

(1999) 12 AHC CK 0047
In the Allahabad High Court
Case No : C.M.W.P. No. 39194 of 1998

Flowmore (P.) Ltd., New Delhi

APPELLANT

Vs

U.P. State Industrial Development Corporation Ltd. and
others

RESPONDENT

Date of Decision : 09-12-1999

Acts Referred:

Companies Act, 1956 — Section 194(1), 2(46), 3(1), 481
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 55, 56, 62
Income Tax Act, 1961 — Section 41, 41(1), 48(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18, 18(1),
18(8), 2, 32
Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 — Section 3(1)

Citation : (2000) 1 AWC 493

Hon'ble Judges : N.K. Mitra, C.J.; S.R. Singh, J

Bench : Division Bench

Advocate : V.B. Updadhayay and Anurag Khanna, for the Appellant; R.N. Singh
and S.P. Singh and S.P. Gupta, S.C., for the Respondent

Final Decision : Allowed

Judgement

N.K. Mitra, C. J.

1. Petitioner is a company registered under the Companies Act, 1956, with having its registered office at 37-38 Community Centre, East of Kailash, New Delhi. The present petition has been instituted under Article 226 of the Constitution for the relief of issuance of a writ, order or direction in the nature of certiorari quashing the recovery certificate dated 10.11.97, as well as the consequential letter dated 20.11.97 from the Collector, Kanpur Nagar to the Collector, New Delhi, Tees Hazari Court, requesting the latter to recover the amount detailed at the margin of the letter from the petitioner as arrears of land revenue and credit it to the treasury of his district under intimation to the former and the notice dated 8.10.98 issued from the Court of Sub-Divisional Officer of

the concerned area. New Delhi to the petitioner directing the latter to deposit a sum of Rs. 2,04, 48,000 in the account of the U. P. State Industrial Development Corporation. Kanpur, by 14.10.98 annexed as Annexures-1, 2 and 3 respectively.

2. The minimal facts necessary to shed light on the controversy involved herein may be set out and they are that the U. P. State Industrial Development Corporation (In short the "Corporation") having obtained a letter of intent from the Government of India to establish a plant for manufacture of 2,000 tons per annum of polyester film, decided that the aforesaid letter of intent be used and implemented in collaboration with the petitioner-company and for this purpose, the Corporation and the petitioner-company, both entered into a joint venture agreement on 27.8.1981 to promote a company with the name and style of Flowmore Polyester Ltd. Pursuant to the said agreement, the Flowmore Polyester Ltd. Company was formed and registered under and in accordance with the provisions of the Companies Act, 1956. The authorised capital of the Company was Rs. 4 crores out of which initial 10% was to be subscribed by the Corporation, 30% by the petitioner and 60% by the Public. Clause 7 (d) of the principal agreement envisaged that the petitioner would buy back a given percentage of the share-holding of the Corporation in the Flowmore Polyester Ltd. within the specified time schedule at the price to be calculated at the paid-up value of the shares plus 15% interest from the date of subscription till the date of purchase minus dividend, if any. By means of the Supplementary Agreement dated 3.8.83, the percentage of shares of the Corporation to be purchased by the petitioner was enhanced to some extent but by Supplementary Agreement No. 2 dated 19.2.87, the petitioner was required to purchase the "entire share-holding" of the Corporation in the Flowmore Polyester Ltd. either directly or through its Associates at its own responsibility. The Agreement was again altered in certain respects pursuant to the Supplementary Agreement No. 3 clause 7 (d) of the agreement as it stood amended and substituted by Supplementary Agreement No. 3 envisaged that "the petitioner would be bound to purchase, on being so required by the Corporation, the shareholding to the extent of Rs. 80 lacs of the Corporation held in Flowmore Polyester Ltd. either directly or through such of its Associates as it may nominate." The amended clause 7 (d) further visualised that the petitioner would have to submit proposal to the Corporation for buying back the share-holding to the extent as agreed by the Corporation at least 90 days prior to the expiry of five years" period from the date of commencement of the commercial production, i.e., 15.3.89. According to the time schedule mentioned in the amended clause 7 (d), the petitioner were to purchase one-third of the shareholding of the Corporation held in Flowmore Polyester Ltd. within five years from the date of commencement of the commercial production, i.e., 15.3.89 and one-third within six years from the said date and the balance within 7 years from the date of commencement of the production. It is the case of the Corporation that the petitioner failed to buy back the eight lacs equity shares of the face value of Rs. 10 each share held by the Corporation in the Flowmore Polyester Ltd. as per clause 7 (d) of the agreement and the

