
(2010) 04 AHC CK 0200

In the Allahabad High Court

Case No : Civil Revision Nos. 34, 35 and 36 of 2010

New India Sugar Mills

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 23-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 115

Citation : (2010) 04 AHC CK 0200

Hon'ble Judges : Rajiv Sharma, J

Final Decision : Disposed Of

Judgement

Rajiv Sharma, J.—Heard Sri Kesri Nath Tripathi, Sri Umesh Chandra, Sri Rakesh Dwivedi, Senior Advocates, assisted by Sri Sudeep Kumar, Pankaj Bhagwat, Mukesh Prasad, learned Counsel for the revisionist and Sri R.N. Trivedi, Senior Advocate, assisted by Sri Piyush Agarwal, learned Counsel for the respondents. Counsel for the parties jointly submitted that the contesting parties are before the court and as such the issuance of notice to opposite parties nos. 1 to 3 be dispensed with and the revisions be decided finally at the admission stage itself. Accordingly, as consented by the Counsel for the parties, issuance of notice to the opposite parties nos. 1 to 3 is dispensed with and the matter is disposed of finally at the admission stage itself.

2. Aforementioned all the three civil revisions have been filed under Section 115 of the Code of Civil Procedure assailing the common orders dated 29.3.2010 whereby the application preferred in Regular Suit No. 1192 of 2008, by opposite party no.4 under Order VI Rule 17 and under Order XXVI Rule 9 and 10A of the Code of Civil Procedure were allowed whereas the application preferred by the Revisionistdefendant under Order I Rule 1, Order VII Rule 11 read with Rule 151 of the Code of Civil Procedure was rejected.

3. As all the aforesaid civil revisions arise out of the order dated 29.3.2010 passed in Regular Suit No. 1192 of 2008 on the aforesaid three individual applications by the Trial Court and the common question of law is involved,

therefore, all the revisions are being decided by a common order.

4. Draped in brevity, the facts of the case are that the M/s New India Sugar Mills Revisionist is a unit of the Oudh Sugar Mills Limited, a company registered under the Companies Act, 1956 with its registered office at Hargaon, District Sitapur. After the notification issued by the Central Government deleting Sugar Industry from Section 11 of the Industries (Development & Regulation) Act, 1951, the Revisionist filed an Industrial Entrepreneur Memorandum (IEM) expressing its intention to setup a sugar industrial undertaking at village Dhadha Buzurg, Tehsil Hata, District Kushinagar, U.P. which was registered vide IEM NO. 830/SIA/IMO/2005. On an application of the revisionist for measuring the distance between the respondent's sugar Mill and the proposed site of the revisionist's unit, the Survey of India issued a certificate no. T449/18B7(b) dated 19.4.2005 in favour of the Revisionist, indicating therein the distance from the site wherein the proposed sugar factory is to be setup as 16.2 Kms from the factory of opposite party no.4. The aforesaid distance was reconfirmed by Survey of India, Lucknow, on the request of the Additional Cane Commissioner, Lucknow, and as the distance was found to be 16.2 KM between the two units, necessary permission was granted by the Cane Commissioner for setting up of a sugar unit by the Revisionist and consequently, the construction work started.

5. Thereafter, the cane reservation order dated 27.10.2007 was passed by the Cane Commissioner for the crushing season 200708 with a liberty to the opposite party no.4 M/s Saraya Sugar Mills Limited to continue to lift the sugarcane from the reserved/assigned area of the Revisionist company till the lifting of cane for crushing by the revisionist unit. As provided in the said order, the opposite party no.4 had lifted the sugarcane from the reserved/assigned area of the Revisionist company for crushing the same during the said crushing season.

6. Subsequently, the opposite party no.4 M/s Saraya Sugar Mills Limited moved an application for measuring the distance between its unit and that of the revisionist's proposed unit and issuance of distance certificate in respect thereof which was issued on 2.9.2008 by the Survey of India wherein the distance between the factory of the opposite party no.4 and that of Revisionist has been shown to be less than 15 kms. In the background of the facts averred above, M/s Saraya Sugar Mills Limited, opposite party No.4 filed a Suit for declaration, mandatory injunction and permanent injunction in the Court of Civil Judge (Senior Division), Lucknow seeking following reliefs:

(a) That by a decree of declaration, the No Objection Certificate dated 13.4.2007 issued by the defendant no.2 on the basis of the Distance Certificate dated 19.4.2005 issued by the Survey of India, to establish a new sugar factory, be declared illegal, non est, baseless, null and void.

(b) That by a decree of declaration, it is to be declared that no sugar factory can come up within 15 kms. periphery of the Sardar Nagar, Tehsil Chauri Chaura, District Gorakhpur, unit of the plaintiff company; including the proposed factory

of the defendant no.4 and 5 situated at Village Dharha Buzurg, Tehsil Hata, District Kushinagar (U.P.) at the strength of the null and void No Objection Certificate dated 13.4.2007 issued by the defendant no.2, since the plaintiff company comes within the ambit of "existing factory" since prior to the passing of the judgment and order dated 2.4.2007 by Hon"ble Supreme Court, and now it being held that the notification dated 10.11.2006 shall operate retrospectively.

(c) That by a decree of declaration, it be declared that the proposed new sugar factory of the defendant no.4 at Village Dharha Buzurg, Tehsil Hata, District Kushinagar (U.P.) shall not be treated as a "Factory" within the meaning of Section 2 (j) of the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953.

(d) That by a decree of mandatory injunction, the defendant no.2 be mandated to direct the defendant no.4 not to proceed in any manner whatsoever with the development of it's new sugar factory at Village Dharha Buzurg, Tehsil Hata, District Kushinagar (U.P.)

(e) That by a decree of permanent injunction, the defendant no.2 be enjoined not to facilitate the setting up of any new sugar factory within 15 kms. of the existing factory of the plaintiff including that of the defendant no.4 and/or allocating sugarcane area to any such new sugar factory including that of the defendant no.4.

(f) That the cost (s) of the suit, as permissible under Order XXA C.P.C. be awarded to the plaintiff against the defendants.

(g) That any other relief (s) which this Hon"ble Court deems in this circumstances be also awarded to the plaintiff against the defendants.

7. Alongwith the plaint, the plaintiff moved an application under Section 80 (2) of the Code of Civil Procedure for leave to institute the Suit without making a compliance of issuing notice to the Government as required under Section 80 (1) of the CPC. The trial Court exempted the Revisionist from complying with the provisions of Section 80 (1) and permitted to institute the aforesaid suit without serving any notice as required by the subsection (1) of Section 80 of the CPC but the Court below issued notices to the opposite parties including the State and Union of India for showing cause in respect of relief prayed for in the application for grant of interim injunction.

8. As no interim order was granted, M/s Saraya Sugar Mills Limited filed a Civil Revision No. 135 of 2008 before this Court. This Court, by an adinterim order dated 23.9.2008, provided for maintaining the status quo as it existed on that date. The relevant order reads as under:

"In the meantime, as an interim measure, it is provided that the respondent no. 4 shall maintain the status quo as it exists today and no developmental or construction activities shall be carried out on the site in question. The Cane Commissioner is restrained from issuing any reservation order or assigning any area for the purpose of purchase of sugarcane in favour of opposite party no.4."

9. The order dated 23.9.2008 was assailed before the Apex Court in the Special Leave Petition by M/s New India Sugar Mills Revisionist, but the same was dismissed as withdrawn on 20.10.2008. By an order dated 3.12.2008, the aforesaid Revision No. 135/2008 was dismissed and the interim order dated 23.9.2008 was vacated. While passing the final orders, this Court directed the Trial Court to dispose of the application filed by the respondent on interim injunction expeditiously, i.e. within a period of two months.

10. In the aforesaid Regular Suit No.1192 of 2008, the State Authorities defendants filed an application under Order 7 Rule 11 read with Section 151 of the Code for rejection/dismissal of Suit filed by the respondent No.4 as barred by various mandatory provisions of Order VI Rule 2 CPC. The present revisionist M/s New India Sugar Mills also filed an application under Order VII Rule 11 (a)(c) and (d) of the Code for rejection of the plaint in view of the fact that the plaint filed by M/s Saraya Sugar Mills was barred by the provisions of Essential Commodities Act, Section 41 (h) and Section 41 (I) of the Specific Reliefs Act.

11. From the record, it comes out that an application for transfer of the case was also moved, which was rejected. However, subsequently, by an order dated 24.2.2009, the District Judge transferred the aforesaid Regular Suit No.1192 of 2008 to the Court of Civil Judge (Senior Division), Mohanlal ganj, Lucknow. The order dated 24.2.2009 was assailed in F.A.F.O. No. 338 of 2009. A Division Bench of this Court disposed of the said appeal by a judgment and order dated 20.3.2009. The concluding paragraph of the judgment reads as under:

"We find that the measurement of distance in the said certificate is on the basis of aerial distance while under the Rules it should be radial distance, which means that the distance should be measured from the Centre of the factory. Therefore, in order to settle the dispute, without entering into the merits of the case we direct the concerned cane Commissioner to issue a fresh certificate after measurement from the centre in their presence within a period of one month from the date of production of a certified copy of this order. It is needless to say that the certificate earlier issued by the Cane Commissioner has gone in abeyance in view of our order for remeasurement for distance. The trial Court is directed to decide the suit expeditiously, in accordance with law."

12. The aforesaid order dated 20.3.2009 passed by a Division Bench of this Court in F.A.F.O. No. 338 of 2009, the Revisionist preferred a Special Leave Petition No. 7375 of 2009 before the Apex Court. The Apex Court granted an interim order dated 9.4.2009. Subsequently, the Special Leave petition was converted into Civil Appeal No. 3269 of 2009 vide order dated 4.5.2009 and the interim order was directed to continue.

13. In the Suit, the Trial Court by an order dated 18.9.2009, rejected the applications, i.e. C6 and C27 preferred under Order 39 Rule 1 and 2 of the Code and Order 7 Rule 11 of the Code respectively. Against this order, M/s Saraya

Sugar Mills Ltd. filed an appeal under Order XLIII Rule 1 (r) of the Code assailing the order dated 18.9.2009 passed by the trial Court. A Division Bench of this Court by a judgment and order dated 5.11.2009 dismissed the appeal. However, the Trial Court was directed to decide the Suit itself within a period of six months from the date of passing of the order. The judgment of the Division Bench dated 5.11.2009 was again assailed by the respondent No.4 before the Apex Court, but the Special Leave Petition met with the same fate as it was also dismissed vide judgment and order dated 15.12.2009.

14. Later on, the present revisionist filed an application under Order 1 Rule 1 of the Code read with Order 7 Rule 11 and Section 151 of the Code for rejecting the Suit of the respondent No.4 inter alia on the ground that the Revisionist came to know on 7.1.2010 that the Suit was filed by M/s Saraya Sugar Mills Ltd. concealing and suppressing the material facts, as like, Saraya Sugar Mills Ltd. was merged with M/s Saraya Industries Ltd, pursuant to the order dated 5.8.2008 of Board for Industrial and Financial Reconstruction [for the sake of brevity, referred to as "BIFR"] and there existed no legal person/plaintiff/entity under the name and style of Sarya Sugar Mills Ltd. on the date of filing of the present Suit, i.e. on 18.9.2008.

15. Before the said application preferred by revisionist under Order 1 Rule 1 read with Order 7 Rule 11 read with Section 151 could be disposed of, an application under Order 6 Rule 17 seeking amendment in the cause title was filed by M/s Saraya Sugar Mills Limited. To this application, objections were filed by the Revisionist. Apart from the aforesaid amendment, the respondent No.4 also filed an application for amendment in Civil Appeal No.3269 of 2009 before the Apex Court.

16. The respondent No.4 also filed an application under Order 26 Rule 9 read with Rule 10A for appointment of local Commissioner for carrying out the measurement between the two sugar units to which objections were filed by the Revisionist. The Trial Court by an order dated 26.2.2010 directed that all the applications under Order 1 Rule 1 bearing no. C85, application for amendment filed by the respondent no.4 bearing no. A89 and the application for appointment of the Commissioner for measurement bearing no. C82 shall be heard and decided together.

