephony and even drinking water schemes have been being' given, low priority in the development of urban and rural infrastructure as compelling obligations of the public authority. But, generous concessions and special fiscal steps have been taken for the satisfaction of the

consumerist urges of the upper and middle classes, among them entertainment, leisure, travel and fashion.

The move to arrange the return to India of the Royal Dutch Shell, one of the notorious seven partners in the international oil cartel, which was expelled, along with two other international oil companies', from India three decades ago for not processing Indian crude oil in their refineries has now brought matters to head on for the contentious issue of the disinvestment of PSUs. Mr. Fernandes deserves compliments for bringing up for review not only the sale of two public sector refineries and their marketing networks but the entire disinvestment programme and the manner it is being implemented at a feverish, break-neck hurry by Mr. Arun Shourie.

Mid-term review of policies and performance for the incumbent political authority in a democratic set up is always ticklish and even painful. The minority congress government, which initiated in 1991 the privatization globalisation process in India, found itself vulnerable in the mid-term of its tenure. The then prime minister, the wily Mr. Narasimha Rao, simply halted the implementation of the market-friendly' economic reforms for the time being and went back to populist gestures in order to be able to improve the poor electoral prospects of his party. He failed to achieve the desired objective.

The option to halt the market-friendly policy and. return to popularism is, however too risky for Mr. A. B. Vajpayee to even contemplate. Mr. Vajpayee has gone too far in committing himself, in the domestic arena as well as globally, to the privatisation-globalisation policy. He can only try to stall to gain, time with small adjustments in the implementation of the policy, which are not likely to win for him popular acceptance.

The awareness of the implications and consequences of the so-called economic reforms has become widespread and strong in India. Economic reforms have indeed become the most contentious issue for political and electoral contention. This contention is likely to exercise dominant influence over party- political alignments and re-alignments before the general election and response of the electorate.

5.2 Employees Related Issues

Post Disinvestment employees issues in privatized CPSEs.

There are two primary employees' issues, which are voiced with respect to disinvestment. First there is a concern about change in the terms of services of employees and secondly there is a concern that the reservation policy of the Government for the Scheduled Castes/Scheduled Tribes and other categories would be diluted.

Terms and Conditions of Services

The concern of the employees regarding alteration in the terms and conditions of the services were sought to be addressed through provisions in the Shareholders Agreement/Share Purchase Agreement entered into with the Strategic Partner at the time of strategic sale. The typical provisions are given below:

Recitals:

Subject to the substantive clauses in this regard, to all employees of the Company on the date hereof will continue in the employment of the Company.

Substantive Clauses

The SP covenants with the Government that:

- a) notwithstanding anything to the contrary in this Agreement, it shall not retrench any of the Employees of the Company for a period of 1 (one) year from the Closing Date other than any dismissal or termination of Employees of the Company from their employment in accordance with the applicable staff regulations and standing orders of the Company or applicable Laws.
- b) notwithstanding anything to the contrary in this Agreement, but subject to Sub-Clause (a) above, any restructuring of the labour force of the Company shall be implemented in the manner recommended by the Board and in accordance with all applicable Laws;
- c) notwithstanding anything to the contrary in this Agreement, but subject to Sub-Clause (a) above, in the event of any reduction of the strength of the

Company's Employees, the SP shall ensure that the Company offers its Employees an option to voluntarily retire on terms that are not, in any manner, less favourable than the VRS applicable before disinvestment.

Reservation Policy

In the strategic sale transactions, the interest of SC/ST employees were also sought to be protected through the provisions in the Shareholders' Agreement. A typical Recital clause provided in the SHA is reproduced below:

"The SP recognizes that the government in relation to its employment policies follows certain principles for the benefit of the members of the Scheduled Castes / Scheduled Tribes, physically handicapped persons and other socially disadvantaged categories of the society. The SP shall use its best efforts to cause the Company to provide adequate job opportunities or such persons. Further, in the event of any reduction in the strength of the employees of the Company, the SP shall use its best efforts to ensure that the physically handicapped persons are retrenched at the end".

5.3 Disinvestment Related Legal Cases

Review of Legal Cases

Ninety-six disinvestment related lawsuits, including transfer petitions, have been filed between December, 1999, (when the Department of Disinvestment was established) and 30th June, 2007. Out of these, sixteen writ petitions were transferred to the Supreme Court from different High Courts. At the end of July, 2007, twenty four matters were pending before different High Courts and two matters before the Supreme Court, details of which are given below in table 5.1.

Table 5.1

Summary of Legal Cases

Sl. No.	Court	Total Number filed (including transfer cases)	Disposed/ Dismissed	Transferred to Supreme court	Number Pending
1.	Supreme Court	15	13	NA	2*
2.	Karnataka High Court	5	4	1	Nil
3.	Delhi High Court	19	13	4	2
4.	Chattisgarh High Court	1	Nil	1	Nil
5.	Madras High Court	7	2	2	3
6.	Allahabad High Court	3	Nil	2	1
7.	Patna High Court	2	2	Nil	Nil
8.	J & K High Court	1	Nil	1	Nil
9.	Calcutta High Court	10	4	1	5
10.	Rajasthan High Court	6	3	1	2
11.	Kerala High Court	1	1	Nil	Nil
12.	Orissa High Court	5	2	Nil	3
13.	Bombay High Court	1	Nil	Nil	1
14.	Bombay High Court (Nagpur Bench)	1	Nil	Nil	1
15.	Bombay High Court (Aurangabad Bench)	1	Nil	Nil	1
16.	High Court of MP (Gwalior Bench)	1	1	Nil	Nil
17.	High Court of MP at Jabalpur	3	2	Nil	1
18.	Gujarat High Court	1	Nil	Nil	1
19.	Andhra Pradesh High Court	2	2	Nil	Nil
20.	Punjab & Haryana High Court	1	1	Nil	Nil
21.	Jharkhand High Court	1	NIL	1	Nil
Total		96	54	16	26

*2 matters consisting of transferred cases (i) 5 writ petitions involving issues arising out of the Supreme Court judgment in HPCL/BPCL case and clubbed together and (ii) 1 writ petition relating to HZL transferred from Rajasthan High Court.