amount of Rs. 204.48 lacs sought to be recovered from the petitioner represents the price of the eight lacs equity shares of the Corporation in Flowmore Polyester Ltd. plus interest calculated till 31.12.97 @ 15% per annum from the date of subscription which was recoverable as arrears of land revenue as per agreement between the parties. The case of the petitioner, on the other hand, is that the Flowmore Polyester Ltd. ran into financial quicksand and degenerated into a sick Company sometime in 1991 and the matter was referred to the Board of Industrial & Financial Reconstruction (In short the "B.I.F.R.") that declared the Company sick and commenced the process of rehabilitation and ultimately sanctioned a scheme of rehabilitation by merger/amalgamation of the sick Company with M/s. S. R. P. Ltd. (in short the Transferee company) which is said to be one of the premier manufacturers of Nylon tyre cord in the country and, in the circumstances, the petitioner stood discharged of its obligation under the contract by doctrine of frustration.

3. We have heard Sri V.B. Upadhaya, learned Senior Advocate assisted by Sri Anurag Khanna for the petitioner and Sri K. N. Singh, learned Senior Advocate assisted by Sri S. P. Singh for the respondent-Corporation, Sri S.P. Gupta, Senior Advocate too had, at the initial stage of hearing entered appearance and advanced his submissions for the petitioner. The questions that beg consideration may, for the sake of convenience, be formulated as under :

1. Whether the Transferor Company lost its identity and corporate character after its amalgamation with the Transferee Company under the scheme sanctioned by the BIFR?
2. Whether the petitioner stood discharged of its obligation under the agreement to buy back the share-holding of the Corporation upon the Transferor Company being amalgamated with the Transferee Company?
3. Whether the arbitration clause 32 of the agreement continued to be operative even after the amalgamation of the Transferor Company with the Transferee Company?
4. Whether in the fact situation of the case, recourse to Section 3 of the U. P. Public Moneys (Recovery of Dues) Act, 1972, was permissible in respect of the price of the entire share-holdings of the Corporation in Flowmore Polyester Ltd.?

IN RE-QUESTION NO. 1

4. Sri V.B. Upadhaya, learned counsel appearing for the petitioner canvassed that the Transferor Company lost its identity after its amalgamation with the Transferee company was duly sanctioned by the B.I.F.R. Sri R.N. Singh, learned counsel appearing, for the Corporation, on the other hand, brought to bear the submission that a Company could lose its corporate-character only as a result of an order of winding up or dissolution passed by the Company Judge under the provisions of the Companies Act, 1956 and not otherwise. The Transferor Company, it has not been disputed, was a public Company registered under the

provisions of the Companies Act, 1956. "Public Company" as the term is defined in Section 3(1)(iv) of the Companies Act, 1956, means a Company which is not a private Company. The term "private Company" as defined in Section 3(1)(iii) means the Company which by its articles-

"(a) restricts the right to transfer its share, if any ;

(b) limits the number of its members to 50 not including-

(i) Persons who are in the employment of the Company ; and

(ii) Persons who having been formerly in the employment of the Company, were members of the Company while in that employment and have continued to be members after the employment ceases : and

(c) Prohibits any invitation to the public to subscribe in any shares in, are debentures of the Company :

Provided that where two or more persons held one or more shares in a Company jointly, they shall, for the purposes of this definition be treated as a single member."