17. In the meantime, the Civil Appeal No. 3269 of 2009 filed by the Revisionist M/s New India Sugar, referred to above, was disposed of by a judgment and order dated 29th March, 2010, which reads as under:

"The first respondent herein filed a Suit for declaration and injunction in Suit No. 1192/2008 and moved an application for temporary injunction. The learned trial Judge on 24.2.2009 informed the District Judge that he will not be able to decide the injunction application and requested that the case be transferred to some other Court.

Therefore, the District Judge, Lucknow, by order dated 24.2.2009, directed the

case to be transferred to another Court. Aggrieved by the said order seeking transfer, an appeal was filed before the Allahabad High Court. In the said appeal, the High Court passed an interim order dated 20.3.2009 issuing certain wide ranging directions which according to appellant (fourth defendant) did not arise for consideration in the said appeal. Feeling aggrieved, the fourth defendant in the Suit filed this appeal. This Court granted leave and stayed the operation of the said interim order of the High Court.

2. We are now informed that subsequently the application for temporary injunction was heard by the trial Court and rejected on 18.9.2009. The rejection of the temporary injunction was challenged before the High Court and the High Court has dismissed the appeal with a direction to dispose of the matter within six months.

3. In view of the subsequent developments, this appeal becomes academic and does not survive for consideration. As noticed above, the appeal arises from an order adjourning the hearing of the application for temporary injunction. Now, that the temporary injunction application has been decided by the trial Court, there is no need to keep this matter pending.

4. Therefore, all that requires to be done is to dispose of this appeal as having become infructuous by clarifying that nothing stated by the High Court in the impugned order will bind the trial Court, nor will the trial court be influenced by any observation made in the impugned order of the High Court. We reiterate the direction for expeditious disposal."

18. Before coming to the actual controversy involved in the present case, it may be mentioned that Sri R. N. Trivedi, raised a preliminary objection as regard to the maintainability of the instant revisions. According to him, all the three impugned orders are interlocutory in nature and in view of the settled legal position, the Revision is not maintainable against an interlocutory order. The power of the High Court under Section 115 is exercisable in respect of "any case" which has been decided". The High Court should not interfere in each and every interlocutory passed by the trial Court so that the trial of a Suit could proceed speedily.

19. Placing reliance upon Prem Bakshi and others v. Dharam Dev and others [(2002) 2 SCC 2] and Smt. Harvinder Kaur and another v. Godha Ram and another [AIR 1979 Punjab & Haryana 76], It has been urged that the proviso to subsection(1) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section vary or reverse any order made or any order deciding a issue, in court of a suit or other proceedings. The order in question by which the amendment was allowed and by another order Commission has been issued could not be said to have finally disposed of the case and as such are not revisable.

20. Answering the question with regard to the maintainability of the revision, Sri Rakesh Dwivedi submitted that the Section 115 of the Code deals with the

Revisions and confers supervisory power on the High Court which can be exercised even at an interlocutory stage prior to the judgment. In the instant case, the revisionist by an application under Order 1 Rule 1, Order 7 Rule 11 read with Section 151 of the Code prayed for rejection of the suit on the grounds mentioned therein. The Trial Court, while passing the impugned order, instead of deciding the pleas raised by the Revisionist, said that the same would be decided while hearing the suit and allowed the application for issuance of Commission for measuring the distance between the two sugar units and the other application for amendment moved by the plaintiff. The Trial Court thus has failed to exercise a jurisdiction so vested in it and as such the Revision is maintainable and the case relied upon by the respondent are of no avail to him.

21. Code of Civil procedure prescribes the procedure for filing a suit and the suit is to be filed by an aggrieved person. In case, the suit has been initiated in the name of wrong person, then it will be open for the party to prefer an application invoking Order 1 Rule 10 of the Code but this power is to be exercised if the mistake is bonafide and not otherwise. In *Hardeva vs. Ismail and others*; AIR 1970 Rajasthan 167, the Full Bench of Rajasthan High Court opined that a revision application would be maintainable against an order of a subordinate Court holding that a suit would proceed for trial even in the absence of necessary party because in trying a suit in the absence of necessary party, the Court will be committing an illegality in the exercise of its jurisdiction.

22. The law is well settled that the High Court is fully empowered to exercise revisional jurisdiction under Section 115 of the Code of Civil Procedure, if the subordinate court has committed illegality or material irregularity in passing the order. The "case decided" referred to in section 115 does not mean the entire case or suit. In the instant case, the grounds raised in the application under Order 1 Rule 1, Order VII Rule 11 and 151 of the code by the revisionist were not decided and the trial court said that the question of merger will be decided at the time of hearing of the suit though the court noted the arguments raised by the Revisionist in this regard. The question of merger of the plaintiff with the Saraya Industries Limited is a primary issue and it was incumbent upon the Court below to have decided this question first but not doing so, the trial court committed illegality or material irregularity and as such the Revision is maintainable. Accordingly, the preliminary objection advanced by the respondent, is overruled.

23. Though none of the parties have argued in relation to the territorial jurisdiction of the Civil Court, Lucknow, but it would be useful to add that Section 20 of the Code of Civil Procedure enjoins that every suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief/prayer for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action. In the instant case, the plaintiff's sugar factory is situated within the territory of District Gorakhpur. The Revisionist has submitted

its proposal to set up a sugar unit in the territory of District Gorakhpur for which they submitted an IEM and the same was approved. Therefore, the cause of action if any, has arisen within the territorial jurisdiction of the Civil Court, Gorakhpur. Merely, because the Cane Commissioner, Lucknow has accepted the distance certificate issued by the Survey of India, no cause of action or part of cause of action has arisen within the territorial jurisdiction of Civil Court, Lucknow.

24. Sri Kesri Nath Tripathi, Senior Advocate has vehemently argued on behalf of the Revisionist that the learned Trial Court committed an error in not appreciating the fact that the suit filed by M/s Saraya Sugar Mills Ltd. claiming a relief of declaration, permanent injunction and mandatory injunction against an existing sugar factory i.e. revisionist was not maintainable as the same was filed by a nonexistent plaintiff/entity, without valid authority. Clarifying the position, it has been submitted that the law is well settled that only a "person" can file a suit and the person can be "natural" and/or "legal". In respect of a company, which is a legal entity but can be represented only through its directors or any authorised legal authority person being authorised by a board's resolution. In the present case, the plaintiff, namely, M/s Saraya Sugar Mills Limited" has filed the Regular Suit through Ms Gayatri Florence claiming herself to be the Chief General Manager of a nonexistent company. Ms Gayatri Florence, who has verified the pleading of the plaint and also sworn the affidavit on behalf of the Sugar Mill was fully aware of the fact that M/s Saraya Sugar Mills Limited was not in existence at the time of filing of the plaint and as such no proceedings or suit could have been filed and/or maintained by a nonexistent company/entity. In other words, the suit is not maintainable on two counts; firstly, that there exists no legal entity under the name and style of "M/s Saraya Sugar Mills Limited" and second, Ms. Gayatri Florence has not mentioned that she has been authorized by any resolution of the Board of Directors to file the present suit/application.

25. Sri Tripathi has submitted that the respondents themselves have admitted in the application for seeking amendment in the array of parties filed under Order 6 Rule 17 C.P.C. that the company Saraya Sugar Mills Ltd. has merged with Saraya Industries Limited. Through this amendment they have not sought any amendment in the pleadings, but in the array of party of the plaint and have prayed for adding M/s Saraya Industries Ltd., 302, Thapar Arcade, 47, Kalu Sarai, Hauz Khas, New Delhi 16 after the words "New Delhi". In paragraph 8, it has been averred that the Scheme has been sanctioned by the BIFR and it has been required that Saraya Sugar Mills Ltd. be merged with its sister concern M/s Saraya Industries Ltd. It has further been averred that a special resolution to the said effect had also been passed. In paragraph 11, it has again been admitted that the plaintiff company has been merged with M/s Saraya Industries Ltd. Therefore, the averment made in paragraph 15 that due to inadvertence and bona fide mistake has crept in the description of the plaintiff in the array of parties of the plaint is wholly false and incorrect. As indicated above, the suit was filed by a nonexistent company and the present application has also been filed by

the nonexistent company which cannot be permitted under law. The deponent of the affidavit is no more an officer of Saraya Sugar Mills Ltd. but even then, she has mentioned herself as the chief General Manager of a company, which is no more alive.

26. Elaborating his arguments further, it has been submitted that M/s Saraya Sugar Mills Limited had merged with M/s Saraya Industries Limited as per its own modified Rehabilitation Scheme submitted by them before the BIFR and the same was approved by the BIFR vide its order dated 5.8.2008. The merger became effective from the appointed date i.e. 31.12.2007. As a matter of fact, the merger took place 39 days before the filing of suit. The proceedings left only before the Board were with respect to mode of payment of the dues of the cane growers. Therefore, there existed no legal entity in the name and style of "Saraya Sugar Mills Limited" on the date of filing of the present suit i.e. on 18.9.2008 having its Industrial Sugar Undertaking at Sardar Nagar, Tehsil Chauri Chaura, District Gorakhpur. By an application of amendment, the respondent Mill is not making any amendment in the pleading but is only amending the title of the suit, which amounts to changing of plaintiff.

27. Next, he asserted that the Court below in allowing the application for amendment did not appreciate that the amendment application moved by the plaintiff/respondent No.4 was not legally maintainable inasmuch as the plaintiff/respondent No.4 has not approached the Court with clean hands as they were aware that M/s Saraya Sugar Mills Limited was not existing at the time of filing of the plaint and no proceedings or suit can be filed by a nonexistent company/entity. Further, the trial Court has committed an error of law in not appreciating that by the amendment application plaintiff/respondent No.4 wanted to amend cause title of the suit without any authorization of the M/s Saraya Industries Limited, which did not come forward till date in any Court of law.

28. His further submission is that the amendment application itself cannot be allowed for amending the cause title in view of the fact that addition of a new party would not be permissible in view of a legal bar for filing of the suit against the State Government and Union of India in view of Section 80 of the Code of Civil Procedure. The Court below ought to have appreciated that the effect of filing the Suit by a legally nonexistent entity would be *pari materia* to pursuing a suit by dead person. Therefore, prayer sought in the application for amendment could not have been granted under Order VI Rule 17 of the Code of Civil Procedure, which provision deals with amendment of pleadings. It is respectfully submitted that prayer for change of cause title can be made only by a "person in existence". However, in the present case, there exists no person/entity in the name and style of Saraya Sugar Mills Limited.

29. It has next been argued that the trial court erred in not taking into consideration that the entire period from 18.9.2008 i.e. the date of filing of the suit till 29.3.2010 i.e. date of passing of the order, the suit was instituted and conducted by a nonexistent entity/person and as such the entire period from

18.9.2008 till 29.3.2010 was the period under vacuum, which is a noncurable defect. While allowing the amendment application of the respondent no.4, it failed to take into consideration that the cause title would not be in consonance with the pleading of the suit as well as with the cause of the action disclosed in the suit. It was the duty of the trial to first ascertain as to whether any amendment would be permissible in a suit filed by a legally nonexistent company/entity to which no relief can be granted.

30. Placing reliance on various documents, namely, the Scheme of Merger, orders dated 5.8.2008, 16.10.2008 passed by the Board for Industrial & Financial Reconstruction, Director's Report, Schedule 20 forming part of the Accounts as on 31st March, 2008, it has been argued that Saraya Sugar Mills Ltd. has merged with the Saraya Industries Ltd. and therefore, has lost its independent entity and has become a division of Saraya Industries Ltd. The present Suit filed by a nonexistent company/a dead company cannot be allowed to continue and the trial Court ought to have rejected not only the applications preferred by the plaintiffs, but would have rejected the plaint in view of the provisions contained in the Code of Civil Procedure. In this context, while referring Order 7 Rule 11 of the Code, which deals with the rejection of plaint, reliance has been placed upon paragraphs 46 and 47 of *Umesh Chandra Saxena v. Administrator General, U. P. Allahabad* [1999 (1) ARC 239], which are quoted as under:

"46. The Hon'ble Judge was confronted not only with the prayer for rejection of the plaint as per application No.A415 but also with a preliminary objection on behalf of the petitioner-appellants that when written statement was filed and issues were framed therein, a prayer for rejection of plaint could not be entertained as the said provisions would only be invoked prior to the filing of the written statement. Without going to the merits of the application for rejection of plaint, it may be stated at this stage itself that the preliminary objection was rightly rejected by the Hon'ble Single Judge. Order VII, Rule 11, C.P.C., as already observed, casts a duty upon the Court to reject a plaint if the circumstances indicated therein were existing. It cannot be the law that this power of the Court would be curtailed in any manner simply because the Court had proceeded to some length, without application of mind on this point. The rule itself does not indicate anywhere that the power is to be exercised upon an application, or if such an application is filed it should be at any particular stage. We must and do not agree that the opinion of the Hon'ble Single Judge that the preliminary objection regarding the stage of moving an application under Order VII Rule 11 C.P.C. was not acceptable. We would only add that an action under Order VII Rule 11 C.P.C. does not await an application by any party. It is the duty of the Court to reject a plaint, if the reasons therefor are found existing from a reading of the plaint itself and not from a reading of the defence or other documents.