Source: www.disinvestment.gov.in/legal/html last visited on June 6th 2007

Out of the cases which were either disposed or dismissed by various courts, there are three important judgments of the Supreme Court. These are the judgments dated 10th December, 2001 in the BALCO matter, the judgment dated 16th September, 2003 in the Centre for Public Interest Litigation and Others vs. Union of India and Others in HPCL BPCL matter and the judgment dated 31st October, 2006 in the matter of All India ITDC Workers Union & Others viz. ITDC and Others.

The Supreme Court in its judgment dated 10th December, 2001 in the BALCO case (AIR 2002 SC 350) has observed as follows:

"In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with the Court.

Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the Courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the Courts. Here the policy was tested and the Motion defeated in the Lok Sabha on 1st March, 2001.

Thus, apart from the fact that the policy of disinvestment cannot be questioned as such, the facts herein show that fair, just and equitable procedure has been followed in carrying out this disinvestment. The allegations of lack of transparency or that the decision was taken in a hurry or there has been an arbitrary exercise of power and without any basis.

The offer of the highest bidder has been accepted. This was more than the reserve price which was arrived at by a method which is well recognized and, therefore, we have not examined the details in the matter or arriving at the valuation figure.

Moreover, valuation is question of fact and the Court will not interfere in matters of valuation unless the methodology adopted is arbitrary.

In the case of a policy decision on economic matters, the courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself."

In the matter of Centre for Public Interest Litigation versus Union of India and Another challenging the disinvestment in regard to HPCL/ BPCL, the Supreme Court, through the judgment delivered on 16th September, 2003 (AIR 2003 SC 3277) upheld the challenge to the proposed Strategic Sale of HPCL and the proposed dilution in equity in the case of BPCL to below 51 per cent through an Offer for Sale of the Government's equity. The Supreme Court took the view that, since both these companies were established through Acts of Parliament under which the undertakings and assets of private companies were acquired and transferred to these Government Companies, it was not open for the Government to proceed with disinvestment that would result in HPCL and BPCL ceasing to be Government Companies without appropriately amending the statutes concerned. The Court also held that setting up of Government Companies is by way of Parliamentary approval for expenditure from the Consolidated Fund of India and hence privatisation of Government Companies can therefore be only with approval of Parliament. This Judgment laid down principles, which would apply to all cases of privatization of Government companies. Subsequently, several ongoing disinvestment proposals were challenged in various High Courts. On petitions filed by the Government under Article 139A of the Constitution, 6 writ petitions (in the cases of Burn Standard Company Limited, Shipping Corporation of India Limited, Hindustan Copper Limited, Hindustan Zinc Limited) pending in various High Courts were transferred to the Supreme Court. Further, four Writ Petitions were directly filed before the Supreme Court. All the transferred cases and the Writ Petitions directly filed before the Supreme Court were tagged with the Civil Appeal SLP (C) No. 12203/2003 (Civil Appeal No. 6780/2004) filed by Jessop & Co Limited Staff Association, in which the Government, through its Counter Affidavit dated 11th November, 2003, sought reconsideration of the ratios of the judgment dated 16th

September, 2003 in the Centre for Public Interest Litigation case (HPCL/BPCL). The Supreme Court on 11th October, 2004 passed orders (1) granting the Special Leave to Jessop & Co Limited Staff Association; (2) allowing the transfer petitions filed by the Union of India; and (3) admitting the Writ Petitions filed by EIL Officers' Association, NFL Officers' Association and Khetri Tamba Shramik Sangh. The Court also observed that, in view of the importance of the issues involved, a larger bench should hear these matters. Subsequently, the writ petitions filed by EIL Officers' Association, NFL Officers' Association were dismissed as withdrawn and the writ petition filed by Khetri Tamba Shramik Sangh was dismissed as premature. Jessop & Co. Staff Association filed an application in June, 2007 seeking permission for withdrawing the Civil Appeal No. 6780 of 2004. The Supreme Court has through orders dated 24th July, 2007 allowed the application and dismissed the appeal as withdrawn. Rest of the matters and the transferred cases are before the Supreme Court.

In the matter of All India ITDC Workers' Association Vs. ITDC & Others [Transfer Case (Civil) No. 73 of 2002 along with Transfer Case (Civil) No. 76 of 2002], the Supreme Court, through the judgment delivered on 31st October, 2006, upheld the disinvestment in Hotel Agra Ashok. The Supreme Court has, referring to and relying on the judgment dated 10th December, 2001 in BALCO matter, observed inter-alia that disinvestment was a policy decision of the Government of India and the said policy decision should be least interfered in judicial review.

5.4 Summary

The above discussion leads one to believe that the disinvestment posed some major challenges special with reference to employees as private sector never wanted a huge wage bill to be paid as it was sure to get the same work done with far lesser manpower partly due to efficiencies and partly by exploiting them. This resulted in large litigations. All these issue ultimately affected the bottom line that is the profitability which we have discussed in next chapter.