
(1994) 12 AHC CK 0057

In the Allahabad High Court

Case No : Civil M. W. P. No. 37155 of 1994

U.P.State Sugar Corporation Karmchari Association and Others

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 09-12-1994

Acts Referred:

Constitution of India, 1950 — Article 215, 226

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 23, 3

Citation : (1994) 12 AHC CK 0057

Hon'ble Judges : R.S.Dhavan, J and S.K.Keshote, J

Final Decision : Disposed Of

Judgement

1. The U. P. State Sugar Corporation Karamchari Association through its President, P. R. Raha, one another D. N. Pandey, Assistant Grade III, petitioner Nos. 1, 2 3 respectively, have filed the present writ petition against the State of U. P., Secretary, Sugar Cane Development Department, Government of Uttar Pradesh, Lucknow the U. P. State Sugar Corporation Limited, respondents, Nos. 1, 2 3 to impugn the action of the respondents, in effect, to undertake a sale of its units at Meerut, Bareilly, Barabanki, Burhwal, Nawabganj, Munderwa, Baitalpur, Ghughli , in addition, the units at Chitauni, Deoria, Pipraich, Bhatani, Ramkola, Lakshmiganj, Shahganj, Ghatampur, Dariyapur, Nganj, Maholi, Hardoi, Barabanki, Rampur aid Chhatta. The notices announcing the sale are appended as Annexures 6 11 to the writ petition.

2. The petitioners are the staff employees of the U. P. State Sugar Corporation, a Public Sector undertaking, otherwise registered as a company under the Companies Act, 1956. The U. P. State Sugar Corporation (hereinafter referred to as the Corporation), apparently, has learnt the lesson of the day that it may not be the forte of State enterprise to run a business or an industrial venture. Falling in line with the concept of laissez faire shedding the experiment which did not succeed, of controlling the means of production distribution of goods, the State Government of Uttar Pradesh its public sector enterprises have taken to shed their assets offered them to entrepreneurs for public sale.

3. The three broad issues on which the employees of the Corporation have assailed the action of selling the assets of the Corporation are: Firstly, that the Corporation ought not to, cannot. They oppose the move of selling the sugar factories held by the corporation. The contention is that the corporation should continue to run the sugar factories. Secondly, if the corporation cannot the workers the staff are available for running the factories, where they are employed. Thirdly, the next challenge, they have confronted the corporation with, is that certain sugar factories, such as those which are sick the matter of their sickness is actively engaging the attention of the Board for Industrial Financial Reconstruction (henceforth referred to as "the Board"), constituted under the Sick Industrial Companies (Special Provisions) Act, 1985, (hereinafter referred to as "the Act of 1985") cannot be sold in any case. The contention is that the corporation has to first seek leave of the Board before alienating any asset of the corporation.

4. Insofar as the first aspect is concerned, the Court has, in no uncertain terms, indicated to the petitioners that where the State has decided not to be an entrepreneur or an industrialist or a businessman, or, for that matter, learnt the hard lesson that it could be neither, is one of the policy of the Government. , it is not the business of the Court to question the policies of the Government in power as long as it does not violate the Constitution of India or any law framed under its sanction. In this regard, the Court has no hesitation in declaring to the petitioners that, if this is the only challenge on which the petition has been based, then, the Court would not interfere to prescribe Parameters for the Government to spell out how it should run its business industries, as these are matters which Basically reflect the personality of the Government in choosing or electing the path of its administration adventurism in trade business. Insofar as the vested right of the petitioners is concerned, i.e., to continue in employment, it has been assured. The sale of the industries after the State Government or its public sector undertakings are to got rid of it, goes as a package deal to whoever offers the highest price. The job guarantee is a stipulation goes with the industries and the new employer is obliged to find the employees of the State enterprises continue the employment, unless there is an amicable equitable settlement by which the employer the employee part company with what is known as golden handshake. But, the other two submissions are fundamental go to the root of the matter that whatever a State may do in changing the pattern of its trade commerce industry, the law cannot be violated.

5. It is a common knowledge, though not disputed in proceedings of" this case, that in the absence of an incentive element in State Government run industries enterprises Barring a few exceptions, State ventures have usually run amuck, saddling the people with a huge bill to make up for the illadvised State run industries where bureaucrats yearned to become corporate executives. But, they tied themselves up in knots of red ribbon tapes, when they could neither shed their power got entangled in the use of it. To be an industrialist, one has to be a floor shift mechanic a corporate executive, both civil servants would not like to

spoil their collars cuffs, but, would like to wear cravats links on double cuffs in the fashion of a corporate image.

6. In detail, the submissions of the petitioners are that : Firstly, the decision of the corporation for selling its units, as a prelude to the scheme of liberalisation, was confined to such units which were incurring losses. The petitioners refer to the policy decision of the corporation, recorded in the minutes, dated 15th October, 1993, appended as Annexure 3 to the writ petition.

7. Secondly, it is contended that the respondent corporation is a sick industrial undertaking , thus, if any sale or arrangement to transfer the ownership was to be undertaken, it could not be done except by the consent of the Board or under its direct supervision.

8. Thirdly, regard being had to the circumstances that the object purpose of the Act of 1985 is that an exercise to revive a sick unit is a step which is contemplated by the Board, transferring the unit by sale, without leave or permission of the Board, is an illegal exercise.

9. Fourthly, by a tripartite agreement, prior approval of the public financial institutions, namely, Industrial Development Bank of India. The Industrial Finance Corporation of India the Sugar Development Board has to be taken, as substantial public funds have been taken, either as loans or financial aid, the consent of the public financial institutions for effecting the sale, undertaken by the Corporation, has not been taken. The sale, it is submitted, is a fraud on public accountability.

10. Fifthly, the valuation of the property which has been undertaken by the Corporation, is incorrect has been favoured to sell the unit at a lower price.

11. Sixthly, the policy decision to sell only loss making units is being violated as some of the units being sold by the corporation are profit making units.

12. Lastly, it is submitted by the petitioners, that if the Corporation has failed to run its industries, rather than a stranger purchaser the corpus, the workers could run it as a cooperative.

13. The submission on behalf of the petitioners began from the premises that originally a Government company had been excluded from the purview of the Act of 1985 as the definition of "company" under Section 3(d) of the Act of 1985 had not included a Government company. But, today, after an amendment to the Act, a Government company is like any other company, its sickness is the subjectmatter of the jurisdiction consideration of the Board. The Corporation, it is submitted, cannot escape the Board, if its intention is to sell its assets as a sick industrial company. It is further contended that it follows, that, if the Corporation is sick as a whole, in other words, as a company, then, in any case, it cannot sell any of its units. The definition of the word "company", in the applicability of the Act of 1985, prior to the amendment after the amendment, were are as below ;

"(d) "company" means a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956) but does not include a Government Company as defined in Section 617 of the Act".

14. The defence of the State respondents is evasive shabby. Counter affidavits have been filed by the State of Uttar Pradesh the U. P. State Sugar Corporation.

15. During the pendency of the writ petition, a litigation no doubt, nothing new should have been introduced. But, the respondents, the State of U. P. the corporation, either or both, permitted this to happen. The rule, *pendente lite nihil innovetur* was violated with impunity. The issues, thus, were complicated enlarged unnecessarily. The Court will deal with this matter subsequently.

16. On the aspect of the obligation of the corporation to avoid the proceeding before the Board, under the Act of 1985, even the reference to proceedings has been evaded in the counter affidavit of the corporation. On the specific averments in the writ petition to the pending proceeding before the Board under the Act of 1985, the replies to the petition by the respondents have evaded writ petition submissions, with the reply, that suitable answers will be given at the time of hearing. A general submission has been made that the company has not been declared as a sick company, under the Act of 1985. On the legal submission that before the Board, a company whose sickness is under consideration, cannot alter the status quo by alienating its assets, the submission in the counter affidavit of the corporation is, to the effect, that it is a matter on the interpretation of the Act of 1985 the arguments will be made during the course of the hearing. The submission, in defence, that the company has not been declared as a sick industrial undertaking that the Act of 1985 is not applicable in the present case, is reiterated repeated a number of times in the counter affidavit. It is further contended in the counter affidavit that the Board has neither formed any opinion under the Act of 1985 nor has done anything uptill now, even though the matters have been pending before it nor more than three months it is impliedly submitted that as the crushing season is about to come, thus, the pendency of the proceedings before the Board does not Bandar the respondents to proceed to sell the units by inviting tenders. There is an allegation in the counter affidavit that because of the noncooperation of the employees, the units of the company have been suffering losses. Much reliance appears to have been placed in the counter affidavit that a similar petition has been dismissed , thus, this petition ought to be dismissed as not maintainable. No substantial argument has been made in the defence of the respondents that the issue in the petition, or the only aspect to be seen, is whether legally the U. P. State Sugar Corporation Limited, in the face of the pending proceedings, in the matter relating to its industrial sickness under consideration before the Board, could sell its industrial assets without leave or permission of the Board under the Act of 1985 ; the respondents have avoided answering the petition on this aspect.

17. The only submission made at the Bandar on behalf of the Corporation was, to the effect, that a similar writ petition has been dismissed , thus, it would not be

appropriate for the Court to enter the merits on the issues raised in this writ petition. No details about similarities of issues considered in another petition were placed before the Court in fact learned counsel for the corporation was at a loss to show to the Court that issues in this petition Basically on the scope jurisdiction of the Sick Industrial Companies (Special Provisions) Act, 1985 had been adjudicated between the parties in any other case. When the Court indicated that it is a matter of proprieties to hear or not to hear submissions on this petition, then, the first obligation duty would be on the counsel for the petitioner to present a petition in which issues stand decided that ho has misled the court to examine issues which are res judicata. Should counsel for the petitioner fail in his explanation to the Court then he ought to be cited for unprofessional conduct. The submission of learned counsel for the corporation, was immediately contradicted by learned counsel engaged specially by the State of U. P. learned Senior counsel for the impleaded respondent, Mr. Vineet Saran, Advocate Mr. R. N. Trivedi, Senior Advocate respectively. They submitted in unison that the case should be examined on merits they beg to differ with learned counsel for the corporation that any similar petition has been decided, which has not been so. They further submitted that no impropriety has been committed either by the petitioners or by their learned counsel in duplicating issues in Court. This petition, they contended, is not similar to any other which may have been decided between the same parties. They further submitted that the only issue considered in another petition filed by the employees of the corporation was on the matter relating to their services employment if the corporation were to sell its factories to the private sector. This is not the issue in the present petition. Between these arguments, it is not necessary for the Court to dwell on this aspect any more than is necessary.

18. One thing is clear that this petition only relates to the aspect of questioning the State Government or challenging the action of the corporation in alienating its assets otherwise than in accordance with law , more so, in the face of proceedings before the Board under the Act of 1985. Thus, if any other petition, may be by the same petitioners in the matter relating to the continuity of their services, may have been entertained or dismissed or had received an order granting an ad interim order or rejecting an ad interim order, it certainly is not a situation which is identical or similar to the facts circumstances of this case. The Court has reservations on the manner in which a preliminary objection was taken to fault the petition on behalf of the corporation. Indeed there was nothing on merits which was submitted by the corporation, by Mr. Yogeshwar Prasad, Senior Advocate, who had made it clear during hearing that he is appearing on behalf of the corporation only.

19. Now the Court is reverting to the merits of the matter.

20. In the pleadings exchanged on record, consistent with the submissions of the corporation virtually nothing was submitted on merits by the State of U. P., either, in its counter affidavit. The counter affidavits of these respondents avoid

details on the merits of the matter, both on law facts. During the course of the hearing, the Court was intimated that on behalf of the State of Uttar Pradesh, there has been a special engagement of a counsel in Mr. Vineet Saran, Advocate. His only submission is, but fairly, to the effect, that it was accepted that proceedings before the Board were pending there is not much that can be said that any party to whom proceedings apply under the Act of 1985 could short circuit the pendency of the proceedings before the Board, more so, when the proceedings have been initiated by the very party which seeks to evade the proceedings. In the present case, it is a matter of record that not once but twice, the U. P. State Sugar Corporation Limited has been before the Board to report its sickness under Section 15 of the Act later on again it was obliged to be before the Board under Section 23 of the Act. The two sections operate in different circumstances, but this does not rule out the relevancy of the matter that the Board was seized of the proceedings.

21. In short, at present, resort to making an application to seek a reference to the Board under Section 15 is occasioned when voluntarily a company comes to the conclusion from the state of affairs of its accounts that it has become a sick industrial company (it is not that any other person cannot make a report to the Board to this effect). Such an occasion did happen that the corporation went to the Board. The other circumstance bringing a corporation before the Board is under Section 23. This happens when the accumulated losses of an industrial company at the end of any financial year see an erosion of 50% of its net worth during the immediately proceeding four financial years. In such circumstances, an industrial company is obliged to report the fact of such erosion to the Board. This situation had also happened with the corporation.

22. If there is an escape for the corporation to alienate its assets one it is before the Board, the law so permits it, then, clearly in what the corporation contends may be correct. In that case, the petition should be dismissed. Therefore, the only issue before the Court is that if an industrial company consciously knowingly of its own volition acquiesces to the jurisdiction of the Board under the Act of 1985, could it ignore the applicability of the Act of 1985 ?

23. The other serious aspect is : that does |a different law applies to a company which is not a Government company.

24. If the same thing which the corporation has done, would have been done by a company which is not a Government company, what would have been the consequences for such an action ?

25. Were any proceedings pending before the Board under the Act of 1985?

26. The answers to the aforesaid questions were evaded the court has no hesitation, on a writ of certiorari, in certifying that the Corporation the State of U. P. withheld public information from the High Court instead of placing the facts on record correctly, faithfully truthfully. Throughout the proceedings, the only answer before the court in the pleadings was that the matter will be replied

appropriately at the time of hearing. This matter relates to public accountability of a Government Company dealing with public finances, its answerability to the people on public moneys.

27. The Corporation the State of Uttar Pradesh have kept away essential documents from the High Court on a very simple matter in which these functionaries ought to have conformed to the law, which implies, the rule of law. When the petitioners asserted in paragraph 26 of the petition that the financial institutions objected to any transfer being effected by the Corporation on its assets, the corporation admitted the statement of fact in paragraph 34 of its counter affidavit, implying thereby, that the public financial institutions had the status to object , in fact, they had objected, when the petitioners refer to the specific letter of the Industrial Finance Corporation of India dated 2nd August, 1994, that this Public Financial Institution had, in no uncertain terms, reservations whether the U. P. State Sugar Corporation could sell its assets, the only answer given in the counter affidavit was that a proper reply to the Industrial Finance Corporation of India had been given by the Corporation (reference, also, paragraph 34 of the counter affidavit). What was the reply ? These are writ proceedings against executive State action. The information available on record was kept away from the Court.