47. It appears that a second preliminary objection was also raised before the Hon'ble Single Judge concerning the application under Order VII Rule 11 C.P.C.

It was contended before him that in a proceeding for letters or administration all the provisions of the Code of Civil Procedure were not to be applied and as such the powers under Order VII Rule 11 C.P.C. Could not be invoked. The Hon"ble Single Judge disagreed with this objection, also making a reference to Section 141 C.P.C. which provides that the procedure provided in the code of Civil Procedure in regard to Suits would be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction. He was of the view that the proceedings for grant of letters of administration was one in which the Court exercised its civil jurisdiction and as such all rigours of the Code of Civil Procedure would be applicable. The Hon"ble Judge further relied on Rule 39 of Chapter XXX of the Allahabad High Court Rules to say that when the matter became contentious the application for letters of administration would be treated and registered as a suit and the petition was to be read as a plaint and the objection as written statement, and, as such, the testamentary suit was a suit for all purposes under the Code of Civil Procedure and no exception could be taken to invocation of Order VII Rule 11 C.P.C. We find no reason to disagree with this aspect of the finding of the Hon"ble Single Judge."

31. When the Saraya Sugar Mills Ltd. has become dead, on account of its merger with Saraya Industries Ltd., the proceedings of the Suit cannot be maintained by the erstwhile company. If Saraya Industries Ltd. was having any interest, it should have prayed for withdrawal of the Suit and would have filed fresh Suit after obtaining liberty from the Court or would have made an application for impleadment as a plaintiff. On the strength of the decision rendered in *Manilal & Sons Versus Umedbhai & Co.* [AIR 1957 Cal 688], it has been submitted that the proper course, when there is a mistake, is not to amend disregarding the conditions of Order 1 Rule 10 of the Code, but to seek Court's permission to withdraw the Suit with liberty to file a fresh Suit under Order 23 Rule 1 of the Code on the ground of formal defect.

32. Sri Kesari Nath Tripathi submitted that law is well settled that the company ceases to exist on the dissolution. Once the company was dissolved, it ceases to exist and the company became nonexisting company. In order to substantiate the aforesaid assertion, reliance has been placed on a Calcutta High Court decision rendered in *Shree Choudhary Cold Storage v. Ruby General Insurance Co. Ltd.* [AIR 1982 Cal 124]. The relevant paragraph is reproduced hereunder:

"The Allahabad High Court applied this principle in the case of an assessment against the dissolved company. Counsel for the respondent also draw our attention to the decision in the case of *Hiralal v. Kali Nath* [1962 2 SCR 747]. There, at p.200 of the report, the Supreme Court observed that the Court was lacking inherent jurisdiction, if the suit was against a person, who was dead at the time of the institution of the Suit. The same principle that a suit against a dead person is a nullity was reiterated by the Division Bench of Mysore High Court in the case of *C. Muttu v. Bharat Match Works*, AIR 1964 Mys 293. In that case, the Mysore High Court reiterated that there was no scope for amending the

plaint where the Court has no jurisdiction. Because of it being a nullity, there is no cope for making an application for amendment. In this case, the suit indisputably, as the cause title of the defendant indicates, was against the dissolved company and, as such, was incompetent. Learned counsel for the appellant contended that the Government was mentioned as a party and this was misdescription. That even was incorrect. The Ruby General Insurance Co. did not vest in the Government. The assets and liabilities of the company had vested in a company, which was a Government of India. As such, this contention on behalf of the appellant also cannot be accepted. In view of the framing of the suit, in the description of the cause title, we are unable to accept the contention that it was a mis description. Therefore, we are on this aspect of the matter in agreement with the view taken by the learned trial Judge."

33. Sri Rakesh Dwivedi, appearing in civil revision No. 35 of 2010, on behalf of the revisionist, submitted that the Revisionist in order to know about the nature of the proceedings going on before the BIFR in respect to M/s Saraya Sugar Mills Limited, applied for online inspection of the record after depositing the requisite fee. On 7.1.2010, when the record was inspected, the revisionist came to know about some startling facts, which were not in their knowledge earlier. From the inspection it was revealed that on 22.8.2008 the BIFR has given its approval to the Modified Draft Rehabilitation Scheme filed by the respondent/plaintiff vide which the proposal of the alleged plaintiff for its merger with M/s Saraya Industries Limited w.e.f. appointed date i.e. 31.12.2007 has been approved. The fact that M/s Saraya Sugar Mills Limited have merged also finds mention in 28th Annual Report and Audited Accounts of the Company for year ended March 31,2008. In the heading Scheme of Merger of Subsidiary Company following facts are mentioned:

"The scheme of merger of Saraya Sugar Mills Limited, erstwhile subsidiary company, with the company, with effect from the appointed date, i.e. 31st December, 2007, was approved by the Hon"ble Board for Industrial & Financial Reconstruction vide its order dated 22nd August, 2008. The scheme, after obtaining all necessary statutory approvals and complying with conditions, has become effective. Accordingly, the assets and liabilities of the transfer company i.e. Saraya Sugar Mills Limited shall stand vested in Saraya Industries Limited with effect from the appointed date i.e. 31st December, 2007 and have been carried over at their respective fair values in the books of the company.

The audited accounts presented herein have been prepared after taking effect of the said scheme as approved by the Hon"ble Board for Industrial & Financial Reconstruction.

Management of the Company is hopeful that the merger of erstwhile subsidiary company, Saraya Sugar Mills Limited with the company would ensure synergy of operations, more efficient utilization of funds & resources, effective management, overall cost reduction and pave the way for rapid growth of the merged entity."

34. From the perusal of the aforesaid facts, it is evident that M/s Saraya Sugar Mills Ltd had merged with M/s Saraya Industries Limited, and therefore, no legal entity under the name and style of "M/s Saraya Sugar Mills Limited" existed on the date of filing of the suit.

35. M/s Saraya Sugar Mills Ltd. is no more a legal entity is also established from the Schedule 20 forming part of the Account as on 31st March, 2008 of Saraya Industries Limited. Clause 1A under the heading "Notes to Accounts" is reproduced hereunder:

"The Board For Industrial & Financial Reconstruction (BIFR) had vide its order dated 5.8.08 approved a Scheme of Merger of Saraya Sugar Mills Ltd. (transfer company), engaged in the business of manufacture and sale of white crystal sugar, with Saraya Industries Ltd. (transferee company), engaged in manufacture and marketing of bottled liquor, fuel ethanol and bulk spirits, with effect from 31.12.07."

36. In the background of the aforesaid facts, Sri Rakesh Dwivedi, emphatically asserted that M/s Saraya Sugar Mills Limited, a company incorporated under the Companies Act and having its registered office at Sardarnagar, District Gorakhpur has merged with the Saraya Industries Limited, a company incorporated under the Companies Act, 1956 and having its registered office at 302, Thapar Arcade, Behind Azad Apartments, Hauz Khas, New Delhi pursuant to the Scheme of Merger (Annexure 1) presented before the BIFR alongwith Modified Draft Rehabilitation Scheme. A Bench comprising of Mr A.K.Goswami and Mr Pavan Raina of the BIFR finally sanctioned the Modified Draft Rehabilitation Scheme as enclosed as Annexure A with certain modifications and directions on 5.8.2008. This fact is substantiated from the paragraph 8 of the order dated 16.10.2008 of the BIFR wherein it has been mentioned that "the Board, finally, sanctioned the MDRS (MS08) with the modifications as emerged in the Board's said hearing held on 5.8.2008". Thus after the merger of SSML with Saraya Industries Ltd. as per Modified Rehabilitation Scheme the entire business, management and assets stood transferred to SIL. Further after merger of SSML with Saraya Industries Limited (SIL), the entire share capital of SSML would be wiped out and the SSML would function as a division of SIL.

37. Sri Rakesh Dwivedi next contended that the application under Order XXVI Rule 9 read with Rule 10A of the Code of Civil Procedure for appointment of local Commissioner for the purposes of measurement was not made by M/s Saraya Industries Limited but by M/s Saraya Sugar Mills Ltd., which is a dead company, after the order dated 5.8.2008 of the BIFR. The impugned order directing for measurement of distance is beyond the purview of the suit and alien to the prayers made in the suit. The Survey of India, which is the competent authority, to measure the distance as provided under Sugarcane (Control) (Amendment) Order, 2006 has already issued a certificate dated 19.4.2005 with regards to distance. The said certificate dated 19.4.2005 has not been assailed in any of the proceedings. Furthermore, in view of the directions of the Apex Court, the slate

was clean and the Trial Court has to decide the case on merits without being guided by any observations made by the Apex Court or by the High Court.

38. It has also been argued the Trial Court while overlooking the fact that suit was abinitio invalid and not entertainable has failed to appreciate that the application filed by the plaintiff was under Order XXVI Rule 9 and 10 which specifically provides for commission for scientific investigation and before grant of such prayer, the trial Court is duty bound to record an opinion that such scientific opinion cannot be conveniently conducted before the Court and then only can pass a direction for appointment of commission. In the present case, no such opinion has been recorded by the trial Court. Thus, the present is a case where not only the trial Court has gone beyond its jurisdiction but has also exercised its limited jurisdiction illegally and with material irregularity. With regard to appointment of Commissioner's, first the party must lead evidence and on the basis of evidence the court has to record a finding that it needs some clarifications and for this purpose the appointment of the Commissioner is imperative.

39. To give strength to his aforesaid arguments, reliance has been placed on a recent decision of this Court in Radhey Shyam and others vs. Additional District Judge, Court No.13, Lucknow and others [2010(28) LCD 485. In this case, the Court held that it is not mandatory on the part of the Court to allow each and every application which is moved for local inspection. Where the Court feels that there is some ambiguity in the evidence which can be clarified by making inspection, the Court after hearing the parties and reaching on just conclusions, may go ahead for the local inspection. In Paragraph 13 and 14 of the Radhey Shyam's Case [supra], the court has referred two decisions to reach on the aforesaid conclusion. Paragraph 13 and 14 are reproduced hereinbelow:

" 13. In the case of Ranbir Singh Sheoran v. Vith Additional District Judge, Muzaffar Nagar and others 1997(2) JCLR 860, this Court has held as under:

"The local inspection by Court is made only in those cases whereon the evidence led by the parties, Court is not able to arrive at a just conclusion either way or where the Court feels that there is some ambiguity in the evidence which can be clarified by making inspection. Local inspection by the Court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence."

40. 14. In the case of Son Pal v. Vth Additional District Judge, Aligarh and others 1992(2) Allahabad Rent Cases, 596, this Court has held as under:

"Whether or not a local inspection or commission is necessary for a just decision of case can only be decided after the Court hears the argument and it is for the Court, thereafter to decide whether to go for local inspection or to issue commission,. Instead of addressing arguments, it appears that the petitioner is causing unwarranted delay in disposal of the appeal."

41. Lastly, it has been argued that the Trial Court while passing the impugned orders have referred the various orders and the case laws relied upon by the revisionist but without recording any findings/reasons passed the impugned orders by saying that all the pleas raised by the revisionist would be considered on future dates. This act of the court amounts to failure in exercise of the jurisdiction vested in it and in failure to decide the primary question for proceeding further. In other words, it is perverse exercise of jurisdiction.

42. Sri Umesh Chandra, Senior Advocate invited the attention of the court towards certain documents annexed with the Revision wherein M/s Saraya Sugar Mills Ltd. has been mentioned in unequivocal words as "erstwhile company" meaning thereby the M/s Saraya Sugar Mills Limited has become a dead company and the suit legally cannot be instituted or prosecuted by a dead company. The Trial Court ought to have first decided the question whether the plaintiff is dead or not and thereafter would have proceeded with the applications for measurement and amendment.