5. A Company whether it is a "public Company" or a "private Company" can be dissolved with or without winding up. As a matter of fact, winding up is one of the means by which dissolution of a Company is brought about and its assets realised and applied in payment of its debts and after satisfaction of the debts, the balance, if any, is paid back to the members in proportion of their contribution made by them to the capital of the Company. During the winding up proceedings, the Company retains its existence though the administration of its affairs has passed to the liquidator but in the case of amalgamation of a Company with another Company under a scheme sanctioned by the B.I.F.R. the former Company stands dissolved, w.e.f. the transfer date fixed by the order of the B.I.F.R. Just as a Company may be dissolved by an order of the Court without going through the process of winding up under a scheme of amalgamation as visualised by Section 394(1)(iv) of the Companies Act, 1956, the same result may be achieved by amalgamation under the scheme sanctioned by the B.I.F.R. u/s 18 of the Sick Industrial Companies (Special Provisions) Act, 1985, which visualises for preparation and sanction of scheme for rehabilitation of a Sick Company inter alia by "the amalgamation of the Sick Industrial Company with any other industrial Company (referred to in the section as "Transferee industrial Company")."

6. Sub-section (2) of Section 18 provides that the scheme referred to in sub-section (1) may, inter alia, provide for the allotment to the shareholders of the Sick Industrial Company of the shares in the Sick Industrial Company or as the case may be in the Transferee industrial Company and where any shareholder claims payment in cash and not allotment of shares or where it is not possible to allot shares to any shareholder, that payment of cash to those shareholders in full satisfaction of their claims in respect of their interest in shares in the Sick

Industrial Company before its reconstruction or amalgamation ; or where such interest has been reduced under clause (f), in respect of their interest in shares as so reduced. Subsection (8) of Section 18 clearly provides that on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provisions shall be binding on the Sick Industrial Company, or as the case may be on the Transferee Industrial Company and also on the share holders of both the Companies. As per the sanctioned amalgamation/ merger scheme, the entire undertaking of the Transferor Company namely. Flowmore Polyester Ltd. stood transferred to and vested in the Transferee Company (M/s. S.R.P. Ltd.) w.e.f. the "transfer date" and under the scheme it became obligatory on the part of the Transferee Company to issue and allot to the shareholders of the Transferor Company equity, shares in the Transferee Company in the proportion of one share of the face value of Rs. 10 each of the Transferee Company for 15 equity shares of the face value of Rs. 10 each of the Transferor Company on such date after the transfer date as the Board of Directors of the Transferee Company may determine." In such view of the matter, the submission made by Sri R.N. Singh that the corporate personality of the Transferor Company is still intact, cannot be countenanced.

7. The decision in "The Official Liquidator Cannon Dankarley Co. (Madras) Ltd. v. Asstt. Commissioner Urban Land Tax and another 1992 (73) Comp Cas 168, reliance on which was placed by Sri R. N. Singh, is not an authority on the point that the juristic personality of a Company cannot be lost except on the basis of an order u/s 481 of the Companies Act, 1956, dissolving the Company. Rather it is an authority on the point that a Company under liquidation continues to exist as a juristic personality until an order u/s 481 of the Companies Act, 1956 dissolving the Company is made by the competent court, for the Madras High Court in that case was confronted with the question as to legal status of a Company under liquidation. It was not called upon to decide the question as to whether a Company can be dissolved without winding up. As observed hereinabove, Section 394(1)(iv) furnishes an example of dissolution of a Company without winding up. We are of the view that what is achieved by an order u/s 394(1)(iv) of the Companies Act, 1956 can be achieved also by an order of amalgamation/ merger of a Company with the another Company under a scheme sanctioned by the B.I.F.R. The Full Bench decision of the Kerala High Court in Mathew Philip and others v. Maligaram Plantation India Ltd. and another 1994 (81) Comp Cas 38, too does not support the contention advanced by Sri R.N. Singh that the amalgamation of the Transferor Company with the Transferee Company in the instant case, did not result in loss of entity of the Transferor Company in the absence of an order of the Company Judge. What has been held therein is that "the first proviso to Section 394 envisages a situation where even without dissolution an amalgamation is made possible." In other words, it has been held therein that amalgamation of a Company into another Company envisaged by a scheme can be sanctioned even without ordering dissolution.

8. In Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, ,

question was whether an amalgamated Company could be held liable to pay tax u/s 48(1) of the Income Tax Act, 1961. The Supreme Court held as under:

"In order to attract the provisions of Section 41(1) for enforcing the tax liability, the identity of the assessee in the previous year and the subsequent year must be the same. If there is any change in the identity of the assessee, there would be no tax liability under the provisions of Section 41."