28. Thus, there is no issue on the fact that the public financial institutions were not in agreement with the latter in heavy debt, it should sell its assets without leave of the public financial institutions. In this regard, an auditors' report is relevant. What is also relevant is, the reference to the accounting year ending 31 March, 1992. The auditors' report were being left on its record, by the Corporation, on 12 July, 1994.

29. Paragraph 2. in reference „to the loans taken from the public financial institutions, particularly, Industrial Finance Corporation of India the Industrial Development Bank of India is relevant. This paragraph is reproduced below :

"Loans from Industrial Finance Corporation of India Industrial Development Bank of India aggregating Rs. 59, 28, 63,714 have been shown as secured loan in the Balance Sheet notwithstanding the fact that these loans are not secured against any of the assets of the Corporation they rank as unsecured loans. Had these loans been properly disclosed unsecured loans would have been higher secured loans lower by the said amount in the Balancesheet (vide Schedule "C" No. 1)."

[Petitioners' Supplementary Rejoinder Affidavit Annexure 1]

Thus, it is now on record that there were amounts, amounting to Rs. 59, 28,63, 714, (over Rupees fifty nine crores) which the corporation, on its record, had incorrectly, unethically inaccurately, to say the least, shown as secured loans in the Balancesheet. If this in itself is not a misdemeanour on behalf of those who ran the corporation, the auditors certified that the loans, in fact, were unsecured loans. The auditors have also certified that if these amounts had not been disclosed as unsecured loans, the possibility cannot be ruled out that the amount

would have been higher. Playing with public funds, amounting to about Rs. 60 crores, needs tremendous courage that also to have a Balancesheet drawn up two years after the year it was meant to have been drawn up.

30. Now, it is understood why the corporation was evading an answer to paragraph 26 of the writ petition when the petitioners drew the attention of the Court that the public financial institutions had protected the manner in which the corporation was alienating its assets. A straight answer was neither given by the Corporation nor by any other of the State respondents.

31. Between paragraph 27 paragraph 41, the petitioners have made, to the point, specific averments, to the effect, that with proceedings pending under the Act of 1985, the corporation is not at liberty to alienate its assets except by leave of the Board. The Corporation contends, in its reply, that is not sick. The question whether the corporation is sick or not is best seen in the reply which the corporation gave in reply to the averments of the writ petition. Both are reproduced below :

"27. That the U. P. State Sugar Corporation Ltd. has become a sick company is covered by the definition of a "SICK INDUSTRIAL COMPANY" as contained in Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985. For convenience Section 3(1)(o) of the 1985, Act is being quoted below :

That the contents of paragraph No 27 of the writ petition, it is stated that the company has not been declared as sick company upto now.

(Not reproduced)

28. That any industrial company (which has been registered for more than seven years) is to be treated as a Sick Industrial Company in case at the end of any Financial Year the accumulated losses thereof equal/exceed it is entire net worth.

29. That the accumulated losses of the U. P. State Corporation Ltd. are in excess of its entire net worth since the Financial Year 199192. According to the Balancesheet of the U. P. State Sugar Corporation Ltd. it is net worth has gone in the negative since the Financial Year 199192 the same position continues to exist till date. The figures pertaining to the net worth of the U. P. State Sugar Corporation Ltd. for the years 198990 to 199394 are specified below :

36. That the contents of paragraph No. 28 of the writ petition being legal will be met at the time of hearing of the present writ petition, but it is submitted that the Corporation has not been declared as sick industry under the Sick Industrial Companies Act, 1985 upto now.

37. That the contents of paragraph No. 29 of the writ petition being a matter of record need no reply.

Year 198990

Net worth Rs. 7580.07 lacs

199091 Rs. 4889.61 lacs 199192 Rs. 54.10 lacs 199293 Rs. 231.91 lacs 199394 Rs. 2157.65 lacs The aforesaid figures are Based upon the Balancesheet of the respondent Corporation for the respective years.

30. That the aforesaid details would demonstrate that the respondent Corporation is covered by the definition "SICK INDUSTRIAL COMPANY" as contained in Section 3(1) (o) of the 1985, Act since 31st March, 1992.

31. That originally the "SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 did not apply to a Government Company. This was on account of the definition of the word "company" as originally contained in Section 3(l)(d) which is quoted below :

(Not reproduced)

32. That however, the words "but does not include a Government company as defined in Sec. 617 of that Act" as obtaining in Section 3(1)(d) was deleted therefrom by means of Section 2 of Sick Industrial Companies (Special Provisions) (Amendment) Act, 1991 (57 of 1991). As a consequence of this amendment with effect from the date of the enforcement of Act No. 57 of 1991 even a Government company is included within the definition of Sick Industrial Companies (Special Provisions) Act, 1985.

33. That under Section 15(1) of the 1985, Act there exists a amatory duty upon the Board of Directors of an Industrial Company become a Sick Industrial Company to intimate within SIXTY days from the date of finalisation

38, That in reply to the contents of paragraph No. 30 of the writ petition, it is stated that unless a company is not declared as a Sick Industrial Company under the Act of 1985. The assertion of the petitioner made in the paragraph under reply are not correct.

39. That the contents of paragraph Nos. 31 32 of the writ petition being legal will be met at the time of hearing of the present writ petition.

40. That the contents of pragraph No. 33 of the writ petition relate to the interpretation of Section 15(1) of 1985 Act, they being legal will be met at the time of

of the duly audited accounts of the Company for the Financial Year at the end of which the Company has become Sick Industrial Company to the Board for Industrial Financial Reconstruction established under Section 4 of the 1985 Act.

That however, despite this matory duty cast upon the Board of Directors of the Company under Section 15(1) of the 1985 Act, no such reference was made by the respondents Corporation to the Board for Industrial Financial Reconstruction within the period envisaged under Section 15 of the 1985 Act. Such a reference has been made only with great delay by a letter of the Managing Director of the respondent Corporation dated 7/11 May, 1994 addressed to the Secretary, Board for Industrial Financial Reconstruction, New Delhi. A true copy of which letter is

being enclosed herewith marked as Annexure 15 to this writ petition.

That the aforesaid reference made by the letter dated 7/11 May, 1994 has been received by the Board for Industrial Financial Reconstruction the enquiry proceedings into the working of the Sick Industrial Company as envisaged under Section 16 of the 1985 Act is pending at the level of the Board. Reference may be made to the explanation added to Section 16(3) by means of Act No. 12 of 1994 which provides that an enquiry shall be deemed to have commenced under Section 16 with effect from the receipt by Board of any reference or information. For convenience Section 16 of the 1986 Act as it existed prior to its Amendment by Act No. 12 of 1994 is quoted below :

hearing of the present writ petition.

41. That the contents of paragraph No. 34 of the writ petition being a matter of record need no reply. It is wrong to say that any delay as alleged has been caused. The Corporation acted in accordance with law with due diligence.

42. That the contents of paragraph No. 35 of the writ petition being a matter of record need no reply.

(Not reproduced)

A true copy of the Sick Industrial Company (Special Provisions)

Amendment Act, 1993 (Act 12 of 1994) is being enclosed herewith marked as Annexure 16 to this writ petition.

36. That under the provisions of 1985 Act the Board for Industrial Financial Reconstruction is entitled to conduct an enquiry into the working of Sick Industrial Companies ; to pass suitable orders on completion of such enquiry ; to appoint an operating agency for the preparation sanction of scheme for reconstruction revival, rehabilitation proper management of the company ; to provide for Financial assistance for rehabilitation. Reference may be made in this regard no powers conferred upon the Board for Industrial Financial Reconstruction under Sections 16, 17, 18 19 of the 1985 Act.

37. That the power under the 1985 Act are so sweeping that even the winding up of a Sick Industrial Company is to be undertaken by the Board under Section 20 thereof; it is the duty of the operating agency under Section 21 prepare complete inventory also.

38. That Section 22 provides for the suspension of legal proceedings contracts etc. while proceedings are pending before the Board. Some further amendments have been effected in Section 22 by Act No. 12 of 1994 as also a new provisions, namely, Section 22A has been inserted therein.

30. That the great haste with which the respondents are proceedings to effect sale of the Sugar Factories referred to above in favour of private entrepreneurs is in order to avoid a scrutiny by the Board under the provisions of the 1985 Act.

43. That the contents of paragraph No. 36 37 of the writ petition relate to the provisions of Sections 16 21 of 1985 Act they will also be met at the time of hearing of the present writ petition.

44. That the contents of paragraph No. 38 of writ petition relate to the provision of Section 22 of 1985 Act they will also be met at the time of hearing of the present writ petition. However, it is again submitted that the company has not been declared as Sick Industrial Company, so the provision of Act, 1985 relied by the petition are not applicable in the present case.

45. That the contents of paragraph No. 39 of the writ petition are denied. As admitted by the petitioner the policy roof privatization

40. That in case the sale is not effected the Board for Industrial Financial Reconstruction completes the proceedings under the 1985 Act, then it is entitled to consider various measures which can be taken for rehabilitating the respondent company for appointing an ex parte body to act as the operating agency. Further the workers employees of the respondent corporation including the petitioners would have the right of participation in all proceedings before the Board of Industrial Financial Reconstruction it would also be open to the Board to consider alternative scheme suggested by the employees/workers for the tuning of the Sugar factories/respondent corporation including formation of workers for assuming management of the Individual Sugar Factories.

41. That the respondent authorities have acted malafidely in not promptly making reference to the Board for Industrial Financial Reconstruction with regard to its sickness not taking proceedings for selling of the Sugar Factories with great haste so as to preclude any scrutiny by the Expert Body of Board of Industrial Financial

been declared in September, 1993 the process for inviting tenders had also started in March, 1994 as such it is wrong to say that the respondent acted in great haste to effect the sale of sugar factories with an intention to avoid the scrutiny by the Board under the provisions of Act 1985.

46. That the contents of paragraph No. 40 of the writ petition are denied. Since the company has not been declared sick upto now, so the question of considering taking various measures as alleged by the petitioner does not arise. The petitioner has got no right to participate in the proceeding as alleged in the paragraphs under reply. Considering the huge losses there is no other alternative scheme for running the management. The allegation of the petitioner contrary to it made in the paragraph under reply are Based upon surmises conjectures. It is due to noncooperation working of the employees, the company suffered a great loss.

47. That the contents of paragraph No. 41 of the writ petition are also false are denied,, Even on the allegation made the petitioner, the reference was made on 7th/11th May, 1994 to the Secretary of the Board under Act 1985, Reconstruction

which has been constituted for this purpose.

but the Board has neither formed any opinion as contemplated under the provision to Sec. 15(1) of the Act has done any thing upto now even though more than 3 months have expired the crushing season is coming. It is further stated due to the pendency of such an application before the Board does not Bandar the respondents to proceed to sell unit by inviting tenders etc.

32. No matter what the Corporation contends, one thing is clear that it cannot pretend that no proceeding is pending before the Board under the Act of 1985. The issue whether the corporation was sick or not, normally, the Court would not have noticed, but as the corporation has made an issue out of it in the pleadings, the Court is obliged to answer it. The Corporation has placed no reference or documents, but has raised an issue in first trying to claim that it is outside the jurisdiction of the Board secondly, that it was not sick on 11th May, 1994. The Corporation filed an application, dated 7/11 May, 1994 [Annexure "15" of the writ petition] before the Board under the Act of 1985 in which it is stated thus :

"Dear Sir,

Ours is a Government company as per the provisions of Section 617 of the Companies Act, 1956 whole of share capital of which has been subscribed by the Government of U. P.

As per the Annual Accounts for the financial year ended on 31.3.1990. Net worth of Company has been ended by more than 50%. Under the amended Sick Industrial Companies (Special Provisions) Act, 1985, the company is required to make a reference to.....Accordingly, as resolved by our Board of Director at their 148 the meeting held on 30th April, 1984, we submit herewith our application in Form CC along with required annexure etc.

We will be pleased to submit any further information as may be required by BIFR.

Kindly acknowledge a receipt of this application.

Thanking You,

Yours sincerely

(Sd.) Uma Shanker"

33. The Corporation was acknowledging before the Board that more than 50% of its assets had been eroded. It was further acknowledging that upon the amendment to the Act of 1985, even as a Government company, it was obliged to report its sickness to the Board that it was also further obliged to make a reference to the Board. The Corporation was undertaking to the Board that it would submit further information as may be required by the Board. The Corporation, of its own admission, was not a normal healthy company. It was sick This application of the corporation was under Section 23 of the Act of 1985 as in the matter relating to the sickness upon the erosion of more than 50% of

its peak net worth or its assets is dealt with under Section 23. A reading of Section 23 implies that if an application is filed by the company in reference to this section, then, the matter of its net worth being first eroded beyond 50% is a circumstance of financial affairs which must exist for four preceding years. This further implies that the corporation had not only been sick in 1994, it has been sick four years prior to this year. The corporation filed pleadings before the High Court which were not correct. Avoiding to make submissions that it had not been declared sick, the corporation was sick on its own showing.

34. When the corporation filed its letter of 11th May, 1994, before the Board, it received a reply from the Board, dated 27 May, 1994 [Annexure RA9, Rejoinder Affidavit of petitioner]. The reply which the corporation received from the Board is set out hereinafter :

"Sir,

Please refer to your letter No. CS/SSG/780, dated 1151994 forwarding Form C for the year ended 3131989.

2. You are requested to furnish copies of the notice together with the minutes of the general meeting of the shareholders convened on 25101993 to consider the erosion in peak net worth, audited accounts for the last five financial years for further action."

35. The Board was drawing the corporation's attention to Form C alongwith the latter's letter, dated 11 May, 1994. Form C is a document which has to be filled by Government companies or corporations. Thus, the Act applied to the corporation, as it was, all the time, aware that it was sick notwithstanding that it was a Government company, it was amenable to the jurisdiction of the Board under the Act of 1985.

36. The Board was seeking from the corporation the minutes of the general meeting of the Shareholder convened on 25th October, 1993, in which meeting the erosion of the net worth the audited accounts for the last five financial years had been considered. It appears that, on record, the corporation gave out to the Board that the matter relating to the erosion of its peak net worth had been considered in a general meeting of the company on 25th October, 1993.