43. On behalf of respondentplaintiff Sri R.N.Trivedi, Senior Advocate submitted that the respondent no.4Company had approached the Board for Industrial and Financial Reconstruction for rehabilitation as it had become sick and in the said proceedings a scheme for rehabilitation of the company, namely, M/s Saraya Sugar Mills Ltd. was sanctioned initially on 26.3.2004. The BIFR vide its order dated 5.8.2008 sanctioned a scheme and under said proceedings a further modifications were made in the scheme. During the course of the said proceedings on 16.10.2008, representatives of the Revisionist attended the hearing before the BIFR and submitted that they were necessary party in the proceedings as a sugar mill is going to be established by them in the area. They were establishing a sugar mill in the said area. Appearance of revisionist was seriously objected by the respondentplaintiff. Therefore, the assertion of the revisionist that they came to know about the proceedings pending before the BIFR only sometime in January, 2010 is wholly incorrect and false and shows the ulterior motives of the revisionist. The application dated 18.1.2010 under Order 1 Rule 1 CPC, Order VII Rule 11 read with Rule 151 of the Code of Civil Procedure has been made by the revisionist just to delay the proceedings of the suit, which is to be decided within a time schedule as provided by the Apex Court. On 18.9.2008 the respondentplaintiff has preferred a suit for declaration, mandatory injunction and permanent injunction which was registered as Regular Suit No. 1192 of 2008. In the proceedings, which are continuing before BIFR at the instance of the Companyplaintiff, it had been required that Saraya Sugar Mills Ltd be merged with its sister concern M/s Saraya Industries Limited. A special resolution to the said effect was passed and consequent to the said resolution the name of M/s Saraya Sugar Mills Ltd has since become M/s Saraya Industries Limited. However, the entity M/s Saraya Sugar Mills Ltd. continues to exist and it has not vanished.

44. He also pointed out that the merger of the plaintiff company does not in any

manner have any bearing on the status of the suit or the present proceedings. The revisionist raised the objection for the first time in January, 2010 just to thwart the proceedings/orders on the application under Order XXVI Rule 9 and 10A of the Code in order to stall measurement of distance in accordance with Sugarcane (Control)(Amendment) Order, 2006. In the backdrop of the aforesaid facts, an application under Order VI Rule 17 of the Code was made with the prayer to add "M/S Saraya Industries Limited" in the cause of title of the plaint. This simple amendment neither changes the nature of the suit nor it would prejudice or adversely affect the rights of the revisionist. The legal entity of the company is still in existent and on account of its merger, it has not lost its entity and is being recognized as a Company by the BIFR itself. In other words, it can be said that the company being sick was in OPD before the BIFR and not in the ICU to infer that the company has become a dead company. In fact, it is still sick. Therefore, it was fully competent to make the application for amendment and for appointment of Commissioner.

45. Elaborating his arguments, it has been submitted that the general principle is that Courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms, as may be just and all those amendments may be allowed which are imperative for determining the real question in controversy between the parties. By amendment of the cause title, no prejudice has been caused to the Revisionist and the Court has rightly and legally allowed the said application. In support of his contention, reliance has been placed on para 63 of 2009 (10) SCC 84 *Reevajeetu Builders and Developers versus Narayanswamy & sons and others*. Paragraph 63 reads as under:

"On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
- (2) Whether the application for amendment is bona fide or mala fide?
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not

exhaustive."

46. On the strength of the aforesaid decision, it has been argued that the Revisionist has failed to establish the nature of prejudice which has been caused to them by the impugned order by which the application for amendment under Rule 17 of the Code has been allowed. On the contrary, refusal in amendment could possibly cause failure of justice or irreparable injury to a party. (see *Prem Bakshi and others v. Dharam and others* [(2002) 2 SCC 2])

47. As regard to the application under Order 39 Rule 7 read with Section 151 of the Code of Civil Procedure, it has been submitted that the law is settled that no sugar factory be developed within a radial distance of 15 kms. from the existing sugar factory. However, the Revisionist is under process of setting up of a new sugar factory at Village Dhara Bujurg which is within the prescribed radial distance of 15 kms. from the Industrial Undertaking of the answering respondents. In the Suit, the answering respondent has prayed for a decree of declaration declaring therein that no sugar factory can come up within 15 kms. periphery of Sadar Nagar, Tehsil Chauri Chaura and to declare the distance certificate dated 13.4.2007 as illegal and non est. The crux of the contention between the parties to the Suit is regarding the distance between the factories of answering respondent and revisionist being within 15 kms. or not and also whether radial distance of 15 kms. translates into diametrical distance of 30 kms. As the immediate inspection and the measurement of distance is essential for proper adjudication of the Suit, an application under Order 39 Rule 7 was moved. The inspection of two sugar factories would facilitate the disposal of the Suit itself and would not cause any loss and injury to any of the parties to the Suit.

48. Placing reliance on *Bali Ram v. Mela Ram* [AIR 2003 Himachal Pradesh 87] and *The Treasurer, Chennai Devangar Mahajana Sabha v. M. Rajappan and others* [(2003) 1 MLJ 131], it has been submitted that the object of local investigation, under Order 26 Rule 9 cannot be belated. Its object is to collect evidence at the instance of party who relies on the same and which evidence cannot be taken in Court but could be taken only from its peculiar nature, on the spot. Rule 9 of Order 26 of the Code empowers the Code to issue Commission to make local investigation which may be required for the purpose of elucidating the matter in dispute. The Court can issue local Commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating the matter in dispute. The trial Court after hearing the parties and being satisfied on the basis of material on record, that the measurement would facilitate the disposal of the Suit, rightly passed the impugned order for measuring the distance of the Revisionist and the answering respondent. There is no material irregularity or illegality in the impugned order so as to warrant interference by this Court under the Revisional jurisdiction.

49. Sri R. N. Trivedi has submitted that the Revisionist in September, 2009 has filed similar application under Order 7 Rule 11 read with Section 151 CPC praying

therein for the rejection of plaint filed by M/s Saraya Sugar Mills Ltd. In this application, the the prayer was to reject the plaint on the ground that the cause of action is barred by the period of limitation as prescribed under Article 58 of the Schedule of Limitation Act. In this application, there was no plea that the company was dead. The said application was rejected on 18.2.2009. Thereafter, a caveat petition was filed by M/s New India Sugar Mills through its Advocate Sudeep Kumar before this Court on the same date, i.e., 18.9.2009. In this petition, the opposite party No.5 has been mentioned as M/s Saraya Sugar Mills Ltd. (now Saraya Industries Ltd.), Sardar Nagar, Tehsil Chouri Choura, District Gorakhpur. From the order dated 16.10.2008, it is also clear beyond doubt that the representative of M/s New India Sugar Mills Ltd. (Revisionist) put their appearance before the Board on 5.8.2008 and 16.10.2008. It is hard to believe that the representative of the Revisionist attended the hearing without knowing the proceedings what about.

50. In the circumstances narrated above, Sri Trivedi submitted that the assertion of the Revisionist that they came to know only in January, 2010 about the merger of the company is an unmitigated lie. He also clarified that appointing date or the cut off date, i.e. 31.12.2007 was fixed for the purposes of accounting. In the instant case, the "effective date" therefore would be 16.10.2008 as per definition enumerated in the Scheme of Merger and not 5.8.2008, as alleged, by the Revisionist. This would be further established from the fact that the order dated 5.8.2008 is the conditional one and in case of noncompliance of the conditions, the net result would be the failure of the Scheme of Merger.

51. As regard the competence of Ms. Gayatri Florence in presenting the Suit or making applications, it has been submitted that in the meeting of the Board of Directors of Saraya Sugar Mills Ltd. held on 2nd May, 2008, a resolution was passed authorizing Ms. Gayatri Florence, Chief General Manager to institute or defend legal proceedings, civil or criminal, for or on behalf of the petitioner. Further, in view of clause 8 of the Scheme of Merger, all the resolutions of the transferor company which were valid and subsisting on the effective date, i.e. 31.12.2007, shall continue to be valid and subsisting thereafter. Therefore, there was no need of any fresh authorization as the authorization dated 2nd May, 2008 is valid and was subsisting on the effective date. In these circumstances, there is nothing wrong if the application has been filed by Saraya Sugar Mills Ltd.

52. While referring to Section 18 of the SICA, Sri R. N. Trivedi submitted that the Scheme of Merger as provided under the SICA is absolutely different than that is provided under the Companies Act, 1956. Under the provisions of the Companies Act, 1956, there may be cessation of company, but under the SICA, all measures are taken for rehabilitation. The provisions of the SICA are special set of Rules and have overriding effect over the provisions of Companies Act, 1956. In this regard, reliance has been placed on paragraph 22, 23 and 24 of Tata Motor Ltd. v. Pharmaceutical Products of India Ltd. and another [2008 (7) SCC 619]. For

ready reference, the aforesaid paragraphs are reproduced hereunder:

" 22. The provisions of a special Act will override the provisions of a general Act. A later of it will override an earlier Act. 1956 Act is a general Act. It consolidates and restates the law relating to companies and certain other associations. It is prior in point of time to SICA.

23. Wherever any inconstancy is seen in the provisions of the two Acts, SICA would prevail. SICA furthermore is a complete code. It contains a nonobstante clause in Section 32.

24 SICA is a special statute. It is a self contained Code. The jurisdiction of the Company Judge in a case where reference had been made to BIFR would be subject to the provisions of SICA."

53. The provisions of SICA are much wider with respect to merger and winding up. Under the Companies Act, 1956, if the company is wound up, it means its civil death. In the instant case, it is fluid type of situation as if the Scheme fails, the effect would be revival of the company, whereas the same cannot be the situation under the Companies Act, 1956.

54. As much emphasis has been laid on Section 18 of the SICA, the same is being reproduced hereunder:

"18. PREPARATION AND SANCTION OF SCHEMES.

(1) Where an order is made under subsection (3) of section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely :

(a) the financial reconstruction of the sick industrial company;

(b) the proper management of the sick industrial company by change in or take over of, management of the sick industrial company;

(c) the amalgamation of

(i) the sick industrial company with any other company, or

(ii) any other company with the sick industrial company (hereafter in this section, in the case of subclause (i), the other company, and in the case of subclause (ii), the sick industrial company, referred to as "transferee company");

(d) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;

(da) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(e) such other preventive, ameliorative and remedial measures as may be

appropriate;

(f) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (e).

(2) The scheme referred to in subsection (1) may provide for any one or more of the following, namely

(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee company;

(b) the transfer to the transferee company of the business, properties, assets and liabilities of the sick industrial company on such terms and conditions as may be specified in the scheme;

(c) any change in the Board of Directors, or the appointment of new Board of Directors, of the sick industrial company and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of Directors or of any director, the period for which such appointment shall be made;

(d) the alteration of the memorandum or articles of association of the sick industrial company or, as the case may be, of the transferee company for the purpose of altering the capital structure thereof, or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

(e) the continuation by, or against, the sick industrial company or, as the case may be, the transferee company of any action or other legal proceeding, pending against the sick industrial company immediately before the date of the order made under subsection (3) of section 17;

(f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Board considers necessary in the interests of the reconstruction, revival or rehabilitation of the sick industrial company or for the maintenance of the business of the sick industrial company;

(g) the allotment to the shareholders of the sick industrial company, of shares in the sick industrial company or, as the case may be, in the transferee 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 the payment of cash to those shareholders in full satisfaction of their claims

(i) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or

(ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced;

(h) any other terms and conditions for the reconstruction or amalgamation of the

sick industrial company;

(i) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified to any person, including a cooperative society formed by the employees of such undertaking and fixing of reserve price for such sale;

(j) lease of the industrial undertaking of the sick industrial company to any person including a cooperative society formed by the employees of such undertaking;

(k) method of sale of the assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefore;

(l) transfer or issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of the sick industrial company;

(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out.

(3)(a) The scheme prepared by the operating agency shall be examined by the Board and a copy of the scheme with modification, if any, made by the Board shall be sent, in draft to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Board shall publish or cause to be published the draft scheme in brief in such daily newspapers as the Board may consider necessary, for suggestions and objections, if any, within such period as the Board may specify;

(b) The Board may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies:

Provided that where the scheme relates to amalgamation the said scheme shall be laid before the company other than the sick industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the company other than the sick industrial company.