And on the question whether on the amalgamation of the Indian Sugar Company with the appellant-company therein, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Income Tax Act, 1961, the Apex Court held as under :

"Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation, two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation have no prescribed legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending Company becomes substantially the share holders in the Company which is to carry under the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company but strictly, amalgamation does not cover the mere acquisition by a Company to the share capital of other company which remains in existence and continues its undertaking for the context in which the terms is used may show that it is intended to include such acquisition, See Halsbury Laws of England, 4th Ed. Vol. VII Para 1539. The two companies may join to form a new Company but there may be absorption or blending of one by the other, both amount to amalgamation. When the two companies are merged and are so joined as to form a third company or one is dissolved into one or blended with another ; the amalgamated Company loses its identity".

And further,

"The High Court was in error in holding that even after amalgamation of the two Companies, the Transferor Company did not become nonexistent instead it continued its entity in blended form with the appellant company. The High Court's view that on amalgamation, there is no complete destruction of corporate personality of the Transferor Company. Instead, there is a blending of corporate personality of one with another corporate body and it continues, as such with the other is not sustainable in law. The effect and character of the amalgamation largely depends on the term of the scheme of merger but there can be any (No.) doubt that when two companies amalgamate or merge into one, the transferor Company loses its entity as it ceases to have its business. However, the respective rights and liabilities are determined under the scheme of amalgamation but the corporate entity of the Transferor Company ceases to exist

with effect from the date, the amalgamation is made effective"

(Emphasis is ours.)

The sanctioned scheme of amalgamation in the present case leaves no manner of doubt that the Transferor Company stood dissolved and completely merged into, and subrogated by, the Transferee Company and lost its original entity. This is clearly stipulated in para 11 of the scheme, which reads thus :

"Upon this scheme being sanctioned as aforesaid the Transferor Company shall stand dissolved without winding up on such effective date."

If the language used in the sanctioned scheme and the authority aforesaid are anything to go by, we are of the view that with effect from the "transfer date", the juristic personality of the Transferor Company completely merged into that of the Transferee Company. The amalgamation of the Transferor Company in the Transferee Company in the instant case has resulted in dissolution of the Transferor Company and after amalgamation, the rights and liabilities of the parties ought to be governed in accordance with the sanctioned scheme except the rights acquired and liabilities incurred prior to "effective date."

IN RE-QUESTION NOS. 2 AND 3

9. It would be convenient to take up question Nos. 2 and 3 together. Clause 32 of the agreement provides for settlement of any dispute, claims or differences in connection with or arising out of or incidental to the agreement including the interpretation of its terms and conditions and its implementation which is not and cannot be settled by a mutual compromise between the parties to the agreement, in fact, a preliminary objection as to the maintainability of the writ petition has been raised by Sri. R.N. Singh, on the ground that the petitioner has the alternative remedy by way of reference to arbitration. The learned counsel for the petitioner on the other hand submitted that in view of changed situation, the contract became void by virtue of Section 55 of the Contract Act and, therefore, Arbitration clause contained in the agreement could not be invoked. In *The Union of India Vs. Kishorilal Gupta and Bros.*, , the Supreme Court was confronted with a question as to whether the arbitration clause falls within a contract which becomes impossible of performance u/s 56 of the Contract Act, 1872. The principles laid down therein per majority are these-

"(1) an arbitration clause is a collateral term of a contract as the definition from its substantive terms ; but nevertheless it is an integral part of it :

(2) however comprehensive the terms of arbitration clause may be the existence of the contract is a necessary condition for its operation, it perishes with the contract ;

(3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio;

(4) though the contract was validly executed, the parties may put an end to it as

if it had never existed and substitute a new contract for it solely governing the rights and liabilities thereunder ;

(5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate. for along with the original contract, it is also void, in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it ; and,

(6) between the two fall many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. in those cases, it is the performance of the contract that has come to an end but the contract is still in existence for certain purposes in respect of dispute arising out under it or in connection with it as the contract exists for certain purposes, the Arbitration clause operates in respect of these purposes."