37. The Corporation replied to the letter of the Board, but after three months. The date in the letter of the Corporation is 12 August, 1994. But the subsequent date which it carries is the date on which it may have been dispatched, is, in fact, the date of issue. This is referred to in the letter itself. The date is recorded as 191994. In reference to the date, the letter is labled as "1281994/191994." The Dispatch No is 02521. The text is as below. [Annexure RA10, Rejoinder Affidavit of Petitioner] :

"Ref. No. GS/SSG/2521 Dated 1281994

191994 To,

Sri P. D. Tahiliani,
Section Officer (B. C.),
Government of India,
Ministry of Finance,
Department of Economic Affairs,
Board for Industrial Financial Reconstruction,
Jawahar Vyapar Bhawan,
Talstoy Marg,
NEW DELHI 110001

Subject : Report under Section 23 of the Sick Industrial Companies (Special Provisions) Act, 1985.

Sir.

Please refer to your letter No. BIFR/SEC 23/CC32 dated 27.5.1994 as the above subject.

As desired copy of notice together with the minutes of the General Meeting of the shareholders convened 28th July, 1994 for considering the erosion of peak net worth audited accounts for the last five financial years are enclosed.

Yours faithfully

(PREM NARAIN)

MANAGING DIRECTOR."

38. Apparent on the record, from this letter one aspect is clear that the Corporation has avoided the inquiry of the Board for the demand of the minutes of the general meeting dated 25 October, 1993. The Corporation has clearly evaded the query of the Board instead, now, refers to the general meeting being on 28 July, 1994. It is, thus, implied that there was no meeting on 25 October, 1993. It is, thus, further implied that the Corporation has made a misstatement of fact that there was a general meeting on 25 October, 1993 to consider the erosion of peak net worth being more than 50%. If there had been a meeting on 25 October, 1993, the Corporation would have acknowledged it. The Corporation evaded the inquiry. Instead, what the Corporation did was to purchase time to reply to the letter of the Board. The Corporation knew, at every given time, that if the letter of the Board had been replied promptly, there was nothing on record by which the Corporation could show that a shareholders of a Board meeting had considered the matter of such financial affairs at a date prior to the Board's inquiry. The relevant date of the meeting, from 25 October, 1993, became 28 July, 1994. This state of the record further reveals that fully aware that its assets

for the last four had been eroded beyond 50% of its peak net worth, but, as a measure of Public accountability, the Board of Directors of the Corporation had not considered this matter in a general meeting of the shareholders, at the appropriate time.

39. What the Corporation did was not to reply to the letter as a first step. Thereafter, the Corporation set about to convene a meeting of its shareholders on 28 July, 1994. In its meeting, the Corporation considered that its net assets had been eroded beyond 50% of its value for the last four years. This information is available from the record, not of the Corporation, but in an affidavit of M/s. Balrampur Chini Mills Limited. This Company, a prospective buyer, was entering into an exercise to purchase one of the sugar factories of the Corporation. On the entry of this respondent into the proceedings of the writ petition, the Court will revert to it later. In the supplementary counter affidavit of this impleaded respondent, Annexure1, refers to the meeting of 28 July, 1994. The contents of the minutes of the meeting for whatever they may be worth, carrying a date of 29 July, 1994, are reproduced below :

U. P. State Sugar Corporation Ltd.,

Minutes of the Ordinary Meeting of members held at Ganna Kisan Sansthan, Dali Bandagh, Lucknow on day Thursday, 28th July, 1994 at 1230 p.m.

Present :

Sarvasri

(1) Aparmita Prasad Singh, Chairman.

(2) Prem Narain,

(3) R. K. Singh,

(4) Ashok Priyadarshi,

(5) U. K. Mittal,

Notice of calling of meeting is read over. Following ordinary resolution, as proposed by Shri Prem Narain second by Shri Umesh Kumar Mittal has been passed.

"Resolved that in accordance with the provisions as contained in Section 293 of the Companies Act, 1956 sanction is hereby accorded for sale of the units, namely at Meerut, Bareilly, Barabanki, Baitalpur, Ghughali, Burhwal, of the Corporation."

"It is further resolved that the Board of Directors of the Corporation are hereby authorised to take all necessary incidental actions to carry out aforesaid resolution.""

"Resolved that the report of Directors reerosion of 50% or more net worth of

Corporation as on 31st March, 1990 is hereby accepted certified."

As no other matter is on agenda, the meeting is hereby closed with vote of thanks of Chair.

Sd. Sd.

Company Secretary 2411994 Chairman

(Translated from Hindi)

40. A perusal of the minutes of the meeting clearly shows that there is no confirmation of any earlier meeting. The minutes further place on record that as from the accounts closing on 31 March, 1994, more than 50% of the assets of the Company stood eroded. This meeting in itself has a direct nexus to the reply which the Corporation gave to the Board, that, in the matter relating to its sickness or the erosion of its net assets beyond 40%, the occasion to consider the matter arose in a meeting of 28 July, 1994. Thus, whether there was a meeting on 25 October, 1993, or for that matter, it was a meeting of 28 July 1994, even the last meeting was directly connected with the proceeding of the Board. Not answering an inquiry which the Corporation was obliged to respond to, now as late as 28 July, 1994, the Corporation was acknowledging that it has been sick for the last four years. But, in its affidavits before the High Court, the Corporation says that it has not been declared sick. Further, even in the information to the Board, which the Corporation had sent during the pendency of this writ petition, its industrial sickness was acknowledged. The Corporation was concealing essential documents from the High Court also from the Board.

The matter does not end here.

41. The reason, the Corporation did not reply to the letter of the Board, dated 27 May, 1994, kept it pending for three months, is that it did not have the statement of audited accounts for sending to the Board as an essential inquiry which was being made from the Corporation. What the Corporation did was that it was seeking a report of the auditors after two years. The petitioners have placed before the Court the auditors' report made for the Corporation. In its reply, in answer to the letter of the Board, dated 27 May, 1994, the Corporation, in September 1994, sends the audit report to the Board, along with other details, for whatever they may be worth. The record now reveals in no uncertain terms that when the Corporation made a statement on oath in paragraph 47 of the counter affidavit that a reference which had been made to the Board by the Corporation's letter dated 7/11 May, 1994, but the Board had neither formed any opinion as contemplated under the Act of 1985 nor has done any thing up to now, even though three months have expired the crushing season is coming, was a false statement. At the expense of repetition, the averment of the petitioner in paragraph 41 of the petition the Corporation's reply in paragraph 47, already noticed above need to be reread. The Corporation deliberately with every intention to suppress material facts gave an impression as if the Board was

delaying the proceedings. The Corporation did not disclose to the High Court in its counter affidavit that it had not even given relevant, complete truthful information to the Board within time even when it did give it, it was after 1 September, 1994. In fact, the letter of the Board dated 27 May, 1994, appended as Annexure RA1 to the rejoinder affidavit of the petitioners was being replied by the Corporation during the pendency of the hearing of this case before the High Court. Thus, the statement in the affidavit of the Corporation that it proceeded to sell its assets because the Board was not acting promptly is not only a misstatement of fact, but a false statement deliberately made with intent to prejudice the Court that the fault lay with the Board not with the Corporation. The Corporation manufactured a plea before the High Court that the Board under the Act of 1985 was delaying matters, thus, it was left with no choice, but to sell its assets without the permission of the Board. The affidavit of the Corporation sworn by its Personnel Manager affirmed on 28 August, 1994 by one K. M. Joshi has materially suppressed the fact that the letter dated 12 August, 1994 had not even been dispatched to the Board when his affidavit had been sworn. The letter of the Corporation addressed to the Board including the essential details were dispatched four days after the affidavit had been sworn. It was dispatched on 1 September, 1994 or any date thereafter. The Corporation made a false statement on this aspect materially suppressed essential facts from the High Court in its counter affidavit in trying to lead the High Court to believe that the Corporation had filed all the information before the Board within time, but the Board was not acting on the proceedings pending before it. Detailed arguments were advanced in this regard by the impleaded respondent on what should be done if the Board delays the proceedings. The record now reveals that the Corporation had concealed the facts from the High Court on the aspect that (a) it had not supplied essential information to the Board in the proceedings pending before it, even during exchange of the pleadings in the writ petition before the High Court (b) was making a false statement before the High Court that all the information had been supplied to the Board, but the Board was not acting on the proceedings. The Board of Directors of the Corporation are liable to be prosecuted for arranging to give false information causing false statements to be made before the High Court. The deponent affirming the counter affidavit on behalf of the Corporation, for having made them.

42. The report by the auditors is of M/s. Ram Lal Company. The report is dated 12 July, 1994. It is appended as Annexure 7 to the supplementary rejoinder affidavit of the petition. The very first paragraph of the report mentions that they have audited the attached Balancesheet of U. P. State Sugar Corporation as on 31 March, 1992. The last paragraph of the report, i.e., Paragraph (xx), is relevant. It records :

?According to the information and explanations given to us, the Corporation is a Sick Industrial Company within the meaning of clause (10) of subsection (1) of Section 3 of the Sick Industrial Companies Act (Special Provisions) Act, 1985 a reference has been made to the Board for Industrial Financial Reconstruction

under Section 5 of that Act."

43. Thus, on the statement of affairs on the accounts of the Company ending on 31 March, 1992, two years prior to filing of the application of the Corporation under Sec. 23 of the Act of 1985, the auditors of the Corporation were certifying that the Corporation is a sick industrial company" "within the meaning of Section 15 read with Section 3 of the Act of 1985 that a reference has been made to the Board in the matter relating to its sickness This shows that the Corporation was sick not only under Section 15 on which a reference was pending, but from the record it was clear that Coloration had eroded more than 50% of its assets was before the Board in any case under Section 23 of the Act of 1985.

44. All the circumstances show that the U.P. State Sugar Corporation either ran or is running its business without any public accountability is concealing records not even from the Board, but also from the High Court The Corporation had not even cared to obtain its audited accounts reports at the relevant time only started running helter-skelter to seek an auditors" report two years after the last of them may have been available Even on this the High Court would not know what caused an audit of the accounts of the year ending 31 March 1992 not to be made in time but was caused to be made in July, 1994. This is a serious reflection on the financial affairs of the Corporation. Even the observations in the auditors" report [Supplementary Rejoinder Affidavit of petitioner, Annexure "7"] are serious. These are:

"(e) The Company has made investment in Magnums of the State Bank of India Mutual Fund the shares of the U.P. Financial Corporation which are, in our opinion, ultra vires its Memorandum of Association as the power to make such investment cannot reasonably be implied from the objects as contained in the objects clause.

(f) Loans from Industrial Finance Corporation of India Industrial Development Bank of India aggregating Rs. 59, 28, 63, 714 have been shown as secured loans in the Balancesheet notwithstanding the fact that these loans are not secured against any of the assets of the Corporation they rank as unsecured loans. Had these loans been properly disclosed unsecured loans would have been higher secured loans lower by the said amount in the Balancesheet (vide Schedule I C No. 1).

(j) Balance in personal accounts under Sundry Debtors (Schedule J) Loans Advances (Schedule L) Current Liabilities (Schedule M) have not been got confirmed by the Corporation (vide Schedule X Note No. 20).

(p) Old dormant Balances in personal accounts have to be reviewed, confirmed or reconciled by the management as such the correctness thereof or the effect on the Profit and Loss Account the Balancesheet of any adjustment in such review, confirmation reconciliation cannot be ascertained."

45. One aspect is now very clear from the record there is no doubt that neither

of the respondents, the State of U. P. or the Corporation, can pretend that no proceedings were pending before the Board. Inasmuch as the replies of both, the State of U. P. the Corporation, have been evasive in giving specific information, or, for that matter, denial, when the petitioner pleaded pendency of the proceedings before the Board. Both these respondents have found it difficult to deny the averments of the petitioners have avoided submissions to them only to submit that appropriate reply would be given at the time of hearing of the petition. At the hearing of the petition, both the respondents were at a loss to contradict anything on the merits of the matter.

46. The Advocate General, Mr. Yogeshwar Prasad, Senior Advocate, apparently, was appearing for the Corporation his only contribution to the case was that the petition is faulted for technical grounds, as a similar petition has been dismissed. On behalf of the State of U.P., the Court saw the engagement of a special counsel who did not deny the pendency of the proceedings before the Board, but, justly, appropriately plainly submitted for whatever opinion the Court might give on the petition, in view of the fact that the Corporation's record shows that it was sick failed to participate in the proceedings before the Board under Section 23, it cannot be said with confidence that the obligation of the Act of 1985 would not apply to the Corporation. This was the submission of Mr. Vineet Saran, Advocate who appeared on a special engagement on behalf of the State of UP.

47. If any submissions were placed on merits, be it as a friend of the Court or finding the situation rather odd, noticing that the respondent, i. e. the State of U. P. the Corporation, had virtually drawn a blank in contradicting anything on merits, those were the submissions of Mr. R. N. Trivedi, Senior Advocate. He was appearing by indulgence of the Court when his client had been permitted to be impleaded. The Court could have declined the request for impleadment, as the time when the petition has been presented, pending, clearly, there were no third party rights the issues should not have been complicated by the Corporation the State of U. P. This judgment would have drawn to an end, but for the arrival of a third party as an extraneous factor. But, that alone is a sordid story on which the Court has already indicated that it will deal with that part of the record, later in the judgment. However, in all fairness, Mr. R. N. Trivedi, Senior Advocate virtually submitted an argument on academics which the Corporation ought to have submitted. At least, the Court can fairly record its appreciation with much satisfaction that he participated in the proceedings to see the pros cons of the case as if he were appearing as *amicus curie*, as well as arguing the cause of his client who had a vested right, though their purchase occurred during the pendency of proceedings before the Board of the writ proceedings before the High Court. This aspect, whether a transfer of assets of the Corporation could have been effected during the pendency of this case, has itself become an issue before the High Court in this petition, protracted the proceedings, its record the judgment longer than was necessary. The rule *pendente lite nihil innovetur* during a litigation nothing new should be introduced, was violated.

48. Chapter III of the Act of 1985 relates to References, inquiries schemes. The entire Act of 1985, in generality, deals with a "sick industrial company". This expression itself is defined in Section 2(o) of the Act of 1985. The issue before the High Court, in this petition, is not whether the Corporation is sick or not. The state of the record is such that the Corporation has, on its own, applied to the Board to adjudicate on its sickness such remedial measures which may be permitted to be undertaken in the circumstances of a sick industrial company.