(4) The scheme shall thereafter be sanctioned, as soon as may be, by the Board (hereinafter referred to as the "sanctioned scheme") and shall come into force on such date as the Board may specify in this behalf :

Provided that different dates may be specified for different provisions of the scheme.

(5) The Board may on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines as may be specified in the order, to prepare a fresh scheme providing for such measures as the operating agency may consider necessary.

(6) When a fresh scheme is prepared under subsection (5) the provisions of subsections (3) and (4) shall apply in relation thereto as they apply to in relation to a scheme prepared under subsection (1).

(6A) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in, and the liability shall become the liability of, such other company or person or, as the case may be, the sick industrial company;

(7) The sanction accorded by the Board under subsection (4) shall be conclusive evidence that all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Board to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise) be admitted as evidence.

(8) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company, or as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies.

(9) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Board may, on the recommendation of the operating agency or otherwise, by order do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty.

(10) The Board may, if it deems necessary or expedient so to do, by order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to such sick industrial company as may be specified in the order.

(11) Where the whole of the undertaking of the sick industrial company is sold

under a sanctioned scheme, the Board may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of section 529A and other provisions of the Companies Act, 1956 (1 of 1956).

(12) The Board may monitor periodically the implementation of the sanctioned scheme."

55. Refuting the allegations advanced by the Revisionist that Saraya Sugar Mills Ltd. has merged with Saraya Industries Ltd. on 5.8.2008 as is reflected from the proceedings dated 5.8.2008 of the BIFR, Sri Trivedi invited the attention of the court towards the proceeding dated 5.8.2008 of the BIFR. According to him, there was no final approval of the BIFR by the order dated 5.8.2008. As a matter of fact, the order dated 5.8.2008 was subject to certain stipulations to be implemented by all concerned agencies. The cane growers were required to submit their option to the company for accepting payment either in cash or through debentures. The company was directed to prepare a list of such cane growers and submit the same to the District Cane Officer, who would verify the same and send a report to the Board. The second stipulation was that outstanding payment to the cane growers would be made by the company in a timebound manner within three years of sanction of modified scheme. The matter was slated for 16.10.2008 for hearing. A perusal of the order dated 5.8.2008 also reveals that the representative of Punjab National Bank appeared and submitted that they should be made first chargeholders as PNB is providing working capital to the company. All these directions were made in consonance with the provisions of Section 18 of SICA.

56. Inviting my further attention towards the provision of Section 18 (5) of the SICA, Sri Trivedi tried to convey that the scheme was not finalized on 5.8.2008. It was not operable, selfoperating or selfexecutable by the order dated 5.8.2008 and was dependent inter alia on the option of the cane growers regarding payment which was to be exercised within two months showing their intention whether they would accept the payment in cash or through debentures and the matter was fixed for 16.10.2008, i.e. after more than two months. It was only on 16.10.2008, which was the date fixed for hearing, the scheme attained the final shape, as on this date, the representatives of Cane Union and Chini Mill Shramik Sangh submitted that the cane growers are not agreeable for payment of their dues in the shape of debentures and wanted the same in cash. In the order dated 16.10.2008, M/s Saraya Sugar Mills Ltd. has been recognized by the Board as would be evident from paragraph 16 and other onward paragraphs of the order dated 16.10.2008. The recognition is in the form of "M/s SSML/M/s SIL". Therefore, there is no illegality in making the applications by the authorized person, namely, Ms Gayatri Florence on behalf of M/s Saraya Sugar Mills Ltd.

57. In rejoinder, Sri Dwivedi vehemently argued that M/s Saraya Sugar Mills Ltd ceased to exist as company after the order dated 5.8.2008 of the BIFR. The assertion of the respondent that M/s Saraya Sugar Mills Ltd. is still alive, is a conceptual error. By the order dated 5.8.2008, the BIFR has finally sanctioned

the Scheme of Merger and M/s Saraya Sugar Mills Ltd became a division/unit of M/s Saraya Industries Limited. Under Section 18(5), the Board has power to review any sanctioned scheme, modify the scheme or monitor the scheme. If the BIFR wants to modify the scheme as provided under Section 18(5), the procedure as enshrined under Section 18(6) is to be followed. Under Section 18(12), the BIFR may monitor the scheme. The respondent is not embarking for a fresh scheme. From the perusal of paragraph 18 of the order dated 5.8.2008, it is clear that the Scheme of merger was finally sanctioned with certain directions. Thus the company has died and it has lost its brain. After the merger, it is M/s Sarya Industries Limited, who has to make payment to the cane growers and not the erstwhile M/s Saraya Sugar Mills Limited. It is for this purpose and connected matters, that the date 16.10.2008 was fixed by the Board. The cane areas after the merger may be assigned to M/s Saraya Sugar Mills Limited but it cannot litigation, as it became a division/unit of M/s SIL. This fact would be also established from Clause 3 of the Modified Draft Rehabilitation Scheme, which was approved by the Board. In clause 3 below the "chart of Financial Position", the sentence reads that "following the merger, SSML will lose its independent corporate identity, but will significantly enhance the prospects of revival of its units. In these circumstances, there is no question of advancing the date of merger as 16.10.2008 and the "appointed date" would be 5.8.2008, when the scheme as contained in Annexure 1 was approved by the Board. It may be clarified that after the sanction of the Scheme of merger, the Board in consonance with the provisions of may modify or monitor the scheme but there is no provision in the SICA which deals with the reemergence of a dead company.

58. As regard the mentioning of M/s Saraya Sugar Mills Ltd. (now Saraya Industries Ltd.), Sardar Nagar, Tehsil Chouri Choura, District Gorakhpur, in the Caveat petition filed by the Revisionist on 18.9.2009, it has been clarified that a writ petition no. 7625 of 2009 was filed by M/s Saraya Sugar Mills Limited assailing the action of the Cane Commissioner. In the title of the writ petition, the name of the petitioner has been mentioned as "M/s Saraya Sugar Mills Limited [now Saraya Industries Ltd.]. The action of the respondent lead the revisionist to mention the caption of the Caveat petition as M/s Saraya Sugar Mills Ltd. [now Saraya Industries Ltd.]. There is nothing wrong in it and no adverse inference can be drawn from it.

59. Mr Kesari Nath Tripathi, while countering the allegations of the respondent, in the rejoinder submitted that filing of a suit by a dead person is like filing of a suit by an insane person, which is not permissible under law. The Trial Court ought to have decided this issue as a primary issue and thereafter should have disposed of other applications. When an specific plea about the dead of a person and authorisation of the officer, who has filed the suit on behalf of the erstwhile company, was raised before the Court, the court should have decided these important issues and committed fundamental error in postponing the same to be decided later on. In support of his various arguments, referred to above, Sri Tripathi referred to the various decisions in this regard.

60. The question of authority to institute a suit on behalf of a company is not a technical and has a farreaching effects. In this context, reference has been made to para 29 of the report, the Delhi High Court in Nibro Ltd. Versus National Insurance Co. Ltd. [AIR 1991 Delhi 25] held as under:

29. It is wellsettled that under Section 291 of the Companies Act except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting, in all other cases the board of directors are entitled to exercise all its powers. Individual directors have such powers only as are vested in them by the memorandum and articles. It is true that ordinarily the court will not unsuit a person on account of technicalities. However, the question of authority to institute a suit on behalf of a company is not a technical matter. It has farreaching effects. It often affects the policy and finances of the company. Thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Needless to say such a power can be conferred by the board of directors only by passing a resolution in that regard."

61. In para 10 of the judgment of K. N. Sankaranarayanan and another v. Shree Consultations and Services Pvt. Ltd. and others [(1993) IIMLJ 298] the High Court of Madras held that "Evidently, this argument of learned senior counsel for the respondents is untenable since the initial infirmity in presenting the company petition without authority is incurable. The question of authority to initiate legal action on behalf of a company be equated with an administrative act like terminating the service of an employee or verifying a plaint. Instead it is flaw which goes to the root of the matter. Any cause instituted without authority makes it invalid from its inception and it cannot be validated by a later ratification. I am in respectful agreement with the view of learned single Judges of the Delhi High Court and the Calcutta High Court as expressed in the above said two decisions relied on the appellants. So, it cannot be said that the company petition herein has been valid presented."

"An analysis of the abovereferred two decisions shows that there is no manner of doubt that Order 29 Rule 1 of the Code of Civil Procedure, only authorises the persons mentioned therein to sign and verify the pleadings on behalf of a corporation/company. It does not authorize such persons to institute an action on behalf of a corporation/company" as has been held by the High Court of Himachal Pradesh.

62. As averred above, Sri Tripathi argued with vehemence that amalgamating Company loses its entity after merger. In other words the Transferor Company stood dissolved and completely merged into, and subrogated by, the Transferee Company and lost its original entity. To strengthen his aforesaid arguments, following decisions were cited:

63. In Saraswati Industrial Syndicate Ltd. Versus Commissioner of Income Tax [AIR 1991 SC 70], the Apex Court observed that "when two companies are

merged and are so joined, as to form a third Company or one is observed into one or blended with another, the amalgamating Company loses its entity". Further, it is observed that "the High Court was in error in holding that even after amalgamation of two companies, the transferor company did not become nonexistent instead it continued its entity in a 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 the corporate personality of one with another corporate body and it continues as such with the other is not sustainable in law. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there cannot be any doubt that when two companies 339 amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights of liabilities are determined under scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."

64. The second case on which reliance has been placed is Flowmore (P.) Ltd. Versus U. P. State Industrial Development Corporation Ltd. and others [2000 (1) AWC 493] is reproduced as under:

"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."

65. 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".

66. In Bank Kreiss Ag Vs Mr Ashok K Chauhan and others, the Delhi High Court held that :

"after examining these decisions of the Supreme Court it is absolutely clear that when two companies merge into one, the transferor company loses its identity as it ceases to have its business. Although the respective rights or liabilities are determined under the scheme or deed of amalgamation or merger, but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation or merger is made effective. In the present case the deed of merger was executed on 27.8.2001 but the merger itself became effective on

9.10.2001. By virtue of the said merger, Bank Kreiss AG, being the transferor company did not have any surviving corporate identity on and from 9.10.2001. It ceased to exist. This effectively meant the death of Bank Kreiss AG. Since Bank Kreiss AG was the sole plaintiff in the present suit it meant the death of the sole plaintiff and, therefore, the provisions of Order 22 Rule 3 became immediately attracted. Since the right to sue would survive, the suit did not abate on 9.10.2001 itself but would abate on the expiration of a period of 90 days from 9.10.2001, in case no application was filed for bringing on record the legal representative in place of Bank Kreiss AG. The factual position is that no such application was made within 90 days and, therefore, by the operation of the provisions of Order 22 Rule 3 (2) CPC, the suit abated on 9.1.2002. As a result of this discussion, the answers to the first two questions are yes and yes."

67. In the instant case, during the course of arguments, Counsels appearing for both the parties consented and suggested that it would be in the fitness of things that the question whether M/s Sarya Sugar Mills Limited still exists as a Company or is a dead company may be decided by this Court instead of remitting the matter to the Trial court, which would delay the early disposal of the suit and as such the said issue is being decided.

68. M/s Saraya Sugar Mills Ltd. (SSML) promoted by the Majithias of Sardarnagar has a plant for the manufacture of white crystal sugar located at village Saraya, District Gorakhpur. SSML was declared a sick Company by VIFR in March, 1997 and IFCI was appointed as the Operating Agency to prepare a rehabilitation Scheme for SSML. A scheme for rehabilitation of sick industrial company, namely, M/s Saraya Sugar Mills Ltd. was sanctioned by the Board vide in terms of the provisions under Section 18 (4) read with Section 19 (3) of the Sick Industrial Companies (Special Provisions) Act, 1985 [hereinafter referred to as SICA, 1985 for the sake of brevity].