The principles laid down in the case aforesaid, have been reiterated in The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, , wherein after noticing its earlier decision, the Supreme Court has held as under :

"In Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, also, Mukherji, J. (as he then was) stated that Section 55 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act, the terms may be expressed or implied in cases where the course covers as a matter of construction that the contract itself contains impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56. Although in English Law such cases would be treated as a case of frustration, in India they would be dealt with u/s 32. In a majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term, which operated to release them from performance of the contract. The Court can grant relief on account of "subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying the provisions for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such event or change of circumstance which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs it is the Court which can pronounce the contract to be frustrated and came at an end. This is really a positive rule enacted in Section 56 which governs such conditions."

In Damodar Valley Corporation Vs. K.K. Kar, , it has been held as under :

"As the contract is an outcome of the agreement between the parties. It is

equally open to the parties thereto to agree to bring it to an end or to treat it as if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to the arbitration clause, which is a part of it also, perishes along with it. Section 62 of the Contract Act incorporates this principle when it provides that if the parties to a contract agree to substitute a new contract or rescind or alter it, the original contract need not be performed. Where, therefore, the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration that dispute cannot be referred to the Arbitration as the arbitration clause itself would perish if the Government is found to be valid. As the very jurisdiction of the Arbitrator is dependent upon the existence of the arbitration clause under which he is appointed, the parties have no right to invoke a clause which perishes with the contract."

The case aforesaid as also *The Union of India Vs. Kishorilal Gupta and Bros.*, , have been referred to and relied on by the Supreme Court in its latest decision in *M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others*, , in which the same view has been echoed. The contract in the instant was validly executed and the same did not come to be substituted by a new contract but we are of the view that consequence that ensues as a result of substitution, rescission or alteration of the original contract as visualised by Section 62 of the Contract Act may follow also by operation of some law. The scheme of rehabilitation of the Sick Company (FPL) by its amalgamation/merger with the Transferee Company (S.R.F. Ltd.) as prepared and sanctioned by B.I.F.R. is a law as much binding on the shareholders of the Transferor Company, viz., the petitioner and the Corporation as it is on the Transferor and Transferee Companies vide Section 18(8) of the Sick Industrial Companies (Special Provisions) Act, 1985. By virtue of Section 32 of the said Act, the scheme will prevail over and have "effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973] and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976), for the time being in force or in the Memorandum or Articles of Association of an industrial Company or in any other instrument having effect by virtue of any law other than this Act."

10. The agreement that the petitioner Company would purchase the entire shares of the Corporation held in the Transferor Company continued to be operative till the "transfer date" and in no case after allotment of shares of S.R.F. Ltd. in lieu of the share of FPL, in other words, the petitioner stood discharged of its obligation to purchase the entire share-holdings of the Corporation in the Transferor Company on and from the date the amalgamation of the Transferor Company with the Transferee Company became effective for the only transferable shares of the Corporation that now exist are the shares allotted and issued in its favour by the Transferee Company in lieu of shares held by the

Corporation in the Transferor Company (FPL). Admittedly, the Corporation has been allotted and issued 66,665 equity shares of M/s. S. R. F. Ltd., in lieu of the shares held by the Corporation in Transferor Company (FPL). Relations between the contesting parties are now governed, by the sanctioned scheme of amalgamation which does not make it obligatory for the petitioner to purchase the entire shares of the Corporation allotted by the Transferee Company in lieu of the shares held by the Corporation in the Transferor Company (FPL) and compensate the loss, if any. In fact, it has not been argued for the Corporation that the petitioner is bound to purchase the shareholdings of the Corporation in S.R.F. Ltd., allotted in lieu of the shares held by the Corporation in Flowmore Polyester Ltd. and pay the damages, if any, to be measured in terms of the difference between the price of its shares in FPL and that of the equivalent shares issued and allotted by M/s. S.R.F. Ltd.