49. The report of the Auditors refers to an application under Section 15 as being pending before the Board. On a reading of the definition "sick industrial company" Section 15, the meaning is clear, to imply that should a company become a sick industrial company, then, it is obliged to make a reference to the Board for determination of the measures which shall be adopted in the matter of its sickness. Who is a "sick industrial company" ? The question is answered in definition clause, Section 2 (o). Simply, it means that it is an industrial company which has been registered for not less than five years, but, has, at the end of any financial year, accumulated losses equal to or exceeding its entire net worth. The record, thus, admits that the Corporation was before the Board under Section 15.

50. The matter relating to the enquiry on the sickness of a company, starts on a reference made to the Board, or on such information which may be received with respect to such company or suo motu by the Board, if it has knowledge about the financial condition of the company. On a reference being received by the Board, the law enjoins, by virtue of subsection (3) of Section 16, that the Board would complete its enquiry as expeditiously as possible an endeavour would be made to complete the enquiry within sixty days from the commencement of the enquiry. The circumstances when an enquiry would commence, has itself been explained under Section 16. The explanation to Section 16 mentions that an enquiry would be deemed to have been commenced upon the receipt by the Board of any reference or information or upon its own knowledge, reduced to writing by the Board. On this aspect, the Court, at present, can only observe that an enquiry would be deemed to have commenced with regard to a reference having been filed, when all the papers which are required to be filed by the company concerned are complete in all respects. When the time comes to complete the enquiry the Board is satisfied that a company has become a sick industrial company, then considering all the relevant facts circumstances the Board can make a suitable order either to resurrect a company or recommend its winding up. If it becomes a matter of resurrection, then, the matter relating to the preparation sanction of a scheme is prescribed under Section 18.

51. Then, there is the case of a potentially sick industrial company. The matter relating to such a company is dealt with under Chapter IV. If in a given circumstance the accumulated loss of an industrial company has, at the end of any financial year, resulted in erosion of 50% or its peak net worth during the immediately preceding four financial years, the company concerned within the

period of sixty days from the end of any financial year is obliged to report the fact of such erosion to the Board simultaneously, hold a general meeting of the shareholders for considering such erosion.

52. But, proceedings in reference to an industrial company having eroded 50% of its peak net worth, in the context of Section 23, can be reported to the Board, without prejudice to the provisions of Section 23, by the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled Bank, if it has sufficient reasons to believe that the accumulated losses of any industrial company have resulted in erosion of 50% or more of its peak net worth during the immediately preceding four financial years.

53. During the pendency of proceedings either under Section 16 or consideration of any scheme under Section 17, in the examination of the sickness of a sick industrial company, or, for that matter, a potentially sick industrial company within the meaning of Chapter IV, alienation of assets is not envisaged under the Act of 1985. Equity prohibits it. It is this very enquiry which the Board will exercise in favour of a sick industrial company or a potentially sick industrial company to consider a revival package. It is this power which has been given to the Board by the Legislature to carry out a resurrection exercise to breath life into a sick industrial company by considering various factors, circumstances schemes so that revival of a company as opposed to sending it down for winding up, is a possibility. If the Board did not have a power to examine the nature of sickness of a sick industrial company, either under Section 16 read with Section 17, or, for that matter, under Section 23 read with Section 23A, the rehabilitation of a sick industrial company would not have been possible. The very purpose of these powers being invested in the Board, is to permit an in depth analysis to rejuvenate the equity base of a company, if the circumstances permit. The power of the Board, under the Act of 1985, are wider than the erstwhile Sections 397 398 of the Indian Companies Act, 1956, where mismanagement oppression was complained against those who controlled the company. , whereas a company could be wound up, the High Court used to exercise its equity jurisdiction to remove the oppression mismanagement explore every possibility or the revival of a company.

54. While proceedings are pending inquiry, whether under Sections 16 17 on a reference being made to the Board or the examination of a potentially sick company under Section 23, all contracts, assurances of property, agreements, settlements, awards, sting orders, or other instruments in force, to which such sick industrial companies are party, or which may be applicable to such industrial company, are to remain suspended all or any of the rights, privileges, obligations liabilities, accruing or arising thereunder, are to remain suspended with such adoption in such manner as may be specified therein. These inhibitions on a sick industrial company apply expressly, if a reference has been made to a Board impliedly in the case of potentially sick industrial companies. These restraints

against a sick industrial company are provided in Section 22 of the Act. This is a rule of common sense prudence, that the substratum or the equity Base of a company must not be reduced while a special statutory authority (the Board) examines the matter of industrial sickness. It is only this examination which permits the Board to come to a conclusion after having gone through the exercise which is prescribed under the Act to either make arrangements for the rehabilitation of a company or to recommend winding up of a company, when the circumstances are such that the erosion of its assets stand at such a level that suscitation or rehabilitation or revival is of no avail, implying thereby, that the sickness is terminal its death is imminent. The power of the Board or revive a company cannot be interfered with by alienation of its assets as that would tantamount to violation of the law, i. e., the Act of 1985.

55. The Court has dealt with this aspect of the matter because the status quo as on the date of the filing of the writ petition was breached by the respondents. The Court did not expect this to happen, more so, in a case in which the Advocate General appears. In a case in which the Advocate General appears, there is an abiding faith in the state of affairs which are sub judice on matters being examined by the High Court. The state of the record before a Superior court of Record, more so, where one party is the State itself, much remain static when a certiorari issues to a State. It is an occasion when the High Court will certify, in pursuance of a writ of certiorari, as a certificate action, on what may be the, if there be any, errors, illegalities, errors apparent on the face of the record, manifest errors, patent lack of jurisdiction to do certain things, or, for that matter, illegalities or actions which are ultra vires to a statute. On the other h, a certiorari also lends its aid to certify that the State has not violated the law.

56. But, in the present case, it is apparent from the record that the State of U. P. the U. P. State Sugar Corporation or its agents assigns or those who represented it, breached the faith which was reposed in them by the High Court, with impunity. The following resume of proceedings, as stand recorded, needs to be reproduced, instead of recapitulating the facts noticed in the orders of the Court :

"2681994 Hon"ble Ravi S. Dhavan J.

Hon"ble S. K. Keshote, J.

Mr. Ashok Khare, Advocote, Counsel for the Petitioners.

Mr. Yogeshwar Prasad, Senior Advocate, Mr. H. S. Nigam, Advocate, as counsel for U. P. State Sugar Corporation Limited, Respondent No. 3.

Mr. S. M. A. Qazmi, Additional Chief Sting Counsel, for State of U. P. another State Respondent, respondent No. 1 2 respectively.

This matter was adjourned yesterday with the following order :

"Hon"ble Ravi S. Dhavan, J.

Hon"ble S. K. Keshote, J.

Yesterday upon being intimated that this petition is to be fixed on which the docket was not with the sting Counsel, Learned Advocate General made a mention that should any order be passed on the petition, he ought to be heard that he would be available only on Friday, 26 August, 1994.

Thus, this matter is adjourned until tomorrow.

Sd/RSD

SKK, JJ.

25894"

57. Upon hearing counsel for the petitioners, the Court kept its assurance to grant the indulgence sought by the learned AdvocateGeneral, to have his say, on the request made to the Court yesterday. On an enquiry of the Court on whose behalf the AdvocateGeneral may be appearing amongst three respondents, it was indicated that he was appearing on behalf of respondent No. 3, i. e. the U. P. State Sugar Corporation Limited not the State of U. P. In reference to indulgence to be heard on any orders which may be passed by the Court on the petition, Mr. Yogeshwar Prasad, Senior Advocate (as he is not appearing on behalf of State of Uttar Pradesh) submitted that on the matter of being heard on any orders being passed by .the Court, he submitted, in effect, that the reference to any orders being passed meant any adverse orders being passed by the Court.

58. As the Court cannot indicate on the nature of orders which it may pass hereinafter, but has no objection in granting an opportunity to the parties on being heard, clearly it is understood that the respondents are inviting a notice of motion. Thus, the Court is left with no option, but to issue notice to the three respondents. The notices have been accepted on behalf of respondent No. 3 U. P. State Sugar Corporation Limited, by Mr. H. S. Nigam, Advocate, instructing Mr. Yogeshwar Prasad, Senior Advocate. The latter indicated to the Court that the respondents 1 2 (the State of U. P. the Secretary, Sugar Cane Development, U. P.) are represented by the Additional Chief Sting Counsel, Mr. S. M. A. Kazmi. Counsel for the respondents, aforesaid, seek are granted time until 5 September, 1994 to answer the petition by a counter affidavit. Counsel for the petitioners prays for time until 9 September, 1994 to answer the counter affidavit(s) by rejoinder affidavit(s). The matter |will be taken up for consideration at the admission stage on exchange of pleadings on 14 September, 1994 on a date indicated by the AdvocateGeneral, U. P. which date counsel for the parties accept.

59. The question now arises on what ad interim order may be passed on the application which seeks such orders, indeed, if a stay order ought to be passed at all. On this aspect when the matter was taken up, Mr. Yogeshwar Prasad, Senior Advocate, appearing on behalf of respondent No. 3, (U. P. State Sugar Corporation Limited) vehemently opposed even the consideration of such a prayer i. e. an adinterim order. His contention was that the matter be heard but, no stay order should be passed.

60. On this, learned counsel for the petitioners expressed his anxiety of the writ petition becoming infructuous during the period, permitted the Court, for exchange of pleadings. The Court indicated to counsel for the respondent No. 3 (U.P. State Sugar Corporation Limited), Mr. Yogeshwar Prasad, Senior Advocate, or the State of U. P. for that matter, that it may be necessary for the Court to consider the prayer for an ad interim order provided the respondent No. 3, or the respondents can give an assurance to the Court that the matter as now will remain in a status quo position so that such a state of affairs is not rendered lies ponders that when the matter does come up for hearing there would be nothing left to hear. The submission of Mr. Yogeshwar Prasad, Senior Advocate, on this was that the powers of the Court are very wide to rectify a situation even if any thing adverse were to happen. Today, the Court shall refrain comment on the submission that if complications were to arise the Court has the power to reconstitute the situation.

61. Thus, rather than consider the prayer for adinterim orders today, regard being had to the circumstances of presence of the AdvocateGeneral, U. P., even though, he does not appear as he submits, for the State Respondents No. 1 2, his entry into the case occasions due regard. The Court will adjourn the proceedings until Tuesday, 30th August, 1994, with a proposition to the respondents their respective counsel. Over the weekend learned AdvocateGeneral, U. P., the respondents may think over the matter reflect on the situation while doing so they may consider that there may be no occasion for the High Court to consider the grant of an adinterim order, if the State of U. P. its Corporation, aforesaid, could give its abiding faith to the Court that while matters are under hearing, the proceedings could go on peacefully without the Court being reminder that the status quo of the state of affairs on the transfer of assets of the Corporation is being altered. This may not be an atmosphere conducive to hearing nor would it be appropriate for the Court to permit complications to happen to reconstitute situations subsequently, which may be difficult.

62. Thus, leaving it in the hands of learned AdvocateGeneral, the Court adjourns the matter until Tuesday, 30th August, 1994, on the aspect of consideration of ad interim orders :

"Place before the Court on Tuesday, 30th August, 1994"

3081994 Hon"ble Ravi S. Dhavan, J.

Hon"ble S. K. Keshote, J.

Presents

Mr. Ashok Khare, Advocate, Counsel for the petitioners.

Mr. Yogeshwar Prasad, Senior Advocate, Mr. H. S. Nigam, Advocate as counsel for U. P. State Sugar Corporation Limited, Respondent No. 3.

63. Mr. S. M. A. Kazmi, Additional Chief Sting Counsel, for State of U. P. another State Respondent, respondent No. 1 2 respectively.

64. Today, a counter affidavit has been filed on behalf of U. P. State Sugar Corporation Limited, Respondent No. 3. Counter affidavit on behalf of respondents No. 1 2 has yet to be filed as time for exchanging pleadings is yet available to these respondents. In reference to the matter relating to the grant of an ad interim order upon indulgence granted to the learned AdvocateGeneral, U. P., whose presence cannot be ignored, though he is appearing only on behalf of the Corporation, aforesaid, no ad interim orders were granted by the Court when the matter was under consideration on Friday last, 26 August, 1994. On that day the Court had put its faith in the AdvocateGeneral, U. P., that he would return it be fittingly by giving confidence to the Court that while matters are pending hearing such an impasse is not created by the respondents that, effectively, ultimately the matter is made infructuous there may be nothing left in considering the reliefs prayed for in the petition, if granted.

65. Mr. Yogeshwar Prasad, Senior Advocate, repeated his submissions of Friday last (reference orders dated 26th August, 1994) that if anything were even to be done by respondents it can always be undone by the Court on the very wide powers it has.

66. The adjournment to think over the matter was not granted to hear this submission, as peace must rule the Courts attention ought, not be diverted on the exertion of power by parties to a dispute when there is a Us between them.

67. The Court is afraid that it cannot subscribe to the proposition on behalf of the learned Advocate General, U. P., with much respect to him, is of the view that while matters are being made ready for hearing by requiring parties to exchange pleadings, the Court must not be Baited to submissions that it may on the success of the petition being parties back to the original position when the cause was brought into Court. In the circumstances of such a case, such suggestion may be misplaced.

68. Regard being had to the principle laid down by the Supreme Court in the matter of Mool Chand Yadav another v. Rasa Buland Sugar Company Limited, Rampur others, 1993 AWC 121. The Court has not been left with any option but to direct that as from the order dated 26th August, 1994, the respondents shall maintain status quo. The assets of the Corporation, movable or immovable, shall not be disturbed the possession of these assets not transferred to any other party, but retained by the Corporation. The Corporation may, however, receive offers on the assets will be at liberty to evaluate the offers the worth of the assets.

Put up on 14th September, 1994, the date already fixed." On 26th August, 1994, the Court had expressed i "Today, the Court shall refrain comment on the submission that if complications were to arise the Court has the power to restitute the situation".

69. Pendente lite these proceedings, a third party appeared at the Bandar to say that, that it has purchased, but recently, certain assets of the Corporation. This was M/s. Balrampur Mills Limited, which was permitted to be impleaded as a party during the pendency of the case. The State of Uttar Pradesh or the U. P. State Sugar Corporation, its agents or assign"s, now it is on record, signed a memorandum of understanding with M/s. Balrampur Chinni Mills Limited, Thereafter, an agreement to sell, within a span of a few days, was signed, sealed, executed duly registered. The memorandum of understanding is said to have been signed on 25th August, 1994. The deed of agreement to sell executed on 27th August, 1994, registered on 30th August, 1994. The affidavit of M/s. Balrampur Chinni Mills Limited, sworn by one S. K. Patodia, the Finance Manager, Balrampur Chinni Mills Limited, reveals no beyond reasonable doubt that the respondents had breached the faith of the Court to sell the assets of the Corporation pendente lite the case before the High Court, notwithstanding the proceedings pending before the Board, in the matter relating to the sickness of the Corporation, under the Act of 1985.