69. Vide order dated 26.3.2004[SS4] and pursuant to BIFR directions and after various attempts at revival of SSML, a rehabilitation scheme was sanctioned by BIFR, vide its order dated 26.3.2004 (SS04) which was implemented partially. The BIFR had appointed IFCI as the monitoring agency to monitor the progress of implementation of the SS04. The SSML, besides making payment of the entire dues of secured creditors by way of OTS, is also reported to have made partial payment to cane growers. SSML is further reported to have raised funds, by way of secured loans to the tune of Rs.4608.51 lakhs upto 31.3.2007 from Clear Water Capital India (Pvt.) Ltd. which have been utilized partially for payment of current cane dues, and partially for the implementation of the other provisions of the scheme. In addition to this, SSML is reported to have also raised loan of Rs.1927.43 lakhs from the holding company, as against Rs.700.00 lakhs envisaged in the scheme. SSML had paid Rs.1160.85 lakhs towards cane dues and cane dues liabilities of Rs.2141.81 lakhs is still outstanding.

70. The operations of SSML were not satisfactory, reportedly due to nonallocation of proper cane area by the State Govt. and also due to technical bottlenecks in

plant and machinery. Further, the position of SSML is reported to have deteriorated drastically due to imposition of additional cane liability on account order passed by the Hon"ble Supreme Court of India.

71. The BIFR, in its hearing held on 16.8.2007, reviewed the progress of implementation of the SS04 and issued the following directions for compliance by the company/promoter(s):

(i)The company/promoter(s) would take necessary steps for growth/development of sugarcane in the area earmarked for them for supply of the sugarcane so as to ensure adequate supply of sugarcane in the mill on a longterm basis.

(ii)The Company would submit the compliance report in respect of the Board"s hearing taken on 6.12.2006.

(iii)The company/promoter(s) would arrive at a settlement with cane growers/ cane commissioner regarding payment of the outstanding dues of cane growers which might include issuance of secured debentures to them.

(iv)The company/promoters would simultaneously examine feasible alternatives for expeditiously turning the network positive, including the possibility of merger of the sick company, M/s SSML with any other healthy sister concern/group company with the permission of BIFR, and would if feasible submit a modified rehabilitation proposal to MA (IFCI).

72. In pursuance of the above directions of the BIFR, SSML submitted a modified rehabilitation proposal to the MA (IFCI) and the BIFR, envisaging, issuance of 4% secured debentures to the cane growers towards payment of their outstanding cane dues and also envisaging merger of SSML with "Saraya Industries Ltd." (SIL), a healthy company of the same group/promoter(s). Annexure1 to the Modified Rehabilitation Scheme is the Scheme of Merger/Amalgamation of M/s Saraya Sugar Mills Limited with M/s Saraya Industries Limited. The relevant paragraphs of the Scheme of Merger reads as under:

PART I GENERAL

1.1 The Transferor Company is engaged in the business of manufacture and sale of White Crystal Sugar and has been declared as a sick industrial Companies (Special Provisions) Act, 1985 (SICA) by the Honorable Board for Industrial & Financial Reconstruction, New Delhi (BIFR).

1.2 The Transferee Company is engaged in distillery operations for manufacturing and marketing of bottled liquor, fuel ethanol and bulk spirits.

1.3 This Scheme of Merger provides for the Merger of the Transferor Company i.e. Saraya Sugar Mills Limited with the Transferee Company i.e. Saraya Industries Limited pursuant to the provisions of Section 18 (1) (c) and other applicable provisions of SICA.

1.4 The Transferor Company and the Transferee Company have proposed the

merger of the Transferor Company and the Transferee Company to facilitate the revival of the Transferor Company.

1.5 The business of the Transferee Company and the Transferor Company has substantial operational and administrative synergy. This Scheme for Merger of the Transferor Company with the Transferee Company has been prepared for longterm rehabilitation of operations of the Transferor Company. With the Merger, the manufacturing capacities of the Transferor Company shall be suitably exploited for optimal utilization and shall bring about the synergy of operations between the Transferor and Transferee Company. The Transferee Company's financial and managerial capabilities and infrastructure facilities shall also be available to for the business and undertaking of the Transferor Company. The Scheme would result in consolidated of the business of Transferor Company i.e. manufacturing White Crystal Sugar and of the Transferee Company i.e. distillery operations for manufacturing and marketing of bottled liquor, fuel ethanol and bulk spirits and would be in the best interest of the Transferor Company, the Transferee Company and their respective stakeholders.

2. Definitions :

73. In this Scheme, unless repugnant to the meaning or context thereof, the following expression shall have the following meaning:

74. "Transferee Company" means Saraya Industries Limited, a company incorporated under the Companies Act, 1956 and having its registered office at 302, Thapar Arcade, Behind Azad Apartments, Hauz Khas, New Delhi.

75. "Transferor Company" means Saraya Sugar Mills Limited, a company incorporated under the Companies Act, 1956 and having its registered office at Sardhanagar, Distt. Gorakhpur, U.P.

76. "Appointed Date" means 31st December, 2007.

77. "BIFR" means Board for Industrial & Financial Reconstruction.

78. "Companies Act" means the Companies Act, 1956 or any statutory modification or reenactment thereof.

79. "Effective Date" means the date on which all the conditions and matters in relation to the Scheme referred to in clause 17 of "coming into effect of this Scheme" or "effectiveness of this Scheme" shall mean the Effective Date.

80. "The Modified Rehabilitation Cum Merger Scheme" or "The Rehabilitation Scheme" means the modified scheme as approved by the BIFR with regard to the Transferor Company, of which this Scheme forms a part, with such modifications, alterations or amendments thereto as may be prescribed by the BIFR/AAIFR or other appropriate authority.

81. "Scheme" means this scheme for the merger of the Transferor Company with the Transferee Company as approved by BIFR with such modifications,

alterations or amendments thereto as may be prescribed by the BIFR/AAIFR or other appropriate authority hereto.

82. "SICA" means Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modification or reenactment thereof.

83. "Undertaking" shall mean the undertaking and entire business of the Transferor Company as a going concern and shall include as of the Appointed Date (without Limitation):

(a) all assets and property wherever situate, whether movable or immovable, tangible or intangible, real or personal, in possession or reversion, corporeal or incorporeal of whatsoever nature, including land (whether freehold or leasehold), plant and machinery, buildings, offices (including marketing offices and liaison offices), any interests in properties coowned, schools, hospitals, temples, township,s premises, capital workinprogress, rolling stock, current assets (including inventories, sundry, debtors, bills of exchange, loans and advances), vehicles, D.G. Sets, go downs, cement dumps, stocks and stores, warehouses, furniture, fixtures, office equipment, appliances, accessories, power lines, railway lines and sidings, water pipelines, depots, power plants, right to use jetties and ports, share of any joint asset and other facilities and all present liabilities restructured as per the Modified Rehabilitation Scheme and all cash and bank balances appertaining or relatable to the Transferor Company.

(b) All permits, quotas, rights, entitlements, export/import incentives and benefits including Duty Exemption Passbook Scheme (DPEB) and advance licenses, industrial and other licenses, bids, tenders, letters of intent, memorandum of understanding, expressions of interest, development rights (whether vested or potential) and whether under agreements or otherwise, licenses, permissions, approvals, consents from various authorities including municipal (whether granted or pending), subsidies, receivables, trade marks, patents, copyrights, all other intellectual property, benefit of any deposits, assets, properties or other interests, financial assets including investments of all kinds, funds belonging to or utilized for the Transferor Company, bank accounts, privileges and all other rights and benefits including any tax direct or indirect including advance tax paid or any tax deducted in respect of any income received, sales tax deferrals and exemptions and other benefits, lease, rights, prospecting licenses and mining leases (in each case including the benefit of any applications made therefor) and the surface rights in relation thereto, waterfront and jetty, exemptions, tenancies in relation to office and/or residential properties for the employees, memberships, lease rights, powers and facilities of every kind, nature and description whatsoever, rights to use and avail of telephones, telexes, facsimile connections and installations, utilities, electricity and other services provisions, funds, benefits of all agreements, contracts and arrangements and all other interests in connection with or relating to the Transferor Company;

- (c) All earnest moneys and/or security deposits paid by the Transferor Company;
- (d) All records, files, papers, engineering and process information, computer, programmes, websites, domain names, softwares licenses (including SAP), drawings manuals, data, catalogues, quotations, sales and advertising materials, lists of present and former customers and suppliers, customer credit information, customer pricing information and other records whether in physical or electronic form in connection with or relating to the Transferor Company; and

84. All terms and words not defined in this Scheme shall, unless repugnant or contrary to the context or meaning thereof, have the same meaning ascribed to them under the Companies Act, SICA, the Securities Contracts (Regulation) Act, 1956, the Depositories Act, 1996. The Modified Rehabilitation Cum Merger Scheme and other applicable laws, rules, regulations, byelaws, as the case may be or any statutory modification or reenactment thereof from time to time.

85. Part III of the Scheme of Merger deals with the transfer and vesting and the relevant paragraphs are reproduced as under:

4.1 Upon the coming into effect of this Scheme and with effect from the Appointed Date and subject to the provisions of this Scheme, the Undertaking shall, without any further act, instrument or deed, be and stand transferred to and vested in and/or be deemed to have been and stand transferred to and vested in the Transferee Company as a growing concern so as to become as and from the Appointed Date, the estate, assets, rights, title, interests and authorities of the Transferee Company.

4.4 Upon the coming into effect of this Scheme and with effect from the Appointment Date and subject to the provisions of this Scheme, all the licenses, permits, quotas, approvals, permissions, incentives, sales tax deferrals, loans, subsidies, concessions, grants, rights, claims, leases, tenancy rights, liberties, rehabilitation schemes, special status and other benefits or privileges enjoyed or conferred upon or held or availed of by and all rights and benefits that have accrued, which may accrue to the Transferor Company shall, pursuant to the provisions of Section 394 (2) of the Act, without any further act, instrument or deed, be and stand transferred to and vested in and or be deemed to have been transferred to and vested in and be available to Transferee Company so as to become as and from the Appointed Date the licenses, permits, quotas, approvals, permissions, incentives, sales tax deferrals, loans, subsidies, concessions, grants, rights, claims, leases, tenancy rights, liberties, rehabilitation schemes, special status and other benefits or privileges of the Transferee Company and shall remain valid, effective and enforceable on the same terms and conditions to the extent permissible under law.

4.5 Upon the coming into effect of this Scheme and with effect from the Appointed Date and subject to this Scheme, all assets, estate, rights, title interest, licenses and authorities acquired by or permits, quotas, approvals, permissions, incentives, sales tax deferrals, loans or benefits, subsidies,

concessions, grants, rights, claims, leases, tenancy rights, liberties, rehabilitation schemes and other assets, special status and other benefits or privileges enjoyed or conferred upon or held or availed of by and/or all rights and benefits that have accrued or which may accrue to the Transferor Company after the Appointed Date and prior to Effective Date, in connection or in relation to the operation of the Undertaking shall without any further act, instrument or deed, be and stand transferred to and vested or deemed to have been transferred to and vested in the transferee company.

7. With effect from the date of filing of this Scheme with the Hon'ble BIFR and upto and including the Effective Date, no assets of the Transferor Company shall be alienated, charged, mortgaged or encumbered and the Transferor Company shall carry on the business and activities not expressly prohibited herein with reasonable diligence and business prudence and shall not undertake any additional financial commitments or any nature whatsoever, borrow any amounts nor incur any other liabilities or expenditure, issue any additional guarantees, indemnities, letters of comfort or commitments either for itself or any third party, except in each case in the following circumstances:

- (A) if the same is in the ordinary course of business;
- (B) if the same is expressly permitted by this Scheme; or
- (C) if prior written consent of the Transferee Company has been obtained.

8. Upon the coming into effect of this Scheme:

All suits, actions and proceedings by or against the Transferor Company pending and/or arising on or before the Effective Date shall be continued and be enforced by or against the Transferee Company as effectually as if the same had been pending and/or arising by or against the Transferee Company.

All contracts, deeds, bonds, agreements, arrangements, assurance and other instruments of whatsoever nature to which the Transferor Company is a party, including without limitation to its mining leases or to the benefit of which the Transferor Company may be eligible and which are subsisting or having effect immediately before the Effective Date, shall be in full force and effect against or in favour of the Transferee Company as the case may be and may be enforced as fully and effectually as if, instead of the Transferor Company, the Transferee Company had been a party or beneficiary or oblige thereto.

86. The Transferee Company may, if so required, under any law or otherwise, execute deeds of confirmation in favour of any party to any contract or arrangement to which the Transferor Company is a party or any writings as may be necessary to be executed in order to give formal effect to the above provisions. The Transferee Company shall be deemed to be authorized to execute any such writings on behalf of the Transferor Company and to carry out or perform all such formalities or compliances on the part of the Transferor Company to be carried out or performed.