11. The question as to discharge by doctrine of frustration may also be considered from another angle. "Share" as the term is defined in Section 2(46) of the Companies Act, 1956, means "share in the share capital of a company, and includes Stock except where a distinction between stock and shares is expressed or implied". In *Borland's Trustee v. Steel Bros, and Co. Ltd.* (1901) 1 Ch D 279, Farewel, J. thus spoke of a share :

"Share is the interest of a shareholder in the Company measured by sum of money, for the purpose of liability in the first place, and of the interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders." The Supreme Court in *The Commissioner of Income Tax (Central), Calcutta Vs. Standard Vacuum Oil Company, ,* shared the aforesaid concept of a share and expounded therein that, "A share is not a sum of money. It represents an interest measured by a sum of money and made up of diverse rights contained in the contract evidenced by the articles of association of the Company."

In *Life Insurance Corporation of India Vs. Escorts Ltd. and Others, ,* the concept of the share has been explained thus :

"On an overall view of the several statutory provision and judicial precedents to which we have referred we find that a shareholder has an undoubted interest in a company, an interest which is represented by his share-holding. Share is movable property, with all the attributes of such property. The rights of shareholder are (i) to elect Directors and thus to participate in the management through them : (ii) to vote on resolution at meetings of the company ; (iii) to enjoy the profits of the company in the shape of dividends, (iv) to apply to the Court for relief in the case of oppression : (v) to apply to the Court for relief in the case of mismanagement : (vi) to apply to the Court for winding up of the Company ; (vii) to share in the surplus on winding up. A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term with all rights of a shareholder,

only when the transfer is registered in the company's register. A transfer effective between the transferor and transferee is not effective as against the company and person without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares."

12. The transfer of shares "is the voluntary conveyance of the rights and, possibly, the duties of a member, as represented in a share in a company, from shareholder who wishes to cease to be a member to a person desirous of becoming a member." Palmer's Company Law, 23rd Edn., by CM, Schmithoff P. 468. It would thus be evident that share in a company pre-supposes existence of the Company and its share capital. On the amalgamation of M/s. Flowmore Polyester Limited with M/s. S.R.F. Ltd., the former ceased to exist as a company and the entire undertaking including all the assets of the Transferor Company as on "transfer date" stood transferred to the Transferee Company and as visualized by clauses (vii) (iv) of the sanctioned scheme of amalgamation upon the new equity share being issued and allotted by the Transferee Company to the Transferor Company, the share certificates in respect of equity shares held in the Transferor Company stood cancelled.

13. Under the said scheme, the members of the Transferor Company were required to "surrender to the Transferor Company for cancellation of their share certificates in respect of equity shares held in the Transferor Company" whereupon Transferor Company shall issue to them certificate in the Transferee Company of the equity shares which they may be entitled in terms of this scheme." Regard being had to the fact that the Corporation has been allotted equity shares of the Transferee Company in lieu of the shares held by the Corporation in Flowmore Polyester Ltd., it can be said that the share certificates issued by the Transferor Company stood cancelled. In such view of the matter, the contract to buy back the shareholdings of the Corporation in the Flowmore Polyester Limited became impossible of performance and the petitioner stood discharged of its obligation to buy back the shareholdings of the Corporation in the Flowmore Polyester Limited with effect from the "transfer date." The contract to purchase the shareholdings of the Corporation stood obliterated w.e.f the transfer date. But this will not affect the liability, if any, of the Petitioner Company arising out of breach of contract taking place prior to the "transfer date."

14. According to clause 7 (d) of the agreement, the petitioner on being so required, was bound to purchase the entire share-holdings of the Corporation in Flowmore Polyester Ltd., in three equal instalments falling due to five, six and seven years respectively of the date of commencement of commercial production, namely 15.3.1989. The petitioner stood discharged of its obligation aforestated w.e.f. the "transfer date" by doctrine of frustration but such

discharge would not absolve the petitioner of its liability towards the Corporation accruing upto the transfer date. Therefore, if the petitioner, on being so required, failed to buy back the one-third shares of the Corporation as per clause 7 (d) of agreement, and the five-year-period w.e.f. 15.3.1989 had lapsed before the "transfer date", he would be liable to make good the loss, if any, to the Corporation to the extent of one-third shareholdings of the Corporation. Such loss is to be measured by the difference between the price of the one-third shares of the Corporation held in Flowmore Polyester Ltd., calculated at the rate specified in clause 7 (d) of the agreement and the price of the equivalent share allotted and issued to the Corporation by M/s. S.R.F. Ltd. Subsequent impossibility would not impinge upon the rights acquired and liabilities already incurred prior to occurrence of the event making the performance of any part of the contract impossible nor will it affect the arbitration clause of the agreement if it is sought to be invoked in respect of any right acquired or liability incurred prior to the effective date.