70. Unable to explain its position, pendente lite this writ petition this company (M/s. Balrampur Chinni Mills Limited) submitted on an affidavit that it was not aware of any proceedings in this writ petition nor of any orders passed by the High Court , in these circumstances, the agreement to sell had been signed that the company came to know of the orders of the High Court only 2 September, 1994 when a letter was received from the Managing Director of the Corporation. Thereafter, it is submitted in the affidavit that the Company voluntarily without any demur hand over possession of the unit to the Corporation. The Company then, submits that it has the greatest regard, esteem respect for this Hon"ble Court prays that its interest as those of the Cane growers who cannot sell the cane grown in the assigned/reserved area to any one, except to the factory at Burhwal, (Purchased by the Company) the interest on the production of sugar may be protected.

71. Messrs Balrampur Chinni Mills Limited, permitted to be impleaded as a respondent, was no where in the picture, even when notice of motion was issued on the petition merely because an indulgence to be heard has been permitted, on the creation of a third party"s right, rightly or wrongly, in favour of this Company, is no occasion to consider yet another complication when this Company may not have any status in the proceedings before the Court. Hearing a respondent is one aspect of a matter, but permitting it to join the list, is another matter. Truly, this Company has only been given an indulgence to be heard. No right has come in the offing in favour of this Company, in so far as the Court is concerned.

72. On the filing of an affidavit by M/s. Balrampur Chinni Mills Ltd., to the effect, that it may not be understood that it has violated any order, as it was not aware of the proceedings before the High Court, the situation, indeed, became serious enough for the Court to require the respondents i.e., the State of U. P. the U.P.

State Sugar Corporation, to reply to the affidavit. It did seem strange that the purchaser had no knowledge that the seller was seriously embroiled in the proceedings before the High Court as also before the Board under the Act of 1985, yet is ignorant of pending proceedings in Court.

73. To alienate an asset during the period when the Corporation was having its sickness considered before the Board, the law did not permit. The proposition of law, as it now applies to the Corporation, is accepted by the special counsel who had been engaged by the State Government. The Corporation did not argue the case on merits learned counsel appearing on behalf of the impleaded respondent, Mr. R. N. Trivedi, Senior Advocate, acknowledged that the issue before the Court is definitely writ large with legal complications, it would have been appropriate if due permission of the Board had been taken. Insofar as learned counsel on behalf of the impleaded company is concerned, it was only his fairness which impressed the court. In accepting the State of the record as it lies.

74. Now the matter whether there was a race to defeat the principle, known as *pendente lite nihil innovetur* : During a litigation nothing new should be introduced.

75. There was a direct issue raised in the petition questioning the legalities of the U.P. State Sugar Corporation Limited making any transfer at all or alienating any asset during the pendency of proceedings before the Board under the Act of 1985 during the pendency of the present writ petition. In effect, the petitioners had sought a writ of certiorari that this matter be examined the High Court be pleased to answer the question whether with a matter of sickness of the Corporation being examined by the Board, could the Corporation sell, transfer, alienate, by any means whatsoever, any of its assets. The Corporation made a faint plea in the beginning that nothing was pending the only submission on record was that it had not been declared sick. Both these aspects turned out to be incorrect as the Corporation had materially concealed suppressed facts from the High Court. This was a case in which it was absolutely clear on record that on 24 August, 1994, learned Advocate General, Uttar Pradesh, made an appearance at the Bandar to submit, that should any order be passed on the petition, he ought to be heard 24th August, 1994 was a Wednesday, it was desired on behalf of the State Government or its learned Advocate General that the matter be taken up on 26th August, 1994. That day was a Friday. On 26th August, 1994, the Court passed no ad interim order. The prayer for the grant of an ad interim order had been opposed by the Advocate General, U. P., Mr. Yogeshwar Prasad, Senior Advocate, later to appear on behalf of the U. P. State Sugar Corporation, though he entered the case as Advocate General of the State. His contention was that the matter be heard, but no stay order should be passed. Why was such a submission made without justifying it by reasons ? This will, subsequently, become clear. When learned counsel for the petitioners submitted that the matter could become infructuous without an ad interim order during the time when pleadings were being exchanged, the Court drew the attention of counsel, both

for the State of U. P. the Corporation that the question of granting an ad interim order may not arise, provided the Corporation or the respondents give an assurance to the Court that matter would remain in status quo position pendente lite the proceedings. The Balance of the state of the record would not be upset, if nothing adverse were to happen. On that date, the Court refrained comment on the submission that if complications were permitted in the case, the Court has the power to reconstitute the situation. The Court was conscious of the fact that on behalf of the respondent, notwithstanding that the status of the person who appeared on behalf of the Corporation, was that of a Senior Advocate, but otherwise of an AdvocateGeneral of the State. The Court had to give due regard to his presence before it. Friday, the 26th August, 1994, was the day before the week end. The Court left the matter by reposing its abiding faith trust in the hands of the respondents, the Advocate General of Uttar Pradesh not excluded. The Court expected that over the week end, the State respondent the Corporation would carefully ponder over the situation, without the Court being reminded that the status quo of the state of affairs on the transfer of assets of the Corporation had been breached. Thus, on 26th August, 1994, the Court recorded its order, to say, "Thus, leaving it in the hands of learned AdvocateGeneral, the Court adjourns the matter until Tuesday, 30th August, 1994, on the aspect of consideration of ad interim orders".

76. When the matter was taken up on 30th August, 1994, on behalf of the counsel for the Corporation, the submissions were repeated by the learned Senior Advocate, to the effect, that if any thing were done by the respondents, pendente lite the proceedings before the High Court, it could always be undone, as the High Court has very wide powers to undo it. By now, it was clear to the Court that the abiding faith trust which the Court had reposed In the hands of State of U. P. the U. P. State Sugar Corporation Limited, meant nothing to them, nor did these respondents have any respect for the proceedings of the High Court, or, for that matter any Court. Their submissions on record had virtually made it clear to the Court that it was indeed intended to disturb the status, quo of the record pendente lite the proceedings in the writ petition before the High Court. Thus, the Court passed an ad Interim order on 30th August, 1994, to the effect, that the respondents would maintain status quo that the assets of the Corporation movable or immovable will not be disturbed the possession of these assets not transferred to any party, but retained by the Corporation.

77. On 7th September, 1994, a party which was not a party to the proceeding whose presence was not even expected, at least from the record, was applying to the Court, in effect, that the ad interim order of the High Court be vacated. This was the application of M/s. Balrampur Chinni Mills Limited, Calcutta. This Company submitted that it had purchased the Burhwal unit of the Corporation as being the highest bidder for a sum of Rs, 4,51,00,000 a memorandum of understanding had been signed on 25 August, 1994. This Company was also placing the record before the Court, on an affidavit that on 27th of August, 1994, an agreement to sell had been executed a Balance of Rs. 3,38,25,000 was paid

to the U. P. State Sugar Corporation "the actual physical possession" of the sugar factory had been taken over. This Company was also making an averment in the affidavit that it had paid a sum of Rs. 28,18,700 towards the registration charges that the agreement had been registered.

78. The glaring facts now before the High Court are that the memorandum of understanding had been signed on 25th August, 1994, the agreement to sell on 27th August, 1994 registered on 30th August, 1994. Were the proceedings before the High Court in which notice of motion was accepted by the respondents, in a case in which an Advocate General appears, unknown to the respondents ? Even notices on the aspect whether an ad interim order should be passed or not, had already been issued as the State of U. P. the U. P. State Sugar Corporation had themselves accepted notices on the notice of motion.

79. The memoranda of understanding is appended as Annexure 1 to the affidavit of the Company, M/s. Balrampur Chinni Mills Limited. The record shows, it was signed on 25th August, 1994. The affidavit of the Company affirmed on 5th September, 1994, is by one K. N. Ranasaraiya, describing himself as the Company Secretary of the Balrampur Chinni Mills Limited, Calcutta. The agreement to sell was registered before the Registrar of Stamps, Barabanki. The value of stamp duty, as a prelude to the exercise of registration amounting to Rs. 28,18,750 was paid into the State Treasury at Lucknow. This amount of Rs. 28,18,750 (Rs. Twenty Eight Lakhs Eighteen Thousand Seven Hundred Fifty) was initially credited by cash before the State Bank of India, Branch Lucknow on 27th August, 1994. The money was deposited on behalf of M/s. Balrampur Chini Mills Limited. This money was transferred into the State Treasury on the same day. The deposit was made at the State Treasury at Lucknow, with the depositor describing himself as the purchaser. The memoranda of the receipt of the State Bank of India dated 27th August, 1994 in favour of the Treasury Officer is appended as Annexure 2 to the affidavit. Likewise, the receipt of the Government Treasury, dated 27th August, 1994, the same day, follows in continuation of Annexure 2 to the affidavits. 27th August, 1994 was a Saturday, on which day banking institutions work for half the day only. Could a common man or an ordinary man, have succeeded in rushing in the acceptance of a cash deposit of over Rupees Twenty Eight Lakhs first with a public Sector Bank then transferred to the State Treasury, all these Banking transactions transfer to the Bank the treasury completed within half a day of Banking hours of a Saturday ?

80. On 27th August, the Managing Director of the Corporation informs the General Manager that the documents have been executed the matter of handing over the possession be expedited. This is the letter dated 27 August, 1994, appended as Annexure 3 to the affidavit of the company. A letter of 31 August, 1994 from the General Manager to the Managing Director records, that the sale delivery of possession has been effected. The letter reads that only the matter of the gate pass the delivery challan remains an appropriate order on this be issued. In all documents, there is nothing whatsoever to suggest that a matter is

pending before the High Court in a writ petition in which the question of alienation of assets of the Corporation is in issue.

81. The documents were being executed by the U. P. State Sugar Corporation as the seller. The U. P. State Sugar Corporation Limited is an active contesting respondent. In the documents which were being executed by the U. P. State Sugar Corporation, the Corporation was pretending as if there was no pendency of a writ petition or ignoring the pendency of the writ petition at the High Court. In fact, it was proceeding to complete the documentation so as to make the transfer of the property effective complete, in all respects. For the first time, the Managing Director by his letter of 2nd September, 1994 writes to the General Manager making a reference to a Stay order of the High Court. But the Managing Director forget that his counsel had received notice, whether appearing as Senior Advocate on behalf of the Corporation or as Advocate General on behalf of the State respondents.

82. Was the State of U. P. the U. P. State Sugar Corporation Limited unaware (a) of the pendency of the writ petition ? (b) notices of received, issued accepted on its behalf ? (c) the matter relating to the issue of an ad interim order being the subjectmatter of active consideration by the High Court ? (d) a positive submission made on behalf of the State respondents that no ad interim order be passed (e) submission made to the Court by its Advocate General that if the status quo is ever disturbed, the Court had wide powers to reconstitute the situation ?

83. Thus, under the law, upon the facts the circumstances on record by presumption or otherwise, the State of U. P. or the U, P. State Sugar Corporation cannot pretend that a writ petition was not pending the matter relating to the grant of an ad interim order was not an issue which was being considered finally, an ad interim order had, in fact, been granted. In the face of these circumstances, to execute a memorandum of understanding have an agreement to sell signed, executed registered, receive consideration of an amount of Rs. 4,51,00,000 (Rupees Four Crores Fifty Lakhs) the deposit of registration charges above Rs. 28,18,750 (Rupees Twenty Eight Lakhs Eighteen Thousand Seven Hundred Fifty) cannot, even in modest terms, be accepted to suggest that the rule of law may not have been violated. If the State of U. P. the U. P. State Sugar Corporation come down to showing such disrespect to proceedings before the High Court, how could one expect a common man to rise to the occasion conform to the proceeding which are before a Court of Law, whether it is before the Munsif, District Judge, High Court or the Supreme Court?

84. One aspect also needs to be considered that this is a side issue which has become an important issue if the State of U. P. the U. P. State Sugar Corporation had conformed to the law which they did not, third party rights would not have come into existence. Third party rights were created in the face of proceedings before the High Court, showing scant respect to the proceedings the Rule of Law, in a case in which an Advocate General, appears. It was in such circumstances

that the special counsel for the State of U.P., submitted that the State of U.P. its Government, in this case, would be bound by the opinion so rendered on the certificate action of a writ" of certiorari before the Court. Notwithstanding this submission, the State of U. P. is free to act as it may.

85. The question now arises, on who had defiled the sanctity of the proceedings before the High Court or had arranged to breach the orders of the Court ? This is for the State Government to find out. There is now no doubt that the Government had shown contempt to proceedings of the High Court has violated the rule of law with impunity, not only the proceedings before the High Court, but also violated the law which is the Sick* Industrial Companies (Special Provisions) Act, 1985.

86. On 28th September, 1994, M/s. Balrampur Chinni Mills Limited filed as an affidavit through its Company Secretary. The contents were attempting to explain to this Court that this Company, as a purchaser at no stage, had been made aware either of the pendency of the writ petition or orders of the High Court in the writ petition. The Company was trying to explain its position that the execution of the sale deed, its registration passing of consideration to the U. P. State Sugar Corporation had all been done in the circumstances that the Company was unaware of the proceedings the orders of the Court. This is only an admission that a third party's right which was not meant to exist, thus, was created. This Company only desired that it be permitted to be heard. Insofar as hearing is concerned, the Court ought not to deny a hearing to this Company as, in a matter like this, it is always better to hear than not to. But, somebody will have to answer take the responsibility, for complicating the situation, to put it modestly.

87. On the affidavit of the Company, on the ignorance of the pendency of the case the orders passed on it, the Court had no option, but to require the State respondents, the State of U. P. the U. P. State Sugar Corporation to reply to it. The reply is even stranger than the fiction. On behalf of the State of U. P. through the Chief Secretary of Uttar Pradesh the Secretary, Sugar Cane Development Department, Government of Uttar Pradesh, respondent Nos. 1 2, the affidavit explaining the circumstances in which the orders of the Court may have been breached, has been filed by Mr. D. K. Mittal describing himself as the principal Secretary (Sugar Industries Cane Development Department), Government of Uttar Pradesh Lucknow. The affidavit is short is reproduced below.

88. That the deponent do hereby solemnly affirm State on oath as follows :

(1) That the deponent is the principal Secretary (Sugar Industry Cane Development Department), Government of Uttar Pradesh as such is fully acquainted with the facts deposed to below is filing this affidavit on behalf of the respondent No. 1 2.