87. The Transferee Company undertakes to engage all employees of the Transferor Company who are in the employment of the Transferor Company as on the Effective Date, on terms and conditions not less favourable than those on which they are engaged by the Transferor Company, without any interruption of service as a result of the transfer. The Transferee Company undertakes to continue to abide by any agreement/settlement entered into by the Transferor Company with any union/employee of the Transferor Company. The transferee Company agrees that for the purpose of payment of any compensation, gratuity and other terminal benefits, the past services of such employees with the Transferor Company shall also be taken into account, and agrees and undertakes to pay the same as and when payable.

88. In so far as the existing provident fund trusts, gratuity fund and pension and/or superannuation fund/schemes/trusts created by the Transferor Company for its employees are concerned, such funds/schemes/trusts shall be transferred to or merged with the relevant funds/schemes/trusts as determined by the Transferee Company.

89. The resolutions, if any, of the Transferor Company, which are valid and subsisting on the Effective Date, shall continue to be valid and subsisting and be considered as resolutions of the Transferee Company and if any such resolutions have upper monetary or other limits being imposed under the provisions of the Companies Act, or any other applicable provisions, then the said limits shall be added and shall constitute the aggregate of the said limits in the Transferee Company.

90. The Statutory Auditors appointed by the Transferor Company for the year commenced from 1st January, 2008 shall be deemed to be the Branch Auditors within the meaning of and subject to Section 228 of the said Companies Act and their terms and conditions shall be decided by the Board of Directors of the Transferee Company.

91. The borrowing limits of the Transferee Company in terms of Section 293 (1) (d) of the Companies Act shall, without further act or deed, stand increased to Rs.450 Crores (Rupees Four Hundred and Fifty Crores Only) (apart from temporary loans obtained from the company's bankers in the ordinary course of the business), over and above the paidup share capital and free reserves of the Transferee Company. It is clarified that the approval of the members of the Transferee Company to the scheme shall be deemed to be their consent/approval also to be enhancement of the borrowing limit of the Transferee Company as required u/s 293 (1)(d) and other applicable provisions of the Companies Act.

92. The Transferor Company shall be dissolved without being wound up. The Board of Directors (or any committee thereof) of the Transferor Company shall without any further act, instrument or deed be and stand dissolved.

17.The Scheme is conditional upon and subject to:

The Scheme being approved, with or without modification, by a special resolution passed by the shareholders of the Transferee Company as required under the Companies Act, 1956 or any other applicable law including SICA.

Sanction of the Scheme by the Hon"ble BIFR.

The certified copies of the BIFR order referred to in this Scheme being filed with the Registrar of Companies, U.P. and Delhi."

93. It may be noted that revival attempts did not yield the good results and as such pursuant to the directions of the BIFR, a modified rehabilitation scheme was submitted to the IFCI and the BIFR envisaging merger of SSML with "Saraya Industries Limited", a healthy company of the same group/promoter(s). Salient features of the Modified Scheme, Post Merger Management and other terms and conditions as mentioned in the Modified Scheme are as follows:

8. Salient features of the modified scheme

A copy of the scheme of amalgamation/merger, containing the terms & conditions in r/o the merger of SSML with SIL is attached herewith as Annexure 1. The salient features of the proposed modified scheme are as under:

- (a) The cutoff date/date of merger has been assumed as 31.12.2007.
- (b) The entire assets and liabilities of SSML (including all leasehold and other rights held by it) prior to/as on cutoff date shall vest with SIL as per the terms and conditions laid down in the scheme of amalgamation/merger.
- (c) Employees of SSML would be taken by SIL on such terms, as has been brought out in the scheme of amalgamation/merger.
- (d) SSML would function as a division of SIL.
- (e) Central Govt. and Govt. of Uttar Pradesh (GoUP) to provide reliefs and concession to SIL in respect of the unit of SSML which would operate as a division of SIL, after merger.
- (f) SIL would get tax benefit u/S 72A of the Income Tax Act, 1961, by way of setting off the brought forward losses/ depreciation of SSML, against future taxable profits of SIL.
- (g) Net worth of the amalgamated entity would remain positive, after the proposed amalgamation/merger.

9. Management : After the merger of SSML with SIL, the management of SSML would get transferred in favour of Board of Directors of SIL, who would be assisted by the competent team of professionals already employed by SSML. SIL shall also strengthen the management team, through induction of need based professional, to look after the different areas of SSML.

Other Terms & Conditions

(i) Upon sanction of this modified scheme by the BIFR, the company M/s SSML would stand merged into w.e.f. 31/12/07. the merger shall be as per the terms & conditions mentioned in the "Scheme of Merger" attached herewith as Annexure I.

(ii) The balance sheet of SSML, as on the cutoff date, shall be restructured and merged with the balance sheet of SIL in the manner, as has been brought out in the Annexures attached to this modified scheme. SSML/SIL shall be exempted from the provisions of Section 78 of the companies Act, 1961 (as to adjustment of the Share Premium Account of SSML against its losses) and/or provisions of any accounting principles/guidelines/ standards etc. for restructuring the balance sheet(s) in terms of this modified scheme.

(iii) Upon merger of SIL and SSML, the intercompany outstanding amounts, would stand cancelled against each other.

(iv) The paidup capital of SSML, amounting to Rs.200.00 lakhs, consisting of 20 lakhs number of equity shares of Rs.10/ each, fully paidup shall, upon its merger with SIL, would stand cancelled.

(v) The authorized share capital of SIL shall stand, enhanced by an amount of Rs.350 lakhs (being authorized share capital of SSML) on account of merger of SSML with SIL.

(vi) The transfer of assets, pursuant to the merger envisaged in this scheme, would not attract payment of stamp duty, wherever applicable.

(vii) SIL, upon merger of SSML with it, shall be entitled to carry forward and setoff the brought forward business losses and unabsorbed depreciation of SSML, against its taxable income, and the merged entity shall be exempted from all applicable provision(s) of the Incometax Act, 1961 in this regard.

(viii) The statutory liabilities, which are under litigation/appeal, shall be paid over a period of seven (7) years on interestfree basis, after crystallization of the dues/ after exercise of the legal remedies available to the company. The interest penal, interest, damages, etc. charged or chargeable on the same shall be waived.

General Terms & Conditions

(i) IFCI may be designated as the Monitoring Agency (MA) and shall be paid MA's fees as per the directions of BIFR.

(ii) The company shall constitute a Management Committee (MC) consisting of CEO of the company, Director of BIFR and representative of MA. MC would review on a monthly basis the operation of the company in all aspects and closely monitor the implementation of the revival scheme.

(iii) Company shall undertake to issue 4% secured debentures to the cane growers within a period of six months from the date of sanction of the scheme and also create security on the fixed assets of the company and also comply with

the relevant provision of the Companies Act, 1956.

(iv) Company shall satisfy the MA that the physical progress as well as expenditure incurred on the scheme is achieved as per the original schedule. To this end, the company shall furnish to MA such information and details as may be required by it, at intervals stipulated by it.

(v) Any financial shortfall arising out of the delayed implementation of the scheme or for any other reason shall be met by the promoters of SIL by way of infusion of fresh funds as equity/subordinated unsecured loans, without any recourse to FI/ Banks or seeking any further reliefs/concessions from them in addition to the amount already provided for in the scheme.

(vi) The company shall not undertake any new project or expansion or make any investment or obtain any assets on lease/hire purchase without the prior approval of MA/BIFR during the currency of the scheme.

(vii) The company shall continue to submit its, audited annual accounts (AAA) at the end of each financial year within one month of the finalization thereof to the MA/secured creditors and to BIFR. It shall also ensure finalization of its AAA within six months from the close of each accounting year and holding its Annual General Meeting (AGM) within the prescribed period without fail.

(viii) In addition to strict compliance with the schedules of payments stipulated under the scheme, the company shall ensure timely payment of all dues accruing after the cut off date and/or date of sanction of the scheme to banks, financial institutions, Central and State Governments, Statutory Authorities and others concerned in the normal course, failing which the concerned parties would be free to recover such amounts in default as per the normal process of law, without prior approval of BIFR. No special protection of SICA would be available to the company against recovery of such dues.

(ix) In the event of default in payment of any amount by the company in terms of the schedule of payment under the scheme, such defaults shall carry additional interest at the rate of 2% p.a. over and above the stipulated rate (prevailing saving Banks interest rate on cutoff date or 4% whichever is higher) for the period of such default.

(x) The company shall submit to the MA/BIFR, Progress Reports (PR) in the prescribed format, regarding the implementation of the scheme on halfyearly basis. A strict view would be taken of any default by the company in the timely submission of the PRS to the BIFR/MA.

(xi) In order to facilitate an agreement for the payment of dues to Cane Growers, as stated in para 11.5 of this scheme, the District Cane Officer is hereby appointed as the nodal officer. He will inform and report to the Board regarding the progress made in implementation of payment of dues to the Cane Growers.

(xii) Dues up to the cut off date not disclosed or covered in the scheme shall be

met by the promoter(s), by way of infusion of additional interest free funds from outside sources under intimation to the BIFR. However, it should be ensured that unsecured creditors do not get better treatment than the secured creditors for settlement of their dues. Any shortfall arising out of operations of the company or shortfalls in the projected returns or for any other reason would have to be met by the promoter(s) from sources outside the company, on interestfree basis.

(xiii) All other dues arising after the cut off date of 31.12.2007, would be paid by the company in the normal course, protection under SICA, would not be available to the company/promoter(s).

(xiv) Company shall not change any of its accounting policies or the financial year, without the specific permission of the BIFR.

(xv) The company shall adhere to the shareholding pattern provided for in this scheme and no alteration shall be carried out, except with BIFR's approval.

(xvi) The implementation of the scheme shall be monitored closely by the BOD of the company at least once in a quarter and the review reports to be submitted to the Management Committee (MC) to be constituted in terms of this scheme.

(xvii) No dividend shall be declared by the company during the period of rehabilitation, without prior approval of the BIFR and also prior to repayment to the concerned agencies provided for in the scheme.

(xviii) The Banks extending working capital facilities would have the right to appoint their nominee(s) on the company's "Board of Directors" at any time during the currency of their loan provided to the company."

94. In the above referred, Modified Scheme which envisages amalgamation/merger of SSML with SIL with effect from 31.12.2007, it has mentioned in clear words that following the merger, SSML will lose its independent corporate identity, but will significantly enhance the prospect of revival of its units. In the Salient feature of the Modified Scheme, referred to above, at clause 8(d) it has been mentioned that SSML would function as a division of SIL. At clause 9, it is provided that after the merger of SSML with SIL, the management of SSML would get transferred in favour of Board of Directors of SIL. Further, all the shares of the transferor company (SSML), held by the transferee company (SIL) shall stand cancelled and extinguished. Clause (I) and (ii) of other terms and conditions of Modified Scheme provides that upon sanction of the modified scheme by the BIFR, the company M/s SSML would stand merged into w.e.f. 31.12.2007. The merger shall be as per the terms & conditions mentioned in the "Scheme of Merger", attached as Annexure 1 to the Modified Scheme.

95. Since both the parties have heavily relied upon the proceedings of Board for Industrial & Financial Reconstruction dated 5.8.2008 and 16.10.2008, I deem it appropriate to refer the relevant paragraphs, which are reproduced hereunder:

"17. Taking into consideration the submission made by those present today, the

Bench observed that the company has not made the payment of the long outstanding dues of Cane Growers despite several orders/directions issued by this Board in this matter. The company should make the payment of long outstanding dues of Cane Growers in a time bound manner within a reasonable period. The Bench also noted that the labour union/cane union are of the view that the company should not be closed as a large number of employees/Cane Growers are dependent on them, and their dues be also paid. A monitoring mechanism for reporting payment of dues shall be constituted, in which the District Cane Officer will be entrusted with the responsibilities of regularly reporting the dues paid to Cane Growers. The Bench further noted that the company offered two methods for payment to the Cane Growers viz. Payment in cash or through debentures.

18. The Bench finally sanctioned the MDRS enclosed as "Annexure A" with the modifications as discussed above, and also issued the following directions to be implemented by all concerned agencies :

(a) Cane Growers would submit their option to the company for accepting payment either in cash or through debentures within a period of 21 days. The company would prepare a list of such Cane Growers and submit the same to the Distt. Cane Officer who would verify the same and send a report to this Board.