IN RE-QUESTION NO. 4.

15. According to Section 3 (1) (a) of the U. P. Public Moneys (Recovery of Dues) Act. 1972, where any person is a party to any agreement providing that any money payable to the State Government or the Corporation shall be recoverable as arrears of land revenue and such person (i) makes any default in repayment of the loan or advance or any instalment thereof, or (ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any instalment thereof, or (iii) otherwise fails to comply with the terms of the agreement, then in the case of the State Government, such officer as may be authorised in that behalf by the State Government by notification in the official Gazettee, and in the case of the Corporation or a Government company the Managing Director (or where there is no Managing Director then the Chairman of the Corporation, by whatever name called) (or such officer of the Corporation or Government company as may be authorised in that behalf by the Managing Director or the Chairman) thereof, and in the case of a banking company, the local agent thereof, by whatever name called, may send a certificate, to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrears of land revenue.

16. It would thus be evident from the provision aforesaid that if the money sought to be recovered is under the agreement, recoverable as arrears of land revenue, then no exception can be taken to the impugned recovery proceeding. Clause 7 (f) of the agreement, visualises that if the petitioner on being so required failed to purchase shares held by the Corporation at the price stated in clause 7 (d) of the agreement, the Corporation would be entitled to transfer its share-holding in the Company to any third party and the losses occasioned and damages caused by such sale and also damages for breach of agreement shall be

recoverable from the petitioner without recourse to a Court of law. It further visualises that difference between the prices fixed by the Corporation as price from the outsiders and the amount received, if any, would, apart from any other mode of recovery, be recoverable by the Corporation as arrears of land revenue under the provisions of the U. P. Public Moneys (Recovery of Dues) Act, 1972. Clause 7 (g) of the agreement visualises that for purposes of recovery of "any amount due under this agreement." the Corporation would on its discretion be entitled to take recourse to the various relevant provisions of the U. P. Public Moneys (Recovery of Dues) Act, 1972. Sub-clauses (e) and (f) were added by Supplementary Agreement No. 2 dated 19.2.1987. By Supplementary Agreement No. 3 dated 28.8.90, sub-clause (e) was replaced and the amended sub-clause (e) visualises that the Corporation in its discretion notwithstanding any other provision in the agreement "shall be entitled to specific performance of the aforesaid agreement and shall also be entitled to damages for the breach of the agreement" and sub-clause (f) as it stands substituted by clause 5 of Supplementary Agreement No. 3 visualised that notwithstanding anything contained in clause 7 (e) if the petitioner on being so required, failed to purchase the shares held by the Corporation on the price specified in clause 7 (d), the Corporation shall be entitled to transfer its shareholding in the Company to any third party as the losses occasioned and damages caused by such sale and also damages for breach of agreement, shall be recoverable from the collaborator without recourse to a Court of law. The difference between the prices fixed by the Corporation in the amount received if any by the Corporation as price from the outsiders, shall, apart from any other mode of recovery, be also recoverable by the Corporation as arrears of land revenue under the provisions of the U. P. Public Moneys [Recovery of Dues) Act. 1972. It would thus be evident from sub-clauses (f) and (g) of clause 7 of the agreement that what is recoverable is the "losses occasioned and damages caused by such sale and also damages for breach of agreement." Accordingly, we are of the view that recourse can be taken to the provisions of the U. P. Public Moneys (Recovery of Dues) Act, 1972 for recovery of the losses if any suffered by the Corporation as visualised in clause 7 (f) as also the damages suffered by it due to breach of contract if it took place before the petitioner stood discharged by doctrine of frustration.

17. In the result the petition succeeds and is allowed. Impugned recovery certificate and consequential recovery proceedings are quashed subject to the observations made in this judgment, i.e., without prejudice to the rights the Corporation acquired due to breach, if any, prior to the "transfer date." The parties shall bear their respective costs.