(2) That the deponent has read the Affidavit of S. K. Patodia filed on 28/9/1994 on behalf of M/s. Balrampur Chinni Mills Ltd. has understood the contents thereof.

(3) That the contents of Paragraph No. 1 of the said affidavit need no reply.

(4) That with regard to the contents of Paragraph No. 2 of the said affidavit, it is only admitted from the record that the agreement was signed on 27.8.1994. The rest of the averments made in the paragraph under reply relate to the respondent No. 3, U. P. State Sugar Corporation.

(5) That the contents of paragraph No. 3 of the said affidavit relate to the respondent No. 3, U. P. State Sugar Corporation.

(6) That with regard to the contents of paragraph No. 4 & 5 of the said affidavit it is submitted that the answering respondents till 19.1.1994 only knew of the filing pendency of the writ petition in the Hon'ble High Court but were not informed of or communicated the orders of the Hon'ble Court dated 26.8.1994, [(1995)1

The deponent or the answering respondents were not aware of any orders to the effect that the respondents in this writ petition were to refrain from taking further steps towards the sale of the units. It may be submitted that as soon as on 19.1.1994, the answering respondents came to know of the orders passed in this writ petition, the State Government immediately on 29.1.1994 passed suitable orders to the Managing Director, U. P. State Sugar Corporation Ltd. to take appropriate steps to regain the possession of the assets of the Burhwal unit on the same date, the possession was taken back by the Corporation. The deponent the answering respondents (including its officers) have utmost respect regard for the orders of this Hon'ble Court.

(7) That the contents of paragraph No. 6 of the said affidavit do not relate to the answering respondents.

(8) That the contents of paragraph Nos. 7 & 8 of the said affidavit are not denied.

(9) That the contents of paragraph No. 9 of the said affidavit are denied for want of knowledge."

89. On behalf of the U. P. State Sugar Corporation, the situation has been explained in an affidavit of one Bharat Bhusan, Company Secretary, U. P. State Sugar Corporation Limited, 5 Mira Bandai Marg, Lucknow. This affidavit is also short is reproduced below :

I, the deponent, above named do hereby most solemnly affirm state on oath as under :

(1) That the deponent is posted as company secretary in U. P. State Sugar Corporation Limited is well acquainted with the facts deposed below.

(2) That the deponent has read the contents of affidavit of Shri S.K. Patodia Finance Manager of M/s. Balrampur Chinni Mills Limited has understood the same,

(3) That the deponent is filing the present affidavit in compliance to the order dated 28th September, 1994 passed by the Hon'ble High Court.

(4) That the contents of paragraph No. 2 of the affidavit are admitted to the extent that the agreement to sale was signed on 27th August 1994 the amount of Rs. 3,38,25,000 was received by the Corporation. It is also correct that the agreement of sale was signed by Shri Prem Narain the then Managing Director of the Corporation but the rest of the contents of the paragraph under reply cannot be replied due to want of knowledge. It is most respectfully submitted that the agreement to sale was signed the amount was received as neither the deponent nor the Managing Director of the Corporation had any knowledge of the order dated 26th August, 1994 by the Hon''ble High Court.

(5) That in reply to the contents of paragraph 3 of the affidavit, it is stated that the letter dated 27th August, 1994 was also issued by the Managing Director as neither the deponent nor the managing director has any knowledge of the order dated 26th September, 1994 due to Bank of communication because the office of the learned counsel for the corporation has not been informed the corporation about the order within time.

(6) That in reply to the contents of the paragraph 4 of the affidavit it is stated that the corporation sent it's employees to Allahabad to collect certified copy of the order dated 30th August 1994 he after obtaining the certified copy of the order dated 30th August 1994 from the office of the learned counsel for the Corporation submitted the same in the office of the corporation the State Government also informed the Corporation on 2nd September, 1994, about the order dated 30th August, 1984 so the Corporation immediately proceeded in the matter by sending the letter dated 2nd September, 1994 took Bank the possession of the assets of the unit from the Company M/s. Balrampur Chinni Mill on 2nd September, 1994.

(7) That in reply to the contents of paragraph 5 of the affidavit it is stated that when the corporation as stated above got the knowledge of the order dated 26/30 August, 1994 the letter dated 2nd September, 1994 was sent in compliance to the direction given by the corporation the possession of the suit was handed over by the company to the corporation on 2nd September, 1994.

(8) That the contents of paragraph 6 of the affidavit can not be replied due to want of knowledge.

(9) That the contents of paragraph 7 of the affidavit need no reply.

(10) That the contents to the paragraph 8 of the affidavit need no reply.

(11) That the contents to the paragraph 9 of the affidavit can not be replied due to want of knowledge.

90. Thus, between the respondents, actively associated with the sale of the assets of a State Sugar Corporation, ignorance has been expressed of the proceedings of the Court. In a case which has been vehemently opposed on behalf of the State respondents, the contention of these respondents is that they had not been apprised of the orders of the Court. The Sting Counsel, whether of

the State of U. P. or of the Corporation, had sting instructions to oppose the petition, the proceedings apparently watched participated, it is being explained to the Court that counsel knew of the proceedings, but their clients did not. The foundations of breaching the orders of the Court had been laid on the second day when either the Advocate General or counsel for the Corporation entered the Bandar to receive notice. It is very difficult for the court to give a finding beyond a reasonable doubt that the State respondents did not know of the proceedings unless the best defence of these respondents is that they had not been made aware of the proceedings formally or not at all by its counsel. If this were correct, then, why was there a rush to complete the documentation on transfer of the assets, as if there was a race between the car which was carrying the documents the proceedings of the Court, considering the grant of an ad interim order ? All the activities appear to have been done on the week end of Friday, the 26th August, 1994. The passing of the Balance consideration (over Rupees three crores), the deposit of registration charges (over Rupees Twenty eight Lakhs) the registration of it appears to have been done on the week end, implying thereby, that all was done between the beginning of the week end the only working day available in the week end, i.e., 27th August, 1994, as 28 of August, 1994 was a Sunday. On 29th August, 1994 it was a gazetted holiday on the eve of Krishna Janmashtami. An ordinary man will not be able to deposit a sum of over Rs. 28 Lakhs have it transferred to the Treasury as registration charges of this huge amount on a Saturday when the Banking hours are only for half of the day. An ordinary man after all this has been done cannot have the document registered before the Registrar for registration in the Balance of the time, which remains between the deposit of registration charges of 28,18,750 its transfer to the Treasury drafts settled drawn up the document being registered on the first day after the long week end why this rush.

91. It is attempted to be explained in the affidavit of the Corporation that this respondent had information of the orders when the certified copy was received of the orders of 30th August, 1994. As public accountability this explains nothing about awareness of proceedings its day to day progress in which Sting Counsel appeared both for the State of U. P. the Corporation. Thus, the affidavit explaining the situation on behalf of the Corporation or the State of U. P. does not give any credence to the theory that the respondents were not aware of the proceedings or the orders of the High Court obtaining of a certified copy of the order on 30th August, 1994 explains nothing. For the principal Secretary (Sugar Industries Cane Development Department) in explaining the situation by his affidavit to submit that he was not aware of the orders until 1st September 1994, but he acknowledges that he was aware of the proceedings, but does not say since when, the explanation, breaches public confidence. His contention is that he came to know of orders only on 1st September, 1994. This is a shabby defence, entered to explain the situation in a very immature way that the State Government know of the pendency of proceedings, but to pretend that it never knew of the orders in a case in which a battery of counsel appear on behalf of

the Government. The memorandum the articles of association of the U. P. State Sugar Corporation show Secretaries to the Government of Uttar Pradesh including the Chief Secretary holding the status of share holders as Directors of the Company. The Board of Directors of the .U.P. State Sugar Corporation Limited is constituted in its ex officio capacity by members of the Civil Services. The Court is not satisfied with the explanation given in concert by the U.P. State Sugar Corporation Limited, or, for that matter, the State of U.P., that it executed as a sale agreement during the pendency of proceedings to violate not only (a) the sanctity of the proceedings before the High Court, (b) the principal of pendente lite nihil innovetur, (c) the rule of law in having done what it did, when its sickness is a subject matter of consideration before the Board under the Act of 1985, (d) the Board had been seeking information from the Corporation in the matter relating to its sickness whether under Section 15, or for that matter, under Section 23 , further, (e) the State of U. P., in any case, under the amended Section 23A, knowing fully well that proceedings were pending before the Board in the matter of either a Sick Industrial Company which the Corporation was, or, for that matter, a company which had eroded 50 per cent of its peak net worth, could have permitted the alienation of assets of the Corporation.

92. The rule of law had been violated by the Corporation the State of U. P. brezenly. Both the Corporation the State Government, have shown contempt to the proceedings before the High Court ; a Corporate body Government can commit contempt, it is not that such an action lies only against individuals. This is one such case. But, when the State violates the Rule of Law violates the sanctity of proceedings before a Court of Law, having done so, cannot explain itself, the Constitutional machinery in the affairs of the administration of the State stands violated.

93. Now the aspect the indulgence which the impleaded respondent (M/s. Balrampur Chinni Mills Limited) has received at best to be heard the examination of the record issues, all legal threadbare on a writ petition. The Court has heard the impleaded respondent examined the record upon hearing him. In fact, Counsel for this respondent was the only one amongst the respondents to plead argue on every aspect on merits., which otherwise was the duty of the Corporation or the State of U. P. On this account the Court appreciates the assistance to the Court by Mr. R. K. Trivedi, Senior Advocate appearing for the impleaded respondent Any indulgence which was granted by the High Court, let it be understood, was clearly granted for the politeness the grace the regard shown by learned counsel who appeared for the Company impleaded as a respondent, i.e., M/s. Balrampur Chinni Mills Limited. One thing was absolutely clear that this respondent, even has no locus standi either under law, equity or the good conscience jurisdiction of the High Court. The clothes which this respondent wears shows their personality beneath them. Indulgence is granted to those who come clean before the Court. The Court is not, at present, certifying, nor giving a finding that the impleaded respondent, M/8. Balrampur Chinni Mills Limited, may have known of the orders of the Court, nor is the Court giving it a clear

certificate, to the effect, that it was, in effect, not aware of the orders of the Court either. The manner in which the status quo, when the petition had been brought notice of motion had been issued accepted, was being altered with undue haste speed, on which the Court has reflected as above, leaves the High Court in doubt, whether in fact the respondents were unaware of the orders of the High Court, or that they were not conscious of the proceedings before the Board on a matter of public finances public accountability. There is much which the respondents, originally arrayed, have to sort out, if indeed, there was some communication gap between them the counsel who represented them.

94. After going through the arguments in detail. Learned Counsel on behalf of M/s. Balrampur Chinni Mills Limited, acknowledged that he was making the best out of a Bad situation. He was proceeding on the hypothesis that his client knows nothing, either of the pendency of proceedings before the High Court or the stay order of the High Court or the proceedings before the Board under the Act of 1985. If that be the case, then the question arises on what the law is in such circumstances. He was fair enough to contend that regard being had to the circumstances that a reference is pending enquiry within the meaning of Sections 15 16 of the Act of 1985, alienation of the assets of a company which is the subjectmatter of an enquiry, of the Corporation's sickness before the Board, is just about the worse thing which could happen. He accepted that in pursuance of Section 22, whereby an enquiry proceeds in reference to a sick industrial company, all contracts, assurances conveyances, decrees, distresses or other things which partake the nature of diluting the assets of a sick industrial company, are to remain in abeyance.

95. The rule is equitable. A revival package can be considered only for such a company which retains its body infect. One cannot sever the limbs of an already sick industrial company reduce it to a scale of acute sickness , then, expect the Board to consider a revival package or resuscitation, or, for that matter, rejuvenation. Thus, by law, M/s. Balrampur Chinni Mills Limited could not be a purchases for the simple reason that the Corporation could not sell. When the Corporation itself reported that it had eroded 50 per cent of its peak net worth, the situation was becoming even worse than a reference under Section 15 for considering a revival of a sick industrial company on an enquiry under Section 16. The peak net worth of the Corporation had been eroded four years prior to 1994. Even the resolution of the Board of Directors of the Corporation certifies this aspect. The Corporation disclosed to the Board that there was a resolution on 25 October, 1993. When the Board asked for a copy of the minutes of the resolution, the Corporation was quick to forget the existence of this record with a hurried meeting on 28th July, 1994 was conferring virtually an ex post facto certificate that it in a state where 50 per cent of the peak net worth of its assets had been eroded. The meeting of the Corporation itself is a reflection on public accountability, as it was only occasioned because the Board had made an enquiry. The Corporation could not answer the letter of the Board immediately because it had been required to send the minutes of the resolution when the

Corporation, as a sick industrial company, it had considered that half of its net worth had been eroded, but there was no meeting as the Corporation had given out. It is only as an after thought that the Corporation set about the exercise to hold such a meeting, apparently, replied to the letter of the Board received during May 1994, in September, 1994. A meeting of 25th October, 1993, was a fiction.

96. What remedies could M/s. Balrampur Chinni Mills Limited have against the Corporation ? It had, it is contended, paid a sum of Rs, 4,95,76,765 in purchasing the sugar unit at Burhwal The certificate action which has been brought before the Court, upon being examined, in pursuance of a writ of certiorari, reveals that all contracts which the U. P. State Sugar Corporation may have signed during the pendency of the writ petition , more so, the alienation of its unit at Burhwal, is void. Void in so far as the proceedings before the Board the High Court are concerned. If the contention of M/s. Balrampur Chinni Mills Limited is that it had no knowledge of the orders of the High Court, then the question arises did it have the knowledge of the proceedings before the Board under the Act of 1985 ?. There is no escape from either. if indeed, M/s. Balrampur Chinni Mills Limited had, beyond reasonable doubt, no knowledge of either the proceedings before the Board or the proceedings before the High Court, then the issue arises that the contract which had been signed with the U. P. State Sugar Corporation. Whether it was a memorandum of understanding or an agreement to sell, at present forgetting the rush in which it was signed, comes within one of the two principles of the law of contracts, known as caveat emptor or uberrimae fide.

97. If the Balrampur Chinni Mills Limited was unaware of the proceedings, it has to show beyond a reasonable doubt that it signed the contract by being misled by the U. P. State Sugar Corporation, with essential information kept away that it was enveloped in proceedings before the Board under the Act of 1985 the present writ petition also. In that case, the principle of Uberrimae fide would apply, to entitle M/s. Balrampur Chinni Mills Limited to seek its remedies, but in appropriate Courts. But, if the situation is that it was, all along, aware of the proceedings either before the Board or before the High Court, yet chose to enter into a memorandum of understanding or an agreement to sell with full knowledge of the proceedings, then it signed the contract under the principle of caveat emptor : purchaser beware. In that eventuality, is entered into the contract with a risk in that case pleas of misrepresentation or fraud, as is being suggested, may not be available to a purchaser.

98. The concept of the principle, particularly, Uberrimae fide, in its applicability to the law of contract, has not developed in India of late, It is a Common Law doctrine. It applies as a principle to contracts as otherwise it is a commonsense Principle of equity. The law of contract, in its applicability to contracts, which cover insurance risks or the sale of goods in India, is not radically different than the Common Law doctrine. The reason why the principle, Uberrimae fide, did

not develop or was not considered by the Courts In India of late, was a theme is not different than the theme which the Court has been required to answer in this very case on which the Court has refrained to interfere in the policy of the State Government to fall in line with a liberalised economy. Forty years since India became a Republic, she was falling in line with a socialistic pattern of economy free trade was not the theme in generality. The principle of *uberrimae fide* is Basically a code of conduct which rests on abiding good faith without which a free economy would not exist, whether it is the stock market, an insurance contract, or the purchase of real estate. Conditions as to warrantee or any special feature 011 a property which is to be passed (in a contract of insurance to disclose all material facts which go into the making of a contract of insurance) must be disclosed by the seller to the purchaser. Nondisclosure affects consent. It makes the contract voidable. When the contract can be avoided, it will be dependent on the facts circumstances of each case. But, if indeed, there is a branch of faith in the manner in which a consent of a purchaser may have been taken, an action for damages could lie. The following passage from Anson's Law of Contract is relevant:

"We have already noted that silence does not normally amount to a misrepresentation that there is in general no duty of disclosure of material facts before the contract is made. But there are some contracts in which more is required than a discreet reticence. They are known as contracts *uberrimae fide* of the utmost good faith they may be avoided unless there has been full disclosure of all material facts.

Two reasons can be advanced for the existence of a duty of disclosure. The first is that, in certain clauses of contract, one of the parties is presumed to have means of knowledge which are not accessible to the other, is therefore bound to tell him every thing which may be supposed likely to affect his judgment. Contracts of marine, fire life insurance, indeed contracts of insurance of every kind or of this nature. The second reason is that, in certain situations, the parties stand together in a special relationship of confidence which imposes upon the party in whom confidence is reposed a duty to make disclosure. The clearest examples of such situations arise where there is a fiduciary relationship. It is true to say that : "whether the contract be one requiring *uberrimae fide* or not must depend on its substantial character how it come to be effected". But these two reasons would account for most situations where, at common law or in equity, contracts have been held to be *uberrimae fide*",

[Ansons Law of Contract, Twenty Sixth Edition, AG Guest, page 231].

99 Then, on the applicability of either principle, whether *uberrimae fide* 01 "caveat"emtor (utmost good faith or purchaser beware) the following opinion regarding the obligations of a seller rights of a purchaser, is relevant :

"Contracts for the sale or I have been said in some respects to be contracts *ubertimae fide* ; but no special relationship of confidence exists between the

parties, nor is the vendor of I uniquely in a position to know all the facts relating to the property sold, caveat emptor is just as much the rule in contracts for the sale of I as it is to contracts of sale of goods.

Nevertheless a vendor must he has contracted to sell, the nature of his right purchaser is unable to chase, the purchaser will sale to the return who has contracted to enforce the contract if be able to convey precisely that which If he has misdescribed the I, or interest in the I, so that the obtain that which he contracted to purchase entitled to refuse to complete the of his deposit. A vendor, for example, sell absolute freehold property cannot his title is possessory only not absolute or if the I is subject to restrictive covenant of which the purchaser was not made aware. Further, a vendor or cannot, by a condition of the contract, compel the purchaser to accept a title which the vendor knew to be a Bad title, but did not disclose. In one sense, therefore, it could be said that a on duty of disclosure is imposed no the vender. On the other h, since the purchaser's remedies do not normally depend upon knowledge or means of knowledge on the part of the vendor, it is better to regard the relief afforded for misdescription as Based on the inability of the vendor or convey that which the purchaser was led to believe he would get under the contract.

If the defect is a serious one, equivalent, in fact to a substantial misdescription, the purchaser can legitimately claim that he has not got what the contracted to buy. He is then entitled to resist specific performance , if necessary, to rescind the contract while, it is stiff executory ; be will not be prevented from doing so by a stipulation which provides that errors, misstatements or omissions shall not annul the sale buit are to be matter of compensation only. Alternatively, he can affirm the contract claim specific performance with an abatement of the purchase price.

If, however, the defect is slight, the purchaser gets substantially what he contracted to buy, he can be compelled to complete the sale subject to compensation to be made by the vendor. The right of a purchaser to rescind the contract or to resist specific performance on the ground of substantial misdescription is available, not only where the misdescription is a term of the contract of sale, but also where it arises from a misrepresentation made in the course of negotiations leading to the contract. But if the misdescription is the result of a misrepresentation, even though this is subsequent embodied as a contractual term, the right to rescind can be exercised after conveyance....."

[Ansons Law of Contracts, Twenty Sixth Edition, A.G. Guest, Page 238] 100. Then there is the other aspect of the matter in the law of contracts that the goods intended to be said are merchantable. In the present case, on the application of the Act of 1985, it is in issue that there was an embargo to alienate the assets of the company except by the leave of the Board. , if the Act of 1985 was not enough, proceedings were pending before the High Court for consideration whether the Corporation could effect a sale, regard being had to

the law as is contained in the Act of 1985, otherwise known as the Sick Industrial Companies (Special Provisions) Act, 1985. Therefore, it is very difficult for the Court to know that the respondent which was permitted impleadment at the time of hearing, whose existence neither the petitioners nor the record knew, can today contend before the High Court that they were not aware of the proceedings, either before the High Court, or, for the matter, before the Board. As observed earlier, the High Court is not giving any finding that this impleaded respondent was not aware of the proceedings in the writ petition or before the Board. In this regard it is for this impleaded respondent to challenge the Corporation, if it is truly genuinely of the opinion that it had been led up the garden path, by the Corporation, to act on a misrepresentation to violate the sanctity of the proceedings before the High Court as well as the Act of 1985. A party cannot be permitted to take advantage of its own fraud. The High Court would not know the extent of misrepresentation the Corporation may have made, to the impleaded respondent, indeed if it has. The High Court only knows that the respondent Corporation had arranged to accept notice at the Bandar of the Court yet it continued to create a third party right, a complication created by the respondent Corporation. Thus, the impleaded respondent also can take no advantage of the situation to pretend that it was not aware of the order of the Court.

101. The doctrine, *uberrimae fide*, is otherwise embodied, in effect, in Sections 18 19 of the Indian Contract Act, 1872. Consent an essential ingredient of a contract is vitiated if there be misrepresentation or fraud. Misrepresentation is dealt with in Section 18. It reads :

"18. "Misrepresentation" means includes(I) the positive assertion, in a manner not warranted by the information of the person, making it, of that which is not true, though he believes it to be true ;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him ;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

"Fraud" is provided for in Section 17, which reads :

"17. "Fraud" means includes any of the following acts committed by a party to a contract, or with his connivance", or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true ;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive ;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation. Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

102. One of the aspects submitted on behalf of the impleaded respondent (M/s. Balrampur Chinni Mills Limited) was on the relief it was seeking, that either it be permitted to possess the assets of the Corporation on such terms conditions which the High Court may impose, or be permitted to run the sugar factory for the current reason on any further conditions which the High Court may impose, or the High Court may grant certify an ex post facto sanction on the sale which has taken place of the Burhwal unit of the U. P. State Corporation purchased by the impleaded respondent. M/s. Balrampur Chinni Mills Limited.

103. It is not possible for the High Court to accept these submissions. Though, the Court appreciates the humility with which they had been made as part of an argument on merits of the case, which, otherwise ought to have been made either by the State of U. P. or by the U. P. State Sugar Corporation. But it took a third party to make the submissions on merits before the Court. Yet, while appreciating the submissions made at the Bandar by the Senior Advocate of the impleaded respondent. Mr. R. N. Trivedi, it may not be possible for the High Court to formulate a relief as is desired on behalf of this respondent. When the High Court permitted impleadment, it did so to grant an opportunity to this impleaded party to be heard. Third, party's rights, in the present case, clearly, were rushed into with much haste, speed in abnormal circumstances. Even if the impleaded respondent never knew of the proceedings pending before the Board, now that it has been made aware of it, any ex post facto sanction which it seeks, must be addressed to the Board not before the High Court. Before the High Court, the situation was only complicated in rushing into documentation to manufacture create a third party's right, when such rights could not even accrue to such a third party, under the law the present circumstances.

104. From the record which has been seen by the Court, it appears that the Corporation as a whole is a sick industrial company. There is no issue on this, nor has this been resisted before the Court. The fact that the Corporation is before the Board, on, a reference under Section 15, or, for that matter, on the erosion of its peak net worth being beyond 50% under Section 23, is a matter of record not one of issue. The question, whether a sick industrial company which has; a large number of industrial units, may be permitted to dispose of any one of them in any given circumstances, before the High Court is only academic. Even if the answer were in the affirmative, the forum where such sanction could be granted to the Corporation would be the Board for Industrial Financial Reconstruction,

that is, under the Act of 1985. The High Court cannot take upon itself to grant ex post facto sanction of a transaction which may have been undertaken between the Corporation the impleaded respondent, admittedly, in irregularity. The law is against both the Corporation the impleaded respondent. In such circumstances, the High Court cannot even exercise its equity jurisdiction, as alienation of an asset in the matter relating to the sickness of a sick industrial company, if it is a matter of rejuvenation by cutting of a diseased limb, is the special jurisdiction of the Board, under the Act of 1985. This is the equity jurisdiction of the Board, regard being had to the facts circumstances of the present case, not the High Court.

105. What had been bothering the impleaded respondent was that if the Corporation is sick as a whole, the possibility of the Board granting peace meat permission or sanction to sell a part of the asset may not be possible. If the law is such, then, the High Court cannot carve out a case for this respondent which may have rushed into a contract to walk oil with a slice of the cake, in the face of all inhibitions of law against it by walking on the wrong side of law. But, on examining the provisions of the Act carefully, the solution may be available under the Act of 1985. Only, but such a solution may be available for only those who seek it permit the Board to consider their submissions. The solution is not available to those who will violate the law, will not come under the umbrella of the Act of 1985 for a resuscitation exercise to rejuvenate a sick company. If any particular unit of a sick industrial Corporation is affected with malignancy, the law permits severance of that unit. But, all this is part of a prepared a sanctioned scheme, duly considered upon a reference being tiled scrutinised considered under Section 17 of the Act of 1985. The sanction of it may be provided under Section 18. Under Section 18 the sale of an "undertaking" as opposed to a Company as a whole, can be contemplated for being sold under clause (d) of subsection (i) of Section 18 of the Act of 1985. For the information of the impleaded respondent, one of the measures for rejuvenating a sick industrial undertaking. Where an operating agency has been required to prepare a scheme with respect to such sick industrial company, it may be provided as a measure of restructuring, resuscitation or rejuvenation by transferring a part or a whole of any industrial undertaking of the sick industrial undertaking by sale or lease. To provide for such measures, Section 18 of the Act of 1985 enjoins that the operating agency may prepare a scheme for considering the sale or lease of a part of whole of any industrial undertaking of the sick industrial company.

106. Thus, an industrial undertaking being a part of the whole of the sick industrial company, may be considered for either being leased or being sold, as part of the arrangement of a scheme being prepared under subsection (3) of Section 17 of the Act, aforesaid. Section 18(1) (d) provides that where an order under Section 17(3) has been made in relation to a sick industrial company, the operating agency is obliged to prepare a scheme for sale or lease of a part or whole of the sick industrial undertaking. It follows from this that if the impleaded respondent desires to conform to the law, which may have been violated by the

Corporation, it will have to appear before the Board. There is no escape from the Board either for the Corporation or for the impleaded respondent. Insofar as both of them are concerned, they have done or acted incorrectly in arranging a contract which the law prohibits. In the present circumstance, any memora of understanding, agreement to sell or sale which the Corporation may have made with the impleaded respondent, is void. It is only the Board which can lend a change in it, if it is to be made voidable from being void. The discretion will be of the Board.

107. But, not to be ignored is the last submission on behalf of the petitioners, all employees of the Corporation. They are already challenging the action of the Corporation to alienate its assets without the permission of the Board. It is contended on their behalf that one of the aspects which the Board considers in removing the sickness of a sick industrial company is the possibility of a cooperative society formed by the employees of such sick undertaking fixing of reserve price for such sale as also lease of the industrial undertaking to any person, including a cooperative society formed by the employees for such undertaking. What the petitioners have contended is otherwise to be found in Section 18(2) (i) (j). In reference to the context subsection (i) (j) are reproduced below :

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

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

108. Even otherwise, if proceedings in the case of a potentially sick industrial company is before the Board where accumulated losses have resulted in erosion of 50% or its peak net worth, even then, under Section 23A (5), the Board gives an opportunity of hearing to all concerned parties before passing any order in recommending the winding up of a sick industrial company. In either case, the Act of 1985 has provided for the employees of a sick industrial undertaking to be heard in the preparation of any scheme which the Board may envisage.

109. The Corporation tried to keep away its record away from the High Court consequently suppressed the truth. The attempt was to mislead the Court. The record of the Corporation was placed before the Court by parties other than the Corporation. The Corporation is under some impression that these matters of public concern in the affairs of a public sector undertaking, the Court ought not to examine the manner it was selling its corporate assets which had been made a challenge in this petition under Article 226 of the Constitution of India. This resistance of the Corporation in not placing the record before the court concealing it for whatever purpose there may have been behind it, is best answered on the point of public answerability in a judgment of the Division

Bench, presided over by the Hon^{ble} B. P. Jeevan Reddy, C. J., with the Hon^{ble} R. B. Mehrotra, J. in the matter of Churk Cement Mazdoor Sangh v. State of U.P., AIR 1992 All 88. The relevant paragraph is reproduced below :

"PART VI: 26. The more important crucial question to be examined is how did the Government go about it: how did it proceed in the matter ; did it adopt follow a procedure consistent with public interest; did it safeguard public interest while parting with a measure chunk of its ownership in a major public sector Corporation ?. That the Court is entitled to examine these questions is beyond the pale of controversy. In Fertilizer Corporation Kamgar Union, Sindri v. Union of India, AIR 1981 SC 344, the Supreme Court proceeded to examine the merits of a complaint by workers of the Fertilizer Corporation that certain machinery said to be surplus obsolete was being sold for a song. It has been held in National Textile Workers Union v. P. R. Ramakrishnan, AIR 1983 SC 75, that in winding up proceedings, the workers have a right to be heard they must be held to have the necessary locus standi to maintain a writ petition designed to protect their interest. In Gujarat Steel Tubes Limited v. Steel Tubes Mazdoor Sabha, AIR 1980 SC 1896, it has been held that workers or equal partners in an enterprise. It must, therefore, be held that workers employees of a public sector concern are vitally interested in the matter, that, in any event, when such an important is brought to the notice of this Court it is entitled to examine the same with a view to safeguard public interest. Judiciary is also an organ of the State inasmuch committed to public weal as any other wing of the State."

110. Thus, now it is amply clear that even the Supreme Court, more than once, has said that the merits of the grievance of the workers would. In fact, be a subjectmatter of a judicial review in requiring the Government or public sector undertakings in arranging sale of its assets. The Court need not dwell on this aspect any more as it has already been elaborated by a Division Bench of this Court relying on several decisions of the Supreme Court.

111. Then, there is an academic question of the manner in which the U. P. State Sugar Corporation went around selling its assets in the face of proceedings before the Board under the Act of 1985. This was a situation of a sick industrial undertaking, registered under the Companies Act, 1956, may not be sick, but arranges to transfer its assets by restructuring, amalgamating or entering into compromises or arrangements as companies normally do in a free market economy. This has nothing to do with a sick industrial company. In such situations, it will be difficult for government companies to avoid Chapter V of the Companies Act, 1956. Thus, whereas the Board cannot be avoided to the matter relating to the allegation of assets of a sick industrial company, likewise, the High Court cannot be avoided when it comes down to the matter relating to arrangements which include a reorganisation of the share capital of a Government company by consolidation of shares of different classes or by division of share in two shares of different class or by both of these methods. If a Government company, or, for that matter, any company is seeking the

sanctioning of a compromise OB arrangement proposed between a company its creditors or any class of them or between a company its members or any class of them, then, the appropriate forum to seek permission of sanction is the High Court under Chapter V of the Companies Act, 1956. There is no escape from the Rule of Law, either way. In corporate matters, like this, if arrangements to restructure the corpus of a company is undertaken, then, the law is clear in its terms. In given circumstances, if a company is affected with industrial sickness, it cannot escape the Board of Industrial Financial Reconstruction, otherwise, the Company Judges at the High Courts of the nation.

112. Selling of the Assets, by the Corporation, admittedly a sick industrial undertaking, would be the negation of an opportunity either to the employees to have a scheme prepared or for the Board to prepare scheme for them. The very purpose of this special enactment would be rendered useless if sale of assets were permitted without the permission of the Board. The sale of the assets by the Corporation without leave of the Board would render the provisions of the Act of 1985 nugatory would prevent the Board from evolving a scheme for revival or rehabilitation. In this regard a reference to the decision of the Supreme Court. In *Re : Maharashtra Steel Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Limited* another, (1993) 2 SCC 144, cannot be avoided. It is only because workers have been given a right to be considered on their proposals to run a sick industrial undertaking themselves, that their enterprise was permitted to succeed in this regard the decision of the Supreme Court In *Re ; Navnit R. Kamani v. R. R. Kamani*, AIR 1989 SC 9, is relevant.

113. Thus, the petitioners who are employment members of staff of the Corporation are entitled to be heard under the Act of 1985, so that, if the Board considers them as equally competent to run a sick industrial undertaking under the scheme, they may receive appropriate direction of the Board in that regard,

114. The Court having examined the entire facts circumstances of the case is constrained to observe that the U. P. State Sugar Corporation Limited, a public sector undertaking chose to violate the law, is further constrained to observe that the State of Uttar Pradesh abetted in such an action. Several other public sector undertakings of the State of Uttar Pradesh are before the Board under the Act of 1985 there is no reason why this Corporation could not move the Board seek its permission to indulge in whatever exercise it had intended in shedding its assets or sale, which is explained as a part of liberalisation, in an open market economy. There is a public accountability when a State Corporation alienates its assets. The assets belong to the people. The accountability is to the people. Insofar as the State of U. P. is concerned, the fact that a public sector undertaking may have been made as independent corporation from the Government will be of I no avail as lifting the corporate veil of the personality of the Corporation, with the curtain lifted, it discloses all functionaries as officials of the State (Government the Board of Directors of the Company is constituted from amongst the officials of the State Government. It is very difficult from the Court to believe beyond a

reasonable doubt that either the State Government, [its officials which constituted the Board of Directors or the U. P. State Sugar Corporation Limited were (a) unaware of the proceedings pending before the " (b) were ignorant of the Act, which is known as Sick Industrial Companies (Special Provisions) Act, 1985. If an ordinary person in a free market economy had done what the State of U. P. the U. P. State Sugar Corporation have done, the Board of Directors of such a company would have been booked for misfeasance. There is no escape for either the Corporation or the State of U. P. whose officials are on the Board of Directors on the U. P. State Sugar Corporation, from the applicability of the Act of 1985, if its provisions have been violated, particularly Chapter III of the Act of 1985. Then, the Directors of this Corporation are liable to be prosecuted for offences which they may have committed, by virtue of the Section 34 of the Act of 1985. Again, for misdemeanours or misfeasance which have been committed by the Directors, under Chapter IV of the Act of 1985, any default for not complying with the provisions when state of affairs had resulted in the erosion of 5% of peak net worth of the Corporation, then each such Director, responsible for misfeasance, is liable to be prosecuted under subclause (3) of subsection (1) of Section 23 of the Act of 1985.

115. In other words, for violating the stipulation of the Act of 1985 during the pendency of enquiry upon a reference being made on the erosion of 50% peak net worth of a sick industrial company, the following provision of the Act of 1985 applies :

"33. Penalty for certain offences.(I) Whoever violates the provisions of this Act or any scheme, or any order of the Board, or the Appellate Authority whoever makes a false statement or gives a false evidence to the Board or the Appellate Authority, shall be punishable with . simple imprisonment for a term which may extend to three years shall also be liable to fine." If any enquiries during the reference under Chapter ill is found false. Section 34 will apply. It reads :

34. Offences by companies.(1) Where any offence, punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence shall be liable to be proceeded against punished accordingly".

Any violation of proceedings in a case of potentially sick industrial companies, for misfeasance on the erosion of 50% of peak net worth by the industrial companies, the penal provision reads :

"23 (3) If default is made in complying with the provisions of this section, every director or other officer of the company who is in default shall be punishable with imprisonment which shall not be less than six months but which may extend two years with fine".

110. Regard being had to the overall circumstances that the entire issue is that the U. P. State Sugar Corporation Limited arranged the sale of its assets during

the pendency of the examination of issues of its sickness by a reference further examination of such sickness on the erosion of 50% of its peak net worth, the transfer pendente lite the proceedings before the Board under the Act of 1985 was an illegal act by a certificate action upon a writ of certiorari, this Court declares it so.

117. The entire defence of the State of U. P. the U. P. State Sugar Corporation Limited, in this matter of alienating the assets of a "sick industrial Company" with proceedings before the Board for Industrial Financial Reconstruction was in the name of liberalisation of economy State control. There is no licence or mokhsa or dispensation from the law ; the Rule of law, whether it is the State or a citizen. Liberalisation of the economy did not invite abdication of public accountability, Liberalisation, as a concept, was taken as an alternate when public enterprises being run by bureaucrats, as an institutional concept, had failed in India. If what is happening in other public corporations, similar to what has happened in the matter of U. P. State Sugar Corporation Limited, then the State Governments the Central Government had best be advised that there was nothing incorrect in the principle of socialism, those who ran the Government , Government ventures failed it.

118. A suggestion to rush the judgment made on behalf of the respondents in this case in which arguments closed in October, to purchase crush sugarcane, was an averment which contradicted its record. The corporation as late as mid August 1994, did not even have the finances to repair overhaul its plant machinery. The Managing Director of the Corporation, by his letter of 16 August, 1994, (Annexure "3" to application/affidavit (sworn on 1991994) of the impleaded respondent. M/s. Balrampur Chinni Mills Ltd.] was writing to the Principal Secretary, Sugar Industries Sugar Development, to say that at the level of sugar mills, difficulties were being faced to raise the necessary finances, the Corporation also did not have the requisite capital. The Managing Director of the Corporation was suggesting that in such circumstances the State Government's directions to repair the plant machinery of the sugar mills could only be complied with provided a minimum amount of Rs. 7 (seven) crores was sanctioned to the Corporation. The Corporation is truly a sick industrial company. Shortcuts to bypass the law, to raise money, which the Corporation did not have, could not be had sale of its assets without sanction of the Board under the Act of 1985. If the Corporation was correct in its bona fides indeed was bona fide with its urgency concerned to go into production, it should have sought had a scheme sanctioned from the Board for financing or have its factories run. Pressurizing High Court in its attempt to obtain incorrect orders ;to obtain such orders quickly, by concealing information breaking the law, is a reflection on such State run public sector undertakings those who run Bank them.

119. The purchase of sugarcane by the Corporation for its industrially sick, financially depleted, quality depreciated deteriorated plants, is an argument which is neither genuine, bona fide nor logically tenable under the law. It is

misplaced sensationalism. If the factories closed for their economic industrial sickness, the solution is before the Board, not by passing or escaping it. If the sale of sugarcane is the worry of the Corporation, with its factories closed for its own fault inefficiency, let the sugarcane areas of these close sugar factories, until the Board considers makes appropriate orders, be assigned made available for purchase in the reserved areas of other sugar factories which are not closed in production to manufacture sugar. This the law permits by making assignments reservations of sugarcane areas, whether under the Central Government Sugarcane (Central) Order, 1966, or U. P. Sugarcane (Regulation of Supply Purchase) Act, 1953. reference the Purtabpur Company Lid. v. Cane Commissioner of Bihar (AIR 1970 SC 1896). But, the law does not permit its breach to enable the Corporation to sick dead mills to market purchasers, under their camouflage vested interests call the bogey of the interests of sugarcane growers. The Corporation is virtually singing the song of market purchasers bounty hunters in the name of agriculturists. The Corporation's immediate need is for Rs. 7,00,00,000 (Rupees seven crores). It cannot have that money today as propping up of loss making, profit eating public sector undertakings are over they cannot run on deficit finding without Reserves capital of their own. The redemption of the Corporation is before the Board, not the High Court. No one advised the Corporation to short circuit the procedure, the law the proceedings before the Board. It did so itself.

120. The U. P. State Sugar Corporation its Board of Directors arranged a state of circumstances in these proceedings before the High Court to violate the speaking of the truth nothing but the whole truth. Events which were yet to happen were declared as if they had happened, events which were given as having taken place, in fact, never did. Thus, suppression of facts were made in a sworn affidavit of on behalf of the Corporation. Giving false evidence is an offence against public justice under Chapter XI of the Indian Penal Code, 1860. The person who swore the counteraffidavit on oath the Board of Directors who abetted with him in arranging such a defence, writ large with suppression, shall be deemed to have intentionally given false evidence in a stage of a judicial proceedings, under the Procedure of High Court Act, 1869, (U. P. Act No. XIII of 1869).

121. The Registrar, High Court, shall draw out a complaint to be filed before the Chief Judicial Magistrate, Allahabad, on the violation of the provision of Chapter XI, (OF FALSE EVIDENCE OFFENCES AGAINST PUBLIC JUSTICE), of the Indian Penal Code. The complaint shall name the deponent of the counter affidavit filed on behalf of the U. P. State Sugar Corporation Limited, its Company Secretary the Board of Directors of the Company, not excluding those referred to in minutes of the ordinary meeting of members, held at Ganna Kishan Sansthan, Dali Bandagh, Lucknow, on Thursday, 28 July, 1994 at 12.30 p.m.

122. The complaint shall refer to the reference declaration of a meeting of share holder on 25101993, the total absence of reference to it in the meeting of 28

July 1994 ; of the subject having been dealt with supposedly at the meeting of 25101993, but then declaring that, in fact, it was on 28 July 1994 : the statement, in paragraph 47 of the counter affidavit, before the High Court that the Board of Industrial Financial Reconstruction despite the proceedings pending before it, since May neither formed any opinion as contemplated under Section 15(1) of the Act nor has done nothing upto even now (i.e., the date of filing of the counter affidavit) though more than three months have expired the crushing season is coming ; that the Corporation Bad not even supplied the essential documents sought by the Board as are referred to in the Corporation's letter dated 1281994/191994 ; that the Board was yet to receive information which the Corporation was obliged to give ; that this information the Corporation could not supply before 1281994 the Board could not receive it before 191994 ; that on the day the counter affidavit had been sworn, 2881994, the Corporation had the documents with it; that while the writ petition was pending the Board had yet to receive this documents; that there was no delay of any proceedings before the Board ; that a plea was manufactured that it was. The plea was false, fabricated falsely made declared, that Sections 191, 192, 196 199 of the Indian Penal Code, 1860, have been violated. The deponent making giving such false evidence either know that it was false was not true thus he those who caused or arranged such false statements shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding under the Procedure of High Court Act, 1869. Let the penalty be judged by the Chief Judicial Magistrate, Allahabad.

123. In a matter like this, when the U. P. State Sugar Corporation Limited has violated the law with impunity, (but, regard being had to the circumstances that It is a sick industrial undertaking), between this Corporation its promoter, the State of Uttar Pradesh, cannot escape from the responsibility for having violated the law. This Court would have considered exemplary costs against the Corporation. But, the Corporation is sick. Exemplary costs may be justified under law, but in the circumstances, in equity not against a sick company. But, let this judgment be a certificate of how a State Corporation (the U. P. State Sugar Corporation Limited) its Board of Directors, the State of Uttar Pradesh abetting with them have shown scant respect, to the law, the proceedings before the High Court in this writ petition.

124 The writ petition succeeds with normal costs, against each respondent.

125. A copy of this writ petition will be sent by the Registrar, High Court, to (i) The Board for Industrial Financial Reconstruction, New Delhi, constituted under the Sick Industrial Companies (Special Provisions) Act, 1985 ; (ii) The Company Law Board, constituted under the Companies Act, 1956 (iii) The Registrar of Companies, U. P., also functioning under the Companies Act, 1956.