(b) The outstanding payment to the Cane Growers would be made by the company in a time bound manner within three years of sanction of modified scheme on interest free basis and the first payment against the same will be made by the company by 31/3/2009 in cash or through allotment of debentures, as the case may be.

(c) The company would adhere to the above said payment schedule and in case the company fails to comply with the above directions, this Board would have no option but to allow the concerned authorities/ interested parties to recover their dues as per law."

19. The next date of hearing will be 16/10/08."

96. The relevant paragraphs of proceeding dated 16.10.2008 are as follows:

"8. The Board, finally, sanctioned the MDRS (MS08) with the modification as emerged in the Board's said hearing held on 5/8/08 and also issued the following directions for implementation by the concerned agencies:

(a) Cane Owners would submit their option to the company for accepting payment either in cash or through debentures, within a period of 21 days. The company would prepare a list of such "Cane Growers" and submit the same to the "District Cane Officer", who would verify the same and sent a report to this Board.

(b) The outstanding payment to the Cane Growers would be made by the company in a time bound manner within three years of sanction of modified

scheme on interest free basis, and the first payment against the same will be made by the company by 31/3/2009 in cash or through allotment of debentures, as the case may be.

(c)The company would adhere to the above said payment schedule, and in case the company fails to comply with the above directions, this Board would have no option but to allow the concerned authorities/interested parties to recover their dues as per law.

(d)The next hearing would be held on 16/10/08.

9.In today's hearing the representative of M/s New India Sugar Mills Ltd. (NISML) attended the hearing without signing the attendance sheet... (sic.) response to an objection regarding his appearance raised by the representative of the company M/s SSML, he submitted that they were in the... (sic.) establishing a sugar mill in the same area as that of M/s SSML.... (sic.) representative of the company M/s SSML explained that the said mill of M/s NISML is yet to be established. Hon'ble High Court of Allahabad had on their application passed an interim order on 28/09/08 not to continue construction job at the said mill site, and also directed the Cane Commissioner not to allot any sugar cane to M/s NISML. M/s NISML have also filed an application to vacate the said order before Hon'ble Supreme Court of India (SCI). Next date of hearing in the case has been fixed for 20/10/08 in SCI. The representative of the M/s SSML also submitted that M/S NISML is not a party to the proceedings and at the time of the hearing earlier taken by this Board on 5/8/08, they had also made an attempt to participate in the said hearing. However, the Hon'ble Bench did not allow them to be impleaded, as they were neither a creditor of the company, nor a share holder, and were not in any manner concerned with the company. The Hon'ble Bench did not allow the representative of the M/s NISML to be impleaded in the hearing as they were unable to establish their locus standi, and asked them to leave the Court room. The representative of DCO requested for fixing the next hearing in the month of March, 2009, so as to enable them ascertain the payment to Cane Growers.

10.Nobody appeared on behalf of IFCI (MA).

11.The representative of PNB submitted that the company is implementing the scheme as per the provisions contained in SS04.

12.The representative of Cane Unions and Chini Mill Shramik Sangh submitted that the cane growers are not agreeable for payment of their dues in the shape of debentures, and they wanted their dues to be paid in cash. They further requested that in case the company does not comply with the directions/orders passed by the Hon'ble Board, the concerned authorities/parties may be allowed to recover the Cane Grower's dues as per law.

13.The representative of M/s Saraya Industries Ltd. (SIL) submitted that a meeting was held in the office of the DCO on 10/9/08 wherein the Cane Growers

decided to accept the payment of their dues in cash and not through debentures.

14. The representative of M/s SSML submitted that the Hon'ble Bench had sanctioned the modified scheme on 05/8/08 and had also directed to hold the next hearing on 16/10/08 i.e. today to establish the mode of payment to be accepted by the Cane Growers. A meeting was held in the office of the District Cane Officer wherein the representatives of Cane Growers of the company opted to accept their payment in cash in stead of in the form of debentures. He further requested the Hon'ble Bench to issue necessary directions to the Cane Commissioner, Govt. of U.P. to allot adequate quantity of cane to the company M/s SSML so that production as per the projection envisaged in MS08 be achieved and other targets be also met.

15. Taking into consideration the submissions made by the representatives present today and the material on record, the Bench noted the following:

- (a) Nobody attended on behalf of the MA (IFCI).
- (b) The Cane Growers have opted for payment of their dues in cash.
- (c) The representative of M/s NISML could not establish their locus standi to be implemented in the matter at this juncture.

16. The Bench keeping in view the above issued the following directions:

- (a) M/s SSML/M/s SIL would comply with the orders of this Board and would adhere to the payment schedule while making the payment to the Cane Growers of their dues. It further emphasized that the payment schedule to Cane Growers was not linked with future productivity of sugar mills, and low productivity cannot be cited as a reason for nonpayment of such dues. As already directed by this Board, any shortfall in the fund for payment of dues to the Cane Growers would be brought in by the promoter(s) and in no case the above payment should be delayed.
- (b) DCO/ M/s SSML/ M/s SIL would forward the outcome of the Court cases pending at Hon'ble Allahabad High Court and Hon'ble Supreme Court in the matter.
- (c) DCO would file written submission regarding the status of establishment of a new sugar mill as reported by M/s NISML immediately.
- (d) Cane Commissioner, Govt. of U.P. would allot adequate quantity of cane to the company M/s SSML so as to enable it achieve the production target as per the Scheme. A status report to this effect would also be immediately forwarded to this Board.
- (e) Nonappearance of IFCI (MA) has been noted with concern by this Board and IFCI (MA) should ensure attendance in all the future hearing as fixed by this Board. MA would also submit the status report on the implementation of the MS08 immediately to this Board.

(f) In case the company fails to comply with the above directions and fails to adhere to the payment schedule, this Board would be constrained to allow the concerned authorities/ interested parties to recover their dues as per law and may also consider to declare the modified scheme (MS08) as "failed" and would take further action as per law."

97. It is also necessary to take note of some clauses of the Scheme of Merger which was sanctioned by the Board. In the Scheme, as reproduced hereinabove, "Transferor Company" means Saraya Sugar Mills Limited, a company incorporate under the Companies Act, 1956. The Transferee Company" means Saraya Industries Limited, a company incorporated under the Companies Act, 1956 and having its registered office at 302, Tapar Arcade, Behind Azad Apartments, Hauz Khas, New Delhi. "Appointed Date" means 31st December, 2007. "Effective Date" means the date on which all the conditions and matters in relation to the Scheme referred to in clause 17 of "coming into effect of this Scheme" or "effectiveness of this Scheme" shall mean the Effective Date.

98. In the Scheme of Merger, which has been sanctioned by the Board, in the last paragraph of clause 8, it is clearly mentioned that upon the coming into effect of this scheme the Transferor Company shall be dissolved without being wound up. The Board of Directors (or any committee thereof) of the Transferor Company shall without any further act, instrument or deed be and stand dissolved. From the proceedings dated 5.8.2008 of the Board, it is imminently clear that on the said date, the Board finally sanctioned the Scheme but had issued three directions with regard to submissions of option by the cane growers for acceptance of dues either in cash or through cheques and the payment schedule. In the Board's review hearing dated 16.10.2008, the Board itself had admitted that it has sanctioned the scheme with the modifications and certain directions as would be evident from the paragraph 8 of the proceeding dated 16.10.2008. M/s Saraya Industries Limited, the Transferee Company while presenting 28th Annual Report and Audited Accounts to its members under the head Prospects have also admitted the merger of their erstwhile subsidiary company, Saraya Sugar Mills Limited with the company w.e.f. appointed dated 31.12.2007. Apart from above, the Saraya Industries Limited in Schedule 20 forming part of the Account as on 31st March, 2008 under the heading Notes to Accounts have themselves accepted the fact that the Board has approved the scheme of Merger vide its order dated 5.8.2008. The language used in subclause 1.A runs as "The Board For Industrial & Financial Reconstruction (BIFR) had vide its order dated 5.8.08 approved a Scheme of Merger of Saraya Sugar Mills Ltd. (transfer company), engaged in the business of manufacture and sale of white crystal sugar, with Saraya Industries Ltd. (transferee company), engaged in manufacture and marketing of bottled liquor, fuel ethanol and bulk spirits, with effect from 31.12.07."

99. From the aforesaid documents on record, it is imminently clear that the Board for Industrial & Financial Reconstruction had vide its order dated 5.8.2008

approved the Scheme of Merger of Saraya Sugar Mills Limited with Saraya Industries Limited with effect from 31.12.2007 and not on 16.10.2008 as asserted by the Counsel for the contesting respondent. The first two conditions as enumerated in the Board's order dated 5.8.2008 are regarding submission of option by the cane growers, payment to be made by the Company to the cane growers in a time bound manner. Undoubtedly, the payments are to be made by the Transferee Company i.e. M/s Saraya Industries Limited and not by the transferor company i.e. M/s Saraya Sugar Mills Ltd. In the third condition, it has been mentioned that in the event of failure in payment, the Board would have no option but allow the concerned authorities/ interested parties to recover their dues as per law. Thus, it is wrong to say that the Board's order dated 5.8.2008 was conditional and in case of failure to comply with any of the conditions, it would result in revival of the "transferor company". Counsel for the respondent has failed to point out any provision under the SICA or any clause in the Modified Scheme which suggest reincarnation or revival of a company after its merger.

loss

100. On amalgamation/merger, the transferor company merges into the transferee company shedding its corporate shell. The transferor company is dissolved not because it has died or ceased to exist, but because for all practical purposes it has merged into another corporate shell. In *Saraswati Industries* [supra] the Court has taken the view that upon amalgamation/merger, the transferor company would stand dissolved and it will lose its juristic personality. In *Shree Chowdhary Cold Storage* [supra] the court held that once the company was dissolved it ceased to exist and the company became a nonexisting company. Thus from the legal position indicated in preceding paragraphs it is crystal clear that the transferor company loses its identity as it ceases to have its business with effect from the date the amalgamation is made effective.

101. For the reasons and the settled legal position, averred above, the irresistible conclusion is that the "transferor company" i.e. Saraya Sugar Mills Limited ceased to exist with effect from the appointed date i.e. 31.12.2007 and thereafter it became the division/unit of "Transferee Company" i.e. Saraya Industries Limited in view of the order dated 5.8.2008 passed by the Board. The Trial Court failed to exercise the jurisdiction so vested in it and committed material irregularity in postponing the issue to be decided later on, while allowing the application for amendment and appointment of Commissioner for measurement of distance. It is also significant to point out at this juncture that the amendment of a plaint can be moved by a person i.e. the plaintiff or defendant but in the instant case the applications have been moved by M/s Saraya Sugar Mills Ltd, which in view of the facts narrated hereinabove has no right to file the said application as it has lost its legal entity w.e.f. 5.8.2008.

102. Consequently, revisions are allowed and the impugned order dated 29.3.2010 passed on the applications under Order VI Rule 17 and under Order XXVI Rule 9 and 10A of the Code of Civil Procedure as also on the application

under Order I Rule 1, Order VII Rule 11 read with Rule 151 of the Code of Civil Procedure in Regular Suit No. 1192 of 2008 is hereby set aside.

Costs easy.

103. Before parting with, I am pained in writing few lines about the conduct of the parties. After filing of the Regular Suit No. 1192 of 2008, the parties to the suit approached this Court thrice in different proceedings and twice the matter went to the Apex Court. However, on none of the occasions respondent plaintiff brought to the notice of the Court that as the revival of M/s Saraya Sugar Mills Ltd. had failed and as such a Scheme of merger has been submitted to the BIFR and the same was accepted by the Board with certain modifications and directions. This conduct of the respondent plaintiff is reprehensible. The revisionist defendant are also responsible to a lesser degree in not bringing this material fact either before this Court or the Apex Court or before the Trial Court at the first instance. From the record it comes out that the Revisionist did approach the BIFR and as such it was in their knowledge that proceedings of certain nature are going on before the BIFR. The moment, they came to know about the proceedings they should have made earnest endeavour to know as to what type of proceedings were/are going on before the BIFR because they were going to set up the factory in the vicinity and were closely watching the moves of the plaintiff respondent. Truth constituted an integral part of the justice delivery system which was in vogue in the pre Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. Therefore, it is imperative that the parties approaching the court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief.